Testimony of

J. Michael Wiggins

Deputy Associate Attorney General
United States Department of Justice
June 15, 2005

STATEMENT OF
J. MICHAEL WIGGINS
DEPUTY ASSOCIATE ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE ON
DETAINEES

JUNE 15, 2005

Mr. Chairman and Members of the Committee: My name is Michael Wiggins. I am a Deputy Associate Attorney General at the Department of Justice. I am pleased to discuss the work of the Department of Justice and the current status of litigation involving the United States Government's detention of enemy combatants at Guantanamo Bay, Cuba, as part of the ongoing global war on terrorism.

Background on Detention and Trial of Enemy Combatants in the War on Terrorism
In response to the terrorist attacks of September 11, 2001, the President dispatched the United States Armed Forces to seek out and subdue the al Qaida terrorist network and the Taliban regime and others that had supported it. In the course of those hostilities, the United States captured or took custody of a number of enemy combatants. As in virtually every other armed conflict in the Nation's history, the military has determined that many of those individuals should be detained during the conflict as enemy combatants. Such detention is not for criminal justice purposes and is not part of our Nation's criminal justice system. Rather, detention of enemy combatants serves the vital military objectives of preventing captured combatants from rejoining the conflict and gathering intelligence to further the overall war effort and to prevent additional attacks. The military's authority to capture and detain such combatants is both well-established and time-honored. See Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion); Ex parte Quirin, 317 U.S. 1, 26 (1942); Duncan v. Kahanamoku, 327 U.S. 304, 313-14 (1946).

A small fraction of those combatants captured in connection with the current conflict, whom the U.S. military has determined through a screening process have significant potential intelligence value or pose a particular threat to the security of the United States, have been designated for detention by the Department of Defense at Guantanamo Bay, Cuba. Currently, the Department of Defense holds approximately 520 detainees at Guantanamo Bay.

Each Guantanamo Bay detainee has received a formal adjudicatory hearing before a Combatant Status Review Tribunal ("CSRT"). Those tribunals, established pursuant to written orders by the Deputy Secretary of Defense and the Secretary of the Navy, were created specifically "to determine, in a fact-based proceeding, whether the individuals detained . . . at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation."

During the CSRT proceedings, each detainee received substantial procedural protections modeled upon an Army regulation that governs hearings under Article 5 of the Third Geneva Convention. Among other things, each detainee

received notice of the unclassified factual basis for his designation as an enemy combatant and an opportunity to testify, call witnesses, and present relevant and reasonably available evidence. Each detainee also received assistance from one military officer designated as his "personal representative for the purpose of assisting the detainee in connection with the CSRT review process." Another military officer, the recorder of each tribunal, is also required to present any evidence which might "suggest that the detainee should not be designated as an enemy combatant." Each tribunal comprised three military officers sworn to render an impartial decision and in no way "involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." Each tribunal decision was subject to mandatory review first by the CSRTs Legal Advisor and then the Director. Out of 558 tribunals, 38 have resulted in determinations that detainees are not enemy combatants. See CSRT Summary, http://www.defenselink.mil/news/Mar2005
/d20050329csrt.pdf.

In addition, a small subset of non-citizen combatants have been designated for trial by military commission. Since the founding of our Nation, the U.S. military has used military commissions during wartime to try offenses against the laws of war. Congress has recognized this historic practice and approved its continuing use in both the Articles of War, enacted in 1916, and their successor, the Uniform Code of Military Justice. And the Supreme Court repeatedly upheld the use of military commissions in the 20th century against a series of legal challenges, including cases involving a presumed American citizen captured in the United States, Ex parte Quirin, 317 U.S. 1 (1942); the Japanese military governor of the Phillippines, Yamashita v. Styer, 327 U.S. 1 (1942); German nationals who alleged that they worked for civilian agencies of the German government in China, Johnson v. Eisentrager, 339 U.S. 763 (1950); and the spouse of a serviceman posted in occupied Germany, Madsen v. Kinsella, 343 U.S. 341 (1952).

Against this backdrop of legal authority and historic practice, on November 13, 2001, the President ordered the establishment of military commissions to try a subset of detainees for violations of the laws of war and other applicable laws. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 ("Military Order"). In doing so, the President expressly relied on his constitutional authority as Commander in Chief of the Armed Forces of the United States and the authority recognized by Congress in the Authorization for Use ofMilitary Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), and in articles 21 and 36 of the Uniform Code of Military Justice, which recognize his authority to convene military commissions and to establish procedures that will govern them.

The President explained in the Order that the creation of military commissions was necessary to "protect the United States and its citizens" and that the commissions would not be governed by the principles of law and rules of evidence applicable to criminal cases in the U.S. district courts because of the threat international terrorism poses to the safety of the United States. See Military Order §§ 1(e), 1(f).

Under the Military Order, a military commission may not exercise jurisdiction over a detainee unless certain preconditions have been met. First, the detainee must be a non-citizen and the President must determine that (1) there is reason to believe that the detainee (i) is or was a member of al Qaida, (ii) has engaged or conspired to engage in acts of international terrorism against United States interests; or (iii) has knowingly harbored a member of al Qaida or someone otherwise involved in international terrorism against United States interests; and (2) it is in the interest of the United States to subject the detainee to the President's Military Order. See Military Order § 2a. Second, the detainee must be charged with a violation of the laws of war or another offense triable by military commission. See 32 C.F.R. § 9.3.

The President directed the Secretary of Defense to issue regulations governing the military commissions that would provide at a minimum for "a full and fair trial"; admission of evidence that would "have probative value to a reasonable person"; and "conviction only upon the concurrence of two-thirds of the members of the commission." See Military Order § 4.

The Secretary of Defense, acting pursuant to the Military Order, established the Appointing Authority for military commissions. The Appointing Authority has many responsibilities, including to appoint military commissions to try individuals subject to the Military Order, to designate a judge advocate of any United States Armed Force to serve as Presiding Officer over each commission, to approve and refer charges, to ensure commission proceedings are open to the maximum extent possible, and to order that investigative or other resources be made available to defense counsel and the accused to the extent necessary for a full and fair trial. See DOD Directive No. 5105.70, 2/10/04.

An individual charged before a military commission is assigned defense counsel (one or more military officers who are judge advocates of any United States armed force) to conduct his defense. The accused may choose to replace the detailed defense counsel with another military officer who is a judge advocate, provided that such officer is available. The accused may also retain a civilian attorney of choice at no expense to the U.S. government, provided the attorney meets certain criteria. See 32 C.F.R. § 9.4(c).

Under the procedures the Secretary established for the commissions, the accused must, among other things, (1) receive a copy of the charges in English and, if appropriate, in another language that the accused understands "sufficiently in advance of trial to prepare a defense"; (2) be presumed innocent until proven guilty; and (3) be found not guilty unless the offense is proved beyond a reasonable doubt. See 32 C.F.R. §§ 9.5(a)-(c). The prosecution must provide the defense with access to evidence it intends to introduce at trial and to evidence known to the prosecution that tends to exculpate the accused. The Commission may not draw an adverse inference if the accused chooses not to testify. The accused may also obtain witnesses and documents for his defense, to the extent necessary and reasonably available, and may present evidence and cross-examine witnesses. Once a Commission's finding on a charge becomes final, the accused cannot be tried again on that charge. See 32 C.F.R. §§ 9.5(e), (f), (h), (i) and (p).

The Secretary has directed that the Commissions "hold open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer." Proceedings may be closed in order to protect classified information, intelligence and law enforcement sources and methods, other national security interests, and the physical safety of participants, including witnesses. See 32 C.F.R. § 9.6(b). In no circumstance, however, may the detailed defense counsel be excluded from the proceeding (32 C.F.R. 9.6(b)(3)), and in no circumstance may the commission admit into evidence information not presented to detailed defense counsel. See 32 C.F.R. 9.6(d)(5)(ii)(C).

Once a trial is completed, a Review Panel comprised of three military officers, at least one of whom has experience as a judge, will review the record for the purpose of identifying whether a material error of law occurred. The Review Panel will either return the case for further proceedings in the event a material error is found, or it will forward the case to the Secretary of Defense with a written opinion recommending a disposition. The Secretary of Defense, in turn, will review the record and the Review Panel's recommendation and either return the case for further proceedings or forward it to the President (if the President has not designated him the final decisionmaker) for final decision. The President may approve or disapprove the commission's findings and may change a finding of guilty to a finding of guilty on a lesser-included offense, or mitigate, commute, defer, or suspend the sentence imposed. Neither the President nor the Secretary may change a finding of not guilty to a finding of guilty. See 32 C.F.R. § 9.6(h).

After the first detainees arrived at Guantanamo Bay in January 2002, relatives of those detainees and others began to file habeas corpus lawsuits in United States courts challenging their detention. These lawsuits were generally dismissed by the lower courts on the grounds that, among other things, the habeas corpus statute, 28 U.S.C. § 2241, does not apply extraterritorially, and aliens detained by the military abroad in connection with hostilities do not enjoy rights under the United States Constitution. Johnson v. Eisentrager, 339 U.S. 763 (1950).

The Trio of Supreme Court Decisions in June, 2004

On June 28, 2004, the Supreme Court issued a trio of decisions that defined the landscape for future litigation involving military detention of enemy combatants. In the first of these cases, Rasul v. Bush, 124 S. Ct. 2686 (2004), a six-Justice majority of the Court interpreted the habeas corpus statute to apply extraterritorially to Guantanamo Bay. As a result, the United States federal courts have statutory jurisdiction over habeas corpus petitions filed by aliens held at Guantanamo Bay challenging their detention. The Court did not, however, reach the question of whether such enemy alien detainees enjoy constitutional rights, stating instead that "[w]hether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction . . . ." The Supreme Court remanded the case for the lower courts to consider those matters in the first instance.

The second decision, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), concerned a United States citizen captured on the battlefield in Afghanistan and then detained at a Navy brig in South Carolina. In that case, the Government did not contest that the individual, as a result of his U.S. citizenship, enjoyed constitutional rights. The issues before the Court were whether the military has the power to detain enemy combatants, and what degree of process is constitutionally required in order for a United States citizen to be so detained. As to the first question, a majority of the Justices concluded that the Military has the power to detain enemy combatants for the duration of the conflict, as

authorized by Congress in the Authorization for Use of Military Force, as a necessary incident of war, and that even United States citizens may be detained pursuant to the Authorization for Use of Military Force. As to the second question, the Court plurality stated that the Due Process Clause requires that a United States citizen detainee seeking to challenge his classification as an enemy combatant be given notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decision-maker. The plurality also stated that the specific procedures used to afford due process could be tailored in light of military exigencies.

The third decision, Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004), involved a United States citizen apprehended in the United States, designated an enemy combatant based on his affiliation with al Qaida and his preparations for acts of terrorism within the United States, and detained at the Navy brig in South Carolina. The Court's holding in Padilla addressed only the questions of what government official is the appropriate respondent in a habeas corpus proceeding, and what is the appropriate venue for such litigation. The Court held that a habeas petitioner seeking to challenge his detention must generally name his immediate custodian as respondent and must file his case in the district of his confinement.

Habeas Corpus Litigation Involving Guantanamo Bay
Detainees Since the June 2004 Supreme Court Decisions

In the aftermath of the Supreme Court's decision in Rasul, a large number of habeas petitions have been filed on behalf of Guantanamo Bay detainees in the United States District Court for the District of Columbia. As of today, approximately 95 cases have been filed on behalf of approximately 200 detainees. These cases are now progressing through the lower courts.

The Government has taken many steps to facilitate this unprecedented litigation by private civilian lawyers representing alien enemy combatants detained offshore by the Military. The private lawyers were permitted to apply for, and many have received, security clearances enabling them (1) to see certain classified national security information relevant to their clients' cases, and (2) to travel to the Guantanamo Bay Naval Base to meet with their clients. Various court orders have been entered to govern the use and handling of certain classified and protected information in the litigation and to establish procedures for counsel to meet with their clients and to correspond via mail with their clients on a privileged basis. A secure facility was established, at Government expense, where habeas counsel possessing security clearances could review and work on classified materials. To date, over 100 lawyers and their support staff have received security clearances. The first counsel visit to Guantanamo Bay in connection with the habeas litigation occurred in August 2004, and numerous visits have occurred since then.

In October 2004, the Government moved to dismiss the then-pending Guantanamo Bay detainee habeas cases on two principal grounds. First, the Government argued that under longstanding precedents of the Supreme Court and the D.C. Circuit, alien enemy combatants detained abroad lack rights under the United States Constitution. Johnson v. Eisentrager, 339 U.S. 763 (1950); United States v. Verdugo-Urquidez, 484 U.S. 249, 266 (1990); 32 County Sovereignty Comm. v. Department of State, 292 F.3d 797, 799 (D.C. Cir. 2002). The Government has argued that Rasul did not implicitly overrule that longstanding precedent.

Second, the Government has argued that even if Guantanamo Bay detainees do enjoy some rights under the Due Process Clause of the Constitution, the CSRTs - which were created to review whether detainees continued to be properly classified as enemy combatants - provide all the process that is required under the circumstances. In fact, the Government has argued that the CSRTs provide more process than the Supreme Court plurality in Hamdi said would be necessary for a United States citizen detained in this country. In the CSRTs, each detainee is provided an unclassified summary of the factual basis for his classification as an enemy combatant; is permitted to testify and present information to a three-member panel of neutral, independent military officers; and is permitted to call witnesses and/or introduce documentary evidence to the extent reasonably available. These features satisfy any applicable constitutional standards and exceed those contained in other types of military tribunals that the Hamdi plurality cited with approval.

In these cases, the Government also filed factual returns including the record of each CSRT proceeding. The Court, and counsel who had obtained appropriate security clearances, were given access to classified information in the factual returns; an unclassified version suitable for public release was filed on the public record.

In response to the Government's motions to dismiss, two United States District Court Judges issued opposite decisions. On January 19, 2005, Judge Richard J. Leon granted the Government's motion in full in two cases. Khalid v. Bush, 355 F. Supp. 2d 311 (D.D.C. 2005). Relying on Johnson v. Eisentrager, 339 U.S. 763 (1950), among other cases, Judge Leon held that aliens detained by the Military outside the United States do not have constitutional rights. Judge Leon also rejected other claims made by some detainees under various statutes and international treaties, and held that separation-of-powers principles highly circumscribe any role for the Judicial Branch in reviewing the Military's capture and detention of enemy combatants.

In contrast, on January 31, 2005, Senior Judge Joyce Hens Green granted the Government's motion in part and denied it in part in other cases. In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443 (D.D.C. 2005). In holding that detainees do have certain rights under the Fifth Amendment's Due Process Clause, Judge Green reasoned that the Naval Base at Guantanamo Bay, Cuba was analogous to past or present United States territories such as the Philipines, Puerto Rico, or Micronesia. Judge Green then ruled that the CSRTs failed to satisfy applicable constitutional standards because they did not provide enemy combatant detainees with either access to classified information or an attorney permitted to review such information; because it was possible, she believed, that information could be considered in the tribunals that would not be admissible in a United States criminal case; and because she viewed the Military's definition of "enemy combatant" as potentially overbroad. Judge Green recognized that because al Qaida is not a party to the Geneva Conventions, individuals detained as members of al Qaida are not entitled to the protection of the treaties. However, she allowed Taliban detainees to maintain claims under the Geneva Conventions. Finally, Judge Green dismissed all other claims raised by the detainees.

The Government has appealed Judge Green's decision, and the petitioners on whose claims Judge Leon ruled have appealed that decision. The cases are now before the United States Court of Appeals for the District of Columbia Circuit, with briefing set to close at the end of this month.

There is also ongoing litigation involving challenges to the military commissions. As of today, four detainees have been referred to military commissions for trial on charges that they violated the laws of war or other offenses triable by military commission. Three of these detainees have challenged the military commissions in federal court. In the first such challenge, brought by Salim Ahmed Hamdan, the self-acknowledged driver for Osama bin Laden, Judge James Robertson of the United States District Court in the District of Columbia issued an injunction on November 8, 2004 barring his trial by military commission. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004). The United States appealed the injunction to the United States Court of Appeals for the District of Columbia Circuit. Argument was heard on April 7, 2005, and the parties are awaiting a decision. The other two habeas challenges to military commissions have been stayed pending the D.C. Circuit's decision in Hamdan, as have those military commission proceedings themselves.

The CSRT litigation presents a number of important issues. The first is whether the Due Process Clause of the Fifth Amendment is applicable to aliens captured abroad and detained at Guantanamo Bay. The Government believes that a long line of Supreme Court and D.C. Circuit precedents foreclose such application. For example, in Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court stated emphatically that conferring constitutional rights on World War II detainees held at Landsberg Air Base in Germany would have been "so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it." 339 U.S. at 784-85 (citation omitted). More recent cases have reaffirmed these principles. See, e.g., United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) ("our rejection of extraterritorial application of the Fifth Amendment [in Eisentrager] was emphatic"). While petitioners in the habeas cases have contended that the Supreme Court's decision in Rasul implicitly overruled or narrowed Eisentrager's constitutional holding, the Government does not believe that a reasonable reading of Rasul, which expressly limited its scope to the threshold issue of jurisdiction, supports that interpretation.

The second major issue is, assuming that aliens detained by the Military at Guantanamo Bay enjoy some constitutional rights, what is the scope of those rights and how are they to be implemented in a judicial proceeding in United States courts? In Hamdi v. Rumsfeld, a plurality of the Supreme Court stated that even for a United States citizen detained as an enemy combatant, all that was required was notice and an opportunity to be heard before a neutral decision-maker, a standard that the CSRTs clearly satisfy. Indeed, Hamdi specifically rejected the contention that more elaborate processes, such as those afforded in domestic criminal trials, would be required. For example, Hamdi noted that the Military may rely on hearsay evidence to support the classification of someone, even a citizen, as an enemy combatant, and that any reviewing authority may create a presumption in favor of the Government's evidence. See 124 S. Ct. at 2649. Hamdi's approach is consistent with a long line of Supreme Court cases that emphasize the flexibility inherent in the Due Process Clause and the need to balance the value of additional procedures against the governmental interests and burdens at stake - which include, here, the need to protect the security of classified information and to avoid unduly burdening military personnel engaged in ongoing combat operations. Again, Hamdi, which involved a citizen, does not mandate any process at all for non-citizens. However, it surely cannot be the case that non-citizen enemy combatants are entitled to more process than that which the Constitution requires for citizens.

Nevertheless, many of the detainees have argued, in effect, that they are entitled to the equivalent of a full-blown criminal trial in their habeas cases, where they would seek to have the federal courts adjudicate their enemy combatant status on a de novo basis after an evidentiary-type hearing. Again, however, detention of enemy combatants is not and has never been a matter committed to the criminal justice system of civilian courts. It is the Government's position that to require such proceedings as a prerequisite for the detention of enemy combatants would be unprecedented and would seriously hamstring the ongoing military campaign against al Qaida and its supporters. Hamdi does not require the equivalent of a criminal trial. Moreover, courts have never engaged in substantive fact-finding to second-guess the judgment of the Military about who is an enemy combatant, even when some degree of habeas review has been allowed. For example, in Yamashita v. Styer, 327 U.S. 1 (1946), the Supreme Court stressed that "The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."

As mentioned previously, the military commissions too have been challenged under the Geneva Conventions, the Uniform Code of Military Justice, and the Constitution. These challenges raise additional important issues. To begin with, the Government believes that Judge Robertson in Hamdan erred in the very decision to reach the merits of this case before the military proceedings had run their course. The Supreme Court instructed in Schlesinger v. Councilman, 420 U.S. 738 (1975), that federal courts should not entertain legal challenges to ongoing military proceedings, but rather should abstain until the military proceedings have been completed. The Court explained that military exigencies, judicial economy, and deference to the judgment of a coordinate branch of government require the federal courts to exercise restraint. Judge Robertson in Hamdan refused to abstain on the theory that Hamdan had raised a substantial jurisdictional challenge to the military proceedings. The exception on which Judge Robertson relied, however, applies only to U.S. citizen civilians subjected to military proceedings. It does not apply to aliens who the U.S. military has determined are enemy combatants. The refusal to abstain in these circumstances constitutes an improper intrusion on the Executive's conduct of the war. We have accordingly asked the Court of Appeals to vacate the District Court's injunction on this basis.

As for the merits, Hamdan claims that the military commission in his case does not have jurisdiction until and unless a tribunal convened pursuant to Article 5 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) determines that he is not entitled to be treated as a Prisoner-of-War. Judge Robertson agreed. Here too, Judge Robertson committed error -- in several respects. First, the Geneva Convention does not provide detainees with rights enforceable in the courts of the United States. In Johnson v. Eisentrager, 339 U.S. 763 (1950), the Supreme Court held that the 1929 Geneva Convention, the predecessor to the 1949 Convention, did not confer on detainees rights enforceable in our domestic, civilian courts. There is nothing in the 1949 Convention's text or ratification history to suggest that the United States or other ratifying nations intended to revolutionize the Convention by granting detainees judicially enforceable rights. To the contrary, the Convention sets out an elaborate dispute-resolution procedure making no mention of private litigation in the domestic courts of signatory nations.

Second, even if there were some doubt about whether the Convention could be enforced by enemy fighters in our courts, it is clearly not enforceable by al Qaida operatives such as Mr. Hamdan, an acknowledged aide to Osama bin Laden, whose status as an al Qaida member or affiliate was confirmed by a CSRT. The President has made an authoritative determination in his capacity as Commander in Chief that al Qaida is not a party to the Geneva Convention; thus, its fighters are not entitled to the Convention's protections. The President has also determined that Taliban fighters do not qualify as prisoners of war under the Convention because they are unlawful combatants who do not satisfy the requirements for prisoner of war status set forth in Article 4 of the Third Geneva Convention. See 2/7/02 Memorandum For The Vice President Re: Humane Treatment of al Qaida and Taliban Detainees. Those decisions lie at the core of the President's Commander-in-Chief and foreign-affairs powers and thus are not subject to countermand by the courts. They are also clearly correct in any event.

Moreover, as mentioned above, the detainees at Guantanamo Bay, including Mr. Hamdan, have been provided the opportunity in CSRTs to challenge the determination that they are enemy combatants. Thus, even assuming Mr. Hamdan is entitled to an Article 5-type proceeding, he has received it. Judge Robertson discounted the CSRT on the ground that it was directed to determine whether Mr. Hamdan was an enemy combatant, not whether he was a POW. But the CSRT's finding that Mr. Hamdan is affiliated with al Qaida necessarily resolved his POW status, because the President has determined that the Convention does not apply to al Qaida, and even if he had not made that determination, there is no doubt that members of al Qaida, which, among other things, does not comply with the laws of war, does not qualify for POW status under the Convention.

The rules governing military commissions have also been challenged under the Uniform Code of Military Justice, a body of law that predominantly regulates courts martial and has only a handful of provisions that apply to military commissions. Judge Robertson in Hamdan held that, because Article 36 of the UCMJ provides that the rules the President prescribes for military commissions "may not be contrary to or inconsistent with" the UCMJ, the military commission rules may not materially diverge from UCMJ rules that, by their plain terms, are applicable to courts-martial only. Here too, the District Court's legal analysis was deeply flawed.

Congress has never sought to regulate military commissions comprehensively; to the contrary, it has recognized and approved the President's historic use of military commissions as he deems necessary to prosecute offenses against the laws of war. Indeed, Article 21 of the UCMJ provides that the UCMJ's conferral of jurisdiction on courts-martial "do[es] not deprive military commissions * * * of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." In Ex parte Quirin, 317 U.S. 1 (1942), the Supreme Court expressly held that the identically-worded predecessor to Article 21 (Article 15 of the Articles of War) "authorized trial of offenses against the laws of war before such commissions." 317 U.S. 1, 29 (1941). Article 21 -- which recognizes the jurisdiction of military commissions without purporting to regulate them -- reflects a considered congressional judgment to leave the conduct of military commissions to the President as Commander-in-Chief, as does the fact that only eight other articles of the UCMJ even mention military commissions. The broad latitude the President enjoys in establishing rules for military commissions is also reflected in the Manual for Courts-Martial, which contains the Rules for Courts-Martial and the Military Rules of Evidence and makes clear that the President may by regulation establish different rules for military commissions. As a logical matter, if military commissions have to follow all of the UCMJ rules for courts-martial, then the UCMJ provisions that do expressly apply to military commissions are all superfluous. And as a practical matter, if military commissions must follow the same procedures as courts-martial, there is no point in having them. Congress has recognized the jurisdiction of military commissions precisely because of the President's historic and constitutionally-grounded authority to convene them to prosecute enemy fighters during wartime.

The military commissions have also been challenged on constitutional grounds. Mr. Hamdan, for example, has claimed that the President's Military Order violates separation of powers and the Equal Protection Clause. As explained above in connection with the non-commission challenges, these constitutional claims are foreclosed by Supreme Court precedent. See Eisentrager, 339 U.S. at 783 (rejecting Fifth Amendment challenge to military commission proceedings brought by German prisoners detained and prosecuted outside the United States on the ground that the Fifth Amendment does not "confer[] rights upon all persons, whatever their nationality, wherever they are located and whatever their offenses"); Verdugo-Urquidez, 494 U.S. at 271 (rejecting claims by "alien who has had no previous significant voluntary connection with the United States" under both the Fourth Amendment and equal protection component of the Fifth Amendment).

The United States hopes that Mr. Hamdan's trial before a military commission and those of the other detainees will be permitted to proceed. The President's Military Order is fully consistent with the Constitution, treaties, and laws of the United States, and the regulations established to govern the commissions reflect a proper balancing of the twin objectives of protecting the security of the United States, and providing captured fighters a full and fair trial.

Other Recent Developments in Guantanamo Bay Detainee Habeas Corpus Litigation
A number of new habeas cases were filed in the wake of Judge Green's January 31, 2005 decision, bringing the current number to approximately 95 cases on behalf of over 200 of the 520 detainees remaining at Guantanamo Bay. In the cases in which she ruled, Judge Green stayed all proceedings in the District Court pending resolution of appeals. Many Judges presiding over other Guantanamo Bay detainee cases have entered similar stays. Despite these stays, significant recent activity has occurred in these cases. These issues include:

1. The United States seeks to release detainees from United States custody when, for example, it is determined that they no longer present a threat to the United States and its allies, and over 230 Guantanamo Bay detainees have been transferred or repatriated in this manner over the past three years. However, beginning in March 2005, a large number of detainees sought, and in many cases received, court orders either requiring advance notice of a repatriation or transfer from Guantanamo Bay, or, in some cases, actually barring the United States from repatriating or transferring them out of Guantanamo Bay absent further court order. These motions have alleged that the United States intends to transfer detainees out of Guantanamo Bay to deprive the Court of its jurisdiction or to have them mistreated and abused in other countries. The Government disputes these allegations and has opposed these motions on several grounds, including that they present an unlawful encroachment on Executive Branch prerogatives. The Government has appealed adverse orders of this nature that have been entered in a number of cases.

2. Several detainees have filed motions seeking court intervention into their conditions of confinement. These motions have sought injunctions that would prescribe the conditions in which they should be detained and/or prohibit treatment that, it is argued, violates their putative constitutional rights. One such motion even seeks an injunction against further interrogation. The Government has opposed these motions on the ground that the detainees are treated humanely and there is no legal or factual basis for such judicial intervention. To date, no Judge has granted one of these conditions-of-confinement motions.

3. Some detainee lawyers have complained to the Court that the conditions in which they are permitted to meet and correspond with their clients at Guantanamo Bay are overly restrictive. For example, lawyers in one case filed an emergency motion seeking an order requiring the Government to allow them to show detainees family videos on DVD. Others have filed motions objecting to the speed of mail transmission to and from the Naval Base and to the quality of the internet connection they are provided when visiting.

4. Some detainees have alleged that the medical care provided to them is inadequate and have therefore sought court orders requiring access to independent physicians or release of medical records. The Government has opposed these motions on the basis that Guantanamo Bay detainees are provided first-rate medical care and that even in prisons in the United States, inmates do not have a right to outside health care providers of their choice. To date, no Judge has granted such a motion. One Judge has denied such a motion. O.K. v. Bush, 344 F. Supp. 2d 44 (D.D.C. 2004).

***

In sum, the unprecedented situation created by Rasul, in which alien enemy combatants detained at Guantanamo Bay by the military have been permitted to pursue habeas claims against their custodians in United States courts, has posed a number of challenges, and a number of substantial legal issues await resolution by the courts.

At this time, Mr. Chairman, I would be happy to address any questions you or Members of the Committee may have.