

**Testimony of Stephen A. Saltzburg**  
**United States Senate Armed Services Committee**  
**Subcommittee on Personnel**  
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**I. Introduction**

Senator Graham, and Members of the Subcommittee, I appreciate the opportunity to testify before you this morning. In 2001, shortly after the attacks on the World Trade Center and the Pentagon, the President of the American Bar Association appointed a Task Force on Terrorism and the Law. That Task Force was succeeded by the American Bar Association Task Force on Enemy Combatants which continues to this day. I had the privilege of serving on both Task Forces and in participating in debates in the ABA House of Delegates on many of the issues this Subcommittee is considering this morning. I draw upon ABA resolutions and Reports to the House of Delegates for much of this testimony. I shall identify ABA policy where it exists and also indicate some of my own views as I proceed.

For many years I have served as the General Counsel of the National Institute of Military Justice, a non-partisan entity designed to improve and educate the public about military justice. Although NIMJ has been involved in discussions about the issues I address, it has taken no position on those issues. Nothing I say here today should be viewed in any way as endorsed by NIMJ.

The horrific bombings of the London subway and bus last week remind not only those of us who reside in the United States but all those who reside in Western-style democracies throughout the world of the dangers posed by international terrorism. Since the unprecedented attacks suffered by the United States on September 11, 2001, the United States has devoted enormous resources to protecting the homeland against

additional terrorism attacks. The President, the Department of Defense, the Department of Justice, intelligence agencies and the relatively new Department of Homeland Security have made eradicating terrorism one of the most important priorities of the United States.

The London bombings, following bombings in Madrid and elsewhere in the world, demonstrate that, while the United States may be the principal target of terrorists, it is not the exclusive target. It has become clearer and clearer that one nation acting alone cannot effectively respond to the terrorist threat. International cooperation is essential. Just as the world's sympathy was with Britain when its celebration over being awarded the 2012 Olympic games quickly turned to mourning the deaths of scores of innocent people and injuries to hundreds of others, the world's sympathy was with the United States following the attacks in New York and the Washington, D.C. area on September 11<sup>th</sup>. But, as time has passed, sympathy toward the United States has turned to dismay in many parts of the world as to the manner in which the United States has carried out its "war on terror."

In truth, we now understand, better than we ever have, that we have a new type of enemy and face novel challenges in seeking to defeat that enemy. Tools that might have seemed sensible, even necessary, in the immediate aftermath of September 11 need to be re-evaluated. We must be constantly aware of how our actions are perceived throughout the world, and how easy it is to turn trust into distrust as a result of missteps. We cannot win the war on terror alone, any more than Britain or Spain can win it alone. We need their help as they need ours. It is imperative, therefore, that the policies of the United States be seen throughout the world as just and fair responses to the clear and present dangers posed by international terrorism.

On September 18, 2001, Congress enacted a Joint Resolution (Public Law 107-40, 115 Stat. 224) authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The Preamble to the resolution states that the acts of September 11 were attacks against the United States that “render it both necessary and appropriate that the United States exercise its right to self-defense.”

The United Nations Security Council approved a resolution recognizing the United States' right to self-defense, *see* U.N.S.C.Res. 1368, and NATO's North Atlantic Council stated that it regarded the attack as an action implicating Article V of the Washington Treaty that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all."

Congress's Joint resolution was bolstered by the actions of the United Nations and NATO. The international community understood the need for the United States to act. The President sent troops to Afghanistan, those troops removed the repressive Taliban regime from power, and there was widespread support for and understanding of the need to prevent a nation from providing territory for terrorist training camps and from harboring terrorist groups.

Questions about the plans of the United States to deal with terrorism began to arise in connection with the November 13, 2001 Military Order in which the President announced that certain non-citizens would be subject to detention and trial by military

authorities. The order provides that non-citizens whom the President deems to be, or to have been, members of the al Qaida organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission. The President's Military Order was cause for concern for a number of reasons. One of the most important was that it appeared to arrogate to the President complete authority to "deem" individuals to be members of al Qaida or to have aided, abetted or conspired to commit acts of terrorism and to prescribe procedures for prosecutions that lacked many of the hallmarks of American criminal justice that are associated with basic notions of due process and fundamental fairness.

The Department of Defense has now adopted procedures for military commissions and has developed a non-exclusive list of war crimes that can be prosecuted before such commissions. The proposed use of military commissions, as opposed to civilian courts, has been controversial from the date the Military Order issued, and the controversy has become more rather than less heated over time. The procedures governing the commissions have generated much of the controversy.

In addition to prescribing military commissions to try unlawful combatants, the Executive constructed the Guantanamo facility to hold unlawful combatants. Although the Executive announced plans to put some of the combatants on trial for violations of the laws of war, it became clear that many would be held for long periods of time without any plan to try them. They were detained for security reasons, and in many parts of the

world there were concerns about the legality of detaining, perhaps indefinitely, individuals without trial.

The Executive also seized two Americans, one in Afghanistan, and another at the O'Hare airport in Chicago, and charged them as enemy combatants. Both were housed in the United States as their cases worked their way through federal courts to the United States Supreme Court. One, Yaser Hamdi, has now been released and returned to Saudi Arabia following a Supreme Court decision recognizing his right to consult with counsel and to some procedural protections. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). The other, Jose Padilla, continues to seek his release in federal court after the Supreme Court held that he had brought his habeas corpus challenge in the wrong federal court. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

As the controversy has mounted, some of our crucial allies have protested the use of or the procedures for military commissions and the prolonged detention of individuals without trial. Civil liberties groups have questioned the detention of American citizens as enemy combatants. Throughout it all, Congress has been silent. During the almost four years since Congress authorized the President to take action against those responsible for the September 11<sup>th</sup> attacks, Congress has left to the President and the Executive branch virtually unfettered discretion in conducting the war on terror. The Executive's actions have been challenged in federal courts. The United State Supreme Court held in *Hamdi* that the Constitution imposes some limits upon the ability of the President to hold "enemy combatants" in indefinite detention. The Court also held that federal law permits those detained in Guantanamo to seek federal habeas corpus review. *Rasul v. Bush*, 542 U.S. 466 (2004). Lower federal courts have struggled to decide what

constitutional protections are due individuals whom the government either plans to hold without trial or to prosecute in military commissions. While federal courts have not welcomed having to second guess the President as to the balance that should be struck between protecting the nation and preserving individual rights, they have recognized their duty to decide the cases brought before them. The courts could not and did not shirk their responsibility to assure that basic constitutional values are not lost in the Executive's war on terror.

This duty is not the courts' alone; it is shared with Congress. Yet, while the courts have met their responsibilities, Congress has provided the courts with no more guidance than it has provided the President. Congress has been silent for too long. There is no evidence of Congressional determination or courage to participate in the growing debate about how to combat terrorism without compromising the values for which the United States has long been proud to stand. Congress's potential to advise the President, to assist the Executive by adopting legislation to deal with some of the knotty problems of substance and procedure that have arisen, and to demonstrate both to the American people and people throughout the world that the September 18, 2001 Joint Resolution was not a blank check from the Congress to the President has gone unfulfilled.

## **II. Congress and the President Share Power over the Military, Military Commissions, and Detentions**

The Constitution of the United States unmistakably gives Congress as well as the President authority over military matters. Article I, Section 8, grants to Congress the powers: "To ... provide for the common Defence" (clause 1); "To define and punish piracies on the high seas, and offenses against the Law of Nations; To declare War, grant

letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies...; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces” (clauses 10-14). Article II confers on the President the “executive Power” (Section 1) and makes him the “Commander in Chief of the Army and Navy” (Section 2).

Congress exercised its constitutional authority when it enacted the Uniform Code of Military Justice. Indeed, Congress provided in the Code for military commissions in Article 21 (10 U.S.C. § 821). That section provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.

The history of the section indicates that Congress intended to preserve the option in some circumstances for the Executive to choose between using military commissions or other tribunals such as court-martial. In *Application of Yamashita*, 327 U.S. 1 (1946), the Supreme Court explained that Article of War 15, which was substantially similar language to UCMJ Article 21, was adopted in 1916 in response to other amendments of the Articles of War that which granted jurisdiction to courts-martial to try offenses and offenders under the law of war. The Court found that the language was intended to preserve the traditional jurisdiction of military tribunals. In *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952), the Court made the following statement about military commissions: “Since our nation’s earliest days, such [military] commissions have been constitutionally

recognized agencies for meeting many urgent governmental responsibilities relating to war. They have been called our common-law war courts.”(Footnote omitted)

In Article 18 of the UCMJ, Congress provided that “[g]eneral courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” Thus, Congress has given the President and the military choices as to how to proceed against those who violate the law of war. Whether Congress should do more and provide clearer guidance as to the manner in which military commissions should be employed and what should happen when there is insufficient evidence to prosecute individuals for violating the laws of war or there are other reasons why prosecution is impractical is a question that cries out for an answer.

Just as Congress had the power to authorize the continued use of military commissions and to prescribe court-martial jurisdiction, Congress has the constitutional authority to impose restraints and conditions upon the exercise of the power to prosecute. Congress also shares authority with the Executive to define the conditions under which individuals may be detained. This includes the power to define when, how, and under what circumstances and procedures enemy combatants may be detained. Nevertheless, as the Executive built the detention and interrogation facilities at Guantanamo, Congress provided the funds but no guidance, direction or control.

Congress did enact the USA Patriot Act in response to the war on terror. That statute, while controversial, expanded executive power in recognition of the increased dangers to the United States posed by terrorism. Because some provisions of the statute will expire this year unless reenacted, Congress now must examine the way in which the

statute has been implemented. But, aside from examining the provisions of the Patriot Act that will otherwise sunset soon, Congress has been AWOL in the war on terror for too long.

### **III. What to Do with Enemy Combatants?**

One of the most controversial aspects of the war on terror has been the use of the term “enemy combatant” and the Executive’s claim that such combatants may be detained until the war on terror is over – which may be for life. Congress has not been heard on the question of how to treat such combatants, despite the fact that life imprisonment without trial is almost incredible to contemplate in a country devoted to due process and the rule of law.

The Executive position had been that enemy combatants may not only be detained indefinitely, but also that while they are detained they have no right under the laws and customs of war or the Constitution to meet with counsel. The U.S. Supreme Court rejected the Executive’s position regarding counsel in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but the Executive continues to claim the power to detain such combatants for their entire lives.

Under any circumstances, the claim of power to detain indefinitely would be cause for concern. Under the circumstances of the war on terror, there is special reason for concern. Contrary to what might seem the case when the term is used again and again by Executive officials, the term “enemy combatant” is not one that has been frequently used by the military or one that has a well-established meaning when the law of war is discussed.

The law of war generally assumes that states or quasi-states are warring, and the

word “enemy” generally means the state against which another state is fighting. When there is no declaration of war that specifically dates the beginning of a war, one looks to whether the use of force has risen to such a level that a *de facto* state of war exists. Based on the September 18, 2001 Joint Resolution and the existence of United States forces on the ground in Afghanistan, it appears that the United States was at war in 2001. But, it is less clear precisely who the enemy was and is. Were we at war against Afghanistan? Or were we at war against al Qaeda (the party responsible for the September 11, 2001 attacks) and the Taliban (who harbored al Qaeda)? Whether or not our original effort was directed against the country or only against selected groups within the country, once Afghanistan had a new government, the American military effort was clearly directed at al Qaeda and the Taliban as well as other groups and individuals supporting them. Fighting a war against distinct groups as opposed to against a nation poses unique problems for any nation.

A “combatant” in the law of war is typically a member of an armed force, who is readily distinguishable from a civilian, because the combatant typically wears a uniform and carries a distinctive identification card or document. A combatant in the war on terror is not so readily identified, because he/she is unlikely to be in uniform or carrying an identification document showing his/her group membership. A combatant in the war on terror may attack his or her own country’s soldiers – as in Afghanistan and Iraq – as well as soldiers from other countries.

The law of war applies to non-state actors, such as insurgents. See Common Article 3 of the 1949 Geneva Conventions, *e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. *See*

*also* The 1977 Protocols Additional to the Geneva Conventions, 16 I.L.M. 1391

Although the U.S. has not ratified the 1977 Protocols, it recognizes that parts of them reflect customary law of war. The fact that the law of war applies to non-state actors does not mean, however, that nations prefer to apply that law as opposed to domestic criminal law when dealing with insurgencies. In fact, there is substantial evidence that nations have resisted applying the law of war to internal conflicts. Their concern has been that treating insurgencies as wars might legitimate acts of violence carried out by non-state actors.

If, for example, Iraq and the United States are at war with insurgents, then the insurgents under the law of war may kill and engage in other acts of violence against legitimate targets. If, on the other hand, insurgencies are simply treated as criminal acts, the non-state insurgents may be prosecuted and punished for violence against both civilians and military forces as well as for destruction of property, and cannot claim a right to use deadly force against military or other targets.

There is no question that the United States and Britain have the right to prosecute those responsible for the September 11<sup>th</sup> attacks and the attacks in London last week for their homicidal and horribly destructive acts. The questions that have arisen for the United States are whether the United States may detain individuals as unlawful combatants and for how long, and what forum should be used for any prosecutions. The United States has chosen to refer to al Qaeda members, some Taliban fighters, and possibly others suspected of involvement in terrorist acts as “unlawful combatants” or “enemy combatants.” The use of these terms is consistent with the Executive’s claim that we are at war, even though the war against terrorists is directed at groups that are not

confined to a single nation.

If we are at war with al Qaeda, the Taliban, and/or the Iraqi insurgency, then members of those groups have the right to kill as long as they focus on military targets. This might suggest that denominating the struggle against terrorism as “war” is unwise, for it may legitimize some of the acts that otherwise would simply be criminal. This concern is largely theoretical, however, since there is no reason to believe that those who commit terrorist acts will refrain from doing so simply because we choose not to recognize their jihad as war. Moreover, terrorists show no respect for the laws of war and no allegiance to the principles underlying those laws. Terrorists engage in murder without regard to law – the law of war or any other. Their disregard of the law of war does not immunize them, however, from responsibility for violating it. Terrorist acts may violate domestic criminal laws, and they also may violate the law of war. Under appropriate circumstances, terrorists may be prosecuted as ordinary criminals or as war criminals. Accordingly, the United States properly has reserved the right to prosecute terrorists for violations of the law of war and/or violations of domestic criminal law as the wise exercise of discretion dictates.

Once we decide that we are at war with terrorist groups and they are combatants who are acting unlawfully, all doubt disappears about whether we can prosecute members of these groups and punish those who are found guilty. What, however, are we to do with those members who are caught but as to whom there is insufficient evidence to prosecute or whose possible prosecutions are hindered by concerns about disclosing military secrets or classified information? Can we detain such persons as prisoners for as long as the war on terror continues? This might well mean incarceration for life. It is no

wonder that such a prospect is disturbing to many people within the United States and around the world. If there is insufficient evidence to prosecute or it is impractical to prosecute, must there at least be sufficient or substantial evidence of group membership? Must the membership be active? Or is any connection, however attenuated, sufficient to warrant detention? Can an individual be detained as an enemy combatant if he or she has not committed any act that would violate the law of war?

Al Qaeda members, for example, may commit acts of war, but not every member of al Qaeda or an affiliated group necessarily will have committed an act that violates the law of war. If an individual is alleged to have “supported” or to be “associated” with al Qaeda, is this sufficient to support detention? Or, must there be evidence as to each that he or she actually engaged in combative acts to be so classified? Who decides whether a person’s actions support detention? In what forum? Under what standards? How long can the person be detained?

There are no easy answers to these questions. But, they must be addressed by Congress as well as the Executive. In the end, the judiciary might well have to measure the answers given by its co-equal branches against the requirements of the Constitution, but its work will be demonstrably easier if the other two branches of government have come to grips with the issues and have endeavored to resolve them in a responsible manner consistent with the values for which America stands and the international norms to which we have long been committed.

At its 2002 mid-winter meeting, the American Bar Association adopted a resolution urging the President and Congress to assure that the President’s November 13, 2001 Military order should “[n]ot permit indefinite pretrial detention of persons subject

to the order.” Permanent detention of persons against whom there is insufficient evidence to prosecute or as to whom prosecution is impractical is cause for much greater concern.

The ABA has not taken a position on what standards should be applicable if non-citizens captured outside the United States are to be detained as unlawful combatants. The question of whether a non-citizen can be detained without prosecution raises a host of difficult issues. There can be no denying their difficulty, but there can be no excuse for Congress not facing them.

The ABA adopted a resolution in August 2002 with respect to United States citizens and other persons lawfully in the United States who are detained as enemy combatants. The resolution called for meaningful judicial review and access to counsel in conjunction with the opportunity for such review. The resolution also called upon Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens and other person lawfully present in the United States as enemy combatants. The ABA also urged that Congress and the Executive consider how the policies of the United States may affect the response of other nations to future acts of terrorism.

In my opinion, Congress should examine all the standards and procedures for detaining individuals as enemy combatants. In its examination, Congress should ask the following questions as it seeks to balance liberty and security interests:

1. Should the Executive be permitted to detain individuals seized as enemy combatants for extended periods of time?
2. Does it make a difference whether a seized individual is an American citizen,

whether a citizen was seized on foreign soil or in the United States, and/or whether a citizen is detained in the United States?

3. Who should make the initial determination that an individual is an enemy combatant?

4. What standard of proof should be used to make the determination? For example, should clear and convincing evidence be required to detain an individual to protect society (using the standard required for civil commitment of persons in the United States, *Addington v. Texas*, 441 U.S. 418 (1979) )? Does the individual have a right to counsel when the initial determination is made?

5. Must an individual have committed a specific act in support of terrorism, or should it be sufficient that a person is found to be a member or supporter of a terrorist group? Should any act, no matter how minor, be sufficient? Or, must a showing be made that the person, if released, poses a genuine threat to the United States, its people or its property?

6. If the initial determination that an individual is an enemy combatant is not made by a court, should a detained person have an opportunity for judicial review? If so, in what court? Should Congress consider establishing a panel of Article III judges to review detention decisions, or giving jurisdiction to the United States Court of Appeals for the Armed Forces to review the decisions? What provision for counsel should be made in conjunction with judicial review?

7. How frequently should a detained person's status be reviewed to assure that continued detention is required?

8. If a person was seized as part of the Afghanistan or Iraqi military actions, when

United States involvement in the hostilities in those countries ends, must the person be released? Does the war on terror justify continued detention when military action ends?

9. Should the tribunal that decides to detain an individual or a reviewing court be required to find that there are no alternatives to detention that would adequately protect the United States? If, for example, an individual is a citizen of a country that offers to receive and monitor that individual, should the person be released to that country unless a showing is made that release would not adequately protect the United States?

10. Should there be an outer limit on the length of detention without prosecution?

The Supreme Court began to address some of these questions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), but that decision addressed the situation of an American citizen allegedly seized on the battlefield. The Court required some procedural protections for Hamdi, but was divided as to precisely what due process required. Because he was released from custody, we do not know what process ultimately would have been required. The fact that *Hamdi* provides only minimal guidance and that the Court avoided the merits in *Padilla* leave open issues that Congress should address. Ultimately, federal courts will decide what standards and procedures are required by the Constitution, but the courts' task will be greatly eased if Congress and the Executive together can derive carefully tailored standards and procedures that recognize the danger associated with detaining individuals for lengthy periods without trial as well as the dangers of terrorism in the 21<sup>st</sup> Century.

#### **IV. Military Commissions**

The military commissions which the President authorized and for which the Department of Defense has planned have an historical pedigree. Military commissions

have been used to prosecute violations of the law of war, and their use has been upheld by the United States Supreme Court.

Military commissions existed during the Revolutionary War and have continued to be used during various conflicts since. W. Winthrop, *Military Law and Precedents*, (2d Ed., 1920 reprint) at 832. George Washington ordered the trial of John Andre for spying by a “Board of Officers,” which was a form of military commission. *Id.* The term “military commission” was used during the Mexican War, and by the time of the Civil War was well established. *Id.* The jurisdiction of military commissions has extended to trying individuals for violations of the law of war and for offenses committed in territory under military occupation

President Roosevelt authorized a military commission to try eight German soldiers for war crimes after they smuggled themselves into the country, hid their uniforms and planned sabotage. The Supreme Court upheld their convictions and death sentences for six defendants in *In Ex parte Quirin*, 317 U.S. 1 (1942). The Court specifically noted that “[b]y the Articles of War, and especially Article 15, 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 in appropriate cases.” *Id.*, at 28. The Court distinguished between lawful and unlawful combatants: “Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Id.* at 30-31 (footnotes omitted).

United States Army military commissions tried more than 1600 individuals in

Germany for war crimes after Germany surrendered. Similar commissions tried almost 1000 persons in the Far East. Military commissions also tried individuals, including U.S. citizens, for ordinary criminal activity in the occupied territories. The Supreme Court upheld the commissions' jurisdiction in these cases.

Citing *Quirin in Application of Yamashita*, 327 U.S. 1 (1946), the Court upheld the jurisdiction of a military commission to try Japanese General Yamashita for war crimes. The Court recognized that Congress had sanctioned the use of the commissions: "The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. *Id.* at 11.

*Madsen v. Kinsella*, 342 U.S. 341 (1952), upheld the jurisdiction of a military commission to try a civilian U.S. citizen for the murder of her U.S. serviceman husband in occupied Germany in 1950. The Court's opinion discussed the history of military commissions.

The Court did not decide in *Quirin* or in the other cases whether the President as commander-in-chief has inherent power to establish a military commission, since Congress had authorized such Commissions. The same remains true today. Congress has provided for military commissions in the Code of Military Justice. In *Quirin* and other cases, the Supreme Court had no occasion to decide what could be done with unlawful combatants who are not tried or who are tried and acquitted. Congress has taken no position on these issues either.

As noted above, if we are at war and war crimes are committed, Article 21 of the

Code of Military Justice recognizes the authority of military commissions to prosecute those crimes. It is well established that a deliberate attack on noncombatant civilians violates the law of war. The customary law of war recognizes this principle and it is also reflected in several conventions, such as Common Article 3 of the Geneva Conventions of 1949, *see, e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

The September 11<sup>th</sup> attacks were not the first by al Qaida against the United States. Al Qaida was responsible for several earlier attacks; the World Trade Center bombing in 1993; U.S. military barracks at Khobar, Saudi Arabia, in 1996; U.S. embassies in Kenya and Tanzania in 1998; and the USS Cole in 2000. Thus, if the United States is in armed conflict with al Qaeda, its use of military commissions to prosecute violations of the law of war is consistent with the use of such commissions from the founding of the Nation.

There are questions, however, about how far military commissions can reach. The President's November 13, 2001 order applies to members of al Qaida, to people complicit in acts of international terrorism, and to those who have harbored such persons. It is not clear that all of these individuals participated in or are responsible for violations of the law of war. Not all acts of international terrorism or support for such acts constitute violations of the law of war. Congress may wish to decide whether the jurisdiction of military commissions should be expanded. But, I would urge Congress to consider the 2002 resolution of the American Bar Association urging the President and Congress to assure that the President's November 13, 2001 Military order should "[n]ot be applicable to cases in which violations of federal, state or territorial laws, as opposed

to violations of such law of war, are alleged.”

In addition to examining the jurisdiction of military commissions, Congress needs to examine the procedures military commissions should use. The American Bar Association’s 2002 resolution urged the President and Congress to assure that the President’s November 13, 2001 Military order should “[r]equire that its procedures for trial and appeals be governed by the Uniform Code of Military Justice except Article 32 and provide the rights afforded in courts-martial thereunder, including but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases.”

The procedures adopted by the Department of Defense depart from the Uniform Code of Military Justice and provide fewer rights than are recognized in courts-martial. The exclusion of the defendant from portions of the trial, the reduced evidence standard set forth for the commissions, and the effort to limit judicial review are among the controversial procedural provisions.

For example, the President’s Military Order provided that, as to individuals subject to it, “military tribunals shall have exclusive jurisdiction with respect to offenses by the individual”; and “the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nations, or (iii) any international tribunal.”

Notwithstanding the Order, the Supreme Court has recognized the right of those detained at Guantanamo to seek habeas corpus relief. *Rasul v. Bush*, 542 U.S. 466 (2004). This is

not surprising, since the Court reviewed habeas corpus petitions in *Madsen, Yamashita*, and *Quirin*. The scope of habeas corpus review is not settled, however, since the Court in *Rasul* interpreted a federal statute which Congress could modify. Although the *Rasul* Court distinguished the denial of habeas review of a military commission in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), it is unclear whether that decision remains good law as applied to defendants prosecuted for war crimes outside territory controlled by the United States. Congress has the opportunity to clarify and define the reach of the Great Writ to those detained as enemy combatants, whether or not they are prosecuted.

It is understandable why the President would find military commissions preferable to prosecutions in U.S. civilian courts. Security is the number one concern with two principal dimensions. The first is a concern for the safety of judges, witnesses and jurors (members). The second is a concern for protection of classified information. It is the latter concern that has resulted in the adoption of procedures for the tribunals that have led many to question its fairness.

Concerns about security have led the Department of Defense to impose restrictions on civilian defense counsel in military tribunals that have made it difficult for them to play the full role in promoting justice they otherwise might. At its annual meeting on August 11-12, 2003, the ABA House of Delegates passed a resolution calling “upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances.” The ABA further resolved that the government should

not monitor attorney-client communications, should assure that CDC can be present at all stages of commission proceedings, and should ensure that CDC should be able to consult with and do research in preparation for proceedings and be able to speak publicly consistent with their obligations under the Model Rules of Professional Conduct and their duty to protect classified information. The ABA's resolution followed an August 2, 2003 unanimous decision by the Board or Directors of the National Association of Criminal Defense Lawyers (which cosponsored the ABA resolution) that it would be unethical for a criminal defense lawyer to represent an accused before military commissions given the restrictions imposed upon defense counsel.

The decision to use military commissions to try individuals accused of violating the law of war would have been much less controversial if the ABA recommendations had been followed. If the procedure used in a court-martial (with any essential modifications that might be required) were used in military commissions, there would have been much more confidence in the fairness of the proceedings. If the rules of evidence used in a court-martial (with slight modification possible) were used in military commissions, there would have been more confidence in their fairness. If civilian judicial review were provided, the concern of several of our important allies would have been satisfied.

The fairness of military commissions is not an Executive issue; it is a national issue. The credibility of the United States is at stake. The jurisdiction, procedures and judicial review issues should be a Congressional concern. Congress, in consultation with the Executive, is capable of providing a system of justice which fair-minded observers throughout the world will conclude is consistent with the highest standards of fairness as

measured against our own traditions and those of the international community. The United States has seen itself as a shining example of a country committed to the rule of law and due process. The world watches to see what standards we set. As the ABA has noted, our actions “may affect the response of other nations to future acts of terrorism.” We have protested the use of military tribunals to try our citizens in other countries. If the United States concludes that such commissions can be fairly conducted and provide due process to our enemies – despite the fact that the accused is not given the same access to counsel as in a court-martial or criminal trial, the rules of evidence provide less protection than in a court-martial or criminal trial, and civilian review is denied or extremely limited – we shall be hard pressed to argue that other countries are less capable or entitled than we to use such commissions and to adopt similar procedures.

Congress has an important role to play as we define through our actions for all the world to see what we think it means to do justice.

## **V. Treatment of Prisoners**

No one event has called United States policy regarding and commitment to humane treatment of prisoners into question as much as the treatment of prisoners at Abu Ghraib prison in Iraq. Although there have been allegations of prisoner abuse in Afghanistan and a number of highly publicized allegations of alleged abuse of prisoners at Guantanamo, Cuba, it is the pictures of American soldiers abusing prisoners at Abu Ghraib that created an unmistakable impression on many that our country was willing to use torture and/or other degrading measures to interrogate and/or control prisoners within our custody. The graphic depictions of misconduct and disregard for human dignity requires a strong response by the United States to show the world that Abu Ghraib is an

aberration which Americans profoundly regret.

On August 9, 2004, the American Bar Association adopted an extensive set of resolutions dealing with treatment of prisoners. I recommend each of these to the Congress and hope that the Subcommittee will give each serious consideration. The American Bar Association does the following:

1. condemns any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government (including its contractors) and any endorsement or authorization of such measures by government lawyers, officials and agents;

2. urges the United States government to comply fully with the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions of August 12, 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions, to take all measures necessary to ensure that no person within the custody or under the physical control of the United States government is subjected to torture or other cruel, inhuman or degrading treatment or punishment;

3. urges the United States government to: (a) comply fully with the four Geneva Conventions of August 12, 1949, including timely compliance with all provisions that require access to protected persons by the International Committee of the Red Cross; (b) observe the minimum protections of their common Article 3 and related customary international law; and ( c ) enforce such compliance through all applicable laws,

including the War Crimes Act and the Uniform Code of Military Justice;

4. urges the United States government to take all measures necessary to ensure that all foreign persons captured, detained, interned or otherwise held within the custody or under the physical control of the United States are treated in accordance with standards that the United States would consider lawful if employed with respect to an American captured by a foreign power;

5. urges the United States government to take all measures necessary to ensure that no person within the custody or under the physical control of the United States is turned over to another government when the United States has substantial grounds to believe that such person will be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment;

6. urges that 18 U.S.C. §§2340(1) and 2340A be amended to encompass torture wherever committed, and regardless of the underlying motive or purpose;

7. urges the United States government to pursue vigorously (1) the investigation of violations of law, including the War Crimes Act and the Uniform Code of Military Justice, with respect to the mistreatment or rendition of persons within the custody or under the physical control of the United States government, and (2) appropriate proceedings against persons who may have committed, assisted, authorized, condoned, had command responsibility for, or otherwise participated in such violations;

8. urges the President and Congress, in addition to pending congressional investigations, to establish an independent, bipartisan commission with subpoena power to prepare a full account of detention and interrogation practices carried out by the United States, to make public findings, and to provide recommendations designed to

ensure that such practices adhere faithfully to the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions;

9. urges the United States government to comply fully and in a timely manner with its reporting obligations as a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

10. urges that, in establishing and executing national policy regarding the treatment of persons within the custody or under the physical control of the United States government, Congress and the Executive Branch should consider how United States practices may affect (a) the treatment of United States persons who may be captured and detained by other nations and (b) the credibility of objections by the United States to the use of torture or other cruel, inhuman or degrading treatment or punishment against United States persons.

I also recommend to you the Report accompanying these resolutions. It identifies the issues that first arose as a result of the Department of Defense approving harsh questioning techniques in Guantanamo and the migration of those techniques to Iraq. The Report describes the legal justifications that were offered by the Executive for its actions:

As the Department of Defense and the CIA were preparing and implementing their approach to interrogations, a series of memoranda were being prepared by various high-ranking legal officials in the Executive

Branch which appear designed to provide a legal basis for going beyond established policies with regard to treatment of detainees. These memoranda set out a series of arguments for restrictive interpretation of the laws and treaties relevant to the subject, so as to greatly curb their effect. One example, in the August 1, 2002 memorandum from the Department of Justice Office of Legal Counsel to Alberto R. Gonzales, Counsel to the President (recently rescinded by the Justice Department) concluded that for an act to constitute torture as defined in 18 U.S.C. §2340, “it must inflict pain that is difficult to endure”, “equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”

Beyond their strained interpretation of the law, the memoranda attempted to craft an overall insulation from liability by arguing that the President has the authority to ignore any law or treaty that he believes interferes with the President’s Article II power as Commander-in-Chief. In one such example, government lawyers argued that, for actions taken with respect to “the President’s inherent constitutional authority to manage a military campaign, 18 U.S.C. §2340A (the prohibition against torture) must be construed as inapplicable to interrogations undertaken pursuant to his Commander-in-Chief authority.”

These documents, which were released publicly after they were widely leaked, purported to provide authority for an aggressive effort to extract information from detainees using means not previously sanctioned.

We do not construe the giving of good faith legal advice to constitute endorsement or authorization of torture. Moreover, it is unclear to what extent these memoranda represented or formed the basis for official policy. However, what does seem clear is that the memoranda and the decisions of high U.S. officials at the very least contributed to a culture in which prisoner abuse became widespread.

The Administration has acknowledged that the conduct that was featured in the Abu Ghraib tapes violated the law, and pledged that those who committed the violations would be brought to justice. In addition, at least six investigations are under way with regard to the abuse of detainees. It is important these investigations be thorough and timely, and that they be conducted by officers and agencies with the scope and authority to reach all those who should be held responsible.

Report 10B to House of Delegates at 3-4 (footnotes omitted).

I believe that the United States is as committed to the humane treatment of prisoners as any nation, and the actions of some soldiers, and perhaps even some commanders, are aberrational. But, there can be little question that the image of this country throughout the world has rarely been damaged more in a short period of time than by the photos and stories about the treatment of the Abu Ghraib prisoners.

It is time for Congress to act and to make clear that the Convention Against Torture And Other Cruel, Inhuman or Degrading Treatment (“CAT”), to which the United States is a party, recognizes no exceptional circumstances in which torture may be used, and that the United States’ ratification committed this country to reject cruel, inhuman or degrading

treatment if such treatment is prohibited by the Fifth, Eighth or Fourteenth Amendments to the United States Constitution (which we provided as a reservation when ratifying CAT). Congress should make clear that it is a crime for an American soldier or a contractor to torture prisoners, and should amend 18 U.S.C. 2340A to encompass torture wherever committed and regardless of the underlying motive or purpose. At the current time, the Uniform Code of Military Justice prohibits those covered from engaging in “cruelty and maltreatment” of prisoners whether or not the conduct violates CAT. 10 U.S.C. 893. There is no civilian parallel to the UCMJ provision. Although the ABA did not recommend it, Congress might consider making it a crime for any person to engage in “cruelty and maltreatment” of prisoners outside the United States.

There has been much debate – more heat than light in many instances – as to who is entitled to the protections of the Geneva Conventions. Much of the world believes that there are no gaps in the conventions and that all detainees are entitled to humane treatment under Common Article 3 of the Conventions. “Common Article 3” provides that detainees “shall in all circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating or degrading treatment.” Common Article 3 also provides that the “wounded and sick shall be collected and cared for.” Article 75 of Additional Protocol I protects all detainees captured in situations of either international or internal armed conflict. Although the United States has not ratified the treaty (nor has Afghanistan), it is generally acknowledged that relevant sections of Protocol I constitute either binding customary international law or good practice, in particular the minimum safeguards guaranteed by

Article 75(2). See Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, reprinted in *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 425-6 (1987). Article 75 provides that "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions" "shall be treated humanely in all circumstances" and that each state Party "shall respect the person, honour, convictions and religious practices of all such persons." Paragraph 2 of Article 75 prohibits, "at any time and in any place whatsoever, whether committed by civilian or military agents": "violence to the life, health, or physical or mental well-being of persons, in particular ... torture of all kinds, whether physical or mental," "corporal punishment," and "mutilation"; "outrages upon personal dignity, in particular humiliating and degrading treatment . . . and any form of indecent assault"; and "threats to commit any of the foregoing acts."

The U.S. rejection of Additional Protocol I was explained in a presidential note to the Senate as follows: "Protocol I ... would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations. . . ." See 1977 U.S.T. LEXIS 465. It is time for Congress to look at the standards set by and relied upon by other civilized nations and to provide that the United States will abide by the highest

standards for treatment of prisoners.

## **VI. Conclusion**

In this testimony, I have had the chance to address use of military commissions, detention of enemy combatants and treatment of detainees in United States custody. I urge Congress to raise its voice as to these issues. The Executive has had little Congressional guidance in its efforts to deal with terrorism. Congress shares authority with the Executive when it comes to wars of all sorts, and it is time for Congress to exercise its authority in cooperation and consultation with the Executive. It is not easy to fight any war, and the war on terror poses unique challenges. We struggle to arrive at appropriate responses to the challenges, and it is not surprising that we may make missteps or falter from time to time. But, we do not struggle alone. Terrorism has stricken Spain, England and other countries in addition to the United States. The international community must fight the battle together, and the United States must be a leader. To lead effectively, however, we need to show the power of our ideas and our principles as well as the power of our guns. We do this best when Congress is actively involved with the Executive setting standards for the United States of which we and the world can be proud and holding us true to them.

Thank you.