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**To the Senate Committee on Armed Services
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**Testimony on Military Commissions in Light of
the Supreme Court Decision in *Hamdan v. Rumsfeld***

Senators, it is a great honor to testify before you here today.

I am not a judge advocate, but I am an attorney with expertise on the laws of war and U.S. counterterrorism law and policy and its practical effects on this nation's ability to fight a truly horrible enemy. I attended multiple military commission hearings at Guantánamo Bay as a human rights observer, and have had numerous formal and informal conversations with military commission officials, the prosecution, and the defense, military and civilian.

I am also a former U.S. military officer. I left the Air Force as a captain in 1996. As a young officer, I was asked to lead people much older and more experienced than me. They taught me something I have never forgotten: when you are not sure what to do, stop, take a deep breath, and think about your bottom line. Ask questions — and if the answer doesn't fit with the bottom line, you are asking the wrong questions. Keep asking, get an answer that fits. And then make it happen.

Today I will talk about the bottom line, and how to make it happen.

Mr. Chairman, for me, the bottom line is this: The Supreme Court's decision in *Hamdan* presents the Congress and the administration with an opportunity – to start bringing accused terrorists to justice in a way that will both protect America's security and uphold its values. I hope that Congress seizes this opportunity, by reaffirming the United States' longstanding commitment to Common Article 3 of the Geneva Conventions, and ensuring that trials of terrorist suspects captured on the battlefield go forward in accordance with the standards of the Uniform Code of Military Justice, which have served this country so well for so long. If the Congress and the administration choose that course, it will help to rebuild America's moral authority in the world, reaffirm America's commitment to the rule of law, and reclaim America's greatest tool in the war on terror: our integrity.

If, on the other hand, the Congress and the administration try to find a way around *Hamdan*, by shirking the Geneva Conventions or creating substandard tribunals, the tribunal system will remain on trial, instead of the terrorists. That would be a profoundly

unfortunate result, whether the goal is an effective fight against terrorism or upholding the rule of law.

Common Article 3 of the Geneva Conventions applied to al-Qaeda

In *Hamdan*, the Supreme Court determined that Common Article 3 of the Geneva Conventions (“Common Article 3”) applied to Mr. Hamdan as a member of al-Qaeda captured on the battlefield.¹ The Court determined the military commissions established by the President to try Mr. Hamdan and other “enemy combatants” violated the requirements of Common Article 3.

In 2002, the Administration had decided that no part of the Geneva Conventions, including Common Article 3, would apply in a legally binding way to the armed conflict with al-Qaeda.² Since the *Hamdan* decision was announced, some have suggested that this ruling somehow imposes a new or alien requirement on the U.S. military, and that it is inappropriate to apply Common Article 3 to al-Qaeda because it is not a signatory to the Geneva Conventions and because its members defy the laws of war and any fundamental regard for human rights.

This argument misrepresents the purpose and requirements of Common Article 3. It is true that al-Qaeda is an irregular force that does not abide by the rules of war and is not a signatory to the Geneva Conventions. As such, its members are not entitled to prisoner of war status, or covered by many of the other provisions of the Third Geneva Convention concerning prisoners of war.³

But the framers of the Geneva Conventions intended to establish a minimal standard that would cover *everyone* involved in an armed conflict, regardless of the nature of the conflict or an individual’s status or behavior. Common Article 3 is that standard. It is specifically designed to apply to conflicts between a state that is party to the Conventions (like the US) and a non-state force, like al Qaeda, that, by definition, could not be a signatory. It is a narrow rule with the broadest application, and establishes the barest minimum safeguards for humane treatment and fair justice. It ensures that no one caught up in an armed conflict is completely beyond the reach of law.

Common Article 3 of the Geneva Conventions and Humane Treatment

¹ *Hamdan v. Rumsfeld* 548 U.S. ____ (2006).

² George Bush. Memorandum on Humane Treatment of Taliban and Al Qaeda Detainees. February 7, 2002. Available at http://www.justicescholars.org/pegc/archive/White_House/bush_memo_20020207_ed.pdf.

³ Of 143 articles in the Third Geneva Convention, 110 address the requirements for the treatment of prisoners of war. Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (entered into force with respect to the USA February 2, 1956), also available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>.

The Administration also argues that the terms of Common Article 3 are too vague. In particular, proponents point to the prohibition on “outrages against personal dignity,” and say that the U.S. military would be unable to apply Common Article 3 in practice.

But the Pentagon has been clear about the meaning of Common Article 3 and its obligations for decades, as the standards it embodies are already part of U.S. military doctrine, policy, and training.⁴ The U.S. military has long treated Common Article 3 and, in fact, the much higher standard for the treatment of POWs, as standard operating procedure.⁵ This Committee heard testimony last week to this effect from Judge Advocates General from all the armed services.⁶ Following the *Hamdan* decision, U.S. Deputy Secretary of Defense Gordon England issued a memorandum to all Department

⁴ As was discussed in testimony last week before this Committee:

SEN. MCCAIN: You agree with that so that -- General Black, do you believe that Deputy Secretary England did the right thing by, in light of the Supreme Court decision, issuing a directive to DOD to adhere to Common Article 3? And in so doing, does that impair our ability to wage the war on terror?

GEN. BLACK: I do agree with the reinforcement of the message that Common Article 3 is a baseline standard. And I would say that at least in the United States Army, and I'm confident in the other services, we've been training to that standard and living to that standard since the beginning of our army. And we continue to do so.

ADM. MCPHERSON (?): It created no new requirements for us. As General Black had said, we have been training to and operating under that standard for a long, long time.

SEN. MCCAIN: General?

GEN. RIVES (?): Yeah, I agree.

SEN. MCCAIN: (Inaudible.)

GEN. SANDKULHER (?): My opinion is that's been the baseline for a long time, sir.

GEN. ROMIG (?): Yes, sir. That's the baseline. As General Black said, we train to it. We always have. I'm just glad to see we're taking credit for what we do now.

ADM. HUTSON: I agree with what was said. But I'd point, I guess, that the president in February 7th of 2002 said that Common Article 3 did not apply. So I think that this is -- although we've been training to it and so forth, I think this is an important, if only perhaps symbolic, change of policy by the administration that I welcome.

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⁵ In 1956, the United States Army codified in AFM 27-10 its position that unwritten or customary law is binding on all nations and that all U.S. forces must strictly observe it. U.S. Dep't of Army Field Manual, Field Manual 27-10, The Law of Land Warfare, para.7(c) (18 July 1956). AFM 27-10 restated Common Article 3 and Third Geneva Convention articles regarding trial of POWs. It also provided that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’):... killing without trial spies or other persons who have committed hostile acts”. AFM 27-10 Sec 504(l).

⁶ *Id.*

of Defense units stating unequivocally that existing Department of Defense orders, policies, directives, execute orders, and doctrine already comply with the standards of Common Article 3.⁷ I sincerely doubt that the Deputy Secretary of Defense would make such a statement if the Pentagon was unclear about the meaning of the terms of Common Article 3.

The U.S. has been steadfast in applying the full protections of the Geneva Conventions (i.e., far more than just Common Article 3) to enemy fighters, even when not required to do so. U.S. adherence to the highest standards has improved treatment of captured American service members, even when capturing governments claimed American servicemen were unprotected by Geneva.

The U.S. even applied the full protections of the Geneva Conventions to soldiers of governments who insisted the Conventions did not bind them, and when the Conventions technically did not apply. Examples include the conflict against the Viet-Cong in Vietnam, covert operations against the Soviet Union in Afghanistan, and against forces loyal to Somali warlords targeting international peacekeepers.⁸

The current conflict is not the last Americans will ever fight — it is only a matter of time before governments who might otherwise avoid the appearance of illegality will exploit America's efforts to carve out exceptions to the Geneva Conventions to justify poor treatment of captured Americans.

Were Congress to repudiate in some way the application of Common Article 3 to this or any conflict, it would be reversing decades of U.S. law and policy and sending a message to U.S. troops that is diametrically opposed to their training.

Congress has also set standards. The humane treatment standard required by Common Article 3 is essentially the same standard that Congress already mandated when it passed the McCain Amendment last year, which stated as law, “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”⁹

⁷ “It is my understanding that, aside from the military commission procedures, existing DoD orders, policies, directives, execute orders, and doctrine comply with the standards of Common Article 3 and, therefore, actions by DoD personnel that comply with such issuances would comply with the standards of Common Article 3.” Memorandum from Gordon England to the Secretaries of the Military Departments, July 7, 2006, available at: <http://www.defenselink.mil/pubs/pdfs/DepSecDef%20memo%20on%20common%20article%203.pdf>.

⁸ Amicus Curiae Brief of Retired Generals and Admirals and Milt Bearden in Support of Petitioner (Geneva Conventions - Judicial Deference), 5-7, in *Hamdan v Rumsfeld*, 126 S.Ct. 2749 (2006).

⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

For decades, the United States has accepted the substance of Common Article 3 as both an obligation under treaty and customary international law.¹⁰ If Congress were to step back from that obligation, it would in effect be establishing a reservation to the Geneva Conventions. No country in the world has ever before formally renounced these obligations under Common Article 3. Such a step would send a message that America's enemies would all-too willingly amplify: the United States *affirmatively* seeks to treat people inhumanely (thus effectively repudiating the McCain Amendment), *intends* to try and execute people without fair trials, and *willingly* defies its own allies and history to do so.

Common Article 3 is not just a matter of human rights. Like many laws of war, it is good war-fighting. The U.S. military knows this well:

Insurgent captives are not guaranteed full protection under the articles of the Geneva Conventions relative to the handling of EPWs [enemy prisoners of war]. However, Article 3 of the Conventions requires that insurgent captives be humanely treated and forbids violence to life and person — in particular murder, mutilation, cruel treatment, and torture. It further forbids commitment of outrages upon personal dignity, taking of hostages, passing of sentences, and execution without prior judgment by a regularly constituted court.

Humane treatment of insurgent captives should extend far beyond compliance with Article 3, if for no other reason than to render them more susceptible to interrogation. The insurgent is trained to expect brutal treatment upon capture. If, contrary to what he has been led to believe, this mistreatment is not forthcoming, he is apt to become psychologically softened for interrogation. Furthermore, brutality by either capturing troops or friendly interrogators will reduce defections and serve as grist for the insurgent's propaganda mill.¹¹

Common Article 3 of the Geneva Conventions and War Crimes

In the War Crimes Act of 1997, Congress made it a felony for any U.S. military personnel or U.S. national to engage in conduct that violates Common Article 3.¹² Reports indicate that the Administration encouraged interrogators to adopt techniques

¹⁰ Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (entered into force with respect to the USA February 2, 1956), also available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>. US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427-428 (iterating that Common article 3 is customary international law).

¹¹ Department of the Army, Field Manual (FM) 34-52, *Intelligence Interrogation*, May 8, 1987, Chapter 9. 12 18 U.S.C. §2441(c) (2006). “(c) Definition.--As used in this section the term 'war crime' means any conduct--... (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict”.

that violated Common Article 3 by telling them they would be immune from prosecution.¹³

In the wake of the *Hamdan* decision, some have expressed concern that applying Common Article 3 to al Qaeda would leave American troops vulnerable to frivolous prosecution.

To accept such a proposition, one would have to believe that the likelihood of war crimes prosecutions by the United States has no relation to the reality of current or historical practice. No soldier can be prosecuted for violations of the War Crimes Act unless military prosecutors decide to bring charges against him. The military justice system is highly unlikely to take action against soldiers for trivial or ambiguous offenses under this Act, especially since it has never done so even to prosecute even extremely serious crimes. To date, no U.S. service member has ever been prosecuted for any violation of the War Crimes Act, even in situations such as the war in Iraq, where everyone agrees the Geneva Conventions fully apply — much less for violations of Common Article 3 occurring under less clear circumstances.

The fact is, American military prosecutors, and not anyone else, will make the decision to prosecute. It is hard to understand why we would suddenly not trust the Executive to judge whether a U.S. service member's suspected crime was sufficiently grave and substantiated to merit prosecution.

The Administration also argues that, because Common Article 3 is an international standard interpreted by foreign courts, these courts will somehow create frivolous standards that U.S. courts will use to prosecute Americans. This proposition disregards the fact that foreign judicial opinions are not binding on U.S. courts,¹⁴ and it is extremely unlikely that a U.S. prosecutor would pursue a case or a U.S. court would hold someone criminally responsible under a strained interpretation of this standard.

The provision of Common Article 3 concerning “outrages upon personal dignity” has always been interpreted as prohibiting very serious abuses. According to the official commentary on the Geneva Conventions, it was meant to prohibit acts “which world opinion finds particularly revolting – acts which were committed frequently during World War II.”¹⁵

Judicial opinions from international criminal tribunal opinions reflect that level of severity. “Outrages upon personal dignity” as a criminal act are usually a form of violence, determined in part by severity and duration, and the intensity and duration of the resulting physical or mental suffering. Typically a crime of an “outrage against

¹³ John H. Richardson, "Acts of Conscience," *Esquire Magazine*, Vol. 146, Issue 2, August 2006.

¹⁴ Remarks of Justice Sandra Day O'Connor, Southern Center for International Studies (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf.

¹⁵ Jean de Preux. *III Geneva Convention: Relative to the Treatment of Prisoners of War*. In Jean S. Pictet, *The Geneva Conventions of 12 August 1949: Commentary*, 39 (Geneva: International Committee of the Red Cross, 1960).

human dignity” is prosecuted alongside other egregious or violent acts to cover behavior outrageous precisely because it offends all sense of decency.¹⁶

For example, international criminal tribunal cases often prosecute outrages against human dignity alongside charges such as murder, rape, and torture — men who forced women to dance naked on tables before they raped them,¹⁷ murderers who forced women to strip naked in public before they were killed,¹⁸ or interrogators who rubbed a knife on a woman’s thigh and threatened to put it in her during torture.¹⁹ Justice demanded those prosecutions address such humiliating treatment as separate outrages in their own right. While “outrages” do not have to take place only in the context of rape or murder, they have generally been prosecuted in the context of the most extreme situations of abuse.

I would add, Mr. Chairman, that the U.S. Constitution gives us a lot of words that are hard to define: for example, due process, free speech, cruel and unusual punishment, unreasonable searches. Americans believe in the principles embodied in these terms, even though their precise legal meaning is not self-evident. We don’t say, “I can’t define due process in ten words or less, so let’s not have any.” Americans have worked out the meaning of these terms over 200 years. The precise meaning of the terms of the Geneva Conventions have also become broadly understood in the 50 years since the Conventions were drafted, and are well understood by the U.S. military. It was the administration’s decision to ignore the Conventions that confused our troops, not the Supreme Court’s decision to respect Geneva. If the Congress wants clarity, the best thing it can do is to reaffirm that Common Article 3 applies.

Common Article 3 is actually much easier than you might think, because it isn’t the gold standard, like granting prisoner-of-war rights. It’s the barest minimum. The list of prohibited conduct is short precisely because the drafters of the Geneva Conventions agreed to apply it broadly.

Finally, Mr. Chairman, we should remember that the War Crimes Act not only permits prosecution of American troops who commit such crimes against others, but prosecution of foreign nationals who commit such crimes against Americans.²⁰ If we were to deny the

¹⁶ Knut Dormann, Louise Doswald-Beck (contributor), Robert Kolb (contributor). *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary*. (Cambridge, UK: Cambridge University Press, 2003). Pp. 314-324.

¹⁷ *The Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of Trial Chamber II, ICTY, JL/P.I.S./566-e February 22, 2001.

¹⁸ *Prosecutor v. Nyiramasuhuko*, Indictment, Case No. ICTR-97-21-I (Int’l Crim. Trib. for Rwanda May 26, 1997), case is ongoing.

¹⁹ *The Prosecutor v. Anto Furundzija*, Statement of the trial chamber at the Judgment hearing, ICTY, Case No. IT-95-17/1-T December 10, 1998.

²⁰ 18 U.S.C. §2441 (2006).

a) Offense.--Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

application of Common Article 3 to this conflict, we would deny ourselves one avenue to try terrorists who perpetrate these offenses against Americans. *If we want an act that was committed against an American to be a crime, it also has to be a crime when it is committed by an American.* I think it is hard to disagree with that bottom line.

Common Article 3 and Fair Trials

People captured on the battlefield and suspected of having committed war crimes or other serious offenses should be brought to justice. Military commissions that prosecute these persons must meet international fair trial standards. The rules and procedures for the military commissions should be based upon those provided for general courts-martial.²¹ Any departures from these standards must be exceptional, narrowly tailored to meet the interests of justice, and uniformly established before any proceedings begin. In particular, some principles must not be compromised.

Military Commissions and Coerced Evidence

Through the adoption of the McCain Amendment to the Detainee Treatment Act, Congress established a prohibition on cruel, inhuman, or degrading treatment or punishment expressly to address abusive interrogation techniques.²²

International and U.S. law have long recognized that one way to curb official abuses in gathering information is to prohibit the use of any evidence obtained through such actions in judicial proceedings. Otherwise, the goal of obtaining a conviction becomes an incentive to coerce confessions from suspects. This is the fundamental logic behind international rules against prosecuting people with evidence obtained through torture,²³ and behind rules in U.S. courts against the use of involuntary confessions or evidence obtained through other unlawful means.²⁴

The bottom line: *Congress cannot effectively prohibit abusive interrogation techniques if rules for military commissions do not explicitly and effectively keep evidence obtained through those techniques out of subsequent legal proceedings.* Evidence obtained through interrogations that violate the Detainee Treatment Act shouldn't be used in military commission hearings. Anything less than this will cut the heart out of the McCain amendment. Upholding this rule provides the McCain amendment with an enforcement mechanism.

(b) Circumstances.--The circumstances referred to in subsection (a) are that the person committing such war crime *or the victim of such war crime* is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act). (emphasis added).

²¹ These rules and procedures are found in the Manual for Courts-Martial (MCM), which incorporates the Rules for Courts-Martial (RCM), the Uniform Code of Military Justice (UCMJ), and the Military Rules of Evidence (MRE); and the body of jurisprudence that has developed from these standards.

²² Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

²³ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 *entered into force with regards to the United States* June 26, 1994. Article 15.

²⁴ *See, e.g. Mapp v. Ohio*, 367 U.S. 643 (1961).

Furthermore, any rules and procedures must make such a prohibition meaningful. For this reason, rather than starting from scratch, Congress should ensure that military commissions use the rules and procedures in the Manual for Courts-Martial and accompanying case law necessary to prohibit the use of coerced evidence.

In the U.S. military justice system, an involuntary statement obtained through the use of coercion generally may not be received in evidence against an accused who made the statement. The accused must move to suppress, or object to the evidence. If the military judge thinks there is sufficient doubt about the statement, the prosecution—the party with the best access to the story behind the statement—then has the burden of establishing the admissibility of the evidence. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. Statements of witnesses not present before the court are presumptively inadmissible. The proponent must show the statement meets limited exceptions to this rule designed to weed out questionable evidence.

The failed military commission rules demonstrate a stark contrast. On March 24, 2006, the General Counsel of the Department of Defense adopted a change to the military commission rules to prohibit the use of evidence obtained through torture.²⁵ However, the rule provided few safeguards to make the prohibition meaningful. It failed to indicate whether the commission on its own would make inquiries into the possible use of torture and whether the U.S. government must provide the information the commission requests to determine whether a statement was extracted through torture. It also failed to provide guidance on whether the prosecution must make its own independent determination of whether interrogation methods constituted torture, or whether it must accept determinations made by others, e.g., those conducting the interrogations, or senior Pentagon or Department of Justice officials.²⁶

The Use of Hearsay Evidence in Military Commissions

Opponents of the use of the U.S. military justice system's rules concerning hearsay evidence say that such rules will stymie prosecutions by limiting evidence essential to the prosecution of accused terrorists. They suggest that rules regarding hearsay – which admit “second hand” statements only in exceptional circumstances – will require military commanders to be called in from war-fighting duties to testify at proceedings thousands of miles away; that key witnesses in Afghanistan and elsewhere will refuse to travel to testify; and that valuable and reliable evidence will be lost to logistics.

In fact, the U.S. courts-martial system has rules and procedures to address these concerns, and allows in more hearsay evidence than these arguments suggest. Hearsay exceptions in

²⁵ “Military Commission Instruction No. 10, ‘Certain Evidentiary Requirements,’” U.S. Department of Defense, March 24, 2006, available at: <http://www.defenselink.mil/news/Mar2006/d20060327MCI10.pdf>.

²⁶ See, e.g., “Q & A on Military Instruction Number 10: Will it Keep Evidence Obtained through Torture or Cruel Treatment out of Commission Trials?” Human Rights Watch Question and Answer, March 31, 2006, available at: <http://hrw.org/english/docs/2006/03/31/usdom13109.htm>.

U.S. courts-martial are generally the same kinds used in U.S. federal courts.²⁷ Summaries of statements made by witnesses in an excited state, at a time of high stress, or just after perceiving an event are all admissible – and the actual witnesses who made the statements need not be present. In all of these cases, soldiers or arresting officers can simply describe what witnesses on the scene told them; the person making the battlefield utterance who wouldn't have to. In this sense, there is some modest burden on the military, but it's worth it given the alternative, which allows easy cover-up of coercive interrogation. In addition, there are many other ways to adhere to the existing rules against hearsay without imposing excessive travel burdens on witnesses who are located far away. Witnesses can testify by closed circuit television, or their depositions by both sides can be taped and played in court. Moreover, the Military Rules of Evidence allow a declarant to be determined “unavailable” by reason of military necessity, opening the door to a number of hearsay exceptions.

The bottom line concerning hearsay evidence should be this: *Any rules or procedures that allow hearsay should not allow the government to convict people on the basis of secret interrogations without producing the witness, either in person, by closed-circuit television, or by deposition.* Our concern is that such interrogations are likely to be described by only the interrogator, or possibly only the interrogator's supervisor or colleague, or a government official who spoke to an interrogator from a foreign country. This is fundamentally unfair for two reasons.

First, if you are listening to a report from an interrogator about a confession or admission, how do you test whether the statement was coerced or even tortured out of the declarant? You are deciding whether the interrogation used torture by asking the interrogator himself. If the declarant also testifies, at least then the fact-finder can decide based on two sides to that story – the declarant and any interrogator who might refute claims of mistreatment.

The second reason does not relate to statements by interrogators, but statements made by one detainee implicating another. When the statement is second-hand, you can't directly test its credibility. According to the Administration, al-Qaeda members are trained to lie during interrogation. No one should be convicted on the basis of the testimony of such allegedly unsavory characters without the opportunity to question the witness directly. An interrogator's hearsay account of what one detainee said about another deprives the suspect of this essential confrontation right.

Some advocate adopting the evidentiary rules and procedures of international criminal tribunals to accommodate hearsay evidence. However, to be effective and fair, such a

²⁷ Article 36(a) of the UCMJ provides that trial procedures for courts-martial, military commissions and other tribunals may be prescribed by the President. It states that the regulations should as far as practicable “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts”. The Manual for Courts-Martial (chapter three: “Military Rules of Evidence”) was issued to set out the applicable rules of evidence for courts-martial, and was modeled on the Federal Rules of Evidence: See U.S. v. Diaz, 59 M.J. 79, U.S. Armed Forces, Sep 17, 2003; Hamdan v. Rumsfeld --- S.Ct. ----, 2006 WL 1764793; Manual for Courts-Martial, Military Rules of Evidence, Analysis of the Military Rules of Evidence, App. 22, M.R.E. 801.

step would need to do more than simply adopt an evidentiary standard. International criminal tribunals use a panoply of evidentiary and other rules to ensure fairness.

Generally, their rules allow the fact-finder to admit any relevant evidence that he or she deems to have probative value. But, there are other rules that work with this standard. For example, the tribunal is made up of legally trained judges who have experience making fine distinctions on the reliability and value of different forms of evidence that a jury or even a panel of non-lawyer officers simply won't have. There is a clear prohibition on any evidence that is obtained by a violation of internationally recognized human rights norms if "the violation casts substantial doubt on the reliability of the evidence; or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings."²⁸ The judges can decide this issue on their own; a party doesn't have to raise the matter. The judges are instructed to look at "indicia of [a statement's] reliability" such as its truthfulness and trustworthiness along with whether or not the statement was voluntarily given.²⁹ The judges can decide to disregard testimony after it has been given rather than keeping it out in the first place.³⁰ In ruling on admissibility, including the relevance or probative value of hearsay evidence, the court must give reasons that are placed in the record of the proceedings.³¹

Hearsay admissibility is one of the most misunderstood rules in the U.S. system, with many careful and complex rules interwoven over time, but the U.S. military judge advocate corps knows them well. If the Administration has a good reason to proceed differently, let the Administration make the case. But concerns about "getting in the evidence" should not obscure the bottom line: *Any rules or procedures that allow hearsay should not allow the government to convict people on the basis of secret interrogations without producing the witness.* The invitation to abuse is simply too great.

"Miranda Warnings" and Military Commissions

The administration witnesses before the Judiciary Committee say that using the U.S. military justice system's requirements for rights warnings and exclusion of evidence would compromise military operations – that U.S. troops in the field would face a choice between reciting *Miranda* warnings as they conducted urban warfare, and thereby potentially discouraging valuable intelligence information, or forgoing prosecution of suspected terrorists.³²

But the rules and procedures for courts-martial have already dealt with this issue. The rights warning is not required when someone is interrogated for the purpose of gathering

²⁸ Rome Statute of the International Criminal Court, Article 69(7) (2002).

²⁹ See., e.g., *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defense Motion on Hearsay, (Trial Chamber, Int'l Crim. Trib. Former Yugo., Aug. 5, 1996).

³⁰ Trial Transcript for IT-94-1-T, Greve Testimony, at page 923, line 8. Available at <http://www.un.org/icty/transe1/960520ed.htm>.

³¹ *Id.* 64(2).

³² The courts-martial system requires rights warnings through Article 31 of the Uniform Code of Military Justice and the *Miranda* and *Tempia* line of cases.

intelligence.³³ Moreover, the failure to give a rights warning does not keep evidence obtained through an intelligence interrogation out of court.

Only if an interrogation is begun for the purposes of law enforcement or disciplinary proceedings is a rights warning required for the resulting statements to be admissible. Whether the interrogation is disciplinary or law enforcement is determined by assessing all the facts and circumstances at the time of the interview to determine whether the questioner was acting or could reasonably be considered to be acting in an official law-enforcement or disciplinary capacity.³⁴

Evidence obtained through intelligence interrogations is generally admissible. The other side can challenge that evidence for a number of reasons, the most relevant here being that it was coerced³⁵ (or that the interrogations were really for law enforcement). If the judge decides evidence from intelligence interrogations cannot be admitted, the next question is whether the evidence from the law enforcement interrogation was tainted by a coerced intelligence interrogation. Evidence from intelligence interrogations can in principle be given to law enforcement interrogators, but if the evidence from an intelligence interrogation was coerced, that may keep out evidence from both interrogations.

This issue typically comes up when US service members are questioned for intelligence-gathering purposes, which not unusual. For example, when troops return to base after combat, they are often debriefed by intelligence personnel – a form of intelligence interrogation. Should the debriefer determine that a US serviceman may have been involved in a crime, the purpose of the questioning might shift, with the purpose determining the admissibility of unwarned statements that the serviceman might make. The classic legal opinion on this rule is *U.S. v. Lonetree*,³⁶ which dealt with a Marine Corps embassy guard stationed in Moscow who was charged, among other things, with committing espionage by passing confidential information to Soviet agents. He was debriefed for intelligence purposes and only later interrogated for prosecution. The court knew the difference, and unwarned statements made during the course of the intelligence debriefing came in.

That's the rule now, Senators. Again, if the Administration has a good reason for changing the rules, let it make the case.

The bottom line regarding Miranda warnings is this: *no one should be forced to testify against themselves or to confess guilt*. This is another reason why statements which have been made as the result of torture may not be used as evidence in any proceedings. The protections in a general court-martial that prevent forced self-incrimination require that

³³ A rights warning is only required when the questioning is of a “law enforcement or disciplinary” nature: *U.S. v. Lonetree*, 35 MJ 396, CMA 1992; cert denied 113 S.Ct 1813; *U.S. v. Loukas*, 29 M.J. 385, 387 (CMA,1990). See also: *U.S. v. Moses*, 45 M.J. 132 (U.S. Armed Forces,1996.); *U.S. v. Cohen*, 63 M.J. 45 (U.S. Armed Forces, 2006).

³⁴ *U.S. v. Cohen*, 63 M.J. 45, 49 (U.S. Armed Forces, 2006).

³⁵ Rule 304, Military Rules of Evidence.

³⁶ 35 MJ 396, CMA 1992; cert denied 113 S.Ct 1813.

people be warned of their right to remain silent and their right to an attorney fairly early in a law enforcement or disciplinary process. As with rules and procedures that give effect to the ban on abusive interrogations, Congress should look to the rules already in place, already tested, already used in training, and use the U.S. military justice system to its best advantage.

In closing: Senators, I want to see terrorists brought to justice. I was in the room when accused al-Qaeda propaganda minister Ali Hamza al Bahlul called the proceedings illegitimate. Of course he said that, but that's not what's important. What killed me was the knowledge that any objective observer would have to agree with him. Please do what's necessary to set the bottom line where it should be, and let's make it happen.