

PANEL I OF A HEARING OF THE HOUSE ARMED SERVICES COMMITTEE

- SUBJECT: UPHOLDING THE PRINCIPLE OF HABEAS CORPUS FOR DETAINEES
- WITNESSES: STEPHEN OLESKEY, PARTNER AT WILMER, CUTLER, PICKERING, HALE AND DORR LLP; DAVID KEENE, CHAIRMAN OF THE AMERICAN CONSERVATIVE UNION; PATRICK PHILBIN, FORMER ASSOCIATE DEPUTY ATTORNEY GENERAL AT THE JUSTICE DEPARTMENT; LT. COL. STEPHEN ABRAHAM, UNITED STATES ARMY RESERVES;
- CHAIRED BY: REP. IKE SKELTON (D-MO)
- 2118 RAYBURN HOUSE OFFICE BUILDING, WASHINGTON, D.C.
- 9:20 A.M. EDT THURSDAY, JULY 26, 2007

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REP. JIM SAXTON (R-NJ): (In progress) -- if it requires our soldiers to read terrorists Miranda rights or to take a battalion of lawyers onto the battlefield. We've tried the former approach and it doesn't work.

During the trial of the terrorists responsible for the first World Trade Center bombing, the discovery rules of the criminal justice system gave the defense access to information that found its way to the al Qaeda camps in Afghanistan. The DTA and the MCA framework is crucial because it is crafted for the conduct of war, providing procedures flexible enough to account for the constraints and conditions of the battlefield.

Mr. Chairman, five years plus into this war, we have crafted a new policy tailored for the new conflict that will work. Now it is upon us to exercise discretion and give this policy a chance.

Mr. Chairman, I'd like to submit at this time for the record the executive summary of a report released just yesterday by the Combating Terrorism Center at West Point, which analyzes 516 CSRT unclassified summaries that took place between July of '04 and March of '05. I note that the CTC study found that 73 percent of the unclassified summaries meet CTC's highest threshold of a demonstrated threat as an enemy combatant. I have the report here, which I ask unanimous consent be included in the record.

REP. SKELTON: Without objection, it's included.

REP. SAXTON: Thank you, Mr. Chairman.

REP. SKELTON: I do, however, introduce the report on Guantanamo detainees, Mark Denbeaux, professor at Seton Hall, and Joshua Denbeaux, for which the West Point report that you have, plus the preliminary response to that report. And I wish that they also be included in the record. The one that you, Mr. Saxton, include in the record is the one in the middle. Without objection, each of them will be placed in the record.

I'm having a little bit of trouble with your name. Is it Oleskey?

MR. OLESKEY: It is, Mr. Chairman.

REP. SKELTON: Good.

MR. OLESKEY: Yes. Thank you.

REP. SKELTON: I got it. Okay, Mr. Stephen Oleskey, we'll call on you first.

Let me also state that, without objection, each of your written statements will be included in the record in toto. And if you could condense them, that would move us along much more rapidly.

Mr. Oleskey. I got it?

MR. OLESKEY: You do, Mr. Chairman. Thank you, Ranking Member Saxton, members of this distinguished committee.

My name is Stephen Oleskey. I am a partner in the law firm of Wilmer, Cutler, Pickering, Hale and Dorr. I appear today to testify in support of H.R. 2826, filed by the chairman and other members of this committee, to restore habeas corpus to the approximately 375 men detained in Guantanamo.

Since July 2004, my firm has been representing pro bono in habeas corpus proceedings six men from Bosnia. These men were living with their wives and children in Bosnia in October 2001. Bosnia was far from any battlefield. The U.S. government insisted that the Bosnian government arrest the six on suspicion of planning to blow up the U.S. embassy in Sarajevo. The Bosnians said they had no evidence of any such plot. The U.S. said it wanted the men arrested anyway immediately, and so they were.

The men were held for 90 days while an extensive investigation, which included our own FBI agents, was carried out under the supervision of a judge of the Bosnian supreme court. The men's homes and offices were searched for incriminating evidence, but no evidence of any such plot was uncovered.

After 90 days under Bosnian law, the Bosnian judge ordered the men released for lack of evidence. There were rumors, however, that the men would be sent by the U.S. to a new prison in Cuba. Therefore, their lawyers sought and obtained an order from the Bosnian human rights chamber court, set out by the Dayton Accords prohibiting such an action.

At the U.S. insistence, however, the men were sent immediately to Cuba. They arrived on January 20, 2002 and have been kept there without charge or trial for five years, seven months and six

days. We filed habeas petitions for them in July 2004. We have devoted thousands of hours to investigating their case, including visiting them 11 times in Cuba.

The men were all labeled as enemy combatants in the fall of 2004 by CSRT panels. Let me remind you briefly how that CSRT system was created in seven days in early July 2004 by then-Deputy Defense Secretary Paul Wolfowitz immediately after a Supreme Court decision held there must be some formal process to hold men without trial indefinitely in Guantanamo.

The administration has said these men can be held until the end of the war on terror. This means, as Justice O'Connor wrote in 2004, that they can be held the rest of their lives, and all as a result of a CSRT process in which they had no counsel, were not told what the secret evidence was against them, could offer no witnesses except fellow prisoners, and could offer no documents to rebut the very sweeping general claims made against them in the secret evidence.

If all that was not enough of a stacked deck, all the evidence the government gave the CSRT, whatever the source or quality, was presumed by the Wolfowitz order to be correct.

In 2004, in the *Rasul* decision, the Supreme Court appeared to say that all Guantanamo habeas corpus cases could go forward on the merits in federal district court. Then, in 2005, in the Detainee Treatment Act, a previous Congress provided for limited review of CSRT decisions by the Court of Appeals in Washington. But this review was confined to whether the CSRTs had complied with their own procedures. You will hear today from me and Lieutenant Colonel Abraham how one-sided these procedures were and how grossly unfairly they were applied.

Then, in 2006, the last Congress passed the Military Commissions Act. This act sought to strip habeas corpus rights from any alien anywhere in the world seized by our military and labeled enemy combatant by a CSRT.

Last week's decision by the D.C. Court of Appeals on preliminary procedural issues in the first cases heard under the DTA underscores how inadequate that review process is compared to a habeas procedure before a federal trial judge.

We are left with a host of unresolved questions about what a Court of Appeals review of each CSRT will involve and how long it will take to resolve even a single case. These unresolved issues are not surprising. Usually, but not here, an appellate court reviews a detailed record of a lower trial court or federal administrative proceeding in which lawyers were present for all parties. Usually, but not here, recognized rules of evidence are applied.

Usually, but not here, there is no issue of evidence arising from torture or coercion. Usually, but not here, all parties are able to offer documents, witnesses, and cross-examine each other. But none of this happened for any detainee in the hundreds of CSRTs that took place.

Let me give you three brief examples from our own six cases of how truly unfair these CSRTs were and why habeas review is required. All detainees were declared enemy combatants based almost entirely on secret evidence they were not allowed to see, much less able to rebut.

As our client, Mustafa Ait Idir, said to his CSRT panel, "You say I am al Qaeda, and I say I am not. You say I am al Qaeda based on evidence that you cannot show me and that I cannot respond to. Maybe if you tell me who says this, I can say I know this man from somewhere and I can respond. But this way I can do nothing. Excuse me, but if someone said this to me in my country, we would laugh."

Mr. Ait Idir and another of our clients asked that the decision of the Bosnian supreme court from January 2002, that they be released immediately for lack of evidence, be given to their panels. Obviously this would be an important fact to consider. Both panels found this publicly filed legal document, available on the Web and in our pleadings, not reasonably available. Not one of the six panels for our clients ever saw this important document.

Let me give you a third example of how fundamentally unfair these procedures were. The procedures allowed detainees to call reasonably available witnesses. One of our clients asked that his panel contact his boss at the Red Crescent Society of Abu Dhabi in Sarajevo, where he was a full-time employee doing relief work with Bosnian orphans when arrested. The panel declared the witness was not reasonably available. Three months after this finding, I went to Sarajevo, I picked up the local telephone book, found a number for the Red Crescent Society and called the witness. Within 24 hours, I had interviewed him. He confirmed my client's account of his employment and outstanding character, an account that his CSRT never heard.

As these and many other examples show, the CSRT process was too full of holes for any court of appeals to patch years later. Based on our expensive -- extensive experience and observation, the CSRT process is disgraced and disgraceful. No amount of limited tinkering with individual CSRT proceedings by a federal appeals court is likely to produce a fair result because the CSRT process was not designed to be fair or to consider objectively whether to continue to hold these men. Finally, let me tell you a few important facts about a habeas hearing. Habeas is not a jury trial. It is a hearing by an Article III federal judge alone, one who reviews habeas petitions frequently. Habeas hearings are not exotic. They are routine. There were 22,000 habeas petitions filed last year in the federal courts. We are talking only of an additional 375.

Habeas is not a criminal trial. There will be no Miranda issues. The only issues for a habeas judge will be one, whether the government's evidence before the court is sufficient to hold the detainee indefinitely or two -- in some cases -- whether the detainee can be transferred by the government to another country where he fears torture. The habeas standard will not be the criminal law standard of proof beyond a reasonable doubt, but a lesser standard of review. The habeas judge will independently review the evidence he or she considers relevant whether that evidence was given to the CSRT or not and that judge will look at exonerating evidence for the first time, virtually none of which was provided to any CSRT panel.

Finally under habeas, the trial judge can order a detainee released in a proper case instead of being sent back for yet another CSRT. In a habeas hearing, American citizens can have some confidence there's likely to be a fair and finally decision thoughtfully arrived at. Contrast this with Brigadier General Jay Hood's statement several years ago in the press. He had been in charge of Guantanamo. Quote, "Sometimes we just didn't get the right folks, but nobody wants to be the one to sign the release orders. There's no muscle in the system," unquote. The federal trial judge in a habeas hearing will put some muscle in the system, and some muscle is what the chairman's bill will provide. The jury-built seven-day CSRT process needs finality and certainty, not endless do-overs where the Court of Appeals sends cases bouncing back to yet another CSRT and the case then rebounds again back to the appeals court while more years pass.

HR 2826 brings integrity and finality to this process. It restores the habeas rights that the last Congress took away. It leaves the federal trial judges -- not appellate judges -- what trial judges do every day and do very well -- sift the evidence, assess it, decide what other evidence a detainee should be allowed to offer. In a habeas case, the trial judge, not three military officers, decides whether there is -- the government has shown enough to justify holding a detainee for a lifetime or should instead now be released. Yes, let us take the truly evil men who our military seize on

the real battlefields in this world, put them on trial in federal court or in appropriate cases before a military commission. There've been over 300 terrorists convicted or who pled guilty in recent years in federal court. By passing HR 2826, this committee can begin to restore the confidence of the rest of the world that this great country remains a shining example of a nation committed to living by the rule of law, no matter how a new enemy -- our new enemies provoke us to experiment with seven-day fixes and seemingly stacked decks.

Thank you, Mr. Chairman and members of the committee.

REP. SKELTON: Mr. Oleskey, thank you.

Now Mr. Keene.

MR. KEENE: Chairman Skelton, Mr. Saxton, and members of the committee, let me begin by thanking you for the opportunity to appear before you this morning.

My name is David Keene. I'm chairman of the American Conservative Union and co-chair of the Constitution Project's Liberty and Security Initiative. I'm here today because as a conservative, I believe that ours is the greatest and freest nation on the face of the earth. I'm here today because as a conservative, I believe we can defeat our enemies without compromising the values that have made this nation great. As citizens, we owe it to ourselves to support realistic measures needed to protect our nations. But men and women of goodwill, regardless of party, have to be able to make certain that our rights survive the stresses of the war in which we're today engaged and the zeal of those fighting it who sometimes forget just what it is that they're fighting to protect.

Since 9/11, Congress has granted the executive branch extraordinary to identify, pursue and eliminate threats to the safety of this country and her citizens. I am one who believes that Congress was correct in granting much of the power sought because of the need to deal with a new kind of enemy in an age of technological advancement that might otherwise have given our enemies advantages that we couldn't match. The fact that we've successfully avoided another attack within our borders is testimony to the effective way in which those charged with our protection have pursued their mission using the traditional and newly granted powers available to them.

On the other hand, as a conservative I believe it is always wise to look critically at every request for more governmental power. Those charged with protecting us naturally want all the power and flexibility they can get to pursue their mission, but sometimes forget that in protecting us there's a danger that they might inadvertently damage the very values they're trying so desperately to protect and preserve. A few days after the terrorist attacks in New York and here, then-Defense Secretary Don Rumsfeld said that if we change the way we live as a result of the terrorist threat we face, the terrorists will have won. The question we have to ask ourselves as we pursue victory over those who would destroy our way of life is whether the steps we take to achieve victory risk the destruction of who and what we are. It's vital that we preserve the tradition -- traditional American constitutional and common-law rights that have made our regard for human liberty unique in world history. I'm here today not to question the validity of holding terrorist suspects at Guantanamo Bay or anywhere else, but to urge that those who do hold have the ability to seek an objective review of the legality of their incarceration.

Throughout our nation's history, the great writ of habeas corpus has served as a fundamental safeguard for individual liberty by enabling prisoners to challenge their detentions and to obtain meaningful judicial review by a neutral decision maker. Although I agree that our government

must and does have the power to detain foreign terrorists to protect national security, repealing federal court jurisdiction over habeas corpus does not serve that goal. It is crucial that we maintain habeas to ensure that we are detaining the right people and complying with the rule of law. Those who argue against extending habeas rights to those being held at Guantanamo like to describe those incarcerated there as among the most dangerous of our enemies and suggest that anything that might lead to the premature release of any of them would constitute a dire and immediate threat to our national security.

I have no doubt that some of those being held there today are enemies who deserve to be exactly where they are. But the purpose of a habeas hearing is not to release the guilty, but to separate the innocent from the guilty.

Many of those being held there were shipped to Guantanamo without any proof whatever that they ever even intended to engage in actions against us. Defense Department data suggests that there's evidence that about eight percent of them actually fought against us, but that as much as 55 percent of the remainder have never committed a hostile act against the United States or our allies. Many of these people have been in prison for five years or longer and may be held indefinitely without ever being brought to trial for anything at all, even though the CIA reported five years ago that most of them, quote, "don't belong there," unquote.

If we're to hold people indefinitely without charge, we should at the very least want to be certain that we're holding the right people.

Restoring habeas corpus is also important to protecting Americans overseas. America's detention policy has undermined our reputation in the international community and weakened support for our fight against terrorism, particularly in the Arab world. Restoring habeas rights would help repair that damage and demonstrate America's commitment to a tough but rights-respecting counter terrorism policy. Having said this, however, I have to say that I'm personally concerned not so much by what others might think of us or do as a result of our policies, but of what the cavalier dismissal of fundamental rights for those we're holding says about who we are. Therefore, I urge Congress to restore the habeas corpus jurisdiction eliminated by the Military Commissions Act because of who we are and what this nation represents. You can do that by supporting HR 2826, reporting it out of committee, and urging your colleagues to do the same when it reaches the floor of the House of Representatives.

Thank you very much.

REP. SKELTON: Thank you, Mr. Keene.

Mr. Philbin, correct?

MR. PHILBIN: Yes, sir.

REP. SKELTON: Please proceed.

MR. PHILBIN: Chairman Skelton, Ranking Member Saxton and members of the committee, I appreciate the opportunity to address the matters before the committee today.

The detention and trial of enemy combatants are critical functions in the continuing armed conflict against al Qaeda. The procedural rights that Congress grants enemy combatants to challenge their detention and trial are vitally important also, both because they can effect the

success of the military mission at hand, and because they play a role in reflecting America's commitment to fairness and the rule of law. The recently released National Intelligence Estimate provides a reminder that our conflict with al Qaeda still presents a grave, continuing threat to our national security. Even in the face of this on-going threat, Congress and the executive branch, working together under the guidance of the Supreme Court, have created a fair system for reviewing enemy combatant's detention and trial by military commission, a system that exceeds the United States' obligation under the Constitution and under international law.

First, to address the risk of erroneous detention, the executive has established an elaborate system of review by combatant status review tribunals, or CSRTs. Although none detained at Guantanamo are American citizens, these CSRTs were crafted to satisfy the procedural requirement that the Supreme Court has previously indicated would be sufficient to justify detaining even American citizens as enemy combatants when detained in the United States. Supreme Court outlined those factors in Hamdan decision. Indeed the CSRTs provide detainees with more rights than are required for status determination under Article 5 of the Third Geneva Convention for lawful combatants potentially entitled to POW status, for they grant detainees not only the assistance of a personal representative, but also a right to review of the CSRT's determination and the U.S. Court of Appeals for the D.C. Circuit, and subsequent review in the U.S. Supreme Court through a petition for certiorari. Just last Friday, moreover, the D.C. Circuit made clear in Bismullah v. Gates that its review of the determinations of combatant status review tribunals would be robust. The Court rejected the government's position that reviews should be based solely on the record developed before the CSRT; that is the information actually presented to the CSRT. Instead, the Court will review all information available to the government, whether it actually made it into the CSRT process or not. That extraordinary level of judicial review for a military decision will ensure that even if there has been flaws in a particular CSRT proceeding, the Court will be able to look beyond what was presented to the CSRT. Mr. Olseksy has suggested that habeas is necessary because an Article 3 judge will put muscle into the system. I believe that the Article 3 judges of the D.C. Circuit have already demonstrated that they will put muscle into the system over viewing the CSRT decision.

Second, Congress has established in the Military Commissions Act a set of procedures for military commissions that is both unprecedented in its detail and fully adequate to satisfy all legal requirements, including those specified by the Supreme Court in Hamdan v. Rumsfeld and Congress has also granted detainees the right to challenge military commission judgment in the D.C. Circuit as well. These review rights are unprecedented in the history of warfare. There is no legal requirement to permit detainees another largely duplicative round of federal court review through habeas corpus. Just as aliens held at Guantanamo Bay have no Constitutional rights to assemble under the First Amendment, they also have no Constitutional right to habeas corpus. And even if they did, the current system nonetheless, would satisfy that right by providing an adequate substitute for habeas corpus through federal court review in the DC Circuit.

Given the absence of any legal defect in the current mechanisms Congress has provided for reviewing the detention and trial of enemy combatants, it becomes clear that amendments proposed to the MCA and DTA should be evaluated solely as policy choices for Congress to make. But from a policy standpoint, the case for re-establishing habeas review is not compelling. It would add a confusing, parallel avenue of judicial review that would sacrifice the benefits of the orderly procedure Congress established in the MCA. Moreover, it would do so without providing any additional substantive rights for the detainees. Nor is the simple step of adding habeas review cure any specific practical deficiencies that might exist within the current CSRT and military commission procedures and to which the D.C. Circuit might well-provide answers in any case, as the recent Bismullah decision indicates.

There are also two specific problems with HR 2826 that I'd like to focus members' attention on. First, there's a substantial risk that the geographical reach of habeas review created by HR 2826 would burden military commanders in the midst of critical operations overseas; precisely the danger the Supreme Court widely warned against more than 50 years ago in *Johnson v. Eisentrager*. Although HR 2826 contains an exception barring habeas jurisdiction over actions brought by aliens held, quote, "in an active zone of combat", it is unclear what areas would qualify under that undefined term. Defining that term would be left up to endless rounds of litigation. Moreover because the laws of war generally require commanders to evacuate prisoners from combat zones in any case, there can be little assurance this exception would accomplish its apparent objective of preventing the expansion of habeas jurisdiction to areas like Afghanistan.

Second, as a final point, I'd like to make sure that close attention is paid to the provisions in HR 2826 that would clear the way for exercise of jurisdiction over actions, quote, "for perspective injunctive relief against transfer". The transfer of detainees has traditionally been an executive process and that is so because it involves delicate and flexible negotiations with foreign powers. Through these negotiations, our government assures itself that the receiving government is willing to accept responsibility for ensuring that the detainee will no longer pose a threat to the United States or its allies, and also that the detainee once transferred, will not be subjected to torture. Inserting the courts into this process that involves negotiation with foreign government, particularly without providing any particular standard there to apply would be extremely disruptive.

Thank you, Mr. Chairman, for the opportunity to address the committee. I'd be happy to address any questions the committee may have.

REP. SKELTON: Mr. Philbin, thank you so much.

Mr. Abraham.

MR. ABRAHAM: Mr. Chairman, Ranking Member Saxton, and to the honorable members of this committee, I am here to speak as a witness to events while assigned to OARDEC. The lens through which I describe what occurred was at the time of my assignment based on 22 years as an intelligence officer and ten years as a lawyer. I'll resist the urge of a lawyer and be brief if I may.

In that time of note, I served as lead terrorism analyst for the Joint Intelligence Center Pacific following the brutal 9/11 attacks. I was at OARDEC from September of 2004 to March of 2005, the time during which nearly all of the CSRTs were performed. In that time, I was called upon to serve as an intelligence officer, a liaison officer with other agencies, and a CSRT tribunal member. What I expected and what occurred were two entirely different things.

The process was described to me as one in which we would determine in the first instance if detainees were enemy combatants. The reality was that the process was designed to fail.

To validate prior determinations. The very name ARDEC, by its letters, its initials, and by the words for which they stand, the Administrative Review of the Detention of Enemy Combatants, did not merely invoke a presumption, but a mandate.

As a liaison officer, I was charged to validate the existence of exculpatory evidence. In practice, I was denied the ability to review relevant information or confirm the existence of exculpatory evidence. As an intelligence officer, I expected to see files developed on detainees using specific information developed through close coordination with other intelligence agencies. In reality, the

information upon which CSRT decisions were based, were vague, generalized, dated, and of little probative value.

And as a CSRT Board member, I expected to be presented with sufficient material from which to reach conclusions regarding the status of detainees. What our Board received was not only insufficient but evidence to profound lack of credibility as to both the source of the information and the process of review. When our panel questioned the evidence, we were told to presume it to be true.

When we found no evidence to support an enemy-combatant determination, we were told to leave the hearings open. When we unanimously held the detainee not to be an enemy-combatant, we were told to reconsider. And ultimately, when we did not alter our course -- did not change our determination, did not go back and question the very foundation by which we had reached our decision, a new panel was selected that reached a different result.

What I expected to see was a fundamentally fair process in which we were charged to seek the truth, free from command influence. In reality, command influence determined not only the lightning fast pace of the 500-plus proceedings, but in large part, the outcome -- little more than a validation of prior determinations that the detainees at Guantanamo were enemy-combatants, and as we have heard so many times, presumed to be terrorists who could be detained indefinitely.

I am not here today as an advocate for any detainee no matter what their status; I am not here as an advocate for legislation, but rather for truth silenced too long. I am here as a person charged by my oath as a commissioned officer and as an officer of the court to uphold and defend the Constitution of the United States. What I witnessed while assigned to ARDEC respected neither oath. The process of which I was a part did not discover the truth but ratified conclusions made long before my assignment. Those conclusions are entitled to no deference by this body or any other.

If I may, I recall a line from "Casablanca," where at the end Captain Renault said, "Round up the usual suspects," today they would be a Guantanamo. Thank you, Mr. Chairman.

REP. SKELTON: I think you gentlemen very, very much. Each of the four of you cause me to recall the valiant efforts of long deceased Colonel Carl Ristine from my hometown of Lexington, Missouri -- World War I veteran and recall as a judge advocate general officer during the Second World War. Carl Ristine was appointed to defend a man by the name of Dasch, one of the eight German saboteurs captured in 1942 -- four of which landed at Ponte Vedra, Florida, four of whom landed in Long Island, New York -- they were all captured and tried.

Carl Ristine, being the great lawyer that he was -- and I'm likening your testimony and your commitment to his record, Colonel Carl Ristine client, a fellow name of Dasch, was not executed as the others were as a result of the tribunal's conviction that year in 1942. So I thank each of you for putting forth your thoughts as great advocates and I appreciate each of the four of you doing this.

Mr. Oleskey, in your opening statement you highlighted the reasons why the CSRTs and its appeal are not adequate. Would you please review again the reasons why you believe that the Supreme Court will find that the current system does substitute that for habeas, please.

MR. OLESKEY: I couldn't hear the end of the question, Mr. Chairman, I'm sorry.

REP. SKELTON: Why it's not a substitute for habeas.

MR. OLESKEY: I think the Supreme Court will find it's not a substitute because it doesn't allow, in the DTA process, any real challenge to the evidence that was available to the governments in the CSRT. It's going to be impossible, in reviewing the record in a court of appeals, to call witnesses, offer affidavits -- perhaps to offer documents that weren't included in the CSRT file. It's only a record review of what happened in Guantanamo, and what the statute says is that the court of appeals should review that record to see if the military complied with its own procedures.

The burden of the testimony today is that, in their creation and in their implementation, those procedures were fundamentally unfair. I don't believe -- and many other lawyers and commentators don't believe, that in that circumstance the system can be found to be an adequate substitute for habeas and it will not be so found.

REP. SKELTON: Thank you.

Mr. Saxton.

REP. SAXTON: Let me -- let me ask Mr. Abraham, if I may. The case that I referred to in my opening statement, this Bismullah case -- and I said that, in my view, Bismullah decision bolsters the claim that DTA and MCA framework provides an adequate alternative to habeas corpus. The case, the Bismullah case and the decision did, in fact, give the Federal Court of Appeals of the D.C. Circuit the right -- bolstered the right to review, as well as to take into consideration, evidence that was not considered by the CSRT, did it not? Do you know?

MR. ABRAHAM: My understanding, sir, is that it did. However, unfortunately, the record that was placed before the court -- as are the records and the cases of every single detainee, do not contain all of the information that was reasonably available. The process was never calculated to allow for, or accommodate, all of the information that was immediately or even reasonably available. And, moreover, the process itself created a scheme -- and I don't mean that in the pejorative sense, but a system by which, through its streamlining orientation and focus, a quick result was preferred over a probing inquiry.

REP. SAXTON: My understanding is that the court, under this decision or pursuant to this decision, has the right to look at evidence that was considered by the CSRT as well as any other evidence that exists.

Is that not correct?

MR. ABRAHAM: My understanding is that you are correct as to the power or reach of the court. The problem is that the tools that are available to gather that information, certainly at the disposal of any of the intelligence communities and that would have been available within any other procedure, were not applied in the case of the CSRTs.

REP. SAXTON: Just -- just for the record, once the CSRT has rendered its determination of status of the -- of the detainee, the detainee, under the current law, is -- that we created last year -- is entitled to an annual administrative review board process and, not being satisfied with that process, has access to the Federal Court of Appeals in the D.C. circuit. And it is the Federal Court of Appeals that we are now talking about, and of course, if the detainee is not satisfied with the result of the Federal Court of Appeals, he has access to the United States Supreme Court. Is that correct?

MR. ABRAHAM: My understanding, sir, is that that is correct.

REP. SAXTON: Mr. Philbin, what is your view of -- of the Bismullah decision and how it affects the ability of the Federal Court of Appeals to do its work?

MR. PHILBIN: Well, Mr. Saxton, I think you've described it correctly, that it shows that the D.C. Circuit will be able to look at not only the evidence that was presented to a CSRT -- so this is not only review on a closed record -- the D.C. Circuit has said that it will have access and must be presented all evidence available to the government. And even if in the original CSRT proceeding the recorder -- I believe it's -- the recorder is supposed to gather the information available to the government -- even if there is some question as to whether all of the properly available information has been gathered, that too, I believe, would be subject to challenge in the D.C. Circuit, because part of their view is did the CSRT comply with its own rules, which include having available reasonably available evidence. The D.C. Circuit will be able to review how that standard is applied and whether it was properly applied in the CSRT in determining whether or the CSRT complied with its own rule.

So I think this is a very robust form of review and, in fact, it's a more searching, factual review than has traditionally been allowed in habeas corpus for military tribunal decisions of any sort. A lot of the discussion here about habeas is simply assuming that habeas review in this circumstance was identical to the way habeas is handled in the criminal justice system, and that's not necessarily true. The writ of habeas corpus, when it has been applied to military decisions in the past, the Supreme Court has made clear is very limited in its review and does not include searching into the facts and second-guessing the facts that were before a military tribunal. So a new law would have to be made to develop the law of habeas corpus to give it the kind of robust application that many are suggesting here.

REP. SAXTON: Thank you. thank you both very much.

REP. SKELTON: Mr. Reyes, please.

REP. SILVESTRE REYES (D-TX): Thank you, Mr. Chairman. Gentlemen, welcome, and thank you for your testimony.

Mr. Philbin, I first wanted to thank you, because we -- we had former Deputy Attorney General Comey in my committee, the Intelligence Committee, where we were taking his testimony about what had transpired on the issue of the terrorist surveillance program. And I wanted to thank you for your principled stand in -- on that issue, in terms of making sure that we complied with the Foreign Intelligence Surveillance Act and the deficiencies that were in that program, which we're looking into now. But thank you for that principled stand.

MR. PHILBIN: Thank you, sir.

REP. REYES: And knowing -- knowing your work through that experience in my committee, I was -- I'm interested in getting a reaction from you, because in reading your statement, you state, "I gained significant expertise with respect to both the legal aspects of the detention of enemy combatants and military commissions during my service with the Department of Justice from 2001 to 2005. And although it's been almost six years since the attack on the World Trade Center, al Qaeda continues to pose a grave threat to the nation." And then you quote from the -- from the NIE of this month, which was put out last week. And you also state in there, after that quote, that "Even in the face of such a threat, the United States has exceeded its obligations toward detainees

in the conflict with al Qaeda under both our Constitution and under international law. The political branches, through recent legislation, have crafted a system that provides unprecedented levels of review and access to civilian courts for combatants detained by the United States in the midst of an ongoing armed conflict."

So my question for you is I'd like your reaction to the testimony of Mr. Abraham and his experience, being part of one of those panels, and obvious frustration at what he was anticipating or expecting as a participant of those panels, and what his real experience was. What is -- what is your reaction to Mr. Abraham's testimony?

MR. PHILBIN: Well, I -- obviously, Mr. Reyes, I have no personal experience with the conduct of a particular CSRT proceeding. And from what Mr. Abraham describes, that it sounds concerning to me, if that is the way a CSRT is conducted. But I don't think that the solution for that, if there is a problem in the way particular CSRTs are conducted. Because when I was in government, I dealt at the level of policy here in Washington; we set policies and then expect things to be carried out as the policies are set. I believe that the CSRT policy, the way the system is set up as a policy, is adequate and ought to work properly. If, in fact, in the field it's not working properly, then the mechanisms for dealing with that ought to be more directly addressed to fixing the CSRT process, rather than doing something like passing legislation that simply restores habeas jurisdiction.

Habeas jurisdiction is just another round of litigation, another avenue of federal court review. It doesn't specifically address the kind of problems that Mr. Abraham was describing. I think that the D.C. Circuit has made clear that in the review Congress has already provided, the D.C. Circuit is going to be able to get into those kinds of problems. If there was other evidence out there that wasn't presented at the CSRT, D.C. Circuit has already said it's going to be able to look at that and find out about that. If a CSRT is applying a standard of what is reasonably available that makes things that are available seem unavailable, then the D.C. Circuit's going to get into that, on review. The argument will be made to the court that the CSRT did not comply with its own standards, that it applied an unreasonable standard of availability, and the court will rule on that.

So I think that the judicial review that is already provided proves the mechanism for getting at the kinds of problems that Mr. Abraham has described.

REP. REYES: So if -- if what his experience was, Mr. Abraham's experience was, if that is the rule rather than the exception, is it your feeling or your observation that we don't need to do anything? That the system will take care of that?

MR. PHILBIN: I think -- it's difficult to say if that's the rule rather than the exception. I think that --

REP. REYES: Well, I'm asking if that were the rule, rather than the exception, what -- what would you say we would need to do?

MR. PHILBIN: I think that the Congress ought to allow the D.C. Circuit review process to operate at least for the time being to see what sort of results it does produce. The Bismullah decision already indicates that some of the types of problems Mr. Abraham has indicated will be looked into -- will be questioned by the D.C. Circuit. And if the first round of D.C. Circuit review demonstrates that problems are uncovered and CSRT decisions are overturned because those problems are discovered, I think that demonstrates the system is working. But at least the first

round of review ought to be allowed to continue to determine whether or not it's going to have that effect.

REP. REYES: Thank you.

Thank you, Mr. Chairman.

REP. SKELTON: Mr. Bartlett.

REP. ROSCOE G. BARTLETT (R-MD): Thank you very much.

Thank you, gentlemen, for your testimony. We live in a great, free country which I'm really honored to serve. We are one person out of 22 and we have a fourth of all the good things in the world. And I ask myself, "What's so special about us that we should be so blessed -- so privileged that this one person out of 22 has a fourth of all the good things in the world?" There are several reasons, perhaps, but I think prime among them is our enormous respect for the rights of the individual. There is no other Constitution, there is no other equivalent to our Bill of Rights that provides such rights to the individual. I think this established the climate and milieu in which entrepreneurship and creativity could flourish.

I think we put at risk who we are if we put at risk these great civil liberties. Civil liberties are always the casualty of war. Abraham Lincoln suspended habeas corpus -- my second favorite president -- and Norm Mineta, who served as secretary of Transportation told me -- said, "Roscoe, I remember as a little boy holding my parents' hands when they ushered us into that concentration camp in Idaho." We're embarrassed now that we did that. We're engaged in a long war and I want to make sure that we don't put at risk our civil liberties as a result of our zeal to catch terrorists. I had some initial concerns about Guantanamo Bay. We put those captured men there saying that since they were not legitimate soldiers, they were not protected by the Geneva conventions. And we put them in Guantanamo Bay, which is not on our soil and we said that they're therefore not protected by our Constitution.

I note that there is a Geneva IV that protects everybody that has fallen through the cracks of the other Geneva conventions, and I note also that the Constitution doesn't protect just our citizens, it protects people. And I'm very pleased the Supreme Court said that those who are under our control are people protected by our Constitution. My concerns were heightened by the Military Tribunals Act. It said that we could use coerced evidence -- that's torture, in common language -- and that we could use secret evidence that the accused couldn't see in convicting them. I felt that the "let's torture them and then try them in a kangaroo court" bill -- I voted present when that bill was passed out of committee because of my enormous respect for the chairman of this committee. But when it got to the floor, I voted against it.

Mr. Keene, thank you very much for your testimony. I was beginning to lose confidence in many of my conservatives -- colleagues who didn't seem to understand the importance of these enormously valuable civil liberties that we have. I thought I might be into trouble -- in trouble with my constituents with this vote, but so many of them called in saying, "Thank the Congressman for voting against the torture bill. I want to ask you, why should we be looking for a substitute for habeas? Why should we invite criticism?"

MR. KEENE: Is that question directed to me --

REP. BARTLETT: No, sir. I'm directing the question to all of you. I'd like all of you to answer why should we be looking for a substitute for habeas corpus? Why should we invite the criticism of the world?

MR. OLESKEY: My response, Congressman, is that we shouldn't. You've addressed some of the issues why the Military Commissions Act doesn't substitute for habeas. Just to be clear in view of the prior testimony, the Appeals Court will be reviewing what the record is from the CSRT and it's -- and whether it complied with its own procedures. Those procedures, as you just pointed out, allow evidence based on coercion or torture. Those provisions allowed the CSRT to determine what was reasonably available. The Circuit Court could find that my client's boss' testimony in Sarajevo wasn't reasonably available, by in habeas I could supplement that with an affidavit. I probably can't do that in the Court of Appeals. And the Court of Appeals last week and the decision Mr. Philbin's talking about -- the Bismullah decision -- rejected attorney-client privilege by allowed mail that I sent my client in Guantanamo -- I can't get there very often. I have to fly there when the military allows me to. So mail is a really important way for me to communicate with my clients.

The Appeals Court felt under the Military Commission Act and the DTA it had to what the government wanted, which was to say, that the government can screen my correspondence with my clients about their case and if I object that, that they can go ahead and tell somebody in Guantanamo or in the Defense Department what it is I'm objecting to about the correspondence that I'm having with my clients. Habeas and the existing protective order that exists in the district court under the original cases won't allow that kind of interference in a very basic right that's critical to effective representation of anybody, particularly where a potential indefinite life sentence may be the result.

REP. BARTLETT: Mr. Keene.

MR. KEENE: If I may say something, I listen to all of this and I ask myself that same question. What we've done is -- or what's being suggested here is that Paul Wolfowitz, in seven days, could do a better job than the drafters of the Magna Carta or the United States Constitution, the Bill of Rights and the jurisprudence to two centuries. And yet we're -- we find the court decision, which was argued as a reason for not doing anything about it -- the court is tortuously trying to fix what Paul Wolfowitz did because there was no conceptual part of that plan that would have the D.C. Circuit look behind what was done at the earlier level. So the court is trying to fix something that was thrown together and doesn't work. And I listen to this and I looked out at you -- how many times have you been told not just on this issue, but on dozens and dozens of other issues that we do this at a policy level? And then after the policy's set by people who look at things at that level, it doesn't work where the rubber meets the road.

And there's only one person on this panel that was there where the rubber meets the road, and it's not enough to just dismiss that because we've dismissed it in government action and government action -- not just in the national security field, but throughout. And you know in dealing with your constituents that those folks at the policy level often develop things that just don't work on the ground. It's been a long time since I've been to law school, and I don't practice law. But when you look at laws, I think they say they've got problems on their face or they've got problems as they're applied. What the witnesses here have said today is that this law has problems on its face and it has problems as it's applied. And an alternative was in place before these laws and procedures came into being. It was developed centuries ago and it worked, and what's wrong with it?

MR. ABRAHAM: I'd like to make a few comments in response, Member Bartlett.

You ask, "Why should we be looking for a substitute for habeas?" Let me start by saying the background rule until the Rasul decision and the peculiar circumstances that the Supreme Court saw in Guantanamo Bay -- the background rule from Johnson v. Eisentrager is that habeas is not available to those detained as part of an armed conflict overseas. So the background rule is no habeas, no judicial review at all whatsoever. That was changed by the Rasul decision so that there could be habeas for those at Guantanamo Bay.

But I think that it is a somewhat pervasive error -- in my view an error -- to claim that habeas review for enemy combatants detained during an armed conflict is this very well defined, very well known specific set of review rights. It's not. There has never been habeas review for enemy combatants detained in an armed conflict before, because of the Johnson versus Eisentrager rule. So the law has to be developed about what exactly the court will do in habeas review.

I think that it was a wise decision for Congress to step in and say, we're going to have judicial review. We're going to have Article III court review where we're going to set up specific procedures for it so that we're not just developing things through litigation -- going through litigation about what the habeas review will be. We're going to set up specific standards. And I think the standards that were set up for review in the DTA are sufficient to address the concerns of allowing serious, robust judicial review.

The D.C. Circuit has made it clear that that review is going to go outside the record of the CSRT. It is not limited simply to the evidence that was presented to the CSRT. It is going to include all available evidence. If there are issues like the particular petitioner believes that evidence that was available was improperly ruled unavailable, that can be challenged in the D.C. Circuit and the D.C. Circuit will rule on that. And there's no reason to think that the Article III judges in the D.C. Circuit are going to be any worse or any more lenient in ruling on basic questions like that than some district judge in a habeas action would be.

And so I think the question also is: Now that Congress has established this specific procedure -- a new specific procedure to deal with a new and unprecedented situation -- why should we be adding habeas corpus, an undefined and somewhat amorphous habeas corpus review, as an alternative on top of that so that there are two avenues for judicial review that will simply add burdensome litigation? I think that the system Congress has set up in the DTA provides for adequate Article III court review and a returning to allowing habeas as a duplicative form of access to the courts is unnecessary and unwise.

REP. BARTLETT: If I might say, Mr. Chairman, I think that you --

REP. SKELTON: I want to suggest, Mr. Abraham, in answering the question we've run out of time. And because of the excellent nature of the question, I think everyone should be given the right to fully answer it.

Mr. Abraham, why don't you answer it -- and then your time will expire.

MR.. ABRAHAM: Thank you. I'll be very brief, sir.

I can only speak about the CSRT process, but through a very, I think, distinctive perspective. Sixty years ago on the soil of two continents people were rounded up. Nobody spoke for them and nobody listened. In the past six years, people have tried to speak from Guantanamo and

elsewhere and no one listened. I can't speak to which process is better, but I can tell you today: The CSRT process was neither a form for speaking nor for listening.

REP. SKELTON: The gentleman's time has expired. Thank you very much.

REP. ADAM SMITH (D-WA): Thank you, Mr. Chairman.

I have a couple of comments and one question based on actually, that last question there.

Just two things: First of all, the point of habeas corpus, as I understand it -- and you know a great deal more about that than me -- sorry, the microphone; I've got to get really close to it -- is basically that you should have a review from some group other than the people who locked you up in the first place.

My colleague, Mr. Snyder -- Dr. Snyder -- was telling me that, you know, it's interesting. The people who are most excited about habeas corpus are the ones who remember what it was like to be a country lawyer back in the day, if you will, like our chairman, which is that, you know, if you're picked up by the local sheriff and your review is his brother-in-law and his cousin down the street at the county courthouse, that's fundamentally unfair. So we put this in place so that you have some place to go where it's not the same people who locked you up. And that's an obvious problem with the CSRT process, as it is in essence the same organization if not the same people. And I think that's what Mr. Abraham encountered. So that's the credibility. And I understand it's a little bit different in this case.

But that's the second point, which Mr. Bartlett made quite well. And that is we have a major public relations problem in the world right now in what we have chosen to call the global war on terror. We're losing the larger battle for ideas, which is, as I like to put it, means that somehow we found a way to lose a PR war to Osama bin Laden. This is a piece of it, okay? There are other pieces, and I think the focus on this has a lot to do with some of those other pieces. But to come out and say, look, we have habeas corpus. It's established, as Mr. Keene described. Let's stick with that. It would help us enormously in that larger battle and ultimately that does help our troops. That does help the fight. I think our values are very important and this is, in Guantanamo, is one thing that's undermining them.

And you know, the final point on this, you know, Mr. Saxton made a point that this overwhelming cost -- I gather of doing habeas, which I find just not terribly supportable. I mean, we're spending \$12 billion a month in Iraq. The Defense budget has gone up enormously since 9/11, which is fine. You know, we're spending all this money to fight this battle, but you know, a few cases of a few judicial reviews are going to break the bank? I would submit that having our credibility intact is every little bit as important in fighting this battle as making sure that we have our troops where we need them.

So with all of that said, the judicial review point that was made -- I would like to ask the first two witnesses to comment on that. Why do you not think that this judicial review process, as was described, is adequate? Now, you know, my bias is that it's not. That habeas is, basically, is as you said, well-defined law. It gives you that clean look, whereas this is going to be necessarily restricted to a few things. I mean, the first thing that occurred to me was the whole, you innocence is not a bar to conviction thing. That basically, judicial review just looks to see if the process worked -- not if the process worked, sorry -- if the rules were followed. And if the rules are followed, then, you know, however bad the result may be, that's fine. But I'm curious on your

thoughts on the judicial review process and why it is not an adequate substitute in this case for habeas?

MR. OLESKEY: Well, first, because, as several speakers have pointed out among the Congress and here, coerced testimony -- testimony procured by torture -- can and apparently was admitted in the CSRTs and may stand on review by the Appeals Court.

Second, because as you just pointed out, Congressman, by specific command of the Detainee Treatment Act of 2005, the Appeals Court review is limited to reviewing the record. And Mr. Philbin says, well, the appeals court just said last week it can go to what was -- what would have been reasonably available, but that leaves out all kinds of evidence that an advocate would want a fact finder to have in the first instance, and therefore in review, if that fact finder was going to say you can be locked up for the rest of your life based on this kind of a limited review.

So it is a limited review. It ultimately will turn on what an appeals court says was or should have been reasonably available. So that's a limit placed by Congress. It's a limit placed by Congress to determine whether the procedures were followed -- and those procedures were written by Paul Wolfowitz in seven days. And as to the point about taking time and money, you know, there are 22,000 habeas reviews a year. We're talking about 375 --

REP. SMITH: At most.

MR. OLESKEY: At most. And these are not new skills for these trial judges to learn. It's what they do. It's not what appeals court judges do. These are very smart, talented judges in the circuit here. They're very respected judges, but they're now being asked to do something by Congress that they shouldn't be asked to do by making these reviews.

REP. SMITH: Mr. Keene, if you could just quickly -- if you have any thoughts on the judicial review process versus habeas.

I'm asking you to respond to your thoughts on the judicial review process versus habeas.

MR. KEENE: Yeah. As I indicated earlier, as it was designed the court was not to look beyond what was presented from the initial hearing. And this decision, recent decision, where the court says, well, we're going to look at what might have been reasonably available at the hearing level, is an attempt to fix that.

But going to the question of: why do we need to do it this way rather than through habeas? I hear the objection that, well, the habeas route requires a lot of effort and -- all this stuff. And yet, what we're trying to do is replace it with procedures -- as the previous -- as Mr. Oleskey pointed out -- procedures where we lay the same responsibilities or similar responsibilities on people who haven't had to do that before when there's a whole process and whole body of law and a whole way to do it. And I just don't understand it, I have to tell you.

I think your point -- people understand because of the fact that the right to habeas corpus, the right to have somebody look at whether you ought to be where you are or whether there's a case that you should be there is something that's understood worldwide. And people that don't have that right and nations that don't have it wish they do.

So why replace something that from the beginning of our nation has been one of the things that we've been most proud of and one of the rights of our citizens that were most proud of? Even if

you come up with something and name it something else that reasonably accomplishes the same thing, which we haven't, why would you do that?

Thank you.

Thank you, Mr. Chairman.

REP. SKELTON: Thank the gentleman.

I lay before the committee a letter dated July 25 this year, a Karen Mathis of the American Bar Association, and ask that it be placed in the record without objection.

And I also notice that several members are not present at this moment that came in before the gavel, so we will go to the list of after-the-gavel.

Mr. Jones.

REP. WALTER B. JONES (R-NC): Mr. Chairman, thank you very much.

And I am not a lawyer. I think I understand the Constitution and the importance as each one of you have, in your own way, made reference.

I want to read a quote then I think I do have a question. General Matthew Ridgway, a great World War II general, wrote a book "Soldier: Memoirs of Matthew B. Ridgway" in 1956. And I quote, "To me, nothing could more tragically demonstrate our complete and utter moral bankruptcy than for us deliberately to initiate a preventive war. Once we take that absolutely fatal step, our civilization would be doomed. We would have to rely on conquest for survival from then on until our society crumbled as the empires of Alexander and of Rome crumbled from their own inner decay. In all the history of the world, no civilization based on conquest has long endured. America would be no exception."

When I think about Paul Wolfowitz, Richard Pearl, David Wurmser, Douglas Feith and all these neocons that created the justification to go into Iraq, and I listen to learned men like the four of you on this panel today, I am offended. And I voted for this legislation, quite frankly. I am offended that we have to be here today to try to defend and protect habeas corpus which, as Mr. Keene said, is one of the bedrocks of this nation.

I just want to know, when I hear each of you speak --and Mr. Philbin, let me say I have great respect for you, and I don't disagree with you. But any time -- and it should be debated and thoroughly analyzed by courts of what the Congress does, and there's no question about that, and I fully agree with you. But as was said by Adam Smith earlier and said by many of you who spoke today, the world looks at America. We have been, and I hope we can still be, the great nation that people across this world have envied. But one of those reasons is because we have two sacred documents in this country that we revere -- the Bible and the Constitution. And I do not understand how people who believe that they have been given a privilege to serve in the Congress -- and we can all disagree on what the policies should be as it relates to terrorists and terrorism.

But my question is a simple question. I'm not the intellect that my friend from Maryland Mr. Bartlett is. But this simple question is, how would you say to the average American like myself that this is critical to maintaining a strong America?

I'll start with you, David Keene.

I know you'll be repetitive, each one of you. But I heard the colonel say that, you know, you were told to assume that it's true. I know that's military, but it's still wrong. We shouldn't assume truth. Truth should be truth just like the words of Jesus Christ.

David, would you try to give me an answer to what I'm fumbling with?

MR. KEENE: Well, I think the purpose here to discuss the question of whether or not we should grant habeas corpus rights to those goes to the nature of what our country is. And as I said in my prepared remarks, I'm not so concerned -- it should be a concern of this committee and it should be a concern of our policymakers -- but I'm not so concerned about what others think of us as I am about what we think of ourselves and who we are. And I urge the support of the chairman's bill to restore these rights precisely because I think it reflects who we are and who we should be.

REP. SKELTON: I thank the gentleman.

Mr. McHugh.

I'm sorry -- Ms. Sanchez then Mr. McHugh.

REP. LORETTA SANCHEZ (D-CA): Thank you, Mr. Chairman.

As you know, I'm very interested in this subject having brought the commission's act bill two years before this committee ever took it up. I also, as you know, currently have a bill out, H.R. 2543, the Military Commissions Revision Act of 2007, which would address the concerns I believe by the administration about giving unprecedented habeas access to war prisoners which, as Mr. Philbin said, has never been done before in the history of this nation. And also the need for the executive to have his Article II power to conduct military and intelligence operations free from judicial interference. But also recognizes the gravity of the liberty interests involved, the ambiguous and unconventional nature of this conflict and the inadequacy of the CSRTs to ensure that mistakes and executive abuses are curbed. So I would encourage members to take a look at that piece of legislation.

International law and the Supreme Court recognize the power of military commanders in warring nations to capture and to detain enemy combatants for the duration of a conflict. Historically, the U.S. has not extended the right of habeas corpus to alien enemy combatants held as POWs. In fact, in 1925, *Johnson versus Eisentrager*, these prisoners did not have a constitutional right to habeas corpus review. And of course, in 2004, the court said that enemy combatants held at Guantanamo Bay, Cuba did have statutory rights to habeas review, but that decision was, of course, pretty much mollified by the MCA last year.

So my questions to you is -- you can write some of these down because they're entailed -- I want to ask the panel, do you believe that enemy POWs or detainees have a constitutional right to habeas?

And, if so, what is the basis of your view? What limitations would such a right have? And, if so, why was the court wrong in *Eisentrager*?

And would you favor the statutory right of habeas corpus to apply everywhere, to all enemy POWs? For example, would you have granted it to Iraqi prisoners captured in Kuwait during the

first Gulf War, to go into the federal courts in D.C. and to challenge their capture on the battlefield? Would you have permitted German POWs captured in North Africa or Sicily in 1943 the right to challenge their internment through habeas?

And we can start down at the end.

MR. OLESKEY: I'll be happy to start, Congresswoman.

Johnson and Eisentrager, the case at the end of World War II, involved prisoners who had been through military commissions with lawyers, trials. Evidence was taken. It was a regular procedure that you have some confidence in. The Supreme Court looked at that and said, "We'll examine whether habeas should apply to German prisoners who did acts in China who were held in an allied war prison in Germany. We don't think that habeas should extend that far." It never has, so it didn't go any further.

Then, in the Hamdi and Rasul cases, as you say, in 2004, they looked at the people in Guantanamo and said, "You know, this is, under that lease the United States had since 2001 that gives us a unilateral right to be there, this is essentially part of the United States. These people didn't get the screening POWs get under Geneva or Army Regulation 19 (E-80 ?) on the battlefield, unlike what happened in the first Gulf War, or in most other wars that I'm aware of. Therefore, there needs to be some process put in place now.

REP. SANCHEZ: But now we have the MCA. Do you believe that they have a constitutional right to habeas now that we have the MCA?

MR. OLESKEY: The Supreme Court has said in some cases that fundamental rights under the Constitution can extend outside the continental United States. It addressed in the Rasul case -- in a footnote that's been much discussed, it said, "If what these men are alleging is found to be correct, it would make our conduct in violation of the Constitution, statutes or laws of the United States." That's as far as the Supreme Court has gone.

My own view is that the right to be free from indefinite imprisonment without a hearing is so fundamental. It is in the Constitution. It's right there. The framers put it in Article I, Section 9 --

REP. SANCHEZ: And it applies to United States citizens and those people within our boundaries. So would you extend it to Sicily? Would you extend it to the war in Iraq? And I need to -- after you answer that, I really need to move on. I want to hear the other --

MR. OLESKEY: I'm only advocating today for this bill, which does not extend it to those places, does not extend it to battlefields; talks about restoring habeas for Guantanamo, where my clients are.

REP. SANCHEZ: Anybody else?

MR. : I'm not going to speak to the constitutional history, but I will suggest that there are some differences. I wouldn't extend it as a matter of policy to battlefield POWs and the like. Many of the people that are being held at Guantanamo, like your clients, were not picked up on the battlefield, scooped up by American troops. Many of them were picked up on vague suspicion. Some were, in fact, turned over to us by tribes that were collecting bounties for doing it.

And then what makes matters worse is then we have a situation in which we're not holding them until an emergency, in historical terms, is over, but we can hold them forever, in essence, because the war on terror could go on forever.

And that, I think, qualitatively changes the situation and is why the chairman's bill addressing those kinds of prisoners in that location is worthy of support.

REP. SANCHEZ: I would just say, read my bill because it addresses this also.

And Mr. Chairman, if you would indulge me Mr. Philbin's comment, I would like to hear it.

REP. SKELTON: Mr. Philbin.

MR. PHILBIN: Thank you, Mr. Chairman.

I would just make two brief points. I do not believe that aliens outside the United States have a constitutional right to habeas. I think the Supreme Court got that right in Eisentrager. And the Eisentrager decision was not based in any on the fact that there had been military commission proceedings. It was based on a fundamental assessment of whether constitutional rights extended extraterritorially to aliens.

And in the 1990s, the Supreme Court emphasized, and I'm quoting, "Our rejection of extraterritorial application of the Fifth Amendment was emphatic in Eisentrager." It had to do with extraterritorial application.

And in terms of extending habeas all around the world, we certainly would not extend habeas to detainees or POWs outside the United States. But I think the committee should be aware there is a very real risk in H.R. 2826 that by excluding simply active combat zones, that bill could create a negative implication that anything that is not an active combat zone -- and who knows exactly what that is -- anywhere else in the world, habeas does apply. It will have that negative implication of extending habeas, and I think that's a serious problem with the bill.

REP. SANCHEZ: Thank you, gentlemen.

Thank you, Mr. Chairman.

REP. SKELTON: Thank you.

Mr. McHugh now.

REP. JOHN MCHUGH (R-NY): Thank you, Mr. Chairman.

Gentlemen, welcome; appreciate your comments.

I want to play a little bit off of what the gentelady from California was pursuing. But I'd like to start with Mr. Philbin.

You said something pretty emphatically. You stated that the process and the review and such under our current system of the CSRTs, as well as the MCA, gives rights that are, your quote, "unprecedented in the history of warfare."

I assume I can deduct and deduce from that that you feel that our obligation as a lawful and as a respectful country are being fully met as defined under the third Geneva Convention for enemy combatants. Is that true?

MR. PHILBIN: That is true, in particular because the third Geneva Convention doesn't apply to al Qaeda. Al Qaeda is not a signatory, so al Qaeda combatants have no rights under it. And for Taliban detainees, they don't have status as POWs.

REP. MCHUGH: Well, that was going to have been my next question; I appreciate your prescience. Therefore, the fact that you've just defined these are not signatories, they're not technically covered, yet we extend at least equivalent rights, would kind of suggest we're more than meeting what most nations on this earth would consider our legal obligations. True?

MR. PHILBIN: Yes, sir, that's true. In fact, we're going beyond. If we were in conflict with another signatory and detained people outside the United States and gave them POW status, they'd have no right to access to U.S. courts.

REP. MCHUGH: Two other things. I assume one of the reasons we encourage people to participate under the Geneva Conventions is that there'll be some semblance of rule and some semblance of propriety in warfare.

My understanding is that if this bill were to be enacted and if those who were detained currently at Guantanamo extended the rights, the rights would actually be duplicative. In other words, there's nothing in the bill before us that in any way takes away the current CSRT and MCA process but, in fact, layers another process of appeals and habeas corpus review. Is that true?

MR. PHILBIN: That's my understanding, yes, sir.

REP. MCHUGH: Would we not, in your language of creating sort of a perverse incentive, would we not, therefore, almost be encouraging people not to abide by Geneva, to, in fact, participate in this kind of unlawful combat and hopefully get sent to Guantanamo? They'd actually have better protections than those afforded under the rules of standard warfare?

MR. PHILBIN: Well, it would be backwards, yes, sir, because we would be providing more process to those who are unlawful combatants than would be provided to those with POW status under Geneva.

REP. MCHUGH: Thank you very much.

Mr. Keene, I noted in your very impassioned plea about restoring habeas rights -- and that was the word you repeatedly used, restoring habeas rights -- you also used the comment, "Those are the things that we've always provided to our citizens." And that was your words -- "our citizens."

You're not arguing that we somehow, on these detainees, strip them for the first-time detainee -- excuse me, rights of due process and -- and such, and that they are citizens of the United States?

MR. PHILBIN: No, Congressman. I was referring to the fact that -- that the court had statutorily suggested that they had -- that there were habeas rights extended there until it was removed by the Military Commissions Act. And my reference to "our citizens" was that --

REP. MCHUGH: But not constitutional.

MR. PHILBIN: -- that habeas is one of the things that we have always valued in this country for our citizens. I'm not -- I don't mean -- the two are not -- I did not mean to confuse those two.

REP. MCHUGH: So I take it from that that you don't -- you don't take exception or disagree with -- with Ms. Sanchez' comments that the provision of habeas rights would be revolutionary in our history? We've never done that --

MR. PHILBIN: We would not -- I would not support extending it as the examples that she was giving -- to battlefields, to everybody outside the United States. I think that the situation that we face with these people in that location, because of -- of all of the exigencies that we know about, the fact that they can be held there forever, the fact that they were not captured, many of them, on the battlefield, and that -- that extending habeas rights there, where the question is not whether you can hold without these rights enemy combatants. The question is whether they are, and that's what -- that's the threshold question that is not being answered under the current process.

REP. PHILBIN: I thank the gentleman. Mr. Sherman, with your forbearance, and I would use as precedent, I think, every other member here has gone well over. I appreciate the comments. Just for the record, I'm very concerned that there have been statements from the witness panels today that somehow the United States, and by suggestion this Congress, supports torture and that torture is part of that. And the fact of the matter is the MCA expressly and very clearly excludes the admission of any statement or evidence by torture -- a statement obtained by the use of torture shall not be admissible in a military commission, under this chapter.

So I understand the passion that's involved here, but I think when you start accusing the United States of -- of formally using torture in a process and, by rote and by suggestion this Congress, of formally endorsing torture is just not correct.

MR. KEENE: If -- if you're referring to my testimony --

REP. MCHUGH: I'm not asking. That's not a question.

MR. KEENE: -- I never used the word "torture" and never talked about it, and it has nothing to do with what I had to say.

REP. MCHUGH: With all due respect, Mr. Keene, that was not your question. It was my statement.

REP. SKELTON: I thank the gentleman.

Mr. Andrews of New Jersey.

REP. ROBERT ANDREWS (D-NJ): Thank you, Mr. Chairman. I thank the witnesses.

I think the meaning of the suspension clause of the Constitution is that absent some emergency, limited circumstances, this country will not be a party to a situation where any person can be held indefinitely without being confronted with the charges against him or her so there can be some fair and just resolution of those claims.

And so Mr. Philbin, I wanted to explore with you your conclusion that the procedures that have been set up under the CSRTs are a sufficient guarantee that such procedures are in place for the

detainees that we're discussing here today. Is there any provision in the law or regulation that sets up the CSRTs for competent and effective counsel for the detainees?

MR. PHILBIN: There's not a provision for legal counsel, no. There's a provision for --

REP. ANDREWS: So a personal representative, which I think is the phrase that you used, need not be a lawyer, correct?

MR. PHILBIN: Correct.

REP. ANDREWS: Need not be a competent lawyer, if the person is a lawyer, correct?

MR. PHILBIN: Well, it's not defined in terms of legal ability.

REP. ANDREWS: So the person could be a person who's trained to process paperwork, for example, correct? That could be the personal representative. Doesn't know the law.

MR. PHILBIN: It's a military officer who is not necessarily trained in the law.

REP. ANDREWS: Okay. Under the provisions that are set up for the CSRT, is -- is a detainee permitted to see evidence that would be used against him, subject to some in camera limitation or emergency limitation? Can they see all the evidence that's going to be used against them?

MR. PHILBIN: I believe that they cannot see the classified evidence.

REP. ANDREWS: Well, thus, isn't the phrase that they can see written summaries of the evidence that's going to be used against them?

MR. PHILBIN: I'm -- don't recall the exact phrasing of the rule.

REP. ANDREWS: It's the phrase that I think is used in your testimony. So if a detainee were held because of a hearsay report of someone in Bosnia, for example, the detainee would not know who the person who made the hearsay statement was, necessarily, would he?

MR. PHILBIN: I'm not aware exactly how the rules are applied, sir. I believe that that's possible. But if I could go to the -- go to the --

REP. ANDREWS: I think -- I think Mr. Abraham's given us -- I think Mr. Abraham's given us a very detailed description of how the rules are applied. My understanding is --

MR. PHILBIN: Well, in some circumstances, but if I could go to the basic assumption behind your question, sir --

REP. ANDREWS: Well, no, I'd -- no, I'd prefer that you answer my questions.

Under the procedures that were set up on the CSRT, is the right of the detainee to confront witnesses in the proceeding guaranteed?

MR. PHILBIN: I believe that he has a right to -- to call witnesses who are reasonably available, and may not be able to confront all witnesses for -- because of security or classification or other restrictions.

REP. ANDREWS: Well, under -- and under habeas proceedings, isn't it true that if there's a witness that might disclose something classified or sensitive, there'd be an in camera proceeding in front of a judge, where the competent lawyer representing the person who's the subject of the habeas petition would have a chance to confront the witness in that limited setting, isn't that right?

MR. PHILBIN: That's not necessarily true. I think that if you were talking about a habeas proceeding in a criminal case in the United States, where all of the constitutional protections that attached to criminal prosecutions applied, that might be the case. But for a habeas proceeding coming out of the detention of an enemy combatant, it's not clear what rule is to be applied. And this goes back to something that's fundamental to what we're discussing here, is whether or not there are constitutional rights to bring the suspension clause into play. And I don't think there are constitutional rights for enemy combatants detained at Guantanamo.

REP. ANDREWS: Well, of course, if that's -- that's -- higher authorities than you or me are going to litigate and decide that question, what the suspension clause means.

I wanted to ask you about the review. You put great credence in the review that takes place in the D.C. Circuit. But that review is based on the record that's created below by the CSRT, isn't it?

MR. PHILBIN: I don't think that's accurate, sir, because of the decision just last Friday in Bismullah. The government had argued that the D.C. Circuit --

REP. ANDREWS: I do, I understand that decision. I understand that it says that all the evidence that was available to the tribunal has to be made available to the court of appeals. But of course, that's evidence that's not been vetted through the process of confrontation of witnesses. That's evidence that's not been vetted through the process of discovery. That's -- that's just -- there's a difference between evidence and documentation. That's the essence of our adversarial system. So I respectfully disagree with your conclusion, and I would yield back.

MR. PHILBIN: Well, sir, you're correct that it is not the way things are handled in our adversarial system. But our adversarial system was developed for the criminal law. These are not criminal prosecutions; this is fighting a war.

REP. SKELTON: Thank the gentleman.

Mrs. Drake.

REP. THELMA DRAKE (R-VA): Thank you, Mr. Chairman. Gentlemen, thank you for being here.

I have to start by saying I think Congresswoman Sanchez really summed this debate up very well, and what divides this discussion, in my mind, is whether or not you think an enemy combatant was captured on a foreign battlefield, a person who has sworn to kill each and every one of us, is covered by the U.S. Constitution. And I personally do not believe that they are. Now, reasonable people can disagree, and we've heard that disagreement here today, but I truly do agree with Congressman Saxton in his assessment that we have not given these laws an opportunity to work, and this discussion may be a little bit premature.

But what I wanted to ask about, and to me it's really apparent and, I think, to everyone that our terrorist enemies are really adept at public relations, much better than we are. They've proven quite capable of using the World Wide Web to promote their message, their hate, and to recruit

others to their cause. So the question is if additional rights are extended to unlawful, enemy combatants, would you agree that this would greatly assist their efforts to recruit other people to their cause?

And the second question I have is, if we do extend habeas rights to unlawful enemy-combatants, what would be the expectation for our military at that point? Are they now going to be charged with collecting evidence? Are they going to have a dual role as a warfighter and as a police officer to compile this information? And so what would their role be?

Those two questions -- what impact it will have on what appears to be the success of our enemy -- and we all know from previous NIE reports that the one thing that will destroy them is if they believe and the world believes that they're losing. And I think this argument would give them the opportunity to think that there's one more thing they're winning on.

MR. OLESKEY: Congressman, let me start off on that. The issue of the rights extension troubles me because -- I have been to Guantanamo nine times personally, my firm's been 11 times -- I've seen what happened to my clients there in the early years. I've seen my client as being in solitary confinement for 14 months, 24/7; I've seen my client as trying to commit suicide right now because he thinks that's the only thing he has left that he has any control over. And the notion that any of these people would want to go there and be held as they are held -- even my clients who are not now in solitary confinement, I just think is a non-starter.

As Mr. Keene has said repeatedly, we're not talking about people, in most cases, who were found on the battlefields -- 5 percent of them were -- we're talking about people who were not found on the battlefields. And the question -- issue is, are they unlawful enemy-combatants or not? And we need a fair process to resolve that.

In terms of the second part of your question, what the military obligations will be -- if the military had been allowed to do what it's done in every other war -- as to the 5 to 8 percent found on the battlefields, and made screenings then of whether they were lawful or unlawful combatants, we probably wouldn't have this today.

If the administration hadn't decided back in 2001 that it would be a great idea to put people in Guantanamo -- because then the Eisentrager case from 1945 could be cited as precedent, where they wouldn't have any right to habeas even though habeas goes back to the Magna Carta and aliens got habeas in the New World before the Constitution -- then we wouldn't be here today. So that's my answer to your questions and I hope I am responsive.

REP. DRAKE: Mr. Philbin, would you like to answer.

MR. PHILBIN: Sure. I think that in terms of how it would affect al-Qaeda, I'm not sure that it would affect their ability to recruit more members but that it would be helpful to them, particularly in training operatives for resistance to interrogation. We know from captured al-Qaeda manuals that they are trained to exploit what they perceive to be the weaknesses provided by our legal system in order to resist interrogation. And the more it is apparent that they will have access to courts and will have access to lawyers, that's something that they can train for and use to resist interrogation when captured.

I think that, in terms of how it would change the military's role, it depends on how broadly habeas is provided. And I think there are dangers in the current proposal, H.R. 2826, that would go well beyond just Guantanamo and you would then be burdening the military. You know, there are

already attempts to have habeas petitions, I believe in Iraq and Afghanistan, and you could end up -- you know, Mr. Oleskey said his firm has been down to Guantanamo 11 times, lots of other firms have been down there lots of times -- you could have lawyers going to bases in Iraq in Bagram, Afghanistan, and diverting the military -- just as the court warned in Eisentrager -- from its mission.

REP. DRAKE: Thank you, Mr. Chairman. I yield back.

REP. SKELTON: Thank you.

Before I call on Mr. Loeb sack, Mr. Abraham -- true or false: coerced statements are allowed in CSRTs as has to do with continued detention, as opposed --

MR. ABRAHAM: I'm sorry -- sorry, sir, I didn't hear the question.

REP. SKELTON: Coerced statements are allowed in CSRTs has it has to do with continued detention -- on the one hand -- as opposed to the Military Commissions, which are for the purpose of prosecution and a finding of guilt under a crime. Is that correct?

MR. ABRAHAM: It is true, but fundamentally flawed in the question asked. Through the process of --

REP. SKELTON: My question is flawed, Mr. Abraham?

MR. ABRAHAM: Forgive -- forgive me, sir. It presumes that in the CSRT process --

REP. SKELTON: How would you rephrase the question, Mr. Abraham?

MR. ABRAHAM: Well, what I would have asked is, in the CSRT process, do you know anything about how you got the information? It's an important first question because while it is true in the Commission process, in the trial -- the war crimes trials that coerced statements, the fruits of terror may not be used -- none of these are issues that we can retrospectively examine properly nor could even have answered through the CSRT process.

You have to understand, the documents that the individuals saw -- not only the recorder who summarized documents given to him by report writers, but that the Board saw -- were heavily redacted, they were excerpts, they were summaries. You didn't know where it came from, in large part, whether it was the product of coercion. And, in fact, the only thing that you would know -- and the only remarkable document would be one where it was explicitly noted, "the detainee said." So you knew a source but you didn't know how that information had been obtained.

REP. SESTAK: Mr. Chairman -- would the gentleman yield for a moment?

MR. SKELTON: You bet.

REP. SESTAK: Thank you.

I have great respect for the chair, and my point -- because I believe your comment was directed to the comment, or the reading I made -- was that several of the witnesses, and contrary to Mr. Keene's objections, I never mentioned that it was his statement. I want him to be clear on that. I didn't accuse you of that. But witnesses today have said very affirmatively, as have members of

this panel, that torture -- I didn't use the word "coercion" nor does the MCA -- torture was being used. And I think that's -- that's an important point that needed to be clarified.

So my point was to torture, Mr. Chairman, as it applies in the MCA.

REP. SKELTON: Thank you --

REP. SESTAK: I thank the gentleman for yielding.

MR. ABRAHAM: You bet.

REP. SKELTON: Now Mr. Loeb sack, maybe you can ask a clearly- defined question of the panel. Mr. Loeb sack.

REP. DAVID LOEBSACK (D-IA): Not being a country lawyer, any kind of lawyer, I'm not sure that I can do much better. But thank you, Mr. Chair.

And not being an attorney, you know, this is all very interesting to me but I want to move away from some of the, I guess, more the legal aspects of what we're talking about because I have a grave concern -- as others on both sides of the aisle have expressed today, about the reputation of the United States and what all this has done to the reputation of the United States.

I just want to begin by mentioning a "Meet The Press" interview that Colin Powell -- where Colin Powell was present on June 10th of 2007. And for the record, I ask unanimous consent that we put that transcript in the record. Is that okay, Mr. Chair?

REP. SKELTON: (Off mike.) -- (inaudible) --

REP. LOEBSACK: Thank you.

Colin Powell was asked about Iraq by Tim Russert, and in the context of the -- or in the course of that discussion, Colin Powell mentioned a letter that he had sent to Senator McCain and he's quoted as saying, "The world is beginning to doubt the moral basis of our fight against terrorism" -- and also I'd like to put that letter in the record, if I may, as well ask unanimous consent?

REP. SKELTON: Without objection.

REP. LOEBSACK: Thank you.

Colin Powell went on to -- he was asked about Guantanamo, among other things, and he went on to say, and I quote, "I would simply move them -- talking about the prisoners -- to the United States and put them into our federal legal system." The concern was, quote, "Well, then they'll have access to lawyers; then they'll have access to writs of habeas corpus." "So what? Let them. Isn't that what our system's all about? And by the way, America, unfortunately, has two million people in jail, all of whom have lawyers and access to writs of habeas corpus."

And then he goes to conclude, "And so essentially we have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things like the Military Commission. We don't need it and it's causing us far damage -- more damage than any good we could get for it.

But remember, when I started in this discussion saying, quote, "don't let any of them go," unquote, put them into a different system, a system that's experienced, that knows how to handle people like this. In other words, Colin Powell, like I think everyone on this panel and everyone on this committee and everyone on the panel, is concerned, obviously, that we are at war with terrorists and that we have to do what we can, of course, to protect American interests. But at the same time, part of America's interests have to do with values. It's already been mentioned here.

Many of us have talked, over the course of American history, about America as an exceptional nation -- America exceptional as Ronald Reagan talked about that, the beacon on the hill, and John Winthrop back in the 1600s. And I think a lot of us have the concern that what's happening with Guantanamo and by withholding habeas from these prisoners that we are not the beacon on the hill around the world. Now, some will say that's fuzzy thinking, that's naive, what have you. But I would submit that it is in fact a vital American interest that we maintain our reputation, because we do need, whether we like it or not, cooperation of countries around the world to fight this war and to protect our vital national interests as well.

So I just have one question for Mr. Philbin. In December when you wrote this letter to John Yoo or this memorandum and you mentioned -- that was in December of 2001 -- and you mentioned the Eisentrager case that's been mentioned here a number of times. And you talked about Guantanamo and how none of this applied to Guantanamo because it was outside the sovereignty of the United States. And I realize the Justice Department doesn't deal in foreign policy. But did anyone think about, at that time, the consequences for America's reputation when you were discussing these issues and did anybody in the administration, you know? And I'll ask witnesses of the next panel the same question. But did anybody give any consideration to how this might affect our reputation and our standing in the world?

MR. PHILBIN: Well, sir, let me just correct one item for the record. It was a memorandum co-authored by John Yoo and myself --

REP. LOEBSACK: My apologies.

MR. PHILBIN: -- that we addressed to the Department of Defense. We were just addressing a legal question, and I couldn't go into policy discussions. In any event, I think that's a question better asked of the administration witnesses.

REP. LOEBSACK: I'll ask Mr. Keene, because you said that, you know, you weren't quite as concerned but that you're more concerned, obviously, about the United States, our citizens and who we are. But are you at all concerned about our reputation as well around the world?

MR. KEENE: of course I am, because America has always stood for something special to the peoples of the rest of the world. What I'm merely saying is that my real concern is not about what others think about it. That's something that should be particularly of concern to this committee because of your mission and responsibilities. But my concern is us, not them and not what they think but what we think and what we are.

REP. LOEBSACK: Yes, Mr. Philbin.

MR. PHILBIN: If I could add one further comment, I certainly agree with you that it is important for the United States how the United States is perceived around the world, because we do need allies. But I believe the fundamental problem many countries around the world have with the United States is the basic war paradigm that we have used for handling the conflict with al Qaeda,

treating is (as an ?) armed conflict. And it's not just habeas. Habeas is not going to solve the problem that the rest of the world has with -- for those who have a problem with us the way we're handling the conflict.

REP. LOEBSACK: Thank you, and I yield back.

REP. SKELTON: Thank the gentleman.

Mr. Kline.

REP. JOHN KLINE (R-MN): Thank you, Mr. Chairman.

Thanks to the witnesses for being here.

It has been a tremendously interesting discussion today, whether or not you're a lawyer. And I hasten to say that I am not, like my friend Mr. Loeb sack. It seems to me that we are fundamentally trying to answer the question whether we're in a law-of-war paradigm or a criminal paradigm as we look to whether or not we should grant habeas rights to enemy combatants for the first time ever.

I'd just like to make a comment. There's been a lot of discussion about the Constitution. I firmly believe that every member of this committee has a great love for the Constitution. We are all of us sworn to uphold and defend that Constitution, and I believe that we are trying to do so to the best of our abilities.

One of the issues we've discussed quite a bit is this issue of CSRTs has been folded into this discussion. And so Colonel Abraham -- Mr. Abraham -- you are the expert witness here. And I'd like to ask a series of questions here so we can better understand your level of experience and expertise if I could do that. So I'd just like to go through these and have you answer as quickly as you can, please.

In your opening statement, you have a discussion about what was done by case writers, those people whose job it is to gather information. Were you ever a case writer?

MR. ABRAHAM: I worked close with the case writers.

REP. KLINE: You were not a case writer?

MR. ABRAHAM: I did not physically write (many ?) of the reports.

REP. KLINE: Thank you, sir. Your statement also discusses what members of quality assurance teams did. Were you ever a member of a quality assurance team?

MR. ABRAHAM: I looked at the products in -- no, I was not.

REP. KLINE: You were not a member. Thank you.

MR. ABRAHAM: Correct.

REP. KLINE: You were an intelligence liaison as I understand it. Can you give us some idea of how many times you visited intelligence agencies?

MR. ABRAHAM: Three to four times I physically went to one particular agency. And on many other occasions, I communicated directly with those agency representatives -- (inaudible).

REP. KLINE: That's good -- three or four times -- thank you very much. There were, according to my notes here, there were a number of duties that people could perform -- recorder, personal representative, convening authority, legal adviser. Were you ever any of those?

MR. ABRAHAM: Well, I was in fact a member of a tribunal. I was thereby prohibited from serving in any of the other positions.

REP. KLINE: Thanks. So you were a panel member?

MR. ABRAHAM: I was a panel member.

REP. KLINE: Okay. My notes here show that we have had 558 CSRTs were conducted. How many of those were you involved in? How many panels were you on?

MR. ABRAHAM: I was on one panel that heard one detainee's case.

REP. KLINE: So I appreciate that that brings a perspective. But we are looking to you for information about this entire process, and you've served on one panel out of 558 in a role as a panel member where you were precluded from these other things. And you weren't a case writer and you weren't on the quality assurance team. So I don't doubt that you paid close attention and you're reporting accurately on your participation. But it seems to me that this is not the depth and breadth of experience that we probably ought to be hanging our decisions on. Why do you feel qualified to tell us about the entire process with what appears to be a fairly limited participation?

MR. ABRAHAM: If I may, sir --

REP. KLINE: Please, it's a question to you.

MR. ABRAHAM: Thank you, sir. The questions that were asked do not necessarily reflect the totality of the experiences that I had. Specifically, you asked me if I was a case writer, but case writing was a responsibility of many individuals who were assigned there, very few of them having any involvement in intelligence activities or intelligence products. One of the things that I did as a qualified intelligence officer was work with each of those case writers as questions arose, as the circumstances dictated, explaining to them the type of products that they were reviewing and in fact dealing with them on questions of the very products they were reviewing. In that regard then, I saw not just one file or one detainee's file but more than 300 files and thousands of individual documents.

REP. KLINE: Excuse me. What did you do most of the time? What were the majority of your duties?

MR. ABRAHAM: The majority of my duties --

REP. KLINE: Were you involved with the tracking system? Or what was your principal function down there?

MR. ABRAHAM: Well, sir, I had three functions, neither of which I don't think anybody could describe as being principal. One of them was to individually track every step of the process for the detainees that were being tracked between September 2004 and February of 2005. So what I literally did, if I may, sir, was I generated the letters that gave notice to the detainees that they were going to have a hearing within 30 days. I generated the letters that were sent out to the various ambassadors, to the Department of State, to the intelligence agencies asking them to begin to review their files. I generated the letters that were used to identify the individuals that were going to be put on the panels. I generated the letters --

REP. KLINE: Excuse me. So most of your time you were writing letters?

MR. ABRAHAM: No, sir.

REP. KLINE: Or were you participating in panels? I mean, what concerns me here, I know that somebody has to track the tracking system.

REP. SANCHEZ: Will the gentleman yield?

REP. KLINE: Happy to yield.

REP. SANCHEZ: Mr. Kline, I'm much more interested in understanding about habeas corpus than I am in having you impeach this witness.

REP. KLINE: Thank you. Reclaiming my time, this issue of CSRTs was brought up by the chairman by bringing this witness. And I think we need to understand better what the witnesses' level of experience is, because his testimony is relevant to what the chairman wanted to do.

I yield back.

REP. SKELTON: Before I yield to Mr. Sestak, let me ask the witness, was there any command influence, in your opinion, on your work in CSRT?

MR. ABRAHAM: Yes, sir. There were two aspects where command influence came directly to bear -- again, in my perspective and based on my experience. The first related to one of the what I believed was highly significant tasks that I was charged to do. Following the opinions of the courts as were then applied in the practices of the CSRT process, through OARDEC, I was specifically charged to go to certain intelligence organizations, whether physically directly, or through communications, and validate the existence or nonexistence of exculpatory information. As a part of that process, I also reviewed the thousands of documents that were included with many of the tribunal packets. I immediately advised my seniors, senior leadership -- the deputy director of OARDEC and the director of OARDEC -- that, one, when I went to the agencies I was not only frustrated but prevented from seeing or knowing the extent or even the existence of exculpatory evidence. That, to my mind, was a mission show-stopper, and I was dismissed by the comments.

Secondly, as related to the documents themselves, I raised frequent concerns with the individuals who asked me about the documents, the individual who used the documents, regarding their substance -- the so-to-speak "logical leaps" that were included in their superficial, oftentimes, review or review of incomplete documents. I expressed these concerns; these were dismissed. Finally, when I was on a tribunal -- yes, sir, one tribunal -- all three members said, "This is not even evidence." We were told, "Go back and do it again."

And if I may address a prior question that was asked of whether or not these practices followed a procedure or whether they were just individual string, in fact, if you look at the CSRT implementing guidelines, they very specifically say that no matter what we find, it is little more than a recommendation to the director of OARDEC, who can choose to accept or reject it. It was that rejection (to that mind ?) was the paramount and clearest expression of command influence that I could have seen in the entirety of the time that I was there.

REP. SKELTON: Thank the gentleman.

Mr. Sestak.

REP. JOE SESTAK (D-PA): Thanks, Mr. Chairman.

Listening to today's discussion does give me concern why we don't have habeas corpus. I remember being at the U.S. Naval Academy and they gave us a book to read, "Military Justice is to Justice as Military Music is to Music." Obviously, it was a critique of the Uniform Code of Military Justice. But I was taken, having -- when I read it, in this profession I was about to embark on for 30-some years in the middle of a war, Vietnam, that how we try to instill the dignity -- even in a war, the dignity in danger -- by the rule of law, not of command influence. I ended my profession having walked through Kuwait in another war and discovering that there's 40,000 individuals there that have nowhere to go. Because when Kuwait was established, you had to find your lineage to a certain number of family, and if you couldn't, you couldn't leave Kuwait, but you couldn't be a member of Kuwait. So they're the ones you see along the roads selling the rags and the stuff. They have nowhere to go. No law to resort to, no court.

So as I step back, I was taken, in warfare that we always wanted to have still the rule of law. And I looked at Kuwait and it just reminded me that down here in Gitmo, Guantanamo Bay, we actually are holding men on trial for how long? Until a man decides, not the rule of law. And as I look at how the CSRT was originally established, it's a man, not a court, that decides whether statements of coercion, however anyone wants to describe that, are actually -- or statements are actually a result of coercion, and if there's value to them. So as I step back, I'm concerned, for three reasons.

Mr. Keene, you stressed the first for me. What was I fighting for? Everybody knows when you're out there in combat, you're fighting for the guy beside you. But for this nation, you're fighting for its ideals. So two questions: Since they've gone back and forth on almost everything, if this really is, sir, for you, such a important issue, why only Gitmo? You know, habeas corpus is so simple. You talked about the Great Right in the 14th century. All it is is for an individual to go to have the government order a court to tell a warden the legal authority for detaining you. Why only Gitmo? Why not elsewhere? And sir for you?

MR. KEENE: Because --

REP. SESTAK: I was taken by your comment, "It's disruptive." Mr. Oleskey, please, but (that ?) first. You kept coming back, "Why set a second system up, because it's disruptive." I've seen a lot of disruptive things in my career, but to have that as the basis for why not, beginning with a system that's already established habeas corpus, which you may not agree goes to an individual, but I do think the suspension clause is important. Somebody, as Mr. Andrews said, higher will decide. But here we've taken a judiciary, in my opinion, and deprived it of the jurisdiction over law, what the Constitution gives it. Tell me why disruption? A second system that you -- (inaudible) -- have anything to do with the concern of starting out initially with what was already

given by this nation, the rule of law by habeas corpus? Sir, could you answer that first, my question? No, Mr. Oleskey. Why not? Why not have habeas corpus for wherever U.S. government detains people? Why only in Gitmo?

MR. OLESKEY: Which one of us are you addressing, please?

REP. SESTAK: You. Yes, sir, you. You touched upon it, but you never went over.

MR. OLESKEY: I'm a lawyer, so I -- I generally argue and respond in terms of the law as I've understood it and as it may evolve. The law as it stood has been that habeas corpus can be extended beyond the United States in some instances. What the Supreme Court has been grappling with are some of the issues we've been talking about today, which is where is it appropriate to extend the writ. Thus far, it's been extended to the Philippines in limited cases, and in other dependencies, and now to Guantanamo. As a -- as a lawyer who advocates for personal liberty, I'd be willing to see the process more broadly extended.

As a lawyer advocating for clients in Guantanamo, I make the case for my clients within the bounds of where the law has been. The law has been that they are entitled to habeas since Rasul in 2004. I just want that process to go forward. I know that the court of appeals, under the Military Commissions Act and the DDA, doesn't have the power to release people even if they disagree with what these CSRTs did. They can apparently just send it back for another round of CSRTs, and we're right back in what Lieutenant Colonel Abraham was talking about. A habeas judge can release people he determines who've been held for five or six or seven years, which is what we're getting to, who shouldn't be kept any longer without trial or charge. So within those bounds, as an advocate, that's where I come out.

I take your larger point, but it goes beyond what I am here to advocate for today.

REP. SESTAK: Sir.

MR. KEENE: I think that we fundamentally disagree on the legal point of whether or not there are constitutional rights at stake here. The suspension clause refers to the privilege of the writ of habeas corpus. In my view, the privilege of the writ does not extend to aliens outside the United States.

But getting to your question about disruption and why is that a basis that -- the law all along, until Rasul, for the nation's entire history, had been that when the nation conducts military operations overseas and seizes people in military operations, they are not entitled to the writ of habeas corpus. Over 600 attempts to get writs of habeas corpus after World War II were turned down by the Supreme Court. And the big opinion that explained why was Eisentrager, and it said rights do not extend to aliens outside the United States. And it explained that part of the reason that that makes sense -- a practical reason, that the Constitution is structured that way -- is that it would be a great hindrance to military commanders in the field, who are trying to subdue an enemy --

REP. SESTAK: I'm out of time, but I meant with Gitmo. Why would it be disruptive?

MR. KEENE: Well, it has been disruptive with Gitmo. The -- when the --

REP. JOHN SPRATT (D-SC): (Strikes gavel.) We need to move on to the rest of the members here today, if you'll wrap it up in a sentence or two.

MR. KEENE: The habeas actions were disruptive in the amount of control that petitioners wanted courts to exercise over access to Gitmo and conditions there. And I think Congress responded responsibly by providing judicial review through a mechanism that is less disruptive to the military operation at Gitmo, but it still provides Article 3 court review.

REP. SPRATT: Mr. Wilson of South Carolina.

MR. JOE WILSON (R-SC): Thank you, Mr. Chairman.

And I -- as I hear of the discussion about military law -- I served 31 years in the Army National Guard, 28 years as a JAG officer, and I have always been impressed by the people serving in the JAG Corps -- their professionalism, their efforts to be fair.

I've heard criticism of the Military -- Code of Military Justice. But in each incident that I've had the opportunity to proceed with the code and work with the code and work with Guard and military members, I have just been so impressed by fellow JAG officers and the code and the whole system of military justice.

And additionally, I have visited Guantanamo Bay twice. I was very impressed by the military personnel there, the intelligence personnel. We had full briefings. We had full access. It was incredible to me to see, through interrogation, the information that was received, which uncovered terrorist cells in Europe, in the Middle East, in the United States. It was incredible, the information that protected and saved, I think, thousands of lives -- of determining techniques of recruiting, the extraordinary ability to finance attacks on the United States, attacks on other countries around the world, and all of this because of the ability that we have had of detaining people who have every desire and intent to kill all of the American public.

As I look at this and look at the bill before us, Mr. Philbin, I'm very concerned that there are legal land mines present in what we're discussing, and in particular, that habeas corpus for alien combatants would not apply for persons who are in a zone of active combat. Would that -- and the question would be: Does that include Iraq and Afghanistan, all of Iraq and Afghanistan?

MR. PHILBIN: Well, I think that that is a difficult question, and that is a problem, in my view, with the bill because the term is not defined, what is an "active" zone of combat. And what would happen in litigation -- people have already filed and others will file petitions for habeas corpus for persons held in Iraq or at Bagram in Afghanistan, and then they'll start to argue in the courts about what does an "active" zone of combat mean. And there are probably other provisions in the U.S. code that refer to zones of combat -- I'm not specifically sure -- but for purposes of combat pay or other reasons -- and they might be defined in a certain way, and they might be only zones of combat, but not active zones of combat. And then, that'll be a way for lawyers to say that, well, even if DOD considers all of Afghanistan zone of combat for one reason, it's not an active zone of combat under this provision. If there is going to be a carve-out that works and that is intended to ensure that habeas petitions are not held -- entertained from Afghanistan or from Iraq, it ought to be a much more well-defined provision.

And as I pointed out in my prepared statement, there's also the concern that under the laws of war, generally commanders are required to remove prisoners from the zone of combat. That is term used in the third Geneva Convention, and while that convention doesn't specifically apply here, the general presumption under the laws of war is that you must take those detain out of the zone of combat. There's an argument for lawyers to make that anywhere they're held is not part of

the zone of combat and that habeas, therefore, would apply. So those are big dangers, big unknowns with using that language in this bill.

REP. WILSON: Additionally, I've had the opportunity to visit with our troops who I so greatly appreciate. I've got four sons serving in the military, so I have a personal interest. I've visited with the troops in Kuwait, I've visited with the troops in Kyrgyzstan. I have -- my next door neighbor served in Djibouti.

Would those be active zones of combat?

MR. PHILBIN: Again, it's hard to say because the term's not defined. I think that it's most likely that some place like Djibouti would not be considered an active zone of combat, at least from what I know.

REP. WILSON: Well, having heard discussions from people serving there, it's a very interesting place.

Final question is also a reference to action solely for prospective injunctive relief against transfer. What does relief against transfer mean?

MR. PHILBIN: I believe that what that's intended to do is give the courts authority to stop temporarily here and decide on whether or not a detainee can be transferred to the custody of another country. Part of the United States policy at Gitmo is to try to transfer as many detainees as possible to the custody of other nations who are willing to accept responsibility for them.

REP. WILSON: But they couldn't -- it's a potential they could not be held and could not be transferred.

I yield the balance of my time. Thank you, Mr. Chairman.

REP. SKELTON: Ms. Boyda.

REP. NANCY BOYDA (D-KS): Thank you, Mr. Chairman. Whoa, there I go. Thank you. And I certainly appreciate the testimony of all four of you this morning, taking your time to do this. I would ask the committee's indulgence for a few minutes to share my own personal story in this.

Five years ago, if somebody had said I was non-political, that would have been an overstatement. I was completely apolitical for some different reasons and have listened to my father and my mother and my grandparents carry on for years about the younger generation and what's going on in our country and what's going to happen, and listened to this debate and worried about our country for years on how things are going to resolve themselves but always rested in that assurance that things would take care of themselves and that it didn't need my participation.

About four years ago I stood up kind of like you, Mr. Abraham, and said, I can't remain quiet any longer. I don't know what to do. The very core of our foundation of our country is about a balance of power. It's about checks and balances so that nothing can get too far out of line and that the problems that we solve -- some way or another, the pendulum will swing back and will get this country back on track.

The reason that I sit here today is because I believe that those checks and balances have been so severely undermined. And the CSRT, it may be a good system. It might work but it doesn't

provide us any assurance that there are any checks and balances, and that's a very fundamental right and the fundamental core of our democracy.

And so I applaud what you're doing to stand up and talk about what has been going on. And I hope that you are able to get that message out. It's not just that it didn't work; it's just that it was fundamentally flawed. And a core value that we share in this country is now under the consideration of this committee and will be under the consideration of this entire House of Representatives. And I hope that our country has not gone so far that we cannot bring it back into balance.

I certainly sit here today as one of those people who's a new kid in Congress because enough people in Kansas said it's gone too far, and that gives me hope.

Now let me ask my question. I do represent Kansas. I represent Leavenworth, and so the discussion certainly is about Gitmo, and I have a very specific question for you. Does the problems that we've seen at Gitmo -- somebody will go down and say, you know, they have good meals, they've got a good place to exercise in the day, there's not a problem and we're going -- that's not the issue at Gitmo. The issue is, are people being held, detained without being charged? Do they have a right to even ask questions about their detention in a way that we're used to in these United States? So it's not about the physical facility; it's about the black eye that's been put on.

And my question to you would be, can we carry out justice at Gitmo? Were we to -- were this Congress to say, we do want to return to the fundamentals of our democracy and we do want to bring back habeas corpus, can justice be served at Gitmo? Can we physically -- do we have to physically choose -- or close Gitmo or can we do it there?

MR.: What I can speak to, Madame Representative, is to what happened in the CSRT process. But we have to begin by remembering that the Constitution did not invent life -- the rights of life or liberty, that all it took was the absence of truth, a silence demonstrated through the CSRT process, to literally extinguish it.

We speak of the bulwarks of our Constitution, of rights that at least as far as this nation are concerned existed for 200 years, and yet we measure the lives of men in decades. Some of these individuals will spend a great part of their adult lives in detention, whether it is at Gitmo or somewhere else. Again, I can't speak to how the freedoms that we enjoy are eroded or our reputations are eroded. But what I can do, if I may, is say that the CSRT process was our opportunity to find the truth, to identify the truth, and by that process to determine whether these individuals should be detained for one more day than they were at the time of the CSRT process. Now, years later, we still don't know why many --

REP. BOYDA: Let me just yield. The point of my question is, again, now that this has such a black eye -- the good people of Leavenworth, Kansas, are asking, why do we want to bring that into our community? And some are asking -- these are different opinions, but I -- on the position of do we close Gitmo, I have said we don't have to close Gitmo to have justice being served. Would you care to -- would anyone else care to comment on that?

MR.: I agree with you, Congresswoman. And I thank you for your time and the time you extended to me in May, when we chatted briefly about this issue.

The issue is justice. It's the principle to be served. There have been issues raised today about whether there will be litigation about restoring habeas. There's already litigation about the system in place. And in point of fact, if the administration had accepted the Rasul ruling and Hamdi and put in place a proper process and agreed to let habeas go forward, we wouldn't be having this discussion today.

REP. BOYDA: Exactly.

MR. : So I think that you're on the right track, absolutely; that the question is, when and where are we going to serve the interests of justice -- in this case, individual liberty -- not where are we going to put people who we continue to deny those rights?

REP. BOYDA: Thank you.

REP. SPRATT: (Strikes gavel.) Mr. Franks of Arizona.

MR. : If I could make a brief comment --

REP. SPRATT: Who would like to comment?

MR. : I would, sir, on the representative's question --

REP. BOYDA: Thank you.

REP. SPRATT: I'm not trying to truncate anybody's full explanation of the facts of the law, but we do have a full day. So do it as expeditiously as possible, please.

MR. : I agree with you, Madame Representative, that Guantanamo does not need to be closed for justice to be served. But I just wanted to comment that when you -- when the discussion refers to the rights we're used to, the things we're used to, and people being held without charge, I think that is putting the discussion in the wrong context, because it's importing the rights of the criminal law into war-fighting. People can be held at Gitmo without charge. That's what happens in war. And I think it's important to keep that distinction in mind.

REP. SPRATT: Thank you, sir.

Mr. Franks of Arizona.

REP. TRENT FRANKS (R-AZ): Well, thank you, Mr. Chairman.

Mr. Chairman, I first want to say that I identify so much with the heart and the sentiments of Mr. Keene and Mr. Bartlett that this country is unique and that we do have a higher standard than the rest of the world because we are not only the unipolar superpower of the world; that we are the -- essentially the focus of freedom and the depot of freedom throughout the planet.

That said, I have a great concern here that today we are conflating, if that's a good term, war and law enforcement.

I serve as ranking member on the Constitution Committee, and with the committee's indulgence here, I'd like to do two things. I would like to read in the Constitution where the writ of habeas

corpus, I think, has its most relevant reference for us today, and then to relate some of the testimony given before the Constitution Committee.

In Article I, Section 9 of the Constitution, it says, "The privilege" -- the privilege -- "of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

Now the Founding Fathers anticipated the possibility of having to suspend the privilege of habeas corpus, even in this country, for certain critical reasons to protect this nation.

And I think it's important here, first of all, for us to realize that this action in Guantanamo Bay, this action in the fight against jihadist terrorism is not law enforcement. This is a war between the free peoples of the world and the most dangerous enemy they have there -- have thus far ever faced.

In the Constitution Committee, we had testimony that essentially went this way. Habeas rights would also give detainees the ability to compel witnesses, the context of enemy combatant, combatant detention -- in that context. The most relevant witnesses would be those soldiers who captured those detainees. It's hard to contemplate a system in which our soldiers are recalled from the battlefield to be cross-examined by the very enemy combatants whom they captured. Indeed, it would be hard to think of anything more demoralizing for our soldiers.

As the court in Eisentrager noted, it would be difficult to devise more effective fettering of field commanders 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.

During -- the detention of enemy combatants during war time is not criminal punishment, and I think that's so important for us to understand. The purpose of detention is to prevent combatants from returning to the battlefield, as some have done upon their release. Detention is a matter of military necessity that has long been recognized as legitimate under international law. As former Attorney General William Barr testified before the Senate Judiciary Committee in July of 2005, he said, quote, "What we are seeing today is an effort to take the judicial rules and standards applicable in domestic law enforcement context and extend them to fighting wars. Nothing could be more farcical or more dangerous."

And you know, I have a hard time understanding that if indeed we are committed to extending habeas corpus to enemy -- in this case, unlawful enemy combatants, why don't we go ahead and extend bail and Miranda rights and counsel, why don't we make sure that our soldiers before they fire on anybody give them their rights and all of these kinds of -- it's just hysterical notion. It just does not work in reality.

And this notion of torture that was brought up, Mr. Chairman, it is in -- our penalty for torturing a prisoner is 20 years. If the prisoner dies, it could be a death penalty. So this nonsense that we're in this country trying to torture our prisoners is just that. And the idea of bringing back habeas corpus, that was mentioned earlier today, that's another misnomer. Habeas corpus has never been given to military combatants, especially nonlawful ones.

I guess I'll just close up my thoughts here and ask Mr. Philbin to respond.

We face the most dangerous enemy we've ever faced. We are at war, and the survival of this republic, I'm afraid, is in question. If we are unable to not be the victims of our own sense of propriety to the point that we throw out every justice point of view completely, then we will, I'm afraid, disintegrate from within.

Mr. Philbin, do you think that if we apply full habeas corpus rights to prisoners that somehow that this will denigrate our ability to fight wars?

REP. SKELTON: Please proceed.

MR. PHILBIN: I think that it would have a deleterious impact on the war-fighting mission. I think that Congress responsibly in the DTA and the MCA provided a review mechanism that is keyed onto a military procedure first, which is something that the Supreme Court suggested in the Hamdi decision would be a fine mechanism, that would satisfy due process rights, even for American citizens. And it already adapts a mechanism for going beyond anything that's provided before to the war-fighting situation by providing a form of review that keys off of prior military proceedings. And habeas corpus would be a disruption, and the current system should be allowed to play itself out.

REP. FRANKS: Thank you, Mr. Chairman.

REP. SKELTON: Thank the gentleman.

Let me remind the members that we have another panel following these distinguished gentlemen. And please proceed accordingly.

Ms. Tauscher.

REP. ELLEN TAUSCHER (D-CA): Thank you, Mr. Chairman. Thank you for holding this hearing. I'm honored to be an original co-sponsor of your legislation and I think it's very important that we move ahead to restore habeas corpus. Gentlemen, thank you for being here. And Mr. Chairman, I have some -- with your permission, some letters for the record in support of the restoration of habeas corpus that I'd like to include in the record.

I represent Walnut Creek, California -- some of the smartest people of the world, not because they've elected me six times but because they understand fairness very up close and very far away. And I think what my constituents and I think many people around the world understand about how we've created a Gumby-like situation with the Constitution and thrown the Constitution up as an excuse when we choose to and then quickly hide it when we don't -- is a stain on the conscience of the American people. And it is about Guantanamo and those people that are there now, that they cannot find any way to prove who they are and what they were doing in a situation that is completely asymmetrical to any war that we've ever done. And frankly the situation of how they got to Guantanamo is completely different to anything that has ever been done in American history.

And the fact that we have people that are absolutely willing to justify this by comments, Mr. Philbin, that say, even in the face of such a threat, the United States has exceeded its obligations toward the detainees in the conflict with al Qaeda under both the constitution and under international law. That does not satisfy me and it doesn't satisfy my constituents. Because they know that there is actually something even better than the Constitution and international law. It's their own gut sense that these men particularly in Guantanamo, specifically in Guantanamo, have

never been given a chance to understand who turned them in, how they got picked up and how they are going to get themselves home. How are they going to get themselves home?

And for our government to constantly bend like a pretzel the excuses for why these habeas rights shouldn't be extended to these people after we intricately designed Guantanamo to be a place where can slip the noose on having anybody really pay attention to what we were doing there for a long time is, on the face of it, very necessarily rejected by my constituents and average Americans. Why is the stain of Guantanamo not enough for us to understand as we are batted about the head internationally, consistently by our friends and our allies? Why isn't it enough for us to understand that this is wrong, and that we have to do something about it?

Mr. Philbin.

MR. PHILBIN: I think that it is certainly the case that we withstand -- we take criticism internationally for Guantanamo.

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Mr. Philbin.

MR. PHILBIN: I think that it is certainly the case that we withstand -- we take criticism internationally for Guantanamo.

Why --

MR. PHILBIN: I do not think the policies at Guantanamo should be changed to provide habeas corpus rights for any combatants detained there in response to that. I believe --

REP. TAUSCHER: Because the criticism is illegitimate or because we don't deal with what other people think?

MR. PHILBIN: Because the criticism doesn't depend simply on habeas corpus rights or on specific judicial review rights. The United States has already --

REP. TAUSCHER: Mr. Philbin, the criticism is consistent. It is specific to this issue.

MR. PHILBIN: The criticism relates to what you have referred to as the stain of Guantanamo. It is a conglomeration of various things --

REP. TAUSCHER: Is it legitimate?

MR. PHILBIN: I do not believe that it is legitimate. I do not --

REP. TAUSCHER: I do.

MR. PHILBIN: Well we disagree, Madam Representative, and --

REP. TAUSCHER: I will tell you one other thing --

MR. PHILBIN: I believe that --

REP. TAUSCHER: -- excuse me. In your comments, I find it fascinating that you refer -- you say the political branches, through recent legislation. I'm not a political branch, Mr. Philbin, I am a legislator.

MR. PHILBIN: Forgive me, Madam Representative, but lawyers refer to both the legislative branch and the executive branch as political branches because they are politically elected. They're representative bodies. Those are the political branches, and the judicial branch is not a political branch.

REP. TAUSCHER: We're the legislative branch. But let's get back to the issue.

MR. PHILBIN: And the issue, in terms of criticism of the United States will not be solved by providing habeas corpus rights to detainees at Guantanamo. The United States has already provided mechanisms of judicial review and Article III courts that go beyond anything that has ever been provided to any detainees in war time before.

REP. TAUSCHER: The only thing that --

MR. PHILBIN: And we --

REP. TAUSCHER: -- will solve the problem of Guantanamo is to close it. The only thing that will solve the problem of Guantanamo is to make sure we don't repeat the mistakes that we made in creating Guantanamo.

I yield back, Mr. Chairman.

MR. PHILBIN: But the problem -- if I could respond, Mr. Chairman -- is the problem of Guantanamo to which you refer is that we received international criticism about it. And I believe you are correct, that the only way to stop all of our criticism --

REP. TAUSCHER: No, the problem is that we're wrong --

MR. PHILBIN: -- if I could finish, Madam Representative, answering your question -- the only way that we could respond to our critics is to do everything that they want and to stop treating this as a war and to stop treating it as criminal law enforcement. That is not --

(Cross talk.)

REP. TAUSCHER: So that's not your -- that cannot be your legal opinion. I would say that's your ideological opinion.

MR. PHILBIN: No, that is my view of the only mechanism that could be used to stop all international critics of the United States. And that's why I do not believe that U.S. policy should be dictated by whether or not we receive international criticism for it. We have determined that we are in a war, and that we will conduct our conflict with al Qaeda according to the laws of war. And I believe that's the right decision and it's the policy that we should stick with.

REP. TAUSCHER: This is not international criticism --

REP. SKELTON: The gentlelady's request regarding the documents --

REP. TAUSCHER: Thank you sir.

REP. SKELTON: -- will be entered in the record without objection.

Thank you. And now Mr. Hayes from North Carolina.

REP. ROBIN HAYES (R-NC): Thank you, Mr. Chairman.

I know it's been a long session, and thank you all for your time and interest and intellect. Mr. Chairman, I think this is a very worthwhile discussion, and I have listened with fascination and come away with the conclusion that Guantanamo is the right thing to do. We don't need to close it, and our enemies, who are very hard to find -- they don't typically wear uniforms -- have declared the whole world as a battlefield.

To close Guantanamo Bay and bring these people to a community near you, as Ms. Boyda has pointed out -- she's not particularly anxious to have them at Fort Leavenworth. I agree.

A couple of other points. As I look at a press clipping from July 25th, a top Taliban commander who became one of Pakistan's most wanted men after his release from Guantanamo Bay -- Abdullah Mehsud, killed himself because he didn't want to be captured -- we've got some dangerous people here.

They're not jaywalkers. They're not there for littering. We had a process -- and Mr. Abraham, I find your testimony quite fascinating and I think Colonel Klein's comments were appropriate because in this kind of forum -- you know, the public has a hard time seeing and understanding everything that goes on in a broader context, so your comments are appropriate. But I think Colonel Klein was saying we shouldn't be disproportionately weighted in the over all process. And in the interim, the responsibility of this committee is to protect and defend, raise an army -- whatever it takes to defend this country.

I'm going to ask you a hypothetical question -- it may not be quite fair -- but each one of you all is an attorney and that's perfectly fine. The professional responsibility you have is to defend your client, and that's crucial. That's crucial to our rule of law and the way we look at things. And you all have done an admirable job of that in the abstract and in the specific today. Given the circumstance that you were defending a murderer -- you knew he was guilty, the whole world knew he was guilty, couldn't get a fair trial because of the weight of the evidence against him -- all of a sudden you had to reverse and no longer are you the defense attorney -- you sat on the jury -- then what would you do?

We in this committee are a jury of sorts charged to defend this nation. The Cole -- they didn't have habeas corpus. Daniel Pearl had no habeas corpus. Folks -- 82nd who are faced with IEDs every day -- no habeas corpus there. We're defending the country. My question to you -- if you had to come sit on the jury all of a sudden and defend these people that you know are guilty, how would you do that? Because that's what we're called to do here and people back home want to know -- the criticism. We're all criticized because we're -- as you said, we're in the political branch. We're used to criticism. One of the reasons that we're criticized by the world is it's an

easy thing to do, and witnesses and members create the ability and the information that we're criticized.

Guantanamo's correct. If we need to have another combatant status review tribunal, then that's what we need to do. But the Magna Carta and habeas corpus said we have to have these people -- a chance to have a review of their status. Well, we've done that. And Mr. Abraham, you said we didn't do it that well, but the federal circuit -- the Federal Court of Appeals said it was done right. So it seems if anything's come out of this, it's -- we've got a process that's not as good as it ought to be, let's go back and correct that process. But to give people who are out do away with us -- to give them rights as though they were U.S. citizens having earned this right, would be a terrible mistake.

I know I'm running out of time but again, the jury question -- if you all left -- you're no longer the defender. You're the jury. What would you do?

Mr. Keene, you've got a smile on your face. That's a good start.

MR. KEENE: Well, Congressman, I agree with almost all that you say and I have listed to some of these things. I don't think there's a need to close Guantanamo. I don't think the question is whether people are well-fed at Guantanamo. I think the -- what we're discussing is how do you get an answer to the threshold question, "Does someone belong there?" There have been references to -- that they're all unlawful enemy combatants. But that's the question -- and that's the threshold question. Are they? They -- many of them weren't captured on the battlefield, many of them were turned in for bounties and the process by which we ask that question -- not the subsequent questions. I think they ought to be interrogated, I think all of those things are true, and actually I'm agreeing with you because you say whether it's habeas or something else, if we need to review that, let's fix it.

What we have doesn't or hasn't or is demonstrably in some cases not gotten to the threshold question -- not answered that accurately and that's what you, as the jury, have to decide how to do. We think that habeas is a way to do it, but at the end of the day you have to say, "Can you go to sleep knowing that all of the 375 people that are at Guantanamo deserve to be there?" And is the process that we now have that says that they do deserve to be there -- is it flawed? And if it's flawed, does that mean some of them don't? And that's the question, and that's what you have to wrestle with.

REP. HAYES: Thank you, Mr. Chairman.

REP. SKELTON: (Inaudible.)

REP. HAYES: I don't think habeas is the way to go, and I don't think we ought to close Guantanamo.

Thank you very much.

REP. SKELTON: Thank you very much.

Ms. Davis from California.

REP. SUSAN A. DAVIS (D-CA): Thank you. Thank you, Mr. Chairman.

Thank you to all of you for being here. I wanted to follow up with a few things that were said, if I may. Mr. Philbin, you mentioned that we have many -- several hundred -- many hundred individuals that have not come under the habeas -- would not come under habeas. But as I understand it, I think they would be covered by the Geneva Convention. Is not -- is that not correct or -- who are you referring to that we would have to bring -- if we chose to bring enemy combatants under the habeas corpus, who else would that impact? Who else would that include?

MR. PHILBIN: Well, I'm not sure. I think what I referred to was at the end of World War II, the Supreme Court rejected habeas corpus petitions from over 600 people who were being held. I think that's the only --

REP. DAVIS: Were those individuals, though, those whose countries were signatories to the Geneva Convention?

MR. PHILBIN: Most probably were. I don't know if all were. But --

REP. DAVIS: But that make a difference, correct? That they at least are covered, as opposed to being in what we would consider this kind of Never-Never Land?

MR. PHILBIN: Well, they -- those who have POWs who are members of the armed forces of signatory nations and who meet the requirements for POW status will have protections under the GPW. Those protections do not include Article III court review of their detention. They're simply held until the end of the conflict. But if I could get -- I think to part of the point of your question, what would happen Congress now passed legislation that broadly said, "Habeas corpus is available for enemy combatants overseas, and we'll have a carve-out for active combat zones?" There'll be a ton of litigation about what an active combat zone is, and people -- particularly in Afghanistan who do not have POW status under the GPW would have access to habeas corpus if it were determined through litigation that they were being held in an area that's not an active zone of combat.

REP. DAVIS: Would you advocate -- do you think it would be better to bring everyone in a war zone even if their countries are not signatories to the Geneva Convention? Would it be preferable to have them covered under the Geneva Convention?

MR PHILBIN: (Inaudible)

REP. DAVIS: Would it be preferable to have them basically be POWs, then as opposed to coming under the fold of habeas corpus if in fact that -- this was changed?

MR. PHILBIN: I don't think so. I think the Geneva Conventions --

REP. DAVIS: Let me move on --

MR. PHILBIN: -- the Geneva Conventions are set up to create a series of incentives for conducting war in a certain fashion. To give POW status to those who are actually unlawful combatants, I think, is a very bad idea because it perverts the incentives of the entire Geneva Convention System, which is designed to force people to do things like wear uniforms and not attack civilians.

REP. DAVIS: I understand that, but I'm just trying to see -- we have individuals who are in this Never-Never Land, and we're trying to -- in some ways, is it true that we're trying to find a home for them of sorts?

MR. PHILBIN: Well, I don't think --

REP. DAVIS: Doesn't the law --

MR. OLESKEY: We're trying to find a remedy for this unusual situation that's been created by the decision to put people deliberately in a place where they'd have no rights, which is what Mr. Philbin was tasked in doing, as I understand it, when he was in the Justice Department. And he makes no bones about that, and I understand and appreciate his candor. But now we have this situation. There's been a lot of talk about criminal process today. Habeas is not a criminal process. But the confusion is that usually when we deprive people of liberty for their lives, we do it for a criminal process which has all kinds of safeguards. And I think what's running around in this room is we're holding folks which the administrations says it can hold for the rest of their lives without the safeguards that most of us feel -- at least, folks I talk to -- ought to attend taking away your life and liberty forever.

So we're talking about a problem that's been created that needs a solution, and does this thing that Wolfowitz -- Secretary Wolfowitz built hastily in seven days withstand six years? And the burden from the argument from this side of the table is it doesn't.

REP. DAVIS: Well, I was concerned, Mr. Philbin because I think at one point, you did say that habeas is just another round of litigation. Is that -- does that sound true to what you meant, that it's just another round of litigation or is that --

MR. PHILBIN: Well, let me address that and if I could, address some other points from what Mr. Oleskey said. First, I believe he mischaracterized my testimony in saying that I made no bones about the fact that, as he put it, my job at the DOJ was to find some place to put these people where they had no rights. I was asked to ask a legal -- to answer a legal question about whether or nor there would be habeas jurisdiction at Guantanamo, and I answered that question.

Second, Mr. Oleskey referred to this process that Paul Wolfowitz put together in seven days. In fact, the CSRT process had in the planning stages for much longer before the Rasul decision and in any event is modeled on AR 190-8. It is not something that was just dreamed up in seven days. It's modeled on an existing set of Army regulations and it provides more protections than that set of regulations, which is usually what's used to determine on detaining someone.

In terms of the, my reference to habeas as another round of litigation, I think, I don't know if I said it exactly that way, but let me put it this way: Congress has already provided an adequate mechanism for Article III court review. It has established a system of review, both for military commission and CSRTs that allows Article III courts to examine those decisions. Habeas corpus petition will be duplicative an additional round of litigation under this bill if they are added, and there seems to be an assumption that habeas corpus will mean this specific set of procedures that will be used in this specific review mechanism. But I don't think that that is a correct assumption.

The law on what habeas corpus review provide varies from one situation to another. It is a set system of rules when it's reviewed in the criminal justice system, that's very well developed system. But habeas corpus review of a military decision to detain someone is not a well-developed system and what standard of review will be applied in those cases and what exactly

that would provide is going to be determined by a big round of litigation. And the precedents are from World War II, in *Yamashita v. Styer* and in the *Quirin* case that judicial review by habeas corpus of the decision of a military tribunal is very limited and does not inquire into the facts, it only inquires into the jurisdiction of the tribunal.

REP. DAVIS: Could I just, just for a motion because I know our time is up.

REP. SKELTON: Thank you.

REP. DAVIS: Would you all agree --

REP. SKELTON: Thank you.

REP. DAVIS: -- (inaudible) -- be ill-defined under the military?

MR. OLESKEY: What would be ill-defined? Habeas --

REP. DAVIS: Yes.

MR. OLESKEY: I don't think the military has any business in habeas, I don't think the military thinks it has any business in habeas. That's the business of the federal courts and the genius of habeas is it is flexible. So where Mr. Philbin sees lemons, I see a sweeter fruit.

REP. SKELTON: I thank the gentle lady.

Dr. Gingrey.

REP. GINGREY: Mr. Chairman, thank you.

And Mr. Oleskey, you have stated several times in your testimony that Secretary Wolfowitz literally threw this detention facility together and the legal policy, I think Mr. Philbin just stated that in fact that was not the case, it was certainly a very careful judicial review with the Justice Department and this was not something that was just throw together.

And I want to start out my question though and ask the panelist just as a show of hands, how many of you have actually been to Guantanamo Bay, to Gitmo. Okay. Thank you.

And I see in particular, Mr. Keene, that you've not been there and I would like to point out that I have been there, I have been there twice. And when I was there back in 2004, early 2005, again in 2005, I saw the detention, the interrogation process, I saw the food service, I saw the exercise facility, I saw detainees having an opportunity daily to meet privately with members of the international committee of the Red Cross. This at the same time while some of our soldiers in Iraq were treated a little differently when they were detained and I could name several names that were very prominent in the news. But one in particular, a contract worker from my home town of Marietta, Georgia, Jack Hensley was beheaded, cruelly beheaded without any right of habeas corpus. So therefore I don't feel, I certainly don't feel we need to take the additional unprecedented step of allowing foreign terrorists, not prisoners of war, but foreign terrorists, enemy combatants is the word, detained not because they were jaywalking or spitting on the sidewalk. Indeed one of these terrorists that was released just last week, Abdullah Mehsud was released after the review commission decided that maybe he was no longer a threat but went back and rejoined the fight. And when he was cornered, he blew himself up.

So the difference between the way we treat our detainees and the way our enemy does could not be greater. Simply restoring habeas corpus privileges for terrorists or closing Gitmo is not the answer. What it is is throwing the baby out with the bath-water. Back to allowing foreign terrorists access to our judicial system, let me point this out, between July 2004 and early 2005, the Department of Defense conducted 528 CSRTs, combatant status review tribunals resulted in 38 determinations of no longer enemy combatant. Further, the administrative review board process is conducted annually, done every year, to consider whether an enemy combatant should remain detained. After the first two cycles, there were 14 decisions to release and there are now 83 more detainees approved for release. Does this not indicate -- and this is my question -- that there is a review process in place outside of habeas petition for evaluating the status of detainees and their detention, which by the way, goes beyond the Geneva Convention, which do not bestow rights to challenge detention or the opportunity to be released, as this thug was, Abdullah Mehsud, prior to the end of hostilities?

MR. KEENE: This is directed at me, I believe, and I think first of all, I should point out as I said repeatedly here I'm not in favor of closing Guantanamo Bay. I don't think the question has anything to do with whether Guantanamo is open or closed or whether they have exercise facilities or whether they have good food. That's nice that they do. We treat prisoners, prisoners of war and our criminals better than do most nations. That's a different question. The question is is there an independent way to determine whether or not people actually belong there. We refer to them all as terrorists, we refer to them all as hostile enemy combatants. Do we know that? And that's the question, that's the threshold question that these things have to answer.

Initially, we didn't do much at all. The system that we have in place now was a response to the court's criticism of that, in saying that you've got to do something. So the question is not whether we're doing anything. The question, and obviously we're doing more than we did before, we're maybe doing more than some other country would do, that's good. The question is is that the best way to make that determination? And the difference between habeas and the others is something that one of the other members of Congress raised earlier and that's that it's independent. It's not asking the person in charge of doing it whether they're doing the right thing. So I think we can do it better. I think that the administration and the people in charge of Guantanamo Bay have moved admirably. But the question is whether we are confident that that threshold question is being answered. Do we know and is there a fair way to determine whether all the people there belong there? It's not a question of how they're treated once they're there. It's a question of whether they belong there because many of these people were not picked up on the battlefield, the Defense Department --

REP. GINGREY: Mr. Chairman, I thank you --

MR. KEENE: -- itself says --

REP. GINGREY: -- and I thank you for your indulgence in the time for both me and the witness. Okay. I yield back.

REP. SKELTON: Thank you so much.

Mr. Murphy from Pennsylvania.

REP. PATRICK MURPHY (D-PA): Thank you, Mr. Chairman.

Gentlemen, thank you all for your testimony today and for being here.

When I was -- I'm Patrick Murphy, 8th District of Pennsylvania -- before I became in Congress I used to be a professor at West Point and I used to teach Constitutional law. And in 2002 I was fortunate enough to lead the cadet team for the first ever law of war competition, it was all the military academies throughout the world.

It was being held in San Remo, Italy.

And about the third day of the weeklong course and competition, a cadet from Belgium grabbed me and she pulled me aside and she said, "Captain Murphy, can I see you -- talk to you in private?"

I said, "Sure."

And she said -- she had this look on her face that I'll never forget, and she said to me -- she said, "Captain Murphy," she said, "why doesn't America give Article V hearings to those detainees in Guantanamo Bay?"

And I had to look at her and I said -- and I had no real legitimate answer. I said, "I don't know why. I don't know why."

And it wasn't until 2004, until the United States Supreme Court stepped in that forced this administration to allow detainees at Guantanamo Bay to at least look at -- to challenge their detainment. And since the Combatant Status Review Tribunal -- the CSRT -- was instituted, every detainee in Guantanamo Bay has been through the CSRT process. And from the statistics that I have seen, in over 550 CSRTs conducted by the Department of Defense, the detainee's enemy combatant status has been reaffirmed 93 percent of the time.

So my question is first -- to the panel but first to Colonel Abraham -- and, sir, thank you for your service to our country and for standing up as you are -- do you think that the CSRT process is in line with the letter and the spirit of Article V of the Geneva Convention?

MR. ABRAHAM: Thank you very much, sir, for your comments.

It is not. Both in looking at the percentages -- the 93 percent affirmed, the annual reviews -- of the 38 non-enemy combatants and of the large number of individuals who have been alleged to have been released and then returned to the battlefield, the one message that comes through with clear resonance is that the process achieved arbitrary results.

By that I mean, are there certain terrorists at Guantanamo? Absolutely. I followed one of them for a year during my duties in the Pacific theater. I know about him. I know what he has done, and he should be there for the rest of his life. Are there people who did nothing? Absolutely. But between those two extremes, there is a chasm in which we have filled the bodies -- 500 -- in excess of 500 bodies. That's all they are. What they've been reduced to are statistics. They were processed through a system that was, as you rightly point out, not the Article V proceeding because the presumption was, under Article IV, that they didn't need that level of protection. We didn't need that level of protection for them.

The annual review process does not deal with the same question -- the validity of their detention. Rather, it deals with the two questions that are completely different: Are they any longer a threat to the United States? And is there any more intelligence value or some other reason why we should keep them? We've lost sight in all of that process of the first question that we as a part of

ORDEC involved in the CSRT process were charged to answer to the best of our abilities: Should they be there in the first place?

REP. MURPHY: Thanks, Colonel.

Gentlemen, could you please respond as well?

MR. KEENE: I think that he's pretty much nailed it.

REP. MURPHY: I would agree, but I --

MR. OLESKEY: I agree.

REP. MURPHY: Okay.

MR. PHILBIN: I'll respond to a couple points. Article V tribunals were not required because al Qaeda is not a signatory to the GPW. So those who were detained who were al Qaeda were not entitled to that. And --

REP. MURPHY: Well, actually, sir -- it's actually to determine whether or not someone's a lawful combatant or an unlawful combatant. I would agree with you that al Qaeda is not an unlawful -- is an unlawful combatant because they don't adhere to the same rules that our professional soldiers do. But I would argue that that's exactly the premise behind the Article V hearing, to determine the --

MR. PHILBIN: The Article V hearing is to determine POW status. POW status can only be for those who are signatories.

REP. MURPHY: Right.

MR. PHILBIN: And --

REP. MURPHY: And the argument that you and I will probably have is that just because Secretary of Defense Rumsfeld or whoever it was in charge and said, "They're all al Qaeda; they're all unlawful combatants" -- that is not for him to decide. That is not for him to decide. And that is exactly why we have the United States of America signing onto these international agreements: to lead the world, to show them that we believe in the rule of law.

MR. PHILBIN: Well, I disagree with the representative on whether or not it can be determined. It was determined by the president himself, that given their tactics, their failure to use uniforms, that the Taliban generally were not entitled to POW status.

But in any event, as to the CSRTs -- do they comply with Article V? Again, I deal -- I dealt, when I was in the government, at the policy level. I didn't sit on CSRTs. But in terms of the way the CSRTs are structured, they provide more process, they provide more protection than Army Regulation 190-8, which is what is used to comply with GPW Article V. So as a matter of how the system is set up, it is set up to comply -- more than comply with Article V.

REP. SKELTON: I thank the gentleman.

We have four members who have not asked questions. We have a second panel waiting, so let's proceed.

Ms. Castor.

REP. KATHY CASTOR (D-FL): Thank you, Mr. Chairman. And thank you, gentlemen. And Mr. Abraham, thank you for your 22 years of service as a military intelligence officer.

MR. ABRAHAM: Thank you, ma'am.

REP. CASTOR: Regardless of how folks feel about the closure of Guantanamo, we're out to find out the truth here, and I think that's -- that regardless of your political stripe, that's the intention of this committee.

Mr. Abraham, in your testimony you state that these CSRTs and the whole process was "designed not to ascertain the truth but to legitimize the detentions. The process was nothing more than an effort by the executive to ratify its exercise of power to detain anyone it pleases." You say, "The system was designed to fail. The Combatant Status Review Tribunal panels were an effort to lend a veneer of legitimacy to the detentions, to launder decisions already made. The CSRTs were not provided with the necessary -- with the information necessary to make any sound, fact-based determinations. Instead the Office for Administrative Review -- the leadership there exerted considerable pressure, and was under considerable pressure itself, to confirm prior determinations."

I'd like you to go a step further than your answer to Chairman Skelton on where the pressure came from. Explain the command influence in greater detail and how the chain of command -- who was in this chain of command, and how far up did it go, in your experience?

MR. ABRAHAM: I can't speak ultimately as to how far it went. My experiences stopped with Rear Admiral McGarrah. But above me and besides me were -- that is, beside me -- were commanders, two of them JAG officers, with whom I consulted on a daily basis. We dealt with the issues of evidence and of the law applying it to the proceedings. I asked them questions and got their feedback to my concerns.

There were then two captains -- Navy captains, the equivalent of an Army full colonel -- above me in the leadership chain -- one the assistant to the deputy and one the deputy director. And these individuals were essentially the intermediate level of command between, so to speak, myself -- or -- and I don't want to imply that I was in any position of command -- but between me and Admiral McGarrah.

In terms of the specific pressure that was applied to this process, and as it specifically applied to me, I was directly tasked to gather information and to validate the existence or nonexistence of exculpatory evidence. I went to one particular agency and said, "Where is the evidence?"

They literally put a laptop in front of me and said, "This is all you get to look at. We did the search for you. Accept that what we've given you is all there is."

I went back and I said, "I cannot perform this mission. That is, specifically, I can tell you that I went to the agency; I can tell you they showed me things; and I can tell you what I said. But I can give you no independent basis for concluding, one, that there is or is not exculpatory evidence or that I have satisfied your charge to me."

I was told, "That's fine. That's all you need to do." That, however, was not my charge.

But where it specifically came to bear was when I sat on a CSRT and I looked at the very same kind of evidence, so to speak, that I had seen for months. And not only I, but the other members of the panel said, this is garbage.

And as a matter of fact, when we looked at direct statements that came from interrogators, where they said, our conclusion as to the facts is that this individual was involved in activities. And we said, 1) that's not even a rational conclusion that you could reach, but 2) we have no reason for presuming the validity of that. We were told, you have to accept that as true. The presumption is, it is true, it is valid.

And when we asked questions, we were told more time should be allowed for them to get the answers. And the answers didn't come -- and we concluded that the individual was not an enemy-combatant -- we were told, keep the hearings open so that they can come back. We were told, reconsider when there's other evidence.

REP. CASTOR: And then ultimately, you were not asked to return to a tribunal panel?

MR. ABRAHAM: That's correct. What I found -- in fact, I didn't even know that the individual received another panel's -- was involved in another hearing.

REP. CASTOR: Did they bring similar -- did they have similar interests when there was a determination that they qualified as an enemy-combatant?

MR. ABRAHAM: Oh, absolutely not, Madame Representative --

REP. CASTOR: And who were -- who did Captain Swaggart (sp) and Admiral McGarrah report to?

MR. ABRAHAM: My understanding is that -- and again, I may be off as to the number of steps, but Secretary England was within that chain of command.

REP. CASTOR: Thank you.

REP. SKELTON: Thank the gentelady.

Mr. Courtney.

REP. JOE COURTNEY (D-CT): Thank you, Mr. Chairman. I just want to follow up that line of questions.

When Panel 23 reached its conclusion and then was told to look again, and then Panel 32 was convened, and just overruled or contradicted your findings, how did OARDEC do that? I mean, did they reconvene the second panel because of their guidelines that you mentioned in earlier testimony? I mean, what's the authority they have to just reconstitute a second panel?

MR. ABRAHAM: It was fair --

REP. SKELTON: Would the gentleman suspend for just a moment? As I understand it, Mr. Philbin has a prior commitment and must leave. Am I correct?

MR. PHILBIN: Yes, sir.

REP. SKELTON: We appreciate your being with us this long. Thank you so much.

MR. PHILBIN: Thank you. Thank you, Mr. Chairman.

REP. SKELTON: Please proceed.

MR. ABRAHAM: If I may, sir. I knew of no authority for holding a second CSRT, or what has been referred to as a "re-do." I do know -- of my understanding based upon my reading of the procedures and as they were applied -- was that each individual got a CSRT. The statement being, no matter what happens as to that outcome -- that is if they continue to be detained, if they're identified as an enemy- combatant or an unlawful enemy-combatant in the ARB process -- we'll smoothen over any problems.

I had never heard of a re-do. I was not only shocked much later to have learned of it, but surprised as to its results. Because the information that we were given -- I had known from my experience working with it, and not just working with it through OARDEC, but in the years that I've worked with information from various agencies, very detailed and specific information -- contrasting that to what I saw, there was no way that our Board could reach any other conclusion.

It wasn't a close call and we weren't giving the benefit of the doubt to small holes in the evidence. It simply didn't even rise to the level of evidence. So I didn't understand, from two aspects, how this happened: 1) procedurally, I've never heard of it and never saw a basis for it, and 2) the evidence simply was not there when that CSRT was scheduled.

It's important to note, however, because I think one of the things you touch upon in your question is the fact that, in many respects, the CSRT panel is merely advisory, because the rules that instituted the CSRT procedures, gives the director of OARDEC the absolute authority to disregard the findings and recommendations. Essentially, the judgment of the tribunal becomes little more than the findings and recommendations of a magistrate that a judge can accept or reject.

REP. COURTNEY: I'm sorry Mr. Philbin had to leave because he actually just finished praising the structure of CSRTs, and it's hard to see how a structure that basically says the whole process can just get trumped by someone who's not on -- even within that tribunal process or an independent magistrate, just doesn't comport with any structure of any kind of independent judicial review that I've ever heard of.

MR. ABRAHAM: If I may, there's a saying in the military repeated by everybody -- I think they're born knowing it, "It's the doctrine, not reality." It's a recognition of the dichotomy between what we're taught in class and what's applied on the field.

In the instance of the CSRTs, there was no such dichotomy. It wasn't as if there was a procedure that anyone in the trenches disobeyed, and that much should be made very, very clear. Talking about the qualifications, a personal representative only had to be a major, no other qualifications. That was it. The recorder only had to be a captain-equivalent, an O3, and that was it. They were required to faithfully discharge their duties, and to the best of their abilities, I think they did.

The fundamental flaw was in the fact that OARDEC was not an embedded consumer of intelligence or information. It was a stranger to most of these agencies -- making requests when it

could, given very little time to get meaningful responses from them, and physically constrained by the necessary limitations that involved the use of sensitive intelligence products. In other words, when they were handed a diluted, watered-down, summarized statement that might or not even apply to the individual, it was the best they got, it was all they had.

In the case of our Board, we said that is not to justify holding somebody perhaps for the rest of their life. To our mind, to reach any other conclusion would have validated what we would then have had to have regarded as an arbitrary process -- a game of "spin the wheel."

MR. COURTNEY: Thank you, Mr. -- I yield back, Mr. Chairman.

REP. SKELTON: Thank the gentleman.

Ms. Giffords.

REP. GABRIELLE GIFFORDS (D-AZ): Thank you, Mr. Chairman. I appreciate the opportunity to have such a distinguished group of panelists. And I find the discussion absolutely fascinating when you think about whether or not the people that are being held at Guantanamo Bay should be issued habeas corpus, it really cuts to the core of who we are as a nation and our status internationally. I think that it's a difficult discussion, but I also think it's tempting to think about giving detainees -- restricting detainees' rights just because of the fact of who they are and the fact that we have military expediency that always seems to take over and to take command of the situation.

I mean, after all, I look at the attorneys who are representing these individuals and many of these individuals who are currently being held don't believe in the very legal and justice system that we have here in this country and perhaps if given the opportunity, they would destroy it or have attempted to destroy the values that we think are so important here in this nation.

But I also think that the lack of appropriate habeas corpus really undermines our standings internationally. And I think about how we are going to fight this global war against radical idealism -- whether they're jihadists or Muslim extremists, or other types of extremists -- and I think our reputation as a nation, in terms of justice and our commitment to freedom, is really important.

The more we have discussions like this, and the more that people are, internationally, concerned about what's happening. I think that we drive away potential allies, and for those radical individuals that may be on the fence, I think that we're losing people.

So my question is to Colonel Abraham. Giving fair trials to 360 detainees at Guantanamo, I don't believe it can be possibly be more dangerous to our national security, than to the thousands of individuals -- perhaps young Muslims who are aspiring to hate us based on what they see happening -- in your opinion, based on your experience with the CSRT and the intelligence community, do you believe that the situation in Guantanamo currently is reducing or increasing the overall violence and hatred toward the United States?

MR. ABRAHAM: Although this is personally -- this is purely my personal opinion, I think it makes tremendously difficult, both the military and political aspects of what we do. One of the assignments that I had, long before I came to work either at Pacific Command or with ORDEC, was as a member of a psychological operations unit -- a military organization specifically designed to go out, and as we like to remind ourselves, "win the hearts and minds" of individuals,

both in wartime and in peace. Most of those individuals are Reservists, it's marginally a Reserve function the way that it's constructed.

It has been tremendously difficult, as I have seen it, to get across a message -- and it's a message based on an interesting paradox. On the battlefield, when an enemy faces us with his gun, we can kill him. Yet the moment he raises his hand and drops his gun, we have to protect him.

This is the -- he may not understand the distinction between those two moments but it is important enough that we do.

As we sat at ORDEC dealing with these questions, it wasn't important that somebody else know the difference between the rule of law and lawlessness, the difference between those who would destroy our country and those who support our country, the question was whether we understood the difference. I think most of the people at ORDEC did but I think the system in which they worked made it impossible to find a meaningful distinction between those two sides of line.

REP. GIFFORDS: And Colonel, given just what you've said, how would you personally recommend implementing habeas corpus or another appellate system to reduce the rate at which we have this conflict -- and perhaps a misconception -- reduce the ability to radicalize our enemies but also not provide for these folks to basically be able to talk their way out of prison?

MR. ABRAHAM: I can't speak ultimately for the effect of habeas or some other proceeding -- there are eminent experts surrounding me to my left, my right, my front, my even my rear that know better about that -- but I think we begin, when we do what the CSRTs in ORDEC were charged to do, find the truth -- find the truth as to these individuals.

When you take away the generalization from the claims and the categorizations and the ease with which you can put somebody in a broad sweeping stroke into one category or another decide their terrorists and keep them in Guantanamo for the rest of their lives -- when you stop that by first examining the truth as we were charged to do, I think you take away the fertilizer from that tree of which you speak.

REP. GIFFORDS: Thank you.

REP. SKELTON: Thank you.

The gentlelady -- I have remaining, Ms. Shea-Porter and Mr. Cummings who have not asked questions. And when they have finished, we will then go to the second panel.

Ms. Shea-Porter.

REP. CAROL SHEA-PORTER (D-NH): Thank you, Mr. Chairman.

I think we've heard some people who have confused safety with this nation with habeas corpus. I, too, worry about the danger this nation faces, but that does not mean that we can't have habeas corpus.

John Adams said that we were a nation of laws not men. And I'm afraid that we've gotten that confused. But what really concerns me are the statements coming from our friends. And so I would like to quote a BBC News security correspondent talking about the report that came out --

it was on BBC News yesterday about the U.S.-U.K. relationship -- the limits revealed in U.S.-U.K. relationship.

The Intelligence and Security Committee report had this to say, "The ISC report reveals aspects of the usually close Anglo-American intelligence relationship that are quote, "surprising and concerning." These tensions have centered on the evolving U.S. policy of rendition. The transferring of detainees from one country to another, in some cases to stand trial, in other cases to U.S. military detention or even to third countries interrogation and its alleged mistreatment. This policy has meant that for British intelligence and I quote, "ethical dilemmas are not confined to counties of poor track records and human rights." United Kingdom now has some ethical dilemmas with our closest ally because of, quote, "very different legal guidelines and ethical approaches."

This should horrify all of us -- all of us good Americans who understand what our role has been in this world should be embarrassed that the United Kingdom is concerned about some of our practices. We are supposed to be the beacon of light and freedom in this world.

Mr. Oleskey, I would like to ask you a couple of questions. You were talking about your client, 24/7 in a cell.

MR. OLESKEY: Yes.

REP. SHEA-PORTER: Okay, that is against everything we understand about human rights. That's the kind of stuff that we read about in newspapers or in books when they talk about some other government, not ours.

Twenty-four, seven -- would you like to talk a moment about that? And then I have a couple of other questions to ask.

MR. OLESKEY: Yes. It's a man named Sarbel Ahkmar (sp) who's one of my six clients from Bosnia. I can't tell you why he's there because no one in the system will tell me. I've written letters; I've asked that he be released from solitary. The last time I was able to see him, last fall, he told me he was hearing voices. I've tried to get him medical attention. I tried to, in every way I can -- but without access to habeas, there's no way for anybody to pass upon why he's there at all, much less why he should be punished in this fashion.

But he is -- he, I am very concerned about because I think he is -- I'm losing him and I can't even talk to him about it because he's seemed to have lost the ability to leave his cell and talk to anyone.

REP. SHEA-PORTER: I don't think any American would approve of somebody being kept in 24/7 in darkness like that, especially without hearing with the story was.

Now --

MR. OLESKEY: Actually it's worse than darkness, he has a light on 24 hours a day so he never knows when it's day and when it's night.

REP. SHEA-PORTER: These are the kinds of stories that my father told me about why our constitution was so wonderful because we were protected from this kind of activity.

I wanted to ask you a couple of questions. And I had one to ask Mr. Philbin and I hope that he will answer in writing to me.

Some of these people were not picked up on a battlefield?

MR. OLESKEY: Yes, in fact it appears from -- that it's not disputed that the majority was not picked up on a battlefield as it would be defined by anybody unless we define the whole world as a battlefield.

REP. SHEA-PORTER: As a battlefield, right. So they're not technically enemy combatants?

MR. OLESKEY: Not as I would view it.

REP. SHEA-PORTER: Okay, they can't see all the evidence. Some is classified.

MR. OLESKEY: They can't see most the evidence because most of what the panels are shown, in my experience, is classified, not unclassified. I'm sure Colonel Abraham, from what he said, would agree.

REP. SHEA-PORTER: Who determines what is classified and what is not?

MR. OLESKEY: People in the military, people in civilian intelligence.

REP. SHEA-PORTER: So we don't know who really determines that and we don't know what evidence is --

MR. OLESKEY: That's correct. And I can't tell you what evidence -- I can't even discuss classified evidence much less whether I've seen it all.

REP. SHEA-PORTER: How is a personal rep chosen?

MR. OLESKEY: As I understand it, the personal reps were not to be lawyers and so they were chosen by the command structure as non- lawyers, as Colonel Abraham said, relatively low-rank in the office of core. In my experience, they did not function as advocates at all.

REP. SHEA-PORTER: And one last question, how did they go from combatant to no longer an enemy combatant? What ever happened to innocent or guilty?

MR. OLESKEY: That's a very good question. I would note that in the first Gulf war, when this Article V process was used on the battlefield, the numbers of people who were screened out as non- military civilian, you go home was 70 percent, at Guantanamo, as you've heard this morning, it was 10 percent. That's because, in my view, the process was applied three years after the battlefield and it's a battlefield process. It's not a process designed to be used after the fact, especially long years after the fact.

REP. SHEA-PORTER: Thank you.

Rep. SKELTON: Thank the gentlelady.

Mr. Cummings?

REP. ELIJAH CUMMINGS (D-MD): Thank you very much, Mr. Chairman.

I want to thank our witnesses for being here. I'm the last questioner. All of you, I thank you for standing up for what you believe in.

And Mr. Abraham, as I listened to your testimony, I could not help but say to myself that this is truly a brave man -- and all of you, standing up for what you believe in.

And I also thought about the fact that I heard a number of concerns about inconvenience. You know, if it were inconvenience of the courts, I wouldn't be sitting here today. I mean, when you think about all the cases that have been brought by Thurgood Marshall and so many others, if inconvenience was the standard for not doing something, not hearing cases, I wouldn't be here today.

But one of the things that concerned me, Mr. Abraham, is something that you said that -- see, I'm having trouble as a lawyer dealing with this enemy combatant status. And perhaps the other two witnesses can talk about this, too -- when I heard what you said about what happens from the beginning that is that exculpatory evidence, I mean, what you witnessed -- what you said you witnessed, seems like some of these folks should have never been picked up from the beginning.

And that seems to taint almost everything down the line. And then when I hear you, Mr. Oleskey, say that you don't have to be picked up on the battlefield, that makes me wonder, too.

And then I wondered about this so-called -- when we say war on terror, does that then give every single inch of the world -- I mean, anybody can be picked up, considered an enemy combatant wherever they may be found anywhere in the world, because when we say war on terror, that's pretty broad. And I'm just wondering how -- would you all comment on those things?

MR. ABRAHAM: I can, if I may, sir.

One of the problems is that we think of war in the traditional sense and we say we know where the battlefield is. But let's take a very specific example of an individual who is in Guantanamo. He's identified by the name Hambali. He was the head of Jemaah Islamiah. We had been watching him for years. The South Pacific was his battlefield from Indonesia up the peninsula to Thailand. He gave little regard to the notion of even what was going on in the Middle East. In that sense he created his battlefield.

The battlefield itself is not the problem and has never been a problem for the intelligence community in dealing with its relationship in dealing with the legal questions -- the Article IV and Article V questions. That was never a concern. When I go to an intelligence agency and I ask it the question: What are the circumstances of this individual's capture? What are the circumstances of his activities? Do you have any evidence relating to the question of whether or not he didn't do any of those things? They don't come to me and say, "Gee, Colonel Abraham, he wasn't really found on a battlefield." It's not a meaningful question. That was never a problem of where the individual came from.

In my mind the question squarely before us was: What evidence do you have of what he did -- whether he moved money, whether he fired a gun, whether he trained terrorists or whether he was sent by his wife to get a gallon of milk? The answer to that question was the most important piece of information in this process and whether it came from a highly classified source or somebody

saying, "Yeah, I sent him. And between that chore, he had other chores." Those are probative pieces of evidence.

REP. CUMMINGS: And assuming that kind of information was lacking, Mr. Oleskey, I guess it makes it -- I mean, they would almost have to let your client go. Is that right -- under habeas?

MR. OLESKEY: They'd have to let my client go, in my view -- my clients -- if they looked at all the evidence. As the Colonel's pointing out, they didn't see much of the evidence. And we filed with the military, as a result of doing our own review, a lengthy document -- 128 pages -- where we pointed out that these six men, who are said to be commonly linked in a conspiracy, had in one of their CSRTs -- somebody sent in after a CSRT, something in the system -- something they said was exculpatory. And that panel said, no. We've already closed the books. And nobody in the chain of command said, well, if these men were all supposed to be part of a common plot, and somebody in the military thinks that whatever this information is it could be exculpatory, it must relate to all of them potentially, not just to this one, but it wasn't shown to any of the other five panels.

And you talk about the expansion of this doctrine under the Military Commission Act of withdrawing habeas corpus. Mr. Al Marri was a student at Bradley University. Mr. Padilla stepped off a plane in Chicago. So this doctrine, if you label somebody an enemy combatant, you can take them anywhere in the world -- not just off a battlefield in Bosnia, but in the United States -- has been greatly expanded by this administration. I think that the muscle the chairman's bill puts back in this to circle around to where we were would help stop what many people regard as some of those excesses.

REP. CUMMINGS: Thank you all very much.

REP. SKELTON: Thank you. I thank the gentleman from Maryland.

And again, thanks to this panel. It's just been excellent. We appreciate your expertise.

We will now go to our second panel. We will give them time to enter the room.

Again, thank you gentlemen.

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