

Testimony of
The Honorable Theodore Olson

July 11, 2006

Senate Committee on the Judiciary
Hamdan v. Rumsfeld: Establishing a Constitutional Process
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Good morning, Chairman Specter, ranking Member Leahy, and Members of the Committee.

Thank you for the opportunity to appear before the Committee to testify about a subject that is of grave importance to both our national security and the integrity of our republican form of government. The Supreme Court's decision in *Hamdan v. Rumsfeld* has far-reaching implications for the President's ability to defend our national security and perform his duties as Commander-in-Chief, and raises fundamental separation-of-powers issues that go to the core of our constitutional structure. No issue deserves more thoughtful consideration from our elected representatives than ensuring that the American people are defended--in a manner consistent with our political traditions and values--from a savage terrorist enemy that deliberately targets civilians in an effort to destroy our way of life.

From 2001 to 2004, I served as the Solicitor General of the United States. In that capacity, I had the privilege and the responsibility to supervise the representation of the United States in several cases involving our Nation's defense against terrorism. These include *Rasul v. Bush*, 542 U.S. 466 (2004), a precursor to the *Hamdan* case in which the Supreme Court held that federal courts have jurisdiction to entertain habeas corpus petitions filed on behalf of terrorist combatants detained in Guantanamo Bay and elsewhere in the world outside United States sovereign territory, and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the President's authority to capture and detain an American citizen who took up arms against the United States overseas as an "enemy combatant." In connection with this responsibility, and as a consequence of my service as Assistant Attorney General for the Office of Legal Counsel from 1981 through 1984, I have had the opportunity to consider at great length the relationship between our three branches of government in time of war. As Solicitor General, I also had the responsibility to represent the government in terrorism-related cases in the lower courts, which required my office and its exceptionally talented staff to make careful judgments about the respective wartime responsibilities of the legislative, executive, and judicial branches.

In *Hamdan*, a majority of the Supreme Court endorsed three significant holdings: first, that, notwithstanding the Detainee Treatment Act, which Congress enacted to foreclose attempts by Guantanamo Bay detainees to seek habeas corpus relief in federal courts, those courts nonetheless retain jurisdiction over habeas petitions filed before the Act went into effect; second, that the President's military commission structure is inconsistent with the Uniform Code of

Military Justice; and third, that Common Article 3 of the Geneva Conventions applies to the conflict with al Qaeda.

It is altogether necessary and appropriate for Congress to consider a legislative response to the Supreme Court's decision in Hamdan. Indeed, all eight Justices who participated in the case-- Chief Justice Roberts was recused-- recognized that Congressional action could cure any perceived inadequacies in the military commissions established by the President.

Justice Breyer's concurring opinion (which was joined by Justices Kennedy, Souter, and Ginsburg) explicitly invited the President to reach out to Congress, observing that "nothing prevents the President from returning to Congress to seek the authority he believes is necessary." Hamdan, 548 U.S. at _ (slip op. at 1) (Breyer, J., concurring).

Justice Kennedy's concurring opinion (which was joined by Justices Souter, Ginsburg, and Breyer) similarly observed that "[i]f Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so." Id. at _ (slip op. at 2) (Kennedy, J., concurring).

Indeed, in his Hamdan concurrence, Justice Kennedy invoked Justice Jackson's well-known concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), which articulated a three-part framework for analyzing the relationship between executive and legislative authority. The President's authority is at its maximum, Justice Jackson explained, "[w]hen the President acts pursuant to an express or implied authorization of Congress." Id. at 635 (Jackson, J., concurring). "When the President acts in absence of either a Congressional grant or denial of authority," Justice Jackson continued, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Id. at 637. And "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb." Id.

Relying upon the *Youngstown* paradigm, Justice Kennedy concluded in his Hamdan concurring opinion, incorrectly in my view, that the military commissions established by the President presented "a conflict between Presidential and congressional action," and that the case therefore fell within Justice Jackson's third category, where the President's authority is at its lowest point. Hamdan, 548 U.S. at _ (slip op. at 4) (Kennedy, J., concurring). If Congress responds to Hamdan by explicitly conferring on the President broad authority to establish military commissions, the Court's analysis makes clear that the President would be acting at the height of his authority--he would be exercising both the inherent constitutional powers of the Commander-in-Chief and the statutory powers granted to him by Congress.

In response to the Justices' invitation to implement a legislative solution, it is my opinion that Congress should restore the status quo that existed prior to the *Rasul* decision and clarify that the federal courts do not possess jurisdiction over pending or future habeas petitions filed by Guantanamo Bay detainees or other noncitizen enemy combatants detained outside the territory of the United States. Congress should also, I submit, expressly authorize the use of military commissions to try terrorists and others accused of war crimes.

Hamdan did not address the President's inherent power to establish military commissions absent Congressional authorization in cases of "controlling necessity." See Hamdan, 548 U.S. at _ (slip op. at 23) ("Whether . . . the President may constitutionally convene military commissions without the sanction of Congress in cases of controlling necessity is a question this Court has not answered definitively, and need not answer today."). According to the Court, the issue before it was limited to whether the President may "disregard limitations that Congress has, in the proper exercise of its own powers, placed on his powers." Id.

I

CONGRESS SHOULD ACT TO CONFIRM THAT THE FEDERAL
HABEAS STATUTE DOES NOT GRANT JURISDICTION OVER
PETITIONS FILED BY ENEMY COMBATANT ALIENS HELD OUTSIDE THE
SOVEREIGN TERRITORY OF THE UNITED STATES.

In *Rasul v. Bush*, 542 U.S. 466 (2004), the Supreme Court overturned a precedent, *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that had stood for fifty years, and held, for the first time, that the federal habeas statute, 28 U.S.C. § 2241, grants United States courts jurisdiction to entertain habeas petitions filed by aliens detained beyond the sovereign territory of the United States (in that case, Guantanamo Bay, Cuba). In the Hamdan decision, the Court held that legislation enacted in response to *Rasul* depriving the federal courts of jurisdiction in such cases does not apply to habeas petitions pending when that legislation was enacted.

Unless Congress acts, the Court's interpretation of section 2241 will have farreaching and adverse consequences for the conduct of this Nation's defense against terrorist attacks on Americans and American facilities here and abroad.

Since the emergence of the writ of habeas corpus several centuries ago in English common-law courts, the writ has never been available to enemy aliens held outside of a country's sovereign territory. The text of section 2241--which authorizes federal courts to grant the writ "within their respective jurisdictions"-- provides no indication that Congress intended to depart from this long-standing historical principle. By requiring the President to justify his military decisions in federal courts, *Rasul* imposed a substantial and unprecedented burden on the President's ability to react with vigor and dispatch to homeland security threats.

Congress responded to the *Rasul* decision by enacting the Detainee Treatment Act of 2005 ("DTA"), which amended section 2241 to provide explicitly that "no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba." Pub. L. No. 109-148, § 1005(e), 119 Stat. 2739, 2741 (emphasis added).

Notwithstanding this clearly stated statutory language withdrawing the jurisdiction created by the *Rasul* decision for the federal courts to entertain habeas petitions filed by Guantanamo Bay detainees and a companion provision plainly making this statutory measure effective on enactment, the Hamdan Court held that the DTA does not apply to petitions pending at the time the measure was signed into law. 548 U.S. at _ (slip op. at 7-20). That holding not only enabled the Court to reach the merits of Hamdan's claim challenging the validity of the military commission system, but also requires the lower federal courts to adjudicate the hundreds of other

habeas petitions filed by Guantanamo Bay detainees that were pending at the time of the DTA's enactment. *Id.* at _ (slip op. at 15) (Scalia, J., dissenting). As Justice Scalia observed in his dissenting opinion in *Hamdan*, the "Court's interpretation [of the DTA] transforms a provision abolishing jurisdiction over all Guantanamo-related habeas petitions into a provision that retains jurisdiction over cases sufficiently numerous to keep the courts busy for years to come." *Id.* Until the Supreme Court's decision in *Rasul*, no court had ever suggested that aliens captured during hostilities and held outside of the United States' sovereign territory could challenge their captivity through a petition for a writ of habeas corpus filed in a U.S. court. This was true at the time of the Founding and continued to be true throughout the military confrontations of the Twentieth Century. Indeed, none of the two million prisoners of war held by the United States at the conclusion of World War II was deemed authorized to file a habeas petition in a U.S. court challenging the terms or conditions of his confinement.

One can only imagine the chaos that would have been introduced into the effort to win World War II if each of these detainees, or lawyers on their behalf, had been permitted to file petitions in U.S. courts immediately upon their capture in Europe, Africa or in the Islands of the Pacific Ocean. Indeed, in the wake of *Rasul*, a habeas petition was even apparently filed on behalf of Saddam Hussein before he was handed over to Iraqi authorities. As the Supreme Court plainly recognized in concluding that it lacked jurisdiction to hear a habeas petition filed by German prisoners held by American authorities in occupied Germany, "[e]xecutive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout history, essential to war-time security." *Eisentrager*, 339 U.S. at 774 (emphases added). *Rasul*'s conclusion that federal courts may hear habeas petitions filed by Guantanamo Bay detainees thus overturned several centuries of precedent concerning the jurisdictional reach of the writ of habeas corpus and introduced incalculable complications in the President's ability to conduct an effective defense against unprincipled and savage terrorists.

Furthermore, the availability of habeas relief to Guantanamo Bay detainees does violence to the separation-of-powers principles embodied in our constitutional structure. The Founders were keenly aware of the need for swift, decisive action to safeguard national security. They designated the President as the sole Commander-in-Chief of the Armed Forces precisely because, as Alexander Hamilton explained, "[o]f all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *The Federalist No. 70*, at 471 (Alexander Hamilton) (J. Cooke ed., 1961). Because courts have limited familiarity with battlefield conditions; must move slowly, deliberately, and collectively; lack access to military intelligence; and may possess an incomplete understanding of relevant foreign policy considerations, they are--by their very institutional design--illsuited to micro-manage on a real-time basis the decisions that the Executive must make daily, indeed hourly, in his capacity as Commander-in-Chief. As Justice Jackson observed in another context, "It would be intolerable that the courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. . . . [T]he very nature of executive decisions as to foreign policy is political, not judicial. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

The Rasul decision also imposes a tremendous burden on our military personnel in the field. To begin with, as the Supreme Court has explained, authorizing courts--at the behest of enemy aliens--to second guess the decisions of military leaders will "diminish the prestige of our commanders, not only with enemies but with wavering neutrals." Eisentrager, 339 U.S. at 779. Indeed, "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." Id. The Rasul decision raises an endless stream of practical problems: Will commanders be summoned from the field to give evidence and to explain the circumstances regarding the capture of combatants? Will detainees have access to counsel? Do they have the right to appointed counsel? Miranda warnings? The right to speedy trials? Will the government be required to disclose sensitive intelligence information to demonstrate that its detention of enemy combatants is justified?⁴ These questions are just a few examples, but they serve to demonstrate how disruptive the extension of habeas relief to enemy combatants could become to the military's ability to focus its resources and undivided attention on defending our people from terrorists.

Congress should act to restore the pre-Rasul status quo. The Constitution places the decision to detain an enemy alien squarely within the exclusive domain of the President, as Commander-in-Chief of the Armed Forces.⁶ Congress should restore, as it attempted to do when it enacted the DTA just six months ago, the constitutional balance between the executive and judicial branches by amending the DTA to clarify that federal courts lack jurisdiction over habeas corpus petitions filed by detainees held outside of the sovereign territory of the United States, no matter when those petitions were filed.

II

CONGRESS SHOULD CONFIRM THAT THE PRESIDENT HAS BROAD AND FLEXIBLE AUTHORITY TO TRY ENEMY COMBATANTS BEFORE MILITARY COMMISSIONS.

The second principal holding of Hamdan is that the military commissions established by the President are invalid because their structure and procedure do not comport in all material respects with the Uniform Code of Military Justice ("UCMJ"). In reaching this conclusion, the Court rejected the government's position that the Constitution, the UCMJ itself, and the Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001), authorized the military commissions established by the President.

⁶ See *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) ("Whether the President in fulfilling his duties, as Commander-in-Chief . . . [chooses] to accord to [aliens] the character of belligerents, is a question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted . . .").

The Hamdan Court's invalidation of the President's military commissions cannot be reconciled with the Court's earlier holding in *Madsen v. Kinsella*, 343 U.S. 341 (1952), that, "as Commander-in-Chief of the Army and Navy of the United States, [the President] may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions." Id. at 348 (emphasis added). Indeed, as the Court

explained in upholding the President's authority to convene a military commission to try a Japanese war criminal after World War II, "[a]n important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *In re Yamashita*, 327 U.S. 1, 11 (1946). The Hamdan decision is also inconsistent with the Court's conclusion in *Ex Parte Quirin*, 317 U.S. 1 (1942) (per curiam), that, in the UCMJ, "Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." *Id.* at 28.

The Court's rejection of the government's position that the AUMF authorized the President's military commissions raises equally serious questions.

The AUMF authorized the President to exercise his full war powers in connection with the defense of the Nation from terrorist attacks. As a plurality of the Court recognized in *Hamdi*, those war powers include the authority necessary for "the capture, detention, and trial of unlawful combatants." 542 U.S. at 518 (plurality op. of O'Connor, J.) (emphasis added). A rational and reasonable reading of the AUMF is that it endorsed the President's exercise of all his war powers, including the establishment of the military commissions at issue in *Hamdan*. But while the *Hamdan* Court recognized that the President's war powers "include the authority to convene military commissions," 548 U.S. at _ (slip op. at 29), it nonetheless concluded that the AUMF did not authorize any use of military commissions beyond those already authorized by the UCMJ.

The *Hamdan* decision represents an extremely cramped and unworkable interpretation of the expansive authorization that Congress gave the President in the AUMF. The Court's approach seriously diminishes the significance of the AUMF as a Congressional endorsement of Presidential war powers, and it apparently does so on the theory that the AUMF does not specifically mention and enumerate each and every aspect of the President's wartime authorities and responsibilities. Congress, however, gave the AUMF an expansive scope precisely to ensure that the authorization it afforded the President was as broad as necessary to permit the President to respond to unprecedented and savage attacks and threats of future attacks. As Justice Thomas stated in his dissenting opinion in *Hamdan*, "the fact that Congress has provided the President with broad authority does not imply--and the judicial branch should not infer--that Congress intended to deprive him of particular powers not specifically enumerated." 548 U.S. at _ (slip op. at 3) (Thomas, J., dissenting). Yet that is precisely what the *Hamdan* Court has done. The Court's unrealistically narrow interpretation of the AUMF makes clear that any Congressional response to *Hamdan* must expressly endorse and ratify the President's authority to oversee the trial and punishment of enemy combatants.

Congress should ensure that the President has broad discretion to try enemy combatants in proceedings that he determines are appropriate, including through utilization of the vehicle of military commissions. Congress also should make clear that the President has expansive and flexible authority to prescribe the rules and procedures governing military commission proceeding.

A conspiracy charge is an especially important prosecutorial tool in trials of high-level terrorist leaders, who typically orchestrate a terrorist organization's deadly activities without themselves participating in the attacks.

Congress should not attempt to establish in an inflexible, rigid, and detailed manner each and every detail of the structure and procedure of these commissions. These determinations should be made by the Executive, which requires the flexibility to develop, modify, and innovate procedures and rules as circumstances and exigencies in the defense from terrorism require.

Experience has unfortunately shown us that terrorists are quick to adapt to our defenses, unprincipled in their determination to use to their advantage any weaknesses in our systems, and resourceful in their ability to exploit any fixed procedures. An effort by Congress to legislate a comprehensive set of rules and procedures, however well conceived and well intended, risks locking the President into one set of procedures that, in time, may be outdated, inappropriate, or unworkable for any number of reasons that are simply unknown and unknowable today. Change would be difficult and slow because the President likely would be required to return to Congress to secure necessary amendments and modifications, and the legislative process would need time to run its course. Therefore, to the extent that Congress determines that it is appropriate to define specific procedures for military commission proceedings, Congress should authorize the President to deviate from those procedures in his discretion, when necessary and appropriate.

The Founders vested the President with primary responsibility to protect the Nation's security and to conduct foreign affairs because the executive branch has structural advantages the other two branches do not have--including the "decisiveness, activity, secrecy, and dispatch that flow from the . . . unity" of the executive branch. *Hamdan*, 548 U.S. at _ (slip op. at 2) (Thomas, J., dissenting) (internal quotation marks omitted). "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981). The structural advantages possessed by the executive branch place the President in the best position to specify the rules and procedures governing the trial of enemy combatants.⁸ Congress should affirm this in its legislative response to *Hamdan*. At a minimum, Congress should explicitly authorize the military commission procedures established pursuant to the President's Military Order of November 13, 2001. 66 Fed. Reg. 57,833.

Nothing in my testimony is intended, or should be construed, in any way to minimize the prerogatives and responsibilities of Congress or the courts in our tripartite system of government. Both the legislative and judicial branches have been endowed by our Founders with authority and special capabilities in our balanced system. All three branches have important roles to play in defending this Nation from terrorism and in guaranteeing individual rights, freedom, and liberty.

But each branch must be sensitive in discharging its respective role, to allow the remaining branches most effectively to function as our Constitution intended.

III

CONGRESS ALSO SHOULD CONFIRM THAT THE GENEVA
CONVENTIONS OF 1949 DO NOT APPLY TO OUR NATION'S DEFENSE AGAINST

TERRORISM AND ITS CONFLICT WITH AL QAEDA AND OTHER TERRORIST ORGANIZATIONS.

The third significant holding in Hamdan is that Common Article 3 of the Geneva Conventions applies to our defense against terrorists such as al Qaeda, whose principal tactics are inflicting injury and destruction on vulnerable civilians and civilian targets.

The Court's conclusion that Common Article 3 applies to stateless terrorist groups committing sustained international attacks is directly contrary to the official position of the executive branch. The President has formally adopted the Justice Department's conclusion that the Geneva Conventions do not apply to our Nation's defense against stateless terrorists, such as al Qaeda and comparable organizations.

It has long been the rule that "the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight." *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 185-86 (1982). As Justice Thomas explained, courts should defer to "the Executive's interpretation" of treaty provisions. *Hamdan*, 548 U.S. at _ (slip op. at 44) (Thomas, J., dissenting). The Court's interpretation of Common Article 3 fails to accord any deference to the views of the executive branch on this question, or, for that matter, any aspect of the Executive's judgment and actions in the defense against terrorism.

There are powerful arguments that the Geneva Conventions generally, and Common Article 3 specifically, do not apply to the Nation's defense against terrorists. Article 2 of the Geneva Conventions renders the full protections of the Conventions applicable only to an armed conflict between two or more "High Contracting Parties," and al Qaeda and its counterparts are plainly not "High Contracting Parties."

Similarly, Common Article 3 by its terms appears to apply only to a purely "internal" armed conflict--such as a civil war--on the territory of a signatory state, and not to an international conflict such as the defense against international terrorism. As Judge Randolph explained in the D.C. Circuit decision that Hamdan reversed, "The Convention appears to contemplate only two types of armed conflicts"--international armed conflict between signatories, and "a civil war." *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005). The conflict with international, stateless terrorists does not fall into either category.

Sound policy considerations also support the conclusion that the protections of the Geneva Conventions do not extend to stateless terrorist groups. One of the key purposes underlying the Conventions is to encourage combatants to conduct themselves in a manner that provides some protection for civilians. Under the Conventions, "irregular forces achieve combatant . . . status when they (1) are commanded by a person responsible for subordinates; (2) wear a fixed, distinctive insignia recognizable from a distance; (3) carry weapons openly; and (4) conduct their operations in accordance with the laws and customs of war." *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State*, Jan. 22, 1987, 2 AM. U. J. INT'L L. & POL'Y 415, 465, 467 (1987). Terrorists, of course, do not comply with any of these requirements, and they deliberately target civilians with violence.

Extending the protections of the Geneva Conventions to terrorist groups endangers civilian populations by removing the incentives these groups have to observe the laws of war.

Indeed, it is precisely for this reason--the increased danger to civilian populations--that the United States has declined to ratify treaties that would extend the protections of international humanitarian law to terrorist groups.

Most notably, the United States has not ratified Additional Protocol I to the Geneva Conventions, which covers "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination." Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. The United States has not ratified Protocol I on the ground that it would "grant[] terrorist groups protection as combatants" and "elevate[] the status of self-described 'national liberation' groups that make a practice of terrorism," undermining efforts "to encourage fighters to avoid placing civilians in unconscionable jeopardy." Remarks of Judge Abraham D. Sofaer, 2 AM. U. J. INT'L L. & POL'Y at 465, 467. The Hamdan Court's conclusion that Common Article 3 applies to stateless terrorists is difficult to reconcile with the executive branch's long-standing position with respect to Protocol I.

Moreover, the Geneva Conventions are not now--and have never been regarded as--judicially enforceable. To the contrary, the Geneva Conventions set out comprehensive and exclusive state-to-state enforcement procedures that are to be carried out by the political branches of the signatory states. By interpreting the UCMJ to encompass the substantive protections of Common Article 3, but not the exclusive enforcement procedures common to all four Geneva Conventions, the Court, as Justice Thomas explained, "selectively incorporates only those aspects of the Geneva Conventions that the Court finds convenient." Hamdan, 548 U.S. at _ (slip op. at 41).

The Court's determination that Common Article 3 applies to the war with al Qaeda and other international, stateless terrorist organizations is potentially very far-reaching. It opens the door to the possibility that senior officials of the American government could be haled into distant courts for violating the Conventions' requirements. Congress can and should remedy this problem by confirming the President's determination that the Geneva Conventions do not apply to the conflict with stateless terrorist organizations--a determination that is more faithful to the text and purpose of the Conventions than the conclusion reached by the Hamdan Court.

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I would like to thank the Committee for the opportunity to testify today and look forward to answering any questions the Committee may have.