Unfortunately, like the Detainee Treatment Act of 2005, the Military Commissions Act of 2006 (MCA) implements precisely such an impoverished two-tier system. The MCA provides a blunt instrument for a complex operation. It eliminates the right of habeas corpus for a group defined not by objective principle, but rather by arbitrary judgment of the Executive.[2] Under the MCA, the federal courts lack jurisdiction to hear habeas claims from *any* alien detained by the United States and determined (by an untested and hastily constructed Executive proceeding) to be an enemy combatant.[3] And after constructing a proceeding where the Executive acts as judge, jury, prosecutor, and possibly executioner, the MCA allows only for the most ephemeral review by an independent judicial authority in which neither the facts nor all of the law may be questioned by the defendant. It lightens the government's burden by casting aside constitutional rights and guarantees as if they are simple conveniences, the chaff rather than the grain of our democratic order. This is plainly a stop-gap law, designed for expediency and guaranteed convictions, not for endurance, legitimacy, or justice. In the end, the gravely flawed MCA only burdens this new Congress and the federal courts with divisive litigation. It is a law that does not merely invite judicial scrutiny, but clamors for it.

Forward-thinking members of the Administration and this Congress have foreseen the end result: a new Supreme Court decision, this year or the next, followed by new legislation, this year or the next, driven by reaction rather than deliberation. This Committee has asked me here today, as I understand it, because it is interested in breaking this counterproductive cycle and avoiding a new round of constitutional hot potato between the political branches of government. Leaving a vacuum of constitutional leadership for the Court to fill falls far short of the ideal envisioned by our nation's founders: a vibrant system of innovation, evolution, and interlocking responsibility with Congress at the helm. How can we forget the stirring words of the great statesman, James Madison, as a young Member of this esteemed body, urging the House of Representatives to determine for itself the deep question of whether the proposed Bank of the United States was constitutional?[4] The need for fresh direction, and a return to Madison's view of Congress's role, is apparent.

On the other hand, a litigation-based approach to this problem can only mean delay and embarrassment as the nation and the world wait for real justice, for a sixth year. Congress should act now, rather than later, to restore rights and establish a framework for

[2] The interpretation of the MCA is currently the subject of pending petitions for certiorari before the Supreme Court of the United States. This testimony adopts, *arguendo*, the current controlling interpretation, which has been offered in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir., Feb. 20, 2007) and *Al Odah v. United States*, No. 05-5063 (D.C. Cir., Feb. 20, 2007).

[3] Indeed, the MCA inexplicably attempts to cement into law the enemy combatant determinations of the Combatant Status Review Tribunals, which were hastily conceived and are notoriously skewed to provide the detainee with little opportunity to disprove the "enemy combatant" allegations against him. *See* Corine Hegland, *Empty Evidence*, NATIONAL JOURNAL, Feb. 4, 2006.

[4] James Madison's Speech to the House of Representatives (1791), *in* James Madison, Writings 480-90 (Rakove ed. 1999).

the habeas procedures that the Supreme Court is likely to require. The legal challenges to the military trials of suspected terrorists held at Guantanamo will cast a glaring spotlight on every nook and cranny of United States policy, and its shortcomings will be apparent. A politics of responsibility, and not reaction, is required now.

I. Moving the Trials to the U.S. Is A First (But Not Last) Step

Defense Secretary Gates has made the most recent brave attempt to argue out of turn on this issue, and I commend his proposal to transfer all terrorism trials from Guantanamo Bay to the United States. As reported by the *New York Times* last week, the purpose of this move would be to make the trials more credible, as high-level officials (evidently including the Secretary of State) acknowledge that Guantanamo's continuing existence hampers the nation's war effort.[5] Moving the trials would communicate to the world that America has no intention of relegating these trials to a "legal black hole," and that the fundamental rights we assume daily here will not be treated as special privileges, doled out to our prisoners at the pleasure of an absentee warden.

However, while the Gates plan would be a first step in signaling the government's intention to integrate these unusual proceedings into our tradition of open, fair adjudication, it would do quite little to substantively further that goal. The MCA denies habeas rights to people based on their citizenship. An alien detainee on trial in Leavenworth, Kansas and an alien detainee on trial in Guantanamo are both excluded from our legal system's most crucial protections, including habeas corpus, under the MCA. This despite the fact that the writ of habeas corpus has been described by the Supreme Court as the "highest safeguard of liberty" in our system.[6]

The Supreme Court has held that geography alone does not create rights. In *Eisentrager v. Johnson*, the Court determined that enemy aliens held abroad did not have enough of a connection to the United States to be entitled to habeas corpus rights.[7] While *Eisentrager* suggested that presence on U.S. soil might change the analysis, the Court later held that lawful but involuntary presence in this country does not necessarily entitle an individual to constitutional protection, either.[8] But even if geography were determinative, a move from Guantánamo to the United States would do little: the Court has already determined that the military base is effectively U.S. soil for reviewing detainee claims.[9]

---

[5] Thom Shanker and David E. Sanger, *New to Job, Gates Argued for Closing Guantanamo*, N.Y. TIMES, Mar. 23, 2007, at A1.
[6] *Smith v. Bennett*, 365 U.S. 708, 712 (1961).
[7] 339 U.S. 763 (1950).
[8] *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1991). Notably, however, *Verdugo-Urquidez* did not concern constitutional rights to habeas corpus, but rather Fourth Amendment rights to suppress illegally obtained evidence.
[9] *Rasul v. Bush*, 542 U.S. 466, 480 (2004).

In short, some of the constitutional and prudential defects of the MCA would follow these alien detainees on their trip from Guantanamo to the United States. Whether these trials take place in the United States or Guantanamo, it is my view that the Court will ultimately hold that the Constitution's fundamental guarantees must govern these trials. Yet if these trials take place at Guantanamo, and the courts follow the Administration's claim that the judiciary is powerless to intervene until after individuals are convicted in these makeshift tribunals, the result will be atrocious: the Court will have to throw out all of the convictions because of the inescapable legal conclusion that Guantanamo is not a legal black hole where the Executive can do anything it wants when it punishes someone.

Therefore, while an incremental step like Secretary Gates's plan would provide a welcome shift of perspective, sure to be lauded by the international community, it would not address all of the substantive legal challenges raised by the detainees or halt the progress of these cases on their way to the Supreme Court. That said, it is a very useful first step in helping to restore the credibility of the United States in this matter, and, as a practical matter, would expedite the trials by eliminating the logistical delays inherent to having trials take place in such a removed locale as Guantanamo.

II. The Military Commissions Act is Unconstitutional

The only way to truly solve the problems that the MCA creates is to repeal the entire law and pass one consistent with this nation's Constitution and moral principles. As it stands, the MCA discriminates against people on the basis of alienage, a violation of the Equal Protection principle so deeply ingrained in our legal culture. And in further contravention of the basic guarantees of a free society, the law burdens the fundamental right of access to the courts. Furthermore, the commissions sanctioned by the MCA flout international law and dispense with 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 using the existing system of courts-martial as the basis of a legal regime to deal with the Guantánamo detainees.

a. The MCA Establishes Unconstitutional Barriers Based on Alienage

The MCA purports to deny the writ of habeas corpus to any alien detained by the United States. As the text of the MCA makes clear, it is not only those whom the Government has held under its control for years in Guantanamo that have their habeas rights removed. The MCA deprives those rights to *all* aliens, even lawful resident aliens living within the United States, who are currently or in the future determined by the Executive's makeshift procedures to be "enemy combatants." Citizen detainees remain free to challenge their detention in civilian courts, while detained aliens are now excluded from independent judicial review based on an arbitrary Executive determination of their combatant status that the MCA cements into law.

I believe that such distinctions based on alienage will eventually be struck down by the courts. As I explained in my Senate testimony, the Equal Protection components of the Fifth and Fourteenth Amendments preclude the restriction of fundamental rights and government discrimination against a protected class. The MCA targets *both* a fundamental right and a protected class, and as such it just 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 who does and who does 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 cannot tolerate this unconstitutional deviation from longstanding American law in the current war on terror any longer.

The commissions set up by the MCA, like President Bush's first set 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 and "a majority of the persons tried . . . were American citizens."[10] The tribunals in the Civil War naturally applied to citizens as well. And in *Quirin*, President Roosevelt utilized the tribunals symmetrically for the saboteur who claimed to be an American citizen and along with the others who were indisputably German nationals, prompting the Supreme Court to hold: "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."[11]

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 "persons."[12] 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."[13] 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."[14] The Amendment's principal author, Representative John Bingham, asked: "Is it not essential to the unity of the people

---

[10] David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2030 (2005).
[11] *Ex Parte Quirin*, 317 U.S. 1, 37 (1942).
[12] U.S. CONST. amend. XIV, § 1; *see also* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens).
[13] 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").
[14] AMAR, *supra* note 13, at 173 (quoting a draft of the Fourteenth Amendment) (emphasis added).

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 . . . ?"[15]

Moreover, drawing lines based on alienage offends all logic and sound policy judgment for effectively fighting the war on terror. Our country knows all too well that the kind of hatred and evil that has led to the massacre of innocent civilians is born both at home and abroad. And 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."[16] Likewise, Congress did not differentiate between citizens and non-citizens in the Authorization for the Use of Military Force, 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."[17]

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. If anything, we can expect organizations such as al Qaeda to select, wherever possible, American citizens to carry out its despicable bidding. The Attorney General himself has recently reminded us that "[t]he threat of homegrown terrorist cells . . . may be as dangerous as groups like al Qaeda, if not more so."[18] Given this sensible recognition by all three branches of government that the terrorist threat is not limited to non-citizens, the disparate procedures for suspected terrorist detainees on the basis of citizenship simply makes no sense.

---

[15] 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.

[16] 504 U.S. 507, 519 (2004).

[17] 115 Stat. 224, note following 50 U.S.C. §1541.

[18] 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 (fearing that Al-Qaeda is aiming to recruit American citizens for domestic terror attacks).

Further, in the wake of international disdain for 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. The reported Gates plan recognizes, at the very least, that our handling of Guantanamo detainees has garnered (and warranted) bad publicity. 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.

b. The MCA's Attempt to Strip Federal Courts of Habeas Jurisdiction Over Alien Detainees is Unconstitutional

Aliens and citizens alike have a constitutional right to challenge the legality of their trial by military commission. Because Congress has not invoked its Suspension Clause power, it may not eliminate the core habeas rights enshrined into our Constitution.[19] Rather, absent suspension, the Great Writ protects all those detained by the government who seek to challenge executive detention, particularly those facing the ultimate sanctions – life imprisonment and the death penalty.[20]

And even if Congress were to invoke its Suspension Clause power, it lacks *carte blanche* power to suspend the writ at will. Instead, the Constitution permits a suspension of habeas only when in "Cases of Rebellion or Invasion the public Safety may require it."[21] In enacting the MCA, Congress made no such finding that these predicate conditions exist. Indeed, even during evident "Rebellion or Invasion," the Supreme Court has required that congressional suspension be limited in scope and duration in ways that the MCA is not:

First, Congress must tailor its suspension geographically to those jurisdictions in rebellion or facing imminent invasion. Thus, in *Ex parte Milligan*, the Court determined that because Milligan was a resident of Indiana, a state not in rebellion, his right to habeas was protected.[22] Like Indiana, "Guantanamo Bay . . . is . . . far removed from any hostilities."[23] In fact, the detention cells at Guantanamo Bay have served the explicit

---

[19] If Congress intends to implement its Suspension Clause power, it must do so with unmistakable clarity. *See INS v. St. Cyr*, 533 U.S. 289, 298-300, 305 (2001). This requirement arises not merely from the principle of avoiding serious constitutional questions, but also from the historical understanding of habeas corpus – and suspension – in our country's history. *See Hamdan v. Rumsfeld*, 464 F. Supp. 2d 9, 14 (2006).

[20] *See* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963) ("The classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military....").

[21] U.S. CONST. art. I, §9, cl. 2.

[22] 71 U.S. 2, 126 (1866). The Court reached this conclusion even though Congress had authorized a broader suspension. *See* Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the President to "suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof.").

[23] *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).

purpose of holding captured suspects in U.S. custody away from the tumult of the battlefield abroad.

Moreover, Congress may suspend the writ for only a limited time. The MCA, however, has no terminal date and indefinitely denies alien detainees access to habeas corpus. As a result, alien detainees swept into U.S. custody would be left to languish in an extralegal zone, their fundamental rights left to the whim of the Executive, potentially suspended forever. The Constitution simply does not condone the existence of a lawless vacuum within its jurisdiction.

The MCA's jurisdiction-stripping provision not only breaches the geographical and temporal restraints imposed by the Constitution, it also defies the historic scope and purposes of the writ. Habeas rights have always extended to individuals in U.S. jurisdiction -- citizen or alien, traitor or enemy combatant. The Supreme Court has declared that the judiciary retains the obligation to inquire into the "jurisdictional elements" of the detention of an enemy alien with a sufficient connection to U.S. territory, explaining that "it [is] the alien's presence within its territorial jurisdiction that [gives] the Judiciary the power to act."[24] Guantanamo Bay is not immune from these dictates of the Constitution. In *Rasul*, the Court rejected the Government's assertion that Guantanamo is a land outside U.S. jurisdiction.[25] Indeed, as "[t]he United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base,"[26] the Court observed that alien detainees held at Guantanamo are not categorically barred from seeking review of their claims. The majority dropped a pointed footnote, strongly suggesting that the detainees were protected by the Constitution.[27] In addition, Justice Kennedy separately concluded that Guantanamo detainees had a constitutional right to bring habeas petitions based on the status of Guantanamo Bay and the indefinite detention that the detainees faced.[28] It makes sense not to constitutionalize the battlefield; but a long-term system of detention and punishment in an area far removed from any hostilities, like that in operation at Guantanamo Bay, looks nothing like a battlefield.

The fact remains that if the military commissions are fundamentally unfair, they are unfair for everyone. It is no more just to subject an alien detainee in Guantanamo Bay to an inferior adjudicatory process than it is to subject a citizen detainee in Norfolk,

---

[24] *Eisentrager*, 339 U.S. at 775, 771 (1950).
[25] 542 U.S. at 480-84.
[26] *Id.*. at 480.
[27] The footnote states: "Petitioners' allegations--that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing--unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.' 28 U.S.C. § 2241(c)(3). *Cf.* United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring), and cases cited therein." *Id.* at 484 n.15. This passage certainly contemplates constitutional violations, otherwise the Court's citation to pages in Justice Kennedy's *Verdugo* concurrence would make no sense, as those pages deal exclusively with the Constitution's applicability.
[28] *Id.* at 488 (Kennedy, J., concurring in the judgment).

Virginia to the very same. The MCA, in its attempt to relegate alien detainees to a lesser brand of justice and eliminate their right to challenge their Executive detention, unconstitutionally tramples on the habeas rights of prisoners held within U.S. jurisdiction. The Constitution will not tolerate such arbitrary exclusions.

Finally, such restrictive habeas review jeopardizes the finality and confidence surrounding verdicts of the military commissions. If the international community believes the entire process is invalid, we cannot expect it to respect the authority of the commission outcomes. Secretary Gates has recognized that the trials of terror suspects must be credible in the eyes of the world. Removing the trials from Guantánamo would lift at least some of the perception of injustice that currently clouds the proceedings.

c. The MCA Establishes a Trial System That Violates Both Domestic and International Law

In addition to violating principles of Equal Protection that are central to our constitutional order, the MCA further violates longstanding rules of criminal procedure and evidence. For example, prosecutions under the MCA may employ hearsay evidence against a defendant on trial for his life, which deprives him of the most elemental opportunity for fairness: challenging allegations against him through cross-examination or confrontation. Further, the MCA leaves open the possibility that evidence that is the fruit of torture may be introduced and used to convict a defendant in the military commissions, a principle previously unheard of in American law.

The MCA also disposes of Common Article 3 of the Geneva Conventions as a possible source of law under which a defendant may assert rights. And what the MCA does retain of the Geneva Conventions is, under the Administration's view, thin gruel. For instance, grave breaches of Common Article 3 are subject to criminal sanction but a court may not consider international or foreign law to determine what would constitute such a grave breach. And American personnel accused of violating Common Article 3 have a ready defense – as long as they acted in good faith that their actions were lawful (which might include reliance on administration memos on torture), they may not be held liable.

The MCA quite simply fails to take our treaty obligations seriously. When this happens, we can no longer be surprised to see our credibility in the world community falling and anti-Americanism on the rise.

d. Congress should repeal the MCA and enact a system to deal with these prosecutions based on the Uniform Code of Military Justice and the courts-martial.

Unlike the dichotomy presented by the media and talk-show hosts, the choice here is not between the unconstitutional tribunals under the MCA and the civilian justice system with the full panoply of criminal procedure rights possessed by any ordinary

defendant. There is a middle way to run these prosecutions that provides the flexibility required to safeguard national security while still employing fair procedures and protecting fundamental rights. Namely, the longstanding system of courts-martial set forth in the Uniform Code of Military Justice. As Justice Stevens declared in *Hamdan*, "Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case."

Most importantly, the existing courts-martial are already equipped to deal with the unique circumstances of a terrorism trial and, in fact, have been statutorily authorized to try such cases for ninety years. These military trials use judges and juries that already possess security clearances and can view classified evidence without fear of security compromises. The rules governing courts-martial provide for trials on secure military bases and for courtroom closures when sensitive evidence is presented, another measure that would help guarantee information security. Courts-martial also already utilize measures that would, among other things, protect the identities of witnesses if necessary. In short, the procedures for conducting courts-martial protect vital national security information.

In addition, unlike the rules for tribunals under the MCA, the court-martial rules benefit from the fact that they are fully delineated, tested by litigation, and validated by the Supreme Court. Thus, a system that tries suspected terrorists under these rules of military justice need not be delayed by legal challenges seeking relief from rigged and un-American procedures such as the introduction of evidence resulting from torture. Indeed, all the energy the government currently spends defending these flawed policies could be redirected to actually trying and convicting terrorists under a tough but fair system that is consonant with American values and ideals.

Neither Congress nor the Executive has offered any compelling reason why the established court-martial system would be insufficient to try suspected terrorists. Given its robust safeguards for national security and its careful balance between security and the rights of the defense, the court-martial system is the most acceptable forum in which to try these cases today.

III. Congress Must Take the Lead Now to Repeal the MCA

There is a reason why Law & Order is one of the longest-running shows on television. Trials are gripping, dramatic, and relatively easy to follow. Unlike detention, which involves little drama and no grand moment of resolution, a trial has developments, recognizable characters, and a climax in the form of a verdict. The military trials of the suspected terrorists housed at Guantanamo will be watched by the world because each trial is a self-contained, symbolic event. Yet we must not forget that in these trials, the United States, not just the detainees it is prosecuting, is also facing judgment.

Changing the background set from Guantanamo to a United States military base will not ultimately change the verdict, but it will provide at least an appearance of good

faith and greater fairness. It is a crucial first step—arguably even more important than the repeal of the habeas-stripping provisions in the MCA and DTA. Still, with the world watching, Congress must be sure that these trials measure up to the substantive standards, both constitutional and moral, against which we judge our own court system.

The Administration clings to the belief that Guantanamo is a legal black hole where literally none of the protections of the American constitution apply. This short-sighted theory is directly responsible for the MCA's unconstitutional provisions, and it will corrupt these important trials. Such views must be repudiated and replaced with an appropriate system that reflects the traditions and values of Americans, one built upon the recognition that the war on terror will only be won with the world – and justice – at our side, not at our back.

As I have argued, the likelihood of an adverse Supreme Court ruling on the MCA is high, and Congress will need to return to the drawing board. Intense discussion and compromise followed the Supreme Court decisions in *Rasul* and *Hamdan*, and ultimately Congress updated the law, much the way doctors re-engineer a vaccine, as if the Constitution were a persistent viral strain coming back to haunt it. This Congress has the choice of getting ahead of the curve to rework the law now, and thereby design a habeas procedure that is consistent both with our national security goals and the Constitution, or it can wait for yet another Court decision and return to cutting corners and erasing words and commas.

Senator Arlen Specter, former Chair of the Senate Judiciary Committee, put it bluntly: "While this exchange of ideas is surely healthy and appropriate, the conversation has begun to generate diminishing returns."[29] No detainee has been tried in the five and a half years since the war on terror began. International perception of the United States remains embarrassingly low for a country that has always been the world's champion of democracy and the rule of law.

I ask the members of this Committee to realize the power that lies in your hands—the power to ensure the safety of our troops and the dignity of the nation and values they defend. As Senator John Warner eloquently put it last summer, "The eyes of the world are on this nation as to how we intend to handle this type of situation and handle it in a way that a measure of legal rights and human rights are given to detainees."[30] The world's scrutiny is specifically targeted at our handling of Guantanamo Bay, and I applaud Secretary Gates and all others in our government who recognize that the only thing worse than making a mistake is failing to correct it when you still have the chance.

Thank you.

---

[29] Brief Amicus Curiae of United States Senator Arlen Specter in Support of Petitioners at 19, Boumediene v. Bush, No. 06-1195 (March 2007).

[30] Remarks of Sen. John Warner, *Hearing on the Future of Military Commissions to Try Enemy Combatants*, July 13, 2006.

TESTIMONY OF
ELISA MASSIMINO

WASHINGTON DIRECTOR
HUMAN RIGHTS FIRST

HEARING ON

THE MILITARY COMMISSIONS ACT AND THE FUTURE OF DETENTION AT GUANTANAMO BAY

BEFORE THE

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON ARMED SERVICES

MARCH 29, 2007

Introduction

Chairman Skelton, Congressman Hunter and Members of the Committee, thank you for inviting me to be here today to share the views of Human Rights First on these issues of such importance to our Nation. We have appreciated the opportunity to work with your office, Mr. Chairman, as well as with others on the Committee, as you consider how best to ensure that U.S. policy on the detention, interrogation and trial of terrorist suspects is effective, humane and consistent with our laws and values.

My name is Elisa Massimino, and I am the Washington Director of Human Rights First. For the past quarter century, Human Rights First has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

I. Guantanamo: A Failed Policy

The issue facing you today is one of great urgency and import. The policy of detention, interrogation and trial of terrorist suspects at Guantanamo has been a failure and it is, I respectfully submit, your job to fix it. The decision to hold detainees at Guantanamo in the first place was driven at least in part by a desire on the part of the Administration to insulate U.S. actions taken there – detention, interrogation, and trials – from judicial scrutiny, and even from the realm of law itself. Early on, one administration official called Guantanamo "the legal equivalent of outer space." That goal – to create a law-free zone in which certain people are considered beneath the law – was illegitimate and unworthy of this nation. And any policy bent on achieving it was bound to fail.

The policy at Guantanamo has been a failure in several important respects. First, and most obviously, it has failed as a legal matter. The Supreme Court has rejected the government's detention, interrogation and trial policies at Guantanamo every time it has examined them. And it likely will do so again.

Military commissions at Guantanamo have also failed to hold terrorists accountable for the most serious crimes. Unless you count the guilty plea this week of the Australian David Hicks who, after five years in U.S. custody pled guilty to a crime (material support for terrorism) that didn't exist in the laws of war at the time Hicks allegedly committed it, the system has failed to bring a single terrorist to justice.

In addition, fueled by the assertion that it was a "legal black hole," Guantanamo became the laboratory for a policy of torture and calculated cruelty that later migrated to Afghanistan and Iraq and was revealed to the world in the photographs from Abu Ghraib. These policies aided jihadist recruitment and did immense damage to the honor and

reputation of the United States, undermining its ability to lead and damaging the war effort.

But perhaps most importantly from a security perspective, the policy at Guantanamo – which treats terrorists as "combatants" in a "war" against the United States, but rejects application of the laws of war – has had the doubly pernicious effects of degrading the laws of war while conferring on suspected terrorists the elevated status of combatants.[1]

By taking the strategic metaphor of a "war on terror" literally, the United States Government has unwittingly ceded an operational and rhetorical advantage to al Qaeda, allowing them to project themselves to the world – including to potential recruits and a broader audience in the Middle East – as warriors rather than criminals.

Khalid Sheik Mohammed reveled in this status at his "combatant status review tribunal" hearing at Guantanamo two weeks ago. After ticking off an itemized list of 31 separate attacks and plots for which he claimed responsibility (including the 9/11 attacks and the murder of Daniel Pearl), he addressed – as if soldier-to-soldier – the uniformed Navy Captain serving as president of the military tribunal. Proudly claiming the mantle of combatant ("For sure, I am American enemies"), he lamented, in effect, that war is hell and in war people get killed: "[T]he language of any war in the world is killing…the language of war is victims." He compared himself and Osama bin Laden to George Washington ("we consider we and George Washington doing [the] same thing").

Those whose job it is to take the fight to al Qaeda understand instinctively what a profound error it was to reinforce al Qaeda's vision of itself as a revolutionary force in an epic battle with the United States. General David Petraeus, who took command of the Multi-National Forces in Iraq last month, oversaw the drafting of the Army's new Counterinsurgency Manual, which incorporates lessons learned in a variety of counterinsurgency operations, including Iraq. The Manual stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a political struggle, one that must focus on isolating the enemy and delegitimizing it with its potential supporters, rather than elevating it in stature and importance. As the Manual states: "It is easier to separate an insurgency from its resources and let it die than to kill every insurgent… Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power."[2]

But U.S. counterterrorism policy has taken just the opposite approach. Prolonged detention at Guantanamo without access to judicial review, interrogations that violate fundamental human rights norms, and flawed military commissions have nurtured the "recuperative power" of the enemy. It is up to Congress to force a clean break from this misguided approach and begin to construct a counterterrorism policy that conforms to the

---

[1] *See* Kenneth Anderson and Elisa Massimino, *The Cost of Confusion: Resolving Ambiguities in Detainee Treatment*, (Muscatine, Iowa: Stanley Foundation, March 2007) *available at* http://www.stanleyfoundation.org/publications/other/Mass_Ander_07.pdf.

[2] U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-23.

logic of counterinsurgency operations, adheres to fundamental human rights standards and capitalizes on the advantages of our system of laws.

II. The Way Forward

A. Close Guantanamo

Human Rights First takes seriously the human rights and legal challenges posed by the ongoing detention of prisoners at Guantanamo. Closing the prison raises many complex questions about what to do with prisoners being held there – those the United States believes have committed crimes against it, and those being held without charge "until the end of the conflict." We have not been among the groups calling for closure of the prison over the last several years, in large part because, in our view, it matters less *where* prisoners are held than that their detention, interrogation and trial comport with U.S. and international law.

It is, however, beyond serious question – even among many who initially supported the decision to detain prisoners at Guantanamo – that Guantanamo has become an enormous diplomatic liability, impairing the capacity of the United States to lead the world, not only in counterterrorism operations but on many other issues of priority on which international cooperation is necessary. As Secretary of Defense Gates said last week, "There is no question in my mind that Guantanamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States."[3] Indeed, Guantanamo has become an icon, in much the same way as the picture of the hooded Iraqi prisoner at Abu Ghraib has become an icon, a symbol of the willingness of this country – in the face of security threats – to set aside its core values and beliefs. Respect for the law and fundamental rights are not the only things that have disappeared into Guantanamo's "black hole" – American credibility is in there somewhere, too.

Of course, while it is important to take into consideration the views of our closest allies, all of whom have called on the United States to close the prison, no one argues that we should change U.S. policy simply because other nations don't like it. The most important questions this Committee should be asking about the current policy are: Is it smart? Is it working? Does it serve the overall objective? Does it comport with our laws and values? Guantanamo policy fails all those tests.

Secretary Gates is reported to have argued that the continued detention of prisoners at Guantanamo is undermining the war effort and that the prison should be shut down as soon as possible. His views echo the conclusion that has now been reached by a broad spectrum of national security policymakers and Members of Congress that, whatever its original utility, the policy at Guantanamo has outlived its usefulness. State Department and Pentagon officials quoted in the New York Times have said that U.S. policy at Guantanamo is "making it more difficult in some cases to coordinate efforts in

---

[3] Karen DeYoung and Josh White, "Guantanamo Prison Likely to Stay Open through Bush Term," *Washington Post*, March 24, 2007.

counterterrorism, intelligence and law enforcement."[4] Former Secretary of State Colin Powell stated at the Aspen Institute in July 2006 that "Guantanamo ought to be closed immediately," arguing that the value of continuing to hold the detainees was questionable while the price of holding the detainees was too high.[5] According to the Washington Post, former Attorney General John Ashcroft had argued that Guantanamo's liabilities outweighed its usefulness.[6]

Again, this is not surprising. As the Army's Counterinsurgency Manual states: "A Government's respect for preexisting and impersonal legal rules can provide the key to gaining widespread and enduring societal support...Illegitimate actions," such as "unlawful detention, torture, and punishment without trial...are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law." [7]

Despite the self-defeating nature of the policy and the growing consensus that it should end, Administration spokespeople have said as recently as this week that the detention facility at Guantanamo will likely remain open throughout President Bush's term in office. Far from moving to close the facility, this week the Administration transferred a new detainee to Guantanamo, the first new arrival since 2004 (other than the fourteen former ghost detainees moved from secret prisons to the base in September of last year). The Administration asserts that the new transferee, Mohammad Abdul Malik, who reportedly confessed to involvement in the 2002 hotel bombing in Kenya, was sent to Guantanamo because he represents a "significant threat." It is increasingly clear, however, that the reason many detainees were sent to Guantanamo, rather than being indicted and tried in federal court, was not because that was the smartest or most strategic option available, but because it was the one that relieved the government of burden of making difficult choices. But if U.S. counterterrorism policy consists of detaining or killing everyone who harbors hostility towards the United States (and one hopes that is not the policy), we must face the reality that the 385 men at Guantanamo are a drop in that bucket, and that holding them there without charge or trial in fair proceedings will eventually mean that we will need to get a much bigger bucket.

It is up to Congress to solve this problem, and to chart a way out of the trap that Guantanamo has become, not only for the detainees who have been held there for so many years, but for U.S. counterterrorism policy itself. The first step is to shut it down.[8]

---

[4] Thom Shanker and David E. Sanger, "New to Job, Gates Argued for Closing Guantánamo Prison," *New York Times*, March 23, 2007.
[5] David E. Sanger, "Setbacks Mark Turning Point on Bush's War Powers," *International Herald Tribune*, July 15, 2006.
[6] Karen DeYoung and Josh White, "Guantanamo Prison Likely to Stay Open through Bush Term," *Washington Post*, March 24, 2007.
[7] U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-22.
[8] While world attention has been fixated on Guantanamo as the embodiment of U.S. misconduct in counterterrorism policy, Guantanamo is not the only prison with which Congress should be concerned. The continued assertion by the President, even after passage of the Military Commissions Act of 2006, of the authority to seize individuals anywhere in the world and hold them in secret prisons without access to the Red Cross or notification to their families is every bit as – if not more – troubling than the prolonged detention at Guantanamo. Congress should ban the practice of holding ghost prisoners and force the

B. Release or Transfer Detainees Not Charged with Crimes and Bring the Rest to the United States

Last July, President Bush said "I'd like to close Guantanamo, but I also recognize that we're holding some people there that are darn dangerous and that we better have a plan to deal with them in our courts." State Department lawyers continue to shop the world for countries that will agree to take the Guantanamo detainees off our hands, but this attempt to sell the Guantanamo problem "retail" is inadequate and unsatisfactory as it leaves U.S. policy at the mercy of other governments, many of whom have no interest in helping.

Despite the growing sense even inside the Administration that the Guantanamo policy is hurting U.S. interests, paralysis has set in and no one in the Administration appears to be prepared to move. Part of the reason for this is that the current system lacks incentives that would force decisions about who to try and who to release. Under current policy, detainees at Guantanamo can be held without trial for an indefinite period. If they are tried and convicted in a military commission, they remain in detention; if they are tried and acquitted, they may also remain in detention.

If the detainees were brought to the United States, that incentive structure would change, and there would be a new sense of urgency to separate those who the United States suspects of having committed crimes against it from those it does not. Detainees not suspected of having committed crimes against the United States should be released to their home countries, if possible, in accordance with U.S. obligations under international human rights and humanitarian laws. Where release to the home country is not possible (for example, because there is a fear that a detainee will be subjected to torture), detainees should be released to a third country in accordance with U.S. obligations under international human rights and humanitarian laws.

U.S. allies, particularly the Europeans who have called most loudly for the prison to be closed, should do much more to help on this score. The United States climbed into this box alone, but its allies have a shared responsibility to help it get out; this is more than just a U.S. problem now. Manfred Nowak, the Austrian U.N. special rapporteur on torture, has urged that European governments assume greater responsibility for helping with third country resettlement of these people. "Europe should help empty it," Nowak has said. "No country is eager to accept people who are accused of having al-Qaeda links. But there should be burden-sharing." We agree.

If a detainee is suspected of having committed a crime in his home country or a third country, he may be transferred there for prosecution in accordance with international human rights and humanitarian laws.

---

closure of any place of detention in which the U.S. holds prisoners in violation of international human rights and humanitarian law.

Detainees suspected of having committed crimes against the United States should be prosecuted, either in a court martial, a military commission that complies with fair trial requirements, or in regular criminal court, depending on the status of the detainee and the type of situation involved. The challenges of prosecuting terrorism cases is addressed further below.

C. Restore Habeas Corpus

My colleagues on this panel will address in detail the constitutional arguments for repealing the MCA's habeas-stripping provisions and for restoring habeas corpus to detainees at Guantanamo, and I will not repeat them here. I strongly concur in those arguments and in the recommendation that Congress should move swiftly to restore habeas to detainees at Guantanamo.

It is worth noting, however, that the debate in Congress about whether detainees at Guantanamo are or should be entitled to raise habeas claims has to a large extent been a dialogue of the deaf. On one side is the argument that granting habeas rights to Guantanamo detainees would be unprecedented; prisoners of war have never been entitled to access to the courts to challenge their detention. On the other is the assertion that anyone in U.S. custody is entitled under the Constitution to habeas corpus, a vital mechanism to check the excesses of executive power against the individual, which can only be suspended "when in Cases of Rebellion or Invasion the public Safety may require it," something Congress has authorized only four times in the Nation's history: the Civil War; in the immediate aftermath of the Civil War to quell rebellions in South Carolina; in the Philippines during a rebellion; and temporarily in Hawaii immediately after the attack on Pearl Harbor

Both sides are right in a way. But the argument against habeas here assumes its premise – that the detainees at Guantanamo are all properly considered wartime prisoners whose detention is regulated by the laws of war. The past five years have clearly shown that some of the detainees have been wrongly held. Habeas corpus is the safety net designed to ensure that a person deprived of liberty is lawfully detained. Unfortunately, the debate over habeas has been contentious in large part because of the misguided insistence on shoe-horning these detainees into a combatant framework. Once you step outside of that framework, it is clear that habeas is required.

D. Amend the Definition of Enemy Combatant

Even if Congress restores the right to habeas for detainees at Guantanamo, however, it should not use that as an excuse to defer to the courts on the critical issue of what constitutes an enemy combatant. The Military Commissions Act defines a combatant not only as those who take part in hostilities, but includes people who "purposefully and materially" support hostilities against the United States, including people arrested far from the battlefield. This definition converts people who would never be considered combatants under the laws of war – such as a doctor who operates on a wounded rebel or a permanent resident of the United States who commits a criminal act

completely unrelated to armed conflict – into "combatants" who can be placed in military custody and tried by a military commission. Even more troubling, the MCA deems anyone – regardless of whether they fit the above definition – who has been determined to be an "unlawful enemy combatant" based on a determination of a combatant status review tribunal or "another competent tribunal" established by the president or the secretary of defense to be an enemy combatant. This "you're a combatant if we say you are" approach not only flies in the face of established humanitarian law, it has ramifications that go far beyond the status of detainees at Guantanamo.

Under the laws of war, combatants may in most situations be lawfully attacked and killed; civilians (unless they take part in hostilities) cannot. The MCA definition blurs that vital distinction, with potentially dangerous consequences. Congress should consider carefully the precedent it will set if this definition is allowed to stand. For example, is it in the interest of the United States to endorse a definition of enemy combatant that would allow Russian President Vladimir Putin to pick up anyone he deems to have provided "material support" to the Chechens (as many human rights NGOs in Russia who document abuses in Chechnya could be under this broad definition) and treat them as if they were combatants? Would we be comfortable with the Chinese government using this definition to label peaceful Uighers as enemy combatants? Or President Uribe in Colombia, who earlier this year described some members of the political opposition as "terrorists in business suits?" What about the American citizen in Kenya, cleared by the FBI of terrorist connections, but deemed by the Kenyan government to have "engaged in guerrilla war against the democratically elected government" of Somalia and rendered last month by the Kenyans to Ethiopia?

E. Repeal the MCA

In July of last year, I testified before the Senate Armed Services Committee which was at that time deliberating how to try terrorist suspects in the wake of the Supreme Court's ruling in the *Hamdan* case that the Administration's military commissions were unlawful. At that hearing, I argued that terrorist suspects at Guantanamo should be tried either pursuant to the rules for courts martial under the UCMJ or in regular federal courts. Such trials would satisfy the requirement of the laws of war – and of our own laws – that sentences be carried out pursuant to a "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[9] That remains our view.

---

[9] *See* Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, *entered into force* Oct. 21, 1950, *6 U.S.T. 3217,* 75 U.N.T.S. 31, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, *entered into force* Oct. 21, 1950, *6 U.S.T. 3217,* 75 U.N.T.S. 85, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950. *6 U.S.T. 3316,* 75 U.N.T.S. 135, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, *6 U.S.T. 3516,* 75 U.N.T.S. 287, *available at* http://www.icrc.org/ihl.nsf/7c4d08d9

Human Rights First opposed the Military Commissions Act. Even some Members of Congress who voted for it did so while expressing the hope that the courts would step in to remedy its many defects.

With respect, Mr. Chairman, this is no way to run a railroad. Congress should not wait for the courts to come to the rescue, nor should it merely tinker with the machinery of military commissions. Instead, Congress should scrap the Military Commissions Act altogether, and embrace its responsibility to ensure that suspected terrorists are brought to justice in proceedings worthy of this country.

The defects of the MCA are many and have been well-documented by Human Rights First and others. They encompass issues beyond those related to the rules for military commissions, including unconstitutional restrictions on habeas, an overly broad definition of enemy combatant, a narrowing of the scope of acts punishable as war crimes and significantly undermining the means of enforcing compliance with the Geneva Conventions. One approach Congress could take would be to identify a list – and we certainly have one – of the most egregious flaws and amend the statute to fix them.

The Military Commissions fly in the face of 200 years of U.S. court decisions by permitting evidence obtained through coercion – including cruel, inhuman and degrading treatment, if obtained before December 20, 2005. A coerced statement can be admitted if found to be "reliable," sufficiently probative, and its admission is "in the interest of justice," and if the interrogation techniques used to obtain the information are classified, it could be extremely difficult for a defendant to show that coerced evidence should not be admitted. Although evidence obtained through torture is not permitted in Military Commissions, there is an increased likelihood that convictions may rest on such evidence because the rules allow for coerced evidence and hearsay and permit the prosecution to keep sources and methods used to obtain evidence from the defendant.

In violation of a fundamental tenet of the rule of law, defendants before a Military Commission can be convicted for acts that were not illegal when they were committed. Basic due process requires that a person cannot be held criminally responsible for an action that was not legally prohibited at the time it was taken. But Military Commissions may punish individuals for offenses — including the crimes of conspiracy and "providing material support for terrorism" — that were either (i) not illegal before the passage of the MCA, or (ii) not recognized as war crimes under the laws of war.

The scope of judicial review of Military Commissions decisions is restricted and inadequate. The review by the initial appeals court, the Court of Military Commission Review, is limited only to matters of law (not fact) that "prejudiced a substantial trial right" of the defendant. This provision would prevent the first appellate court, the U.S. Court of Appeals for the District of Columbia, and the U.S. Supreme Court from

---

b287a42141256739003e636b/6756482d86146898c125641e004aa3c5.

considering factual appeals, including possible appeals based on a defendant's factual innocence.

Finally, the Military Commission rules for classified evidence are so broad that they would prevent the defense from seeing evidence that tends to show innocence or a lack of responsibility. Upon the request of the government, the judge may exclude both the defendant and his lawyer from the process in which the government argues to the judge that classified information should be withheld. The government has no duty to disclose classified information that could result in a more lenient sentence for the defendant. The judge is specifically permitted to limit the scope of examination of witnesses on the stand, which could hamper the ability of the defense to challenge a witness's testimony or basis for classification.

One of the most telling indictments of the original military commissions was the way the ad hoc and constantly-changing system looked up close, in practice. It often looked as if the rules were being written in real time, the very antithesis of the rule of law. Unfortunately, little has changed under the new MCA system. This week, a Human Rights First staff member is at Guantanamo for the first proceedings under the newly constituted MCA commissions, and it is clear that there is little to distinguish the new system from the old. Even after the issuance of a military commissions manual, the fundamental ad hoc character of the system has not changed.[10]

There is no question that the commissions are staffed by many talented, dedicated and honorable service personnel. But the system itself is illegitimate, and no amount of good will or good lawyering can change that. It is abundantly clear from our observations why Common Article 3 of the Geneva Conventions requires, as a prerequisite for passing sentences and carrying out executions, trials by a "regularly constituted court." The post-MCA system in operation at Guantanamo does not come close to passing that test.

F. Try Suspects in Courts Martial or Federal Courts

As you recently remarked, Mr. Chairman, "The last thing that we would want is to convict an individual for terrorism and then have that conviction overturned because of fatal flaws in the Military Commissions law passed in the previous Congress." We agree. That risk is quite real. Khalid Sheik Mohammed would likely have few defenses in a fair

[10] For example, on Monday morning, defendant David Hicks had three civilian lawyers; by the end of the day, he had only one. Why? One of his civilian defense counsel was told he would have to sign a form, created by the judge, vowing to comply with DOD regulations for civilian defense counsel. But the regulations have not yet been issued by DOD. So the lawyer, reluctant to agree to rules he had not seen for fear of risking ethical violations, agreed to abide by "existing" rules for civilian defense counsel. That wasn't good enough. The judge told the lawyer he could not represent Hicks, though he could sit at counsel table and consult. Another member of the defense team was excluded by the judge based on his interpretation of a contested – and poorly drafted – provision of the rules for military lawyers detailed to represent detainees.

trial. But in a military commission under the current rules, he will have the defense that the trial is not fair. The United States can deprive him of that defense by moving his trial to either a court martial or, preferably, to a regular federal criminal proceeding. That not only would guard against the risk you identified, but it is just smart counterterrorism policy. As the Counterinsurgency Manual points out, "to establish legitimacy, commanders transition security activities from combat operations to law enforcement as quickly as feasible. When insurgents are seen as criminals, they lose public support."

Trials in federal court would also offer the advantage of a venue capable of exercising jurisdiction over a much broader spectrum of criminal conduct. The decision to treat terrorism suspects as "enemy combatants" was made in order to justify targeting, detention and trial practices that could not be supported outside of an armed conflict paradigm. There are many reasons, legal and practical, why this decision was, and continues to be, a mistake. One reason is that it has led to the establishment of military commissions that have jurisdiction only over war crimes, limiting the offenses with which terrorist suspects can be charged. This limitation led the administration and Congress to try to expand the jurisdiction of military commissions to include acts such as intentionally causing serious bodily injury; mutilating or maiming; murder and destruction of property in violation of the law of war; terrorism; material support for terrorism; and conspiracy that do not constitute war crimes by simply *calling them* war crimes.

These acts are not criminal under the laws of war if the targets are legitimate military objectives. And though they are war crimes if committed "in violation of the laws of war," it appears from the charges brought so far that they are erroneously being construed to include any act of unprivileged belligerency, which is not a violation of the laws of war. Application of these new crimes to events that occurred before the passage of the law is a textbook violation of the prohibition of ex post facto prosecution, raising additional and legitimate bases for defense counsel to challenge the military commission convictions. These problems can be avoided by using civilian criminal courts and the broader spectrum of established criminal laws available there.

On the other side of the ledger, those who insist that it would be impossible to try terrorist suspects in the federal courts say that such trials would be too dangerous for judges, juries and witnesses. But the risks of reprisals against juries, witnesses, and judges – while extremely serious – is certainly nothing new.

The judiciary has long taken measures to prevent threats of violence from undermining the trial process. We protect those involved in the trial of murderous mob bosses through witness relocation, anonymous juries, and employing the Marshal Service for the safety of judges. We secure courtrooms with Plexiglas shields, extra layers of security screening, metal detectors, and additional police. Our experience with prosecution of organized crime, including violent members of drug cartels throughout much of the 20th Century, indicates that terrorism cases present no unique challenge in this realm.

Those skeptical of the feasibility of moving these cases to federal court also assert that such prosecutions would force the government to reveal classified information to the defense in order to satisfy constitutional requirements for a fair trial. Leaving aside the fact that terrorist suspects *are* being tried in the federal courts, these are serious concerns that should be explored and fully addressed. But the fact that terrorism cases pose difficult challenges for the criminal justice system should not preclude trials from proceeding successfully to conviction without damage to sensitive information. Given the enormous strategic and political costs of the alternative – the status quo – it is incumbent upon those who would abandon the criminal justice system to demonstrate why the existing procedures, such as the Classified Information Procedures Act (CIPA), designed to protect against such disclosures are insufficient to protect the government's legitimate interests in these cases. Many judges believe that these procedures are adequate to meet the special challenges presented by terrorism cases. Judge Royce Lamberth recently remarked: "I have found the Classified Information Procedure Act to provide all the tools that I have needed as a district judge to successfully navigate the tricky questions presented in spy cases, as well as terrorist cases." In fact, of the hundreds of CIPA motions filed in criminal cases since the law came into effect, there have been no reversible errors found on appeal. Human Rights First is studying these issues carefully. We urge Congress to consider them as well and to explore whether amendments to CIPA or other measures are needed in order to move forward with these prosecutions in federal court.

Conclusion

How we treat terrorist suspects – including how we try them – speaks volumes about who we are as a nation, and our confidence in the institutions and values that set us apart. The distinction between the United States and its terrorist enemies has narrowed over the course of this conflict. This is in part because of lapses in U.S. compliance with human rights norms, but also because U.S. counterterrorism policy has unwittingly elevated al Qaeda by treating it as a military adversary contending with the United States on a global battlefield.

Four years ago, when Judge William Young sentenced al Qaeda terrorist Richard Reid to life plus 110 years in federal prison, this is what he said:

> We are not afraid of any of your terrorist co-conspirators, Mr. Reid. We are Americans. We have been through the fire before. There is all too much war talk here. And I say that to everyone with the utmost respect.
>
> Here in this court where we deal with individuals as individuals, and care for individuals as individuals, as human beings we reach out for justice.
>
> You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature. Whether it is the

officers of government who do it or your attorney who does it, or that happens to be your view, you are a terrorist.

***

So war talk is way out of line in this court. You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.

***

You're no big deal.[11]

Some administration officials argue that adhering to these standards of justice and the rule of law is too great a liability. They say that these rules make for an unfair fight – we fight with one hand tied behind our backs while the enemies do as they please. But while terrorists employ methods that we abhor, we too have an advantage in that asymmetrical conflict: our institutions and values set us apart from our enemies. The goal of terrorists, as Will Taft, the former Legal Advisor to the Department of State described it, is the "negation of law."[12] Yet in many ways, that same impulse – the "negation of law" – was the genesis of the detainee policies at Guantanamo. It is time for a clean break from those policies. This Congress has the opportunity to set a new course, one that takes seriously the long and difficult road ahead in combating the threat of terrorism, while recognizing that adherence to our values and our system of laws is a source of strength in that effort.

Thank you.

---

[11] CNN.com, "Reid: 'I am at war with your country'," *CNN.com*, January 31, 2003 at http://www.cnn.com/2003/LAW/01/31/reid.transcript/.

[12] William H. Taft, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L. 319 (2003).

Hearing Before the House Committee on Armed Services

Re: The Strengths and Weaknesses of the Military Commissions Act of 2006 and the Future of the Detention and Interrogation Facilities at the U.S. Naval Station, Guantanamo Bay, Cuba.

March 29, 2007

Prepared Statement of Patrick F. Philbin, former Associate Deputy Attorney General, U.S. Department of Justice.

Chairman Skelton, Ranking Member Hunter, and Members of the Committee, I appreciate the opportunity to address the matters before the Committee today. Both the Military Commissions Act of 2006 ("MCA"), and recent proposals to amend it, and the continued use of the U.S. Naval Base at Guantanamo Bay, Cuba as a detention facility are exceedingly important issues for the Nation's conduct of the continuing armed conflict with al Qaeda and associated terrorist forces. I gained significant expertise with respect to both military commissions and Guantanamo Bay during my service at the Department of Justice from 2001 to 2005. My duties both as a Deputy Assistant Attorney General in the Office of Legal Counsel and, subsequently, as an Associate Deputy Attorney General involved providing advice on many issues related to military commissions, the detention of enemy combatants at Guantanamo Bay, and the creation of the military's procedures for reviewing detentions through both Combatant Status Review Tribunals and annual Administrative Review Boards. Since my return to the private sector, I have continued to follow the developments in this area with interest.

In addressing the topics before the Committee, I intend to make two basic points.

First, in the MCA, Congress has already crafted a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in *Hamdan v. Rumsfeld*, 126 S. Ct.

2749 (2006). As a result, under the MCA, military commissions are finally poised to proceed more than six years after the President originally issued the order providing for their creation. Indeed, just this Monday, David Hicks entered a guilty plea in the first military commission proceeding initiated under the new rules of the MCA, and by the end of this week it is likely that a conviction will be entered in his case. At this juncture, when the process is finally starting to work, changes to the MCA should be made only if they are required either by a compelling legal need to remedy some constitutional infirmity in the statute or by an imperative operational need of the military. In my view, the changes that some Senators and Members of Congress have proposed are not justified by either necessity. Instead, they would only add confusion to a workable system and further delay the day when military commissions become fully operational.

Second, with respect to Guantanamo Bay, the only feasible alternative to holding enemy combatants at Guantanamo would be bringing them onto U.S. soil. That, in my view, would be a gravely misguided policy choice for at least three reasons. First, as a practical matter it would raise a serious security concern for whatever facility was constructed to house the detainees and for the vicinity around that facility. Second, it would likely materially alter the detainees' legal rights. Under current law, aliens detained outside the United States do not have rights under the Constitution. Once they are brought onto U.S. soil, however, the detainees arguably will have constitutional rights, and that change in status will inevitably spawn a completely new round of litigation. That will only further drain resources from the military and divert attention from the military mission of detaining the enemy combatants to prevent them from rejoining the fight. Third, and finally, simply moving the detainees to the United States will not achieve one of the primary stated objectives of closing Guantanamo — namely, silencing the chorus of criticism the United States receives in the international community and thereby repairing strained relations