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109TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPT. 109–664
Part 2

MILITARY COMMISSIONS ACT OF 2006

R E P O R T

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

TO ACCOMPANY

H.R. 6054

together with

DISSENTING VIEWS

SEPTEMBER 25, 2006.—Ordered to be printed.

MILITARY COMMISSIONS ACT OF 2006

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SEPTEMBER 25, 2006.—Ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 6054]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 6054) to amend title 10, United States Code, to authorize trial by military commission for violations of the law of war, and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 4, after line 18, insert the following new paragraph (and redesignate the succeeding paragraphs accordingly):

> "(2) LAWFUL ENEMY COMBATANT.—The term 'lawful enemy combatant' means an individual determined by or under the authority of the President or Secretary of Defense (whether on an individualized or collective basis) to be—
>
> "(A) a member of the regular forces of a State party engaged in hostilities against the United States or its co-belligerents;
>
> "(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or
>
> "(C) a member of a regular armed force who professes allegiance to a government engaged in

such hostilities, but not recognized by the United States.

Page 6, after line 15, insert the following new subsection (and redesignate the succeeding subsection accordingly):

"(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

Page 34, line 15, insert "classified" after "who receives".

Page 80, after line 24, add the following new section:

SEC. 9. AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.

(a) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph:

"(13) Lawful enemy combatants who violate the law of war.".

(b) EXCLUSION OF CHAPTER 47A COMMISSIONS.—Section 821 of such title (article 21 of such Code) is amended by adding at the end the following new sentence: "This section does not apply to military commissions established under chapter 47A of this title.".

(c) INAPPLICABILITY OF REQUIREMENT FOR UNIFORM REGULATIONS.—Section 36(b) of such title (article (36) of such Code) is amended by inserting before the period at the end ", except insofar as applicable to military commissions established under chapter 47A of this title".

PURPOSE AND SUMMARY

H.R. 6054, the "Military Commissions Act of 2006" amends title 10, United States Code, to authorize military commissions for violations of the law of war by alien unlawful enemy combatants. H.R. 6054 would establish procedural rules governing the conduct of military commissions, including the use of sensitive classified evidence, admissibility of hearsay evidence, and the rights afforded detainees before, during and after trial. The bill would also make changes to the War Crimes Act [1] to enumerate specific "serious violations" of Common Article 3 of the Geneva Conventions which would be subject to prosecution as war crimes under our domestic criminal code.

H.R. 6054 limits judicial review of causes of action relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement, including habeas corpus applications, by unlawful enemy combatants pending on, or filed after, the date of enactment of this Act. The bill also declares prohibitions against cruel, inhuman and degrading treatment in the Detainee Treatment Act of 2005 (DTA) fully satisfies the United States' obliga-

[1] 18 U.S.C. § 2441 (2006).

tions with respect to the standards for detention and treatment established by the relevant sections of Common Article 3 of the Geneva Conventions. H.R. 6054 additionally would overturn a portion of the Supreme Court's decision in *Hamdan* v. *Rumsfeld* and clarify that the Geneva Conventions are not judicially enforceable in United States courts. Finally, the bill expands the right to counsel for United States government personnel established in the DTA.

BACKGROUND AND NEED FOR THE LEGISLATION

On November 13, 2001, President George W. Bush issued a military order regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[2] One purpose of this order was to authorize the Secretary of Defense to establish military commissions that would provide full and fair trials to foreign individuals who were members of the al Qaeda terrorist organization or who engaged in, aided or abetted, or conspired to commit, the attacks against the United States on September 11, 2001.[3]

In January 2002, the United States began detaining foreign individuals captured in the global war on terror as 'enemy combatants' at United States military facilities at Guantanamo Bay, Cuba. Upon an individual's arrival at Guantanamo, United States officials assess whether that individual should be released or transferred to the custody of his government. After Supreme Court decisions providing individuals with a method to contest their detention,[4] the United States established the combatant Status Review Tribunal ("CSRT") procedures in 2004.[5] These procedures provide for a one-time review of an individual's combatant status. The United States also created an Administrative Review Board ("ARB") procedure to consider each individual's status on an annual basis.[6] Finally, United States courts have held that each individual must have access to counsel in the United States judicial system, and in 2004, the United States Supreme Court ruled that the United States District Court for the District of Columbia Circuit has jurisdiction to consider habeas corpus challenges to the legality of the detention of foreign nationals at Guantanamo.[7] That ruling, in concert with other related rulings, has resulted in further litigation at the Federal trial and appellate court levels.

Aside from establishing procedures to address individuals' status as "enemy combatants", the United States has noted that other nations have traditionally used military commissions, which are recognized by the Geneva Conventions, to prosecute violations of the law of war. The United States chose to prosecute certain foreign in-

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[2] Military Order, 66 FR 57,833–57,836 (November 13, 2001).

[3] *Id.*

[4] *Hamdi* v. *Rumsfeld,* 542 U.S. 507 (2004).

[5] U.S. Dep't of Def., Fact Sheet, Combatant Status Review Tribunals Update (Jul. 7, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040707factsheet.pdf [hereinafter DOD Fact Sheet]; Memorandum from the Deputy Secretary of Defense, for the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal (Jul. 7, 2004), available at http://www.defenselink.mil/news/jul2004/d20040707review.pdf [hereinafter DOD Order]. See also Memorandum from the Secretary of the Navy, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba (Jul. 29, 2004), available at http://www.defenselink.mil/news/jul2004/d20040730comb.pdf (providing implementation guidance of the combatant status review tribunal).

[6] Deputy Secretary of Defense Paul Wolfowitz, Order OSD 06942–04 Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba (May 11, 2004), available at: http://www.globalsecurity.org/security/library/policy/dod/d20040518gtmoreview.pdf

[7] *Rasul* v. *Bush* 542 U.S. 466 (2004).

dividuals for such violations using military commission procedures established by the Secretary of Defense as authorized by Executive Order in November 2001. Some defendants in these cases chose to sue United States officials to challenge these procedures.[8]

On June 29, 2006, the United States Supreme Court ruled 5–3 in *Hamdan* v. *Rumsfeld,* that the President's military commissions could not proceed because they did not comply with the Uniform Code of Military Justice (UCMJ) and Common Article 3.[9] The Court's essential holdings were that: (1) military commissions require specific congressional authorization; (2) the structure and procedures of the *Hamdan* military commission violated the UCMJ; (3) the mandates of Common Article 3 of the Geneva Conventions are judicially enforceable in United States courts; and (4) the procedures adopted to try *Hamdan* did not meet the Common Article 3 requirement that sanctions must be pronounced by 'a regularly constituted court affording all judicial guarantees which are recognized as indispensable by civilized peoples.'

Although the Court declared the military commissions as constituted to be illegal, it left open the possibility that changes to commission rules or new legislation could bring the commissions within the law of war and conform with the UCMJ. The Court also suggested that the President could ask Congress to authorize commission rules that diverge from the UCMJ, provided that they were consistent with the Constitution and other laws.[10]

In *Hamdan,* the Court also found that section 1005 of the Detainee Treatment Act of 2005,[11] which prohibited any court, justice or judge from considering statutory habeas corpus claims and other lawsuits by aliens, including those held at Guantanamo Bay, Cuba, did not apply to cases pending on the date of enactment of the DTA.[12] Section 1005 also gave the Court of Appeals for the District of Columbia Circuit exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal (CSRT). In failing to hold that the DTA's jurisdictional bar applied to pending cases, the Court ignored decades of its own precedents applying intervening statutes conferring or eliminating Federal court jurisdiction to cases pending on the date of enactment.[13] At least three members of the Court believed that this conclusion was "patently erroneous."[14] In his dissent, Justice Scalia also reminded the majority that they failed to cite a single case where such a jurisdiction limitation provision was denied immediate effect in pending cases.[15] We agree with his opinion that "the cases granting such immediate effect are legion."[16]

The Committee strongly believes that the Constitution gives Congress the power to determine whether the Federal courts have jurisdiction over applications for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 filed by or on behalf of an alien detained by the

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[8] See *Hamdan* v. *Rumsfeld,* 548 U.S._____; 165 L. Ed. 723 (2006).

[9] *Id.* at 2.

[10] *Id.* at 1 (Breyer, J., concurring)("nothing prevents the President from returning to Congress to seek the authority he believes necessary.")

[11] Pub. L. No. 109–148, 119 Stat. 2739 (2005).

[12] 548 U.S. __ at 7–20.

[13] *See Hallowell* v. *Commons,* 239 U.S. 506 (1916); *Bruner* v. *United States,* 343 U.S. 112 (1952); *Landgraf* v. *USI Film Products,* 511 U.S. 244, 274 (1994); *Republic of Austria* v. *Altmann,* 541 U.S. 677, 693 (2004).

[14] 548 U.S. __ at 1 (Scalia, J. dissenting).

[15] *Id* at 5.

[16] *Id.*

Department of Defense at Guantanamo Bay, Cuba. In the view of the Committee, the Supreme Court had no authority to hear the *Hamdan* case after enactment of the DTA. The plain language of this statute clearly applies to cases pending at the date of enactment. The Committee believes that the Supreme Court should have reached this conclusion by relying on its own precedents, but it failed to do so. In response, H.R. 6054 has been carefully drafted so that the Court can fully understand that it applies to both pending and later-filed cases. It was not necessary for Congress to be so specific, but in order to be sure that the Court will not make the same mistake twice, the Committee has carefully chosen the words "pending on or filed after the date of the enactment" in section 5 of this legislation.

Opponents of the bill may claim that it impermissibly "suspends" or limits the right of habeas corpus for individuals held as enemy combatants at Guantanamo Bay or elsewhere. This argument ignores decades of Supreme Court precedent to the contrary. In fact, the case of *Johnson* v. *Eisentrager*[17] held that United States constitutional protections do not apply to alien prisoners of war held outside of our borders. The Court in *Eisentrager* noted that "[n]o decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it."[18]

More recently, the Supreme Court reaffirmed this view in the case of *United States* v. *Verdugo-Urquidez*[19] when it found that "we have rejected the claim that aliens are entitled to Fifth Amendment rights outside of the sovereign territory of the United States."[20] *Verdugo* also makes it clear that aliens receive constitutional protections when they have come within the territory of the United States "and developed substantial connections with this country."[21] The Committee believes that terrorists and other detainees suspected of planning, supporting or otherwise participating in attacks against the United States and its citizens have not developed the type of substantial connections with the United States sufficient to justify extending to them all of the protections of our Constitution. Nonetheless, this legislation provides a full and fair process for the review by the D.C. Circuit of enemy combatant determinations by a CSRT and for review of the decisions of military commissions. The Committee believes the judicial review authorized in this bill provides more than ample protections for the rights of the detainees.

In response to the *Hamdan* decision and legislation proposed by the President, the Judiciary Committee considered H.R. 6054 in open session on September 20, 2006. The legislation addresses the scope, jurisdiction, and procedures of military commissions in which the United States could prosecute alien unlawful enemy combatants for violations of the law of war and other offenses, makes changes to the War Crimes Act, clarifies the intent of Congress that statutory habeas corpus relief is not available to alien

[17] 339 U.S. 763 (1950).
[18] Id at 784–85.
[19] 494 U.S. 259 (1990).
[20] *Id* at 269.
[21] *Id* at 271.

unlawful enemy combatants held outside of the United States, and that such jurisdictional bar applies to pending and future claims.

HEARINGS

The Committee on the Judiciary held no hearings on H.R. 6054.

COMMITTEE CONSIDERATION

On September 20, 2006, the Judiciary Committee met in open session and ordered favorably reported the bill, H.R. 6054, by a vote of 20–19, a quorum being present.

VOTE OF THE COMMITTEE

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee notes that the following roll call vote occurred during the Committee's consideration of H.R. 6054.

ROLLCALL NO. 1—DATE: 9–20–06

SUBJECT: Schiff/Flake amendment to H.R. 6054 to strike section 4 of the bill and insert an alternative amendment to the War Crimes Act, which was not agreed to by a rollcall vote of 17 ayes to 18 nays.

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY		x	
MR. GOODLATTE		x	
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS.			
MR. INGLIS	x		
MR. HOSTETTLER		x	
MR. GREEN		x	
MR. KELLER.			
MR. ISSA		x	
MR. FLAKE	x		
MR. PENCE		x	
MR. FORBES		x	
MR. KING		x	
MR. FEENEY		x	
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER	x		
MR. NADLER	x		
MR. SCOTT	x		
MR. WATT	x		
MS. LOFGREN	x		
MS. JACKSON LEE	x		
MS. WATERS	x		
MR. MEEHAN	x		
MR. DELAHUNT	x		
MR. WEXLER.			
MR. WEINER	x		
MR. SCHIFF	x		
MS. SANCHEZ	x		

	Ayes	Nays	Present
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ.			
MR. SENSENBRENNER, CHAIRMAN		x	
TOTAL	17	18	

ROLLCALL NO. 2—DATE: 9–20–06

SUBJECT: Meehan amendment to H.R. 6054, to strike section 5 (related to judicial review), which was not agreed to by a rollcall vote of 12 ayes to 15 nays.

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY.			
MR. GOODLATTE		x	
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS.			
MR. INGLIS		x	
MR. HOSTETTLER.			
MR. GREEN		x	
MR. KELLER.			
MR. ISSA.			
MR. FLAKE		x	
MR. PENCE.			
MR. FORBES		x	
MR. KING.			
MR. FEENEY		x	
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER	x		
MR. NADLER	x		
MR. SCOTT	x		
MR. WATT.			
MS. LOFGREN.			
MS. JACKSON LEE	x		
MS. WATERS.			
MR. MEEHAN	x		
MR. DELAHUNT	x		
MR. WEXLER.			
MR. WEINER	x		
MR. SCHIFF	x		
MS. SANCHEZ.			
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN		x	
TOTAL	12	15	

ROLLCALL NO. 3—DATE: 9–20–06

SUBJECT: Jackson Lee amendment to H.R. 6054 to strike section 6(b), which was not agreed to by a rollcall vote of 17 ayes to 18 nays.

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY.			
MR. GOODLATTE		x	
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS		x	
MR. INGLIS		x	
MR. HOSTETTLER		x	
MR. GREEN.			
MR. KELLER.			
MR. ISSA		x	
MR. FLAKE		x	
MR. PENCE.			
MR. FORBES		x	
MR. KING		x	
MR. FEENEY		x	
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER	x		
MR. NADLER	x		
MR. SCOTT	x		
MR. WATT	x		
MS. LOFGREN	x		
MS. JACKSON-LEE	x		
MS. WATERS	x		
MR. MEEHAN	x		
MR. DELAHUNT	x		
MR. WEXLER	x		
MR. WEINER	x		
MR. SCHIFF	x		
MS. SANCHEZ	x		
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN		x	
TOTAL	17	18	

ROLLCALL NO. 4—DATE: 9–20–06

SUBJECT: Motion to report H.R. 6054 favorably, which was not agreed to by a rollcall vote of 17 ayes to 20 nays.

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE	x		
MR. SMITH	x		
MR. GALLEGLY.			
MR. GOODLATTE	x		
MR. CHABOT	x		
MR. LUNGREN	x		
MR. JENKINS	x		
MR. CANNON	x		
MR. BACHUS	x		
MR. INGLIS		x	
MR. HOSTETTLER	x		
MR. GREEN	x		
MR. KELLER.			
MR. ISSA	x		
MR. FLAKE		x	

	Ayes	Nays	Present
MR. PENCE	x		
MR. FORBES	x		
MR. KING	x		
MR. FEENEY	x		
MR. FRANKS	x		
MR. GOHMERT		x	
MR. CONYERS		x	
MR. BERMAN		x	
MR. BOUCHER		x	
MR. NADLER		x	
MR. SCOTT		x	
MR. WATT		x	
MS. LOFGREN		x	
MS. JACKSON LEE		x	
MS. WATERS		x	
MR. MEEHAN		x	
MR. DELAHUNT		x	
MR. WEXLER		x	
MR. WEINER		x	
MR. SCHIFF		x	
MS. SANCHEZ		x	
MR. VAN HOLLEN		x	
MRS. WASSERMAN SCHULTZ		x	
MR. SENSENBRENNER, CHAIRMAN	x		
TOTAL	17	20	

ROLLCALL NO. 5—DATE: 9–20–06

SUBJECT: Nadler motion to adjourn, which was not agreed to by a rollcall vote of 14 ayes to 17 nays.

	Ayes	Nays	Present
MR. HYDE.			
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY.			
MR. GOODLATTE.			
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS		x	
MR. INGLIS		x	
MR. HOSTETTLER.			
MR. GREEN		x	
MR. KELLER.			
MR. ISSA.			
MR. FLAKE		x	
MR. PENCE		x	
MR. FORBES		x	
MR. KING		x	
MR. FEENEY		x	
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER.			
MR. NADLER	x		
MR. SCOTT	x		
MR. WATT	x		
MS. LOFGREN	x		
MS. JACKSON LEE.			
MS. WATERS	x		

	Ayes	Nays	Present
MR. MEEHAN	x		
MR. DELAHUNT.			
MR. WEXLER	x		
MR. WEINER	x		
MR. SCHIFF	x		
MS. SANCHEZ	x		
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN		x	
TOTAL	14	17	

ROLLCALL NO. 9—DATE: 9–20–06

SUBJECT: Gohmert motion to reconsider H.R. 6054, which was agreed to by a rollcall vote of 20 ayes to 19 nays.

	Ayes	Nays	Present
MR. HYDE	x		
MR. COBLE	x		
MR. SMITH	x		
MR. GALLEGLY	x		
MR. GOODLATTE	x		
MR. CHABOT	x		
MR. LUNGREN	x		
MR. JENKINS	x		
MR. CANNON	x		
MR. BACHUS	x		
MR. INGLIS		x	
MR. HOSTETTLER	x		
MR. GREEN	x		
MR. KELLER.			
MR. ISSA	x		
MR. FLAKE		x	
MR. PENCE	x		
MR. FORBES	x		
MR. KING	x		
MR. FEENEY	x		
MR. FRANKS	x		
MR. GOHMERT	x		
MR. CONYERS		x	
MR. BERMAN		x	
MR. BOUCHER		x	
MR. NADLER		x	
MR. SCOTT		x	
MR. WATT		x	
MS. LOFGREN		x	
MS. JACKSON LEE		x	
MS. WATERS		x	
MR. MEEHAN		x	
MR. DELAHUNT		x	
MR. WEXLER		x	
MR. WEINER		x	
MR. SCHIFF		x	
MS. SANCHEZ		x	
MR. VAN HOLLEN		x	
MRS. WASSERMAN SCHULTZ		x	
MR. SENSENBRENNER, CHAIRMAN	x		
TOTAL	20	19	

ROLLCALL NO. 10—DATE: 9–20–06

SUBJECT: Motion to report H.R. 6054 adversely, which was not agreed to by a rollcall vote of 19 ayes to 20 nays.

	Ayes	Nays	Present
MR. HYDE		x	
MR. COBLE		x	
MR. SMITH		x	
MR. GALLEGLY		x	
MR. GOODLATTE		x	
MR. CHABOT		x	
MR. LUNGREN		x	
MR. JENKINS		x	
MR. CANNON		x	
MR. BACHUS		x	
MR. INGLIS	x		
MR. HOSTETTLER		x	
MR. GREEN		x	
MR. KELLER.			
MR. ISSA		x	
MR. FLAKE	x		
MR. PENCE		x	
MR. FORBES		x	
MR. KING		x	
MR. FEENEY		x	
MR. FRANKS		x	
MR. GOHMERT		x	
MR. CONYERS	x		
MR. BERMAN	x		
MR. BOUCHER	x		
MR. NADLER	x		
MR. SCOTT	x		
MR. WATT	x		
MS. LOFGREN	x		
MS. JACKSON-LEE	x		
MS. WATERS	x		
MR. MEEHAN	x		
MR. DELAHUNT	x		
MR. WEXLER	x		
MR. WEINER	x		
MR. SCHIFF	x		
MS. SANCHEZ	x		
MR. VAN HOLLEN	x		
MRS. WASSERMAN SCHULTZ	x		
MR. SENSENBRENNER, CHAIRMAN		x	
TOTAL	19	20	

ROLLCALL NO. 11—DATE: 9–20–06

SUBJECT: Gohmert motion to reconsider the vote to report H.R. 6054 favorably, which was agreed to by a rollcall vote of 20 ayes to 19 nays.

	Ayes	Nays	Present
MR. HYDE	x		
MR. COBLE	x		
MR. SMITH	x		
MR. GALLEGLY	x		
MR. GOODLATTE	x		
MR. CHABOT	x		
MR. LUNGREN	x		
MR. JENKINS	x		
MR. CANNON	x		

	Ayes	Nays	Present
MR. BACHUS	x		
MR. INGLIS		x	
MR. HOSTETTLER	x		
MR. GREEN	x		
MR. KELLER.			
MR. ISSA	x		
MR. FLAKE		x	
MR. PENCE	x		
MR. FORBES	x		
MR. KING	x		
MR. FEENEY	x		
MR. FRANKS	x		
MR. GOHMERT	x		
MR. CONYERS		x	
MR. BERMAN		x	
MR. BOUCHER		x	
MR. NADLER		x	
MR. SCOTT		x	
MR. WATT		x	
MS. LOFGREN		x	
MS. JACKSON LEE		x	
MS. WATERS		x	
MR. MEEHAN		x	
MR. DELAHUNT		x	
MR. WEXLER		x	
MR. WEINER		x	
MR. SCHIFF		x	
MS. SANCHEZ		x	
MR. VAN HOLLEN		x	
MRS. WASSERMAN SCHULTZ		x	
MR. SENSENBRENNER, CHAIRMAN	x		
TOTAL	20	19	

ROLLCALL NO. 12—DATE: 9–20–06

SUBJECT: Motion to report H.R. 6054 favorably, which was agreed to by a rollcall vote of 20 ayes to 19 nays.

	Ayes	Nays	Present
MR. HYDE	X		
MR. COBLE	X		
MR. SMITH	X		
MR. GALLEGLY	X		
MR. GOODLATTE	X		
MR. CHABOT	X		
MR. LUNGREN	X		
MR. JENKINS	X		
MR. CANNON	X		
MR. BACHUS	X		
MR. INGLIS		X	
MR. HOSTETTLER	X		
MR. GREEN	X		
MR. KELLER.			
MR. ISSA	X		
MR. FLAKE		X	
MR. PENCE	X		
MR. FORBES	X		
MR. KING	X		
MR. FEENEY	X		
MR. FRANKS	X		
MR. GOHMERT	X		
MR. CONYERS		X	
MR. BERMAN		X	

	Ayes	Nays	Present
MR. BOUCHER		X	
MR. NADLER		X	
MR. SCOTT		X	
MR. WATT		X	
MS. LOFGREN		X	
MS. JACKSON-LEE		X	
MS. WATERS		X	
MR. MEEHAN		X	
MR. DELAHUNT		X	
MR. WEXLER		X	
MR. WEINER		X	
MR. SCHIFF		X	
MS. SANCHEZ		X	
MR. VAN HOLLEN		X	
MRS. WASSERMAN SCHULTZ		X	
MR. SENSENBRENNER, CHAIRMAN	X		
TOTAL	20	19	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 6054, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

H.R. 6054—Military Commissions Act of 2006

Summary: H.R. 6054 would authorize the President to establish military commissions to try unlawful combatants for a number of offenses including terrorism, hijacking, and the murder of non-combatants. The bill would set out the rules and procedures for such trials, including the process for assigning counsel and compelling witnesses and evidence, the rules of evidence, and post-trial reviews and appeals. H.R. 6054 also would amend the U.S. criminal code to retroactively specify which actions under the Geneva Convention would be considered criminal acts for which the U.S. Armed Forces or other U.S. nationals could be prosecuted. The bill would apply to detention, treatment, or trial of any person detained since September 11, 2001.

CBO estimates that implementing H.R. 6054 would cost $21 million in 2007 and $141 million over the 2007–2011 period, assuming

the appropriation of necessary funds. Enacting H.R. 6054 would not affect direct spending or revenues.

H.R. 6054 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 6054 is shown in the following table. The costs of this legislation fall within budget function 050 (national defense).

	By fiscal year, in millions of dollars—				
	2007	2008	2009	2010	2011
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level	29	30	31	31	32
Estimated Outlays	21	28	29	31	32

Basis of estimate: Pursuant to the President's Military Order on November 21, 2001, the Secretary of Defense established the Office of Military Commissions (OMC) within the Defense Legal Services Agency of the Department of Defense (DoD). Prior to the U.S. Supreme Court's decision on June 29, 2006, that prohibited the use of military commissions to try unlawful combatants, the OMC was responsible for trying unlawful combatants detained by DoD.

To date in fiscal year 2006, the OMC has received approximately $27 million in appropriations from the fiscal year 2006 Defense Appropriations Act (Public Law 109–148) and the 2006 Emergency Supplemental for Defense, the Global War on Terror, and Hurricane Recovery (Public Law 109–234). Those amounts cover expenses for salaries and benefits of civilian personnel, travel, contractual services, equipment and supplies. In addition, the OMC has also used 10 to 15 reserve Judge Advocates to assist the OMC in preparing and trying cases. Based upon prior costs and staffing levels, CBO estimates that implementing H.R. 6054 would cost $21 million in 2007 and $141 million over the 2007–2011 period, assuming the appropriation of necessary funds.

CBO assumes for the purposes of this estimate that, if legislation is not enacted authorizing the use of military commissions to try unlawful combatants detained by the United States, the OMC will be dissolved and the United States would continue to hold those detainees who would have been tried. Thus, the estimated costs of the bill reflect only the incremental costs for conducting such trials.

Section 4 of H.R. 6054 would change the U.S. criminal code to specify which actions under the Geneva Convention would be considered criminal acts for which the U.S. Armed Forces or other U.S. nationals could be prosecuted. We expect that section 4 would apply to a relatively small number of cases. Thus, any resulting change in costs for law enforcement, court proceedings, or prison operations would not be significant.

Section 6 would specify that section 1003 of the Detainee Treatment Act of 2005 would satisfy U.S. obligations with respect to the standards for treatment under Common Article 3 under the Geneva Conventions. If enacted, this section may provide more latitude to the United States in the treatment and interrogation of detainees. Section 7 of the bill would expand the conditions under which the

government would provide funds and personnel to defend certain government employees who are being investigated or prosecuted in matters related to the detention and interrogation of certain detainees. CBO has no basis for estimating the potential cost of those sections.

Intergovernmental and Private-Sector Impact: H.R. 6054 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Previous CBO Estimate: On September 15, 2006, CBO transmitted a cost estimate for H.R. 6054 as ordered reported by the House Committee on the Armed Services on September 13, 2006. The two versions of the bill are identical, as are CBO's estimates.

Estimate prepared by: Federal Costs; Jason Wheelock. Impact on State, Local, and Tribal Governments: Melissa Merrell. Impact on the Private Sector: Victoria Liu.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 6054 authorizes trial by military commission for violations of the law of war, amends the War Crimes Act to specify particular crimes constituting "serious violations" of Common Article 3 of the Geneva Conventions, and overturns certain holdings in the recent Supreme Court case of *Hamdan* v. *Rumsfeld.*

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article 1, section 8 of the Constitution, including clauses 10, 11, 14 and 18.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

The following section-by-section analysis describes the sections of H.R. 6054 as reported that fall within the Rule X jurisdiction of the Committee on the Judiciary. For a description of the other sections of the bill, please refer to the report of the Committee on Armed Services.[22]

Section 4—Clarification of conduct constituting a war crimes offense under Federal Criminal Code

Section 4 amends 18 U.S.C. § 2441(c) (the War Crimes Act of 1996) to clarify that the United States will prosecute as war crimes conduct which constitutes a "serious violation" of Common Article 3 of the Geneva Conventions. Common Article 3 prohibits certain conduct, including "outrages upon personal dignity," a vague phrase virtually impossible to define in the context of a criminal statute. See *Connally* v. *General Constr. Co.,* 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926) ("a statute which either forbids or requires the doing of an act in terms so vague that men of common

[22] See H.R. Rep. No. 109–664 (2006).

intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.")

Section 4 instead enumerates specific, definable conduct which will be prosecuted as a war crime: torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing great suffering or serious injury, rape, sexual assault or abuse, and taking hostages are codified and defined in this section as conduct which constitutes a war crime. The section would also make the amendment apply retroactively to the date of the last amendment of the War Crimes Act (November 26, 1997). Retroactivity will not affect any pending case, since no person has been prosecuted for violations of the War Crimes Act since its initial enactment.

Section 5—Judicial review

Section 5 would amend 28 U.S.C. § 2241 to prohibit any court, justice, or judge (except the United States Court of Appeals for the District of Columbia Circuit) from hearing or considering any claim or cause of action, including an application for a writ of habeas corpus, pending on or filed after the date of enactment of H.R. 6054, against the United States or its agents, brought by or on behalf of any alien detained by the United States as an unlawful enemy combatant, relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement. Section 5 would permit the D.C. Circuit to review two causes of action for these aliens: (1) exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal (CSRT); and (2) final judgments of military commissions as provided for pursuant to section 950g of Section 3 of H.R. 6054. Finally, this section would provide that the D.C. Circuit may consider classified information submitted in camera and ex parte in making any determination under this section.

This section would correct the Supreme Court's erroneous interpretation of the Detainee Treatment Act of 2005 (DTA) in *Hamdan* v. *Rumsfeld,* in which the Court found that the DTA's habeas corpus limitations did not apply retroactively to cases pending on the date of enactment. The DTA amended the Federal habeas corpus statute (28 U.S.C. § 2241) to provide that the D.C. Circuit would have jurisdiction over determinations of CSRTs for enemy combatants detained at the U.S. Naval Base, Guantanamo Bay, Cuba and final judgments of military commissions, and that all other courts would be foreclosed from hearing habeas corpus petitions or any other civil actions brought by enemy combatants in United States custody. This section forecloses any legal claim, including applications for the writ of habeas corpus, brought on by or on behalf of these detainees, since judicial review of detention and military commission decisions is channeled through the adequate alternative procedures provided by this Act and the DTA. The Committee notes that the use of the phrase "pending on or filed after the date of enactment" is in response to the Supreme Court's incorrect holding in *Hamdan,* but should not be construed by the courts to require the use of such terms in any future legislation where Congress removes any court's jurisdiction over a class of cases. Absent an express reservation by Congress to the contrary, any Act removing courts' jurisdiction over a class of cases should apply to

cases pending on or after the date of the enactment of the Act, regardless of whether Congress uses the phrase "pending on or filed after the date of enactment."

Section 6(b)—Rights not judicially enforceable

Section 6(b) would prohibit any court from treating the Geneva Conventions as a source of rights, directly or indirectly, making clear that the Geneva Conventions are not judicially enforceable in any court of the United States.

Until the *Hamdan* decision, the prohibitions contained in Common Article 3 were not considered enforceable in United States courts. This section demonstrates Congress' intent to return to that original understanding of Common Article 3. Instead, the United States Constitution, which provides the fundamental, underlying protections for the rights and liberties of all American citizens, will be used as a familiar standard to provide sufficient rights for detainees, especially unlawful enemy combatants.

Section 6(c)—Geneva Convention defined

This section defines the "Geneva Convention" as the international conventions signed at Geneva on August 12, 1949, including Common Article 3.

Section 7—Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel

Section 7 would amend section 1004(b) of the Detainee Treatment Act (DTA) of 2005 to enhance the protection of U.S. government personnel engaged in authorized interrogations. Section 1004(b) of the DTA provides counsel in any civil action or criminal prosecution against a member of the armed forces or other agent of the United States government in cases involving certain interrogation procedures of aliens determined by the government to be international terrorists. This section would provide that the provision of counsel under section 1004(b) is mandatory, that the right to counsel includes investigations, and that the right applies to foreign and international courts or agencies. This section would further provide that the affirmative defense provided in section 1004(a) of the DTA and the right to counsel provided in section 1004(b) of the DTA applies to any criminal prosecution that: (1) related to the detention and interrogation of aliens described in such section, (2) is grounded in section 2441(c)(3) of title 18, United States Code (as amended by section 4 of this Act), and (3) relates to actions occurring between September 11, 2001, and December 30, 2005.

Section 8—Retroactive applicability

Section 8 would clarify that the Act retroactively applies 'to any aspect of detention, treatment or trial of any alien detained at any time since September 11, 2001.' This section further states that the Act applies to any case, pending or not, whether filed before or after the effective date of the Act.

CHANGES IN EXISTING LAW BY THE BILL, AS REPORTED

The bill was referred to this Committee for consideration of such provisions of the bill as fall within the jurisdiction of this Com-

mittee pursuant to clause 1(1) of rule X of the Rules of the House of Representatives. The changes made to existing law as reported by the Committee on Armed Services are shown in the report filed by that committee (Rept. 109–664, Part 1). The amendments made by this Committee to existing law within its jurisdiction are identical to those shown in such part 1.

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, SEPTEMBER 20, 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (chairman of the committee) presiding.

Chairman SENSENBRENNER. The committee will be in order. A working quorum is present. Pursuant to notice I now call up the bill H.R. 6054, the Military Commissions Act of 2006, for purposes of markup and move its favorable recommendation to the House. Without objection, the bill will be considered as read and open for amendment at any point and the text as reported by the Committee on Armed Services which the members have before them will be considered as read, be considered as the original text for the purposes of amendment and open for amendment at any point, and the Chair recognizes himself for 5 minutes to explain the bill.

[The bill, H.R. 6054, follows:]

109TH CONGRESS
2D SESSION

H. R. 6054

[Report No. 109-]

To amend title 10, United States Code, to authorize trial by military commission for violations of the law of war, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 12, 2006

Mr. HUNTER (for himself, Mr. BOEHNER, Mr. SENSENBRENNER, Mr. CALVERT, Mrs. MILLER of Michigan, Mr. MILLER of Florida, Mr. SHUSTER, Mr. FRANKS of Arizona, Mr. WILSON of South Carolina, Mr. SAXTON, Mr. PORTER, Mr. KLINE, Mr. HEFLEY, Mr. HAYES, Mr. SWEENEY, Mr. CHOCOLA, and Mr. LOBIONDO) introduced the following bill; which was referred to the Committee on Armed Services, and in addition to the Committees on the Judiciary and International Relations, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

SEPTEMBER --, 2006

Reported from the Committee on Armed Services with amendments

[Omit the part struck through and insert the part printed in italic]

A BILL

To amend title 10, United States Code, to authorize trial by military commission for violations of the law of war, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

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

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

1. Short title; table of contents.
2. Construction of Presidential authority to establish military commissions.
3. Military commissions.
4. Clarification of conduct constituting war crime offense under Federal Criminal Code.
5. Judicial review.
6. Satisfaction of treaty obligations.
7. Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel.
8. Retroactive applicability.

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution to establish military commissions on the battlefield or in occupied territories should circumstances so require.

SEC. 3. MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—

(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

"CHAPTER 47A—MILITARY COMMISSIONS

"Subchapter
"I. General Provisions 948a
"II. Composition of Military Commissions 948h

"III. Pre-Trial Procedure 948q
"IV. Trial Procedure 949a
"V. Sentences 949s
"VI. Post-Trial Procedure and Review of Military Commissions 950a
"VII. Punitive Matters 950p

1 "SUBCHAPTER I—GENERAL PROVISIONS

"Sec.
"948a. Definitions.
"948b. Military commissions generally.
"948c. Persons subject to military commissions.
"948d. Jurisdiction of military commissions.
"948e. Annual report to congressional committees.

2 **"§ 948a. Definitions**

3 "In this chapter:

4 "(1) UNLAWFUL ENEMY COMBATANT.—(A) The
5 term 'unlawful enemy combatant' means an indi-
6 vidual determined by or under the authority of the
7 President or the Secretary of Defense—

8 "(i) to be part of or affiliated with a force
9 or organization (including al Qaeda, the
10 Taliban, any international terrorist organiza-
11 tion, or associated forces) that is engaged in
12 hostilities against the United States or its co-
13 belligerents in violation of the law of war;

14 "(ii) to have committed a hostile act in aid
15 of such a force or organization so engaged; or

16 "(iii) to have supported hostilities in aid of
17 such a force or organization so engaged.

18 "(B) Such term includes any individual deter-
19 mined by a Combatant Status Review Tribunal be-

1 fore the date of the enactment of the Military Com-
2 missions Act of 2006 to have been properly detained
3 as an enemy combatant.
4 "(C) Such term does not include any alien de-
5 termined by the President or the Secretary of De-
6 fense (whether on an individualized or collective
7 basis), or by any competent tribunal established
8 under their authority, to be—
9 "(i) a lawful enemy combatant (including a
10 prisoner of war); or
11 "(ii) a protected person whose trial by a
12 military commission under this chapter would
13 be inconsistent with Articles 64 through 76 of
14 the Geneva Convention Relative to the Protec-
15 tion of Civilian Persons in Time of War of Au-
16 gust 12, 1949.
17 "(D) For purposes of subparagraph (C)(ii), the
18 term 'protected person' refers to the category of per-
19 sons described in Article 4 of the Geneva Convention
20 Relative to the Protection of Civilian Persons in
21 Time of War of August 12, 1949.
22 *"(3) LAWFUL ENEMY COMBATANT.—The term*
23 *'lawful enemy combatant' means an individual deter-*
24 *mined by or under the authority of the President or*

Secretary of Defense (whether on an individualized or collective basis) to be—

"(A) a member of the regular forces of a State party engaged in hostilities against the United States or its co-belligerents;

"(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

"(C) a member of a regular armed forces who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

"~~(2)~~ *(3)* GENEVA CONVENTIONS.—The term 'Geneva Conventions' means the international conventions signed at Geneva on August 12, 1949, including Common Article 3.

"~~(3)~~ *(4)* CLASSIFIED INFORMATION.—The term 'classified information' means the following:

"(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or

1 regulation to require protection against unau-
2 thorized disclosure for reasons of national secu-
3 rity.
4 "(B) Any restricted data, as that term is
5 defined in section 11 y. of the Atomic Energy
6 Act of 1954 (42 U.S.C. 2014(y)).
7 "~~(4)~~ *(5)* ALIEN.—The term 'alien' means an in-
8 dividual who is not a citizen of the United States.
9 **"§ 948b. Military commissions generally**
10 "(a) AUTHORITY FOR MILITARY COMMISSIONS
11 UNDER THIS CHAPTER.—The President is authorized to
12 establish military commissions for violations of offenses
13 triable by military commission as provided in this chapter.
14 "(b) CONSTRUCTION OF PROVISIONS.—The proce-
15 dures for military commissions set forth in this chapter
16 are based upon the procedures for trial by general courts-
17 martial under chapter 47 of this title (the Uniform Code
18 of Military Justice). Chapter 47 of this title, including any
19 construction or application of such chapter and any ad-
20 ministrative practice under such chapter, does not apply
21 to trial by military commission under this chapter.
22 "(c) STATUS OF COMMISSIONS UNDER COMMON AR-
23 TICLE 3.—A military commission established under this
24 chapter is a regularly constituted court, affording all the
25 necessary 'judicial guarantees which are recognized as in-

1 dispensable by civilized peoples' for purposes of common
2 Article 3 of the Geneva Conventions.

3 **"§ 948c. Persons subject to military commissions**

4 "Any alien unlawful enemy combatant is subject to
5 trial by military commission under this chapter.

6 **"§ 948d. Jurisdiction of military commissions**

7 "(a) JURISDICTION.—A military commission under
8 this chapter shall have jurisdiction to try any offense made
9 punishable by this chapter when committed by an alien
10 unlawful enemy combatant before, on, or after September
11 11, 2001.

12 *"(b) LAWFUL ENEMY COMBATANTS.—Military com-*
13 *missions under this chapter shall not have jurisdiction over*
14 *lawful enemy combatants. Lawful enemy combatants who*
15 *violate the law of war are subject to chapter 47 of this title.*
16 *Courts martial established under that chapter shall have ju-*
17 *risdiction to try a lawful enemy combatant for any offense*
18 *made punishable under this chapter.*

19 "~~(b)~~ *(c)* PUNISHMENTS.—A military commission
20 under this chapter may, under such limitations as the Sec-
21 retary of Defense may prescribe, adjudge any punishment
22 not forbidden by this chapter, including the penalty of
23 death when authorized under this chapter.

"§ 948e. Annual report to congressional committees

"(a) ANNUAL REPORT REQUIRED.—Not later than December 31 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on any trials conducted by military commissions under this chapter during such year.

"(b) FORM.—Each report under this section shall be submitted in unclassified form, but may include a classified annex.

"SUBCHAPTER II—COMPOSITION OF MILITARY COMMISSIONS

"Sec.
"948h. Who may convene military commissions.
"948i. Who may serve on military commissions.
"948j. Military judges.
"948k. Detail of trial counsel and defense counsel.
"948l. Detail or employment of reporters and interpreters.
"948m. Number of members; excuse of members; absent and additional members.

"§ 948h. Who may convene military commissions

"Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.

"§ 948i Who may serve on military commissions

"(a) IN GENERAL.—Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter.

"(b) DETAIL OF MEMBERS.—When convening a military commission under this chapter, the convening authority shall detail as members of the commission such members of the armed forces eligible under subsection (a), as in the opinion of the convening authority, are fully qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

"(c) EXCUSE OF MEMBERS.—Before a military commission under this chapter is assembled for the trial of a case, the convening authority may excuse a member from participating in the case.

"§ 948j. Military judges

"(a) DETAIL OF MILITARY JUDGE.—A military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions. The military judge shall preside over each military commission to which he has been detailed.

"(b) QUALIFICATIONS.—A military judge shall be a commissioned officer of the armed forces who is a member

1 of the bar of a Federal court, or a member of the bar
2 of the highest court of a State, and who is certified to
3 be qualified for duty under section 826 of this title (article
4 26 of the Uniform Code of Military Justice) as a military
5 judge in general courts-martial by the Judge Advocate
6 General of the armed force of which such military judge
7 is a member.

8 "(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No
9 person is eligible to act as military judge in a case of a
10 military commission under this chapter if he is the accuser
11 or a witness or has acted as investigator or a counsel in
12 the same case.

13 "(d) CONSULTATION WITH MEMBERS; INELIGI-
14 BILITY TO VOTE.—A military judge detailed to a military
15 commission under this chapter may not consult with the
16 members of the commission except in the presence of the
17 accused (except as otherwise provided in section 949d of
18 this title), trial counsel, and defense counsel, nor may he
19 vote with the members of the commission.

20 "(e) OTHER DUTIES.—A commissioned officer who
21 is certified to be qualified for duty as a military judge of
22 a military commission under this chapter may perform
23 such other duties as are assigned to him by or with the
24 approval of the Judge Advocate General of the armed

1 force of which such officer is a member or the designee
2 of such Judge Advocate General.
3 "(f) PROHIBITION ON EVALUATION OF FITNESS BY
4 CONVENING AUTHORITY.—The convening authority of a
5 military commission under this chapter shall not prepare
6 or review any report concerning the effectiveness, fitness,
7 or efficiency of a military judge detailed to the military
8 commission which relates to his performance of duty as
9 a military judge on the military commission.

10 **"§ 948k. Detail of trial counsel and defense counsel**

11 "(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial
12 counsel and military defense counsel shall be detailed for
13 each military commission under this chapter.
14 "(2) Assistant trial counsel and assistant and asso-
15 ciate defense counsel may be detailed for a military com-
16 mission under this chapter.
17 "(3) Military defense counsel for a military commis-
18 sion under this chapter shall be detailed as soon as prac-
19 ticable after the swearing of charges against the accused.
20 "(4) The Secretary of Defense shall prescribe regula-
21 tions providing for the manner in which trial counsel and
22 military defense counsel are detailed for military commis-
23 sions under this chapter and for the persons who are au-
24 thorized to detail such counsel for such commissions.

1 "(b) TRIAL COUNSEL.—Subject to subsection (d),
2 trial counsel detailed for a military commission under this
3 chapter must be—
4 "(1) a judge advocate (as that term is defined
5 in section 801 of this title (article 1 of the Uniform
6 Code of Military Justice) who is—
7 "(A) a graduate of an accredited law
8 school or is a member of the bar of a Federal
9 court or of the highest court of a State; and
10 "(B) certified as competent to perform du-
11 ties as trial counsel before general courts-mar-
12 tial by the Judge Advocate General of the
13 armed force of which he is a member; or
14 "(2) a civilian who is—
15 "(A) a member of the bar of a Federal
16 court or of the highest court of a State; and
17 "(B) otherwise qualified to practice before
18 the military commission pursuant to regulations
19 prescribed by the Secretary of Defense.
20 "(c) MILITARY DEFENSE COUNSEL.—Subject to sub-
21 section (d), military defense counsel detailed for a military
22 commission under this chapter must be a judge advocate
23 (as so defined) who is—

"(1) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

"(2) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member.

"(d) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person who has acted as an investigator, military judge, or member of a military commission under this chapter in any case may act later as trial counsel or military defense counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may act later in the same case for the defense, nor may any person who has acted for the defense before a military commission under this chapter act later in the same case for the prosecution.

"§ 948l. Detail or employment of reporters and interpreters

"(a) COURT REPORTERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter shall detail to or employ for the commission qualified court reporters, who shall make a verbatim recording of the proceedings of and testimony taken before the commission.

1 "(b) INTERPRETERS.—Under such regulations as the
2 Secretary of Defense may prescribe, the convening author-
3 ity of a military commission under this chapter may detail
4 to or employ for the military commission interpreters who
5 shall interpret for the commission and, as necessary, for
6 trial counsel and defense counsel.

7 "(c) TRANSCRIPT; RECORD.—The transcript of a
8 military commission under this chapter shall be under the
9 control of the convening authority of the commission, who
10 shall also be responsible for preparing the record of the
11 proceedings.

12 **"§ 948m. Number of members; excuse of members; ab-**
13 **sent and additional members**

14 "(a) NUMBER OF MEMBERS.—(1) A military com-
15 mission under this chapter shall, except as provided in
16 paragraph (2), have at least five members.

17 "(2) In a case in which the death penalty is sought,
18 the military commission shall have the number of members
19 prescribed by section 949m(c) of this title.

20 "(b) EXCUSE OF MEMBERS.—No member of a mili-
21 tary commission under this chapter may be absent or ex-
22 cused after the military commission has been assembled
23 for the trial of a case unless excused—

24 "(1) as a result of challenge;

"(2) by the military judge for physical disability or other good cause; or

"(3) by order of the convening authority for good cause.

"(c) ABSENT AND ADDITIONAL MEMBERS.—Whenever a military commission under this chapter is reduced below the number of members required by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide not less than such number. The trial may proceed with the new members present after the recorded evidence previously introduced before the members has been read to the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

"SUBCHAPTER III—PRE-TRIAL PROCEDURE

"Sec.
"948q. Charges and specifications.
"948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements.
"948s. Service of charges.

"§ 948q. Charges and specifications

"(a) CHARGES AND SPECIFICATIONS.—Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

"(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

"(2) that they are true in fact to the best of the signer's knowledge and belief.

"(b) NOTICE TO ACCUSED.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

"§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

"(a) IN GENERAL.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by use of torture, whether or not under color of law, shall not be admissible against the accused in a military commission under this chapter, except against a person accused of torture as evidence the statement was made.

"(c) OTHER STATEMENTS.—An otherwise admissible statement, including a statement allegedly obtained by coercion, shall not be admitted in evidence in a military commission under this chapter if the military judge finds that

1 the circumstances under which the statement was made
2 render the statement unreliable or lacking in probative
3 value.

4 "(d) TORTURE.—In this section, the term 'torture'
5 has the meaning given that term in section 2340 of title
6 18.

7 **"§ 948s. Service of charges**

8 "The trial counsel assigned to a case before a military
9 commission under this chapter shall cause to be served
10 upon the accused and military defense counsel a copy of
11 the charges upon which trial is to be had. Such charges
12 shall be served in English and, if appropriate, in another
13 language that the accused understands. Such service shall
14 be made sufficiently in advance of trial to prepare a de-
15 fense.

16 "SUBCHAPTER IV—TRIAL PROCEDURE

"Sec.
"949a. Rules.
"949b. Unlawfully influencing action of military commission.
"949c. Duties of trial counsel and defense counsel.
"949d. Sessions.
"949e. Continuances.
"949f. Challenges.
"949g. Oaths.
"949h. Former jeopardy.
"949i. Pleas of the accused.
"949j. Opportunity to obtain witnesses and other evidence.
"949k. Defense of lack of mental responsibility.
"949l. Voting and rulings.
"949m. Number of votes required.
"949n. Military commission to announce action.
"949o. Record of trial.

1 **"§ 949a. Rules**

2 "(a) PROCEDURES.—Pretrial, trial, and post-trial
3 procedures, including elements and modes of proof, for
4 cases triable by military commission under this chapter
5 shall be prescribed by the Secretary of Defense, but may
6 not be contrary to or inconsistent with this chapter.

7 "(b) RULES OF EVIDENCE.—(1) Subject to such ex-
8 ceptions and limitations as the Secretary may prescribe
9 by regulation, evidence in a military commission under
10 this chapter shall be admissible if the military judge deter-
11 mines that the evidence would have probative value to a
12 reasonable person.

13 "(2) Hearsay evidence is admissible unless the mili-
14 tary judge finds that the circumstances render the evi-
15 dence unreliable or lacking in probative value. However,
16 such evidence may be admitted only if the proponent of
17 the evidence makes the evidence known to the adverse
18 party in advance of trial or hearing.

19 "(3) The military judge shall exclude any evidence
20 the probative value of which is substantially outweighed—

21 "(A) by the danger of unfair prejudice, confu-
22 sion of the issues, or misleading the members of the
23 commission; or

24 "(B) by considerations of undue delay, waste of
25 time, or needless presentation of cumulative evi-
26 dence.

1 "(c) NOTIFICATION TO CONGRESSIONAL COMMIT-
2 TEES OF CHANGES TO PROCEDURES.—Not later than 60
3 days before the date on which any proposed modification
4 of the procedures in effect for military commissions under
5 this chapter goes into effect, the Secretary of Defense
6 shall submit to the Committee on Armed Services of the
7 Senate and the Committee on Armed Services of the
8 House of Representatives a report describing the modifica-
9 tion.

10 **"§ 949b. Unlawfully influencing action of military**
11 **commission**

12 "(a) IN GENERAL.—(1) No authority convening a
13 military commission under this chapter may censure, rep-
14 rimand, or admonish the military commission, or any
15 member, military judge, or counsel thereof, with respect
16 to the findings or sentence adjudged by the military com-
17 mission, or with respect to any other exercises of its or
18 his functions in the conduct of the proceedings.

19 "(2) No person may attempt to coerce or, by any un-
20 authorized means, influence the action of a military com-
21 mission under this chapter, or any member thereof, in
22 reaching the findings or sentence in any case, or the action
23 of any convening, approving, or reviewing authority with
24 respect to his judicial acts.

"(3) Paragraphs (1) and (2) do not apply with respect to—

"(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

"(B) statements and instructions given in open proceedings by a military judge or counsel.

"(b) PROHIBITION ON CONSIDERATION OF ACTIONS ON COMMISSION IN EVALUATION OF FITNESS.—In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

"(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

"(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented

1 any accused before a military commission under this
2 chapter.

3 **"§ 949c. Duties of trial counsel and defense counsel**

4 "(a) TRIAL COUNSEL.—The trial counsel of a mili-
5 tary commission under this chapter shall prosecute in the
6 name of the United States.

7 "(b) DEFENSE COUNSEL.—(1) The accused shall be
8 represented in his defense before a military commission
9 under this chapter as provided in this subsection.

10 "(2) The accused shall be represented by military
11 counsel detailed under section 948k of this title.

12 "(3) The accused may be represented by civilian
13 counsel if retained by the accused, but only if such civilian
14 counsel—

15 "(A) is a United States citizen;

16 "(B) is admitted to the practice of law in a
17 State, district, or possession of the United States or
18 before a Federal court;

19 "(C) has not been the subject of any sanction
20 of disciplinary action by any court, bar, or other
21 competent governmental authority for relevant mis-
22 conduct;

23 "(D) has been determined to be eligible for ac-
24 cess to classified information that is classified at the
25 level Secret or higher; and

1 "(E) has signed a written agreement to comply
2 with all applicable regulations or instructions for
3 counsel, including any rules of court for conduct
4 during the proceedings.
5 "(4) Civilian defense counsel shall protect any classi-
6 fied information received during the course of representa-
7 tion of the accused in accordance with all applicable law
8 governing the protection of classified information and may
9 not divulge such information to any person not authorized
10 to receive it.
11 "(5) If the accused is represented by civilian counsel,
12 military counsel detailed shall act as associate counsel.
13 "(6) The accused is not entitled to be represented by
14 more than one military counsel. However, the person au-
15 thorized under regulations prescribed under section 948k
16 of this title to detail counsel, in that person's sole discre-
17 tion, may detail additional military counsel to represent
18 the accused.
19 "(7) Defense counsel may cross-examine each witness
20 for the prosecution who testifies before a military commis-
21 sion under this chapter.
22 **"§ 949d. Sessions**
23 "(a) SESSIONS WITHOUT PRESENCE OF MEM-
24 BERS.—(1) At any time after the service of charges which
25 have been referred for trial by military commission under

1 this chapter, the military judge may call the military com-
2 mission into session without the presence of the members
3 for the purpose of—
4 "(A) hearing and determining motions raising
5 defenses or objections which are capable of deter-
6 mination without trial of the issues raised by a plea
7 of not guilty;
8 "(B) hearing and ruling upon any matter which
9 may be ruled upon by the military judge under this
10 chapter, whether or not the matter is appropriate for
11 later consideration or decision by the members;
12 "(C) if permitted by regulations prescribed by
13 the Secretary of Defense, receiving the pleas of the
14 accused; and
15 "(D) performing any other procedural function
16 which may be performed by the military judge under
17 this chapter or under rules prescribed pursuant to
18 section 949a of this title and which does not require
19 the presence of the members.
20 "(2) Except as provided in subsections (c), (d), and
21 (e), any proceedings under paragraph (1) shall—
22 "(A) be conducted in the presence of the ac-
23 cused, defense counsel, and trial counsel; and
24 "(B) be made part of the record.

1 "(b) PROCEEDINGS IN PRESENCE OF ACCUSED.—
2 Except as provided in subsections (c) and (e), all pro-
3 ceedings of a military commission under this chapter, in-
4 cluding any consultation of the members with the military
5 judge or counsel, shall—
6 "(1) be in the presence of the accused, defense
7 counsel, and trial counsel; and
8 "(2) be made a part of the record.
9 "(c) DELIBERATION OR VOTE OF MEMBERS.—When
10 the members of a military commission under this chapter
11 deliberate or vote, only the members may be present.
12 "(d) CLOSURE OF PROCEEDINGS.—(1) The military
13 judge may close to the public all or part of the proceedings
14 of a military commission under this chapter, but only in
15 accordance with this subsection.
16 "(2)(A) The military judge may close to the public
17 all or a portion of the proceedings of a military commis-
18 sion under paragraph (1), or permit the admission of clas-
19 sified information outside the presence of the accused,
20 based upon a presentation (including an ex parte or in
21 camera presentation) by either the prosecution or the de-
22 fense.
23 "(B) Trial counsel may not make a presentation re-
24 questing the admission of classified information outside
25 the presence of the accused unless the head of the depart-

1 ment or agency which has control over the matter (after
2 personal consideration by that officer) certifies in writing
3 to the military judge that—
4 "(i) the disclosure of the classified information
5 to the accused could reasonably be expected to prej-
6 udice the national security; and
7 "(ii) that such evidence has been declassified to
8 the maximum extent possible, consistent with the re-
9 quirements of national security.
10 "(3) The military judge may close to the public all
11 or a portion of the proceedings of a military commission
12 under paragraph (1) upon making a specific finding that
13 such closure is necessary to—
14 "(A) protect information the disclosure of which
15 could reasonably be expected to cause identifiable
16 damage to the public interest or the national secu-
17 rity, including intelligence or law enforcement
18 sources, methods, or activities; or
19 "(B) ensure the physical safety of individuals.
20 "(c) EXCLUSION OF ACCUSED FROM CERTAIN PRO-
21 CEEDINGS.—(1) The military judge may not exclude the
22 accused from any portion of the proceeding except upon
23 a specific finding of each of the following:
24 "(A) That the exclusion of the accused—

"(i) is necessary to protect classified information the disclosure of which to the accused could reasonably be expected to cause identifiable damage to the national security, including intelligence or law enforcement sources, methods, or activities;

"(ii) is necessary to ensure the physical safety of individuals; or

"(iii) is necessary to prevent disruption of the proceedings by the accused.

"(B) That the exclusion of the accused—

"(i) is no broader than necessary; and

"(ii) will not deprive the accused of a full and fair trial.

"(2)(A) A finding under paragraph (1) may be based upon a presentation, including a presentation ex parte or in camera, by either trial counsel or defense counsel.

"(B) Before trial counsel may make a presentation for purposes of subparagraph (A) requesting the admission of classified information that has not been provided to the accused, the head of the executive or military department or governmental agency concerned shall ensure, and shall certify in writing to the military judge, that such evidence has been declassified to the maximum extent pos-

1 sible, consistent with the requirements of national secu-
2 rity.
3 "(3)(A) No evidence may be admitted that has not
4 been provided to the accused unless the evidence is classi-
5 fied information and the military judge makes a specific
6 finding that—
7 "(i) consideration of that evidence by the mili-
8 tary commission, without the presence of the ac-
9 cused, is warranted;
10 "(ii) admission of an unclassified summary or
11 redacted version of that evidence would not be an
12 adequate substitute and, in the case of testimony, al-
13 ternative methods to obscure the identity of the wit-
14 ness are not adequate; and
15 "(iii) admission of the evidence would not de-
16 prive the accused of a full and fair trial.
17 "(B) If the accused is excluded from a portion of the
18 proceedings, the accused shall be provided with a redacted
19 transcript of the proceedings from which excluded and, to
20 the extent practicable, an unclassified summary of any evi-
21 dence introduced. Under no circumstances shall such a
22 summary or redacted transcript compromise the interests
23 warranting the exclusion of the accused under paragraph
24 (1).

1 "(4)(A) Military defense counsel shall be present and
2 able to participate in all trial proceedings and shall be
3 given access to all evidence admitted under paragraph (3).
4 "(B) Civilian defense counsel shall be permitted to
5 be present and to participate in proceedings from which
6 the accused is excluded under this subsection, and shall
7 be given access to classified information admitted under
8 this subsection, if—
9 "(i) civilian defense counsel has obtained the
10 necessary security clearances; and
11 "(ii) the presence of civilian defense counsel or
12 access of civilian defense counsel to such informa-
13 tion, as applicable, is consistent with regulations to
14 protect classified information that the Secretary of
15 Defense may prescribe.
16 "(C) Any defense counsel who receives classified in-
17 formation admitted under this subsection shall not be obli-
18 gated to, and may not, disclose that information to the
19 accused.
20 "(D) At all times the accused must have defense
21 counsel with sufficient security clearance to participate in
22 any proceeding, including an ex parte or in camera presen-
23 tation, with respect to classified information.

1 "(5) If evidence has been admitted under this sub-
2 section that has not been provided to the accused, the
3 judge shall instruct the members of the commission—
4 "(A) that such evidence was so admitted; and
5 "(B) that, in weighing the value of that evi-
6 dence, the commission shall consider the fact that
7 such evidence was admitted without having been
8 provided to the accused.
9 "(f) ADMISSION OF STATEMENTS OF ACCUSED.—(1)
10 A statement described in paragraph (2) that is made by
11 the accused during an interrogation, even if otherwise
12 classified, may not be admitted into evidence in a military
13 commission under this chapter unless the accused is
14 present for the admission of the statement into evidence
15 or the statement is otherwise provided to the accused.
16 "(2) A statement of an accused described in this
17 paragraph is a statement communicated knowingly and di-
18 rectly by the accused in response to questioning by United
19 States or foreign military, intelligence, or criminal inves-
20 tigative personnel.
21 "(3) This subsection shall not be construed to prevent
22 the redaction of intelligence sources or methods, which do
23 not constitute statements of the accused, from any docu-
24 ment provided to the accused or admitted into evidence.

1 **"§ 949e. Continuances**

2 "The military judge in a military commission under
3 this chapter may, for reasonable cause, grant a continu-
4 ance to any party for such time, and as often, as may
5 appear to be just.

6 **"§ 949f. Challenges**

7 "(a) CHALLENGES AUTHORIZED.—The military
8 judge and members of a military commission under this
9 chapter may be challenged by the accused or trial counsel
10 for cause stated to the commission. The military judge
11 shall determine the relevance and validity of challenges for
12 cause. The military judge may not receive a challenge to
13 more than one person at a time. Challenges by trial coun-
14 sel shall ordinarily be presented and decided before those
15 by the accused are offered.

16 "(b) PEREMPTORY CHALLENGES.—Each accused
17 and the trial counsel are entitled to one peremptory chal-
18 lenge. The military judge may not be challenged except
19 for cause.

20 "(c) CHALLENGES AGAINST ADDITIONAL MEM-
21 BERS.—Whenever additional members are detailed to a
22 military commission under this chapter, and after any
23 challenges for cause against such additional members are
24 presented and decided, each accused and the trial counsel
25 are entitled to one peremptory challenge against members
26 not previously subject to peremptory challenge.

1 **"§ 949g. Oaths**

2 "(a) IN GENERAL.—(1) Before performing their re-
3 spective duties in a military commission under this chap-
4 ter, military judges, members, trial counsel, defense coun-
5 sel, reporters, and interpreters shall take an oath to per-
6 form their duties faithfully.

7 "(2) The form of the oath required by paragraph (1),
8 the time and place of the taking thereof, the manner of
9 recording the same, and whether the oath shall be taken
10 for all cases in which duties are to be performed or for
11 a particular case, shall be as prescribed in regulations of
12 the Secretary of Defense. Those regulations may provide
13 that—

14 "(A) an oath to perform faithfully duties as a
15 military judge, trial counsel, or defense counsel may
16 be taken at any time by any judge advocate or other
17 person certified to be qualified or competent for the
18 duty; and

19 "(B) if such an oath is taken, such oath need
20 not again be taken at the time the judge advocate
21 or other person is detailed to that duty.

22 "(b) WITNESSES.—Each witness before a military
23 commission under this chapter shall be examined on oath.

1 **"§ 949h. Former jeopardy**

2 "(a) IN GENERAL.—No person may, without his con-
3 sent, be tried by a military commission under this chapter
4 a second time for the same offense.

5 "(b) SCOPE OF TRIAL.—No proceeding in which the
6 accused has been found guilty by military commission
7 under this chapter upon any charge or specification is a
8 trial in the sense of this section until the finding of guilty
9 has become final after review of the case has been fully
10 completed.

11 **"§ 949i. Pleas of the accused**

12 "(a) ENTRY OF PLEA OF NOT GUILTY.—If an ac-
13 cused in a military commission under this chapter after
14 a plea of guilty sets up matter inconsistent with the plea,
15 or if it appears that the accused has entered the plea of
16 guilty through lack of understanding of its meaning and
17 effect, or if the accused fails or refuses to plead, a plea
18 of not guilty shall be entered in the record, and the mili-
19 tary commission shall proceed as though the accused had
20 pleaded not guilty.

21 "(b) FINDING OF GUILT AFTER GUILTY PLEA.—
22 With respect to any charge or specification to which a plea
23 of guilty has been made by the accused in a military com-
24 mission under this chapter and accepted by the military
25 judge, a finding of guilty of the charge or specification
26 may be entered immediately without a vote. The finding

1 shall constitute the finding of the commission unless the
2 plea of guilty is withdrawn prior to announcement of the
3 sentence, in which event the proceedings shall continue as
4 though the accused had pleaded not guilty.

5 **"§ 949j. Opportunity to obtain witnesses and other**
6 **evidence**

7 "(a) RIGHT OF DEFENSE COUNSEL.—Defense coun-
8 sel in a military commission under this chapter shall have
9 a reasonable opportunity to obtain witnesses and other evi-
10 dence, including evidence in the possession of the United
11 States, as provided in regulations prescribed by the Sec-
12 retary of Defense.

13 "(b) PROCESS FOR COMPULSION.—Process issued in
14 a military commission under this chapter to compel wit-
15 nesses to appear and testify and to compel the production
16 of other evidence—

17 "(1) shall be similar to that which courts of the
18 United States having criminal jurisdiction may law-
19 fully issue; and

20 "(2) shall run to any place where the United
21 States shall have jurisdiction thereof.

22 "(c) TREATMENT OF CLASSIFIED INFORMATION.—
23 The military judge in a military commission under this
24 chapter, upon a sufficient showing, may authorize trial
25 counsel, in making documents available to the accused

1 through discovery conducted pursuant to such rules as the
2 Secretary of Defense shall prescribe, to delete specified
3 items of classified information from such documents and,
4 when such a deletion is made—
5 "(1) to substitute an unclassified summary of
6 the classified information in such documents; or
7 "(2) to substitute an unclassified statement ad-
8 mitting relevant facts that classified information in
9 such documents would tend to prove.
10 "(d) DISCLOSURE OF EXCULPATORY EVIDENCE.—
11 (1) As soon as practicable, trial counsel in a military com-
12 mission under this chapter shall disclose to the defense
13 the existence of any evidence known to trial counsel that
14 reasonably tends to exculpate the accused.
15 "(2) Exculpatory evidence that consists of classified
16 information may be provided solely to defense counsel, and
17 not the accused, after review in camera by the military
18 judge.
19 "(3) Before evidence may be withheld from the ac-
20 cused under this subsection, the head of the executive or
21 military department or government agency concerned shall
22 ensure, and shall certify in writing to the military judge,
23 that—

"(A) the disclosure of such evidence to the accused could reasonably be expected to prejudice the national security; and

"(B) such evidence has been declassified to the maximum extent possible, consistent with the requirements of national security.

"(4) Any classified exculpatory evidence that is not disclosed to the accused under this subsection—

"(A) shall be provided to military defense counsel;

"(B) shall be provided to civilian defense counsel, if civilian defense counsel has obtained the necessary security clearances and access to such evidence is consistent with regulations that the Secretary may prescribe to protect classified information; and

"(C) shall be provided to the accused in a redacted or summary form, if it is possible to do so without compromising intelligence sources, methods, or activities or other national security interests.

"(5) A defense counsel who receives *classifed* evidence under this subsection shall not be obligated to, and may not, disclose that evidence to the accused.

"§ 949k. Defense of lack of mental responsibility

"(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense in a trial by military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

"(b) BURDEN OF PROOF.—The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

"(c) FINDINGS FOLLOWING ASSERTION OF DEFENSE.—Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue in a military commission under this chapter, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

"(1) guilty;

"(2) not guilty; or

"(3) subject to subsection (d), not guilty by reason of lack of mental responsibility.

"(d) MAJORITY VOTE REQUIRED FOR FINDING.—The accused shall be found not guilty by reason of lack of mental responsibility under subsection (c)(3) only if a

1 majority of the members present at the time the vote is
2 taken determines that the defense of lack of mental re-
3 sponsibility has been established.

4 **"§ 949l. Voting and rulings**

5 "(a) VOTE BY SECRET WRITTEN BALLOT.—Voting
6 by members of a military commission under this chapter
7 on the findings and on the sentence shall be by secret writ-
8 ten ballot.

9 "(b) RULINGS.—(1) The military judge in a military
10 commission under this chapter shall rule upon all ques-
11 tions of law, including the admissibility of evidence and
12 all interlocutory questions arising during the proceedings.

13 "(2) Any ruling made by the military judge upon a
14 question of law or an interlocutory question (other than
15 the factual issue of mental responsibility of the accused)
16 is conclusive and constitutes the ruling of the military
17 commission. However, a military judge may change his
18 ruling at any time during the trial.

19 "(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote
20 is taken of the findings of a military commission under
21 this chapter, the military judge shall, in the presence of
22 the accused and counsel, instruct the members as to the
23 elements of the offense and charge them—

"(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

"(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

"(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

"(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

"§ 949m. Number of votes required

"(a) CONVICTION.—No person may be convicted by a military commission under this chapter of any offense, except as provided in section 949i(b) of this title or by concurrence of two-thirds of the members present at the time the vote is taken.

"(b) SENTENCES.—(1) No person may be sentenced by a military commission to suffer death, except insofar as—

"(A) the penalty of death is expressly authorized under this chapter for an offense of which the accused has been found guilty;

"(B) trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial;

"(C) the accused is convicted of the offense by the concurrence of all the members; and

"(D) all the members concur in the sentence of death.

"(2) No person may be sentenced to life imprisonment, or to confinement for more than 10 years, by a military commission under this chapter except by the concurrence of three-fourths of the members present at the time the vote is taken.

"(3) All other sentences shall be determined by a military commission by the concurrence of two-thirds of the members present at the time the vote is taken.

"(c) NUMBER OF MEMBERS REQUIRED FOR PENALTY OF DEATH.—(1) Except as provided in paragraph (2), in a case in which the penalty of death is sought, the number of members of the military commission under this chapter shall be not less than 12.

"(2) In any case described in paragraph (1) in which 12 members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and

1 the military commission may be assembled, and the trial
2 held, with not fewer than the number of members so speci-
3 fied. In such a case, the convening authority shall make
4 a detailed written statement, to be appended to the record,
5 stating why a greater number of members were not rea-
6 sonably available.

7 **"§ 949n. Military commission to announce action**

8 "A military commission under this chapter shall an-
9 nounce its findings and sentence to the parties as soon
10 as determined.

11 **"§ 949o. Record of trial**

12 "(a) RECORD; AUTHENTICATION.—Each military
13 commission under this chapter shall keep a separate, ver-
14 batim, record of the proceedings in each case brought be-
15 fore it, and the record shall be authenticated by the signa-
16 ture of the military judge. If the record cannot be authen-
17 ticated by the military judge by reason of his death, dis-
18 ability, or absence, it shall be authenticated by the signa-
19 ture of the trial counsel or by a member of the commission
20 if the trial counsel is unable to authenticate it by reason
21 of his death, disability, or absence. Where appropriate,
22 and as provided in regulations prescribed by the Secretary
23 of Defense, the record of a military commission under this
24 chapter may contain a classified annex.

"(b) COMPLETE RECORD REQUIRED.—A complete record of the proceedings and testimony shall be prepared in every military commission under this chapter.

"(c) PROVISION OF COPY TO ACCUSED.—A copy of the record of the proceedings of the military commission under this chapter shall be given the accused as soon as it is authenticated. If the record contains classified information, or a classified annex, the accused shall be given a redacted version of the record. The appropriate defense counsel shall have access to the unredacted record, as provided in regulations prescribed by the Secretary of Defense.

"SUBCHAPTER V—SENTENCES

"Sec.
"949s. Cruel or unusual punishments prohibited.
"949t. Maximum limits.
"949u. Execution of confinement.

"§ 949s. Cruel or unusual punishments prohibited

"Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited under this chapter.

"§ 949t. Maximum limits

"The punishment which a military commission under this chapter may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

"§ 949u. Execution of confinement

"(a) IN GENERAL.—Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission under this chapter may be carried into execution by confinement—

"(1) in any place of confinement under the control of any of the armed forces; or

"(2) in any penal or correctional institution under the control of the United States or its allies, or which the United States may be allowed to use.

"(b) TREATMENT DURING CONFINEMENT BY OTHER THAN THE ARMED FORCES.—Persons confined under subsection (a)(2) in a penal or correctional institution not under the control of an armed force are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, District of Columbia, or place in which the institution is situated.

"SUBCHAPTER VI—POST-TRIAL PROCEDURE AND REVIEW OF MILITARY COMMISSIONS

"Sec.

"950a. Error of law; lesser included offense.
"950b. Review by the convening authority.
"950c. Waiver or withdrawal of appeal.
"950d. Appeal by the United States.
"950e. Rehearings.
"950f. Review by Court of Military Commission Review.
"950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court.
"950h. Appellate counsel.
"950i. Execution of sentence; suspension of sentence.
"950j. Finality or proceedings, findings, and sentences.

"§ 950a. Error of law; lesser included offense

"(a) ERROR OF LAW.—A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

"(b) LESSER INCLUDED OFFENSE.—Any reviewing authority with the power to approve or affirm a finding of guilty by a military commission under this chapter may approve or affirm, instead, so much of the finding as includes a lesser included offense.

"§ 950b. Review by the convening authority

"(a) NOTICE TO CONVENING AUTHORITY OF FINDINGS AND SENTENCE.—The findings and sentence of a military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

"(b) SUBMITTAL OF MATTERS BY ACCUSED TO CONVENING AUTHORITY.—(1) The accused may submit to the convening authority matters for consideration by the con-

1 vening authority with respect to the findings and the sen-
2 tence of the military commission under this chapter.
3 "(2)(A) Except as provided in subparagraph (B), a
4 submittal under paragraph (1) shall be made in writing
5 within 20 days after accused has been given an authenti-
6 cated record of trial under section 949o(c) of this title.
7 "(B) If the accused shows that additional time is re-
8 quired for the accused to make a submittal under para-
9 graph (1), the convening authority may, for good cause,
10 extend the applicable period under subparagraph (A) for
11 not more than an additional 20 days.
12 "(3) The accused may waive his right to make a sub-
13 mittal to the convening authority under paragraph (1).
14 Such a waiver shall be made in writing and may not be
15 revoked. For the purposes of subsection (c)(2), the time
16 within which the accused may make a submittal under this
17 subsection shall be deemed to have expired upon the sub-
18 mittal of a waiver under this paragraph to the convening
19 authority.
20 "(e) ACTION BY CONVENING AUTHORITY.—(1) The
21 authority under this subsection to modify the findings and
22 sentence of a military commission under this chapter is
23 a matter of the sole discretion and prerogative of the con-
24 vening authority.

1 "(2)(A) The convening authority shall take action on
2 the sentence of a military commission under this chapter.
3 "(B) Subject to regulations prescribed by the Sec-
4 retary of Defense, action on the sentence under this para-
5 graph may be taken only after consideration of any mat-
6 ters submitted by the accused under subsection (b) or
7 after the time for submitting such matters expires, which-
8 ever is earlier.
9 "(C) In taking action under this paragraph, the con-
10 vening authority may, in his sole discretion, approve, dis-
11 approve, commute, or suspend the sentence in whole or
12 in part. The convening authority may not increase a sen-
13 tence beyond that which is found by the military commis-
14 sion.
15 "(3) The convening authority is not required to take
16 action on the findings of a military commission under this
17 chapter. If the convening authority takes action on the
18 findings, the convening authority may, in his sole discre-
19 tion, may—
20 "(A) dismiss any charge or specification by set-
21 ting aside a finding of guilty thereto; or
22 "(B) change a finding of guilty to a charge to
23 a finding of guilty to an offense that is a lesser in-
24 cluded offense of the offense stated in the charge.

1 "(4) The convening authority shall serve on the ac-
2 cused or on defense counsel notice of any action taken by
3 the convening authority under this subsection.
4 "(d) ORDER OF REVISION OR REHEARING.—(1) Sub-
5 ject to paragraphs (2) and (3), the convening authority
6 of a military commission under this chapter may, in his
7 sole discretion, order a proceeding in revision or a rehear-
8 ing.
9 "(2)(A) Except as provided in subparagraph (B), a
10 proceeding in revision may be ordered by the convening
11 authority if—
12 "(i) there is an apparent error or omission in
13 the record; or
14 "(ii) the record shows improper or inconsistent
15 action by the military commission with respect to
16 the findings or sentence that can be rectified without
17 material prejudice to the substantial rights of the
18 accused.
19 "(B) In no case may a proceeding in revision—
20 "(i) reconsider a finding of not guilty of a spec-
21 ification or a ruling which amounts to a finding of
22 not guilty;
23 "(ii) reconsider a finding of not guilty of any
24 charge, unless there has been a finding of guilty

1 under a specification laid under that charge, which
2 sufficiently alleges a violation; or
3 "(iii) increase the severity of the sentence un-
4 less the sentence prescribed for the offense is man-
5 datory.
6 "(3) A rehearing may be ordered by the convening
7 authority if the convening authority disapproves the find-
8 ings and sentence and states the reasons for disapproval
9 of the findings. If the convening authority disapproves the
10 finding and sentence and does not order a rehearing, the
11 convening authority shall dismiss the charges. A rehearing
12 as to the findings may not be ordered by the convening
13 authority when there is a lack of sufficient evidence in the
14 record to support the findings. A rehearing as to the sen-
15 tence may be ordered by the convening authority if the
16 convening authority disapproves the sentence.

17 **"§ 950c. Appellate referral; waiver or withdrawal of**
18 **appeal**

19 "(a) AUTOMATIC REFERRAL FOR APPELLATE RE-
20 VIEW.—Except as provided under subsection (b), in each
21 case in which the final decision of a military commission
22 (as approved by the convening authority) includes a find-
23 ing of guilty, the convening authority shall refer the case
24 to the Court of Military Commission Review. Any such re-

1 ferral shall be made in accordance with procedures pre-
2 scribed under regulations of the Secretary.
3 "(b) WAIVER OF RIGHT OF REVIEW.—(1) In each
4 case subject to appellate review under section 950f of this
5 title, except a case in which the sentence as approved
6 under section 950b of this title extends to death, the ac-
7 cused may file with the convening authority a statement
8 expressly waiving the right of the accused to such review.
9 "(2) A waiver under paragraph (1) shall be signed
10 by both the accused and a defense counsel.
11 "(3) A waiver under paragraph (1) must be filed, if
12 at all, within 10 days after notice on the action is served
13 on the accused or on defense counsel under section
14 950b(c)(4) of this title. The convening authority, for good
15 cause, may extend the period for such filing by not more
16 than 30 days.
17 "(c) WITHDRAWAL OF APPEAL.—Except in a case in
18 which the sentence as approved under section 950b of this
19 title extends to death, the accused may withdraw an ap-
20 peal at any time.
21 "(d) EFFECT OF WAIVER OR WITHDRAWAL.—A
22 waiver of the right to appellate review or the withdrawal
23 of an appeal under this section bars review under section
24 950f of this title.

"§ 950d. Appeal by the United States

"(a) INTERLOCUTORY APPEAL.—(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that—

"(A) terminates proceedings of the military commission with respect to a charge or specification;

"(B) excludes evidence that is substantial proof of a fact material in the proceeding; or

"(C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title.

"(2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

"(b) NOTICE OF APPEAL.—The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

"(c) APPEAL.—An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court of Military Commission Review may act only with respect to matters of law.

"(d) APPEAL FROM ADVERSE RULING.—The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.

"§ 950e. Rehearings

"(a) COMPOSITION OF MILITARY COMMISSION FOR REHEARING.—Each rehearing under this chapter shall take place before a military commission under this chapter composed of members who were not members of the military commission which first heard the case.

"(b) SCOPE OF REHEARING.—(1) Upon a rehearing—

"(A) the accused may not be tried for any offense of which he was found not guilty by the first military commission; and

"(B) no sentence in excess of or more than the original sentence may be imposed unless—

"(i) the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings; or

"(ii) the sentence prescribed for the offense is mandatory.

"(2) Upon a rehearing, if the sentence approved after the first military commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first military commission.

"§ 950f. Review by Court of Military Commission Review

"(a) ESTABLISHMENT.—The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions under this chapter, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

"(b) APPELLATE MILITARY JUDGES.—The Secretary shall assign appellate military judges to a Court of Military Commission Review. Each appellate military judge shall meet the qualifications for military judges prescribed by section 948j(b) of this title or shall be a civilian with comparable qualifications. No person may be appointed to

1 serve as an appellate military judge in any case in which
2 that person acted as a military judge, counsel, or review-
3 ing official.

4 "(c) CASES TO BE REVIEWED.—The Court of Mili-
5 tary Commission Review, in accordance with procedures
6 prescribed under regulations of the Secretary, shall review
7 the record in each case that is referred to the Court by
8 the convening authority under section 950c of this title
9 with respect to any matter of law raised by the accused.

10 "(d) SCOPE OF REVIEW.—In a case reviewed by it
11 under this section, the Court of Military Commission Re-
12 view may act only with respect to matters of law.

13 **"§ 950g. Review by the United States Court of Ap-**
14 **peals for the District of Columbia Circuit**
15 **and the Supreme Court**

16 "(a) EXCLUSIVE APPELLATE JURISDICTION.—(1)(A)
17 Except as provided in subparagraph (B), the United
18 States Court of Appeals for the District of Columbia Cir-
19 cuit shall have exclusive jurisdiction to determine the va-
20 lidity of a final judgment rendered by a military commis-
21 sion (as approved by the convening authority) under this
22 chapter.

23 "(B) The Court of Appeals may not review the final
24 judgment until all other appeals under this chapter have
25 been waived or exhausted.

1 "(2) A petition for review must be filed by the ac-
2 cused in the Court of Appeals not later than 20 days after
3 the date on which—
4 "(A) written notice of the final decision of the
5 Court of Military Commission Review is served on
6 the accused or on defense counsel; or
7 "(B) the accused submits, in the form pre-
8 scribed by section 950c of this title, a written notice
9 waiving the right of the accused to review by the
10 Court of Military Commission Review under section
11 950f of this title.
12 "(b) STANDARD FOR REVIEW.—In a case reviewed
13 by it under this section, the Court of Appeals may act
14 only with respect to matters of law.
15 "(c) SCOPE OF REVIEW.—The jurisdiction of the
16 Court of Appeals on an appeal under subsection (a) shall
17 be limited to the consideration of—
18 "(1) whether the final decision was consistent
19 with the standards and procedures specified in this
20 chapter; and
21 "(2) to the extent applicable, the Constitution.
22 "(d) SUPREME COURT.—The Supreme Court may re-
23 view by writ of certiorari the final judgment of the Court
24 of Appeals pursuant to section 1257 of title 28.

1 **"§ 950h. Appellate counsel**

2 "(a) APPOINTMENT.—The Secretary of Defense
3 shall, by regulation, establish procedures for the appoint-
4 ment of appellate counsel for the United States and for
5 the accused in military commissions under this chapter.
6 Appellate counsel shall meet the qualifications for counsel
7 appearing before military commissions under this chapter.

8 "(b) REPRESENTATION OF UNITED STATES.—Appel-
9 late counsel appointed under subsection (a)—

10 "(1) shall represent the United States in any
11 appeal or review proceeding under this chapter be-
12 fore the Court of Military Commission Review; and

13 "(2) may, when requested to do so by the At-
14 torney General in a case arising under this chapter,
15 represent the United States before the United States
16 Court of Appeals for the District of Columbia Cir-
17 cuit or the Supreme Court.

18 "(c) REPRESENTATION OF ACCUSED.—The accused
19 shall be represented by appellate counsel appointed under
20 subsection (a) before the Court of Military Commission
21 Review, the United States Court of Appeals for the Dis-
22 trict of Columbia Circuit, and the Supreme Court, and by
23 civilian counsel if retained by the accused. Any such civil-
24 ian counsel shall meet the qualifications under paragraph
25 (3) of section 949c(b) of this title for civilian counsel ap-
26 pearing before military commissions under this chapter

1 and shall be subject to the requirements of paragraph (4)
2 of that section. The provisions of subparagraph (D) of sec-
3 tion 949d(c)(5) of this title shall apply with respect to ap-
4 pellate counsel.

5 **"§ 950i. Execution of sentence; suspension of sentence**

6 "(a) EXECUTION OF SENTENCE OF DEATH ONLY
7 UPON APPROVAL BY THE PRESIDENT.—If the sentence
8 of a military commission under this chapter extends to
9 death, that part of the sentence providing for death may
10 not be executed until approved by the President. In such
11 a case, the President may commute, remit, or suspend the
12 sentence, or any part thereof, as he sees fit.

13 "(b) EXECUTION OF SENTENCE OF DEATH ONLY
14 UPON FINAL JUDGMENT OF LEGALITY OF PRO-
15 CEEDINGS.—(1) If the sentence of a military commission
16 under this chapter extends to death, the sentence may not
17 be executed until there is a final judgement as to the legal-
18 ity of the proceedings (and with respect to death, approval
19 under subsection (a)).

20 "(2) A judgement as to legality of proceedings is final
21 for purposes of paragraph (1) when—

22 "(A) the time for the accused to file a petition
23 for review by the Court of Appeals for the District
24 of Columbia Circuit has expired and the accused has

1 not filed a timely petition for such review and the
2 case is not otherwise under review by that Court; or
3 "(B) review is completed in accordance with the
4 judgment of the United States Court of Appeals for
5 the District of Columbia Circuit and—
6 "(i) a petition for a writ of certiorari is not
7 timely filed;
8 "(ii) such a petition is denied by the Su-
9 preme Court; or
10 "(iii) review is otherwise completed in ac-
11 cordance with the judgment of the Supreme
12 Court.
13 "(c) SUSPENSION OF SENTENCE.—The Secretary of
14 the Defense, or the convening authority acting on the case
15 (if other than the Secretary), may suspend the execution
16 of any sentence or part thereof in the case, except a sen-
17 tence of death.
18 **"§ 950j. Finality or proceedings, findings, and sen-**
19 **tences**
20 "(a) FINALITY.—The appellate review of records of
21 trial provided by this chapter, and the proceedings, find-
22 ings, and sentences of military commissions as approved,
23 reviewed, or affirmed as required by this chapter, are final
24 and conclusive. Orders publishing the proceedings of mili-
25 tary commissions under this chapter are binding upon all

1 departments, courts, agencies, and officers of the United
2 States, except as otherwise provided by the President.
3 "(b) PROVISIONS OF CHAPTER SOLE BASIS FOR RE-
4 VIEW OF MILIARY COMMISSION PROCEDURES AND AC-
5 TIONS.—Except as otherwise provided in this chapter and
6 notwithstanding any other provision of law (including sec-
7 tion 2241 of title 28 or any other habeas corpus provi-
8 sion), no court, justice, or judge shall have jurisdiction to
9 hear or consider any claim or cause of action whatsoever,
10 including any action pending on or filed after the date of
11 the enactment of the Military Commissions Act of 2006,
12 relating to the prosecution, trial, or judgment of a military
13 commission under this chapter, including challenges to the
14 lawfulness of procedures of military commissions under
15 this chapter.

16 "SUBCHAPTER VII—PUNITIVE MATTERS

"Sec.
"950p. Statement of substantive offenses.
"950q. Principals.
"950r. Accessory after the fact.
"950s. Conviction of lesser included offense.
"950t. Attempts.
"950u. Solicitation.
"950v. Crimes triable by military commissions.
"950w. Perjury and obstruction of justice.
"950x. Contempt.

17 **"§ 950p. Statement of substantive offenses**

18 "(a) PURPOSE.—The provisions of this subchapter
19 codify offenses that have traditionally been triable by mili-
20 tary commissions. This chapter does not establish new

1 crimes that did not exist before its enactment, but rather
2 codifies those crimes for trial by military commission.
3 "(b) EFFECT.—Because the provisions of this sub-
4 chapter (including provisions that incorporate definitions
5 in other provisions of law) are declarative of existing law,
6 they do not preclude trial for crimes that occurred before
7 the date of the enactment of this chapter.
8 **"§ 950q. Principals**
9 "Any person is punishable as a principal under this
10 chapter who—
11 "(1) commits an offense punishable by this
12 chapter, or aids, abets, counsels, commands, or pro-
13 cures its commission;
14 "(2) causes an act to be done which if directly
15 performed by him would be punishable by this chap-
16 ter; or
17 "(3) is a superior commander who, with regard
18 to acts punishable under this chapter, knew, had
19 reason to know, or should have known, that a subor-
20 dinate was about to commit such acts or had done
21 so and the superior failed to take the necessary and
22 reasonable measures to prevent such acts or to pun-
23 ish the perpetrators thereof.

1 **"§ 950r. Accessory after the fact**

2 "Any person subject to this chapter who, knowing
3 that an offense punishable by this chapter has been com-
4 mitted, receives, comforts, or assists the offender in order
5 to hinder or prevent his apprehension, trial, or punishment
6 shall be punished as a military commission under this
7 chapter may direct.

8 **"§ 950s. Conviction of lesser included offense**

9 "An accused may be found guilty of an offense nec-
10 essarily included in the offense charged or of an attempt
11 to commit either the offense charged or an attempt to
12 commit either the offense charged or an offense nec-
13 essarily included therein.

14 **"§ 950t. Attempts**

15 "(a) IN GENERAL.—Any person subject to this chap-
16 ter who attempts to commit any offense punishable by this
17 chapter shall be punished as a military commission under
18 this chapter may direct.

19 "(b) SCOPE OF OFFENSE.—An act, done with spe-
20 cific intent to commit an offense under this chapter,
21 amounting to more than mere preparation and tending,
22 even though failing, to effect its commission, is an attempt
23 to commit that offense.

24 "(c) EFFECT OF CONSUMMATION.—Any person sub-
25 ject to this chapter may be convicted of an attempt to com-

1 mit an offense although it appears on the trial that the
2 offense was consummated.

3 **"§ 950u. Solicitation**

4 "Any person subject to this chapter who solicits or
5 advises another or others to commit one or more sub-
6 stantive offenses triable by military commission under this
7 chapter shall, if the offense solicited or advised is at-
8 tempted or committed, be punished with the punishment
9 provided for the commission of the offense, but, if the of-
10 fense solicited or advised is not committed or attempted,
11 he shall be punished as a military commission under this
12 chapter may direct.

13 **"§ 950v. Crimes triable by military commissions**

14 "(a) DEFINITIONS AND CONSTRUCTION.—In this sec-
15 tion:

16 "(1) MILITARY OBJECTIVE.—The term 'military
17 objective' refers to—

18 "(A) combatants; and

19 "(B) those objects during an armed con-
20 flict—

21 "(i) which, by their nature, location,
22 purpose, or use, effectively contribute to
23 the opposing force's war-fighting or war-
24 sustaining capability; and

"(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

"(2) PROTECTED PERSON.—The term 'protected person' refers to any person entitled to protection under one or more of the Geneva Conventions, including—

"(A) civilians not taking an active part in hostilities;

"(B) military personnel placed hors de combat by sickness, wounds, or detention; and

"(C) military medical or religious personnel.

"(3) PROTECTED PROPERTY.—The term 'protected property' refers to property specifically protected by the law of war (such as buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions.

"(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack.

"(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

"(1) MURDER OF PROTECTED PERSONS.—An alien unlawful enemy combatant who intentionally kills one or more protected persons is guilty of the offense of intentionally killing a protected person and shall be subject to whatever punishment a commission may direct, including the penalty of death.

"(2) ATTACKING CIVILIANS.—An alien unlawful enemy combatant who intentionally engages in an attack upon a civilian population as such or individual civilians not taking active part in hostilities is guilty of the offense of attacking civilians and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

1 "(3) ATTACKING CIVILIAN OBJECTS.—An alien
2 unlawful enemy combatant who intentionally en-
3 gages in an attack upon property that is not a mili-
4 tary objective shall be guilty of the offense of attack-
5 ing civilian objects and shall be subject to whatever
6 punishment a commission may direct.
7 "(4) ATTACKING PROTECTED PROPERTY.—An
8 alien unlawful enemy combatant who intentionally
9 engages in an attack upon protected property shall
10 be guilty of the offense of attacking protected prop-
11 erty and shall be subject to whatever punishment a
12 commission may direct.
13 "(5) PILLAGING.—An alien unlawful enemy
14 combatant who intentionally and in the absence of
15 military necessity appropriates or seizes property for
16 private or personal use, without the consent of a
17 person with authority to permit such appropriation
18 or seizure, shall be guilty of the offense of pillaging
19 and shall be subject to whatever punishment a com-
20 mission may direct.
21 "(6) DENYING QUARTER.—An alien unlawful
22 enemy combatant who, with effective command or
23 control over subordinate groups, declares, orders, or
24 otherwise indicates to those forces that there shall
25 be no survivors or surrender accepted, with the in-

1 tent therefore to threaten an adversary or to conduct
2 hostilities such that there would be no survivors or
3 surrender accepted, shall be guilty of denying quar-
4 ter and shall be subject to whatever punishment a
5 commission may direct.

6 "(7) TAKING HOSTAGES.—An alien unlawful
7 enemy combatant who, having knowingly seized or
8 detained one or more persons, threatens to kill, in-
9 jure, or continue to detain such person or persons
10 with the intent of compelling any nation, person
11 other than the hostage, or group of persons to act
12 or refrain from acting as an explicit or implicit con-
13 dition for the safety or release of such person or per-
14 sons, shall be guilty of the offense of taking hostages
15 and shall be subject to whatever punishment a com-
16 mission may direct, including, if death results to one
17 or more of the victims, the penalty of death.

18 "(8) EMPLOYING POISON OR ANALOGOUS WEAP-
19 ONS.—An alien unlawful enemy combatant who in-
20 tentionally, as a method of warfare, employs a sub-
21 stance or a weapon that releases a substance that
22 causes death or serious and lasting damage to health
23 in the ordinary course of events, through its asphyx-
24 iating, bacteriological, or toxic properties, shall be
25 guilty of employing poison or analogous weapons and

1 shall be subject to whatever punishment a commis-
2 sion may direct, including, if death results to one or
3 more of the victims, the penalty of death.

4 "(9) USING PROTECTED PERSONS AS
5 SHIELDS.—An alien unlawful enemy combatant who
6 positions, or otherwise takes advantage of, a pro-
7 tected person with the intent to shield a military ob-
8 jective from attack or to shield, favor, or impede
9 military operations, shall be guilty of the offense of
10 using protected persons as shields and shall be sub-
11 ject to whatever punishment a commission may di-
12 rect, including, if death results to one or more of the
13 victims, the penalty of death.

14 "(10) USING PROTECTED PROPERTY AS
15 SHIELDS.—An alien unlawful enemy combatant who
16 positions, or otherwise takes advantage of the loca-
17 tion of, protected property under the law of war with
18 the intent to shield a military objective from attack
19 or to shield, favor, or impede military operations,
20 shall be guilty of the offense of using protected prop-
21 erty as shields and shall be subject to whatever pun-
22 ishment a commission may direct.

23 "(11) TORTURE.—An alien unlawful enemy
24 combatant who commits an act specifically intended
25 to inflict severe physical pain or suffering or severe

1 mental pain or suffering (other than pain or suf-
2 fering incidental to lawful sanctions) upon another
3 person within his custody or physical control for the
4 purpose of obtaining information or a confession,
5 punishment, intimidation, coercion, or any reason
6 based on discrimination of any kind, shall be guilty
7 of torture and subject to whatever punishment a
8 commission may direct, including, if death results to
9 one or more of the victims, the penalty of death. In
10 this paragraph, the term 'severe mental pain or suf-
11 fering' has the meaning given that term in section
12 2340(2) of title 18.

13 "(12) CRUEL OR INHUMAN TREATMENT.—An
14 alien unlawful enemy combatant who commits an act
15 intended to inflict severe physical pain or suffering
16 or severe mental pain or suffering (other than pain
17 or suffering incidental to lawful sanctions), including
18 severe physical abuse, upon another person within
19 his custody or physical control shall be guilty of
20 cruel or inhuman treatment and subject to whatever
21 punishment a commission may direct, including, if
22 death results to one or more of the victims, the pen-
23 alty of death. In this paragraph, the term 'severe
24 mental pain or suffering' has the meaning given that
25 term in section 2340(2) of title 18.

1 "(13) INTENTIONALLY CAUSING SERIOUS BOD-
2 ILY INJURY.—An alien unlawful enemy combatant
3 who intentionally causes serious bodily injury to one
4 or more persons, including lawful combatants, in vio-
5 lation of the law of war shall be guilty of the offense
6 of causing serious bodily injury and shall be subject
7 to whatever punishment a commission may direct,
8 including, if death results to one or more of the vic-
9 tims, the penalty of death. In this paragraph, the
10 term 'serious bodily injury' has the meaning given
11 that term in section 113(b)(2) of title 18.
12 "(14) MUTILATING OR MAIMING.—An alien un-
13 lawful enemy combatant who intentionally injures
14 one or more protected persons, by disfiguring the
15 person or persons by any mutilation thereof or by
16 permanently disabling any member, limb, or organ
17 of his body, without any legitimate medical or dental
18 purpose, shall be guilty of the offense of mutilation
19 or maiming and shall be subject to whatever punish-
20 ment a commission may direct, including, if death
21 results to one or more of the victims, the penalty of
22 death.
23 "(15) MURDER IN VIOLATION OF THE LAW OF
24 WAR.—An alien unlawful enemy combatant who in-
25 tentionally kills one or more persons, including law-

1 ful combatants, in violation of the law of war shall
2 be guilty of the offense of murder in violation of the
3 law of war and shall be subject to whatever punish-
4 ment a commission may direct, including the penalty
5 of death.

6 "(16) DESTRUCTION OF PROPERTY IN VIOLA-
7 TION OF THE LAW OF WAR.—An alien unlawful
8 enemy combatant who intentionally destroys prop-
9 erty belonging to another person in violation of the
10 law of war shall be guilty of the offense of destruc-
11 tion of property in violation of the law of war and
12 shall be subject to whatever punishment a commis-
13 sion may direct.

14 "(17) USING TREACHERY OR PERFIDY.—An
15 alien unlawful enemy combatant who, after inviting
16 the confidence or belief of one or more persons that
17 they were entitled to, or obliged to accord, protection
18 under the law of war, intentionally makes use of
19 that confidence or belief in killing, injuring, or cap-
20 turing such person or persons, shall be guilty of
21 using treachery or perfidy and shall be subject to
22 whatever punishment a commission may direct.

23 "(18) IMPROPERLY USING A FLAG OF TRUCE.—
24 An alien unlawful enemy combatant who uses a flag
25 of truce to feign an intention to negotiate, sur-

1 render, or otherwise to suspend hostilities when
2 there is no such intention, shall be guilty of improp-
3 erly using a flag of truce and shall be subject to
4 whatever punishment a commission may direct.

5 "(19) IMPROPERLY USING A DISTINCTIVE EM-
6 BLEM.—An alien unlawful enemy combatant who in-
7 tentionally uses a distinctive emblem recognized by
8 the law of war for combatant purposes in a manner
9 prohibited by the law of war shall be guilty of im-
10 properly using a distinctive emblem and shall be
11 subject to whatever punishment a commission may
12 direct.

13 "(20) INTENTIONALLY MISTREATING A DEAD
14 BODY.—An alien unlawful enemy combatant who in-
15 tentionally mistreats the body of a dead person,
16 without justification by legitimate military necessary,
17 shall be guilty of the offense of mistreating a dead
18 body and shall be subject to whatever punishment a
19 commission may direct.

20 "(21) RAPE.—An alien unlawful enemy combat-
21 ant who forcibly or with coercion or threat of force
22 wrongfully invades the body of a person by pene-
23 trating, however slightly, the anal or genital opening
24 of the victim with any part of the body of the ac-
25 cused or with any foreign object shall be guilty of

1 the offense of rape and shall be subject to whatever
2 punishment a commission may direct.
3 "(22) HIJACKING OR HAZARDING A VESSEL OR
4 AIRCRAFT.—An alien unlawful enemy combatant
5 subject to this title who intentionally seizes, exer-
6 cises unauthorized control over, or endangers the
7 safe navigation of, a vessel or aircraft that was not
8 a legitimate military target is guilty of the offense
9 of hijacking or hazarding a vessel or aircraft and
10 shall be subject to whatever punishment a commis-
11 sion may direct, including, if death results to one or
12 more of the victims, the penalty of death.
13 "(23) TERRORISM.—An alien unlawful enemy
14 combatant subject to this title who intentionally kills
15 or inflicts great bodily harm on one or more persons,
16 or intentionally engages in an act that evinces a
17 wanton disregard for human life, in a manner cal-
18 culated to influence or affect the conduct of govern-
19 ment or civilian population by intimidation or coer-
20 cion, or to retaliate against government conduct,
21 shall be guilty of the offense of terrorism and shall
22 be subject to whatever punishment a commission
23 may direct, including, if death results to one or more
24 of the victims, the penalty of death.

1 "(24) PROVIDING MATERIAL SUPPORT FOR
2 TERRORISM.—An alien unlawful enemy combatant
3 who provides material support or resources, knowing
4 or intending that they are to be used in preparation
5 for, or in carrying out, an act of terrorism (as de-
6 fined in paragraph (23)), or who intentionally pro-
7 vides material support or resources to an inter-
8 national terrorist organization engaged in hostilities
9 against the United States, knowing that such orga-
10 nization has engaged or engages in terrorism (as de-
11 fined in paragraph (23)), shall be guilty of the of-
12 fense of providing material support for terrorism
13 and shall be subject to whatever punishment a com-
14 mission may direct. In this paragraph, the term 'ma-
15 terial support or resources' has the meaning given
16 that term in section 2339A(b) of title 18.
17 "(25) WRONGFULLY AIDING THE ENEMY.—An
18 alien unlawful enemy combatant who, in breach of
19 an allegiance or duty to the United States, know-
20 ingly and intentionally aids an enemy of the United
21 States or one its co-belligerents shall be guilty of the
22 offense of wrongfully aiding the enemy and shall be
23 subject to whatever punishment a commission may
24 direct.

"(26) SPYING.—An alien unlawful enemy combatant who, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign power, collects or attempts to collect certain information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States or one of its co-belligerents, shall be guilty of the offense of spying and shall be subject to whatever punishment a commission may direct, including the penalty of death.

"(27) CONSPIRACY.—An alien unlawful enemy combatant who conspires to commit one or more substantive offenses triable under this section, and who knowingly does any overt act to effect the object of the conspiracy, shall be guilty of conspiracy and shall be subject to whatever punishment a commission may direct, including, if death results to one or more of the victims, the penalty of death.

"§ 950w. Perjury and obstruction of justice

"A military commission under this chapter may try offenses and impose punishments for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.

1 **"§ 950x. Contempt**

2 "A military commission under this chapter may pun-
3 ish for contempt any person who uses any menacing word,
4 sign, or gesture in its presence, or who disturbs its pro-
5 ceedings by any riot or disorder.".

6 (2) TABLES OF CHAPTERS AMENDMENTS.—The
7 tables of chapters at the beginning of subtitle A, and
8 at the beginning of part II of subtitle A, of title 10,
9 United States Code, are each amended by inserting
10 after the item relating to chapter 47 the following
11 new item:

"47A. Military Commissions ..... 948a".

12 (b) CONFORMING AMENDMENT TO UCMJ.—Section
13 836(a) of title 10, United States Code (article 36(a) of
14 the Uniform Code of Military Justice)), is amended by in-
15 serting ", except as provided in chapter 47A of this title,"
16 after "but which may not".

17 (c) SUBMITTAL OF PROCEDURES TO CONGRESS.—
18 Not later than 90 days after the date of the enactment
19 of this Act, the Secretary of Defense shall submit to the
20 Committees on Armed Services of the Senate and the
21 House of Representatives a report setting forth the proce-
22 dures for military commissions prescribed under chapter
23 47A of title 10, United States Code (as added by sub-
24 section (a)).

SEC. 4. CLARIFICATION OF CONDUCT CONSTITUTING WAR CRIME OFFENSE UNDER FEDERAL CRIMINAL CODE.

(a) APPLICABILITY ONLY TO SERIOUS VIOLATIONS OF COMMON ARTICLE 3.—Section 2441 of title 18, United States Code is amended—

(1) by striking paragraph (3) of subsection (c) and inserting the following:

"(3) which constitutes a serious violation of common Article 3 of the 1949 Geneva Conventions, when committed in the context of and in association with an armed conflict not of an international character; or"; and

(2) by adding at the end the following new subsection:

"(d) COVERED COMMON ARTICLE 3 VIOLATIONS.—

"(1) SERIOUS VIOLATIONS.—In subsection (c)(3), the term 'serious violation of common Article 3 of the 1949 Geneva Conventions' means any of the following:

"(A) TORTURE.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical pain or suffering or severe mental pain or suffering (as such term is defined in section 2340(2) of this title), other than pain or suf-

1 fering incidental to lawful sanctions, upon an-
2 other person within his custody or physical con-
3 trol for the purpose of obtaining information or
4 a confession, punishment, intimidation, coer-
5 cion, or any reason based on discrimination of
6 any kind.
7 "(B) CRUEL OR INHUMAN TREATMENT.—
8 The act of a person who commits, or conspires
9 or attempts to commit, an act intended to in-
10 flict severe physical pain or suffering or severe
11 mental pain or suffering (as such term is de-
12 fined in section 2340(2) of this title), other
13 than pain or suffering incidental to lawful sanc-
14 tions, and including severe physical abuse, upon
15 another person within his custody or physical
16 control.
17 "(C) PERFORMING BIOLOGICAL EXPERI-
18 MENTS.—The act of a person who subjects, or
19 conspires or attempts to subject, one or more
20 persons within his custody or physical control to
21 biological experiments and in so doing endan-
22 gers the body or health of such person or per-
23 sons.
24 "(D) MURDER.—The act of a person who
25 intentionally kills, or conspires or attempts to

1 kill, or kills whether intentionally or uninten-
2 tionally in the course of committing any other
3 offense under this section, one or more persons
4 taking no active part in the hostilities, including
5 those placed hors de combat by sickness,
6 wounds, detention, or any other cause.

7 "(E) MUTILATION OR MAIMING.—The act
8 of a person who intentionally injures, or con-
9 spires or attempts to injure, or injures whether
10 intentionally or unintentionally in the course of
11 committing any other offense under this sec-
12 tion, one or more persons taking no active part
13 in the hostilities, including those placed hors de
14 combat by sickness, wounds, detention, or any
15 other cause, by disfiguring the person or per-
16 sons by any mutilation thereof or by perma-
17 nently disabling any member, limb, or organ of
18 his body, without any legitimate medical or den-
19 tal purpose.

20 "(F) INTENTIONALLY CAUSING GREAT
21 SUFFERING OR SERIOUS INJURY.—The act of a
22 person who intentionally causes, or conspires or
23 attempts to cause, serious bodily injury (as
24 such term is defined in section 113(b)(2) of this
25 title) to one or more persons taking no active

1 part in the hostilities, including those placed
2 hors de combat by sickness, wounds, detention,
3 or any other cause.
4 "(G) RAPE.—The act of a person who
5 forcibly or with coercion or threat of force
6 wrongfully invades, or conspires or attempts to
7 invade, the body of a person by penetrating,
8 however slightly, the anal or genital opening of
9 the victim with any part of the body of the ac-
10 cused or with any foreign object.
11 "(H) SEXUAL ASSAULT OR ABUSE.—The
12 act of a person who forcibly or with coercion or
13 threat of force engages, or conspires or at-
14 tempts to engage, in sexual contact (as such
15 term is defined in section 2246(3) of this title)
16 with one or more persons, or causes, or con-
17 spires or attempts to cause, one or more per-
18 sons to engage in sexual contact (as so defined).
19 "(I) TAKING HOSTAGES.—The act of a
20 person who—
21 "(i) having knowingly seized or de-
22 tained one or more persons, threatens to
23 kill, injure, or continue to detain such per-
24 son or persons with the intent of compel-
25 ling any nation, person other than the hos-

tage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons; or

"(ii) attempts to engage or conspires to engage in conduct under clause (i).

"(2) INAPPLICABILITY OF SPECIFIED PROVISIONS WITH RESPECT TO CERTAIN CONDUCT.—The intent specified for the conduct stated in subparagraphs (D), (E), and (F) of paragraph (1) precludes the applicability of those subparagraphs with regard to—

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack.".

(b) RETROACTIVE APPLICABILITY.—The amendments made by this section shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002 of Public Law 107–273).

SEC. 5. JUDICIAL REVIEW.

Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by section 1405(e)(1) of

1 Public Law 109–163 (119 Stat. 3477) and inserting the
2 following new subsection (e):
3 "(e)(1) Except as provided for in this subsection, and
4 notwithstanding any other law, no court, justice, or judge
5 shall have jurisdiction to hear or consider any claim or
6 cause of action, including an application for a writ of ha-
7 beas corpus, pending on or filed after the date of the en-
8 actment of the Military Commissions Act of 2006, against
9 the United States or its agents, brought by or on behalf
10 of any alien detained by the United States as an unlawful
11 enemy combatant, relating to any aspect of the alien's de-
12 tention, transfer, treatment, or conditions of confinement.
13 "(2) The United States Court of Appeals for the Dis-
14 trict of Columbia Circuit shall have exclusive jurisdiction
15 to determine the validity of any final decision of a Combat-
16 ant Status Review Tribunal. The scope of such review is
17 defined in section 1005(e)(2) of the Detainee Treatment
18 Act of 2005. If the Court grants a detainee's petition for
19 review, the Secretary of Defense may conduct a new Com-
20 batant Status Review Tribunal.
21 "(3) Review shall be had only of final judgments of
22 military commissions as provided for pursuant to section
23 950g of title 10, United States Code.

1 "(4) The court may consider classified information
2 submitted in camera and ex parte in making any deter-
3 mination under this section.".

4 **SEC. 6. SATISFACTION OF TREATY OBLIGATIONS.**

5 (a) IN GENERAL.—Satisfaction of the prohibitions
6 against cruel, inhuman, and degrading treatment set forth
7 in section 1003 of the Detainee Treatment Act of 2005
8 (42 U.S.C. 2000dd) shall fully satisfy United States obli-
9 gations with respect to the standards for detention and
10 treatment established by section 1 of Common Article 3
11 of the Geneva Conventions, with the exception of the obli-
12 gations imposed by subsections 1(b) and 1(d) of such Arti-
13 cle .

14 (b) RIGHTS NOT JUDICIALLY ENFORCEABLE.—

15 (1) IN GENERAL.—No person in any habeas ac-
16 tion or any other action may invoke the Geneva Con-
17 ventions or any protocols thereto as a source of
18 rights, whether directly or indirectly, for any pur-
19 pose in any court of the United States or its States
20 or territories.

21 (2) CONSTRUCTION.—Paragraph (1) may not
22 be construed to affect the obligations of the United
23 States under the Geneva Conventions.

24 (c) GENEVA CONVENTIONS DEFINED.—In this sec-
25 tion, the term "Geneva Conventions" means the inter-

1 national conventions signed at Geneva on August 12,
2 1949, including common Article 3.

3 **SEC. 7. REVISIONS TO DETAINEE TREATMENT ACT OF 2005**
4 **RELATING TO PROTECTION OF CERTAIN**
5 **UNITED STATES GOVERNMENT PERSONNEL.**

6 (a) COUNSEL AND INVESTIGATIONS.—Section
7 1004(b) of the Detainee Treatment Act of 2005 (42
8 U.S.C. 2000dd–1(b)) is amended—

9 (1) by striking "may provide" and inserting
10 "shall provide";

11 (2) by inserting "or investigation" after "crimi-
12 nal prosecution"; and

13 (3) by inserting "whether before United States
14 courts or agencies, foreign courts or agencies, or
15 international courts or agencies," after "described in
16 that subsection".

17 (b) PROTECTION OF PERSONNEL.—Section 1004 of
18 the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–
19 1) shall apply with respect to any criminal prosecution
20 that—

21 (1) relates to the detention and interrogation of
22 aliens described in such section;

23 (2) is grounded in section 2441(c)(3) of title
24 18, United States Code; and

(3) relates to actions occurring between September 11, 2001, and December 30, 2005.

SEC. 8. RETROACTIVE APPLICABILITY.

This Act shall take effect on the date of the enactment of this Act and shall apply retroactively, including—

(1) to any aspect of the detention, treatment, or trial of any person detained at any time since September 11, 2001; and

(2) to any claim or cause of action pending on or after the date of the enactment of this Act.

SEC. 9. AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.

(a) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) of title 10, United States Code (article 2(a) of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph:

"(13) Lawful enemy combatants who violate the law of war.".

(b) EXCLUSION OF CHAPTER 47A COMMISSIONS.—Section 821 of such title (article 21 of such Code) is amended by adding at the end the following new sentence: "This section does not apply to military commissions established under chapter 47A of this title.".

(c) INAPPLICABILITY OF REQUIREMENT FOR UNIFORM REGULATIONS.—Section 36(b) of such title (article (36) of

1 *such Code) is amended by inserting before the period at the*
2 *end ", except insofar as applicable to military commissions*
3 *established under chapter 17A of this title".*

Chairman SENSENBRENNER. This bill, the Military Commissions Act of 2006, authorizes trials by military commissions of alien unlawful enemy combatants for violation of the laws of war. Provisions of this legislation that are within the jurisdiction of the Judiciary Committee make changes to the Federal habeas corpus and war crime statutes.

In the aftermath of September 11, President Bush authorized the Secretary of Defense to establish military commissions to provide full and fair trials for members of al-Qaeda who engaged in, aided, abetted or conspired to commit the attacks against the United States.

In January 2002, the administration began detaining foreign terrorists as enemy combatants at U.S. facilities at Guantanamo Bay and instituted procedures to review the detainees' enemy combatant status. DOD began prosecuting certain detainees using military commissions as authorized by the President. During this time, detainees brought lawsuits in Federal courts that challenged the legality of their detention and the legality of the President's military commissions.

Partially in response to these lawsuits, Congress passed the Detainee Treatment Act of 2005, which provided for limited judicial review of DOD detention decisions and barred other lawsuits by the detainees in U.S. custody.

On June 29th, 2006, the Supreme Court held in *Hamdan v. Rumsfeld* that the President's military commissions were unlawful because they did not comply with Uniform Code of Military Justice and Common Article 3 of the Geneva Conventions. The Court also found the DTA did not bar habeas petitions in other lawsuits by detainees pending on the date of enactment despite clear statutory language to the contrary.

In response to the Supreme Court's decision in *Hamden* and this acknowledgment that Congress could authorize military commissions as long as they complied with the Constitution, Chairman Hunter, several other members and I introduced H.R. 6054. Last week the Armed Services Committee favorably reported this legislation by an overwhelming bipartisan vote of 52 to 8.

The portions of the bill that fall within the Judiciary Committee's jurisdiction are as follows:

Section 4 of the bill amends the War Crimes Act of 1996 to clarify what conduct the United States will prosecute under Common Article 3 of the Geneva Conventions as a war crime.

Section 5 of the bill amends the Federal habeas corpus statute to prohibit any lawsuits pending or filed after enactment brought by unlawful alien combatants relating to detention, transfer, treatment or conditions of confinement.

This change is in response to the Supreme Court's erroneous determination in *Hamden* that the DTA's habeas corpus limitations did not apply retroactively to cases pending on the date of enactment. It is important to note that this provision will allow the D.C. Circuit to review the validity of enemy combatant determinations by DOD and any final judgments of the military commissions created under this bill.

Section 6 of the bill pertains to U.S. obligations under the Geneva Conventions. Only sections 6B and C are within this commit-

tee's jurisdiction. 6B overturns a portion of the *Hamden* decision and declares that the Geneva Conventions are not the source of any judicially enforceable rights in U.S. courts. Section 6C is a housekeeping provision that defines the term "Geneva Conventions."

Section 7 provides that the DTA's access to counsel provision for U.S. personnel is mandatory. It further provides that the right of counsel includes investigation and the right to counsel applies in cases before international and foreign courts and agencies.

Section 8 clarifies the entire act applies retroactively to any aspect of detention, treatment or trial of any alien detained at any time since September 11th and to any case whether pending or filed after the date of enactment.

While this committee's jurisdiction is broad, rule X of the rules of the House places a germaneness limitation on amendments that can be considered as markup. Therefore, the Chair would advise members to limit amendments to the aforementioned sections of the bill.

As a final note, I hope that my colleagues will remain mindful that the purpose of this legislation is to provide congressional authorization to establish a fair and effective procedure to prosecute dangerous terrorists. In taking this action we provide terrorists, such as Khalid Shaikh Mohammed, the mastermind of the 9/11 attacks, the fairness and legal protections that none of their innocent victims ever enjoyed.

I urge my colleagues to support this legislation and in the absence of Mr. Conyers, who wishes to give the Democratic opening statement? The gentleman from New York, Mr. Nadler, is recognized for 5 minutes.

Mr. NADLER. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized.

Mr. NADLER. Mr. Chairman, this is how a nation loses its moral compass, its identity, its values and ultimately its freedom. It is ironic that the people who use the word "freedom" with reckless abandon in everything from freedom fries to a global vision should come before the American people advocating torture. I know we have been told it is not really torture, but I am sickened by the quibbling, legalistic hair splitting on something so basic to our Nation's fundamental values. We seem to have forgotten that this is the United States of America and that we stand for certain inalienable propositions.

Let me say that again, we are the United States of America and we ought to behave that way. We have stood as a beacon to the world. People have aspired to our way of life, our values, our example, our leadership. Now, with scant deliberation, with no hearing in this committee, in an election eve stampede, we are urged to throw it away like yesterday's newspaper.

The honor and values of our Nation would be permanently stained by this detestable legislation. It is beneath us. It should not be what we stand for.

Perhaps if this were necessary for our safety, perhaps if, as military leaders have told us, it would not place our men and women in jeopardy, perhaps if it would not guarantee that our allies would

simply stop cooperating with us on intelligence matters vital to our security, we might have something to discuss. But that is not the case. We do not need to do this and it will make us less safe if we do.

Who does this sort of thing? I ask unanimous consent to place into the record an article by Vladimir Bukosy, who was a guest of the KGB for 12 years in various camps, prisons and psychiatric hospitals.

Chairman SENSENBRENNER. Without objection.

[The information follows:]

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One nasty morning Comrade Stalin discovered that his favorite pipe was missing. Naturally, he called in his henchman, Lavrenti Beria, and instructed him to find the pipe. A few hours later, Stalin found it in his desk and called off the search. "But, Comrade Stalin," stammered Beria, "five suspects have already confessed to stealing it."

This joke, whispered among those who trusted each other when I was a kid in Moscow in the 1950s, is perhaps the best contribution I can make to the current argument in Washington about legislation banning torture and inhumane treatment of suspected terrorists captured abroad. Now that President Bush has made a public show of endorsing Sen. John McCain's amendment, it would seem that the debate is ending. But that the debate occurred at all, and that prominent figures are willing to entertain the idea, is perplexing and alarming to me. I have seen what happens to a society that becomes enamored of such methods in its quest for greater security; it takes more than words and political compromise to beat back the impulse.

This is a new debate for Americans, but there is no need for you to reinvent the wheel. Most nations can provide you with volumes on the subject. Indeed, with the exception of the Black Death, torture is the oldest scourge on our planet (hence there are so many conventions against it). Every Russian czar after Peter the Great solemnly abolished torture upon being enthroned, and every time his successor had to abolish it all over again. These czars were hardly bleeding-heart liberals, but long experience in the use of these "interrogation" practices in Russia had taught them that once condoned, torture will destroy their security apparatus. They understood that torture is the professional disease of any investigative machinery.

Apart from sheer frustration and other adrenaline-related emotions, investigators and detectives in hot pursuit have enormous temptation to use force to break the will of their prey because they believe that, metaphorically speaking, they have a "ticking bomb" case on their hands. But, much as a good hunter trains his hounds to bring the game to him rather than eating it, a good ruler has to restrain his henchmen from devouring the prey lest he be left empty-handed. Investigation is a subtle process, requiring patience and fine analytical ability, as well as a skill in cultivating one's sources. When torture is condoned, these rare talented people leave the service, having been outstripped by less gifted colleagues with their quick-fix methods, and the service itself degenerates into a playground for sadists. Thus, in its heyday, Joseph Stalin's notorious NKVD (the Soviet secret police) became nothing more than an army of butchers terrorizing the whole country but incapable of solving the simplest of crimes. And once the NKVD went into high gear, not even Stalin could stop it at will. He finally succeeded only by turning the fury of the NKVD against itself; he ordered his chief NKVD henchman, Nikolai Yezhov (Beria's predecessor), to be arrested together with his closest aides.

So, why would democratically elected leaders of the United States ever want to legalize what a succession of Russian monarchs strove to abolish? Why run the risk of unleashing a fury that even Stalin had problems controlling? Why would anyone try to "improve intelligence-gathering capability" by destroying what was left of it? Frustration? Ineptitude? Ignorance? Or, has their friendship with a certain former KGB lieutenant colonel, V. Putin, rubbed off on the American leaders? I have no answer to these questions, but I do know that if Vice President Cheney is right and that some "cruel, inhumane or degrading" (CID) treatment of captives is a necessary tool for winning the war on terrorism, then the war is lost already.

Even talking about the possibility of using CID treatment sends wrong signals and encourages base instincts in those who should be consistently delivered from temptation by their superiors. As someone who has been on the receiving end of the "treatment" under discussion, let me tell you that trying to make a distinction between torture and CID techniques is ridiculous. Long gone are the days when a torturer needed the nasty-looking tools displayed in the Tower of London. A simple prison bed is deadly if you remove the mattress and force a prisoner to sleep on the iron frame night after night after night. Or how about the "Chekist's handshake" so widely practiced under Stalin -- a firm squeeze of the victim's palm with a simple pencil inserted between his fingers? Very convenient, very simple. And how would you define leaving 2,000 inmates of a labor camp without dental service for months on end? Is it CID not to treat an excruciatingly painful toothache, or is it torture?

Now it appears that sleep deprivation is "only" CID and used on Guantanamo Bay captives. Well, congratulations, comrades! It was exactly this method that the NKVD used to produce those spectacular confessions in Stalin's "show trials" of the 1930s. The henchmen called it "conveyer," when a prisoner was interrogated nonstop for a week or 10 days without a wink of sleep. At the end, the victim would sign any confession without even understanding what he had signed.

I know from my own experience that interrogation is an intensely personal confrontation, a duel of wills. It is not about revealing some secrets or making confessions, it is about self-respect and human dignity. If I break, I will not be able to look into a mirror. But if I don't, my interrogator will suffer equally. Just try to control your emotions in the heat of that battle. This is precisely why torture occurs even when it is explicitly forbidden. Now, who is going to guarantee that even the most exact definition of CID is observed under such circumstances?

But if we cannot guarantee this, then how can you force your officers and your young people in the CIA to commit acts that will scar them forever? For scarred they will be, take my word for it.

In 1971, while in Lefortovo prison in Moscow (the central KGB interrogation jail), I went on a hunger strike demanding a defense lawyer of my choice (the KGB wanted its trusted lawyer to be assigned instead). The moment was most inconvenient for my captors because my case was due in court, and they had no time to spare. So, to break me down, they started force-feeding me in a very unusual manner -- through my nostrils. About a dozen guards led me from my cell to the medical unit. There they straitjacketed me, tied me to a bed, and sat on my legs so that I would not jerk. The others held my shoulders and my head while a doctor was pushing the feeding tube into my nostril.

The feeding pipe was thick, thicker than my nostril, and would not go in. Blood came gushing out of my nose and tears down my cheeks, but they kept pushing until the cartilages cracked. I guess I would have screamed if I could, but I could not with the pipe in my throat. I could breathe neither in nor out at first; I wheezed like a drowning man -- my lungs felt ready to burst. The doctor also seemed ready to burst into tears, but she kept shoving the pipe farther and farther down. Only when it reached my stomach could I resume breathing, carefully. Then she poured some slop through a funnel into the pipe that would choke me if it came back up. They held me down for another half-hour so that the liquid was absorbed by my stomach and could not be vomited back, and then began to pull the pipe out bit by bit. . . . Grrrr. There had just been time for everything to start healing during the night when they came back in the morning and did it all over again, for 10 days, when the guards could stand it no longer. As it happened, it was a Sunday and no bosses were around. They surrounded the doctor: "Hey, listen, let him drink it straight from the bowl, let him sip it. It'll be quicker for you, too, you silly old fool." The doctor was in tears: "Do you think I want to go to jail because of you lot? No, I can't do that. . . . " And so they stood over my body, cursing each other, with bloody bubbles coming out of my nose. On the 12th day, the authorities surrendered; they had run out of time. I had gotten my lawyer, but neither the doctor nor those guards could ever look me in the eye again.

Today, when the White House lawyers seem preoccupied with contriving a way to stem the flow of possible lawsuits from former detainees, I strongly recommend that they think about another flood of suits, from the men and women in your armed services or the CIA agents who have been or will be engaged in CID practices. Our rich experi-

ence in Russia has shown that many will become alcoholics or drug addicts, violent criminals or, at the very least, despotic and abusive fathers and mothers.

If America's leaders want to hunt terrorists while transforming dictatorships into democracies, they must recognize that torture, which includes CID, has historically been an instrument of oppression -- not an instrument of investigation or of intelligence gathering. No country needs to invent how to "legalize" torture; the problem is rather how to stop it from happening. If it isn't stopped, torture will destroy your nation's important strategy to develop democracy in the Middle East. And if you cynically outsource torture to contractors and foreign agents, how can you possibly be surprised if an 18-year-old in the Middle East casts a jaundiced eye toward your reform efforts there?

Finally, think what effect your attitude has on the rest of the world, particularly in the countries where torture is still common, such as Russia, and where its citizens are still trying to combat it. Mr. Putin will be the first to say: "You see, even your vaunted American democracy cannot defend itself without resorting to torture. . . . "

Off we go, back to the caves.

Vladimir Bukovsky, who spent nearly 12 years in Soviet prisons, labor camps and psychiatric hospitals for nonviolent human rights activities, is the author of several books, including "To Build a Castle" and "Judgment in Moscow." Now 63, he has lived primarily in Cambridge, England, since 1976.

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Mr. NADLER. He points out that he was subject to many of the techniques we are now debating. The techniques he describes, including sleep depravation, have all taken place on our watch. Is this the company we now want to keep? Are Stalin's techniques the models that we want to follow?

There is no ambiguity as to what is prohibited under the treaties we have voluntarily agreed to respect and claim to have respected for the last 50 years until this bill, at least not until the latest crowd of hair splitters found their way into the White House.

We should not do this. We should not stand up—we should stand up for America and American values. We should not stain our Nation's honor.

I would point out that even if you object to placing in the record a relevant excerpt from the experiences of someone else, we have the statement that was in the New York Times 2 days ago, a couple of days ago from a Bubak Irkasim, who was held totally innocently by Americans in prison in Iraq because—in Guantanamo because he was in the wrong place at the wrong time and we finally released him after a year and a half of not nice measures. But habeas corpus is what set him free. This bill will eliminate habeas corpus.

Mr. Chairman, no executive authority in an English speaking country has claimed the right to eliminate habeas corpus except in cases of an imminent insurrection or invasion or when enemy troops were on our soil during the Civil War since Magna Carta 800 years ago. The White House claims that right. Not even George III did that. The complaints we leveled against George III in the Declaration of Independence were less obnoxious than the things that this bill would make legal and that this President claims are legal.

Mr. Chairman, this bill is an insult to all of our traditions and should not be adopted. I thank you. I yield back.

Chairman SENSENBRENNER. Without objection, all members may put opening statements in the record at this point.

Are there any amendments? For what purpose does the gentleman from California, Mr. Schiff, seek recognition?

Mr. SCHIFF. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment to H.R. 6054 offered by Mr. Schiff and Mr. Flake, strike section 4, insert the following. Section 4, revision to war crimes offense under Federal criminal code. Subsection A, in general.

[The amendment follows:]

AMENDMENT TO H.R. 6054

OFFERED BY MR. SCHIFF AND MR. FLAKE

Strike section 4 and insert the following:

1 **SEC. 4. REVISION TO WAR CRIMES OFFENSE UNDER FED-**
2 **ERAL CRIMINAL CODE.**
3 (a) IN GENERAL.—Section 2441 of title 18, United
4 States Code, is amended—
5 (1) in subsection (c), by striking paragraph (3)
6 and inserting the following new paragraph (3):
7 "(3) which constitutes a grave breach of com-
8 mon Article 3 (as defined in subsection (d)) when
9 committed in the context of and in association with
10 an armed conflict not of an international character;
11 or"; and
12 (2) by adding at the end the following new sub-
13 section:
14 "(d) COMMON ARTICLE 3 VIOLATIONS.—
15 "(1) GRAVE BREACH OF COMMON ARTICLE 3.—
16 In subsection (c)(3), the term 'grave breach of com-
17 mon Article 3' means any conduct (such conduct
18 constituting a grave breach of common Article 3 of
19 the international conventions done at Geneva August
20 12, 1949), as follows:

1 "(A) TORTURE.—The act of a person who
2 commits, or conspires or attempts to commit,
3 an act specifically intended to inflict severe
4 physical or mental pain or suffering (other than
5 pain or suffering incidental to lawful sanctions)
6 upon another person within his custody or
7 physical control for the purpose of obtaining in-
8 formation or a confession, punishment, intimi-
9 dation, coercion, or any reason based on dis-
10 crimination of any kind.
11 "(B) CRUEL, UNUSUAL, OR INHUMANE
12 TREATMENT OR PUNISHMENT.—The act of a
13 person who subjects another person in the cus-
14 tody or under the physical control of the United
15 States Government, regardless of nationality or
16 physical location, to cruel, unusual, or inhu-
17 mane treatment or punishment prohibited by
18 the Fifth, Eighth, and 14th Amendments to the
19 Constitution of the United States.
20 "(C) PERFORMING BIOLOGICAL EXPERI-
21 MENTS.—The act of a person who subjects, or
22 conspires or attempts to subject, one or more
23 persons within his custody or physical control to
24 biological experiments without a legitimate med-
25 ical or dental purpose and in so doing endan-

1 gers the body or health of such person or per-
2 sons.
3 "(D) MURDER.—The act of a person who
4 intentionally kills, or conspires or attempts to
5 kill, or kills whether intentionally or uninten-
6 tionally in the course of committing any other
7 offense under this section, one or more persons
8 taking no active part in hostilities, including
9 those placed out of active combat by sickness,
10 wounds, detention, or any other cause.
11 "(E) MUTILATION OR MAIMING.—The act
12 of a person who intentionally injures, or con-
13 spires or attempts to injure, or injures whether
14 intentionally or unintentionally in the course of
15 committing any other offense under this sec-
16 tion, one or more persons taking no active part
17 in hostilities, including those placed out of ac-
18 tive combat by sickness, wounds, detention, or
19 any other cause, by disfiguring such person or
20 persons by any mutilation thereof or by perma-
21 nently disabling any member, limb, or organ of
22 the body of such person or persons, without any
23 legitimate medical or dental purpose.
24 "(F) INTENTIONALLY CAUSING SERIOUS
25 BODILY INJURY.—The act of a person who in-

1 tentionally causes, or conspires or attempts to
2 cause, serious bodily injury to one or more per-
3 sons, including lawful combatants, in violation
4 of the law of war.
5 "(G) RAPE.—The act of a person who
6 forcibly or with coercion or threat of force
7 wrongfully invades, or conspires or attempts to
8 invade, the body of a person by penetrating,
9 however slightly, the anal or genital opening of
10 the victim with any part of the body of the ac-
11 cused, or with any foreign object.
12 "(H) SEXUAL ASSAULT OR ABUSE.—The
13 act of person who forcibly or with coercion or
14 threat of force engages, or conspires or at-
15 tempts to engage, in sexual contact with one or
16 more persons, or causes, or conspires or at-
17 tempts to cause, one or more persons to engage
18 in sexual contact.
19 "(I) TAKING HOSTAGES.—The act of a
20 person who, having knowingly seized or de-
21 tained one or more persons, threatens to kill,
22 injure, or continue to detain such person or per-
23 sons with the intent of compelling any nation,
24 person other than the hostage, or group of per-
25 sons to act or refrain from acting as an explicit

1 or implicit condition for the safety or release of
2 such person or persons.
3 "(2) DEFINITIONS.—In the case of an offense
4 under subsection (a) by reason of subsection
5 (c)(3)—
6 "(A) the term 'severe mental pain or suf-
7 fering' shall be applied for purposes of para-
8 graph (1)(A) in accordance with the meaning
9 given that term in section 2340(2) of this title;
10 "(B) the term 'serious bodily injury' shall
11 be applied for purposes of paragraph (1)(F) in
12 accordance with the meaning given that term in
13 section 113(b)(2) of this title; and
14 "(C) the term 'sexual contact' shall be ap-
15 plied for purposes of paragraph (1)(G) in ac-
16 cordance with the meaning given that term in
17 section 2246(3) of this title.
18 "(3) INAPPLICABILITY OF CERTAIN PROVISIONS
19 WITH RESPECT TO COLLATERAL DAMAGE OR INCI-
20 DENT OF LAWFUL ATTACK.—The intent specified for
21 the conduct stated in subparagraphs (D), (E), and
22 (F) of paragraph (1) precludes the applicability of
23 those subparagraphs to an offense under subsection
24 (a) by reasons of subsection (c)(3) with respect to—
25 "(A) collateral damage; or

1 "(B) death, damage, or injury incident to
2 a lawful attack.
3 "(4) INAPPLICABILITY OF TAKING HOSTAGES
4 TO PRISONER EXCHANGE.—Paragraph (1)(I) does
5 not apply to an offense under subsection (a) by rea-
6 son of subsection (c)(3) in the case of a prisoner ex-
7 change during wartime.".
8 (b) CONSTRUCTION.—Such section is further amend-
9 ed by adding at the end the following new subsections:
10 "(e) INAPPLICABILITY OF FOREIGN SOURCES OF
11 LAW IN INTERPRETATION.—No foreign source of law shall
12 be considered in defining or interpreting the obligations
13 of the United States under this section.
14 "(f) NATURE OF CRIMINAL SANCTIONS.—The crimi-
15 nal sanctions in this section provide penal sanctions under
16 the domestic law of the United States for grave breaches
17 of the international conventions done at Geneva August
18 12, 1949. Such criminal sanctions do not alter the obliga-
19 tions of the United States under those international con-
20 ventions.".
21 (c) PROTECTION OF CERTAIN UNITED STATES GOV-
22 ERNMENT PERSONNEL.—Such section is further amended
23 by adding at the end the following new subsection:
24 "(g) PROTECTION OF CERTAIN UNITED STATES
25 GOVERNMENT PERSONNEL.—The provisions of section

1 1004 of the Detainee Treatment Act of 2005 (42 U.S.C.
2 2000dd–1) shall apply with respect to any criminal pros-
3 ecution relating to the detention and interrogation of indi-
4 viduals described in such provisions that is grounded in
5 an offense under subsection (a) by reason of subsection
6 (c)(3) with respect to actions occurring between Sep-
7 tember 11, 2001, and December 30, 2005.".

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and the gentleman from California is recognized for 5 minutes.

Mr. SCHIFF. Mr. Chairman, I offer this bipartisan amendment today with my colleague Representative Flake from Arizona. This proposal amends section 4 of the Hunter bill to bring it in line with the Warner-McCain-Graham language. After the Supreme Court held that Common Article 3 applies to the conflict against al-Qaeda the President suggested some of the articles of Common Article 3 provide U.S. Personnel with inadequate notice as to what interrogation methods can permissibly be used against detained al-Qaeda suspects and requested legislation listing specific recognizable offenses that would be considered crimes under the War Crimes Act.

Therefore, both the Warner-McCain-Graham as well as the Hunter bill amend the War Crimes Act provision concerning Common Article 3, specifying the serious grave violations that would be punishable. These include a number of serious offenses, including torture and cruel treatment.

The key difference between Warner-McCain-Graham legislation and the Hunter bill in this section is the definition of cruel treatment. The Hunter bill defines cruel treatment as treatment arising to the level of torture. This effectively removes cruel, inhuman, degrading treatment from the list of prohibited conduct, merely reiterating that torture is a prosecutable offense.

The Warner-McCain-Graham bill on the other hand addresses this issue squarely by defining cruel, inhuman or degrading treatment as conduct that would be unconstitutional under the 5th, 8th and 14th amendments if it occurred in the United States. This language is entirely consistent with the McCain amendment language that Congress passed last year.

The Warner-McCain-Graham approach provides needed clarity, ensuring that interrogators and officials have sufficient notice of what conduct could subject them to liability while ensuring that Congress does not implicitly endorse any future abuse. This I believe is also critical to protecting our own troops that we observe these standards in dealing with those that we hold in custody.

Senators Warner, McCain, and Graham I believe have the right approach. I commend my colleague Mr. Flake for also seeking to address this issue and I urge members of the committee to support our bipartisan amendment.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. SCHIFF. Mr. Chairman, I yield back.

Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Yes, sir. Thank you, Mr. Chairman. Mr. Chairman, I hope that we will——

Chairman SENSENBRENNER. Does the gentleman move to strike the last word?

Mr. FORBES. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FORBES. Mr. Chairman, I hope that we will oppose this amendment. While I am sure its intention is good, the purpose of this legislation is to bring clarity to the provisions which were not

there before. There is particular language in the amendment that I think would offer us even more unclarity as we move, especially the provisions which require the amendment to make cruel, unusual and inhumane treatment or punishment that violates the 5th, 8th and 14th amendments a war crime, and I am hoping that we will defeat this amendment and pass the bill.

Mr. CHABOT. Would the gentleman yield?

Mr. FORBES. I yield.

Mr. CHABOT. I want to make a point. My colleague Mr. Nadler, who I have the greatest respect for and actually accompanied on a trip down to Guantanamo Bay earlier this year, I just wanted—and the gentleman talked—it is the second time I have been to Guantanamo Bay. And the gentleman talked about the KGB and sleep deprivation and the Soviet gulags, and not necessarily a direct analogy between that and what is going on in Guantanamo, but I would refer to a Washington Times article. A reporter from the New York Post, Richard Minter, was down there, according to this, last week, and talks about the atmosphere down there in which the detainees are entitled to a full 8 hours of sleep and cannot be awakened for interrogation. So that is the situation down in Guantanamo Bay right now, and so I think to maybe leave that impression out there hanging, that the way these people are being treated down at Guantanamo Bay is in any way similar to the gulags, Soviet gulag, is just not accurate.

Other things—there is a misimpression I think out there in the world about how these people are being treated down there, that there is rampant torture and abuses and the people are just being treated in the most miserable fashion. I would just note a couple of things. The nutrition, for example, they get there compared to the way before they came there from Afghanistan or wherever they came from, the average inmate gained about 15 pounds, was receiving better medical care by far, dental care, you name it, being given a Koran.

They pray five times a day. There is an arrow on the floor in each of the rooms and out in the hallways so that they know which way Mecca is so they can pray accordingly.

Clearly I wouldn't want to be an inmate in Guantanamo Bay and I don't think anything in this room would want to be there, but I think you have to remember where these people came from and the circumstances that resulted in their being at Guantanamo Bay.

Mr. DELAHUNT. Would the gentleman yield?

Mr. CHABOT. It is his time.

I have heard from constituents in my area and a lot of other people that the terrorists and especially the higher al-Qaeda individuals that are being housed there are being treated far better than most of them deserve when you consider the circumstances that they were involved in which resulted in them being at Guantanamo Bay. It really depends on whether or not we are serious about this battle against international terrorism or whether we are not. I am not for torturing anybody and that is not what is happening down there and I would defy anybody to prove the opposite.

I thank the gentleman for yielding.

Mr. DELAHUNT. Would the gentleman yield?

Mr. FORBES. Reclaiming my time.

One of the things the gentleman from Ohio makes clear too is the importance for us reaching a balance here. Congressman Nadler talked about American values but we can't forget one of the major American values is the right for our citizens to be able to live and to continue to be free from the terrorist attacks that are out there.

I think the amendment that is before us, while again good intentioned, certainly brings a lack of clarity to the primary piece of legislation that is before this committee which I think strikes a good balance, and I hope that we will defeat the amendment. I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentleman from Michigan, Mr. Conyers, seek recognition?

Mr. CONYERS. I rise in support of the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. I do so because I had a similar amendment, but in the interest of time I want to make it clear that the Schiff amendment is right on point and is absolutely necessary. We are trying to correct legislation that endangers our troops because it lowers the standards set forth in the Geneva Convention which were agreed to by all the nations of the civilized world after World War II and have been honored ever since.

When our troops are captured in combat we expect every nation and every person to abide by the letter and spirit of the law. When a public official as respected as Colin Powell writes the administration's proposal would put our troops at risk, we should take him seriously.

And so what we are trying to do is correct a serious mistake in this legislation because by defining cruel or inhuman treatment on par with torture, we would immunize civilians and CIA interrogators who engage in abuse of detainees. In other words, what we are being asked to do is to authorize CIA and civilian interrogators to use practices that amount to torture.

And so my friend from Ohio, the Chabot relativity theory that you are better off in Guantanamo than where you came from so let's get on with it is totally unacceptable from my analysis.

The amendment correctly defines the domestic war crime of cruel or inhuman torture and treatment by using the standards of the 5th, 8th and 14th amendments in our own Constitution, similar to the Warner bill in the Senate and the Detainee Treatment Act already passed by Congress. This category of conduct is broader in scope, as there are many practices that while unconstitutionally cruel or inhuman, may not rise to the level of torture.

Ladies and gentlemen of the committee, this is an incredibly important consideration that we are examining today, and I regret very much that we haven't had hearings on it. I know we are facing the clock now but it is very important that this amendment, which is constructive and helpful, the least we could do is add the Schiff amendment to a very questionable proposition that is before us today.

I return my unused time.

Chairman SENSENBRENNER. For what purpose does the gentleman from Arizona seek recognition?

Mr. FLAKE. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. FLAKE. I commend Mr. Schiff for working so hard on this and other issues that we will deal with today and I am proud to stand with him in offering this amendment.

My understanding is, if you read the press reports today, that the White House is coming a little closer to the Warner-McCain-Graham position with regard to the *Hamden* case. I think that this is where we are going to end up with this language or something very similar and gratefully so. We believe amending the War Crimes Act to cover specific acts without addressing cruel, inhuman or degrading treatment, as the Hunter language does, would overly restrict the act's scope, making certain unspecified conduct legally permissible even though it is as severe as conduct expressly prohibited by the act. That is what this is about.

We are simply taking a standard that we can all understand, I believe; conduct that would be unconstitutional under the 5th, 8th or 14th amendment if it had occurred in the U.S. This I might point out as well is consistent with the McCain amendment that passed last year.

Again, I think this is where we are going to end up. I commend the gentleman from California for offering this.

Mr. FEENEY. Will the gentleman yield?

Mr. FLAKE. Yes.

Mr. FEENEY. I want to commend the gentleman from California and Arizona and I know that they do this in good faith and I have some concern about this treatment as well. The problem is the actual language. The bill in front of us actually talks about inflicting severe physical pain or suffering or mental pain or suffering. I think the intelligence community can decide what that means.

On the other hand, the language in the Schiff-Flake amendment talks about inhumane treatment. We just heard that not guaranteeing 8 hours of sleep at Guantanamo has been interpreted by some as inhumane. There is not an American mom that is guaranteed 8 hours of sleep every night. There are very few people in the business world, there are very few employees that are guaranteed 8 hours of sleep.

There are suggestions that playing loud music is inhumane treatment. By the way, there are trial lawyers in America prepared to try to prove that case every day. I guarantee you every major city in America has trial lawyers that will try to prove that playing loud music is inhumane if they think they can make a buck out of it. The bottom line is virtually every teenager I know is torturing mom and dad.

I have a definitional problem. I really do share the concerns and I have talked to the gentleman from Arizona, but maybe there is better language that is in the bill. But given the state of where we are and what some people have interpreted inhumane treatment, I suggest the definitional problem is the key to giving Americans comfort that we are maintaining our moral standards but also guaranteeing every intelligence officer can do what he needs to do to find out when that nuclear bomb, when that chemical bomb,

when that biological bomb is going to hit ahead of time and not after.

I would yield back to the gentleman from Arizona for comment.

Mr. FLAKE. Before yielding to the gentleman from California the remainder of the time, I would state if you have the definitional problems that we have, you will have them to a similar degree with the Hunter language. It is difficult, it is difficult to define. We feel this is a better standard.

I yield to the gentleman from California.

Mr. SCHIFF. I thank the gentleman for yielding. I would add to that we do give content to those terms and we give content to it by saying that cruel and inhuman treatment is conduct that would be considered cruel and inhuman treatment and unconstitutional under our 5th, 8th and 14th amendments. Now I don't think the court has ever interpreted the 5th, 8th or 14th amendment to say if you don't get 8 hours of sleep——

Mr. FEENEY. Would the gentleman yield on that? In fairness what you are suggesting is that known terrorists that have information about a potential nuclear weapon are entitled to the protections of the Bill of Rights and I don't know that I am prepared to say that.

Mr. SCHIFF. If the gentleman will yield again. What I am saying is you probably remember, as I do, during the opening days of the Iraq war when American troops are captured and how we lamented the terrible treatment of those American troops. And when American troops are captured on the battlefield I am very concerned about how they are treated and I don't know how we can avoid a situation where if we are willing to under the guise of clarifying the Geneva Convention, really amend the Geneva Convention and adopt our own standard, a looser standard, how that will give us any confidence that when American troops are captured that they will be well treated, not treated inhumanely, cruelly, or tortured.

This is to protect our troops as much as anything, and I have never seen any court interpret the Constitution in the manner in which the gentleman has suggested, although I am sure parents who feel tortured by their teenagers, I don't think that is in the Constitution.

Moreover, as my other colleague pointed out in terms of the conditions at Guantanamo, again, whether the conditions at Guantanamo are better or worse than where the people came from, the important thing is how are our troops going to be treated, how can we insist upon their fair treatment and prohibit torture of own troops without adopting standards as clearly as we can, and I think our Constitution is about as clear as we can get in an otherwise murky area. I think this is necessary for the protection of our own troops, and I yield back to the gentleman.

Chairman SENSENBRENNER. The time of the gentleman has expired. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. I think on this occasion we ought to give deference to the overwhelming opinion of our military leaders. Yes,

this is about fighting terrorism, and I think it is interesting to note that in testimony before the Senate, and I would have welcomed hearing the senior-serving Judge Advocates General testify in this matter but we won't have that opportunity.

But before the Senate the Judge Advocates indicated that our Armed Forces have been trained to Common Article 3, which is the core of what we are talking about, and can live within its requirements while waging the war on terror effectively. That was their opinion. So any suggestion that this would limit or inhibit the United States in terms of dealing with those that would destroy us, according to our military, has no substance.

To the contrary, some 40 retired generals, admirals, senior military, and I am not referring specifically to the former Secretary of State Colin Powell who made that rather dramatic observation about the moral basis, the erosion of our claim to a moral basis for the war on terrorism, but in very practical terms they are imploring that we go in the direction of the Schiff-Flake legislation known as the Warner-McCain-Lindsay approach in the Senate.

There is a letter dated September 12th to Chairman Warner articulating the views of these esteemed retired military. We always talk about listening to the military. This is an opportunity to do that by adoption of this particular amendment.

Let me read one excerpt from that letter. We have deployed right now in theaters where Common Article 3 is the only source of legal protection should they be captured, "they" referring to American troops. If we allow that standard to be eroded, we put their safety at greater risk.

This is an opportunity to protect American service personnel, and if we fail to adopt this, if we listen to our military, we are putting our troops at risk. So understand what this vote is about. It is about protecting American military personnel in the war on terror.

With that I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Lungren, seek recognition?

Mr. LUNGREN. Strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. Mr. Chairman, this is a difficult issue and difficult question and I think some of the discussion borders on hyperbole here. I think there are well-intentioned people on both sides whose main purpose is to make sure that we protect American troops who might be captured on the battlefield, but I do have to respond to some comments. As much as I respect Colin Powell, to suggest that somehow our actions here would change the moral discussion or the moral reality that exists between this Nation fighting against terrorists who reject every norm under the Geneva Convention I think with all due respect to General Powell is absurd. We are dealing with an enemy who refuses to wear a uniform, who uses as a normal tactic hiding among civilians, whose idea of justice is sawing somebody's head off not only to kill them but to get as much pain as possible and to broadcast it such that it sends a message of terror.

To suggest that as we go through this and attempt to articulate the appropriate definition of appropriate activity by those who

would seek to gain intelligence, that somehow there is a moral equivalence to that is absurd. It is the kind of nonsensical argument that unfortunately diminishes the seriousness of the threat that is against us.

One can take that position; that is, saying that the definition contained in the amendment is more appropriate than the definition contained in the bill, without suggesting that men and women of good will in this body attempting to find the best solution are somehow because of their position undercutting the moral position of the United States, number one.

Number two, I may be one of the few people in this committee who voted against that torture resolution that came through on the floor of the House of Representatives earlier this year. It is not because I support torture.

While I was in another position in the State of California I had the obligation of attempting to ensure that inappropriate action was not taken by authorities and, when we did find that, prosecuting those authorities. But what bothered me in that debate and what bothers me here is this. A good friend of mine on the Senate side, Senator McCain, with his definition of torture, said when posed the question of what we would do if we had one of these terrorists in custody who had the information that could in fact make the difference between protecting 3,000 or 30,000 or 300,000 American lives said, well, we would take care of that. We would find a way. And the suggestion is that we would find a way that would allow us to get that information that might contravene the definition of torture, but we would want that done because under certain circumstances we would think that appropriate to gain that information.

But what that does is it puts at risk those individuals who are the professionals who we ask, probably young men and women in uniform or young intelligence officers somewhere in the world, we put them at risk. It is our obligation and that is what we are pursuing here, to try and define the parameters in which this action would take place.

Hence, my second concern, which is to define this in terms of the U.S. Constitution, 5th, 8th and 14th amendments, suddenly confers constitutional protections on those who are obviously not citizens but, more than that, those who have at least been accused of attempting to kill American citizens in the name of some distorted view of a religion. I think that is something we had better very seriously think about, whether we believe we ought to extend the constitutional protections in those cases. That doesn't mean you torture people willy nilly, doesn't mean that you torture people. But to extend the notion of the 5th, 8th and 14th amendments with respect to cruel, unusual and inhumane treatment or punishment I think goes a little too far.

Depravation of sleep I think would be seriously considered by some courts in this land with respect to that definition under certain circumstances. I just think that we ought to recognize that we are men and women of good will trying to figure out a very difficult thing, but in addition to trying to say the actions we take here will somehow influence an enemy that believes it is important to saw peoples' heads off, that somehow by passing a certain definition

here we are going to change their conduct. But that is a legitimate concern as to whether or not it could affect the way our men and women would be treated, but we also ought to be concerned about those men and women for whom we are going to impose an awesome obligation, attempt to try and get this information in a way that is not torture but in a way that may be uncomfortable, in a way that may be difficult, in a way that may be different than normal interrogation methods in order to protect 3,000, 30,000, 300,000 American lives. That is our obligation and we should look at both sides of this equation.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, I simply want to make several observations. Number one, the Geneva Convention was signed by the United States and ratified I believe in 1949. We have lived with it and with its definitions for over almost 60 years. We lived with these definitions of what are war crimes and what are our obligations through the Korean War, through the Vietnam War, through various other actions, Grenada, et cetera.

The only reason that anybody thinks these definitions—and, frankly, the savagery of the terrorists is not relevant. No one is defending their conduct. But why are the standards that the United States has followed that almost every country in the world has agreed to, if not adhered to, why are we suddenly finding that that is not right? For only one reason, because this lawless administration has violated the law in numerous ways and has condoned what most people would call torture. Sleep deprivation 8 hours; how about 40 hours, how about water boarding, how about holding people and subjecting them to hypothermia? That has happened. May not have happened at Guantanamo, I don't know, but it has happened, we know that. We have testimony.

And now people are afraid that under the law that this Congress passed in 1996 under the speakership of Newt Gingrich that defined war crimes, that some members of this administration may be held liable for violating the laws of the United States. So we have to retroactively redefine the laws of the United States so the things that were illegal will be retroactively legal so the President doesn't have to issue pardons to himself and half his administration when he departs office. That is what this debate is really about.

We can very well defend our liberty while adhering to civilized values and the reason there is a definition of torture here, we can let our courts decide what torture is under the 60 years of precedence in court decisions that we have under the Geneva Conventions. We don't need to invent new definitions that most people think will being less severe by claiming that Geneva is too vague. It is not vague. We have 60 years of court precedence. We know what it means.

That is why we have all these generals and admirals who were raised in the American tradition, who were taught at West Point and Annapolis and taught the codes of honor and also worried about the safety of our people, not those who are captured like Khalid Shaikh Mohammed, if he were still at large, because he won't abide by any convention. But there are others. It is for future wars, God forbid.

The United States should hold itself to the same standards we claim to hold ourselves and did until a few years ago for the last 60 years. It is the standard we preached, we demanded in the Geneva Conventions, we got other countries to ratify, we ratified, and we tried other people for violating.

What this is about is saying let's hair split on what torture is because we have engaged and we want to engage in things that most people would consider torture but we will define as not torture. That is not worthy of this country. I urge the adoption of this amendment.

Chairman SENSENBRENNER. For what purpose does the gentleman from Iowa, Mr. King, seek recognition?

Mr. KING. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. I would submit to this committee that we are here wrestling with this issue unnecessarily from the perspective of the Supreme Court, who injected themselves into this decision, even though the Detainee Treatment Act clearly specified that that appeals process would go exclusively to the U.S. District Court of Appeals, Washington, D.C., and in the precedence that had been established about the court were ignored by the Supreme Court. Now we are hearing trying to accommodate language to a Supreme Court that didn't have jurisdiction over this case in the first place. Additionally, to have this language that grants constitutional protection for enemy combatants, for non-American citizens is a precedent that I am unwilling to follow, and furthermore I would submit that we are facing sleep deprivation here in this Congress at the shutdown of every single session, and that part of the discussion seems absurd to me.

But I would yield the balance of my time to the gentleman from Virginia, Mr. Forbes.

Mr. FORBES. Thank the gentleman for yielding. Mr. Chairman, up to a few minutes ago I was going to say that I was very impressed with the debate that we had had because this issue is so important. I think all the people have been so well-intentioned. We haven't had the normal beating on the desk and the screaming and hyperbole and I wanted to compliment the gentleman from California, the gentleman from Arizona, the gentleman from Florida for all of their comments. All of them are well-intentioned.

But we have had a lot of people talk about the fact that we put our troops at risk. That is the whole purpose and that is why we are discussing this, because our troops are at risk and our citizens are at risk. If anyone kids themselves and believes that the best way to protect our troops or to protect our citizens is something we decide in this committee today, I would suggest that the best way to do it is with good intelligence to protect those troops and protect

our citizens. What we are talking about is balance. Both sides in this argument, the gentleman from California, the gentleman from Arizona, the gentleman from Florida, all have acknowledged none of our wording is infallible, none is perfect. What we are trying to do is strike a balance, a balance between protecting the safety of our troops and the safety of our citizens against an enemy that wants to kill them and destroy them and a balance with the rights of terrorists or at least alleged terrorists.

If we have to err, if that wording can't be perfect and we can't strike that perfect balance, I would rather err on the side of protecting our citizens, and I believe this underlying bill does that.

The final thing is one of the important things that we have is clarity. I think there is no question that the underlying piece of legislation gives this whole issue far more clarity than the amendment.

Mr. Chairman, I hope we will defeat the amendment and pass the underlying legislation.

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts, Mr. Meehan, seek recognition?

Mr. MEEHAN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. MEEHAN. Mr. Chairman, the fundamental issue that we face is whether or not we are going to comply with the Geneva Convention. We can have a debate back and forth of whether 8 hours, 4 hours or 3 hours are appropriate, but this idea that we can just throw away the Geneva Convention.

One of my friends on the other side said how dare Colin Powell say that we are losing the moral high ground. He has a right to speak out when he sees the United States' credibility around the world threatened by the fact that we seem to act willy nilly when we want to take the Geneva Conventions that are so precious to international law and toss them aside. He has a right to speak out.

John McCain has a right to speak out. He was a prisoner of war for 5 years. You know what John McCain says about torture, he says it doesn't work. It isn't effective. There is no evidence to suggest if we torture people we are going to get the information that is the accurate information. There is some evidence to suggest that we are going to get the information that they think we want to get but not that we are going to get accurate information. John McCain, when asked to give names, gave the offensive line for the Green Bay Packers. He gave it to them. It is not accurate information you necessarily get.

We are here at this position because the administration put forward a military commissions, military tribunals procedure that were unconstitutional. I don't know how many more appointments to the Supreme Court he needs to get, but his Supreme Court said it was unconstitutional.

Now you could say that on the other side the Supreme Court had no business in this. The Supreme Court does have business in this. And they said it was unconstitutional. And if this Congress drafts a piece of legislation that throws out the Geneva Conventions or that somehow says torture is okay, we are going to be back here

afterwards because the Supreme Court again will say it is unconstitutional, go at it again.

Now the amendment offered by the gentleman from California is a good amendment because it looks to the leadership of the Senate to try to devise a piece of legislation that is bipartisan and bicameral that we can get done. Keep in mind the Justice Department has reported that they have had convictions in the American system of over 260 terrorism cases. How many terrorists have we brought to justice under the military commissions, military tribunals after 5 years of 9/11? How many people have we brought to convictions and brought to justice and held accountable? None. Not a single one.

We should have been drafting, this administration should have been drafting a legal constitutional military tribunal system years ago but instead we are here 5 years after 9/11 and we are having to debate about whether 8 hours, loud music. That has nothing to do with this. And when a great American like Colin Powell stands up and speaks out because he is worried about the United States of America having the moral high ground, I think we ought to listen. When we see people like Lindsay Graham, a JAG officer, stand up and say hold on here, we have to make sure we maintain our credibility around the world, I think we ought to listen.

So let's see if we can't get together and draft something that is bipartisan, bicameral. But this idea—and by the way, our military spends a lot of time determining what is effective in terms of interrogation. There is a new Army Field Manual that outlines acceptable methods of interrogation. There are 15 techniques. I would urge Members to look at it. There are psychological, emotional interrogation techniques that have been worked in the past. They also, as tough as they are, comply with the Geneva Convention. That is what we ought to be doing here. That is what our responsibility is. But make no mistake, we are here because the administration put in place an unconstitutional military tribunal system. If they had done it right the first time, maybe we would have 50 convictions and we would have eliminated more of al-Qaeda and maybe we would have been able to get the convictions that the Justice Department seems to have been able to get utilizing our own justice system here in the United States.

I would like to yield to the gentlelady from California.

Ms. LOFGREN. Mr. Chairman, I thank the gentleman for yielding. I would just note that at the beginning of this whole process Congresswoman Harman and I drafted a bill to create a system of courts and told the White House that they lacked the authority; only Congress has the authority to establish such——

Chairman SENSENBRENNER. The gentleman's time has expired.

For what purpose does the gentleman from Texas, Mr. Gohmert, seek recognition?

Mr. GOHMERT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman. This is an excellent discussion, but the reason we are here is because this is what we do in America. We talk about truthfully what we are going to do and how we are going to treat people. I am glad to know that be-

cause I was a JAG officer you are going to put great faith and stock in everything I say as well. I appreciate that.

But having been a prosecutor, a defense attorney, served in JAG, I can also tell you I was stationed at Fort Benning at a time when the Judge Advocate General of the Army didn't even know where he was. He was talking about laws that he had never read and didn't have a clue about. So forgive me if I don't put quite the sacred nature around some of their comments that others do.

In any event, when we talk about—we have people in the Senate and in here talk about the concern about subjecting our troops to inhumane treatment. That is all of our concerns on both sides of the aisle, I know that. But the fact is in 1949 you know who signed onto the Geneva Convention wholeheartedly? Korea. You know who didn't care what it said? Korea. You know else who signed on? Vietnam. You know else who just completely ignored the Geneva Convention? Vietnam. Because they don't care about signing things and ignoring them, just like the people that are at war with us right now. They don't care what they sign and turn around and say you violated, and this is on the Internet, been in the news nationally, while they can stick a knife in one of our detainee's throats while he is alive and while he is screaming and brutally cut it off. We are beyond talking about them not treating our troops inhumanely or people they capture inhumanely. It is what they do. It is how we are going to go about preserving this civilization and the rights we have.

As someone who had to issue opinions on 5th and 6th constitutional protections, I appreciate those things, but I am telling you when you have Federal judges who are out there who have previously ruled it is a constitutionally protected right under the Constitution written in 1787 that detainees or people in jail have to have electric typewriters, it is a constitutional right that they have to have a television or they are being mistreated, then it is something we have to really look at closely.

How many of those rights are going to be applied to people who want to destroy our way of life, in areas where it is just impractical? So these are things we need to realistically look at.

We also, the sacredness of the Supreme Court; I was sitting there and heard a Supreme Court Justice during the debate on 10 Commandments say I went online to look for additional information about the 17 monuments you have around your State Capitol and I really didn't find as much as I was hoping; and I was going oh, my goodness, any trial judge knows you don't go outside the record to do your own research. And then we read their opinions that cite the evolving international opinion as something to consider and the changing will of the American people. That is going outside the record. That is making them their own pollsters, which makes them witnesses, which should make them subject to cross-examination to keep from violating the 5th amendment, but they don't seem to grasp that all the time.

So again pardon me if I don't apply the sacred nature to the Supreme Court's pronouncements that others do, but I think it is also great we have these kind of discussions.

Now Common Article 3 for 60 years supposedly it only applied in cases of civil war, is what we signed onto, until the Supreme

Court of our Nation decided to apply it even further as something that this Nation had not signed onto.

So we are here and having this discussion because we believe in openly and honestly discussing how we treat others, unlike many of the signatories of the Geneva Convention. That is why I love being an American, but let's be realistic. They are already treating our troops inhumanely, as they did Senator McCain, and this is something that we should vote for, and so I think the world of my friends, both of them, and I appreciate their efforts in this regard but I would submit opposition is appropriate here.

Mr. ISSA. Would the gentleman yield?

Chairman SENSENBRENNER. The gentleman's time has expired.

For what purpose does the gentleman from New York, Mr. Weiner, seek recognition?

Mr. WEINER. Mr. Chairman, I agree with my colleagues——

Chairman SENSENBRENNER. Would you like to move to strike the last word or just talk?

Mr. WEINER. Those are two options I have? I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes to talk.

Mr. WEINER. Mr. Chairman, I agree with those that have articulated their opposition to the Schiff amendment. This is not going to be a panacea to stop tyrannical things by our opponents. This is not going to be something that is going to make greater humanity on the part of inhumane people.

But this is an articulation of what our values are. This is an articulation of what we do to honor the 147,000 American men and women who are fighting for Iraq and Afghanistan in other places. This is how we try to protect them. And I think if there is one place that we have found in this Congress and in this country bipartisan agreement, it is we listen to the generals to hear what they have to say.

We listen to those who are truly experts in these matters to hear what they have to say. No one is arguing that if you pass the Flake-Schiff amendment that suddenly you are going to stop running up against tyrants who pay no attention to the rule of law. This can't be where we vote on whether we approve the methods of terrorists. This is where we decide who we are going to be as a country. And I think what we found with the Schiff amendment, with the Flake amendment with our Republican and Democratic colleagues in the Senate, with the generals who have spoken out on this issue, is that this is the way we do what we have always done in this country is to find a different paradigm. And it is the paradigm on who we are, who we think everyone else should be, and we try to lead that way.

We do righteous things around the world. One of the things we do is put tens, and in this case, hundreds of thousands of troops in harm's way. We honor them with this debate and we honor them by passing the Schiff-Flake amendment because we say these are what our ideals are. And I yield the balance of my time to Mr. Schiff.

Mr. SCHIFF. I thank the gentleman for yielding. And I think what it all comes down to, and I know that many of my colleagues

on the other side are wrestling with this issue, and there are actually other parts of this bill that we don't have jurisdiction over that I think are even a tougher call on both sides of the aisle. But I think what it all comes down to is when an American soldier is captured, do we, are we prepared to say that any treatment of that soldier that is cruel or inhumane or degrading, we cannot complain of, because we have defined cruelty, inhuman and degrading treatment out of the Geneva Convention for our purposes. Are we prepared to say that any other country is free to similarly define out cruel and inhuman treatment to the ragged edge of torture? Are we prepared to countenance that mistreatment of our own troops?

The Navy JAG Rear Admiral Bruce McDonald testified earlier this month on this issue when he said, I go back to the reciprocity issue that we raised earlier, that I would be very concerned about other nations looking in on the United States and making a determination that if it is good enough for the United States, it is good enough for us, and perhaps doing a lot of damage and harm internationally if one of our servicemen or women were taken and held as a detainee.

But I think most eloquently on this is Senator McCain, who speaks with a rare moral authority given his personal history, who said earlier this year, the protection our personnel require is not limited to freedom from lawsuits and unjust criminal prosecutions. They also need and deserve the undiluted protections offered since 1949 by the Geneva Conventions.

For this reason, I oppose unilaterally re-interpreting in law Geneva Common Article 3. Weakening the Geneva protections is not only unnecessary, but would set an example to other countries with less respect for human rights that they could issue their own legislative reinterpretations. This puts our military personnel and others directly at risk in this and future wars. I don't think anyone could say it better than that. More recently, Senator McCain said, this is a matter of conscience, an American conscience. Are we going to be like the enemy or are we going to be like the United States of America? We should be very aware that if we engage in these activities, the world will condemn us and we will lose the high ground. And then what happens to Americans who are captured in future wars? This is, I think, the essential nature of the issue we have before us. On the one hand, we have a concern about our own personnel who conduct interrogations and what liability they may face, and there is a desire to make them immune by saying that anything short of torture, they are protected from.

On the other hand, we have the men and women in uniform who are out there in the field right now, 140,000 of them in Iraq, many more in Afghanistan and other places around the world. And we have to ask ourselves——

Chairman SENSENBRENNER. The time of the gentleman from New York has expired. We have one 15-minute vote on the floor. Again, we are going to complete the first two bills on the agenda today, come hell or high water or staying here until midnight. So without objection, the committee is recessed for the vote. And members are instructed to come back immediately after the vote.

[Recess.]

Chairman SENSENBRENNER. The committee will be in order. A working quorum is present. When the committee recessed for the votes—can we keep the conversation in the back of the room down to a dull roar, please. When the committee recessed for votes, pending was a motion by the Chair to report the Armed Services committee bill favorably. The bill was, or the Armed Services committee version, was considered as read, open for amendment at any point. And the gentleman from California, Mr. Schiff, had offered an amendment which was being debated.

Ms. LOFGREN. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from California seek recognition?

Ms. LOFGREN. To strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized 5 minutes.

Ms. LOFGREN. Mr. Chairman, I want to express my appreciation to Mr. Flake and Mr. Schiff for offering this bipartisan amendment to really preserve a level of civilization that has served us well for half a century. As I mentioned, when my colleague from Massachusetts yielded to me for a few minutes, when this whole thing began, Congresswoman Harman and I introduced a bill and had discussions with the White House pointing out that the Executive Branch does not have the authority to do what they have done and, in fact, it is only the Congress, in Article 1, Section 8, that has the power to constitute tribunals inferior to the Supreme Court, to grant letters of mark and reprisal, to make rules concerning captures on land and water, and to make the rules for the government in regulation of the land and Naval forces. They said they were fine, that we would be happy with what they did. And the result is a mess.

I think that it is important to just keep a few things in mind. First, the Geneva Convention is not confusing. It has served the United States and the world community well for over half a century and, to pretend at this point that there is something vague or unusual or confusing about it is simply wrong.

I think it is also worth pointing out that we, our Nation, has faced grave challenges and dangers throughout our history, and throughout the Cold War, which arguably was a much greater threat to the survival of the United States than the current situation we face. The Geneva Convention was fully in play, and something that we never sought to back away from.

I finally want to say that, as have others on the committee, that it is important to listen to General Powell, to the generals, to the experts in military affairs and their concern that if we attempt to weasel out of the Geneva Convention we are opening the door to mistreatment of our own men and women in the Armed Forces. Several members have gone on about what, in fact, has occurred in various facilities. I, for one, will say I don't know what has gone on in various facilities around the world. I would caution members, however, that we are likely to soon find out, because there are individuals who have been held, apparently in secret facilities by the CIA, who have now been sent back to Guantanamo.

Soon the Red Cross will have access to those individuals and the world will learn what happened to them in the last several years.

I don't know, and my guess is you don't know either. It is possible we will not be proud of what occurred.

I finally want to just give a mention to the concept that the courts have no business in looking at this situation. In 1803, in the case of Marbury vs. Madison basically established the three branches of government. The President can't do only what he wants. The Congress can't do only what it wants, and the courts can't do only what they want. We work as a check and balance against each other.

And to even suggest that the Court didn't have jurisdiction to do what it did is simply wrong and wrongheaded. And with that, I would yield to Mr. Van Hollen, if he would like the balance of my time.

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. The time of the gentlewoman has expired. For what purpose does the gentlewoman from Maryland seek recognition?

Mr. VAN HOLLEN. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. Thank you, Mr. Chairman. I want to commend Mr. Schiff and Mr. Flake for offering this important amendment, and to Senators McCain, Warner, Graham and others for pursuing a similar path on the Senate side.

We are in the process of defining a particular provision of the bill, but I think in a larger sense, we are defining who we are as a country, who we are as a people, and I do think this is a defining moment for the nation. And I think it is unfortunate we haven't had hearings to discuss this very important issue before we make these very important decisions. I think what we are doing is pretty clear.

We are setting the standard for what we think is the kind of conduct and treatment that should apply to our own troops. Senator McCain and others have been clear on that. Secretary Powell has been clear on that. No one is so naive to think that all our enemies are going to abide by the standards that we set. But we are an example to the world. We are respected for the power of our military, but I hope we will continue to be respected for the power of the example we set. And how can we stand on firm ground in condemning the abuses that may happen to American soldiers overseas, if those abuses are being applied to others that are detained by the United States?

So it is not a question about whether everybody's going to apply this standard, but we want to set the standard for the world. It has been set in the Geneva Convention. We want to preserve that standard, and we want to be on firm ground when we ask others to abide by those examples, because if we don't hold true to those goals, we can't expect others to follow them as well.

Now, the Army Manual has been very clear. They have set forth some clear guidelines and in the guidelines they have set forth, they will no longer allow certain practices that went on at Guantanamo. But what the President seeks to do in the legislation he has submitted is not provide clearer standards. He wants to create greater ambiguity for the CIA, to allow the CIA to essentially un-

dergo, to use certain practices that do not apply in the Army Manual. He wants to create that ambiguity. And I think that that is a very dangerous path to head down.

It was suggested that Colin Powell, Secretary Powell, former Secretary Powell, in his letter, was somehow applying some kind of moral equivalents. I think that is a gross perversion of what General Powell set forth. I think what he wanted to make clear is the United States has always stood for human rights, has always stood for the kind of standards we hope will be followed through the Geneva Convention, and that we need to make clear that we continue to accept that example.

And finally, I think Secretary Powell should also know the limits of the quality of information that can be obtained through practices like torture. You may recall that when he was up at the U.N. delivering his speech before going to war, laying out the argument that the United States was making, one of the arguments he made, and we all heard it, it was there were these mobile bioweapons labs in Iraq.

Well, guess what? It turned out he was wrong. The CIA had interrogated people and they had not used abusive practices at that time and they hadn't found anything with respect to the weapons in Iraq. Those individuals were then turned over to the Egyptians, who did engage torture, and, in fact, the information that Colin Powell used at the U.N. with respect to the mobile weapons labs was information obtained through the Egyptians as a result of torture, false information.

The CIA has later retracted that. We have a Senate Select Committee on Intelligence that has refuted that. That information that we, as a Nation, used to make critical decisions about whether or not to go to war was false information. That information was obtained through torture. So when Secretary Powell, former head of the Joint Chiefs of Staff, and other military leaders, talk about this issue, they are not talking only from the moral high ground which is critical. They are also talking from the pragmatic military perspective and trying to get the best results for our military.

So Mr. Chairman, I would urge this committee to adopt the substitute amendment that is being proposed.

Ms. JACKSON LEE. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas, Ms. Jackson-Lee seek recognition?

Ms. JACKSON LEE. To strike the requisite number of words.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. I thank the chairman. This is reminiscent of the urgency and the terror that we experienced after 9/11. This committee did its job. It frankly listened to the voices of reason and the voices of security. You can do both. You can master the Constitution and provide the constitutional oversight, and you can also protect America. But I use that framework because this committee, in a bipartisan manner, passed the PATRIOT Act, a working document. But politics became the call of the day. And out of that bipartisan came a PATRIOT bill that stomped on the Constitution. No one can say that we have gained more leverage because of the PATRIOT Act that has its failings.

We are here with this particular legislation by accident. We were not supposed to have the opportunity for oversight. This was supposed to be a presidential action with no lights and no oversight. But because there were brave Americans, Members of Congress on both sides of the aisles, in fact, a POW who had spent any number of years as a prisoner of war, for many of us in our districts, we just recently commemorated our prisoners of war and missing in action of the United States military to be reminded of their plight, but because of that kind of sensitivity to the importance of Geneva Convention, we are now here today.

But unfortunately, the light has been turned on, but the arrogance is still present. We will give Congress the opportunity to review it, but we will put forward the same kind of leadership and the same kind of language and it really won't matter. We are here because we have the right to be here because Article I, Section 8 claims, clause 18, the necessary and proper clause, authorizes Congress regulate authorities entrusted by the Constitution to any branch of government or officer. The President is that. The executive is that.

And what we are doing now in terms of the violation of the Geneva Convention is being corrected by the gentleman from California and the gentleman from Arizona's amendment of which I rise to support because it is the right thing to do.

I wonder whether the Pakistan informant that provided the underlying basis of the British being able to solve the liquid dynamite case was tortured. We know that the way to secure America is intelligence and information. Many of us went to Guantanamo Bay in the early stages. I had three visits. And we were commended by the military that everything was okay. In fact, we were allowed to see interrogation, and we saw the ice cream interrogation. But now we know there are failures there. And even as we seek to secure America, I can venture to say to you that the military have answered our question, does torture secure America or does it jeopardize the lives of young men and women who may be sent to places that don't even begin with I and A, Iraq and Afghanistan. Their work is international. Their intelligence work is international. Their ability to be subjected to torture is international. It could be in the far hinterlands of any nation, including our friends, like the former Soviet Union.

And so, I can't imagine why we can't reject the politics of fear and terror and do the right thing for the American people, which is to pass this amendment, recognizing that we can, in fact, provide the necessary intelligence. And all of us will agree that preventive actions are better than the offensive, or having to defend. And therefore, knowing information ahead of time is vital.

I simply commend my colleagues, that inherent presidential powers to gather foreign intelligence without oversight may sound attractive in the backdrop of fear and the fear of terrorism. But I can assure you that it does not commend itself to the very words that we said after 9/11, let the terrorists not turn us into despots and violators of constitutional rights, but let us handle our business in the right way. I'd ask my colleagues to support the existing amendment. I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Berman, seek recognition?

Mr. BERMAN. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. I would just like to, this point may have been made, but if it, was I didn't pick it up. The consequence of this bill is that it weakens our ability to prosecute those who commit war crimes against U.S. persons and U.S. military. And the irony of it is that this is a law that was pushed by this majority, and most particularly by the chairman of the Armed Services Committee back in 1996. I am going to read from an article by Mark Benjamin. Duncan Hunter was one of the 15 Republicans in the House who cosponsored the original legislation that is the War Crimes Act. And he also cosponsored an expansion of the Act covering even more potential transgressors that passed the very next year. Similarly, in the Senate, the man who shepherded the original bill through that body in 1996, Oklahoma Republican James Inhofe is now a cosponsor of the bill that will gut it. Back in 1996, a vote for the War Crimes Act, which passed both Houses with overwhelming support, could have been considered a vote for the U.S. to follow the Geneva Conventions to the letter.

When a House Judiciary Committee panel first considered the War Crimes Act in June 1996, John McNeil, then a senior deputy counsel of the Department of Defense testified that the bill was an opportunity for Members of Congress to endorse the idea that the United States, as a political matter, should be seen as fully in conformity with its international obligations in this very sensitive area. But at the time, Republicans were really focused on making sure U.S. courts would be able to prosecute war crimes committed against American citizens, not by them.

Inhofe took to the Senate Floor that August to say the War Crimes Act would protect our young troops in the event a crime is perpetrated against them. It was unthinkable back then that it might be the U.S. that was systematically violating the Geneva Conventions. In other words, without the Schiff-Flake amendment, we are faced with a bill which undercuts the law we passed in 1996 to establish jurisdiction over people who committed war crimes against American citizens, against American troops. By definition, weakening that law through this base bill, without the Schiff Flake amendments, weakens the law that protects American citizens and American personnel against war crimes committed by others. I don't want to be a part of that.

Chairman SENSENBRENNER. Does the gentleman yield back? The gentlewoman from California, Ms. Sánchez.

Ms. LINDA SÁNCHEZ. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. LINDA SÁNCHEZ. And I would yield that time to my colleague from California, Mr. Schiff.

Mr. SCHIFF. Mr. Chairman, I won't consume the time. But I did want to just finish the thought I started before we broke for votes. And I thank the gentleman from California for shedding more light on the effect of the base bill. Plainly, the goal in the base bill is

to protect, not those that commit crimes against our citizens and our soldiers, although that is an important feature of the law we want to preserve, but it is to protect American interrogators. And while I share the desire to protect American interrogators, I also have the desire to protect our troops. And it seems to me the best way to do both, to protect our troops and to protect the interrogators, is to have clearer lines of what is permissible. But not drawing a bright line that says anything to the ragged edge of torture is acceptable. That, I think, puts our troops too much at risk.

By using the jurisprudence of the 5th, 8th and 14th amendments, I think we do give protection to our interrogators, at the same time, getting to the point Mr. Berman made, we protect our troops from whoever would commit acts of torture or anything approaching torture. And I think it is the best balance we can strike. There isn't going to be a perfect answer. But to preserve the ability to go after those that commit war crimes against our troops, as Mr. Berman outlined, at the same time, to give a measure of protection to those that work in our intelligence and other agencies to gather information, I think what Senators McCain and Warner and Graham have set out is the best approach, and I would urge my colleagues to support it.

Mr. LUNGREN. Would the gentleman yield on that?

Mr. SCHIFF. Yes.

Mr. LUNGREN. Here is my question. This is the conundrum I have. And I have discussed this with Senator McCain, and I have never resolved it in my own mind, because he has said that we ought not to use torture, or as you say, come to the ragged edges of torture. But then, when posed with the question, what if you do have an individual who has information that could save 3,000, 30,000, 300,000 American lives, and his response basically is we do what is necessary. And when I hear that, it suggests that we believe that there are certain exigent circumstances which would allow us to do other things we wouldn't otherwise allow in interrogation when the stakes are so high.

And my problem is if that is true, and maybe the gentleman doesn't agree with that, but if that is true, isn't it our obligation to try and refine what that is and if there are exceptions, to articulate what the requirements would be, rather than say that we will depend on those interrogators to get us the information? Even given the fact that in some cases, it may work and in some cases it may not work. That is the problem I have got in this situation, because I can't honestly answer that question when a constituent asks me that with the language that we have; frankly, either the language present in the bill or in the amendment.

Mr. SCHIFF. Reclaiming my time. You know, the gentleman asks a legitimate question and it is a tough question and I am not sure any of us have the answer. I don't know that that question, though, is answered by the base bill or the amendment, because if someone knew the whereabouts of an atomic bomb that was about to go off in an American city, it wouldn't be a question of torture or cruel and inhumane treatment. It probably would be a question of torture or not torture.

But this goes to the point that I think Mr. Van Hollen and others have made, which is there is no guarantee that that produces a

more accurate outcome than by using other interrogation techniques, which are fully permissible under Geneva and under our Constitution. So I am not sure what happens in those circumstances. I would imagine that if someone, you know, one thing that has been speculated upon is that the President always has the power to pardon as backstop and a fail-safe mechanism. But we don't write a system based on who the President would pardon. We write a system based on the standards that we would want others to apply to our troops. And I think what McCain, Warner and Graham have set out is a standard that we can live with and our troops are protected by. And with that, Mr. Chairman, I yield back.

Chairman SENSENBRENNER. Gentlewoman from California yield back?

Ms. LINDA SÁNCHEZ. I yield.

Chairman SENSENBRENNER. For what purpose does the other gentlewoman from California, Ms. Waters, seek recognition?

Ms. WATERS. Thank you very much Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. WATERS. I would like to start by entering into the record a letter to Senator McCain from General Colin Powell, and I would like to point out that this is a letter that does not support what is being attempted. The letter basically says, I just returned to town and learned about the debate taking place in Congress to redefine Common Article 3 of the Geneva Convention.

Chairman SENSENBRENNER. Without objection, the letter will be entered into the record.

[The information follows:]

General Colin L. Powell, USA (Retired)
909 North Washington Street
Suite 700
Alexandria, Virginia 22314
September 13, 2006

Dear Senator McCain:

I just returned to town and learned about the debate taking place in Congress to redefine Common Article 3 of the Geneva Convention. I do not support such a step and believe it would be inconsistent with the McCain amendment on torture which I supported last year.

I have read the powerful and eloquent letter sent to you by one my distinguished predecessors as Chairman of the Joint Chiefs of Staff, General Jack Vessey. I fully endorse in tone and tint his powerful argument. The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.

I am as familiar with *The Armed Forces Officer* as is Jack Vessey. It was written after all the horrors World War II and General George C. Marshall, then Secretary of Defense, used it to tell the world and to remind our soldiers of our moral obligations with respect to those in our custody.

Sincerely,

Senator John McCain

Ms. WATERS. Thank you. And I would like to bring to the attention of the committee information that I have gathered talking with a number of experts and individuals in academia, who are closely watching what is happening. It has been identified that there are many hidden problems with this bill and they raise serious potential difficulties.

For example, the integral paragraph at the very beginning headed Section 2, construction of presidential authority, suggests that the President has unfettered authority not to be limited in any way by the Uniform Code of Military Justice to establish military commissions. This is not consistent with the underlying principle of the UCMJ, that all military tribunals must apply the basic standards that are set out in the UCMJ. It is understood that the President is looking for congressional authority to escape that requirement.

However, an example of why this should not take place and why the President and the Secretary of Defense should not be given the power and authority under section 948 to decide, for example, who is an enemy combatant. Under the Geneva Conventions, that decision has to be made by a competent or regularly constituted tribunal. The whole point of the Supreme Court's *Hamden* decision was that this should not be left to the President, and doing so violates the Geneva Conventions, as well as the UCMJ. This is a back door way, along with the Common Article 3 provision to eliminate Geneva Convention protections.

And the question is raised, do we want the President of North Korea or the President of Iran to have the power to determine whether U.S. captives are unlawful enemy combatants and therefore entitled to far reduced protections? I think it has been said here today already. I just wanted to reiterate with these examples that we should be very concerned about this attempt by the President of the United States to undermine the Uniform Code of Military Justice.

Mr. BERMAN. Will the gentlelady yield?

Ms. WATERS. Yes I will yield to the gentleman from California.

Mr. BERMAN. I would just like to take what little time the gentlelady has remaining to deal with the question Mr. Lungren posed because I have been thinking about it. It is a good question. And I see three problems with trying to institutionalize legislatively what I think all of us in our gut sort of want to see protected somehow. One is if you institutionalize it, it becomes routine. Every potential interogee, if that is the right word, person you are questioning, becomes the person who could have that information that could save lives.

Secondly, defining it to go to the ragged edge of torture, but not to torture, why there? Why not an exception to the law on torture? And third, and this is why the irony of what I, Duncan Hunter's, no other way, but flip flop on this issue is and every enemy of ours who wants to do us harm, but claims that martyrdom or some cause was so great that this justified will now have an institutionalized defense against our prosecution that we have provided in order to protect against the situation.

That is why I would suggest Mr. Schiff's response, the notion of absorbing the liability or the use of the pardon is a far better approach towards dealing with that exceptional situation than trying

to institutionalize it and codify it in a law that will either be misused, will be abused, in some cases, by our folks for, you know, for good reasons, because they had a sincere belief there might be something there, and more importantly, will be used as a defense against war crimes prosecutions by enemies of ours.

Chairman SENSENBRENNER. The gentlewoman's time has expired. For what purpose does the gentleman from Virginia Mr. Scott seek recognition?

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, the problem with considering the bill, this bill, the underlying bill the way we are doing it, it just makes it look like we are going to rubber-stamp whatever is put before us. We have had no hearings on this very complicated bill. There has been no subcommittee mark. The gentleman from California has suggested that we are using hyperbole. Well, we don't have anything else. We don't have any evidence. What else can we use? We have heard about whether or not you need 8 hours of sleep, TVs and typewriters and that kind of stuff.

Let's get somebody here before us that can explain exactly what is going on. We don't know what they are doing now. We know some of what has leaked out. But we have had public statements to the effect that the administration might have to stop what it is doing now if they don't get new legislation.

But that is an interesting comment. We ought to have somebody up here to let us know whether they are breaking the law as it is now, and what are we going to be approving if we pass this legislation. We do know that they have not denied involvement with the torture of an innocent Canadian, as my friend from New York has indicated, they haven't denied involvement with torture of an innocent Canadian. Do they need to torture innocent people? Is that part of the process?

We haven't had any requests from the military that they need this additional torture power. Last year's bill we passed with overwhelming bipartisan majorities prohibiting torture. This amendment just allows us to join Senators Warner and McCain and Graham over in the Senate, and General Powell, who have had enough of what is going on now because they recognize that what we do to others will set an international standard and that standard will be applied to us.

So we need to conform our understanding of the Geneva Convention to the rest of the world and defeat the underlying bill, at least adopt this amendment. I yield back.

Mr. LUNGREN. Will the gentleman yield please?

Mr. SCOTT. I yield to the gentleman from California.

Mr. LUNGREN. Okay. And I don't want to overstate this, but this is a very serious question, because Alan Dershowitz has suggested that it is better for us, as policymakers, to establish the legal parameters under which certain interrogation techniques could be used where we otherwise would not allow it. I understand the gentleman from California, Mr. Schiff suggesting the President has the power of pardon. I think Alan Dershowitz suggests, and I know some will say well you don't quote Alan Dershowitz very often, and

I know that is true. I will concede that on the record. But he suggests that I believe that perhaps you could set up a mechanism where certain exigent circumstances, as determined by a President in an affirmative finding, would require it.

Now I know there is objection to that because you say it might be misused. But that would require the President to do it before the fact rather than after the fact, which would be the situation of a pardon. And the only reason I voice this is I am absolutely concerned about what we do to the young men and women in uniform, either our Armed Forces or CIA or whatever, if we come upon a circumstance in which we have in the balance the lives of 3,000 Americans versus using different techniques. And I just raise that because I think we need to, at some point in time, address it.

Mr. SCOTT. Reclaiming my time. And I would say to the gentleman that we are weren't waiting for the President to do the pardoning. We are doing it in the bill because there is a retroactive provision in the bill which retroactively applies the new definition to whatever has been going on for the last couple of years. I yield to the gentleman from North Carolina.

Mr. WATT. I thank the gentleman for yielding, and I haven't claimed my own time, because I don't have a lot to say about this. It does strike me that this is yet another example of trying to establish trust in a world that is more and more looking at us and saying as the United States, it is do as we say rather than do as we do.

And I guess, the only adage I can add is the biblical adage, that we should be trying, in this case, to do unto others as we would have do them do unto us. So I just think anything that hints of setting a different standard for the United States in a global world, than we expect other people to use and apply is going to be misinterpreted and we need to be very careful. And I appreciate the gentleman yielding.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. FRANKS. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman. Mr. Chairman, I heard the comments a few moments ago from one of the minority party's representatives here. She said that preventive actions are better than defensive ones. And I certainly believe that that is true. And really, in a great sense, that is why we are all here. That is why the President is seeking to see this legislation pass is because he seeks to prevent great tragedy in this country before it occurs and rather than taking the defensive action afterwards.

But you see, he has a significant challenge because his greater tactical challenge is that he has to find terrorists and bring them to justice before they gain weapons of mass destruction or before they are able to supercharge their efforts ideologically all over the world. The terrorists greatest tactical challenge is to stay hidden long enough to do those two things, to gain some type of either nuclear or some other type of weapon of mass destruction long enough to do us great, great damage.

And the fact is that as we debate this, this notion that these terrorists are covered under our Constitution, would it not then follow that our special forces on the field and the battle would have to read them their Miranda Rights? I mean, if terrorists are indeed covered under our Constitution, then I have to say that we have completely missed, the nomenclature is completely wrong to begin with. These are unlawful combatants that have no uniform, and that hide between and behind innocent men, women and children, in order to effect a tragedy against civilization that could be unknowable to this at this point.

The President has to find a way to protect this country, maintaining the moral high ground of this Nation and still defeating the terrorists. I suggest that he has the moral high ground because he is trying to defeat terrorists and stop them from killing innocent men, women and children in the United States of America. That is the purpose for this legislation.

The Hunter language does great effort to try to find a way to afford those detainees the kinds of rights that can be afforded without sacrificing the national security of the United States of America. And I would suggest that sometimes we just need to get a hold of ourselves a little bit. And that notion of torture that somehow we are practicing torture, it is against the law for us to torture detainees. If you are convicted of torturing detainees, it is a 20-year prison sentence. If you kill a detainee in the process of torture, punishable by death. So this notion that we are trying to torture detainees is outrageous. We need to help the President defend America. And he has the high ground and the real battle here is intelligence.

If we knew where every terrorist was today, in a month this war would be over. But we don't. And unfortunately, some of those in Congress seem hell-bent on stopping the President from being able to gain the necessary intelligence to fight this war. And I would suggest to you that is the crucible. Some don't want him to listen to them on the telephone. He has the right to hunt them down, ferret them out and kill them but not to listen to them on the telephone.

Some of the opposition doesn't want him to follow the money. Some of them don't want him to interrogate detainees and in some way that might be aggressive. I am astonished that somehow we miss the focus here that intelligence is what it is all about in this war and if we don't win on that front, then we will lose on the greater front.

So Mr. Chairman, I just hope that we can defeat this substitute motion and that we can get back to the base bill. And I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from California, Mr. Schiff. Those in favor will say aye. Those opposed, no. The noes appear to have it.

Mr. SCHIFF. Mr. Chairman, on that I request a recorded vote.

Chairman SENSENBRENNER. A recorded vote is ordered. Those in favor of the Schiff amendment will, as your names are called, answer aye. Those opposed, no. The clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK.Mr. Coble.

Mr. COBLE. No.
The CLERK. Mr. Coble votes no.
Mr. Smith.
Mr. SMITH. No.
The CLERK. Mr. Smith votes no.
Mr. Gallegly.
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly votes no.
Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte votes no.
The CLERK. Mr. Chabot.
Mr. CHABOT. No.
The CLERK. Mr. Chabot votes no.
Mr. Lungren.
Mr. LUNGREN. No.
The CLERK. Mr. Lungren votes no.
Mr. Jenkins.
[No response.]
The CLERK. Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon votes no.
Mr. Bachus.
[No response.]
The CLERK. Mr. Inglis.
Mr. INGLIS. Aye.
The CLERK. Mr. Inglis votes aye.
Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler votes no.
Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green votes no.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. No.
The CLERK. Mr. Issa votes no.
Mr. Flake.
Mr. FLAKE. Aye.
The CLERK. Mr. Flake votes aye.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence votes no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes votes no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King votes no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no.
Mr. Franks.

Mr. FRANKS. No.
The CLERK. Mr. Franks votes no.
Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert votes no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers votes aye.
Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman votes aye.
Mr. Boucher.
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher votes aye.
Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler votes aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt votes aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren votes aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee votes aye.
Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters votes aye.
Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan votes aye.
Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Mr. Weiner.
[No response.]
The CLERK. Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez votes aye.
Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen votes aye.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz votes aye.
Mr. Chairman.

Chairman SENSENBRENNER. No. Members in the Chamber who wish to cast or change their votes? The gentleman from Tennessee, Mr. Jenkins.

The CLERK. Mr. Jenkins.

Mr. JENKINS. No.

The CLERK. Mr. Jenkins votes no.

Chairman SENSENBRENNER. Further members who wish to cast or change their votes? If not the clerk will report.

Ms. JACKSON LEE. Mr. Chairman, how am I recorded?

Chairman SENSENBRENNER. How is the gentlewoman from Texas recorded?

The CLERK. Mr. Chairman, Ms. Jackson Lee is recorded as aye.

Chairman SENSENBRENNER. Is that correct?

Ms. JACKSON LEE. Yes, that is correct. Thank you very much, Mr. Chairman.

Chairman SENSENBRENNER. The clerk will report.

Gentleman from Massachusetts, Mr. Delahunt.

The CLERK. Mr. Delahunt, aye.

Mr. DELAHUNT. Aye.

The CLERK. Mr. Delahunt votes aye.

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. I was wondering how I am recorded.

The CLERK. Mr. Chairman, Mr. Nadler is recorded as aye.

The CHAIRMAN. Okay. Clerk will report.

Ms. WATERS. Mr. Chairman.

Chairman SENSENBRENNER. Does the democratic side—gentleman from New York, Mr. Weiner.

Mr. WEINER. Mr. Chairman, how am I recorded?

The CLERK. Mr. Chairman, Mr. Weiner is not recorded.

Mr. WEINER. I am an aye, please.

The CLERK. Mr. Weiner votes aye.

Chairman SENSENBRENNER. Anybody else need to come in? The clerk will try again to report.

The CLERK. Mr. Chairman, there are 17 ayes and 18 nays.

Chairman SENSENBRENNER. Then the amendment is not agreed to. Are there further amendments?

Mr. MEEHAN. Mr. Chairman, I have an amendment at the desk.

Chairman SENSENBRENNER. The gentleman from Massachusetts has an amendment at the desk which the Clerk will report.

The CLERK. Amendment to H.R. 6504, offered by Mr. Meehan of Massachusetts.

[The amendment follows:]

AMENDMENT TO H.R. 6054, AS REPORTED

OFFERED BY MR. MEEHAN OF MASSACHUSETTS

Strike section 5 (relating to judicial review).

Mr. SMITH. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. A point of order is reserved by the gentleman from Texas.

The CLERK. Strike section 5 relating to judicial review.

The CHAIRMAN. The gentleman from Massachusetts is recognized for 5 minutes.

Mr. MEEHAN. Mr. Chairman, my amendment is simple. It strikes section 5 and protects not only the vital right of habeas court reporters, but also preserves the jurisdiction of our courts. Section 5 strips the Federal courts of jurisdiction over habeas corpus claims that are pending, or in the future, and it would not just be limited to detainees at Guantanamo. Rather, it would apply to any alien detained outside of the United States who is in United States custody, and has been determined to be an enemy combatant. Taking away individuals well-established habeas corpus rights and enacting a sweeping jurisdiction stripping provision raises grave constitutional question. It runs contrary to established case law. I believe that this provision leaves the door wide open for a Supreme Court ruling that would put us back in the same room debating this same issue.

As the Supreme Court made clear in Lynn versus Murphy, legislative provisions depriving Federal courts of jurisdiction do not alter or affect any case in any court at the time of enactment. Lynn versus Murphy is solid case law and it has been cited thousands of times. If section 5 remains in the bill, it will be challenged, further prolonging the process of justice to detainees that have been held for 4 years.

Mr. Chairman, as one of only three members of this committee that also serves on the House Armed Services Committee, I know well the balance that we need to strike in regard to justice within the military. But no one knows more about military justice than judge advocate generals. In a letter to the Senate Armed Services Committee, former JAGs John Hudson and John Gerter wrote the following and I quote: "it is critical that Congress not strip the courts of jurisdiction to hear their pending habeas cases." It would be utterly inconsistent and unworthy of American values to include language that would strip the courts of habeas jurisdictions. No one in this room disagrees that we need to bring perpetrators of terror to justice. But we also need to do it in a way that holds up to the Supreme Court challenge, otherwise, we have accomplished nothing.

I would urge this amendment be adopted so that we aren't revisiting this same issue after another Supreme Court ruling. And further, Mr. Chairman, I would ask unanimous consent to submit two letters, one from a series of U.S. judges here in the United States and secondly, from, the letter that I quoted from the JAG officers that is I be allowed to them for the record.

Chairman SENSENBRENNER. Without objection, the letters will be put in the record.

[The information follows:]

To Members of Congress:

The undersigned retired federal judges write to express our deep concern about the lawfulness of Section 6 of the proposed Military Commissions Act of 2006 ("MCA"). The MCA threatens to strip the federal courts of jurisdiction to test the lawfulness of Executive detention at the Guantánamo Bay Naval Station and elsewhere outside the United States. Section 6 applies "to all cases, *without exception*, pending on or after the date of the enactment of [the MCA] which relate to any aspect of the detention, treatment, or trial of an alien detained outside of the United States . . . since September 11, 2001."

We applaud Congress for taking action establishing procedures to try individuals for war crimes and, in particular, Senator Warner, Senator Graham, and others for ensuring that those procedures prohibit the use of secret evidence and evidence gained by coercion. Revoking habeas corpus, however, creates the perverse incentive of allowing individuals to be detained indefinitely on that very basis by stripping the federal courts of their historic inquiry into the lawfulness of a prisoner's confinement.

More than two years ago, the United States Supreme Court ruled in *Rasul v. Bush*, 542 U.S. 466 (2004), that detainees at Guantánamo have the right to challenge their detention in federal court by habeas corpus. Last December, Congress passed the Detainee Treatment Act, eliminating jurisdiction over *future* habeas petitions filed by prisoners at Guantánamo, but expressly preserving existing jurisdiction over pending cases. In June, the Supreme Court affirmed in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the federal courts have the power to hear those pending cases. These cases should be heard by the federal courts for the reasons that follow.

The habeas petitions ask whether there is a sufficient factual and legal basis for a prisoner's detention. This inquiry is at once simple and momentous. Simple because it is an easy matter for judges to make this determination – federal judges have been doing this every day, in every courtroom in the country, since this Nation's founding. Momentous because it safeguards the most hallowed judicial role in our constitutional democracy – ensuring that no man is imprisoned unlawfully. Without habeas, federal courts will lose the power to conduct this inquiry.

We are told this legislation is important to the ineffable demands of national security, and that permitting the courts to play their traditional role will somehow undermine the military's effort in fighting terrorism. But this concern is simply misplaced. For decades, federal courts have successfully managed both civil and criminal cases involving classified and top secret information. Invariably, those cases were resolved fairly and expeditiously, without compromising the interests of this country. The habeas statute and rules provide federal judges ample tools for controlling and safeguarding the flow of information in court, and we are confident that Guantánamo detainee cases can be handled under existing procedures.

Furthermore, depriving the courts of habeas jurisdiction will jeopardize the Judiciary's ability to ensure that Executive detentions are not grounded on torture or other abuse. Senator John McCain and others have rightly insisted that the proposed military commissions established to try terror suspects of war crimes must not be permitted to rely on evidence secured by unlawful coercion. But stripping district courts of habeas jurisdiction would undermine this goal by permitting the Executive to detain without trial based on the same coerced evidence.

Finally, eliminating habeas jurisdiction would raise serious concerns under the Suspension Clause of the Constitution. The writ has been suspended only four times in our Nation's history, and never under circumstances like the present. Congress cannot suspend the writ at will, even during wartime, but only in "Cases of Rebellion or Invasion [when] the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Congress would thus be skating on thin constitutional ice in depriving the federal courts of their power to hear the cases of Guantánamo detainees. At a minimum, Section 6 would guarantee that these cases would be mired in protracted litigation for years to come. If one goal of the provision is to bring these cases to a speedy conclusion, we can assure you from our considerable experience that eliminating habeas would be counterproductive.

For two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not of men. The proposed legislation imperils this proud history by abandoning the Great Writ to the siren call of military necessity. We urge you to remove the provision stripping habeas jurisdiction from the proposed Military Commissions Act of 2006 and to reject any legislation that deprives the federal courts of habeas jurisdiction over pending Guantánamo detainee cases.

Respectfully,

Judge John J. Gibbons
U. S. Court of Appeals for the Third Circuit (1969 – 1987)
Chief Judge of the U.S. Court of Appeals for the Third Circuit (1987 – 1990)

Judge Shirley M. Hufstedler
U. S. Court of Appeals for the Ninth Circuit (1968 – 1979)

Judge Nathaniel R. Jones
U. S. Court of Appeals for the Sixth Circuit (1979 – 2002)

Judge Timothy K. Lewis
U. S. District Court, Western District of Pennsylvania (1991 – 1992)
U. S. Court of Appeals for the Third Circuit (1992 – 1999)

Judge William A. Norris
U.S. Court of Appeals for the Ninth Circuit (1980 – 1997)

Judge George C. Pratt
U. S. District Court, Eastern District of New York (1976 – 1982)
U. S. Court of Appeals for the Second Circuit (1982 – 1995)

Judge H. Lee Sarokin
U.S. District Court for the District of New Jersey (1979 – 1994)
U.S. Court of Appeals for the Third Circuit (1994 – 1996)

William S. Sessions
U.S. District Court, Western District of Texas (1974 – 1980)
Chief Judge of the U.S. District Court, Western District of Texas (1980 – 1987)

Judge Patricia M. Wald
U.S. Court of Appeals for District of Columbia Circuit (1979 – 1999)
Chief Judge of the U.S. Court of Appeals for District of Columbia Circuit (1986 – 1991)

Senator John Warner
Chairman, U.S. Senate Committee on Armed Services
225 Russell Office Building
U.S. Senate
Washington, D.C. 20510

Senator Carl Levin
Ranking Member, U.S. Senate Committee on Armed Services
269 Russell Office Building
U.S. Senate
Washington, DC 20510-2202

September 12, 2006

We find it necessary yet again to communicate with you about issues arising out of our policies concerning detainees held at Guantanamo Bay. It would appear that each time the U.S. Supreme Court speaks, efforts are taken to reverse by legislation the decision of the Court. We refer, of course, to the Supreme Court's *Rasul* and *Hamdan* decisions and to the provision in the Administration's proposed Military Commissions Act of 2006 that would strip the federal courts of jurisdiction over even the pending habeas cases that have been brought by the detainees at Guantanamo to challenge the basis for their detention. We urge you to reject any such habeas-stripping provision.

As we have argued and agreed since 9/11, it is necessary for Congress to enact legislation to create military commissions that recognize both the basic notions of due process and the need for specialized rules and procedures to deal with the new paradigm we call the war on terror. This effort must cover those already charged with violating the laws of war and those newly transferred to Guantanamo Bay.

But the military commissions we are now fashioning will have no application to the vast majority of the detainees who have never been charged, and most likely never will be charged. These detainees will not go before any commissions, but will continue to be held as "enemy combatants." It is critical to these detainees, who have not been charged with any crime, that Congress not strip the courts of jurisdiction to hear their pending habeas cases. The habeas cases are the only avenue open for them to challenge the bases for their detention -- potentially life imprisonment -- as "enemy combatants."

We strongly agree with those who have argued that we must arrive at a position worthy of American values, i.e., that we will not allow military commissions to rely on secret evidence, hearsay, and evidence obtained by torture. But it would be utterly inconsistent, and unworthy of American values, to include language in the draft bill that would, at the same time, strip the courts of habeas jurisdiction and allow detainees to be held, potentially for life, based on CSRT determinations that relied on just such evidence. The effect would be to give greater protections to the likes of Khalid Sheikh Mohammed than to the vast majority of the Guantanamo detainees, who claim that they had nothing to do with al Qaeda or the Taliban.

We are on a course that should have been plotted and navigated years ago, and we might be close to consensus. We ask that, in the closing moments of your consideration of this vital bill, you restore the faith of those who long have been a voice for simple commitment to our longstanding basic principles, to our integrity as a nation, and to the rule of law. We urge you to oppose any further erosion of the proper authority of our courts and to reject any provision that would strip the courts of habeas jurisdiction.

As Alexander Hamilton and James Madison emphasized in the Federalist Papers, the writ of habeas corpus embodies principles fundamental to our nation. It is the essence of the rule of law, ensuring that neither king nor executive may deprive a person of liberty without some independent review to ensure that the detention has a reasonable basis in law and fact. That right must be preserved. Fair hearings do not jeopardize our security. *They are what our country stands for.*

Sincerely,

John D. Hutson, Rear Admiral, JAGC, USN (Ret.)

Donald J. Guter, Rear Admiral, JAGC, USN (Ret.)

David M. Brahms, Brigadier General, USMC (Ret.)

Mr. MEEHAN. And I yield back the balance of my time.

Chairman SENSENBRENNER. Does the gentleman from Texas insist on his point of order?

Mr. SMITH. No, I do not, and I'll withdraw the point of order.

Chairman SENSENBRENNER. Reservation is withdrawn.

Mr. LUNGREN. Mr. Chairman.

Chairman SENSENBRENNER. Gentleman from California, Mr. Lungren, for what purpose does he seek recognition?

Mr. LUNGREN. I rise in opposition to the amendment.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. Mr. Chairman, the case that the gentleman mentioned where the Court found it unconstitutional was a matter of statutory construction. It said that the Congress had not acted. We had not stated in both parts of the bill our specific authorization of that sort of treatment in litigation. It wasn't that we were unable to do it. The D.C. court review that's authorized by the Detainee Treatment Act provides a more than adequate substitute for habeas or rather reasonably regulates the use of habeas just as past statutes have done. The idea that the Congress is not able to regulate habeas is a misnomer. Most of the time when we are talking about habeas, we are talking about statutory habeas, not the great writ that is referred to in the Constitution. The Detainee Treatment Act allows the D.C. circuit to rule on the constitutional questions that were litigated in the case.

In other words, the Detainee Treatment Act still allows resolution of the same constitutional questions that were being litigated under ordinary habeas review prior to the enactment of the Detainee Treatment Act. In 1950, the U.S. Supreme Court ruled in Eisentrauger versus Johnson that enemy combatants held by U.S. forces overseas are not, I underscore, not entitled to the, quote, privilege of litigation, and cannot sue our military and our courts.

It was the law of the land for over 50 years, until in June 2004, Rizal versus Bush created an exception for it for enemy combatants held in Guantanamo. Let me make clear that that case did not change the constitutional holding of Eizentrager. It merely extend the Federal statute to the Guantanamo detainees. And let me quote from a key passage in that case that explains why enemy combatants outside the U.S. should not have access to U.S. courts.

As that court began by noting there has been "no instance where a court in this or any other country, where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time, and no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

Other authorities also have emphasized that the Anglo American common law tradition includes no place for habeas petitions filed by enemy aliens in military custody outside our territory. Law professor Peter Lushing, in an Internet posting commenting on the Graham amendment shortly after it passed the Senate put the matter rather colorfully. The guys in the powder wigs would have flipped over the idea that habeas extends to foreigners who we are in combat with who have been captured and are being held by us abroad.

He concludes, quote: "The decision has extended habeas far beyond what anybody alive during the ratification of the Constitution would have envisioned."

In a 2003 article in George Washington Law Review Law Professor John Yoe notes the special importance of interrogating enemy combatants for information about coming attacks in this conflict and concludes: De novo judicial review threatens to undermine the very effectiveness of the military effort against al-Qaeda. A habeas proceeding would become a forum for recalling commanders and intelligence operatives from the field into open court, disrupting overt and covert operations, revealing successful military tactics and methods, enforcing the military to shape its activities to the demands of the judicial process. There is no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in the zone of battle have fifth amendment rights which can be asserted against the American troops. The Supreme Court has consistently held the fifth amendment does not have extraterritorial application to foreign persons outside the United States."

In this regard even Justice Kennedy has observed the Constitution does not create nor do general principles of law create any juridical relation between our country and some undefined limitless class of noncitizens who are beyond our territory.

Perhaps most disturbing, the habeas litigation has imperiled crucial military operations during the time of war. Moreover, habeas counsel have frustrated interrogation critical to preventing further terrorist attacks on the United States. One of the coordinating counsel for the detainees boasted about this in public, quote: The litigation is brutal for the United States. It's huge. We have over a hundred lawyers now from big and small firms working to represent the detainees. Every time an attorney goes down there it makes it that much harder for the U.S. military to do what they're doing. You can't run an interrogation with attorneys. What they're going to do now that we're going to get court orders is to get more lawyers down there. What are they going to do?

Now maybe that is what we want to do here. I don't think so. That is why I would suggest that we reject this amendment.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Massachusetts.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Virginia, for what purpose do you seek recognition?

Mr. SCOTT. Strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I would hope that we would adopt the amendment offered by the gentleman from Massachusetts. We don't know right now what is going on and what is going on in the name of the United States. We do know what has been leaked out. We do know that there has been no denial of the allegation that we were involved in the torturing of an innocent Canadian. This amendment would prevent that from even coming to light, and the little bit that escapes in the bill for judicial review, you have a provision in there on the top of page 80 that the court may consider

classified information submitted in camera and ex parte in making determinations. That is in camera, that is not public. Ex parte, one-sided. So the defendant never knows what happened.

We haven't had any hearings on this. There is no military—we haven't heard from the military that said they need this, whatever this section 5. I would hope that we would delete it and if there is a need for it, let the military come forward and explain what they need it for. But otherwise we would not expect people to be doing this to American soldiers overseas, so we shouldn't have that as part of our law. I would hope that we would adopt the amendment, and I yield back.

Chairman SENSENBRENNER. The question is on——

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler, for what purpose do you seek recognition?

Mr. NADLER. I seek recognition to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. You don't need permission and you are recognized for 5 minutes.

Mr. NADLER. Thank you. I appreciate the recognition if not the permission.

Mr. Chairman, I rise in support of this amendment. The underlying bill without the amendment would eliminate habeas corpus for so-called enemy combatants. Habeas corpus is the rock solid foundation of our system of justice for the last 800 years. It is inconceivable to have a fair system of justice without habeas corpus or something like it.

We have—the gentleman from Virginia referred to the torture by mistake. We have had—let me read from—we have had many cases of people in Guantanamo in secret sites held by the CIA, we don't know where they are, who are held—we haven't given them the right of habeas corpus and we don't know.

The President says they are the worst of the worst. The truth is some may be and some may be innocent people caught up and sold by warlords in Afghanistan or being in the wrong place at the wrong time. A fellow named Abu Bakir Qassim wrote an op ed piece in the Times the other day. He was held in Guantanamo because Pakistani bounty hunters sold him and 17 others to the United States military for $5,000 a head. Turned out he was innocent of anything, but he was only released because of the writ of habeas corpus.

This bill says that no court has jurisdiction of habeas corpus and no court except the D.C. Circuit can have any review of these, but only for final review of a final decision of a combatant's status review tribunal or a military court, a military tribunal.

Very few people are going to get tried by military tribunals. That is only for people accused of war crimes. Most people will have nothing. There is no guarantee that anybody will ever go before a combatant status review tribunal. Under this bill without this amendment we could arrest somebody in good faith but by mistake and that person could be in jail for life with no opportunity to see the evidence against him, to know what he is charged with, or anything else. That is not anything that we can call justice.

The New York Times points out the White House wants to strip the Federal courts of any power to review the detentions of the prisoners in Guantanamo Bay, and I would say anywhere else, too. The provision is no real barrier in the handful of genuine terrorists recently shipped there from abroad. Their cases are likely to be brought before military tribunals, whose judgments could be appealed to higher courts, but it has a profound impact on the hundreds of others at Guantanamo Bay, many, perhaps the majority who committed only minor offenses, if any.

The administration has no intention of trying them, no intention of trying them and wants to prevent them from appealing for help in court. In other words, these people could be in jail forever with no hearing whatsoever. That is not only un-American, it is against everything this country stands for, and I would agree with the gentleman from Virginia it is intolerable that we are considering bills of this complexity and this importance without hearings, without the subcommittee having looked at them, but beyond that, to pass a bill which in effect enables people to be held in jail forever with no hearing whatsoever of any kind, no showing of guilt.

The President says they are the worst of the worst but he doesn't know. Some agent decided someone was bad. Some warlord in Afghanistan said the Chinese told me to give this person to you. We have no idea. We could be wrong. That is not any kind of civilization.

I urge my colleagues to vote for this amendment.

Chairman SENSENBRENNER. Does the gentleman yield back? The question is on——

Mr. JENKINS. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. JENKINS. I yield to the gentleman from California.

Mr. LUNGREN. I thank the gentleman for yielding.

Let's at least get something straight here. This is not the habeas provision of the last 800 years. That is the writ of habeas corpus in the Constitution. We are talking about statutory habeas, which is a very different thing, and people on this panel continue to misstate what the law is.

We are not talking about the great writ, we are talking about statutory habeas, which the Supreme Court has said time and time again is under the jurisdiction of the Congress to give or to take away, number one. Number two, this decision has already been made by this Congress. This decision was made by this Congress earlier when we passed the DTA.

What this is about is whether or not it applies to people already in Guantanamo. That is what it applies to. Nothing else. We have already made the decision, both the House and the Senate, and the law passed by the President which says this is the process that will obtain.

Thirdly, it does not mean you don't have a right but it is not the habeas corpus. We have given you a right of review to the D.C. Circuit, so all of these questions could be handled by one court.

Mr. NADLER. Would the gentleman yield for a question? I am going to ask a question. The right under habeas.

Mr. LUNGREN. Fine.

Mr. NADLER. You just stated that you have the right. You have the right to appeal to the D.C. Circuit, yes; from a military tribunal, if they choose to bring you before one, or from a combatant status review, CSR, tribunal if they choose to bring you before that. There is no guarantee that you go before that. So the fact is that you have no rights of anything.

Mr. LUNGREN. I think the gentleman is mistaken.

Mr. NADLER. Why?

Mr. LUNGREN. Because the procedure is automatic.

Mr. NADLER. The procedure is not automatic. What procedure is automatic?

Mr. LUNGREN. You have——

Chairman SENSENBRENNER. The time belongs to the gentleman from Tennessee and only he can yield.

Mr. JENKINS. Mr. Chairman, I retain my time and yield back the balance of my time.

Chairman SENSENBRENNER. We have three votes on the floor. The Chair again requests members to return promptly after the votes, more promptly than last time. And without objection the committee is recessed until after the three votes.

[Recess.]

Chairman SENSENBRENNER. The committee will be in order. A working quorum is present. When the committee recessed for the votes, pending was the motion by the Chair that the version of the bill reported by the Committee on Armed Services be favorably reported. That version was considered as read, open for amendment at any point and pending was an amendment by the gentleman from Massachusetts, Mr. Meehan.

The question is on the Meehan amendment. Those in favor will say aye. Those opposed, no. The noes appear to have it.

Mr. MEEHAN. Mr. Chairman, I would like a rollcall vote on that.

Chairman SENSENBRENNER. Recorded vote will be ordered. Those in favor of the Meehan amendment will as your name is called answer aye, those opposed no, and the Clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK.Mr. Coble.

[No response.]

The CLERK. Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith votes no.

Mr. Gallegly.

[No response.]

The CLERK. Mr. Goodlatte.

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte votes no.

Mr. Chabot.

Mr. CHABOT. No.

The CLERK. Mr. Chabot votes no.

Mr. Lungren.

[No response.]

The CLERK. Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins votes no.
Mr. Cannon.
[No response.]
The CLERK. Mr. Bachus.
[No response.]
The CLERK. Mr. Inglis.
[No response.]
The CLERK. Mr. Hostettler.
[No response.]
The CLERK. Mr. Green.
Mr. GREEN. No.
The CLERK. Mr. Green votes no.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
[No response.]
The CLERK. Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.
Mr. Pence.
[No response.]
The CLERK. Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes votes no.
Mr. King.
[No response.]
The CLERK. Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no.
Mr. Franks.
[No response.]
The CLERK. Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert votes no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers votes aye.
Mr. Berman.
[No response.]
The CLERK. Mr. Boucher.
[No response.]
The CLERK. Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler votes aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye.
Mr. Watt.
[No response.]
The CLERK. Ms. Lofgren.
[No response.]
The CLERK. Ms. Jackson Lee.

[No response.]
The CLERK. Ms. Waters.
[No response.]
The CLERK. Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan votes aye.
Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.
[No response.]
The CLERK. Mr. Weiner.
[No response.]
The CLERK.Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
[No response.]
The CLERK. Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen votes aye.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz votes aye.
The CLERK. Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman votes no.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes. The gentleman from North Carolina, Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble, no.
Chairman SENSENBRENNER. The gentleman from California, Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Chairman SENSENBRENNER. The gentleman from South Carolina, Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes. If not, the Clerk will report.
The gentleman from New York, Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon. The gentleman from Utah, Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon, no.
Chairman SENSENBRENNER. The gentleman from Massachusetts, Mr. Delahunt.
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye.
Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Chairman SENSENBRENNER. Further members who wish to cast or change their vote. If not, the Clerk will try again to report.

The gentleman from Arizona, Mr. Franks.

Mr. FRANKS. No.

The CLERK. Mr. Franks, no.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Aye.

The CLERK. Ms. Jackson Lee, aye.

Mr. Chairman, 11 ayes and 15 nays.

Chairman SENSENBRENNER. The amendment is not agreed to.

The vote has been reported.

Mr. NADLER. Ask unanimous consent to reopen the votes so Mr. Boucher may cast his vote.

Chairman SENSENBRENNER. Without objection. The gentleman from Virginia.

Mr. BOUCHER. Aye.

The CLERK. Mr. Boucher, aye.

Chairman SENSENBRENNER. The Clerk will report again.

The CLERK. Mr. Chairman, there are 12 ayes and 15 nays.

Chairman SENSENBRENNER. The amendment is not agreed to. Are there further amendments?

Ms. JACKSON LEE. I have an amendment at the desk.

Chairman SENSENBRENNER. The gentlewoman from Texas has an amendment at the desk which the clerk will report.

The CLERK. Amendment to H.R. 6054 offered by Ms. Jackson Lee of Texas and Mr. Nadler of New York.

[The amendment follows:]

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AMENDMENT TO H.R. 6054

OFFERED BY MS. Jackson Lee of Texas and Mr. Nadler of New York

[Page & line Nos. refer to text as reported from Committee on Armed Services]

In section 6, strike subsection (b) (page 80, lines 14 through 23) and redesignate the succeeding subsection accordingly.

[The prepared statement of Ms. Jackson Lee follows:]

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

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Congress of the United States
House of Representatives
Washington, DC 20515

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RANKING MEMBER
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HOMELAND SECURITY
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CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT

BEFORE THE

JUDICIARY COMMITTEE

IN SUPPORT OF AMENDMENT #1 TO H.R. 6054

"MILITARY COMMISSIONS ACT OF 2006"

SEPTEMBER 20, 2006

Mr. Chairman, I have an amendment at the desk. It is labeled 6054-3. I offer this amendment on behalf of myself and Mr. Nadler and I thank the Ranking Member for his support.

Mr. Chairman, this amendment improves H.R. 6054, the Military Commissions Act of 2006 by striking Section 6 (b) from the bill.

It is clear to us, Mr. Chairman that Section 6 of the bill would redefine Common Article 3 of the Geneva Conventions to equate it to the standards set forth in the Detainee Treatment Act *and would render those rights judicially unenforceable*. This interpretation and application violates the core principles of the Geneva Conventions and poses a grave threat to American service-members, now and in, heaven forbid, future wars. This is not just our view, Mr. Chairman. It is also the view expressed powerfully and eloquently, by Gen. John Vesey, former Chair of the Joint Chiefs of Staff; former Secretary of State Colin Powell; former prisoner of war Senator John McCain; former Navy Secretary and Senate Armed Services Committee Chair, John Warner; former Air Force JAG officer Senator Lindsay Graham; and scores of retired flag officers of the United States armed services.

With respect to the interpretation and judicial enforceability of Common Article 3, Mr. Chairman, *the real question to be decided is not whether terrorists are bad, but whether American will remain good and true to its ideals and values*.

Common Article 3 of the Geneva Conventions provides the *minimum* standards for humane treatment and fair justice that apply to anyone

captured in armed conflict. These standards were specifically designed to ensure that those who fall outside the other, more extensive, protections of the Conventions are treated in accordance with the values of civilized nations. The framers of the Conventions, including the American representatives, in particular wanted to ensure that Common Article 3 would apply in situations where a state party to the treaty, like the United States, fights an adversary that is not a party, including irregular forces like al Qaeda. The United States military has abided by the basic requirements of Common Article 3 in every conflict since the Conventions were adopted. In every case, the military applied the Geneva Conventions -- including, at a minimum, Common Article 3 -- even to enemies that systematically violated the Conventions themselves.

As Gen. Powell and Gen. Vesey make clear, the reason the United States military has abided by this standard in its own conduct is simple: that same standard protects American servicemen and women when they engage in conflicts covered by Common Article 3. Preserving the integrity of this standard has become increasingly important in recent years when America's adversaries often are not nation-states. In 1997, Congress acted to further this goal by criminalizing violations of Common Article 3 in the

War Crimes Act, enabling the United States to hold accountable those who abuse captured personnel, no matter the nature of the armed conflict.

If any agency of the U.S. government is excused from compliance with these standards, or if the United States redefines what Common Article 3 requires, we should not be blind to the fact that our enemies will take note of our double-standard should they take U.S. prisoners captive. If degradation, humiliation, physical and mental brutalization of prisoners is decriminalized or considered permissible under a restrictive interpretation of Common Article 3, we will forfeit our moral authority and all credible objections should such barbaric practices be inflicted upon American prisoners.

This is a real, not theoretical, concern. The United States military has personnel deployed right now in theaters where Common Article 3 is the only source of legal protection should they be captured. If we allow that standard to be eroded, we put their safety at greater risk.

Mr. Chairman, section 6 of the bill creates real interpretive problems because it replaces the fixed and clear terms of Common Article 3 with a flexible, sliding scale that might allow certain coercive interrogation techniques under some circumstances, while forbidding them

under others. Replacing an absolute standard – Common Article 3 -- with a relative one will only create confusion. And it makes matters worse – and worse for America – if the protections of Common Article 3 are put beyond the reach of the federal courts. A federal court should always be permitted to consider whether the United States has acted in accordance with the minimum standards set forth in Common Article 3 of the Geneva Convention. Up to now, America has never shied away from that scrutiny because it has always complied with this international benchmark of humane treatment.

Finally, it should be noted that should we take this step, the rest of the world will see us as having renounced the clear strictures of the Geneva Conventions for a mere temporary advantage. Our enemies would be encouraged to interpret the Conventions in their own way as well, placing American soldiers at risk. This is unnecessary. Our armed forces have trained to Common Article 3. They can live within its requirements and win the war on terror decisively and honorably. And we will honor them by placing our confidence in their ability to win this victory without sinking to the level of our enemies.

I urge all Members to support the amendment. I yield back the balance of my time. Thank you.

Mr. SMITH. Mr. Chairman, I reserve a point of order.

Chairman SENSENBRENNER. Point of order is reserved.

The CLERK. In section 6 strike subsection (b), page 80, lines 14 through 23 and redesignate the succeeding sections accordingly.

Chairman SENSENBRENNER. The gentlewoman from Texas is recognized for 5 minutes.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman. To my colleagues, I started out this debate by indicating that I hope that we will not be gripped by the hands of fear and the hands of politics and the hands of rejection. The hands of rejection are to look at our military brass and the men and women on the front lines and indicate to them that we only use and employed you during times of patriotism and special holidays but when you recommend to us that this will jeopardize your actions on the front lines and your ability to defend America, we give you little comfort and little consequence.

So on behalf of myself and Mr. Nadler I offer this amendment that improves H.R. 6054, the Military Commissions Act, by striking 6(b) from the bill. It is clear to us, Mr. Chairman, that section 6 of the bill would redefine Common Article 3 of the Geneva Convention to equate it to the standards set forth in the Detainee Treatment Act and would render those rights judicially unenforceable. This interpretation and application violates the core principles of the Geneva Conventions and poses a grave threat to American services members now and in, heaven forbid, future wars.

This is not just our view. I think what is important about striking that provision is that it goes to the core of those who pay the toll. Our military pay the toll. John McCain paid the toll, and many, many others paid the toll. It is the view expressed powerfully and eloquently by General John Vessey, former Chair of the Joint Chiefs of Staff, and former Secretary of State Colin Powell and the orchestrator of the successful Gulf War I who understood that massive numbers of troops could be the victory if you had to engage in war, interestingly enough, less casualties and certainly less prisoners of war than that we have today.

Right now in Iraq we have a raving civil war with our troops in the middle of it. People are being kidnapped every single day and our troops are not immune. Right now as we look at this legislation we are putting their lives in jeopardy. We are rejecting the pleas of their leadership by ignoring the convention that so aptly and ably has protected our soldiers and those around the world.

Former prisoner of war Senator John McCain, former Navy Secretary and Senate Armed Services Committee Chairman John Warner, and certainly our own former member of this committee who was part of the JAG core, Senator Lindsay Graham. I know about the JAG obviously because I went to the University of Virginia that has one of the premiere JAG schools and as well was a number of years a member of the U.S. Military Appeals Court. We know the consequences of not having the parameters that will give comfort not to the enemy but our captured soldiers.

With respect to the interpretation and judicial enforceability of Common Article 3, Mr. Chairman, the real question to be decided is not whether terrorists are bad but whether America will be able to maintain its intelligence gathering and protect the United States

military. Common Article 3 of the Geneva Convention provides the minimum standards for humane treatment and fair justice that apply to anyone captured in armed conflict.

I heard my good friend on the other side of the aisle correct one of my colleagues about the tenure of this question dealing with the habeas and of course its impact, statutory versus constitutional. I would venture to say when torture is being projected on you I don't know whether you decipher as to whether or not your Nation only made mockery of the statutory habeas corpus or whether or not they made mockery of the 800-year habeas corpus.

The Geneva Convention is the protection that our soldiers need. These standards were specifically designed to ensure that those who fall outside the other more extensive protection of the convention are treated in accordance with the values of the civilized nations. The framers of the Convention, including the American representatives in particular, wanted to ensure that Common Article 3 would apply to situations where a state party to the treaty like the United States fights an adversary that is not a party, including irregular forces like al-Qaeda. Therefore, if our soldiers are captured in this ongoing new trend of guerilla warfare, we at least have the precedent, the precedent of a Nation that abhors tortuous treatment and does not adhere to the Geneva Convention.

So it is not whether or not al-Qaeda or other terrorists adhere to it, it is the standards we set so we can make the appropriate argument when our troops may be in danger. As General Powell——

Chairman SENSENBRENNER. The time of the gentlewoman has expired. The time of the gentlewoman has expired.

Does the gentleman from Texas insist on his point of order?

Mr. SMITH. No, Mr. Chairman, I do not.

Chairman SENSENBRENNER. A reservation is withdrawn. For what purpose does the gentleman from Utah seek recognition?

Mr. CANNON. To strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CANNON. Let me begin by saying that I agree with the sentiments of the gentlelady from Texas; that is, I agree that we want to protect our soldiers and that the Geneva Convention in ordinary circumstances does that. I abhor torture. We also agree I think that al-Qaeda and other terrorist groups are not constrained by the Geneva Conventions and have done awful, horrible and terrible things.

I guess part of the question here is, therefore, how do we protect our soldiers. We have a lot of history here. Some of that history was reversed in the Supreme Court decision in *Hamden*, where the bill before us, as I understand this amendment, it would strike the language in the bill before us that the Geneva Conventions do not provide any rights that are enforceable in U.S. courts.

This amendment would open the door for terrorists and trial lawyers to sue government personnel for things like

outrages against personal dignity and of course the vagueness of the language is always difficult to struggle with here and beauty is in the eye of the beholder. But here what we are going to have as the definition of outrage is in the eye of the trial lawyers and

that is going to result in an onslaught, I believe, of frivolous lawsuits.

Now if we had some better protections like the Lawsuit Abuse Reduction Act, which Mr. Smith has introduced, maybe we could live with this kind of vagueness but we don't have that. So what we are left with, our current guidelines, which are essentially advisory in these cases of frivolous lawsuits, and I suspect frivolous lawsuits will proliferate and be disruptive to our efforts to prevent terrorism.

This is not just vague talking. Michael Ratner of the Center for Constitutional Rights, who is one of the coordinating counsel for detainees, boasted, and I am quoting him now: The litigation is brutal for the United States. It is huge. We have over 100 lawyers now from big and small firms working to represent the detainees. Every time an attorney goes down there it makes it that much harder for the U.S. Military to do what they're doing. You can't run an interrogation with attorneys. What are they going to do now that we are getting court orders is to get more lawyers down there.

Look, this is a very straightforward, plain issue. If we do what the gentlelady desires despite the good sentiments behind it we handicap our ability to deal with the kind of information that these people have that will inevitably result if we don't get it in the destruction of schoolchildren or people working in skyscrapers or other easy targets that we as an American society provide.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. CANNON. I would be happy to yield, yes.

Ms. JACKSON LEE. I thank the gentleman for at least expressing the sympathy or the empathy with the intent of this particular amendment and I would only raise this qualification to the rebuttal that you have just offered, is that this is a simple amendment that allows simply for the Geneva Convention to be raised in a proceeding. It is not a door opener to frivolous lawsuits.

Mr. CANNON. Reclaiming my time, I understand that is exactly what this is, and the problem is we are not a hegemonist society where dissidents get killed. We have people who view the world from many perspectives and it is absolutely clear that people like Michael Ratner want to disturb our process of protecting ourselves and your amendment empowers Mr. Ratner and other people like him to interfere with our ability to obtain the information that will allow us to stop these terrorists.

I mean it is absolutely amazing to me, astonishing beyond my ability to actually state it that we have not had another terrorist attack on American soil. We have had other attacks around the world, we know these people want to fight and murder, we know they want to disturb, destroy and throw into chaos our complex systems. The duty of civilization is to civilize. That is our responsibility and part of that means we have to be a little bit tough. Being tough means getting the information——

Mr. CONYERS. Would the gentleman from Utah yield?

Mr. CANNON.—from people that we need to get it from in a timely manner. And we have to do that in a way that our soldiers and the people getting that information are clear. If they believe they are going to be sued, if they believe they are going to be defendants

in lawsuits, it makes it almost infinitely more difficult to do what we need to do and what this bill is trying the do.

Mr. Conyers, I see I only have a little bit of time but I am happy to yield what I have.

Mr. CONYERS. That is good, I only need a little time.

Chairman SENSENBRENNER. The gentleman from Utah's time has expired. Without objection, he gets an additional minute.

Mr. CONYERS. Thank you.

Mr. CANNON. Which I am happy to yield to Mr. Conyers.

Mr. CONYERS. Thank you. I never thought I would have to choose between your rationale and Senator Warner's rationale, which left out section 6. I appeal to you to consider that when we start selectively determining when the Geneva Conventions shall be employed it gets to be pretty risky business.

Mr. CANNON. Reclaiming my time, the Geneva Conventions on their face are clear and we have always had a historic distinction between people in uniform who are fighting because they are drafted or otherwise drawn into a conflict and people who choose to be part of a conflict using methods that we abhor more than we abhor the possibility that some American soldier is going to interrogate a detainee too roughly.

I think my minute has expired, Mr. Chairman. I yield back.

Mr. BERMAN. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Berman, seek recognition?

Mr. BERMAN. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BERMAN. To my friend from Utah, this is not—the amendment to strike is to strike a provision regarding an argument you are making, it is not about whether or not the litigation is allowed, whether the writ is allowed, it is about what argument you are making. The one thing I would like to hear is why, if you are allowed to bring a habeas action, you cannot in that habeas action claim that your rights under the Geneva Convention have been violated. That isn't about whether you are abusing it through frivolous litigation, that is about your right to make and prove one contention, that the Geneva Convention has been violated.

Why would we want to prohibit that from being part of the action? If you want to get to the issue of abuse of the process, that is one thing, but here is simply for some reason in the bill that the gentlelady seeks to strike a prohibition on making a specific argument.

I am curious about and I would be happy to yield for an understanding of why that one argument should not be allowed.

Mr. CANNON. I understand the gentleman, I believe, and I am sympathetic, but my understanding of this amendment and the practical effect is that lawyers who bring the habeas action have the ability then or will use as a matter of course or try to have access to secret information that will lead us to other information that is vitally important or sources of information or methods that we use to get information, things that we don't want to share with terrorists.

I believe that is the core of the reason that you have this provision in the bill.

Mr. BERMAN. You can deal with that issue through prohibitions on evidence. But someone files a writ and accompanies with that writ an affidavit regarding what that person claims to have been put through during the interrogation process, that is evidence to support a contention. And the person who is giving that affidavit was the person involved. So it is firsthand legitimate evidence, it is not classified evidence, and why can't they make that argument? In other words, if you want to get at abuse of litigation, or frivolous litigation, go after that. If you want to go over restrictions on the revelation of classified evidence, go to that. But why outlaw an argument that a fundamental convention that we have signed and are signatory to, that the rights under that convention have been violated; why prohibit that?

Mr. CANNON. Would the gentleman yield?

Mr. BERMAN. Sure.

Mr. CANNON. Thank you. The answer to that is I am sympathetic to everything you say and largely in agreement. I am responding to an amendment to the underlying bill that I think would gut the bill. If you want to work on other language that would do what you have suggested, I am happy to do that. I just think this amendment the way it works now is highly destructive to what we need to do overall.

Mr. BERMAN. I assume the gentlelady's amendment was simply to remove the prohibition on raising this argument.

Ms. JACKSON LEE. Would the gentleman yield?

Mr. BERMAN. I would be happy to.

Ms. JACKSON LEE. Absolutely, Congressman. If you look at the language, you are absolutely right in your interpretation. The language of 6(b) says: No person in a proceeding may invoke the Geneva Convention or any protocols. Which means that you just simply cannot argue that you were impacted negatively or positively by the use or nonuse of the Geneva Convention. It is evidence. I would simply argue that a judge or proceedings could confine the proceedings to determine whether the testimony be classified, so it could be a closed proceeding, or otherwise.

And that is all I am attempting to do, is to strike 6(b).

Mr. BERMAN. And just to reclaim my time, so it is to prohibit an argument in an action that we are allowing the individual to bring before a Federal judge who is interpreting an international agreement to which we are signatory, not some foreign tribunal or international commission, a Federal judge subject to an appellate review. It is saying, bring the action, but you can't make this argument. I can't understand what you are getting at here.

Chairman SENSENBRENNER. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman.

This is a, as far as I know, unprecedented provision in this bill. The United States has been a signatory since 1949 to the Geneva Conventions. Geneva Conventions do give people certain rights. We are told here that most of those rights are fine. Everybody's, you know, happy with them. But this provision says, no person in any habeas action or any other action may invoke the Geneva Conven-

tions or any protocols thereto as a source of rights, directly or indirectly, for any purpose, any court of the United States or its States or territories.

What that is saying is that if you are dealt with in a manner contrary to the rights given by the Geneva Convention, you can't tell that to a court. You can go to court. It doesn't stop you from going to court, but you have to make some other claim.

Article VI of the Constitution of the United States reads as follows: This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding.

This says, in so many words, that the treaties to which the United States is a signatory which the Senate has ratified are the law of the land, and the judges are bound and the Court shall enforce it.

Now, it is true that a treaty is a law. We can pass another law, and that law can abrogate the treaty. Everybody else in the world can say we are faithless. We don't adhere to our word. They may conclude that. But we have the power to pass the law to abrogate a treaty which—as we have the power to repeal or supersede any law passed previously.

I don't doubt the power of this Congress to do that. I doubt the rightness of that action. What precedent do we set by saying we are not abrogating the treaty? We are simply saying you can't enforce it in the law.

In fact, I am not sure you can do that. I am not sure you can say we remain signatory to the treaty. We are not repealing the treaty, but the courts can't consider any claim under the treaty.

But even if we have that power, what purpose does it serve, other than to declare to the world we are faithless to the Geneva Accord; do to our soldiers whatever you want; and we have no standing to claim under the Geneva Conventions because we are not going to give that.

But I know people will say, well, these people do not adhere—these people, the terrorists—don't adhere to the Geneva Convention. And the terrorists don't, but other people do, and not everybody arrested is a terrorist. We may think they are a terrorist.

One of the parts of this debate that frustrates me from the President on down, he says, they are the worst of the worst. People arrested, people held in Guantanamo, people held in some secret prison in God knows where may be the worst of the worst, or they may be innocent, or they may be somewhat guilty, or there may be mistakes.

We saw that Mr. Hariri was a mistake. We have seen others that were mistakes. Hundreds of people we have admitted now were mistaken.

You cannot say that people who are arrested in the belief that maybe they are guilty should be treated—they should have no rights, because, after all, they are the worst of the worst. Once you have determined they are the worst of the worst, then punish

them. But first you need some due process. That is what this country stands for.

And to say that a treaty to which we are a signatory, which we hope that other civilized powers will abide by and will treat our captured soldiers by in future wars—God forbid there should be any—but we are not going to allow our courts to enforce them is simply wrong and hypocritical.

And I will yield to the gentleman. I yield to Mr. Cannon.

Mr. CANNON. Thank you.

Let me just say that I wish—it would be interesting if God would prohibit wars, but he has been around for a long time, as long as man, and hasn't yet done so.

Mr. NADLER. He has prohibited them. He just hasn't enforced it.

Mr. CANNON. Right.

We don't disagree on many things, but there are a couple of distinctions that I think are very important here. In the first place, the Geneva Convention makes a distinction between unlawful combatants and uniformed combatants; and that distinction is——

Mr. NADLER. Reclaiming my time for the moment, under the Geneva Convention you are supposed to have a tribunal, an article 5 tribunal right there, within a very short period of time where you have captured somebody, if you claim that he is not a prisoner of war, that he is an unlawful combatant. We have chosen—the President declared we are not holding such tribunals. We are declaring a whole class of people, whoever we capture, as unlawful. So that is a violation right off the bat.

Mr. CANNON. May I just make one other point? Will the gentleman yield?

Mr. BERMAN. Just one thing. The irony of this bill, if this amendment were to lose, is that, in a bill that is done in the name of complying with the Supreme Court decision in *Hamden*, you are taking away the way that court decision came about because there could have been no effort to raise the issue that caused that issue to be made.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Mr. NADLER. Can I have ask for another minute so Mr. Cannon and I can clarify?

Chairman SENSENBRENNER. Without objection, the gentleman is recognized for another minute.

Mr. NADLER. Let Mr. Berman finish then, Mr. Cannon.

Mr. CANNON. Have you finished, Mr. Berman? Thank you.

The other point I wish to make is that this is—the effect of what we do here is profound, and what I haven't heard from the other side is any repudiation of Mr. Ratner's statement. In other words——

Mr. NADLER. Reclaiming my time, I will repudiate Mr. Ratner's statement if it is quoted correctly. The fact of the matter is that one of the prices you sometimes pay for litigation is it takes time. Now there are ways under our law, and maybe we should strengthen them, and maybe we should have another amendment or a bill to strengthen our defenses against frivolous legislation. Maybe. But to simply say that we are not going to allow our treaties to be enforced in our courts is hardly the way to do that.

Mr. CANNON. Again, this is—to make—will the gentleman yield?

Mr. NADLER. I yield, yes.

Mr. CANNON. I don't believe this is a matter of not being properly supportive of the Geneva Convention. But, that said, if the gentleman is willing to work with me to limit frivolous lawsuits, that may give us the ability to come back later. We have guys today in the field who don't know what they can do in interrogation. I think we need to send them a very clear signal today.

And I yield back.

Chairman SENSENBRENNER. The question is on the amendment offered by——

Mr. VAN HOLLEN. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Maryland, Mr. Van Hollen, seek recognition?

Mr. VAN HOLLEN. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. VAN HOLLEN. Back to this issue of the United States setting a standard for others in the world to follow. I think if other countries that have adopted the Geneva Convention, as the United States has adopted, were to then pass as a matter of their domestic law various provisions that said that they were not going to allow provisions to the Geneva Convention to be enforced in their courts, we would be screaming bloody murder. Because that would mean that our troops would not be entitled to any kind of protection under the Geneva Convention as applied to those courts.

So I really think that we are rushing to judgment here. I do not believe these things have been thought through.

Mr. Cannon, you said that you sort of agreed with the thrust of what had been said and yet, you know, you oppose the amendment. So I think it would behoove us, Mr. Chairman, to really take that provision out; and then, if someone can put forward a good justification for putting it back in, the burden should be on them for doing it. And, therefore, I would certainly support this amendment.

I would yield the balance of my time to Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Van Hollen, thank you very much for I think what was a very clear and lucid explanation simply of what I am attempting to do with Mr. Nadler; and I think it is important to refer back to this little document. You cited provisions and certainly provisions and the recognition of our compliance with treaties. But I think here is where my colleagues are going on the other side.

They want to reject the Geneva Convention of the Korean War. They want to reject the Geneva Convention of the Vietnam War. They want to reject it of Gulf War I. Because they are basically saying it is antiquated. We don't need to adhere to it. And matching frivolous lawsuits with the right of a petitioner to simply raise the question of the Convention begs the question of our own understanding of the protection that our soldiers need.

I can imagine that we have gotten this jurisdiction, as I said, by accident, because the Supreme Court said that the President was wrong. He was wrong, wrong, wrong. And all we are doing is righting what the President did wrongly and sending it back to the Supreme Court. And then, in addition to accepting the wrongness of

the President and the wrongness of the administration, we are going to ignore soldiers who have been shot at, soldiers like General Vessey and General Powell, who today have wounds that they experienced in battle.

And they are saying—and because General Powell used the word "moral," he is now being made mockery of; and I take offense to those who would malign his morality statement. All that he said was that he wanted to associate himself with the words of General Vessey, and General Vessey cited the particular document, considered Americans in combat. Certainly it was a document written in World War II; and, of course, there is a great deal of humor saying we are in a war of terror now.

But what we are suggesting is that when you begin to tear up the Constitution, tear up provisions that we have used from war to war—and Vietnam was a guerilla war if it was anything else—then we begin to jeopardize soldiers wherever they might be all over the world.

As relates to fighting the war on terror, we have convinced the American people that you are right and we are wrong, that we are weak on terrorism, that we are now not wanting to proceed, not wanting to proceed to protect America.

Intelligence is the offensive. We can get the intelligence. But I ask the question again. Do we want the Canadian story of this individual who went all the way to Syria back and we found out that we maligned him and he had the wrong information and he was tortured wrongly, is there any evidence that the informant in Pakistan that helped bring down the British, the terrorist plan, was tortured? Or did we just have an informant?

There are many ways to fight this war on terror, and I can't imagine that the administration would stand by the sheer lack of use of the Geneva Convention in a proceeding. That is all my amendment and Mr. Nadler's amendment does. It strikes section 6(b) which takes out the right to simply acknowledge in your defense that there was a Geneva Convention problem. So we are tearing up the Constitution and we are shredding the Geneva Convention.

Mr. LUNGREN. Would the gentlelady yield on that?

Ms. JACKSON LEE. I'd yield for a moment. I am on Mr. Van Hollen's time.

Chairman SENSENBRENNER. The time belongs to the gentleman from Maryland.

Ms. JACKSON LEE. So I will continue.

Chairman SENSENBRENNER. The time of the gentleman has expired.

Ms. JACKSON LEE. And I ask my colleagues to support the amendment.

Chairman SENSENBRENNER. The question is on the Jackson Lee amendment. Those in favor will say aye.

Mr. SCOTT. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Virginia seek recognition?

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, the gentleman from New York has reminded us of the awkward situation we are in when we set up criminal laws and procedures and that is that both the guilty and the innocent will be tried by the same process. We don't know at the beginning of the process whether the person is innocent or guilty, so whatever we do is going to affect both of them.

Now, we haven't had any hearings and we haven't had any subcommittee markup, so it is hard to know the actual effect of section 6 and how it differs from what we are doing now, what the present law has been up to now, whatever the President is doing and how it is going to affect us afterwards. But it incredibly just declares that what will satisfy all of article 3 of the Geneva Convention—it doesn't tell us how it changes things. It just says that satisfaction of the provisions of section 1003 of the Detainee Treatment Act of 2005 shall fully satisfy the United States' obligations with respect to the standards for detention and treatment established by article 3 of the Geneva Conventions. Just declares it. And then it says, whatever rights you have left after that paragraph, you can't enforce them in court.

We haven't been requested—it is not apparent to me that we have had any request from the military to change, if we are changing, the definition of what constitutes torture. But it would be nice to hear from them in some hearings so we know what we are doing.

This is precedence, the United States declaring what we are going to consider torture. It doesn't say what everybody else in the world considers torture. We are just going to declare what we think it is. This sets a mighty poor precedence for what other countries are going to do.

Suppose Iran or Iraq just decided, well, I think, notwithstanding what the rest of the world is doing, we are going to define torture this way. We wouldn't put up with that. And we are setting the moral tone for everybody else. We wouldn't want our soldiers treated by whatever Iran makes up this week for their new definition of torture.

We ought to remove this section till we can put in there something that will withstand international scrutiny, not just something that's made up, no hearings, no subcommittee markup or anything else. I would hope that we would adopt the amendment.

Mr. CHABOT. Would the gentleman yield?

Mr. SCOTT. I yield to the gentleman from Ohio.

Mr. CHABOT. I thank the gentleman for yielding.

I will be very brief. I just wanted to go back to what the gentleman's colleague, the gentlelady from Texas—before, she talked about a man who was tortured wrongly. Our position is there is no way to torture rightly. We are talking about more aggressive tactics to get information that will save American lives, sometimes thousands of American lives, but none of us condone torture on this side of the aisle.

I thank the gentleman for yielding.

Mr. SCOTT. Well, reclaiming my time.

Mr. BACHUS. Will the gentleman yield further?

Mr. SCOTT. Well, let me just respond. Because if we are just going to make up what we think is torture, notwithstanding what

everybody else in the world thinks is torture isn't much of a definition.

I yield to the gentleman from Alabama.

Mr. BACHUS. What I am curious about from both you and the gentleman from Virginia and the gentlewoman from Texas and the Armed Services Committee, who reviewed this and passed it, it was—of the Democrats on that committee, 19 voted in favor of this legislation, and only 8 opposed it. And all of a sudden we get to the Judiciary Committee, and we are tearing up the Constitution. I just wonder, the 19 Democrats who voted for this legislation on the Armed Services Committee, in other words, probably three out of four Democrats on the committee voted in favor of this legislation.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. BACHUS. Did they say—I mean, they voted for this legislation, and I would—you have someone on the other side that said an intelligent individual would not support this legislation.

Mr. SCOTT. Reclaiming my time, the Judiciary Committee has a different responsibility. The Armed Services Committee is fighting the war, and we are trying to put all these things together in some fashion that we can defend with the Constitution form of government.

Mr. BACHUS. Would you yield?

Mr. SCOTT. As I indicated to the gentleman, John Warner, John McCain, Lindsay Graham also reviewed it; and they came up with the idea that they want American troops treated the way this would allow others to be treated.

Mr. BACHUS. I am talking about the 19 members, an overwhelming number of Democrats on the Armed Services Committee, who voted in favor of this and said it was very necessary.

Chairman SENSENBRENNER. The time of the gentleman from Virginia has expired.

Mr. LUNGREN. Mr. Chairman.

Chairman SENSENBRENNER. The gentleman from California, Mr. Lungren.

Mr. LUNGREN. Mr. Chairman, request permission to strike the requisite number of words.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. LUNGREN. Mr. Chairman, I have been trying to decipher what this section of the bill is and what the amendment seeks to do; and I was intrigued by the gentlewoman from Texas' comments on the fact that if we don't adopt her amendment that somehow this bill will abrogate the rights that were enjoyed by American troops and our enemy during the Second World War, the Vietnam War, the Korean War.

And unless I am mistaken, during all those periods of time and up to the *Hamden* decision, the understanding of the courts was consistent that the Geneva Convention, as a convention, is not enforceable by individuals in terms of court appeal. Rather, the enforcement mechanism was a diplomatic mechanism.

That is, countries were held to account for either following the Geneva Accords or not and that the very existence of the sections of the Military Code of Justice that we are talking about, that have

been incorporated, or reference to Common Article 3 is incorporated into our Criminal Code or our Military Code and that, therefore, what this does is bring us back to the common understanding and enforcement of that treaty as it was understood prior to the *Hamden* decision.

So, if that is the case, I guess we have something—the question before us is whether we think that is the appropriate way to do it or that we should do it in this new interpretation of enforcement of the Geneva Convention.

I just want to make it clear that that is a policy decision for us to make. But to suggest that by maintaining this section in this bill we are somehow turning our back and turning the clock back from what it was during World War II, the Korean War and the Vietnam War is factually incorrect.

And I yield to the gentleman from Virginia.

Mr. GOODLATTE. I thank the gentleman for yielding.

I thank him for his very cogent observation regarding that. I agree with that fully, and I would add to that.

In response to the comments of the gentleman from Virginia, Mr. Scott, who expressed concern that somehow the United States would be taking the country in a new direction in terms of interpreting what the Geneva Convention means and we would be taking a different interpretation than other countries who signed it, I would point out that on the day we signed it we did that. Because we have here a page and a half of reservations that we filed upon ratification of the Geneva Convention that sets forth our specific definitions of torture, our specific definitions of what is encompassed within the purview of our Constitution as it affects United States' citizens and a whole host of other reservations. And all we are doing in this action today is clarifying what we intended at that time and restoring that, based upon what I think is a flawed Supreme Court decision.

Mr. LUNGREN. I appreciate the gentleman's comments.

The other thing in terms of the Supreme Court decision, if you look at the core of it, it is to say that these individuals are accorded recognition under the Geneva Accords under a section which specifically says they would not be.

That section that was referred to by Justice Stevens in his opinion basically talked about these are not international disputes and they involve a singular party which is a signatory to the Convention. In other words, it is a singular definition of a civil war within a country which is a signatory to the Accords.

The basis of the Accords or the Convention was a sense of reciprocity. That is, we were attempting to encourage people to join into the Convention by virtue of the fact that we would accord certain rights that they would accord.

Then we have the Supreme Court decision saying, irrespective of whether you agree to do that, we are going to bind ourselves to it; and that is really the question of, I think, misinterpretation.

But also, more than that, the question of in the way the real world works in international events or affairs, what incentive is there for an enemy to agree to the Geneva Convention if, in fact, they get all of the benefits from it without any of the responsibilities?

And that is separate from the question of how you enforce it. We have traditionally enforced the norms of the Geneva Convention to which we have agreed through our Military Code of Conduct and our criminal laws. This would be——

Chairman SENSENBRENNER. The time of the gentleman from California has expired.

The question is——

Ms. WATERS. Mr. Chairman.

Chairman SENSENBRENNER. Okay.

Ms. WATERS. I move to strike the last word.

Chairman SENSENBRENNER. Okay. And——

Ms. WATERS. I yield to the gentlewoman from Texas.

Chairman SENSENBRENNER. Just a minute, please. The gentlewoman from California is recognized for 5 minutes and is estopped from complaining that we are practicing sleep deprivation when we are here at 1:00 this morning.

Ms. WATERS. I don't know what you are talking about, but I yield to the gentlelady from Texas.

Ms. JACKSON LEE. Let me welcome all of you to the 1:00 a.m. proceedings for the House Judiciary Committee.

But I thank the distinguished gentlewoman for her yielding. It gives me an opportunity to try and correct some of the well-intended but misstatements of my friends on the other side of the aisle.

If we were on the playground, we would say in some kind of confrontation, you started it. It is interesting that my friends are talking about their interpretation of the Geneva Convention, and it is not to be interpreted this way. They started it.

They have in section 6(b) that you cannot use an existing Convention that has been in force since the Korean War, the Vietnam War, the Gulf War; and it has been used by the United States military in times of war but also in times of securing necessary intelligence.

I want to correct my good friend from Ohio in correcting my English. It is what I said, that he was wrongly tortured, and wrongly tortured means that torture is wrong, though it is utilized, but also that he was tortured in that he was innocent. So if we were trying to punish someone who we thought was not innocent, we have wrongly done it; and we have wrongly done it, in essence, if we believe that is the way that we should promote our values.

We have a war on terror. And our colleagues on the other side, again, are using the politics of elections to suggest that we are, on this side, weak on the war on terror. So this legislation now having to be in place because of the Supreme Court decision, we are not doing our oversight job by giving good guidance to the executive, good guidance to the interrogators who are out there, who want to do the right thing. What we are doing is allowing a free-for-all.

My only point that I am making is a simple, singular point, and that is the point that General Vessey has made, and I ask unanimous consent to submit his statement into the record, the former Chairman of the Joint Chiefs of Staff. I ask unanimous consent to submit the statement, his letter into the record.

Chairman SENSENBRENNER. Without objection.

Ms. JACKSON LEE. Thank you.

[The information follows:]

Sep 13 2006 3:44PM

September 12, 2006

The Honorable John McCain
United States Senate
Washington, DC 20515

Dear Senator McCain:

Sometimes, the news is a little garbled by the time it reaches the forests of North-central Minnesota, but I call your attention to recent reports that the Congress is considering legislation which might relax the United States support for adherence to Common Article 3 of the Geneva Convention. If that is true, it would seem to weaken the effect of the McCain Amendment on torture of last year. If such legislation is being considered, I fear that it may weaken America in two respects. First, it would undermine the moral basis which has generally guided or conduct in war throughout our history. Second, it could give opponents a legal argument for the mistreatment of Americans being held prisoner in time of war.

In 1950, three years after the creation of the Department of Defense, the then Secretary of Defense, General George C. Marshall, issued a small book, titled *The Armed Forces Officer*. The book summarized the laws and traditions that governed our Armed Forces through the years. As the Senate deals with the issue it might consider a short quote from the last chapter of that book whichGeneral Marshall sent to every American Officer. The last chapter is titled "Americans in Combat" and it lists 29 general propositons which govern the conduct of Americans in war. Number XXV, which I long ago underlined in my copy, reads as follows:

> "The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not terrorize helpless non-combatants, if it is within our power to

> avoid so doing. Wanton killing, torture, cruelty or the working of unusual hardship on enemy prisoners or populations is not justified in any circumstance. Likewise, respect for the reign of law, *as that term is understood in the United States*, is expected to follow the flag wherever it goes ...."

For the long term interest of the United States as a nation and for the safety of our own forces in battle, we should continue to maintain those principles. I continue to read and hear that we are facing a "different enemy" in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950-53, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II . Through those years, we held to our own values. We should continue to do so.

Thank you for your own personal courage in maintaining those values, both in war and on the floor of the Senate. I hope that my information about weakening American support for Common Article 3 of the Geneva Convention is in error, and if not that the Senate will reject any such proposal.

Very respectfully,

Jack Vessey

General John W. Vessey, USA (Ret.)
27650 Little Whitefish Road
Garrison, MN 56450

Ms. JACKSON LEE. General Vessey makes it very clear that every battle that we have been in is a battle to the finish for our troops. We stand down for no one, and we don't stand down in the war on terror.

But my amendment simply argues the point that, in the instance of our detainees, allow the evidence to be presented. And we would hope that the instance of our detainees internationally, that the world opinion would come down on those that are not associated with a nation state, that they begin to feel the pressure and the punishment that would come about through terrorist activities toward our detainees.

But by giving no comfort to that language in our legislation, we throw the whole argument in the wind; and you can be assured that it will be a free-for-all for our military personnel on the front lines. And why, for the life of me, we want to step on the Constitution and step on the military personnel who not only carry around their badges of honor but they carry around wounds that they have suffered as members of the United States military.

So this amendment is simple. The amendment of Mr. Nadler and myself, it strikes section 6(b). And if any of you would read section 6(b) you would find that the interpretation, Mr. Berman, is absolutely correct. It is simply allowing that kind of evidence to be presented. And it could be, in essence, by the Court presiding, dismissed, ruled out of order, not allowed, but in the circumstances that is before them, the Court could go into a session that is closed, many opportunities. But as long as that is allowed in——

I cannot imagine why my colleagues will not see reason behind those who have experienced the military procedures to allow this amendment to prevail and for it to be stricken, section 6(b); and I ask my colleagues to support this amendment.

I yield back.

Chairman SENSENBRENNER. The time of the gentlewoman has expired.

The question is agreeing to the amendment offered by the gentlewoman from Texas, Ms. Jackson Lee. Those in favor will say aye; those opposed, no.

Ms. JACKSON LEE. rollcall.

Chairman SENSENBRENNER. The noes appear to have it. The noes have it, and the amendment is not agreed to. Are there further amendments?

Ms. JACKSON LEE. I asked for a roll call, Mr. Chairman.

Mr. DELAHUNT. I ask for a recorded vote, Mr. Chairman.

Chairman SENSENBRENNER. Okay. Well, the proper time to ask for a recorded vote is between the time the Chair says that the ayes or the noes appear to have it.

Ms. JACKSON LEE. I was speaking, Mr. Chairman. You didn't hear me.

Chairman SENSENBRENNER. No, you spoke too soon.

But the Chair will order a roll call, without objection. Those in favor of the Jackson Lee amendment will, as your names are called, answer aye; those opposed, no. And the clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK.Mr. Coble.
Mr. COBLE. No.
The CLERK. Mr. Coble votes no.
Mr. Smith.
Mr. SMITH. No.
The CLERK. Mr. Smith votes no.
Mr. Gallegly.
Mr. GALLEGLY. No.
The CLERK. Mr. Gallegly votes no.
Mr. Goodlatte.
Mr. GOODLATTE. No.
The CLERK. Mr. Goodlatte votes no.
Mr. Chabot.
Mr. CHABOT. No.
The CLERK. Mr. Chabot votes no.
Mr. Lungren.
Mr. LUNGREN. No.
The CLERK. Mr. Lungren votes no.
Mr. Jenkins.
Mr. JENKINS. No.
The CLERK. Mr. Jenkins votes no.
Mr. Cannon.
Mr. CANNON. No.
The CLERK. Mr. Cannon votes no.
Mr. Bachus.
Mr. BACHUS. No.
The CLERK. Mr. Bachus votes no.
Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis votes no.
Mr. Hostettler.
Mr. HOSTETTLER. No.
The CLERK. Mr. Hostettler votes no.
Mr. Green.
[No response.]
The CLERK. Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
[No response.]
The CLERK. Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.
Mr. Pence.
[No response.]
The CLERK. Mr. Forbes.
[No response.]
The CLERK. Mr. King.
Mr. KING. No.
The CLERK. Mr. King votes no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney votes no.
Mr. Franks.
Mr. FRANKS. No.

The CLERK. Mr. Franks votes no.
Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert votes no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers votes aye.
Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman votes aye.
Mr. Boucher.
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher votes aye.
Mr. Nadler.
Mr. NADLER. Aye.
The CLERK. Mr. Nadler votes aye.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott votes aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt votes aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren votes aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee votes aye.
Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters votes aye.
Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan votes aye.
Mr. Delahunt.
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt votes aye.
Mr. Wexler.
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler votes aye.
Mr. Weiner.
Mr. WEINER. Aye.
The CLERK. Mr. Weiner votes aye.
Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff votes aye.
Ms. Sánchez.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez votes aye.
Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen votes aye.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.

The CLERK. Ms. Wasserman Schultz votes aye.

Mr. Chairman.

Chairman SENSENBRENNER. No.

The CLERK. Mr. Chairman votes no.

Chairman SENSENBRENNER. Members in the Chamber wish to cast or change their votes?

Gentleman from California, Mr. Issa.

Mr. ISSA. No.

The CLERK. Mr. Issa, no.

Chairman SENSENBRENNER. Gentleman from Virginia, Mr. Forbes.

Mr. FORBES. No.

The CLERK. Mr. Forbes, no.

Chairman SENSENBRENNER. Further members who wish to cast or change their votes?

If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 17 ayes and 18 nays.

Chairman SENSENBRENNER. The amendment is not agreed to.

Are there further amendments?

Ms. LOFGREN. Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentlewoman from California seek recognition?

Ms. LOFGREN. A unanimous consent request.

I was on the floor when the vote was taken on Mr. Meehan's amendment. Had I been present, I would have voted aye; and I request that that be made a part of the record in the appropriate place.

Chairman SENSENBRENNER. Without objection.

Are there further amendments?

If there are no further amendments——

Mr. BACHUS. Mr. Chairman, I have a unanimous consent.

Chairman SENSENBRENNER. State your request.

Mr. BACHUS. Mr. Chairman, I would like to introduce a record of the Committee on Armed Services vote on this legislation——

Chairman SENSENBRENNER. Without objection.

Mr. BACHUS.—and remind the members of this committee that 19 Democratic members supported the President's efforts to interrogate terror suspects.

Chairman SENSENBRENNER. Okay. That is not a unanimous consent request. The Armed Services Committee vote will be placed in the record by unanimous consent.

[The information follows:]

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES
ONE HUNDRED NINTH CONGRESS

ROLLCALL

Final passage of H.R. 6054, the Military Commissions Act of 2006

Date: 9/13/06 Time: 1:10 pm

Roll Call # 2

MEMBER	AYE	NO	ANSWER PRESENT	REMARKS
Mr. Hunter, Chairman	X			
Mr. Skelton	X			
Mr. Weldon	x			
Mr. Spratt	X			
Mr. Hefley	X			
Mr. Ortiz	X			
Mr. Saxton	X			
Mr. Evans	X			
Mr. McHugh	X			
Mr. Taylor	X			
Mr. Everett	X			
Mr. Abercrombie		X		
Mr. Bartlett			X	
Mr. Meehan		X		
Mr. Thornberry	X			
Mr. Reyes	X			
Mr. Hostettler	X			
Dr. Snyder	X			
Mr. Jones	X			
Mr. Smith		X		
Mr. Ryun of Kansas	X			
Ms. Sanchez		X		
Mr. Gibbons	X			
Mr. McIntyre	X			
Mr. Hayes	X			
Ms. Tauscher		X		
Mr. Calvert	X			
Mr. Brady	X			
Mr. Simmons	X			
Mr. Andrews	X			
Mrs. Davis of Virginia	X			
Ms. Davis of California		X		
Mr. Akin	X			
Mr. Langevin	X			
Mr. Forbes	X			
Mr. Israel	X			
Mr. Miller of Florida	X			
Mr. Larsen		X		
Mr. Wilson	X			
Mr. Cooper	X			
Mr. LoBiondo	X			
Mr. Marshall	X			
Mr. Bradley	X			
Mr. Meek	X			
Mr. Turner	X			
Ms. Bordallo	X			
Mr. Kline	X			
Mr. Ryan of Ohio	X			
Mrs. Miller of Michigan	X			
Mr. Udall		X		
Mr. Rogers	X			
Mr. Butterfield	X			
Mr. Franks	X			
Ms. McKinney				
Mr. Shuster	X			
Mr. Boren	X			
Dr. Schwarz	X			
Mrs. Drake	X			
Mrs. McMorris Rodgers	X			
Mr. Conaway	X			
Mr. Davis of Kentucky	X			
Mr. Bilbray	X			
Total	52	8	1	

ROBERT L. SIMMONS, *Staff Director*

NOTE: Committee rule 17(d) provides that in the event of a vote or votes, when a member in attendance at any other committee, subcommittee, or conference committee meeting during that time, the necessary absence of that member shall be so recorded in the rollcall record, upon timely notification to the Chairman by that member.

Chairman SENSENBRENNER. If the gentleman wishes to strike the last word——

Mr. BACHUS. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. BACHUS. The five top Democrats—the five senior Democrats on the Armed Services Committee supported this legislation. They voted—they agreed with the President, and they voted for the legislation. There were only seven Democrats on the entire Armed Services Committee, including Mr. Meehan, who serves on this committee, who voted against it. And I would simply say that to vote against this legislation you are not only out of step with the American people, who want something done about these terrorist attacks and threat on our national security—and if the anniversary of 9/11 wasn't enough, I would certainly hope that the exposure of the airline plot in London was enough. But I simply say, you know, this vote—this vote is about the national security of our country.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. BACHUS. And to vote no and to say that Republicans are supporting the President, I would remind you that 19 Democratic members of the Armed Services Committee also voted for this legislation; and it is not us who are out of step with the American people. I think it is those who oppose this legislation.

I will close by saying that Abraham Lincoln said that the Constitution is not a suicide pact, and I think that is very relevant to what we are considering today. The Supreme Court actually suggested that this legislation would address their concerns; and, thus, this legislation—this legislation is—part of that is in response to what the Supreme Court in their opinion suggested that we as a Congress do to cure their concerns; and that is what we are doing.

Mr. BERMAN. Mr. Chairman, I move the previous question.

Chairman SENSENBRENNER. Without objection, the previous question is ordered. A reporting quorum is present. The question is on reporting the bill, H.R. 6054, favorably. All in favor will say aye; opposed, no. The noes appear to have it.

Mr. CHABOT. Ask for a recorded vote.

Chairman SENSENBRENNER. The gentleman from Ohio asks for a recorded vote. A recorded vote will be ordered. Those in favor of reporting the bill favorably will, as your names are called, answer aye; those opposed, no.

And the Clerk will call the roll.

The CLERK. Mr. Hyde.

[No response.]

The CLERK. Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble votes aye.

Mr. Smith.

[No response.]

The CLERK. Mr. Gallegly.

[No response.]

The CLERK. Mr. Goodlatte.

[No response.]

The CLERK.Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot votes aye.
Mr. Lungren.
[No response.]
The CLERK. Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins votes aye.
Mr. Cannon.
Mr. CANNON. Aye.
The CLERK. Mr. Cannon votes aye.
Mr. Bachus.
Mr. BACHUS. Aye.
The CLERK. Mr. Bachus votes aye.
Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis votes no.
Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler votes aye.
Mr. Green.
[No response.]
The CLERK. Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa votes aye.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake votes no.
Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence votes aye.
Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes votes aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King votes aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney votes aye.
Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks votes aye.
Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert votes aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers votes no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman votes no.
Mr. Boucher.
Mr. BOUCHER. No.

The CLERK. Mr. Boucher votes no.
Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler votes no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott votes no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt votes no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren votes no.
Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee votes no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters votes no.
Mr. Meehan.
Mr. MEEHAN. No.
The CLERK. Mr. Meehan votes no.
Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt votes no.
Mr. Wexler.
Mr. WEXLER. No.
The CLERK. Mr. Wexler votes no.
Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner votes no.
Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff votes no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez votes no.
Mr. Van Hollen.
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen votes no.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. No.
The CLERK. Ms. Wasserman Schultz votes no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman votes aye.
Chairman SENSENBRENNER. Members who wish to cast or change their votes?
Gentleman from Texas, Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye.
Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.
Mr. GOODLATTE. How am I recorded Mr. Chairman?

The CLERK. Mr. Chairman, Mr. Goodlatte is not recorded.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Chairman SENSENBRENNER. Gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye.

Chairman SENSENBRENNER. Gentleman from California, Mr. Lungren.

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye.

Chairman SENSENBRENNER. Further members who wish to cast or change their vote?

Gentleman from Texas, Mr. Gohmert.

Mr. GOHMERT. No.

The CLERK. Mr. Gohmert, no.

Chairman SENSENBRENNER. Further members who wish to cast or change their vote?

If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 17 ayes and 20 nays.

Chairman SENSENBRENNER. The motion to report favorably is not agreed to.

The Chair now moves to report——

Mr. SCOTT. Mr. Chairman, I have a motion to make.

Chairman SENSENBRENNER. The Chair has recognized himself.

The Chair now moves to report the bill unfavorably.

Without objection, the previous question is ordered. Those in favor of the Chair's motion will say aye; those opposed, no.

The ayes appear to have it. The ayes have it. The bill is reported adversely. Without objection, the bill will be reported adversely to the House in the form of a single amendment in the nature of a substitute incorporating the amendments adopted here today. Without objection, the staff is directed to make any technical and conforming changes; and all members will be given 2 days, as provided by the House rules, in which to submit additional dissenting supplemental or minority views.

[Intervening business.]

Chairman SENSENBRENNER. For what purpose does the gentleman from Texas, Mr. Gohmert, seek recognition?

Mr. GOHMERT. Mr. Chairman, I move to reconsider the vote on the motion to report the bill H.R. 6054 adversely on which the ayes prevailed by voice vote.

Chairman SENSENBRENNER. The gentleman qualifies. The motion is not debatable because the underlying motion was not debatable. Those in favor——

Mr. WEINER. Mr. Chairman, point of order.

Chairman SENSENBRENNER. State your point of order.

Mr. WEINER. Mr. Chairman, I make a point of order that once a bill is reported out of this committee to the floor, it is no longer on our calendar, no longer subject to further amendment without being rescheduled or recalendared.

Chairman SENSENBRENNER. The point of order is not well taken because the motion to reconsider lies at any time during the markup at which the vote was taken.

The question is on the motion by the gentleman from Texas, Mr. Gohmert, to reconsider the vote by which the bill was reported adversely.

Those in favor will say aye.

Opposed, no.

The ayes appear to have it. The ayes have it.

Mr. NADLER. rollcall.

Chairman SENSENBRENNER. rollcall is ordered. The question is shall the vote by which H.R. 6054 was reported adversely be reconsidered.

Those in favor will, as your names are called, answer aye. Those opposed, no. The Clerk will call the roll.

Mr. NADLER. Mr. Chairman.

Chairman SENSENBRENNER. The Clerk will call the roll.

The CLERK. Mr. Hyde.

Chairman SENSENBRENNER. State your parliamentary inquiry.

Mr. NADLER. My point is, isn't it the case before we can vote on a motion to reconsider the vote by which the motion to report favorably was not passed, we first have to vote to reconsider the vote by which the bill that was reported unfavorably was passed?

Chairman SENSENBRENNER. That is exactly what we are doing. The Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. Aye.

The CLERK. Mr. Hyde, aye.

Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly.

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye.

Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Lungren.

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon.

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye.

Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Mr. Inglis.

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.
Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye.
Mr. Green.
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye.
Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King, aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.
Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye.
Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman, no.
Mr. Boucher.
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler, no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.

Ms. Jackson Lee.
Ms. JACKSON LEE. A "no" vote for justice.
The CLERK. Ms. Jackson Lee, no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters, no.
Mr. Meehan.
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no.
Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no.
Mr. Wexler.
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no.
Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner, no.
Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no.
Mr. Van Hollen.
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. No.
The CLERK. Ms. Wasserman Schultz, no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Any members who wish to cast or change their votes? If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 20 ayes and 19 nays.
Chairman SENSENBRENNER. The motion to reconsider is agreed to. The question now is—the question is nondebatable. That is quite clear under the rules.
Ms. WASSERMAN SCHULTZ. I don't wish to debate it, Mr. Chairman, I suggest the absence of a quorum.
Chairman SENSENBRENNER. The Chair rules that a quorum is present. There is one member absent.
Mrs. WASSERMAN SCHULTZ. Mr. Chairman, can I have a rollcall vote on that, please?
Chairman SENSENBRENNER. The Chair rules that to be dilatory because it is obvious that only one member is absent. A recording quorum is present.
The question is shall the bill H.R. 6054 be reported adversely.
Those in favor will say aye. Opposed, no.
The noes appear to have it.
Ms. JACKSON LEE. rollcall.
Chairman SENSENBRENNER. rollcall is ordered. The question is on reporting H.R. 6054 adversely.

Those in favor will, as your names are called, answer aye. Those opposed no.

The Clerk will call the roll.

Mr. SCOTT. Could you restate the motion?

Chairman SENSENBRENNER. The Chair will restate the question once the committee is in order, lest there be any confusion. The question is, shall the bill H.R. 6054 be reported adversely?

Those in favor will, as your names are called, answer aye. Those opposed, no.

And the Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. No.

The CLERK. Mr. Hyde, no.

Mr. Coble.

Mr. COBLE. No.

The CLERK. Mr. Coble, no.

Mr. Smith.

Mr. SMITH. No.

The CLERK. Mr. Smith, no.

Mr. Gallegly.

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no.

Mr. Goodlatte.

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no.

Mr. Chabot.

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no.

Mr. Lungren.

Mr. LUNGREN. No.

The CLERK. Mr. Lungren, no.

Mr. Jenkins.

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no.

Mr. Cannon.

Mr. CANNON. No.

The CLERK. Mr. Cannon, no.

Mr. Bachus.

Mr. BACHUS. No.

The CLERK. Mr. Bachus, no.

Mr. Inglis.

Mr. INGLIS. Aye.

The CLERK. Mr. Inglis, aye.

Mr. Hostettler.

Mr. HOSTETTLER. No.

The CLERK. Mr. Hostettler, no.

Mr. Green.

Mr. GREEN. No.

The CLERK. Mr. Green, no.

Mr. Keller.

[No response.]

The CLERK. Mr. Issa.

Mr. ISSA. No.

The CLERK. Mr. Issa, no.

Mr. Flake.
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye.
Mr. Pence.
Mr. PENCE. No.
The CLERK. Mr. Pence, no.
Mr. Forbes.
Mr. FORBES. No.
The CLERK. Mr. Forbes, no.
Mr. King.
Mr. KING. No.
The CLERK. Mr. King, no.
Mr. Feeney.
Mr. FEENEY. No.
The CLERK. Mr. Feeney, no.
Mr. Franks.
Mr. FRANKS. No.
The CLERK. Mr. Franks, no.
Mr. Gohmert.
Mr. GOHMERT. No.
The CLERK. Mr. Gohmert, no.
Mr. Conyers.
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye.
Mr. Berman.
Mr. BERMAN. Aye.
The CLERK. Mr. Berman, aye.
Mr. Boucher.
Mr. BOUCHER. Aye.
The CLERK. Mr. Boucher, aye.
Mr. Nadler.
Mr. NADLER. Pass.
The CLERK. Mr. Nadler, pass.
Mr. Scott.
Mr. SCOTT. Aye.
The CLERK. Mr. Scott, aye.
Mr. Watt.
Mr. WATT. Aye.
The CLERK. Mr. Watt, aye.
Ms. Lofgren.
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye.
Ms. Jackson Lee.
Ms. JACKSON LEE. Aye.
The CLERK. Ms. Jackson Lee, aye.
Ms. Waters.
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye.
Mr. Meehan.
Mr. MEEHAN. Aye.
The CLERK. Mr. Meehan, aye.
Mr. Delahunt.
[No response.]
The CLERK. Mr. Wexler.

[No response.]
The CLERK. Mr. Weiner.
Mr. WEINER. Pass.
The CLERK. Mr. Weiner, pass.
Mr. Schiff.
Mr. SCHIFF. Pass.
The CLERK. Mr. Schiff, pass.
Ms. Sánchez.
Ms. SÁNCHEZ. Pass.
The CLERK. Ms. Sánchez, pass.
Mr. Van Hollen.
Mr. VAN HOLLEN. Aye.
The CLERK. Mr. Van Hollen, aye.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. Aye.
The CLERK. Ms. Wasserman Schultz, aye.
Mr. Chairman.
Chairman SENSENBRENNER. No.
The CLERK. Mr. Chairman, no.
Chairman SENSENBRENNER. Members who wish to cast or change their votes.
Mr. NADLER. Mr. Chairman. Aye.
The CLERK. Mr. Nadler, aye.
Chairman SENSENBRENNER. The gentleman from Florida, Mr. Wexler.
Mr. WEXLER. Aye.
The CLERK. Mr. Wexler, aye.
Chairman SENSENBRENNER. The gentleman from California, Mr. Schiff.
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye.
Chairman SENSENBRENNER. The gentlewoman from California.
Ms. SÁNCHEZ. Aye.
The CLERK. Ms. Sánchez, aye.
Chairman SENSENBRENNER. The gentleman from New York, Mr. Weiner.
Mr. WEINER. Yes.
The CLERK. Mr. Weiner, aye.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes. If not, the Clerk will report.
Mr. DELAHUNT. What about me?
The CLERK. Mr. Delahunt has not recorded.
Chairman SENSENBRENNER. The gentleman from Massachusetts.
Mr. DELAHUNT. Aye.
The CLERK. Mr. Delahunt, aye.
Chairman SENSENBRENNER. The Clerk will report.
The CLERK. Mr. Chairman, there are 19 ayes and 20 nays.
Chairman SENSENBRENNER. The motion to report adversely is not agreed to.
For what purpose does the gentleman from Texas, Mr. Gohmert, seek recognition?
Mr. GOHMERT. Mr. Chairman, I now move to reconsider the vote on the motion to report bill H.R. 6054 favorably, in which the noes prevailed.

Chairman SENSENBRENNER. Did the gentleman vote "no" on the rollcall to report favorably?

Mr. GOHMERT. I voted "yes" before I voted "no," Chairman. But I did vote "no". Yes.

Chairman SENSENBRENNER. Then the gentlemen qualifies. The question is, shall the vote by which the bill H.R. 6054 failed a favorable reporting be reconsidered?

Those in favor will say aye. Opposed, no.

The noes appear to have it.

Mr. LUNGREN. rollcall.

Chairman SENSENBRENNER. A request for a rollcall has been made. Those in favor of reconsidering the vote by which H.R. 6054 failed at being favorably recorded will, as your names are called, answer aye. Those opposed, no.

The Clerk will call the roll.

The CLERK. Mr. Hyde.

Mr. HYDE. Aye.

The CLERK. Mr. Hyde, aye.

Mr. Coble.

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye.

Mr. Smith.

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye.

Mr. Gallegly.

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye.

Mr. Goodlatte.

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Chabot.

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye.

Mr. Lungren.

Mr. LUNGREN. Aye.

The CLERK. Mr. Lungren, aye.

Mr. Jenkins.

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye.

Mr. Cannon.

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye.

Mr. Bachus.

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Mr. Inglis.

Mr. INGLIS. No.

The CLERK. Mr. Inglis, no.

Mr. Hostettler.

Mr. HOSTETTLER. Aye.

The CLERK. Mr. Hostettler, aye.

Mr. Green.

Mr. GREEN. Aye.

The CLERK. Mr. Green, aye.

Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence.
[No response.]
The CLERK. Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King, aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.
Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye.
Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye.
Mr. Conyers.
Mr. CONYERS. No.
The CLERK. Mr. Conyers, no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman, no.
Mr. Boucher.
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler, no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.
Ms. Jackson Lee.
Ms. JACKSON LEE. No.
The CLERK. Ms. Jackson Lee, no.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters, no.
Mr. Meehan.
Mr. MEEHAN. No.

The CLERK. Mr. Meehan, no.
Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt, no.
Mr. Wexler.
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no.
Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner, no.
Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no.
Mr. Van Hollen.
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. No.
The CLERK. Ms. Wasserman Schultz, no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Members in the Chamber who wish to cast or change votes. The gentleman from Indiana, Mr. Pence.
Mr. PENCE. Yes.
The CLERK. Mr. Pence, aye.
Chairman SENSENBRENNER. Further members who wish to cast or change their votes. If not, the Clerk will report.
The CLERK. Mr. Chairman, there are 20 ayes and 19 nays.
Chairman SENSENBRENNER. The motion to reconsider is agreed to.
The question now is, shall the committee agree to the motion to report the bill H.R. 6054 favorably. A reporting quorum is present.
Those in favor will say aye. Opposed, no.
The ayes appear to have it.
Recorded vote is requested. Those in favor of favorably reporting the bill 6054 will, as your names are called, answer aye. Those opposed, no.
The Clerk will call the roll.
The CLERK. Mr. Hyde.
Mr. HYDE. Aye.
The CLERK. Mr. Hyde, aye.
Mr. Coble.
Mr. COBLE. Aye.
The CLERK. Mr. Coble, aye.
Mr. Smith.
Mr. SMITH. Aye.
The CLERK. Mr. Smith, aye.
Mr. Gallegly.
Mr. GALLEGLY. Aye.
The CLERK. Mr. Gallegly, aye.

Mr. Goodlatte.
Mr. GOODLATTE. Aye.
The CLERK. Mr. Goodlatte, aye.
Mr. Chabot.
Mr. CHABOT. Aye.
The CLERK. Mr. Chabot, aye.
Mr. Lungren.
Mr. LUNGREN. Aye.
The CLERK. Mr. Lungren, aye.
Mr. Jenkins.
Mr. JENKINS. Aye.
The CLERK. Mr. Jenkins, aye.
Mr. Cannon.
Mr. CANNON. Aye.
The CLERK. Mr. Cannon, aye.
Mr. Bachus.
[No response.]
The CLERK. Mr. Inglis.
Mr. INGLIS. No.
The CLERK. Mr. Inglis, no.
Mr. Hostettler.
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye.
Mr. Green.
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye.
Mr. Keller.
[No response.]
The CLERK. Mr. Issa.
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye.
Mr. Flake.
Mr. FLAKE. No.
The CLERK. Mr. Flake, no.
Mr. Pence.
Mr. PENCE. Aye.
The CLERK. Mr. Pence, aye.
Mr. Forbes.
Mr. FORBES. Aye.
The CLERK. Mr. Forbes, aye.
Mr. King.
Mr. KING. Aye.
The CLERK. Mr. King, aye.
Mr. Feeney.
Mr. FEENEY. Aye.
The CLERK. Mr. Feeney, aye.
Mr. Franks.
Mr. FRANKS. Aye.
The CLERK. Mr. Franks, aye.
Mr. Gohmert.
Mr. GOHMERT. Aye.
The CLERK. Mr. Gohmert, aye.
Mr. Conyers.
Mr. CONYERS. No.

The CLERK. Mr. Conyers, no.
Mr. Berman.
Mr. BERMAN. No.
The CLERK. Mr. Berman, no.
Mr. Boucher.
Mr. BOUCHER. No.
The CLERK. Mr. Boucher, no.
Mr. Nadler.
Mr. NADLER. No.
The CLERK. Mr. Nadler, no.
Mr. Scott.
Mr. SCOTT. No.
The CLERK. Mr. Scott, no.
Mr. Watt.
Mr. WATT. No.
The CLERK. Mr. Watt, no.
Ms. Lofgren.
Ms. LOFGREN. No.
The CLERK. Ms. Lofgren, no.
Ms. Jackson Lee.
Ms. JACKSON LEE. Pass.
The CLERK. Ms. Jackson Lee, pass.
Ms. Waters.
Ms. WATERS. No.
The CLERK. Ms. Waters, no.
Mr. Meehan.
Mr. MEEHAN. No.
The CLERK. Mr. Meehan, no.
Mr. Delahunt.
Mr. DELAHUNT. No.
The CLERK. Mr. Delahunt no.
Mr. Wexler.
Mr. WEXLER. No.
The CLERK. Mr. Wexler, no.
Mr. Weiner.
Mr. WEINER. No.
The CLERK. Mr. Weiner, no.
Mr. Schiff.
Mr. SCHIFF. No.
The CLERK. Mr. Schiff, no.
Ms. Sánchez.
Ms. SÁNCHEZ. No.
The CLERK. Ms. Sánchez, no.
Mr. Van Hollen.
Mr. VAN HOLLEN. No.
The CLERK. Mr. Van Hollen, no.
Ms. Wasserman Schultz.
Ms. WASSERMAN SCHULTZ. No.
The CLERK. Ms. Wasserman Schultz, no.
Mr. Chairman.
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.

Chairman SENSENBRENNER. Members who wish to cast or change their votes. The gentleman from Alabama, Mr. Bachus.

Mr. BACHUS. Yes.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. The gentlewoman from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, how am I recorded?

The CLERK. Mr. Chairman, Ms. Jackson Lee is recorded as a pass.

Ms. JACKSON LEE. No.

Chairman SENSENBRENNER. Further members who wish to cast or change their votes. If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 20 ayes and 19 nays.

Chairman SENSENBRENNER. The motion to favorably report is agreed to. Without objection, the staff is directed to make any technical conforming changes and all members will be given 2 days, as provided by the rules, in which to submit additional dissenting, supplemental, or minority views.

[Intervening business.]

[Whereupon, at 6:08 p.m., the committee was adjourned.]

DISSENTING VIEWS

We dissent from the passage of H.R. 6054, the "Military Commissions Act of 2006." While we believe it is necessary that Congress pass legislation to provide the President with a tough and fair system of military commissions that will ensure swift convictions for terrorists, we have serious concerns about the manner in which this legislation achieves that vital objective.

We dissent for several reasons. First, the legislation endangers our service members by rewriting and limiting compliance with the Geneva Conventions and with U.S. legal norms. Second, the legislation violates separation of powers by stripping federal courts of habeas jurisdiction. Finally, the legislation was considered under a flawed and unnecessarily truncated process. The legislation is strongly opposed by the following wide array of individuals, organizations, and highly respected members of the U.S. military: retired General and former Chairman of the Joint Chiefs of Staff Colin Powell;[1] retired General and former Chairman of the Joint Chiefs of Staff John Vessey;[2] retired Rear Admirals John Hutson and Donald Guter, and retired Brigadier General David Brahms;[3] forty-five retired military leaders;[4] and numerous families who lost loved ones in the 9/11 attacks.[5]

DESCRIPTION OF LEGISLATION

H.R. 6054 has, as its stated purpose, "to authorize trial by military commission for violations of the law of war . . ." First, the legislation would authorize standards and procedures for the military commissions within the Uniform Code of Military Justice.[6] Among other things, the bill provides standards for the admission of evidence, including hearsay evidence, and in certain circumstances, allows for the introduction of sensitive classified information into evidence outside the presence of the accused.[7]

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[1] Letter from General Colin Powell to the Hon. John McCain (September 13, 2006), available at http://www.washingtonpost.com/wp-dyn/content/graphic/ 2006/09/14/GR2006091400728.html.

[2] Letter from General John Vessey to the Hon. John McCain (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

[3] Letter from retired Rear Admirals John Hutson and Donald Guter, and retired Brigadier General David Brahms to the Hon. John Warner, Chairman of the Senate Committee on Armed Services and the Hon. Carl Levin, Ranking Member of the Senate Committee on Armed Services (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

[4] Letter to the Hon. John Warner, Chairman of the Senate Committee on Armed Services and the Hon. Carl Levin, Ranking Member of the Senate Committee on Armed Services (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

[5] Letter from over 35 family members to the Hon. John Warner, Chairman of the Senate Committee on Armed Services and the Hon. Carl Levin, Ranking Member of the Senate Committee on Armed Services (September 14, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

[6] Section 3, H.R. 6054, creating new chapter 47A of Title 10, United States Code.

[7] Id.

Second, in Section 4, H.R. 6054 would amend title 18, United States Code, to redefine a war crime under United States law as any "serious" violation of Common Article 3 of the Geneva Conventions ("Common Article 3").[8] Conduct, which would constitute a serious violation of Common Article 3, would include torture, cruel or inhuman treatment, murder, mutilation or maiming, intentionally causing great suffering or serious injury, and taking hostages. The section narrowly defines cruel or inhuman treatment, in contrast to the Common Article 3 standard, making the definition similar to the definition of torture.[9]

Third, in Section 5, the legislation would amend title 28, United States Code, to allow for limited appeals of commission and Combatant Status Review Tribunal decisions to the United States Court of Appeals for the District of Columbia Circuit. In addition, the section strips federal courts of pending or future habeas jurisdiction "relating to any aspect of the alien's detention, transfer, treatment, or conditions of confinement."

Fourth, the legislation, in Section 6, would lower the standards of the Geneva Conventions by establishing that compliance with section 1003 of the Detainee Treatment Act ("DTA") of 2005 [10] fully satisfies the obligations of the United States with regard to Common Article 3. In addition, the section prohibits individuals from invoking the Conventions "as a source of rights" in U.S. courts.

CONCERNS WITH LEGISLATION

A. H.R. 6054 endangers our troops by lowering U.S. and international standards

The legislation endangers our troops because it lowers the standards set forth in the Geneva Conventions, treaties this nation led the way in establishing and has maintained for over 50 years. In fact, the Geneva Conventions have been ratified by 194 countries and our own JAGs have testified that the United States military has been trained to comply with them for decades.

Redefining the Geneva Conventions poses a grave threat to our troops. Our uniformed military has been among the most vocal in their concerns about diluting this standard because they want to do everything possible to ensure that American forces would be treated with a similarly high standard if captured. Former Secretary of State, retired Gen. Colin Powell has stated that the Administration's proposal "would put our own troops at risk." [11] The highly respected former Chairman of the Joint Chiefs of Staff, General John Vessey, has said that the change, "could give opponents a legal argument for the mistreatment of Americans being held

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[8] Common Article 3 of the 1949 Geneva Conventions sets out minimum standards for the treatment of detainees in armed conflicts of a non-international character. Such persons are to be treated humanely and protected from certain treatment, including "violence to life and person" "cruel treatment and torture," and "outrages upon personal dignity, in particular, humiliating and degrading treatment."

[9] The bill defines cruel and inhuman treatment almost identically with torture, linking it to "severe physical pain or suffering or severe mental pain or suffering . . . including severe physical abuse . . ." It does not further define "severe physical abuse" which distinguishes the offense from torture.

[10] Public Law 109–148.

[11] Letter from General Colin Powell to the Hon. John McCain (September 13, 2006), available at *http://www.washingtonpost.com/wp-dyn/content/graphic/2006/09/14/GR2006091400728.html.*

prisoner in time of war" and would "undermine the moral basis which has . . . guided our conduct in war throughout our history."[12]

B. The bill broadly strips courts of habeas jurisdiction

In a sweeping measure, Section 5 of H.R. 6054 contravenes separation of powers and constitutional guarantees by stripping federal courts of habeas review.[13] If there is any one principle that has defined our nation, it is the respect for the rule of law and the independence of the courts. As numerous former federal judges, including Reagan FBI Director Sessions wrote, "[f]or two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not men. The proposed legislation imperils this proud history . . ."[14]

Moreover, by legislating that all pending and future habeas petitions are not subject to judicial review, the legislation leaves itself open to an adverse court ruling that will strike this bill similar to how the Supreme Court struck down the President's use of military commissions in *Hamdan* v. *Rumsfeld*.[15] This would lengthen the current delay in the prosecution of terrorists. Not a single trial has taken place, or a single criminal convicted, in military commissions in the more than five years since September 11, 2001.[16]

C. Flawed process for committee consideration

We also express our concerns regarding the Committee process. While we support the Committee obtaining jurisdiction to consider this important measure, it was also incumbent on the Committee to conduct hearings on this critical issue to inform the judgment of the Members. Unfortunately, no such hearings were held.

In addition, we would also note that during the markup, the Committee initially voted to defeat reporting the measure. Unfortunately, the Committee then went through a number of tortured exercises to reconsider and ultimately approve the measure, after the Majority was able to convince more of its members to attend the markup.[17] We would note that when the Majority assumed power in 1995, one of their first measures was to eliminate proxy voting so that only those Members who attended the markups would affect the outcome of bills. By now developing a policy that in essence states that if the Majority loses a vote because its Members did not bother to show up, they will simply revote when their Members are

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[12] Letter from General John Vessey to the Hon. John McCain (September 12, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

[13] Habeas petitions "ask whether there is a sufficient factual and legal basis for a prisoner's detention . . . [habeas] safeguards the most hallowed judicial role in our constitutional democracy—ensuring that no man is imprisoned unlawfully . . . [w]ithout habeas, federal courts will lose the power to conduct this inquiry." Letter from nine retired federal judges to Members of Congress regarding H.R. 6054 (September 14, 2006) (on file with the House of Representatives Committee on the Judiciary, Democratic Staff).

[14] *Id*.

[15] 126 S. Ct. 2749 (2006).

[16] The importance of habeas is not a hypothetical concern. This Administration has been flatly wrong in its assessments as shown by the example of Maher Arar, who was falsely branded a terrorist and rendered to Syria where he tortured for 10 months. See Doug Struck, "Canadian Was Falsely Accused, Panel Says," Washington Post, September 19, 2006, at A01. In fact, if the provisions of this bill had been in force, the Hamdan ruling itself would not have been possible. Hamdan brought his challenge via a habeas petition.

[17] Dana Milbank, "Bush's Bill Suffers a Torturous Day in Committee," Washington Post, September 21, 2006, at A02.

available or it is convenient for them, they have essentially returned to the functional equivalent of proxy voting. This is unfair to the Members who take time out of their day to participate in the markup.

CONCLUSION

We need to come together to develop a fair system of military commissions that will swiftly convict terrorists. However, we cannot support legislation that in the name of fighting terrorism endangers our brave troops, undermines our nation's moral authority, and contravenes the principle of separation of powers and rule of law that our nation was founded on. The Committee should have passed a stronger more intelligent bill, that finally holds terrorists accountable but at the same time can withstand judicial scrutiny, protect American troops under the Geneva Conventions, and remains true to American values.

DESCRIPTION OF AMENDMENTS OFFERED BY DEMOCRATIC MEMBERS

During the markup, there were three amendments offered by Democratic members. One amendment by Mr. Schiff and Mr. Flake, one amendment by Mr. Meehan and one by Ms. Jackson-Lee and Mr. Nadler.

1. Amendment offered by Rep. Schiff and Rep. Flake (#1)

Description of amendment: The Schiff-Flake amendment sought to define the domestic war crime of "cruel or inhuman treatment" by using the standards set out in the 5th, 8th, and 14th Amendments of the U.S. Constitution, similar to the definition in the Warner Bill (S. 3901) and the Detainee Treatment Act.

The amendment was defeated by a vote of 17 to 18. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt, Lofgren, Jackson Lee, Waters, Meehan, Delahunt, Weiner, Schiff, Sanchez, Van Hollen, Inglis, and Flake. Nays: Representatives Coble, Smith, Gallegly, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Hostettler, Green, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert, and Sensenbrenner.

2. Amendment offered by Rep. Martin Meehan (#2)

Description of amendment: The Meehan amendment sought to strike Section 5, thereby exempting the bill's restrictions on judicial review.

The amendment was defeated by a vote of 12 to 15. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Jackson Lee, Meehan, Delahunt, Weiner, Schiff, Van Hollen, and Wasserman Shultz. Nays: Representatives Coble, Smith, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Inglis, Green, Flake, Forbes, Feeney, Franks, Gohmert, and Sensenbrenner.

3. Amendment offered by Rep. Jackson Lee and Rep. Nadler (#3)

Description of amendment: The Jackson Lee-Nadler Amendment sought to strike Section 6(b), which reads, "No person in any habeas action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights, whether directly or indirectly, for any purpose in any court of the United States or its States or territories."

The amendment was defeated by a vote of 17 to 18. Ayes: Representatives Conyers, Berman, Boucher, Nadler, Scott, Watt,

Lofgren, Jackson Lee, Waters, Meehan, Delahunt, Wexler, Weiner, Schiff, Sanchez, Van Hollen, and Wasserman Shultz. Nays: Representatives Coble, Smith, Goodlatte, Chabot, Lungren, Jenkins, Cannon, Bachus, Inglis, Hostettler, Issa, Flake, Forbes, King, Feeney, Franks, Gohmert, and Sensenbrenner.

JOHN CONYERS, JR.
RICK BOUCHER.
ROBERT SCOTT.
ZOE LOFGREN.
MAXINE WATERS.
WILLIAM DELAHUNT.
ANTHONY D. WEINER.
LINDA T. SÁNCHEZ.
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HOWARD L. BERMAN.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTIN MEEHAN.
ROBERT WEXLER.
ADAM B. SCHIFF.
CHRIS VAN HOLLEN.

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