Testimony of

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regarding
Hamdan v. Rumsfeld: Establishing a Constitutional Process

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Thank you, Mr. Chairman and Members of the Committee, for inviting me today.

I am Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law at the Yale Law School, where I have taught since 1985 in the areas of international law, human rights, and the law of U.S. foreign relations. I have served the United States government in both Republican and Democratic Administrations. I appear today to testify about the Supreme Court's historic June 29, 2006 decision in Hamdan v. Rumsfeld, and to suggest how the President and Congress can now work together to restore a constitutional process for humane treatment and fair trial of suspected terrorist detainees.

The Hamdan decision is perhaps the most significant decision regarding executive power since the Court's landmark 1952 decision in the Steel Seizure case. Hamdan is important not just because it invalidates the current system of military commissions, but also because its broader reasoning supports views I have previously offered this Committee regarding the incorrectness of the Administration's past legal positions regarding torture, cruel treatment and interrogation of detainees, the warrantless NSA domestic surveillance program, and the applicability of provisions of the Geneva Conventions to suspected terrorist detainees. Let me review the significant holdings of the Hamdan decision, outline its broader significance, and examine a legislative proposals to repair the system of military commissions that has already been suggested to this Committee.

I. The Hamdan Decision

Hamdan v. Rumsfeld arose, according to one recent press account, from a presidential order that was issued without the knowledge or consultation of the Secretary of State, the National Security Adviser or her legal counsel, the General Counsel of the CIA, the Assistant Attorney General for the Criminal Division, or any of the top lawyers in the military's Judge Advocate General (JAG) corps. In November 2001, President Bush issued a military order, without congressional authorization or consultation, which declared that "[t]o protect the United States and its

citizens, . . . it is necessary for [noncitizen suspects designated by the president under the order]. . . to be tried for violations of the laws of war and other applicable laws by military tribunals." Although that decision immediately triggered a huge public outcry, Salim Ahmed Hamdan was eventually charged with "conspiracy ... to commit offenses triable by a military commission."

Before the Supreme Court, the Administration asserted a constitutional theory of unfettered executive power, based on an extremely broad interpretation of Article II of the Constitution and the September 18, 2001 Authorization for the Use of Military Force resolution (AUMF). The Solicitor General argued, in effect, that Hamdan was a person outside the law, held in an extralegal zone (Guantanamo), who could be subjected to the jurisdiction of a non-court. The Administration further asserted that Hamdan's alleged crimes could be determined in a proceeding whose rules comported with neither a prior enactment of Congress-- the Uniform Code of Military Justice (UCMJ) --nor a binding treaty obligation-- Common Article 3 of the Geneva Conventions of 1949 (Common Article 3).

Justice Stevens's opinion for a five-justice majority demolished each of the Government's arguments. From the outset, the Court refused to accept the Government's core premise that a new "crisis paradigm" required that ordinary legal rules be jettisoned in this case. Calling the military commissions an "extraordinary measure raising important questions about the balance of powers in our constitutional structure," the Court roundly rejected the Administration's extreme constitutional theory of executive power. Instead, all of the Justices who addressed the merits placed the case within the well-established tripartite framework of shared institutional powers set forth in Justice Jackson's concurrence in the Steel Seizure Case.
By enacting the UCMJ, the Court reasoned, Congress had authorized the president to use commissions, but had specified that, wherever practicable, the executive must follow the same procedural rules in military commissions as are applied in ordinary courts-martial. Accordingly, Hamdan's case fell within the third Youngstown category: in which the executive action is held unlawful because "the President takes measures incompatible with the express or implied will of Congress, [and thus] his power is at its lowest ebb, for then he can rely only on his own constitutional powers minus any constitutional powers of Congress over the matter."

The Court followed its earlier insistence in Rasul v. Bush that Guantanamo be treated as a land subject to law by rejecting the Administration's attempt to depict Hamdan as a person outside the law. Even while acknowledging that Hamdan might have committed serious crimes, the Court nevertheless proclaimed that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."

Even more important, the Court rejected the Government's attempted dichotomy between law and war by requiring consistent application of the law of war to Hamdan's case. As Justice Kennedy cogently put it, "If the military commission at issue is illegal under the law of war, then an offender cannot be tried 'by the law of war' before that commission." Applying the law of war, a majority of the Court denied the Government's claim that individuals could never enforce the Geneva Conventions in U.S. court, reasoning that Hamdan's proposed trial violated Common Article 3 of those Conventions, which prohibits "the passing of sentences and the carrying out of

executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." By so saying, the majority both took note of the treaty's intention to be applied universally, not selectively, and confirmed that Congress had effectively "internalized" Common Article 3 into domestic law when it enacted the UCMJ.
Finally, given the individual liberties at stake, the Court demanded a clear congressional statement before the Commander-in-Chief could try a suspected alien terrorist before a military commission. Said Justice Breyer, in his concurrence for four Justices, "[t]he Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check'" in the AUMF. In demanding such a clear legislative statement, the Court followed a critically important line of cases holding that, in times of war or national crisis, the Executive Branch may not deny even suspected enemies of their basic liberties, without the explicit approval of Congress.

In Hamdan, the Supreme Court reaffirmed the spirit of the Steel Seizure case for the 21st Century. The decision confirms that constitutional checks and balances do not stop at the water's edge. As important, on all three occasions in which the Supreme Court has now ruled on the merits of a challenge to presidential authority after September 11, it has set significant constitutional limits on the President's capacity to act unilaterally in national security and foreign affairs.

Hamdan instructs that our constitutional democracy must fight even a War on Terror through balanced institutional participation: led by an energetic executive, but guided by an engaged Congress and overseen by a judicial branch that enforces enacted law. The Court's ruling recognizes that the best way to develop a sustained democratic response to external crisis is through interbranch dialogue, and not executive unilateralism. As Justice Breyer put it: "[w]here, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine--through democratic means--how best to do so. The Constitution places its faith in those democratic means. Our Court today simply does the same."

II. Implications of the Hamdan ruling

Hamdan not only gives broad direction on how a war on terror may be constitutionally conducted, it also disproves exorbitant claims previously made by the Administration regarding the President's supposed freedom to authorize torture and cruel treatment, to carry out widespread warrantless domestic wiretapping, and to avoid Common Article 3. By so doing, Hamdan goes a long way toward reestablishing what Justice Jackson in his famous concurrence in the Steel Seizure Case termed the "equilibrium established by our constitutional system."
A. Torture and Cruel, Inhuman or Degrading Treatment: With respect to torture and cruel treatment, Hamdan confirms that the President must act within the scope of a specific statute (here, the McCain Amendment to the Defense Authorization Act) and treaty (here, Geneva Conventions Common Article 3), or his actions will be invalidated under Youngstown. According to a longstanding canon of statutory construction, courts must construe statutes, absent clear congressional intent to the contrary, consistently with international law. Such a

reading would interpret the McCain Amendment-- notwithstanding any presidential signing statement to the contrary-- to require the Executive branch to comply with the anti-torture provisions of Common Article 3, which the Hamdan Court held to apply not just to inter-state armed conflicts, but as widely as possible.

With respect to covered persons, who would appear after Hamdan to include suspected Al Qaeda detainees, Common Article 3 prohibits "at any time and in any place whatsoever ... violence to life and person, in particular ... cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment." But this prohibition simply confirms the existing legal obligations of American officials under the McCain Amendment and two other treaties-- Articles 1-4 and 16 of the Convention Against Torture and Articles 7 and 10 of the International Covenant on Civil and Political Rights -- both of which the United States has ratified. As a matter of both international and U.S. law, techniques such as waterboarding, sexual and other forms of humiliation, forcing detainees into painful positions for extended periods, mock executions, and the like, manifestly violate Common Article 3 as well as these other legal provisions.

Although news accounts suggest that some officials of the United States government have opposed embedding compliance with the anti-torture and cruel treatment provisions of Common Article 3 into the Army Field Manual, the Hamdan opinions now make clear that these obligations must be treated by U.S. officials as "binding law." In its now-withdrawn August 1, 2002 "Torture Opinion," which I have previously criticized before this Committee, the Office of Legal Counsel of the Justice Department argued that American officials who commit torture or cruel, inhuman or degrading treatment could claim immunity from prosecution on the grounds that they were following the orders of the Commander-in-Chief. In Hamdan, Justice Kennedy rejected OLC's discredited reasoning in his separate opinion, stating clearly that Congress has made "violations of Common Article 3 ... 'war crimes,' punishable as federal offenses, when committed by or against United States nationals and military personnel."

B. Warrantless Domestic Surveillance: Hamdan equally destroys the legal case underlying the NSA's sustained program of secret, unreviewed, warrantless electronic surveillance of American citizens and residents. Under the Foreign Intelligence Surveillance Act of 1978 (FISA), if Executive officials want to wiretap or conduct electronic surveillance, they can do so without a warrant, but only for three days, or for fifteen days after a declaration of war. After that, they must either go to the special FISA court for an order to approve the surveillance, come to Congress seeking wartime amendments to the FISA, or be in violation of the criminal law. Moreover, Congress clearly specified that the FISA (and specified provisions of the federal criminal code that govern criminal wiretaps) "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire communications may be conducted."

Despite this settled law, last December it was revealed that the Executive Branch has in fact been secretly eavesdropping on "large volumes of telephone calls, e-mail messages, and other Internet traffic inside the United States," without ever seeking warrants or new authorizing legislation, and with no guarantee that those searches are limited to those having contact with Al Qaeda. In its legal defense, the Administration claimed that the Congress implicitly authorized the NSA surveillance plan when it voted for the AUMF, even though the AUMF never discusses surveillance in general, or FISA in particular. But to accept that reading, one would have to conclude that in September 2001, Congress had somehow silently approved what twenty-three years earlier, in the FISA, it had expressly criminalized. To so read the law would violate

Hamdan by construing the AUMF to give the President the kind of "blank check" to engage in warrantless wiretapping on U.S. soil that the Hamdan Court expressly withheld with respect to military commissions. Hamdan thus joins a long string of Supreme Court decisions rejecting the claim that the President may invoke his Commander in Chief power to disregard an Act of Congress designed specifically to restrain executive conduct in a particular field.

In the alternative, the Administration claimed that the President has an implied exclusive constitutional authority over "the means and methods of engaging the enemy," including the conduct of "signals intelligence" during wartime. But as Justice Jackson wrote in Youngstown, "the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and inhabitants." Congress undeniably has power "[t]o make Rules for the Government and Regulation of the land and naval Forces" and to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Under these authorities, Congress has enacted myriad statutes regulating the "means and methods of engaging the enemy," including, most obviously, the UCMJ. But given that Hamdan required the President to follow the terms of the UCMJ despite his claim of exclusive presidential authority, congressional assertion now of legislative authority over NSA surveillance would also plainly be constitutional.
C. Applicability of Geneva Conventions Common Article 3: Common Article 3 establishes the minimum legal protections that must be accorded to all persons, in situations of conflict, who are no longer taking part in hostilities. As Counsel to the President, now-Attorney General Alberto Gonzales correctly noted in a Memorandum to the President that: "Since the Geneva Conventions were concluded in 1949, the United States has never denied their applicability to either U.S. or opposing forces engaged in armed conflict, despite several opportunities to do so." Nevertheless, Mr. Gonzales found that the war on terror presents a "new paradigm [that] renders obsolete Geneva's strict limitations on questioning of enemy prisoners." Since then, the Administration has asserted in numerous settings that Common Article 3 does not apply to the War on Terror. In the Hamdan case, a majority of the Court authoritatively rejected that notion.

It is hornbook law that "[c]ourts in the United States have final authority to interpret an international agreement for purposes of applying it as law in the United States . . . ." The Constitution gives the Supreme Court interpretive jurisdiction over "all Cases . . . arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority. . . ." A treaty interpretation made by the U.S. Supreme Court thus binds both the states and the coordinate branches of the federal government.

In Hamdan, Justice Stevens, writing for the Court, stated as a matter of binding treaty interpretation that "Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a 'regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.'" Justice Kennedy, concurring, also joined the key part of the majority's opinion regarding applicability of Common Article 3. Moreover, his concurring opinion referred to Common Article 3 as "part of a treaty the United States has ratified and thus accepted as binding law."
The President and his subordinates now have a solemn constitutional duty to "take Care that the Laws be faithfully executed," including Common Article 3 as a law of the United States, which

the Court has now definitively interpreted. Nothing in the Court's ruling suggests that the Executive Branch has any option but to apply Common Article 3 in its entirety. Indeed, it would defy logic to read Hamdan as requiring suspected terrorist detainees to have fair trials, while nevertheless leaving them free to be subjected at the will of their captors to torture and cruel and inhuman treatment. Nor is Congress free to pick and choose with which elements of the Court's ruling it will comply. Given the authoritative nature of the Supreme Court's interpretation of the applicability of Common Article 3 under U.S. law, Congress could not now enact legislation modifying or rejecting the Supreme Court's interpretation without also violating a binding treaty obligation (Common Article 3) and amending or repealing at least three controlling statutes (the UCMJ, the War Crimes Act, and the McCain Amendment).

When testifying before this Committee in January 2005, I was asked by Senator Cornyn whether the Geneva Conventions applied to Al Qaeda detainees. In answering that question affirmatively, I noted that "Broad applicability is the logic. We [Americans] have been the ones who are saying it should apply broadly because we want our troops to have a strong presumption of protection. . . . The bottom line, Senator, is we have tried not to create ways in which people can be taken in and out of the protections of the Convention, because that might happen to our troops."

In response, Senator Cornyn asked whether reasonable, respectable legal minds could differ on whether the Geneva Conventions apply to Al Qaeda. I answered: "[D]isputes among lawyers are often resolved at the Supreme Court. ... I think we are moving to a definitive resolution of these issues . . . in the courts."

That definitive judicial resolution has now occurred. Accordingly, the political branches must now act upon it.

III. After Hamdan: Next Steps

By statute, treaty, and judicial opinion, the McCain Amendment, the UCMJ, Common Article 3, and Hamdan have all established beyond doubt that the United States is legally bound not to commit torture and cruel, inhuman or degrading treatment, as well as to give detainees in the War on Terror a fair trial. Now that the Supreme Court has settled these legal issues, both the Executive and Legislative Branches face important policy tasks.

A. Executive Branch:

Notwithstanding past internal disputes, the Department of Defense should follow Hamdan by promptly revising its Army Field Manual to reaffirm that U.S. Armed Forces are legally bound, under U.S. statutory and treaty law, to abide by Common Article 3.

By clarifying this obligation, Hamdan would remove any impediment to the President finally following the prudent recommendation of the bipartisan 9/11 Commission that

The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists. New principles might draw upon Article 3 of the Geneva Conventions on the law of armed conflict. That article was specifically designed for those cases in which the usual laws of war did not apply. Its minimum standards are generally accepted throughout the world as customary international law.

The upcoming G-8 summit in St. Petersburg, Russia on July 15-17, 2006, presents the Administration with a rare opportunity to seize upon the 9/11 Commission's recommendation. The President should take that occasion to propose, as part of the anti-terrorism declaration to be issued at the St. Petersburg summit, a Joint Declaration of Principles on Humane Treatment and Fair Trial. Such a Joint Declaration would make clear that, as part of a durable, long-term approach to the War on the Terror, all the G-8 countries commit themselves to obey Common Article 3. By so doing, the President would reassert United States leadership on human rights and proactively address the growing human rights concerns of our allies about our conduct of the War on Terror. In addition, such a step would help to secure the support of our leading allies for future anti-terrorism efforts by ensuring the interoperability of treatment and detention of terrorist suspects. Finally, such a declaration--issued twenty years after the historic Helsinki Accords--would lay down a critically important standard to restrain such governments as China and Russia, both of whom have cited U.S. antiterrorism practices to justify their own harsh dealings with the Uighur Muslims and Chechens, respectively.

B. Legislative Branch:
1. Hamdan's Requirements: I have long ago expressed skepticism as to whether we really need military commissions to deal with terrorist suspects. But if we are to have military commissions, surely they must be lawfully constituted.

On June 29, 2006, the same day as the Supreme Court decided Hamdan, Senator Specter introduced S. 3614, the "Unprivileged Combatant Act of 2006." Let me first suggest what minimum requirements the Hamdan ruling would require in any legislation that Congress might now consider, and second, explain why, under those minimum requirements, S. 3614 has serious deficiencies.
The Hamdan opinions make clear that any legislation authorizing military commissions must meet seven minimum standards:
A. Providing Necessary Statutory Authority: The statute should make clear that it derives not from vague presidential authority, but rather, from Congress' legislative authority to constitute tribunals inferior to the Supreme Court.
B. Ensuring Humane Treatment during Proceedings: Common Article 3 prohibits "at any time and in any place whatsoever [including during the pendency of criminal proceedings]... violence to life and person, in particular ... cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment."
C. Defining Eligible Defendants: The law should define, clearly and fairly, what kinds of combatants can be charged before the military commission.
D. Defining Crimes Chargeable Under the Law of War: The law should define a list of crimes that can validly be charged under the law of war, e.g., war crimes and crimes against humanity.
E. Provide Procedures Comparable to Courts-Martial that Satisfy Common Article Three and the ICCPR: Ideally, the procedures adopted would resemble those applied in courts-martial conducted under the UCMJ, as closely as reasonably possible. In addition, the procedures must, under Hamdan, strictly adhere to the fundamental requirements of international human rights law and the laws of war, in particular Common Article 3, which mandates "the passing of sentences and the carrying out of executions" with "previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Under Article 14 of the International Covenant on Civil and Political Rights

(ICCPR), currently ratified by 156 nations (including the United States), these indispensable guarantees would include:
1. A fair and public hearing by a competent, independent and impartial tribunal established by law;
2. A presumption of innocence until proved guilty according to law;
3. A right to a trial without undue delay, in the presence of the accused, with the right to defend himself in person or through legal assistance, under rules of evidence designed to ensure admission only of reliable, probative information;
4. A right of the accused to examine evidence and witnesses against him and to obtain the attendance and examination of witnesses on his behalf; and
5. A right of the accused not to be compelled to testify against himself or to confess guilt.
F. Giving Meaningful Judicial Review: The bill must provide for meaningful, independent judicial review of military commission decisions before a civilian court.
G. Giving Meaningful Congressional Oversight: Congress must also oversee the overall operation of any new military commission system, to ensure that only those cases that cannot be properly handled by standing civilian or military courts are sent to military commissions.

2. S. 3614, the "Unprivileged Combatant Act of 2006": In its current form, S. 3614 seriously fails under each of the above criteria:

A. Providing Necessary Statutory Authority: § 1(c)(3) of S. 3614 claims that the Executive Branch has "inherent" constitutional and statutory authority to establish "military tribunals to adjudicate and punish offenses relating to the war on terrorism." But if Congress may only contribute "additional" authorization to military commissions that the President is already empowered to establish on his own, this Act has just declared itself unnecessary. Hamdan insisted upon proper legislative approval, which Hamdan's military commission lacked. But by the logic of this provision, the President could simply continue with his current military commissions under existing authority, even without any form of congressional approval. This language should therefore be deleted, leaving the language in current § 3 of the bill, which simply states that "The President is authorized to establish military commissions for the trial of individuals for offenses as provided in this Act."

Far better on this issue is S. 1941, the Military Tribunal Authorization Act of 2002, introduced by Senator Leahy ("2002 Leahy Bill"), which explicitly invokes Congress's authority to constitute tribunals inferior to the Supreme Court, makes plain the need for a "clear and unambiguous legal foundation for such trial," and emphasizes the importance of ensuring "basic procedural guarantees of fairness, consistent with the international law of armed conflict and the [ICCPR] to garner the support of the community of nations."

B. Ensuring Humane Treatment During Proceedings: In clear violation of Hamdan, the bill would only apply the standards of humane treatment established by the Geneva Conventions Relative to the Treatment of Prisoners of War (GPW) after a "Field Tribunal" determines whether the accused is a "privileged" or "unprivileged" combatant. Sections 7 and 11 of S. 3614 in effect authorize indefinite imprisonment, and Section 9(g) permits a detainee to be held as long as six months before determining his status. The bill also allows removal of prisoners to other countries regardless of whether these other countries practice torture or other abuse, Section 9(a).

Moreover, Section 14 prohibits a detainee from communicating with his family or friends, or even with the International Committee of the Red Cross, unless the military approves, even though such approval should be routinely granted.

The 2002 Leahy bill (§ 5), by contrast, placed statutory limits on the duration, terms of detention, and the conditions under which detainees may be held.

C. Defining Eligible Defendants: The bill would create statutory "Field Tribunals" to separate detainees into "privileged" and "unprivileged" combatants. Under § 9(b) of S. 3614, only if "a detainee is found to be a privileged combatant entitled to provisions under the [GPW], then the detainee must be treated in accordance with that convention," a standard plainly at odds with Hamdan. Nothing in the bill ensures that these "Field Tribunals" meet the standards of a speedy determination by a "competent tribunal" required by Article 5 of the GPW. S. 3614 would also potentially permit denial of GPW protections to a vaguely described group: anyone associated with a group or individual "hostile to the United States," Section 2(11)(B)(ii)(I), or who "intentionally assisted combat operations against the United States," Section 2(11)(B)(ii)(IV). If a detainee were denied POW status, the detainee would be subject to the processes provided by the bill, not the standards of Common Article 3, again in clear violation of Hamdan.

E. Defining Crimes Chargeable Under the Law of War: S. 3614 authorizes military commissions to hear any criminal prosecution involving international terrorism, presumably including the crime of conspiracy (which was not allowed by a plurality of the Court in Hamdan). Unprivileged combatants may be punished for "bad acts ... deemed to be relevant by a commission including propensity," a term which might well include the charge of conspiracy. § 13(a)(4). By contrast, an earlier bill introduced by Senator Specter, S. 1937, Military Commission Procedures Act of 2002 ("2002 Specter bill") more appropriately limited military commissions to trying only "violations of the international law of war" (§ 4).

F. Providing Procedures Comparable to Courts-Martial that Satisfy Common Article Three and ICCPR: S. 3614 falls below court-martial standards and does not meet the fundamental requirements of international human rights law and the laws of war. In particular, despite the requirement of a fair and public hearing by a competent, independent and impartial tribunal established by law, the bill would constitute a commission comprised of military officers. Because the Secretary of Defense would appoint, and presumably could remove, all officers, and the bill states no requirement of cause for removal, there is no assurance that these tribunals will in fact be independent and impartial. Section 12(c)(2)(A)-(B) also provides that upon motion by the Government, criminal proceedings before a commission can be closed to the public, or held in secret, violating the requirement of a public hearing. Nor would the accused have the right to be present at all stages of the proceedings
S. 3614 mentions the accused's "right to be represented by counsel" (§ 12(a)(1)), but sets no comparison to the rights of accused in a court-martial. Under the 2002 Specter Bill, by contrast, "[a] defendant charged with any offense referred or to be referred to trial by a military commission shall have the same rights to representation by counsel as does an accused in a general court-martial under [the UCMJ]."

Nor does the bill set up any presumption of innocence. Some provisions of the new bill purport to: allow the admission of any evidence of "probative value to a reasonable person," Sections

10(d)(2) and 13(a)(2)(B); permit the admission of evidence obtained by coercion or torture, Section 9(f)(1)(C); and permit the government to "proceed by proffer," Section 10(d)(3), which apparently means that the government can submit an affidavit telling a tribunal what it can prove, and then use the affidavit as the proof. S. 3614 even denies access by prisoners to classified evidence considered in determining whether they are "unprivileged combatants," Section 10(a)(2), which could well constitute most, or even all, of the evidence used against them. By contrast, the 2002 Specter Bill (S. 1937 § 7) required that the accused be considered innocent until proven guilty, required that guilt be proved beyond a reasonable doubt, and established various voting guidelines for various kinds of sentences.

Standards of evidence in both the Classification Tribunal Boards and the Commissions created by the bill permit admission of anything with "probative value to a reasonable person"--which does not ensure exclusion of confessions extracted by torture and cruel treatment. Similarly, § 9(f)(1)(C) states that "any statements made by the detainee in response to interrogation" are admissible as evidence, presumably including confessions extracted by torture or cruel, inhuman or degrading treatment, providing no assurance that an accused may not be compelled to testify against himself or to confess guilt.

By contrast, the 2002 Leahy Bill (S. 1941) would have required that the tribunal be independent and impartial (§ 4(a)(1)); that all evidence must be made available to the accused (§ 4(a)(4)); that the accused must be present at all proceedings (§ 4(a)(5)); and that there be a presumption of innocence and proof beyond a reasonable doubt (§ 4(a)(15)).

G. Giving Meaningful Judicial Review: The 2002 Leahy bill would also have required appeal "at a minimum" at the United States Court of Appeals for the Armed Forces established under the UCMJ (§ 4(e)(3)). S. 3614, however, appears to eliminate all original federal court jurisdiction, including habeas jurisdiction, with respect to Guantanamo prisoners in Defense Department custody in pending and future cases. In addition, Section 5(c)(1)(B) of the new bill would unwisely repeal § 1005(h)(2) of the Detainee Treatment Act, which underlay the Supreme Court's conclusion that Congress did not intend by passing that law to cut off habeas and other actions by Guantanamo detainees pending on the date of enactment of that law.

H. Giving Meaningful Congressional Oversight: The bill provides for only modest congressional oversight, by requiring the Secretary of Defense to submit a list of all people detained on Guantanamo to Congress and a summary of the evidence against them, with periodic updates. Given the human rights concerns that have been raised about the Guantanamo detention center over the past few years, the operation of that center and the trials of its detainees must be subject to more regular and searching congressional oversight.

IV. Conclusion

The Supreme Court's historic decision in Hamdan v. Rumsfeld has presented both Congress and the President with an opportunity to make a fresh start in crafting a fair and durable solution to the problems of humane treatment and fair trial of suspected terrorist detainees. My government service has made me fully sensitive to the ongoing threat from al Qaeda and the need to prevent and punish terrorist crimes. But even in times of war and national emergency, our Constitution requires that the President take care that the laws be faithfully executed.

Hamdan reminds us that both the courts and Congress have significant roles to play in crafting those laws, which plainly include the UCMJ and Common Article 3 of the Geneva Conventions. The Court having now done its job, it is now Congress's turn. But to enact new legislation quickly and without full hearings, at which advice from experts in international and military law can be heard, would be both poor legislative process and an invitation to more legal challenges like those that led to Hamdan itself. "Quick-fix legislation," such as the proposed S. 3614, would do little to repair the legal defects that Hamdan exposed in the current military commission system. Nor would such legislation help to redress the serious injury to our international reputation caused by the Administration's five-year misadventure of creating military commissions that plainly fall short of minimum global standards of fair trial.

Thank you. I stand ready to answer any questions the Committee may have.