Thank you, Mr. Chairman, Senator Warner, members of the committee, for the opportunity to testify before you today regarding individuals detained by the Department of Defense as unlawful enemy combatants.

Dr. Samuel Johnson, the esteemed English philosopher, poet and critic, famously tells us, "The law is the last result of human wisdom acting upon human experience for the benefit of the public."

DELL'ORTO:

The Military Commissions Act, developed by the president and the Congress in light of the Supreme Court's decision in Hamdan v. Rumsfeld, in conjunction with the other procedures implemented by the U.S. government relating to the determination of detainee status, represent precisely this combination of wisdom, experience and concern for the public interest.

The Military Commissions Act provides a system whereby alien unlawful enemy combatants accused of violations of the law of armed conflict will be tried fairly, while ensuring the national security of the United States and allowing the continued prosecution of the global war on terrorism.

Similarly, the Combatant Status Review Tribunal and the Administrative Review Board processes provide the detainees with a measure of process significantly beyond that which is required by international law.

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

The United States is entitled to hold these enemy combatant detainees until the end of hostilities. The principal purpose of this detention is to prevent the persons from returning to the battlefield, as some have done upon their release.

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

The United States relies today -- just as we always have -- on commanders in the field to make the initial determination of whether persons detained by U.S. forces qualify as enemy combatants.

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

In addition to the screening procedures used initially to screen detainees at the point of capture, the Department of Defense has created two administrative review processes at Guantanamo: Combatant Status Review Tribunals and Administrative Review Boards.

The Combatant Status Review Tribunal, the CSRT, is a formal review process created by the department and incorporated into the Detainee Treatment Act of 2005 that provides the detainee with the opportunity to have his status considered by a mutual

decision-making panel composed of three commissioned military officers sworn to execute their duties faithfully and impartially.

The CSRTs provide significant process and protections. In addition to the opportunity to be heard in person, and to present additional evidence that might benefit him, a detainee can receive assistance from a military officer to prepare for his hearing and to ensure that he understands the process.

Furthermore, the CSRT recorder is obligated to search government files for evidence suggesting the detainee is not an enemy combatant, and to present such evidence to the tribunal.

Moreover, in advance of the hearing, the detainee is provided with an unclassified summary of the evidence supporting his enemy combatant classification. Every decision by a tribunal is subject to review by a higher authority empowered to return the record to the tribunal for further proceedings.

In addition, a CSRT decision can be directly appealed to an American domestic federal civilian court, the United States Court of Appeals for the District of Columbia Circuit. Providing review of enemy combatant determination in our nation's own domestic courts is an unprecedented protection in the history of war.

In addition to the CSRT, an Administrative Review Board conducts an annual review to determine the need to continue the detention of the enemy combatant. The review includes an assessment of whether the detainee poses a threat to the United States or its allies, or whether there are other factors that would support the need for continued detention -- intelligence value, as an example.

Based on this assessment, the ARB can recommend to a designated civilian official that the individual continue to be detained, be released or be transferred to his country of nationality.

DELL'ORTO:

The ARB process is unprecedented and is not required by the law of war or by international or domestic law. The United States created this process to ensure that we detain individuals no longer than necessary.

Approximately 390 detainees have been released or transferred out of Guantanamo Bay. Approximately 80 detainees are awaiting transfer or release once their governments' provide credible assurances that they will be treated humanely and that the countries will take steps to mitigate the threat those individuals pose to the United States and its allies. This underscores our commitment not to hold any detainee longer than necessary.

Where appropriate, the president has indicated that military commissions should be used to try those suspected of serious war crimes. As you're likely aware, criminal charges were referred this week against a Guantanamo detainee who was accused of, among other things, murdering a U.S. soldier. This individual and others to follow will face trail under the military commission procedures found in the Military Commissions Act of 2006.

Transfer and trials before a military commission from the secure facility at Guantanamo Bay to the continental United States would hamstring the nation's ability to prosecute terrorist war crimes. The existing civilian court system is ill-equipped to handle the dispensation of justice in the chaotic and irregular circumstances of armed conflict.

Rules of evidence and procedure designed for information derived from civilian law enforcement investigations are impracticable for the trial of accused terrorist war criminals.

Much of the evidence against these accused war criminals was collected on foreign battlefields where reading Miranda-style rights warnings and obtaining court-issued search warrants would be impossible and would in any case cripple intelligence-gathering efforts.

For this reason, this nation has since the earliest days of the republic used military commissions as a means to try enemy combatants during wartime.

The system created by the Military Commissions Act and implemented by the Office of Military Commissions is designed to provide for prosecution of accused war criminals before regularly constituted courts, affording all the judicial guarantees recognized as indispensable by civilized peoples.

The MCA and the manual for military commissions provide extensive procedural guarantees to commission defendants, including presumption of innocence until proven guilty beyond a reasonable doubt, trial before a commission made up of at least five members -- 12 in capital cases -- and an impartial judge, the ability to call witnesses and present evidence, the ability to cross-examine the prosecution witnesses, the privilege against self-incrimination, and many others.

The current system thus provides an accommodation to unlawful enemy combatants beyond what is required by the Geneva Conventions and indeed unprecedented in the history of war.

To abandon this carefully crafted system in attempt to transplant the trials of enemy combatants into the civilian courts would be ill- advised as would be transplanting the commissions themselves from the secure facility at Guantanamo to some unspecified location in the United States.

In the nine months since the Supreme Court's Hamdan decision, the Congress and the administration have made great strides in moving forward. Congress drafted and enacted legislation. The president signed that legislation into law. The courts have begun ruling on that legislation and have rejected challenges to the act. Military commissions have begun again and are proceeding in earnest.

The department has been criticized for the delay in conducting military commissions. We are now moving forward. It would be worse than counterproductive to make any changes to the legislation at this point while the courts are actively engaged in reviewing the Military Commission Act and military commissions are hearing cases.

Together, Congress and the president developed the Detainee Treatment Act and the Military Commissions Act. Those statutes, along with the CSRT and ARB processes, represent the result of the combined wisdom of the president, the Congress and numerous military and civilian personnel applied to the nation's accumulated experience in fighting an entirely new kind of war. They seek to provide justice fairly and lawfully administered while safeguarding the security of the American people.

To discard the system or any element of it would be to ignore wisdom and experience, and doing so would do a disservice to the American public.

Thank you, Mr. Chairman.

LEVIN:

Thank you, Mr. Dell'Orto.

Our next witness will be Rear Admiral John Hutson, United States Navy retired. He is the former judge advocate general of the Navy.

Admiral Hutson?

HUTSON:

Thank you, Mr. Chairman. I thank Mr. Warner -- Senator Warner, for the opportunity to participate in what I think is a critically important hearing. I have a prepared statement that I'd ask to be made part of the record.

LEVIN:

All the statements will be made part of the record.

HUTSON:

Thank you.

My years of experience, observation, and studying history have taught me that there is one and only one immutable rule of international relations: that is that nation states will always, always, always do what they believe to be in their self-interest. They may be wrong. They may be short-sighted. But they will always do what they believe is in their self-interest, and that includes the United States.

For generations, the president, Congress, the courts and the American people have believed that it was in our self-interests to uphold the rule of law and to support human rights. We understood that it was not a rule of law if we only applied it when it was convenient. It was not a human right if we only applied it to our friends rather than to all humans.

Those values were in our self-interests because it was our greatest strength. It was what we stood for that gave us our strength.

If you believe that combatant status review tribunals in which the fate of people is determined without access to all the information -- after the commander in chief and the secretary of defense and everybody else has already said very publicly the status of the individuals -- is in our self-interest, if you believe the military commissions with secret evidence that have tried successfully -- I think, it's one person in the last five years -- an overly broad definition of enemy combatant, stripping habeas corpus from the detainees, if you believe that that's in our self-interest, if that's what makes us strong, then we should continue that.

If you believe as I do that they are not in our self-interest, that they undermine our national character and our strength, then it's incumbent upon us to stop them.

HUTSON:

I like Senator Warner's description of the system, from Congress to the courts -- or to the president to the courts, and then back to Congress.

In prior wars, that system was upset to some extent -- understandably and perhaps justifiably -- because Congress and the courts very much deferred to the president as commander in chief. As others have said before me, this is unlike other wars. And I think

that it is -- in this context, in this struggle, it is less appropriate for Congress to simply defer to the commander in chief on issues such as these.

Specifically, in summary, I urge you to narrow the definition of enemy combatant, to disband the ill-conceived combatant status review tribunals. That dog won't hunt. They are fundamentally and fatally and irretrievably flawed.

I urge you to restore habeas corpus, and to restore prosecutions to the federal court system.

I was a very early supporter of military commissions. I thought military commissions were the way to go. I've testified to that. I've talked to the media about that. I thought they were the way to go. I was wrong.

We can't fix them anymore. We've tried. We've tried a couple of times. They just aren't going to work.

We've got the greatest court system in the world, and we ought to be using it. We should be trumpeting, heralding our judicial system for all the world to see. We should be using it as an example that we want everybody else to emulate, rather than hiding it behind the concertina wire of Guantanamo Bay.

We have the opportunity now to demonstrate to the world how strong we are, how just we are. Rather, we are proving to the world that we're frightened, that we don't really stand for the things that we have said for all these generations that we stand for.

I believe that we cannot -- we dare not -- fundamentally change who we are in the face of this enemy. Because for this enemy, fundamental changes in our DNA as a nation is victory. They can't beat us on the battlefield. The only thing they can do is try to cause us to change ourselves. And they seem to be succeeding in that regard.

We owe it to our forebears, who fought so hard and shed blood to give us this great country, to turn it over to our progeny in the same condition or better than it was when we got it in the first place.

HUTSON:

So, again, thank you for this opportunity. I look forward to your questions, specifically with regard to some of the recommendations that I've made. And thank you for holding this hearing, Mr. Chairman.

LEVIN:

Thank you, Admiral.

Our next witness will be Jeff Smith, former general counsel of the Central Intelligence Agency, and, as Senator Warner's pointed out, formerly a very esteemed staff member of this committee.

SMITH:

Thank you, Mr. Chairman. It is indeed a special honor for me to appear before the committee this morning that I was privileged to serve for nearly five years, initially as minority counsel, and then as general counsel, under Senator Sam Nunn.

And it's, I think, especially important that the committee is addressing these enormously important issues that really go to the core of who we are as a nation and how we fight and win our wars.

And I should say that we are in a war, and it's important that we succeed, but that it's important that we also fight it in a way that when the war ends or we reach some kind of political settlement we have not prejudiced our ability to reach that settlement through the manner in which we fight the war.

Mr. Chairman, the president was correct, in my view, when he concluded that many of our laws were inadequate or outmoded when it came to responding to the new threats that we saw after 9/11. The president was wrong, however, when he concluded that he could adhere to those laws with which he agreed and disregard those with which he did not agree.

Law matters, especially in time of war. It matters because we are a democracy and because we respect the rule of law. It matters because the law of war governs how we fight, it governs how we treat those whom we capture, and perhaps most importantly, it governs how we expect our fellow citizens to be treated when they're captured.

Fidelity to the law also matters because how we fight the war and how others see us shapes the political landscape after the war is over. And this is especially true of the wars we're currently fighting.

Mr. Chairman, I'm concerned that in our efforts to get tough with the terrorists, with which we all agree, we have strayed from some of our fundamental principles and undermined 60 years of American leadership in the law of war.

In six short years, our disregard for the rule of law has undermined our standing, and with it our ability to achieve our objectives in the broader war. Our actions have affected the level of cooperation we have received from allied and friendly governments. Senator McCain has observed this on many occasions, as have other members of this committee.

You've asked me to address, Mr. Chairman, a few specific matters, and I will do so. But there are a couple of principles I'd like to address up front.

First, I believe the United States must regain its leadership in upholding the law of war and promoting adherence to the Geneva Conventions.

Second, the United States must take concrete steps to convince the world that we do not torture any person held in U.S. custody.

Third, the president has said he wishes to close Guantanamo. I believe it would be an important step and urge the Congress to direct the president to outline a specific plan to close Guantanamo. I recognize that's not easy, a lot of pragmatic considerations, but I think we should have that as an objective.

Fourth, Congress should revise the Military Commissions Act along the lines suggested by Senator Dodd in S. 576, cosponsored by Senator Kennedy of this committee.

Fifth, the use of renditions, which I've been asked to address, in part because of my role in the intelligence world, has been a very valuable tool in the war on terror and in law enforcement matters.

It's recently been called into question, particularly in Europe, but I believe it's an important tool, and I believe the president, perhaps with congressional authority, should issue an executive order establishing clear criteria for the conduct of renditions, including specific matters to ensure that to the maximum extent practicable individuals are not handed over to states where they may be tortured.

SMITH:

Sixth, and of critical importance, the United States must develop clear guidance for the men and women of the armed forces and intelligence services who implement these policies and enforce these laws.

We ask these brave men and women to take physical risks on our behalf. We should not also ask them to take legal and financial risks. Too frequently, these officers are asked to carry out directives not knowing whether, when the political winds in Washington shift, they will be left out on a limb and forced to face multiple investigations and possible prosecution for doing what was thought to be proper at the time.

We owe it to these men and women to be clear in what we want them to do, and then back them up when they do it.

Mr. Chairman, about two minutes on my remaining time on the specifics.

As I said, I believe S. 576 is important, and I certainly support its adoption.

With respect to the CSRTs, I am sad to say I disagree with Admiral Hutson. I believe they play an important role.

I favor the restoration of the right of habeas corpus for individuals detained in Guantanamo. But I believe that combatant status review tribunals should have their procedures considerably strengthened, because I do believe they fill an important but different function than that of habeas corpus.

So I am hopeful that we can find a way to do that. I agree that they are not currently effective, but I believe ways can be made to strengthen them.

Finally, Mr. Chairman, the question has been asked of me of whether I believe that the president should continue to have the right to use the CIA to detain people outside of the military system, the so-called ghost detainees.

I am skeptical of the need for that. And I'm pleased that the president has now moved all of those individuals into the military system.

But I would not by statute deny the president the right to do that. We may need to do that at some point in the future. I hope we don't, but I'm reluctant to say by statute the president should not have that right.

With that, Mr. Chairman, I look forward very much to your questions.

LEVIN:

Thank you very much.

And next we'll call on Neal Katyal. Pronounce your name for me, if you would.

KATYAL:

Perfect.

LEVIN:

Perfect. Thank you.

Mr. Katyal is the -- is a professor of law at Georgetown University Law Center.

Thank you for being with us.

KATYAL:

Thank you, Mr. Chairman and Senator Warner, for inviting me.

I want to begin by thanking the chairman's staff, particularly Peter Levine and Bill Monahan. They're outstanding public servants who have spent countless hours with me and folks on the other side during the 2005 Detainee Treatment Act debates and the 2006 Military Commission Act debates.

KATYAL:

Mr. Dell'Orto started this hearing quoting Samuel Johnson. Let me do so as well. He once called second marriage the triumph of hope over experience. The same, I think, might be said of the Military Commission Act. It represents the triumph of unsupported hopes, namely to avoid the Constitution and judicial review, over instructive experience.

Experience said the previous military commission system was a failure. In the five years it existed, it spent tens of millions of taxpayer dollars, produced zero trials and zero convictions and was ultimately held illegal by the Supreme Court -- five wasted years.

While the military commission system was busy wasting resources and producing no results, many terrorism cases were prosecuted successfully in our civilian courts. The Justice Department recently heralded over 500 terrorism prosecutions since 9/11.

The documented successes of the established judicial system and the failure of the commission experiment call into question the need for an alternative judicial system at all.

But if military commissions are to be retained, experience suggests the need for reform to make them work fairly, accurately and economically.

I want to make three points today. First, while habeas corpus has gotten the bulk of attention, I think the reported views of Secretaries Gates and Rice that the military commission trials be moved to the United States are right.

It is a crucial first step, perhaps even more important than repealing the MCA's habeas provisions. Trials are gripping, dramatic and easy to follow. This is the reason why shows like "Law & Order" are running so long on television. They're unlike detention, which involve little drama and no grand moment of resolution.

The trials at Guantanamo will be watched by the world. And we must not forget that in them, our nation, not just the detainees, face judgment.

Yet, the administration clings to the idea that Guantanamo should be a legal black hole, where none of the protections of our great Constitution apply. This shortsighted theory will corrupt these trials. These ideas should be repudiated and replaced with American traditions and values.

Second, Congress should repeal the Military Commission Act and use our proud traditional system of courts-martial to try terrorism suspects, as suggested by Senator Dodd.

Here, I want to focus on something basic, which is the role of equality. When I first met Mr. Hamdan in 2004 at Guantanamo, he asked everyone to leave his cell, except for me.

I thought he was going to yell at me. He'd been detained for a long period of time there.

He said to me just one thing -- he said, "I have one simple question for you." He said, "Why are you doing this? Why are you defending me?" He said, "I thought your last client was Al Gore."

And I told him the reason why was that my parents had come to this land from India with $8 in their pockets, and they chose America because they knew they could arrive on our shores and be treated fairly.

"There's no other nation on earth," I told him, "who would give me, the son of immigrants, the opportunities I had." I told him, "I'm deeply patriotic for these reasons," and that when the president issued his military commission order, it was the first time I felt, in my life, that this vision, my parents' vision, had been violated.

Remember our history. We are a land of immigrants. The Declaration of Independence lists as its first self-evident truth that all men are created equal. That promise is the centerpiece of the Equal Protection Clause, which protects all persons, not simply citizens.

When you think about the Military Commission Act, think about that. For the first time, Congress has set up a separate and unequal trial system, to only apply to the 5 billion people in the world and 12 million green card holders who live here.

A United States citizen gets the Cadillac justice system, the American civilian trial, no matter what he's accused of. A foreigner gets the beat-up Yugo, a stripped-down Guantanamo one. We've never done that before.

KATYAL:

We've had military commissions since 1847. They've always applied symmetrically to citizens and foreigners alike.

Not only does this offend the Constitution, it's bad policy. As Justice Scalia has warned, the genius of the equal protection guarantee is to avoid letting Congress sidestep difficult choices by singling out the powerless for disfavor.

It's not surprising that this act was introduced on September 6th and passed this body on September 29th. It did so in record time not because, with all due respect, the act was written by Plato. It passed because it only affected the powerless, people who literally had no vote in this chamber. Ultimately, I believe the Military Commission Act will be struck down for this and other reasons.

Third and finally, instead of trying to avoid a court ruling on the legitimacy of these military commissions, I believe Congress should expedite it. It should at the very minimum repeal the provisions requiring trials to take place before legal challenges can ensue.

That's the kind of delay that the administration had told the Supreme Court to take in Hamdan. They told the Supreme Court, "Don't decide this case. Let's have the trials first."

Think about what would have happened, the atrocious result. We would have had dozens of military commission trials. They would have all gone forward. Some of these folks would have been convicted. And then all those convictions would have to be overturned, because the previous system was illegal.

Before gambling on the administration's shaky legal theories once more, we should be absolutely sure the system will stand up in court. The expedited review is a system we

used in the McCain-Feingold campaign finance reform package, and it is crucial here as well.

In sum, I ask you to realize the power that lies in your hands: the power to ensure the safety of our troops and the dignity of the values they defend.

I applaud Secretary Gates and all others who recognize that the only thing worse than making a mistake is failing to correct it when you have the chance.

(APPLAUSE)

LEVIN:

Excuse me. Please, no demonstrations or you'll have to leave.

Mr. Denbeaux?

DENBEAUX:

Thank you very much.

Unlike Mr. Smith, I've never been on your staff. I've never been before the Senate. And I've never testified. So I hope you'll bear with me. I will try to...

LEVIN:

So far you're just doing great, by the way.

(LAUGHTER)

DENBEAUX:

Thank you very much.

I guess as you said last time, I'll wait until the end to see how you think I did.

When I -- this is a personal beginning. After Rasul, my co- counsel, my co-author and my eldest son asked me what I thought about Guantanamo. And I'm ashamed to say that I said I hadn't thought much about it at all.

He asked if I felt we had the right people there. And I replied we probably did.

Then he asked whether my father -- his grandfather -- who was a chaplain with General Patton, would have believed that the United States Army marching across Germany during World War II could have accurately selected the 500 bad Germans civilians from all the rest.

And I said, "I'm sure he would not have believed that the 3rd Army could have made those distinctions in combat as it was moving along, and it wouldn't have bothered."

But I said, "My father also wouldn't have cared, because my father didn't believe that there were any good Germans during that period of time."

And my son Joshua said, "Isn't that the whole point?"

I'm grateful to him for that because I then started looking into this. And, frankly, I think in one sense it's my lips moving but it's the government documents talking.

DENBEAUX:

Because what I did, as a result of the efforts of a series of my law students, was decide to look and see what the government records actually said.

And one of the things that I discovered was, that what our United States government said before habeas corpus was granted, even temporarily, which was also before any of

the government documents for the CSRT proceedings had to be prepared, and before they had to publish any of those documents, we learned that the government had made a series of statements that were totally false.

And one of the scary parts about that is, those statements are very difficult to pull out of the record once they have been made. One of those statements was "The detainees there are the worst of the worst." And I had a poignant moment when a student came into my office and he said, "Where are the worst of the worst?" He'd been looking through all of them.

And he showed me a record, and this is the entire CSRT charge against one person. It said -- this is it in its entirety -- "Detainee is associated with the Taliban. He indicates he was conscripted into the Taliban. He was engaged in hostilities against the U.S. or its coalition partners. One, he was a cook's assistant for the Taliban forces. Two, he fled from Narim to Kabul during the Northern Alliance attack and surrendered to the Northern Alliance."

That's the entire charge upon which he was being held. My student said, "All right, we have the assistant cook. Where's Mr. Big? Where's the cook? Why do we have the sous chef and not the chef?" And he turned and walked out of the room.

And, you know, I don't have an answer to that, and I think all Americans should ask that, but especially those of you who say "We have the worst of the worst there," because what's really scary is when you look at the government records and find out who is there.

They say all the time "They're the worst of the worst," and what -- if you look at our records, you'll find out that 55 percent -- and this is government's own records from their CSRTs -- are not even accused of committing a single hostile act.

So these enemy combatants, 55 percent of them, are enemy civilians, as my students point out. But you don't have to be a combatant to be an enemy combatant, to be the worst of the worst, to be held in Guantanamo. But you also don't have to be a member of Al Qaida.

You don't -- it turns out that 60 percent of all those detained in Guantanamo are not even accused by the United States government of being fighters for or members of either Al Qaida or the Taliban.

DENBEAUX:

Another point that's been made by several of you today -- and it's distressing because it's not true based on the government's own records -- the number of members of the executive branch who have consistently said the detainees were captured on the battlefields of Afghanistan shooting at Americans.

Our government's own records show that 66 percent of the detainees weren't even captured in Afghanistan. Yet people keep saying they were captured in Afghanistan shooting at U.S. forces.

The second percent is, depending if you give the government the maximum benefit of the doubt, only 8 percent of those detainees were ever captured on the battlefield -- or, pardon me, were captured by Americans.

And you know, if you look at all of the charges against everybody in the CSRTs, eight individuals are alleged to have fired weapons at U.S. forces.

Now, those people are enemy combatants. I'm not here to argue they're not. They deserve to be prosecuted. And the CSRT process, if they were to go through the proper process -- and it's true they should be held there. But it's very distressing.

And I want to say another factor the government records show.

For those who have been told that we're holding those people because they're the repositories of useful information, General Schmidt's report indicates that over more than 30 months of interrogation, the Defense Department conducted 24,000 interrogations of those detained in Guantanamo. That sounds like a lot.

But there are 759 detainees. That averages one interrogation a month. We're holding people there for their intelligence purposes in order to interrogate them once a month during the first 30 months of their detention. And at least one FBI agent has reported that most interrogations last approximately three hours.

It's deeply troubling, if you're worried about our security, to believe that we're holding those people there in order to interrogate them, in order to spend approximately one afternoon a month finding out what they know.

Now, one of my really distressing parts of this is, I believe, in all fairness, anybody's belief that those are the worst of the worst, that they were captured on the battlefield, that they shot at Americans, is simply been misled by information made public before habeas corpus.

We would not know it now, if habeas corpus had not existed, that those statements were false. And we would not be able to refute those false statements that have penetrated all levels of our government, all branches of our government, the press and the popular world. But they're false.

Now, how is it that those detainees are still there?

DENBEAUX:

The CSRT proceedings -- which, by the way, the very first attempt to create the CSRT proceedings -- the establishment of the procedures, their implementation, and the completion and the final decision in the first CSRT proceeding took 24 days.

So when you talk about working out a complicated, sophisticated process to find out if you do have the right people there, they spent -- they didn't complete the process for almost three weeks. Within three days of the completion of the process, they had the first CSRT proceeding. On that same day, the decision was made. And on that same day, the detainee was found to be an enemy combatant.

The cook, the assistant cook, was found to be an enemy combatant, and to the best of our ability to check those records, that assistant cook remains in Guantanamo to this day, after five years, with no impartial review.

Now, I want to talk about what the CSRT proceedings are and how they operate. And I appreciate the chairman citing some of our information. But it's really very distressing.

It turns out that a detainee is assigned a personal representative, and the personal representative may not be a lawyer. And in fact a personal representative must come in, and there's a script, he has to come in and tell the detainee, "I am not your lawyer. I'm not your advocate. What you tell me may be shared with the panel. How can I help you?"

The average length of those interviews is less than 90 minutes, and that includes translation time. Those often happen within 48 hours of the hearing. A significant number happen the same day as the hearing.

Then the detainee is brought into the room, and 200 of them, after being given that offer by the personal representative, choose not to come.

Two hundred do not. The remainder do come in. And they're brought in the usual shackles. They're shackled to the floor. They're alone in a room, seated against the wall, with a tribunal on one side. And this is their chance to have a hearing.

And at this hearing, the rules say they're entitled to question witnesses. To my absolute shock, in 100 percent of the cases the government's made public the United States produced zero witnesses.

So the opportunity under the process to question witnesses is a complete sham, not because it isn't offered, but because the government doesn't exercise it. Because in this impartial hearing, the government is entitled to rely on the classified secret evidence the detainee never sees, and it's presumed to be reliable and valid. So the government doesn't call a witness.

And, in fact, in 94 percent of the cases it produces no documentary evidence for the detainee to see.

So detainees actually have their impartial hearing when they walk into a room, only to discover that no evidence will be presented against them, they'll hear no evidence, they see no evidence, and then the government turns to them and says, "Well, now you may speak."

Most of the detainees believe it's another form of interrogation because they hear nothing and they're asked to speak.

And then, after that, they're told, "You may call witnesses." Well, you know, every detainee who ever asked for any witness who was not a fellow detainee was always turned down because the witness was not reasonably available.

Even when the detainees would say, "Would you please allow by telephone to call my brother, here's the phone number," our government would decide to work through the Afghani embassy to find the person, and there'd be a brother waiting by a phone.

DENBEAUX:

And they wouldn't call him.

Now, those detainees were then, at the end of the hearing -- the personal representatives, 98 percent of the time, had the opportunity to speak and didn't.

And if I may just -- I probably used up all my time, Senator, but if I could just end with one point?

In terms of impartial, they say this can be reviewed. They can be reviewed. And do you know, every time a detainee won, even in that process, they were reviewed. And every time they were reviewed, when they won, it was sent back down again.

Two detainees won; went up through the chain of command; came back down again. And it turned out they were tried again.

One detainee won twice, and they sent it back down the third time. That's the impartial review they give.

Now, the question is, what can be done to solve this?

When I was a young man and I was trying to get by on cars, I used spit, baling wire, glue to keep a car going. And I actually believed that it was economical and efficient. And I think we've all experienced that. And it isn't economical and it isn't efficient.

But I'll tell you, even in my youth, I never tried to fix a car after it hit a bridge abutment at a high speed.

The CSRTs are a vehicle that has hit a bridge abutment at a high speed. You can't tinker with these and fix it. They are totaled. They never operated. They are not distinguishing people. Every detainee loses.

And my final point is only this. When we talk about habeas corpus, all I want to do is to allow the courts to evaluate whether we have the right people.

My problem with this process isn't giving them rights. My problem is we have the wrong people there, if you believe our own government's records.

And the question is, what do you say to those people who have been held wrongly, after the CSRTs confirmed, nonetheless, to be enemy combatants, wrongly?

What do you say to them?

We're not talking about habeas corpus in terms of post-conviction release, where they've had the trial. This is the purpose habeas corpus was for.

When the sheriff of Nottingham wanted to lock somebody up, in the time of Robin Hood and Magna Carta, what Magna Carta said was, you couldn't hold him for no reason, without any hearing, indefinitely; you had to produce the body and explain why.

Detainees in the United States always ask for second bites of the apple. The people detained in Guantanamo have never had a first apple. They haven't had a nibble.

And I ask you simply to appreciate how this system has failed us, based not on what I say but what our own records say and only our own records.

Thank you very much.

LEVIN:

Thank you, Mr. Denbeaux.

Next it's David Rivkin, Jr., who is a partner at the firm of Baker Hostetler. We welcome you, Mr. Rivkin. Please proceed.

RIVKIN:

Chairman, thank you.

Chairman Levin, Senator Warner, I wanted to thank the committee for giving me a chance to share my views on the Military Commissions Act of 2006, the Detainee Treatment Act, the procedures used by Department of Defense to determine detainees' status under the international law of armed conflict, and to try some of them for war crimes.

RIVKIN:

Fundamentally, I believe that both MCA and DTA comport with our Constitution and more than meet applicable international law standards.

Their procedures are streamlined yet fair. They essentially provide detainees with judicial process that is more than sufficient to enable them, at appropriate times, to mount

a meaningful challenge to the government's -- core government decisions that impacted them.

Meanwhile, the actual procedures used by the Department of Defense to determine their status -- and we heard today about CSRTs to try them for war crimes by military commissions -- in my view are constitutionally sufficient and give them far more due process -- far more due process -- than they've had in the past under any competent tribunal convened, for example, under Article V or Geneva Convention III, or any military commission in American history or history of any other country.

To me the fact that DOD, in addition to these procedures, also implemented something called administrative review boards, which focus primarily not on whether or not an individual is an enemy combatant, but they question whether or not individuals detained in U.S. custody pose a continued danger, and whether or not a viable alternative exists for their continued detention, underscores the extent to which the U.S. has opted -- with input from both political branches -- to provide captured enemy combatants with additional rights that go far beyond those provided for under the Constitution or international law of armed conflict.

Let me try and underscore this point somewhat dramatically.

Since the notion of enabling captured enemy combatants to be released on parole -- and even then, it'd apply not to everybody but to officers and the gentlemen -- fell out of practice in late 19th century. The current U.S. practice of releasing captured enemy combatants before the end of hostilities, ladies and gentlemen, is historically unprecedented and does represent a very generous act on the part of the United States.

And, of course, we all know, because you cannot always be right -- I agree with my colleagues who think the government does make mistakes -- a number of those individuals went back to combat. And it must be a very difficult situation to explain to somebody who's lost a loved one how that person got killed not by an individual before we had a chance to apprehend him, but by somebody who was actually in U.S. custody and was let go.

RIVKIN:

Now, primarily, planning to talk about habeas, I believe, today. And I don't need to describe in detail how the DTA and MCA work for designating the United States Court of Appeals for the District of Columbia Circuit as the exclusive venue for dealing with appeals from a decision of CSRTs and military commissions.

Now, substantively, the judicial review timelines aside, it's limited to essentially two questions: Whether or not a HUMINT CSRT or military commission operated consistent with the rules and standards adopted by it and also whether or not the CSRT or military commission reached a decision that, quote, "is consistent with the Constitution and laws of the United States."

Now, this review has been derided, I would say, as being austere and inadequate, in particular because it allegedly does not grapple with the facts. I think it is a misreading of the statute and applicable case law.

The scope of judicial review, in my opinion, is sufficient not only for noncitizens held abroad, but it's constitutionally sufficient for the United States citizens themselves.

The fact that the review does not commence at the district court level and does not fall on all the particulars the existing federal statutory habeas procedures codified at 28 USC 2241 is constitutionally unexceptional.

And contrary to critics' assertions that these procedures are deficient because they don't allow for review of factual issues, I believe that the scope of habeas review provided by DT-MC is not limited to merely reviewing the legality of procedures. A detainee should be able to claim that he is in fact not an enemy combatant, that he is an innocent civilian, a shepherd, if you will, or an aid worker, and that the relevant factual record of a CSRT military commission would be judicially reviewable.

Indeed, there's nothing particularly noble about it. This is exactly the same type of review the Nazi saboteurs, of whom at least one was a U.S. citizen, in Ex parte Quirin received before the United States Supreme Court, at least -- people will think that was a long time ago, that is still a good case. That case was referred to in approval in the Supreme Court's recent opinion in Hamdan v. Rumsfeld.

And of course recently the D.C. Circuit upheld the constitutionality of the MCA against attack by the detainees who were asserting pre-existing claims in Boumediene.

Now, I know that predicting what the Supreme Court is going to do is chancy business. But with all respect to my good colleague, Professor Katyal, to me the fact that six Supreme Court justices, including two justices, Stevens and Kennedy, who were in the majority in the recent Hamdan decision which struck down the pre-MCA version of military commissions, let stand the D.C. Circuit Boumediene decision and refused to consider the facial challenge to the MCA is highly significant.

In my view, it certainly casts substantial doubt on the critics' contention that MCA is palpably unconstitutional.

Now, we're not going to get, at least now, in a detailed discussion about the procedures used by CSRTs and military commissions. They've been much criticized.

But I would challenge my critics and others who criticized those procedures to look at the facts, facts as reflected in state practice of other countries, the competent tribunals convened under Article 5, Geneva 3, to show this committee or anybody else, for that matter, how these other historical precedents implemented by countries like Britain and Canada are more plentiful, are more robust in their procedures than CSRTs, because, with all due respect, the answer is, they're not.

And the only appropriate point of reference for assessing the sufficiency of procedures used by CSRTs and military commissions is not our civilian criminal justice system, with all due respect, but their historical international counterparts.

And I'm going to repeat myself to say you get a lot more due process in CSRT and military commission than you've gotten either in Article 5 tribunals convened under Geneva 3 or in World War II-style military commissions.

Let me just briefly make a couple points reflecting the discussion that went on before. I understand that we're not popular in the world, and I don't disagree with some of the opinion polls that have been cited.

With all due respect, having looked at the subject carefully, having written about it, having engaged a lot of my European friends and colleagues in debates, I'm afraid -- I'm afraid -- that even if we closed Guantanamo tomorrow, even if we were to deploy the criminal justice system as the exclusive avenue for dealing with enemy combatants, that would not vitiate the problem.

RIVKIN:

Simply put, there's a huge doctrinal, philosophical gulf between us and most of our allies on the issue of the laws of war and it's a very complicated subject. But, to me, it is not a fair proposition, but if we were to close Guantanamo or move the trials here, that would fundamentally change the equation. I could be wrong on that.

Two other points briefly. On the whole issue of why do we need a second-tier justice system, why shouldn't we use at least courts- martial, I would submit to you that the way a society treats a given class of problem is not only driven by fairness to their accused. It is that, of course, but it also tells us a great deal about how society views a particular type of problem.

If you look at this historically, the reason to use military commissions and not courts-martial -- and not just utilitarian. It's not a question where it's easier to convict somebody. There's enormous and fundamental differences between unlawful combatants and lawful combatants when lawful combatants (inaudible) of humanity, committing disproportionate portion of war crimes and just being absolutely bad people.

These are institutions and practices that ought to be delegitimized and suppressed, and that has always been the case historically. One of a few remaining ways, especially because we do give a lot more due process to unlawful enemy combatants than in the past and properly so -- the only way in which in those differences are still manifest, are still palpable in trying them by fair procedures under a different system called military commissions and not by courts-martial.

And last but not least, with all due respect to my colleague, Professor Denbeaux, under the laws of war, the fact that you are a cook absolutely makes you a combatant subject to detention.

So in his case, if you have somebody who admitted to being an assistant cook for a particular Taliban detachment, given the fact that Taliban is an unlawful combatant entity, I'm very sorry to say that individual is an unlawful combatant and no other particular review as to his motivations, as to whether or not he was oppressed or how much he did need not be done.

You do not need to fire guns or machine guns, you do not need to charge the enemy trenches to be considered a enemy combatant. A person who repairs vehicles for a military unit is an enemy combatant. So is the cook. So is the person who processes payroll. This is a fundamental difference between the military system that looks at individuals in that context and the civilian justice system.

Thank you, and I'm looking forward to the questions from the committee.

LEVIN:

Thank you very much, Mr. ricin. Let's try a eight-minute round for round one.

Mr. Smith, you indicated that we should maintain the CSRT system but we should reform it. Is that correct?

SMITH:

That's correct.

LEVIN:
What reforms do you recommend and why?

SMITH:
Mr. Chairman, first of all, I want to be very clear. I am in favor or restoring the right to habeas corpus. That is to say, as you said earlier, repealing that section of the Military Commissions Act that denied the courts jurisdiction to hear habeas cases. But I believe the CSRTs can fulfill a vital role.

I believe they are not currently doing so because the procedures are inadequate, but I believe that under Article 5 of Geneva III, there is an important role to be held by or to be fulfilled by those commissions, review tribunals. Insofar as increasing their effectiveness, I agree with much of what has been said.

SMITH:
I think they ought to be...

LEVIN:
By whom?

SMITH:
I'm sorry. By my colleagues here who favor giving them an attorney, giving them some degree of access to the evidence against them.

We can have cleared attorneys on their behalf able to see the evidence that the government has. Seems to me that's an important step. The detainee themselves, in many instances, probably should not be entitled to see it, but I think their lawyers ought to see it.

And then, secondly, I think there ought to be meaningful review in the court of appeals. The current review is so constrained that it reviews only the issue of whether or not the tribunal stayed within the four corners of their authority. That's so limited that it's not meaningful.

So I would give them much stronger review, but I would have ultimately the right to file habeas once the CSRTs have been exhausted.

LEVIN:
What other changes would you make in the CSRT law? For instance, would you say that if witnesses are available you should not use hearsay testimony?

SMITH:
I'm not sure I would...
(CROSSTALK)

LEVIN:
I think that's in the Dodd bill, although I'm not positive.

SMITH:
I'm not sure I would go quite that far, Mr. Chairman. This is something less than a full-scale habeas. It's designed to be a, sort of, first rough cut justice to say, "Do we have the right person?"

I do think there's clearly a difference between those individuals whom we capture and hold in Iraq or Afghanistan. And I think we're not talking about those individuals.

LEVIN:
We're not.

SMITH:
We're talking about those individuals who for whatever reason we believe are a sufficient threat to kill Americans that they should be detained specially at Guantanamo or some other place if we close Guantanamo.

And the concern I have is that under the current scheme, as Senator Leahy said, they can be locked up forever. And this is a war with a very uncertain end. And in that sense it's different than World War II, it's different than Korea, where we did have some end in sight. And we need to have some procedure.

LEVIN:
You want to preserve the CSRTs though...
(CROSSTALK)

LEVIN:
And I want to just go into what other changes would you make and why in the law, besides the one you say.

One, the current representative, you say -- or I assume you believe -- doesn't fulfill a proper function because that representative doesn't have any fiduciary duty to the detainee, as a matter of fact, could be interrogated by the government as to what the detainee told them. So you would recommend a lawyer at those hearings, those detainee hearings.

Secondly, as I understand it, he would have some access to the evidence, at least by a cleared lawyer, to know what it is that the evidence is that is being used by the government to decide whether or not that person should be held.

Are there any other changes you'd make?

SMITH:
Yes, Mr. Chairman. Two other things. I'd change the presumption. At the moment, the burden is on the detainee to prove that he should not -- the government is entitled a presumption that he's legitimately a combatant. I would change that around and put the burden on the government to prove that he's being held on basis.

The other thing is I would not permit the use of any evidence obtained by coercion and torture. And I would permit the detainee rights to be able to get at whether the -- any evidence was obtained by coercion or torture.

LEVIN:
Thank you.
Mr. Dell'Orto, in your opening statement you say that the CSRT recorder is required to search government files, quote, "for evidence suggesting the detainee is not an enemy combatant and to present such evidence to the tribunal."
It is our understanding the recorder receives a package of evidence from the Office for the Administrative Review of the Detention of Enemy Combatants in Washington and does not have access to any other government files.
Am I right?

DELL'ORTO:
I think you're generally right, Mr. Chairman. But I do think he can have access to the other materials if he so desires.
And, certainly, there are people on the other end who are -- or as they review the information are certainly obligated to take a look for anything that might indicate that the detainee is not an unlawful combatant.

LEVIN:
The recorder, however -- am I correct that he is given a packet of information?

DELL'ORTO:
He is.

LEVIN:
And that is where he reviews the evidence?

DELL'ORTO:
Yes.

LEVIN:
Do you disagree, Mr. Dell'Orto, with the accuracy of the data that Professor Denbeaux has presented on the CSRT process, particularly the two items that he mentioned here this morning, that 66 percent of the people who are being held were not captured in Afghanistan?

LEVIN:
Do you have any reason to disagree with that?

DELL'ORTO:
I've read the reports. I don't have firsthand knowledge of information that would enable me to either confirm or rebut those. I do know that we are -- we -- certain people are undergoing reviews of the records that we have to establish whether that information, that data are correct.

I do on certain aspects of what I've read in the report, based on information I do know, I would say that I disagree.

LEVIN:
Would you get for the committee any specific disagreements that you have factually with the reports of Mr. Denbeaux?

DELL'ORTO:
We think that...

LEVIN:
I don't mean right now. For the record.

DELL'ORTO:
I understand. Within a relatively short period of time, although I think one of the reviews is going to take us about another 30 days, Mr. Chairman.

LEVIN:
That's fine. That'd be very helpful. And if you'd send Mr. Denbeaux a copy of your review, we'd appreciate it.

DELL'ORTO:
Well, at least one of them will be classified, so I'll have to provide that only to the Congress.

LEVIN:
At least the unclassified part, if you'd share that with Mr. Denbeaux.
The definition of enemy combatant is a big issue here. The District Court for the District of Columbia reviewed the administration's position on the scope of the term enemy combatant, and the brief, or the counsel for the government, argued that the executive branch has the authority to detain the following individuals until the conclusion of the war on terrorism. The first example is a, quote, "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but really is a front to finance Al Qaida activities." And apparently the counsel for the government said, yes, that that little old lady, without any requirement that there be knowing and willful support for Al Qaida, simply writing checks to a person who the lady believes is a harmless person, is just a charity that helps orphans.
Do you agree with that answer?

DELL'ORTO:
I guess I would want to see the question in a larger context.
I would say that as we in the department make our assessments of unlawful enemy combatants in our operational scheme, we are probably more conservative than that view in making those sorts of assessments.

LEVIN:

Do you require any knowledge or intent on the part of the person, that little old lady?

DELL'ORTO:
Well, generally, I think, for our purposes, when we are engaged in reviews of target-and-capture decisions, probably require a little bit more in the way of indicia. But I'm not -- I wouldn't say that that's a wrong assertion, but I do think that -- I do know that we apply a more conservative approach...
(CROSSTALK)

LEVIN:
I would hope so. But you would take the position that you have the right to hold somebody who writes those checks who has no knowledge or intent that that charity is, in fact, a front to finance Al Qaida. Would you agree with that answer, that you have the right to do it? Put aside your practice for a moment.

DELL'ORTO:
On the extreme end of that sort of an assessment, I'd want to be able to consider it a little bit more, Mr. Chairman.

LEVIN:
You say consider it more, I mean, would you -- does that mean that you have doubts about that answer? I mean, give us a little more than consider it more.
(CROSSTALK)

DELL'ORTO:
Well, again, I mean, I think that's a bare-bones hypothetical. I'd want to know more about the -- I mean, how frequent was the practice, what was the organization, where was it listed, where was it identified.
I mean, you know, we talk about people with knowledge. There's more than just what they actually know, but what they probably should know is a factor to take into consideration.

LEVIN:
Well, but the counsel for the government did not say that he needed or she needed to know more. They knew enough. It's not enough for you. Is that fair to say?

DELL'ORTO:
I would say I want to know more, yes, Mr. Chairman.

LEVIN:
Senator Warner?

WARNER:
Thank you, Mr. Chairman.

WARNER:
Basically, I still strongly adhere to my earlier comments that we should have let the sequence of actions by the three components of our government to run their course.

Nevertheless, I was greatly taken with Mr. Smith's thoughts about certain revisions that he would recommend in response to Senator Levin's question to the CSRT and ARB processes.

Given that I'm not advocating any support for a change of law at this time, are there some thoughts within DOD and Justice maybe to take into consideration the views that we've heard today and that you and others have been available to you for some time to change some of the procedures now?

DELL'ORTO:
Senator Warner, I have to admit I'm not -- I don't quite understand Mr. Smith's approach to both reinstating the habeas -- the statutory habeas access and the CSRT. To have the dual process doesn't seem to make sense to me.

Again, I think at this point, with the Military Commissions Act, a relatively recent legislative initiative, and its signing into law, and our grappling with all that came from that with respect to in particular the military commissions themselves, I have not given and I'm not aware -- there may be other discussions under way, but I'm not aware of any as to whether we should at this point undertake a revision in any way of the CSRT process.

DELL'ORTO:
Again, I do think that with...
(CROSSTALK)

WARNER:
Then why don't you go back and assess from your other colleagues in Justice the views and just advise the committee in a written response to the record?

DELL'ORTO:
OK.

WARNER:
Thank you.

DELL'ORTO:
We will.

WARNER:
Mr. Smith, you've had a long and distinguished career regarding security issues in this country. And I thought you spoke very boldly about your views with regard to our

intelligence gathering and the necessity to have certain areas remain in effect simply for national security reasons in this time of war.

But what about the provisions in S. 576 about the expanded discovery rights? Do you have any views on the implications of those expanded provisions as it would affect our security?

SMITH:

I do, Senator Warner. I think that the expanded right of defense counsel to get clearances -- and, by the way, one of the things I suggest in my statement is that the defense counsel in -- S. 576 permits civilian defense counsel to be appointed.

I think either a civilian or military defense counsel should be granted clearances if they are eligible, and I think they should be permitted to see the underlying evidence that would be used against a detainee.

I've been involved in a number of litigations and criminal matters over the years where defense counsel have gotten access to highly classified code word information, and then they've respected it in not being able to share it with their client, the defendant.

And that works. It requires a lot of effort on the part of the court, but it does work. I think it can be done, and I think it would not necessarily be harmful to the nation's security.

WARNER:

But S. 576 would authorize a military judge upon motion from a defense counsel to disclose the intelligence sources, methods or activities by which the U.S. obtained an out-of-court statement intended to be introduced at trial to a military judge who determines that the intelligence sources, method and activities might affect the weight to be given an out-of-court statement.

Now, it seems to me we're moving very close to a fine line of impairing our intelligence collecting if that sort of situation prevails.

SMITH:

Well, I'd be very troubled if it did, Senator Warner. My experience with both -- I've not tried a court-martial in decades, but my experience with military judges and certainly civilian judges is they make good decisions. And as I strike the balance, I would be prepared to give defense counsel access to that kind of information.

To make it clear, I would not be in favor of giving it to the detainees, but I believe our system works quite well with responsible counsel. I think if -- and there are sometimes irresponsible counsel, but I think responsible counsel can be trusted.

WARNER:

Well, history shows that while we have a great deal of confidence in our judiciary system, each day courts are reversing the findings and directions of lower courts.

WARNER:

And such a finding and direction by a lower court to release that evidence that's out and gone by the time the review panel says it was injudicious to do so, that's what concerns me.

We go then to Mr. Rivkin.

If habeas corpus jurisdiction were restored for alien unlawful enemy combatants, should habeas corpus be reviewed to the fundamental question of the determination of enemy combatant status or should it extend to all conditions of capture and confinement.

RIVKIN:

I think, Senator Warner, I think it should be the latter.

One of the things that we have not touched upon so far, that it is not -- repeated not -- just a question of testing the adequacy of the government's determination that somebody's an enemy combatant.

I happen to think that, whether you call it habeas, whether you call it judicial review of a government's decision is very important, and the way in which it's done in the DTA and MCA is entirely appropriate and consistent, as a matter of fact, with Supreme Court teachings on that.

But your question goes to another issue. Believe it or not, we now have people who have sued the government under so-called Bivens- type actions. This is a famous early '70s case styled, if I'm not mistaken, Bivens against 26 federal agents, which basically goes to the deprivation of an ability to recover, if you will, of deprivations of individual civil rights in the context of badly handled apprehension.

I happen to actually support Bivens-type jurisprudence in its proper place. But do we really want to have Bivens-type actions brought against aliens for apprehensions conducted overseas in a combat environment?

One of the reasons, of course, to have Bivens-style actions, just like Miranda type jurisprudence, is because you want to give clear standards of behavior, inculcate better behavior on the part of police and federal agents operating in a law enforcement context.

And, Senator Warner, we as a society made a decision in the last 30 or 40 years to basically create such -- place such enormous importance on inculcating those good standards that we created rules that allow guilty parties to go free.

But that is in a domestic law enforcement environment where the government enjoys the monopoly in force and where the rules are fairly straightforward.

To me, it would be -- unprecedented would be a charitable way of putting it, to allow people captured in Pakistan -- and this is not -- it's not a hypothetical. They haven't gotten very far so far, but we have Bivens-type actions pending, brought by lawyers, very good and aggressive lawyers, against government agents, presumably military and intelligence agents, for activities conducted in the United States.

I'm not even talking about interrogation here and levels of coercion, but just how the person was apprehended. Do you really want to tell our soldiers, you know, (inaudible) you can throw somebody to the ground as you arrest them in a combat environment, what's the level of force to exert?

RIVKIN: