Gorsuch, Neil M

From: Gorsuch, Neil M
Sent: Wednesday, July 12, 2006 5:17 PM
To: Katsas, Gregory (CIV)
Subject: FW: Draft Hamdan Legislation
Attachments: Enemy Combatant Detention Act_Draft15.doc; Legislative Options4.doc

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From: Engel, Steve
Sent: Wednesday, July 05, 2006 4:44 PM
To: Sampson, Kyle; Elwood, Courtney; McNulty, Paul J; Rowan, Patrick (ODAG); Clement, Paul D; Garre, Gregory G; Elston, Michael (ODAG); Moschella, William; Keisler, Peter D (CIV); Nichols, Carl (CIV); Hertling, Richard; McIntosh, Brent; Katsas, Gregory (CIV); Letter, Douglas (CIV)
Cc: Bradbury, Steve; Gorsuch, Neil M; Elwood, John; Marshall, C. Kevin; Eisenberg, John; Sobota, Luke
Subject: Draft Hamdan Legislation

I attach a draft memorandum detailing legislative options on Hamdan as well as the latest draft of the proposed legislation.

Per the WH's request, we intend to circulate drafts to the NSC this evening. Comments before then are particularly welcome.

Thanks,

Steve

FOR DISCUSSION PURPOSES ONLY
DRAFT—7/05/06

ENEMY COMBATANT MILITARY COMMISSIONS ACT

SECTION 1. SHORT TITLE; AUTHORITY; FINDINGS.

(a) SHORT TITLE.—This Act may be cited as the "Enemy Combatant Military Commissions Act of 2006."

(b) AUTHORITY.—The requirements, conditions, and restrictions established by this Act are made under the authority of Congress under Clauses 1, 10, 12, 13, 14, and 18 of Article I, Section 8 of the Constitution of the United States.

(c) FINDINGS.—Congress finds the following:

(1) For more than 10 years, the al Qaeda terrorist organization has waged an unlawful war of violence and terror against the citizens of the United States and their allies abroad. Al Qaeda was involved in the bombing of the World Trade Center in New York City in 1993, the bombing of the Khobar Towers in Saudi Arabia in 1996, the bombing of the U.S. Embassies in Kenya and Tanzania in 1998, and the attack on the U.S.S. *Cole* in Yeman in 2000. On September 11, 2001, members of al Qaeda hijacked commercial airplanes and attacked the World Trade Center in New York City and the Pentagon in Washington, DC, and downed United Airlines Flight 93. Approximately 3,000 civilians were killed.

(2) Following September 11, Congress recognized the existing hostilities with al Qaeda and affiliated terrorist organizations and authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541.

(3) The President has the authority to convene military tribunals arising from his role as Commander in Chief of the Armed Forces under Article II of the Constitution. As the Supreme Court of the United States has recognized, "[s]ince our nation's earliest days, such tribunals have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. . . . They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each

instance to the need that called it forth." *Madsen v. Kinsella*, 343 U.S. 341 (1952).

(4) Article I, Section 8, of the Constitution provides that Congress has the power to "constitute Tribunals inferior to the Supreme Court; . . . define and punish . . . Offenses against the Law of Nations; . . . make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

(5) Pursuant to the President's constitutional authority and to the AUMF, the President issued a comprehensive military order to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" and authorized the Secretary of Defense to establish military commissions to try detained enemy combatants for violations of the laws of war. 66 Fed. Reg. 57833 (2001).

(6) In *Hamdan v. Rumsfeld*, the Supreme Court held that the military commissions established under the President's authority conflicted with the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* As Justice Kennedy recognized in his concurring opinion, the Court's decision was premised upon "domestic statutes," and therefore if Congress "deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so."

(7) This Act is in direct response to the Supreme Court's decision in *Hamdan*. The Act authorizes the President to prosecute by military commission enemy combatants captured by United States forces during the War on Terror. The prosecution of enemy combatants by military commissions established under the procedures set out in this Act fully complies with United States law and United States treaty obligations.

(8) The Act also resolves any uncertainties that may have arisen under the Supreme Court's decision in *Hamdan* by clarifying that the standards for treating detainees under the Detainee Treatment Act of 2005 fully satisfy United States obligations under international law, and the Geneva Conventions shall not be applied to confer rights on members of al Qaeda and affiliated terrorist organizations whose activities, by definition, demonstrate no respect for the laws of war.

(9) The use of military commissions is particularly important because the War on Terror makes other alternatives, such as courts martial, impracticable. Al Qaeda terrorists have demonstrated their commitment to the destruction of the United States and to the abuse of our legal processes. In a time of ongoing conflict, it is neither practicable nor appropriate for illegal enemy

combatants like Al Qaeda terrorists to be tried like American citizens under federal law. Recent events, including the evidentiary difficulties associated with the trial of admitted al Qaeda terrorist Zacharias Moussaoui confirm and illustrate some of the problems that would be encountered if military commissions were not employed.

(10) Unlawful enemy combatants are not entitled to be treated and should not be treated in a manner equivalent to members of the Armed Forces of the United States, who are subject to military law. The members of al Qaeda simply have no right to be tried in the same courts as those men and women of the Armed Forces whom they have fought against, and the procedures for courts martial simply would not be practicable here. For instance, courts martial proceedings would require the Government to share classified information with the accused, but members of Al Qaeda cannot be trusted with our Nation's secrets. Courts martial also would restrict the use of hearsay beyond that provided in this Act. The hearsay statements of fellow terrorists are often the only evidence available in this conflict, and the commissions will only consider statements that are probative and reliable. Our enemies in the War on Terror do not fight or declare their intentions openly but often pursue their objectives in secret conspiracies whose objectives are often discernible only through hearsay statements made by captured collaborators. Securing properly sworn and authenticated evidence in every instance would require members of the Armed Forces to leave the front lines and their duty stations to attend legal proceedings, distracting members of the Armed Forces from their primary role in protecting the American people. The guarantee of a speedy trial, likewise, may not be practicable when, during wartime, members of the Armed Forces must focus first on protecting the American people by detaining enemy combatants and only later on gathering the evidence for war crimes trials.

(11) The right to habeas corpus is not suspended by this Act or the Detainee Treatment Act but is channeled in a manner appropriately tailored to the circumstances of this conflict. Each detainee is entitled to petition for judicial review of his or her detention, as well as any conviction by military commission, exclusively in the U.S. Court of Appeals for the D.C. Circuit and, thereafter, to the United States Supreme Court. The Congress finds that this level of judicial review is appropriate to balance the fair treatment of detainees without imposing an undue litigation burden on the Nation's military. This level of civilian court judicial review is more generous than what has historically been provided for military commission proceedings; indeed, it is without precedent in the history of armed conflict in this country.

SEC. 2. DEFINITIONS.

As used in this Act, the following definitions apply:

(1) CLASSIFIED INFORMATION.—The term "classified information" has the meaning given that term in section 1(a) of the Classified Information Procedures Act (18 U.S.C. App.).

(2) COMMISSION.—The term "commission" means a military commission established pursuant to section 4 of this Act.

(3) ENEMY COMBATANT.—The term "enemy combatant" means a person determined by the President or the Secretary of Defense to have actively associated himself with the military arm of an organization engaged in armed conflict with the United States and who poses a risk of return to hostilities.

(4) GENEVA CONVENTIONS.—The term "Geneva Conventions" means the international conventions signed at Geneva, 12 August 1949, including common Article 3.

SEC. 3. AUTHORIZATION AND PROCEDURES FOR DETENTIONS.

(a) The President is authorized to detain enemy combatants for a period of up to ten years from the date of this Act or until such time as the President determines that hostilities with al Qaeda and affiliated terrorist organizations have ceased, whichever comes first. If, after ten years, the President believes hostilities continue, Congress may renew this authorization.

(b) Enemy combatants shall be held under conditions that do not involve cruel, inhuman, and degrading treatment as defined in the Detainee Treatment Act of 2005, and in such places, including within the United States, as the President deems appropriate.

(c) With respect to detainees in the custody of the Department of Defense, the Secretary of Defense shall apply the procedures promulgated under the Detainee Treatment Act of 2005, subject to review and modification by Congress as therein specified, for:

(1) Combatant Status Review Tribunals to determine each detainee's enemy combatant status;

(2) Administrative Review Boards to review annually whether each detainee continues to pose a risk of return to hostilities.

SEC. 4. AUTHORIZATION FOR MILITARY COMMISSIONS.

(a) The President is authorized to establish military commissions for the trial of alien enemy combatants for violations of the laws and customs of war, including for the crime of conspiracy to violate the laws and customs of war.

(b) Military commissions shall have authority to impose upon any defendant found guilty after a proceeding under this Act a sentence that is appropriate to the offense or offenses for which there was a finding of guilt, which sentence may include death, imprisonment for life or term of years, payment of fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.

(c) The Secretary of Defense shall be authorized to carry out a sentence of punishment decreed by a military commission pursuant to such procedures.

(d) The military commissions established under this Act shall be deemed to satisfy the obligations of the United States under the Geneva Conventions and any other treaty or statute relating to the detention, treatment, or prosecution of enemy combatants.

(e) The Secretary of Defense shall submit to Congress an annual report on the conduct of trials by military commissions under this Act. Each such report shall be submitted in unclassified form, with classified annex, if necessary and consistent with national security. The report shall be submitted not later than December 31 of each year.

SEC. 5. MILITARY COMMISSION PROCEDURES.

(a) COMMISSION PERSONNEL.

(1) MEMBERS.—The Secretary of Defense shall appoint the members of each military commission. Each member shall be a commissioned officer of the United States Armed Forces, including without limitation reserve personnel on active duty, National Guard personnel on active duty in Federal service, or retired personnel recalled to active duty.

(2) NUMBER.—Each commission shall consist of three military officers. The commission also shall include an alternate member who shall attend all sessions and take the place of a commission member in the case of incapacity, resignation, or removal of any member.

(3) PRESIDING OFFICER.—From among the members of each Commission, the Secretary of Defense shall designate a Presiding Officer to preside over

the proceedings of that Commission. The Presiding Officer shall be a United States military judge.

(4) DUTIES OF THE PRESIDING OFFICER.—

(A) The Presiding Officer shall admit or exclude evidence in accordance with rules of evidence established by the Secretary of Defense and by this Act.

(B) The Presiding Officer shall have the authority to close proceedings or portions of proceedings in accordance with this Act.

(C) The Presiding Officer shall ensure that the discipline, dignity, and decorum of the proceedings are maintained, shall exercise control over the proceedings to ensure proper implementation of the President's Military Order and this Act, and shall have authority to act upon any contempt or breach of commission rules or procedures. The Presiding Officer shall have the authority to discipline attorneys authorized to appear before the commission for violations of the laws, rules, regulations, or orders governing the proceedings, including but not limited to revocation of eligibility to appear before that commission or to appear before any other commission convened under this Act.

(D) The Presiding Officer shall ensure the expeditious conduct of the trial.

(E) The Presiding Officer may certify all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge, to the United States Court of Appeals for the District of Columbia Circuit for expedited consideration.

(b) POWERS OF A COMMISSION.—A commission shall have the following powers:

(1) To summon witnesses to trial and to require their attendance and testimony to put questions to them;

(2) To require the production of documents and other evidentiary material;

(3) To administer oaths to witnesses;

(4) To appoint officers for the carrying out of any task designated by the commission, including the power to have evidence taken.

(c) OTHER PROCEDURES.

(1) The military commissions shall be conducted pursuant to procedures promulgated by the Secretary of Defense, consistent with the requirements of this Act. The Secretary of Defense need not rely upon the procedures for courts martial pursuant to the Uniform Code of Military Justice, where he deems alternative procedures appropriate.

(2) EVIDENCE.—Evidence is admissible if the Presiding Officer determines that the evidence would have probative value to a reasonable person. Hearsay evidence shall be admissible in the discretion of the Presiding Officer where its probative value is not substantially outweighed by its prejudicial impact.

(3) STANDARD OF PROOF.—All 3 members of a commission shall agree that the defendant is guilty of a charge beyond a reasonable doubt for a defendant to be found guilty of it.

(4) OPEN PROCEEDINGS.—The military commission shall hold open proceedings except as noted in this subsection.

(A) The Presiding Officer may close all or a portion of the proceeding upon a determination that closing of the proceeding is necessary to protect classified information; the physical safety of the participants in the proceeding; intelligence and law enforcement sources, methods, or activities; or other national security interests.

(B) The Presiding Officer may close all or part of a proceeding on his own initiative or based upon a presentation, including an *ex parte* or *in camera* presentation, by either the prosecution or the defense.

(C) A decision to close a proceeding or portion thereof may include a decision to exclude the defendant when necessary for national security or the safety of individuals, provided that one defense counsel shall be present for all trial proceedings, and the exclusion shall be no broader than necessary.

(D) If the defendant is denied access to evidence, a redacted or unclassified summary of evidence shall be provided, if possible. The evidence shall not be admitted if the admission of the evidence would result in the denial of a full and fair trial.

(d) COUNSEL.—The Secretary of Defense shall have the authority to promulgate regulations for the appointment of the prosecution, counsel for the defense, and any other commission personnel.

(e) SUBMITTAL OF PROCEDURES.—Not later than 90 days after the date of enactment of this Act, the Secretary of Defense shall submit to the House of Representatives and the Senate a report setting forth the procedures for military commissions promulgated under this section. Thereafter, the Secretary of Defense shall submit to the same committees a report on any modification of such procedures, no later than 60 days before the date on which such modifications shall go into effect.

SEC. 6. MILITARY COMMISSION JURISDICTION.

(a) A military commission shall have jurisdiction to hear any criminal prosecution involving international terrorism, including any offense under chapter 113B of title 18, United States Code.

(b) A military commission shall have exclusive jurisdiction over violations of the laws of war, including conspiracy to violate the laws of war, committed by alien enemy combatants engaged in hostilities against the United States or its allies.

(c) A military commission shall have jurisdiction over other offenses traditionally triable by military commissions or pursuant to the Department of Defense's Military Commission Instruction Number Two.

SEC. 7. JUDICIAL REVIEW.

(a) Except as provided for in this section, and notwithstanding any other law, no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any application for a writ of habeas corpus pending or filed after the date of enactment of this Act, relating to any aspect of an alien's detention, classification as an enemy combatant, or conditions of confinement:

(1) COMBAT STATUS REVIEW TRIBUNALS.—The United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal. The scope of such review is defined in section 1005(e)(2) of the Detainee Treatment Act of 2005. If the Court grants an alien's petition for review, the Department of Defense may conduct a new Combat Status Review Tribunal.

(2) MILITARY COMMISSIONS.—Pursuant to Section 1005(e)(3) of the Detainee Treatment Act of 2005, the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the

validity of a final judgment rendered by a military commission. In addition, the D.C. Circuit may review on an expedited basis any interlocutory appeal certified by the Presiding Officer of a military commission.

(3) INFORMATION CONSIDERED.—The court may consider classified information submitted *in camera* and *ex parte* in making any determination under this section.

SEC. 8. SATISFACTION OF TREATY OBLIGATIONS.

(a) For all purposes under federal law, including with respect to the treaty obligations of the United States, the phrase "armed conflict not of an international character" under the Geneva Conventions, including common Article 3, shall not apply to armed conflicts between the United States and an international terrorist organization. In particular, and without limitation, common Article 3 shall not apply to the worldwide armed conflict with al Qaeda and affiliated terrorist organizations.

(b) Except as provided in 18 U.S.C. § 2441, no court shall apply the Geneva Conventions or Protocol I to the Geneva Conventions, directly or indirectly, as a source of rights or obligations in any habeas action or any other action.

(c) Satisfaction of the prohibitions against cruel, inhuman, and degrading treatment found in Section 1003 of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note) shall fully satisfy United States obligations under section 1 of common Article 3 of the international conventions signed at Geneva, 12 August 1949, with the exception of the obligations imposed by subsections 1(b) and 1(d).

SEC. 9. RULES OF CONSTRUCTION; RETROACTIVE APPLICATION; CONFORMING AMENDMENTS.

(a) CONSTRUCTION.—This Act shall be construed in accordance with its plain language and without any reference to the doctrine of constitutional avoidance or to the judgments or opinions of foreign or international courts.

(b) RETROACTIVE APPLICATION.—This Act shall take effect on the date of the enactment of this Act and shall apply to any aspect of the detention, treatment, or trial of any alien detained as an enemy combatant by the United States at any time since September 11, 2001, and to any claim or cause of action whatsoever relating to an alien detained as an enemy combatant by the United States that is pending on or after the date of the enactment of this Act.

(c) Section 1005 of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note) is amended to conform with this Act as follows—

(1) by striking subsection (e)(3)(B) and renumbering subsections (e)(3)(C) and (e)(3)(D) as subsections (e)(3)(B) and (e)(3)(C), respectively; and

(2) in subsection (e)(3)(A), by striking "pursuant to Military Commission Order No. 1, August 31, 2005 (or any successor military order)" and inserting by a military commission constituted under the Enemy Combatant Detention Act of 2004; and

(3) in former subsection (e)(3)(C)(i), by striking "pursuant to the military order" and inserting "by a military commission"; and

(4) in former subsection (e)(3)(C)(ii), by striking "pursuant to such military order" and inserting "by such a military commission"; and

(5) former subsection (e)(3)(D)(i) by striking "specified in the military order" and inserting "specified for a military commission"; and

(6) and in former subsection (e)(3)(C)(i), by striking "at Guantanamo Bay, Cuba"; and

(7) in former subsection (e)(2)(B)(i) by replacing "the Department of Defense at Guantanamo Bay, Cuba" with "United States".

LEGISLATIVE OPTIONS TO ADDRESS *HAMDAN V. RUMSFELD*

The Supreme Court held in *Hamdan v. Rumsfeld* that the military commissions established to try captured al Qaeda terrorists are inconsistent with the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 801 et seq., and common Article 3 of the Geneva Conventions. The Court's rationale for deciding the case, as well as questions that the Court left open, may invite future legal challenges to the detention and prosecution of enemy combatants. Because *Hamdan* turns solely upon federal law and the domestic impact of treaties, Congress may act to resolve certain outstanding issues by legislation.

Members of Congress have asked the Administration to propose a legislative package to address the issues raised by *Hamdan*. This memorandum identifies the key issues and discusses the legislative options to address them. A draft bill, incorporating the recommendations discussed below, is attached as Exhibit A.

MILITARY COMMISSION AUTHORITY

Hamdan held that the UCMJ requires military commissions to follow court martial procedures except where a specific procedure is impracticable. Unless commission procedures are revised to track those for courts martial, *Hamdan* requires renewed statutory authorization. The proposed draft bill would authorize the establishment of commissions with distinct procedures to try enemy combatants.

ISSUE FOR DECISION: Whether to seek statutory authorization for military commissions separate from the UCMJ.

- Assessment. Because al Qaeda detainees have no right to be tried in the courts established for the United States troops whom they have fought against, and because judicial scrutiny of every departure from those procedures is impractical and inappropriate, the draft bill should seek statutory authorization for commissions that need not hew to the UCMJ procedures.

- The President also might consider satisfying *Hamdan* by making specific determinations of the impracticability of certain courts martial procedures. This alternative, however, would create too much uncertainty and risk that commission determinations could be struck down by courts after trials. Another alternative would be to continue to hold enemy combatants without bringing any charges. This open-ended detention, without trial, has been a source of criticism, however. It is clearly appropriate to try and punish detainees where there is evidence that they have committed war crimes.

- A declaration of war, as discussed below, might also make specific authorization unnecessary by authorizing a departure from peacetime procedures.

RECOMMENDATION: We recommend seeking express statutory authorization for military commissions.

DETENTION AUTHORITY

Hamdan raises concern over whether, absent legislative action, the Court would accept the President's ongoing authority to detain enemy combatants. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Court held that the Authorization for the Use of Military Force (AUMF) provided the detention authority for the duration of hostilities in Afghanistan; a plurality recognized, however, that what constitutes "active hostilities" could be subject to future challenge. *Id.* at 521. *Hamdan* expressly noted that Hamdan did not challenge his detention in the case before the Court (suggesting that there might be grounds for such a challenge), and the decision otherwise read the President's authority under the AUMF narrowly.

ISSUE FOR DECISION: Whether to seek statutory authorization for detention and whether to include a sunset provision limiting legislative endorsement to ten years.

- Pros. The proposed bill would strengthen the President's detention authority against legal challenges. It would make clear that the President has the sole discretion to determine whether hostilities continue and where individuals may be detained. The sunset provision would help mollify legislative and judicial skeptics concerned about an open-ended detention authority, while ensuring that this authority remains strong well into the future.

- Cons. Seeking statutory authority could suggest that the President's Article II authority is insufficient. In addition, as *Hamdan* demonstrates, courts could read a statute to set a ceiling on executive authority. The proposed language provides the President with sufficient authority, but there is the risk that Congress might water down the bill. Seeking specific authority here also might weaken the argument that the AUMF clearly empowered the President in other contexts, such as the Terrorist Surveillance Program.

- Granting the President the authority to detain enemy combatants in the United States, as well as in Guantanamo Bay, also may prove controversial.

RECOMMENDATION: While recognizing the risk of codifying the President's authority, we believe that the risk of judicial challenge is not trivial and therefore believe it prudent to seek statutory authorization for the detention authority.

DECLARATION OF WAR

Although the AUMF broadly authorizes the President to use military force, *Hamdan* read the President's authority narrowly, holding that the AUMF does not grant the authority to conduct commissions apart from peacetime standards. To make clear that the President enjoys his full constitutional authority as Commander in Chief in the War on Terror, the proposed bill could include a declaration confirming that a state of war exists between the United States and al Qaeda, including affiliates who associate themselves with al Qaeda's war against the United States.

- Pros. A declaration of war would make clear that the President enjoys all the inherent powers of a wartime President, including the authority to use force, detain enemy combatants, interrogate detainees, and conduct surveillance on the enemy. The declaration could itself authorize commissions and detention and therefore avoid the need for specific authorizations.

- Cons. A declaration of war may be unnecessary because the AUMF should provide full authority to the President to take all measures incident to waging war, and *Hamdan* addressed only military commissions. In addition, should a declaration be proposed, but not adopted, courts could infer further limitations on the President's authority. Some might also question the need for an express declaration five years after September 11.

RECOMMENDATION: Because the AUMF should make a declaration of war unnecessary, and because the failure to adopt a declaration might be viewed as limiting the AUMF, we believe that the proposed act should not contain a formal declaration.

MILITARY COMMISSION PROCEDURES

The *Hamdan* opinion and Justice Kennedy's concurrence expressed concern over military commission procedures. Although resting its holding upon federal statutes, the Court could find in a future case that these procedures are unconstitutional or *ultra vires*, absent amendment and clear statutory authority. The proposed bill makes clear that the DOD has general authority over commission procedures, but proposes codifying some to address the justices' concerns and to strengthen commissions against future challenges.

ISSUE FOR DECISION: Whether to propose general DOD authority over the commissions, and whether to codify procedures as detailed below.

- *Military judge; unanimity*. Ensuring that the presiding officer is a military judge, with greater independence from the prosecution, and that the vote of conviction be unanimous responds to Justice Kennedy's concerns about the fairness of the proceeding and strengthens the commissions against judicial scrutiny.

- *Closing of the proceedings*. The *Hamdan* plurality and Justice Kennedy expressed concern that the accused might be convicted based on secret evidence that he had never seen. On the other hand, the Government has a strong interest in preventing detained al Qaeda terrorists from gaining access to highly classified information. The proposed statute makes clear that the accused shall be present at all proceedings, except where it is strictly necessary to exclude him.

- *Use of hearsay*. Justice Kennedy's concurrence questioned the use of unreliable hearsay in the proceeding. Hearsay reports from the battlefield, however, may often be the best evidence against the accused. The proposed rule permits hearsay, but only where its probative value outweighs its prejudicial effects.

- *Counsel.* Detainees could be given the right to choose their own counsel, regardless of nationality. Such counsel would not have access to classified information, but could otherwise assist in the representation. Granting such a right to detainees, however, could create significant problems, because DOD has a strong interest in limiting detainee access to approved individuals. In addition, granting detainees their chosen counsel would suggest that they cannot be fairly represented by military lawyers, when in fact, those lawyers have proven to be zealous advocates.

RECOMMENDATION: The proposed bill seeks a middle ground, as detailed above, between preserving flexibility in establishing procedures and providing clear statutory authorization. We do not recommend granting the accused counsel of their choice.

THE GENEVA CONVENTIONS

Hamdan held that the military commissions must follow common Article 3 of the Geneva Conventions, which sets standards for "armed conflicts not of an international character." The Court rejected the President's view that common Article 3 applies only to internal civil conflicts, not to conflicts with international terrorists. Four justices went further and would have required the commissions to follow the optional Protocol I to the Geneva Conventions, even though the United States has not ratified that protocol.

If common Article 3 applies, the War Crimes Act, 18 U.S.C. § 2441, makes violations of its provisions a war crime. Those provisions would require that detainees be treated "humanely" and prohibit "outrages upon personal dignity," including "humiliating and degrading treatment." Such vague terms are susceptible to unpredictable interpretation, and such ambiguity is unacceptable to those charged with fighting the War on Terror for the United States. In addition, because the Detainee Treatment Act of 2005 (DTA) already prohibits "cruel, inhuman, or degrading treatment," the direct application of Article 3 is likely unnecessary.

ISSUES FOR DECISION: Whether to restore, by statute, the President's interpretation of Article 3 and to prevent courts from applying vague standards from international law to give privileges to al Qaeda terrorists and create a risk of liability for U.S. persons.

- Pros. To protect United States personnel, the proposed bill should make clear, at a minimum, that the DTA's standards satisfy common Article 3.

- A bill also may restore the President's interpretation of common Article 3 for domestic purposes and prevent terrorists from invoking rights under international treaties that they themselves condemn.

- Cons. Critics might charge that the United States is seeking to breach its treaty obligations or seeking to treat detainees inhumanely. The proposed bill responds

by making clear that even if comment Article 3 applied, the treatment standards of the DTA would fully satisfy that standard.

RECOMMENDATION: Propose a bill that both makes clear that existing protections will satisfy common Article 3 and that restores the political Branches' control over treaty obligations and prevents detainees from invoking the Geneva Conventions.

PROTECTION OF SERVICE PERSONNEL

Hamdan's determination that common Article 3 applies here could mean that United States personnel have unknowingly violated the Convention in holding enemy combatants. The DTA provides a defense to civil or criminal prosecution for government agents who have acted in the good faith belief that their actions were lawful, such as those who relied upon the prior treaty interpretation of the United States. A proposed bill might expressly confer immunity if there is a concern that U.S. personnel are at risk.

ISSUE FOR DECISION: Whether to grant express immunity from claims based on *Hamdan*'s interpretation of Article 3 to United States personnel.

- Pros. The proposed bill grants immunity indirectly by providing that no court shall find in the Geneva Conventions a source of rights and obligations and making clear that this applies to conduct undertaken since September 11, 2001. United States personnel will also be able to rely upon the DTA's good faith defense.

- Cons. An express immunity is unnecessary and could suggest, by implication, a belief that U.S. personnel in fact have treated detainees inhumanely. Further, if an immunity proposal is not adopted, then courts may infer from the legislative history a limit upon the good faith defense.

RECOMMENDATION: Confirm indirect immunity by making clear that common Article 3 does not provide a source of rights and obligations in United States courts.

STATUS DETERMINATION PROCEDURES

Hamdan raises some concern over existing procedures for determining the status of detainees. Combat Status Review Tribunals ("CSRTs") currently make the initial determination of enemy combatant status, and Administrative Review Boards ("ARBs") review whether there is a continued risk that the detainee might return to battle. The DTA requires that the procedures governing these bodies be reported to Congress and provides for limited judicial review of CSRTs. The Act, however, does not specify procedures for either body. Legislation could create a new framework for these tribunals, establishing procedures and fixed timelines for initial and subsequent reviews, and permitting judicial review of those determinations. Legislation also might strengthen the United States position in existing legal challenges to these bodies.

ISSUES FOR DECISION: Whether to seek statutory authorization for CSRTs and ARBs, whether to codify procedures for CSRTs and ARBs, and whether to expand existing judicial review to ARBs.

- Pros. Expressly codifying procedures for CSRTs and ARBs would strengthen them against legal challenge and could strengthen political and international support for the long-term detention of enemy combatants.

- Cons. The DTA already acknowledges CSRTs and ARBs, and opening the door to these procedures would give legislative critics a chance to impose new limits on the tribunals. The issues *Hamdan* does address are of more immediate need for legislative attention. Expanding judicial review to ARBs would permit detainees to file annual petitions, greatly increasing the number of pending court challenges to detention and thereby burdening the DOJ and the courts.

RECOMMENDATION: Because the DTA already touches on these tribunals by requiring reporting, and because *Hamdan* does not directly put these tribunals into question, we believe on balance that the proposed bill need not address their procedures.

JUDICIAL REVIEW

The DTA provides that no court shall have jurisdiction over petitions for habeas corpus except for a narrow review by the D.C. Circuit to ensure that existing procedures were followed and that the procedures are constitutional. *Hamdan* held that this provision did not apply to some petitions pending when the DTA was enacted, and Justice Kennedy expressed some concern that the existing procedures for judicial review may not be adequate. A proposed bill could reaffirm the limits on judicial review and, if appropriate, extend judicial review.

ISSUES FOR DECISION: Whether to reaffirm that federal law does not permit enemy combatants to file habeas petitions outside the limited review procedures of the DTA and whether to modify the existing standards for judicial review.

- Assessment. The proposed bill provides that the judicial review provisions limit federal court jurisdiction over pending habeas petitions. The detainees may argue that such limited judicial review constitutes an unlawful suspension of habeas corpus. The DTA review procedures merely channel judicial review; they do not deprive the detainees of a meaningful chance to challenge their detention or prosecution and thus do not implicate the Suspension Clause.

- The proposed bill preserves the existing DTA standards of review. Such a limited review standards may be challenged, particularly for military commissions. We believe it preferable, however, to defend the current standards rather than, by legislative act, to invite greater judicial scrutiny.

RECOMMENDATION: Reaffirm the DTA's limits on judicial review and preserve the existing limited review for military commissions and CSRTs.

IMMEDIATE JUDICIAL REVIEW

The statute could invite immediate judicial review to expedite legal challenges. Such a procedure has been followed for other legislation, such as the McCain-Feingold Act, where constitutional challenges are inevitable and it is desirable to have them resolved as soon as possible. The bill could provide that a three-judge district court develop a record and issue a decision to be reviewed immediately by the Supreme Court.

ISSUE FOR DECISION: Whether to provide for immediate judicial review.

- Pros. Immediate judicial review would resolve many issues quickly and within one judicial proceeding. The Supreme Court would have one opportunity to pass on the legislation and then the military commissions could presumably proceed.

- Cons. Such a provision could invite a broader review than would otherwise occur. The DTA and the draft bill contemplate review only of final decisions, yet this provision would provide for immediate, pre-trial review. This provision also would not end litigation, because new issues and specific challenges will undoubtedly arise once trials are actually held.

RECOMMENDATION: On balance, we believe the costs of expedited review outweigh its benefits. It would be better for courts to review completed trials by military commissions rather than to speculate about due process requirements in the abstract.