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September 19, 2006

Responding to Hamdan

Crafting Legislation to Prosecute Terrorist War Criminals and Preserve Valuable Interrogations

Executive Summary

- The Supreme Court decision in *Hamdan v. Rumsfeld* invalidated the military commissions that were being used to prosecute war criminals at Guantanamo Bay, and also put the nation's terrorist interrogation program in jeopardy by holding that Common Article 3 of the Geneva Convention applies to treatment of unlawful enemy combatants.
- Congress has now undertaken the task of crafting legislation to address both issues: to create military commissions to try war criminals, and to preserve the terrorist interrogation program.
- Two Senate bills have been offered to address these challenges, an Administration proposal, S. 3861, and a Senate Armed Services Committee (SASC) proposal, S. 3901.
- Both bills create military commissions so that terrorist war criminals can be brought to justice and punished, whereas today they are simply held until the end of the conflict.
 - The Administration proposal would allow the use of classified evidence after showing it to the detainees' lawyers, but not the detainees themselves. The SASC bill would not allow evidence to be used that is not shown directly to the detainee.
 - The two bills also differ on the use of hearsay evidence and evidence gained by coercive tactics, with the SASC bill being more restrictive on their admission into evidence.
- The terrorist interrogation program has been highly effective in preventing terrorist plots and saving innocent lives across the globe; the question is how best to preserve it.
 - The Administration proposes to clearly define the meaning of arguably vague terms in Common Article 3 — prohibitions against “outrages upon human dignity” and “humiliating and degrading treatment” — by explicit reference to the Detainee Treatment Act of 2005. That law requires interrogations to comply with existing U.S. constitutional standards. The President has argued that U.S. personnel require clear guidance on the meaning of Common Article 3, or they will not be able to do their jobs.
 - The SASC bill would protect U.S. personnel from prosecution for vague interpretations of Common Article 3, but would not attempt to define Common Article 3 itself. SASC bill supporters argue that providing explicit definition to Common Article 3 could backfire on the United States and hurt U.S. personnel in future conflicts.

Introduction

In the June 2006 case of *Hamdan v. Rumsfeld*, the Supreme Court invalidated military commissions established by the President to prosecute detained enemy combatants for their commission of war crimes. The Court also held that Common Article 3 of the Geneva Convention applied to U.S. treatment of enemy combatants. Now, Congress has undertaken the responsibility of creating military commissions that comport with domestic and international law so that prosecutions of war criminals may continue, and to ensure that the arguably vague international standards embodied in Common Article 3 do not hinder the terrorist interrogations that have been so helpful in preventing future attacks. Two proposals have been offered to address these challenges, an Administration proposal, S. 3861, and a Senate Armed Services Committee (SASC) proposal, S. 3901. This paper examines how these two bills deal with the key issues being debated — in particular, the admissibility of allegedly coerced testimony (pg. 7), the treatment of classified information (pg. 9), the admissibility of hearsay evidence (pg. 11), and the application of the Geneva Convention to unlawful combatants (pg. 12).

Background to the Detention of Unlawful Enemy Combatants

Since September 11, 2001, our nation has grappled with the task of determining how best to fight a new and unconventional war against enemies who, as President George W. Bush has said, “represent no nation ... defend no territory, and ... wear no uniform.”¹ Instead, “they operate in the shadows of society; they send small teams of operatives to infiltrate free nations; they live quietly among their victims; they conspire in secret; and then they strike without warning.”² They operate outside the laws of war, refuse to respect the distinction between civilians and combatants, and show no respect for the standards of a civilized society.

The United States military has been effective in capturing and killing thousands of terrorists and enemy combatants around the world. Approximately 770 of those operatives who were captured were sent to Guantanamo Bay, Cuba, for detention, due either to their threat to the nation or due to their elevated intelligence value; today, approximately 455 detainees remain in U.S. custody.³ These terrorists and enemy combatants are not “prisoners of war” as a matter of law because they do not fight for foreign states, and they operate in violation of the laws of war on a regular basis. By detaining them at Guantanamo Bay, the government has had the opportunity to interrogate them and prevent them from returning to the battlefield. Others have been interrogated in a special program run by the Central Intelligence Agency (CIA), a program which, as the President explained recently, has been highly effective in preventing future terrorist attacks and undermining terrorist networks.

The Supreme Court Decisions Leading to the Present Legislation

Since 9/11, the Supreme Court has decided three cases dealing with aspects of the treatment and custody of these detainees: *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004), and *Hamdan v. Rumsfeld* (2006). Understanding the Supreme Court’s holdings in these cases is essential to being able to move forward on a legislative solution.

¹ President George W. Bush’s remarks on Sept. 6, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html> (hereinafter “Bush 9/6/06 Remarks”).

² Bush 9/6/06 Remarks.

³ Bush 9/6/06 Remarks.

Rasul v. Bush — Enemy Combatants’ Right to Challenge Detention in Federal Court

In 2004, the Supreme Court held in *Rasul v. Bush* that enemy combatants detained at Guantanamo Bay had the right to file petitions for habeas corpus challenging their detention.⁴ This was *not* a “constitutional holding.” Rather, the Supreme Court emphasized that its holding was a function of statutory interpretation, specifically of 18 U.S.C. § 2241. While Congress has the power to regulate the reach of the habeas corpus petition and it retains the ability to control access to federal courts for enemy combatants; the Court held that Rasul could pursue his petition, because Congress had not foreclosed it.

Hamdi v. Rumsfeld — U.S. Power to Detain Enemy Combatants Without Prosecution

In 2004, in *Hamdi v. Rumsfeld*, the Court affirmed the United States’s power, pursuant to the laws of war, to detain enemy combatants “until the end of hostilities.”⁵ The Court also held that a person designated as an enemy combatant may be detained without trial, so long as the detainee has a process to challenge that designation.⁶

The United States has acted to provide extensive process and protections for enemy combatants. For example, detainees have as many as five layers of review for the sole purpose of ensuring that their detention is warranted and lawful.⁷ The Executive also established military commissions to bring to justice certain detainees who were eligible for prosecution for war crimes.⁸ In 2005, Congress passed the Detainee Treatment Act, which provides that “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”⁹ Before that, the President declared in 2002 that it was U.S. policy to treat these enemy combatants “humanely and...in a manner consistent with the principles of international law.”¹⁰ As the President has reiterated emphatically, “The United States does not torture.”¹¹

This complex legal regime that has been designed to manage these new challenges wrought by international terrorism is unprecedented. As Attorney General Alberto Gonzales has stated, “We are aware of no other nation in history that has afforded procedural protections like these to enemy combatants – including allowing access to civilian courts for those captured on the battlefield.”¹²

⁴ 542 U.S. 466, 485 (2004).

⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

⁶ *Hamdi*, 542 U.S. at 537.

⁷ Each detainee is provided an initial assessment by commanders in the field, a formal hearing before a combatant status review tribunal (“CSRT”), an appeal to D.C. Circuit and thereafter to the United States Supreme Court, in addition to an annual administrative review to determine whether he should be released. Prepared Remarks by Attorney General Alberto R. Gonzales at the International Institute for Strategic Studies, London, England, March 7, 2006, available at http://www.usdoj.gov/ag/speeches/2006/ag_speech_060307.html (hereinafter “Gonzalez 3/7/06 Remarks”).

⁸ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non- Citizens in the War Against Terrorism, available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>.

⁹ Detainee Treatment Act of 2005, Pub. L. 109-148, Div. A, Tit. X, 119 Stat. 2739 (hereinafter “Detainee Treatment Act” or “DTA”).

¹⁰ Memo from President to Vice President, et al, re Humane Treatment of Al Qaeda and Taliban Detainees ¶ 3 (Feb. 7, 2002).

¹¹ Bush 9/6/06 Remarks.

¹² Gonzales 3/7/06, Remarks; see also Remarks of John Bellinger III, Legal Adviser to Secretary of State Condoleezza Rice, USINFO webchat (May 25, 2006), available at <http://usinfo.state.gov/usinfo/Archive/2006/May/25->

Hamdan v. Rumsfeld — Military Commissions and Common Article 3

Despite these efforts to provide a complete process, the Supreme Court in *Hamdan v. Rumsfeld* struck down military commissions established by the Executive, holding that they were inconsistent with international and domestic law.¹³ The Court held that the commissions failed to comply with the Uniform Code of Military Justice's ("UCMJ") requirement that procedures for courts-martial and military commissions be "uniform insofar as practicable."¹⁴ Specifically, the Court found that the President failed to justify the commissions' deviation from traditional rules of courts-martial.¹⁵ Additionally, the Court held that Common Article 3 of the Geneva Convention applies to the current conflict,¹⁶ and that the military commissions did not satisfy Common Article 3's requirement that judgments be rendered by "a regularly constituted court affording all the judicial guarantees ... recognized as indispensable by civilized peoples."¹⁷

How the *Hamdan* Decision Made Congressional Action Essential

The *Hamdan* decision impacts two areas that must be addressed in order for the nation to have the tools needed to further the War on Terror: an approved process for trying enemy combatants, and approved and workable U.S. interrogation techniques. Congress must pass legislation that addresses both issues.

Hamdan's Impact on Military Commissions

Hamdan has made it impossible to prosecute enemy combatants at Guantanamo Bay for war crimes, because the military commissions the President had authorized were held to be inconsistent with U.S. law. Prosecutions have come to a stand-still pending congressional action, because the government lacks an appropriate forum in which to try captured combatants, in particular terrorist leaders. The Department of Defense has estimated that approximately 40-80 detainees are expected to be charged with war crimes.¹⁸

It is essential that a forum for effective prosecutions exist if terrorist war criminals are to be brought to justice. It is true that, per *Hamdi*, enemy combatants can be held through the duration of hostilities, and it is generally agreed that hostilities will be lengthy. But detention at Guantanamo Bay is not a product of a search for justice, nor is it a form of punishment. Combatants are detained in order to keep them from the battlefield. The international law of armed conflict recognizes by "universal agreement and practice" that the primary purpose behind the capture and detention of enemy combatants is to prevent their return to combat, not to serve as punishment for criminal conduct.¹⁹ While detention is appropriate for enemy fighters, only by prosecuting those leaders who have actually committed war crimes, and by sentencing them either to punitive incarceration,

[537678.html](#) ("We are also not aware...of cases where the detaining power has simply released large numbers of enemy combatants during the course of the conflict.").

¹³ *Hamdan v. Rumsfeld*, 548 U.S. ___, 126 S. Ct. 2749 (2006).

¹⁴ *Hamdan*, 126 S. Ct. at 2791-92.

¹⁵ *Hamdan*, 126 S. Ct. at 2792.

¹⁶ *Hamdan*, 126 S. Ct. at 2796.

¹⁷ *Hamdan*, 126 S. Ct. at 2798.

¹⁸ Donna Miles, *Officials study implications of Supreme Court ruling on tribunals*, Armed Forces Press Service, June 29, 2006, available at http://defenseink.mil/news/Jun2006/20060629_5548.html.

¹⁹ *Hamdi*, 542 U.S. at 518.

or, in some cases, to death, will the U.S. ensure that justice is delivered. Merely holding them until hostilities end will not serve this goal.²⁰

To illustrate this point, consider that President Bush recently announced the transfer of 14 captured terrorists in CIA custody to Guantanamo Bay. Included in the transfer was the infamous Khalid Sheik Mohammed (“KSM”), the 9/11 mastermind. While in CIA custody, KSM and other extremely dangerous terrorist operatives and leaders who possessed “unparalleled knowledge about terrorist networks and plans for new attacks”²¹ were questioned extensively by professional interrogators. As a result, they revealed valuable information that helped stop terrorist attacks and save innocent American lives.²² Now that their intelligence value has been extracted, the President has sent them to Guantanamo Bay with the expectation that Congress will create military commissions for their prosecution. It is reasonably safe to assume that the death penalty will be an option that prosecutors will consider in the case of KSM. That option will not be available, however, if KSM and the others are merely detained. As the President stated, “the families of those murdered [on 9/11] have waited patiently for justice...they should have to wait no longer.”²³

Hamdan’s Impact on Ongoing Interrogations

The *Hamdan* decision has had another major effect: the undermining of effective interrogations of terrorist suspects. On September 6, 2006, President George W. Bush confirmed that a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the U.S. in a separate program operated by the CIA.²⁴ He explained that “the CIA program has been, and remains, one of the most vital tools in our war against the terrorists.”²⁵ The President continued:

Captured terrorists have unique knowledge about how terrorist networks operate. They have knowledge of where their operatives are deployed, and knowledge about what plots are underway... [T]his is intelligence that cannot be found any other place. *And our security depends on getting this kind of information.*²⁶

The Administration has explained that CIA interrogations have revealed a wide variety of intelligence, including initial leads; photo identifications; precise locations of where terrorists were hiding; identification of individuals that al Qaeda sought to use for Western operations, including persons sent to case targets inside the United States; identification of al Qaeda travel routes and safe

²⁰ Some of those detainees will be released when their intelligence value is depleted and the military determines that they no longer pose a threat to the United States, although experience shows that such determinations can be incorrect. Attorney General Gonzales recently explained that at least 15 detainees who were released from Guantanamo Bay have been recaptured or killed on the battlefield. Gonzales 3/7/06 Remarks.

²¹ Bush 9/6/06 Remarks.

²² Bush 9/6/06 Remarks; *see also* White House Fact Sheet: Bringing Terrorists to Justice, *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060906-2.html> (hereinafter “White House Fact Sheet”).

²³ Bush 9/6/06 Remarks; *see also* White House Fact Sheet.

²⁴ Bush 9/6/06 Remarks, ; *see also* White House Fact Sheet.

²⁵ Bush 9/6/06 Remarks; President Bush, Press Conference, September 15, 2006 (hereinafter “Bush 9/15/06 Press Conference”), *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>; *see also* White House Fact Sheet.

²⁶ Bush 9/6/06 Remarks (emphasis added).

havens; explanations of how al Qaeda's senior leadership communicates with its operatives in Iraq; and identification of voices in recordings of intercepted calls.²⁷

The Supreme Court's holding that Common Article 3 of the Geneva Convention applies to unlawful enemy combatants has made it very difficult for the CIA to proceed with interrogations. That is because Common Article 3 contains a prohibition against "outrages upon personal dignity" and "humiliating and degrading treatment."²⁸ This language has had a chilling effect on interrogators who rightfully fear that otherwise lawful interrogation techniques may be treated as falling under this Common Article 3 prohibition. In practice, they worry that they could be prosecuted under federal law, because the War Crimes Act, 18 U.S.C. § 2441, criminalizes conduct that violates Common Article 3 itself. Interrogators now lack clear notice as to what conduct is lawful,²⁹ and until Congress provides this notice, those servicemen and CIA interrogators responsible for extracting valuable, life-saving intelligence from dangerous terrorists remain subject to civil lawsuits and criminal prosecution for their past actions. Thus, they are forced to limit their interrogations, and the nation's intelligence-gathering suffers.

The First Challenge: Ensuring Prosecutions of Terrorist War Criminals

In the weeks since the Supreme Court's *Hamdan* decision, a general consensus has emerged that the Uniform Code of Military Justice can serve as a good starting-point for crafting military commissions. The UCMJ contemplates prosecutions during wartime, and has procedures to deal with the unique evidentiary challenges that arise. At the same time, it has been acknowledged by most that some deviation from the UCMJ is necessary to create a process appropriate for prosecuting foreign terrorists.

Both the Administration proposal (S. 3861) and the SASC bill (S. 3901) contain the same basic structure for new military commissions to try enemy combatant terrorists for violations of the law of war. Both bills would create a new Code of Military Commissions in title 10 of the U.S. Code, modeled after the courts-martial procedures contained in the same title, but with some distinctions. The commissions would have jurisdiction over unlawful enemy combatants who have committed war crimes. Like the courts-martial procedures established by the UCMJ, the commission would be presided over by a military judge, with commission members (functioning as a jury) composed of members of the Armed Forces. Prosecution and defense counsel would be appointed from the Judge Advocates General ("JAG") corps, with the possibility that civilian counsel may be employed. The government would bear the burden of proving the accused's guilt beyond a reasonable doubt, and conviction would require a vote by two-thirds of the commission in a non-death penalty case; it would require a unanimous 12-member vote to impose the death penalty.

The Administration and SASC proposals differ slightly on how appeals would be handled. The Administration would create a Court of Military Commission Review to hear appeals on

²⁷ White House Fact Sheet.

²⁸ Geneva Convention Relative to the Treatment of Prisoners of War, art. 3.1.c, Aug. 12, 1949, *available at* <http://www.yale.edu/lawweb/avalon/lawofwar/geneva03.htm> (hereinafter "Geneva Convention").

²⁹ Background Briefing by a Senior Administration Official and a Senior Intelligence Official on the Transfer of CIA Detainees to the Department of Defense's Guantanamo Bay Detention Facility, Sept. 6, 2006 ("The issue with Common Article 3 is its vagueness. What we are asking for is precision from the language."), on file with the Senate Republican Policy Committee.

questions of law.³⁰ For final military commission decisions, S. 3861 would grant jurisdiction to the D.C. Circuit Court of Appeals, where detainee actions are currently heard, pursuant to the Detainee Treatment Act of 2005 (“DTA”), and would provide an appeal as of right to all detainees. The Supreme Court could then review any D.C. Circuit decision by granting a writ of certiorari.³¹ The SASC bill would keep appeals in the military court system, sending appeals for both law *and* fact to the Court of Appeals for the Armed Forces (under the same scope of review provided in the Detainee Treatment Act), and then permitting writs of certiorari to be filed in the U.S. Supreme Court.³²

The Administration and SASC bills do contain important differences, however, especially regarding the handling of evidence and trial procedure. The following sections of this paper discuss some of the most significant areas of disagreement, including the admissibility of allegedly coerced testimony (pg. 7), the treatment of classified information (pg. 9), the admissibility of hearsay evidence (pg. 11), and the application of the Geneva Convention to unlawful combatants (pg. 12).

Evidentiary Issue #1: “Coercion” and Self-Incrimination

There is consensus that statements obtained by torture should never be admitted as evidence against an accused; however, there is disagreement over statements obtained by “coercion.” The crux of the problem is that defining “coercion” is very difficult, and no clear legal test exists to determine when unlawful coercion has occurred. In an environment where detainees are trained to remain silent and claim torture,³³ nearly every statement gleaned by interrogators is likely to seem coercive to a certain degree. On the other hand, turning a blind eye towards “coercion” may invite abuse, such that activities come closer to the “torture” standard that the U.S. eschews.

There are two different approaches to handling allegedly coerced statements. The Administration’s proposal is to permit the admission of statements obtained by methods other than torture, so long as the military judge does not determine the testimony to be unreliable or lacking in probative value.³⁴ The SASC bill prohibits the admission of statements obtained by, in addition to torture, “cruel, inhuman, or degrading treatment.”³⁵

The Administration’s Proposal as to Coercion

The Administration’s proposal prohibits the admission of statements obtained by torture into evidence.³⁶ Its approach to testimony gained by alleged “coercion” is to allow a military judge discretion to evaluate the credibility of an accused’s claim that his statement was obtained by coercion. Accordingly, S. 3861 allows a judge to determine whether the allegedly coercive

³⁰ S. 3861, 109th Cong., 2nd Sess., § 4, proposed 10 U.S.C. § 950f (hereinafter “S. 3861”).

³¹ S. 3861, § 4, proposed 10 U.S.C. § 950g.

³² S. 3901, 109th Cong., 2nd Sess., § 4, proposed 10 U.S.C. § 950f (hereinafter “S. 3901”).

³³ A manual discovered in Manchester, England, in 2000 revealed a comprehensive “how-to” guide on becoming an effective al Qaeda operative, including detailed instructions on how to operate in a prison or detention center and how to handle interrogations and investigations. The manual instructs members of al Qaeda to “insist on proving that torture was inflicted” and to “complain of mistreatment while in prison.” During interrogation, operatives are instructed to “be careful not to give the enemy any vital information.” The Manchester Document, available at <http://www.fas.org/irp/world/para/manualpart1.html>.

³⁴ S. 3861, § 4, proposed 10 U.S.C. § 948r(b).

³⁵ S. 3901, § 4, proposed 10 U.S.C. § 948r(b).

³⁶ S. 3861, § 4, proposed 10 U.S.C. § 948r(b).

circumstances under which a statement was made render the testimony unreliable or lacking in probative value.³⁷ The Administration argues that its approach preserves evidence that was obtained through interrogations specifically designed to elicit truthful and valuable information.

This approach mirrors the approach that Congress took in the Detainee Treatment Act, which provides standards for evaluating coercive statements in the context of a Combatant Status Review Tribunal (CSRT). Those standards require the CSRT to assess whether statements were obtained as a result of coercion and to evaluate their probative value.³⁸ In other words, neither S. 3861 nor the Detainee Treatment Act incorporates an exclusionary rule with respect to coercive statements. Instead, both rely on the relevant decision-making authority to evaluate a statement's reliability and probative value before allowing its admission into evidence.

The Administration's proposal provides an additional safeguard to help ensure that only credible, valuable evidence is admitted against a defendant. The military judge shall not admit evidence "the probative value of which is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members of the commission, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."³⁹ Consequently, S. 3861 creates a scenario whereby even the most reliable and probative statement could be excluded from evidence due to other considerations.

The SASC Bill's Alternative Approach

In addition to its prohibition against the admission of statements obtained by torture, the SASC bill bars statements obtained by "cruel, inhuman, or degrading treatment." This phrase refers to the DTA, which makes clear that those terms are "the cruel, unusual, and inhuman treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution" and in other expressions of U.S. law.⁴⁰ Statements obtained through alleged coercion *not* amounting to "cruel, inhuman, or degrading treatment" may be admitted in evidence only if the military judge finds the statement reliable and probative and finds that the "interests of justice" are best served by its admission into evidence.⁴¹

Proponents of the SASC approach argue that coercive statements are routinely barred from evidence in federal court and traditional military courts-martial because of their suspect reliability. Because such statements are rarely admissible in traditional courts of law, SASC proponents view the admission of statements obtained by "coercion" as inconsistent with the Geneva Convention's Common Article 3 requirement that judgments derive from "a regularly constituted court affording all the judicial guarantees...recognized as indispensable by civilized peoples."⁴² Proponents also argue that, if such evidence obtained in violation of the DTA is admissible, there may be incentive to violate the law. They also express concerns that statements obtained by overly aggressive interrogation tactics represent false confessions or assertions made only to end the coercion.

³⁷ S. 3861, § 4, proposed 10 U.S.C. § 948r(c).

³⁸ Detainee Treatment Act, Sec. 1005(b)(1).

³⁹ S. 3861, § 4, proposed 10 U.S.C. § 949a(c).

⁴⁰ S. 3901, § 4, proposed 10 U.S.C. § 948r(b).

⁴¹ S. 3901, § 4, proposed 10 U.S.C. § 948r(c).

⁴² Geneva Convention, *at* art. 3.1.d.

Evidentiary Issue #2: Admissibility of Classified Information

In some cases against enemy combatants, successful prosecution will not be possible without the use of classified evidence. Yet, classified information — including sources and methods to obtain the information — should not be allowed to fall into terrorists' hands.⁴³ There is widespread agreement that the government should be able to withhold classified information from terrorists, but approaches to admissibility of evidence differ markedly. Under the Administration's bill, classified evidence may be kept from the accused, so long as it is provided to his defense counsel. In contrast, the SASC bill creates a privilege against disclosure of classified information, *but* would require the government to forego prosecutions where disclosure would not be feasible.

The Administration's Proposal as to Classified Information

The approach favored by the Administration is to provide a mechanism whereby classified evidence may, in limited and defined circumstances, be admitted without the accused's knowledge. S. 3861 allows for an *in camera* or *ex parte* presentation to allow the military judge to determine whether exclusion of the defendant is necessary to protect the integrity of classified evidence.⁴⁴ The bill then requires the head of the executive department or agency that has classified the evidence to certify in writing that sharing the evidence would harm national security and that the evidence has been declassified as much as possible.⁴⁵ Once that assurance has been obtained, S. 3861 allows the admission of classified evidence without the knowledge of the accused when the judge determines that such admission is warranted, that no unclassified substitutes are adequate, and that admission would not deprive the accused of a full and fair trial.⁴⁶ Under S. 3861, if the accused is excluded from the courtroom, he shall be provided with a redacted transcript of the proceeding and, to the extent practicable, an unclassified summary of any evidence introduced in his absence.⁴⁷

However, the Administration proposal does permit a defendant's military defense counsel to be present for all trial proceedings and have access to all evidence admitted against the accused.⁴⁸ Civilian defense counsel is afforded those same privileges, so long as he has obtained the security clearances necessary for handling classified evidence.⁴⁹ Counsel is prohibited from discussing the evidence with the accused.

The Administration argues that even providing classified information to cleared defense counsel is not without risk. There remains some concern that ideological attorneys will be willing to compromise national security secrets and disclose classified information. Indeed, there are at least two recent instances involving the disclosure of classified information by attorneys defending suspected terrorists. In August 2006, Navy Lieutenant Commander Matthew Diaz was charged after he printed secret information about Guantanamo detainees and transmitted the material outside

⁴³ "In the midst of the current conflict, we simply cannot consider sharing with captured terrorists the highly sensitive intelligence that may be relevant to military-commission prosecutions." Steven Bradbury, Acting Assistant Attorney General for the Office of Legal Counsel, Testimony before the House Armed Services Committee, September 7, 2006, available at <http://www.house.gov/hasc/schedules/9-7-06BradburyStatement.pdf>.

⁴⁴ S. 3861, § 4, proposed 10 U.S.C. § 949d(e)(3)(A).

⁴⁵ S. 3861, § 4, proposed 10 U.S.C. § 949d(e)(3)(B).

⁴⁶ S. 3861, § 4, proposed 10 U.S.C. § 949d(e)(4)(A).

⁴⁷ S. 3861, § 4, proposed 10 U.S.C. § 949d(e)(4)(B).

⁴⁸ S. 3861, § 4, proposed 10 U.S.C. § 949d(e)(5)(A).

⁴⁹ S. 3861, proposed 10 U.S.C. § 949d(e)(5)(B).

of the prison.⁵⁰ That Diaz was a cleared military defense counsel creates even greater cause for alarm, as critics generally seem to presume that civilian defense counsel would be more likely to compromise classified information than experienced servicemembers. In February 2005, civilian defense counsel Lynne Stewart was convicted of providing material support for a terrorist conspiracy by smuggling messages from her jailed client, a Muslim cleric convicted of terrorism,⁵¹ to his Islamic fundamentalist followers in Egypt.⁵² Fueling the suggestion that some lawyers would be willing to compromise classified evidence, Stewart said about her conviction: “I would do it again — it’s the way a lawyer is supposed to behave.”⁵³ Nevertheless, in the interest of providing process to defendant detainees, the Administration proposal absorbs these risks and allows cleared counsel to have access.

SASC’s Alternative Approach to Classified Evidence

Under the SASC’s bill, both the defense counsel *and the defendant* must be permitted to see all evidence offered against the defendant at trial. The bill provides that classified information shall be handled in accordance with rules applicable in trials by general courts-martial, requiring the prosecution to substitute redacted or summarized evidence for classified evidence, where possible.⁵⁴ It precludes disclosure of classified information if disclosure would be “detrimental to the national security.”⁵⁵ But if classified evidence cannot be summarized or redacted for the accused to see, the prosecution must forego prosecution.

Proponents view an accused’s opportunity to confront each and every piece of evidence offered to prove his guilt as essential to a fair trial.⁵⁶ As Marine Brigadier General James C. Walker testified before the House Armed Services Committee:

I simply believe the right to see the evidence against you and to be present when evidence is presented are fundamental to a full and fair trial and are also part of those judicial guarantees which are recognized as indispensable by civilized people. This may require in particular cases ... the government ... to balance ... the need for prosecution on a particular charge against the need to protect certain classified information.⁵⁷

⁵⁰ Larry O’Dell, *Navy charges lawyer in secrets case*, ASSOCIATED PRESS, August 29, 2006, available at <http://apnews.myway.com/article/20060830/D8JQFH00.html>.

⁵¹ Lynne Stewart’s client, Sheik Omar Abdel Rahman, was serving a life sentence for conspiring to blow up the United Nations, two Hudson River tunnels and the FBI building in Manhattan. He also wanted to assassinate Egyptian President Hosni Mubarak. Michael Powell and Michelle Garcia, *Sheik’s U.S. lawyer convicted of aiding terrorist activity*, WASHINGTON POST, February 11, 2005 (hereinafter “Powell and Garcia”).

⁵² Powell and Garcia.

⁵³ Powell and Garcia.

⁵⁴ S. 3901, § 4, proposed 10 U.S.C. § 949d(a)(4).

⁵⁵ S. 3901, § 4, proposed 10 U.S.C. § 949d(a)(4)(B).

⁵⁶ As Brigadier General Walker, Staff Judge Advocate to the Commandant U.S. Marine Corps, testified before the House Armed Services Committee, “the key is the meaningful participation of the accused in his trial, not the participation of his attorney.” Brigadier General James C. Walker, Staff Judge Advocate to the Commandant U.S. Marine Corps, Testimony before the House Armed Services Committee, September 7, 2006, available at <http://www.house.gov/hasc/schedules/9-7-06WalkerStatement.pdf> (hereinafter “Walker 9/7/06 Testimony”).

⁵⁷ Walker 9/7/06 Testimony.

In other words, SASC supporters are concerned about the possible reciprocal treatment of U.S. soldiers.⁵⁸ Advocates of the SASC's bill would require prosecutors to apply a balancing test: which is more important—prosecuting a detainee accused of committing war crimes (but without the benefit of classified information) , or foregoing prosecution altogether? In the latter case, the accused would continue to be held as an enemy combatant, for so long as hostilities occur, and, if crucial evidence later becomes unclassified, the SASC bill would allow the government to revisit the possibility of prosecution.

Evidentiary Issue #3: Admissibility of Hearsay Evidence

While the federal and military rules of evidence prohibit admission of most hearsay statements, unique circumstances presented by this conflict may require more flexibility in the evidentiary rules for military commissions. Given the worldwide, ongoing nature of the current conflict, crucial witnesses may be precluded from testifying before the commissions because they are foreign nationals who are not amenable to process, or because they are unavailable due to military service, incarceration, injury, or death. Adopting either the federal or military rules of evidence on hearsay would be impracticable in conducting trials by military commission, as both the Administration and SASC bills agree.

The Administration's Proposal on Hearsay Evidence

The Administration's approach is to make *probative* hearsay evidence admissible unless the military judge, in his discretion, finds that the evidence is unreliable.⁵⁹ Additionally, S. 3861 requires the exclusion of evidence, the probative value of which is outweighed by the danger of unfair prejudice.⁶⁰ The military judge would account for the exigencies of war and admit reliable, probative hearsay evidence that would otherwise be excluded in a traditional trial setting, while excluding such evidence when it would render a defendant's trial unfair. As General Walker testified before the House Armed Services Committee, this approach "conform[s] with the accepted legal standards but also recognize[s] the unique character of the conflict we're in now and the availability of evidence and the availability of witnesses worldwide."⁶¹

SASC's Alternative Approach on Hearsay Evidence

S. 3901 provides that hearsay evidence not otherwise admissible under the rules of evidence applicable in a trial by general courts-martial may be admitted in a trial by military commission *only* if the judge finds that the evidence is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts, taking into consideration the unique circumstances of the conduct of military and intelligence operations during

⁵⁸ The Administration's views about reciprocal treatment are twofold: (a) this rule would only apply to enemy combatants, not lawful combatants operating under the laws of war, and (b) classified information is not automatically given to all defendants in foreign and international courts. The European Court of Human Rights, for example, has explained, "In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest." *Case of Roe & Davis v. United Kingdom*, application # 28910/95, decided February 16, 2000, available at <http://www.echr.coe.int>.

⁵⁹ S. 3861, § 4, proposed 10 U.S.C. § 949a(c).

⁶⁰ S. 3861, § 4, proposed 10 U.S.C. § 949a(c).

⁶¹ Walker 9/7/06 Testimony.

hostilities.⁶² In other words, the SASC bill is more restrictive as to the admission of hearsay evidence. It would still allow its admission if it is the best evidence available.

The Second Challenge: Common Article 3 and Interrogations

Common Article 3 of the Geneva Convention governs the treatment of persons detained by signatory nations during the course of “an armed conflict *not* of an international character.”⁶³ Among its provisions is a prohibition against “outrages upon personal dignity” and “humiliating and degrading treatment.”⁶⁴ Prior to *Hamdan*, Common Article 3 unquestionably applied to U.S. personnel dealing with actual prisoners of war from nations who had signed the Geneva Convention. However, despite the President’s determination that the war with al Qaeda was an armed conflict of an international character, the Supreme Court held that Common Article 3 *does* apply to the current conflict.⁶⁵ Thus, all interrogations conducted by U.S. personnel (whether by the CIA or the military) of captured enemy combatants are now governed by Common Article 3’s provisions listed above.

The vagueness of this Common Article 3 prohibition, and its new application to terrorists, has presented severe difficulties for ongoing interrogations. The President has stated that the vagueness of the Common Article 3 prohibition against “outrages against personal dignity” prevents the government from giving adequate guidance to U.S. personnel as to what interrogation conduct satisfies U.S. treaty obligations. On September 15, he explained:

The Court said that you’ve got to live under Article 3 of the Geneva Convention and the standards are so vague that our professionals won’t be able to carry forward the program because they don’t want to be tried as war criminals. They don’t want to break the law. These are decent, honorable citizens who are on the front line of protecting the American people and they expect our government to give them clarity about what is right and what is wrong in the law.⁶⁶

President Bush’s reference to the risk of being tried as “war criminals” refers to the War Crimes Act, 18 U.S.C. § 2441, which provides that *any* violation of Common Article 3 is a criminal violation. Thus, today, any American interrogator is subject to potential prosecution if a judge and jury find that his conduct violates the amorphous standard of “outrages against personal dignity.” Moreover, as it stands, this term, currently undefined in U.S. law, *will be* defined on a case by case basis depending on how *all* courts interpreting the treaty — domestic, foreign, or international — interpret its scope.

There is a general consensus that American personnel should not be subject to prosecution based on such a vague standard, especially where international and foreign courts could be

⁶² S. 3901, § 4, proposed 10 U.S.C. § 949a(b)(3)(D).

⁶³ Geneva Convention, *at* art. 3.

⁶⁴ Geneva Convention, *at* art. 3.1.c.

⁶⁵ For a discussion as to why the Supreme Court was wrong to extend the Geneva Conventions to non-signatories, see Justice Thomas’s dissenting opinion in *Hamdan*, as well as the Senate Republican Policy Committee, *The Impact and Meaning of the Supreme Court’s Hamdan Decision*, released July 11, 2006, available at <http://rpc.senate.gov/files/July1106HamdanBCMS.pdf>.

⁶⁶ President Bush, Press Conference, September 15, 2006, available at <http://www.whitehouse.gov/news/releases/2006/09/20060915-2.html>. (hereinafter “Bush 9/15/06 Press Conference”).

determining the meaning of that language, but disagreement remains as to how to remedy that problem.

The Administration Proposal for Dealing with Common Article 3

The Administration has elected to accept the Supreme Court’s statutory interpretation of the Geneva Convention and apply it to enemy combatants, but it also recommends that Congress exercise its authority to interpret — for the first time — its understanding of Common Article 3. Until now, the vague language of Common Article 3 has gone without express interpretation by Congress, but there is no legal dispute regarding Congress’s power to do so. According to well-settled Supreme Court precedent, Congress has the power to provide meaning to the language of Common Article 3, and doing so would be consistent with the nation’s international treaty obligations.⁶⁷ The Administration emphasizes that its proposal is *not* an amendment to or reinterpretation of Common Article 3, but, rather, is an interpretation that provides clear meaning to it for the first time.

To that end, Section 6 of the Administration’s proposal specifies that the United States’s obligations under the treaty are satisfied by the standards Congress previously adopted in the Detainee Treatment Act of 2005 (the “DTA”).⁶⁸ The DTA expressly prohibits U.S. personnel from using any “cruel, inhuman, or degrading treatment or punishment” against enemy combatants. This language, which was negotiated by Senator John McCain and the White House, passed the Senate, 90-9, on October 5, 2005.⁶⁹ Although this language is arguably vague in and of itself, the Administration favors this language because it is hinged to American constitutional and statutory law, and that is what the government presently trains its personnel to abide by. Specifically, the DTA provides:

[T]he term “cruel, inhuman, or degrading treatment or punishment” means the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.⁷⁰

Thus, by exercising its power to interpret the treaty in this way, Congress would be protecting U.S. personnel from the uncertainty of international legal decisions, and ensure that U.S. law — the standards of the DTA — would apply instead.

The Administration contends that it is essential to interpret Common Article 3 in explicit terms such as these because U.S. personnel need clear guidance as to what conduct will be

⁶⁷ Congressional power to interpret treaties — even to pass legislation directly contrary to treaties — is settled. As the Supreme Court has held, “When a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.” *Breard v. Greene*, 523 U.S. 371, 376 (1998) (quoting *Reid v. Covert*, 354 U.S. 1, 18 (1957)). This greater power (to enact legislation that is inconsistent with a treaty) includes the lesser power (to define and interpret treaty terms).

⁶⁸ S. 3861, § 6.

⁶⁹ See Record Vote #249, October 5, 2005.

⁷⁰ See McCain Amendment (Amendment #1977) to the Defense Appropriations bill, as printed in the *Congressional Record* on October 3, 2005, at S10908.

permissible. As Director of National Intelligence John Negroponte said on September 13, individuals conducting interrogations need “certainty” in order to “feel comfortable that they [are] carrying out these responsibilities in a lawful manner.”⁷¹ Only with clear guidance on what Common Article 3 means, the President maintains, can U.S. personnel do their jobs.

Section 6 of the Administration proposal also addresses another issue: judicially enforceable rights. Historically, the United States has *not* interpreted the Geneva Convention as creating judicially enforceable private rights, so, consistent with that interpretation, the proposal clarifies that Geneva Convention rights are *not* judicially enforceable by detainees in any habeas or other action, for any purpose, in any court of the United States or its territories.⁷² Consequently, under S. 3861, no detainee would be able to use Common Article 3 to pursue civil damages or to challenge the legality of military commissions. At the same time, section 7 of the proposal would amend the War Crimes Act to make clear that certain serious violations of Common Article 3 shall be prosecutable, including, for example, torture, rape, and cruel and inhuman treatment, as defined in U.S. law.

The SASC Bill’s Approach to Common Article 3

Supporters of the SASC bill agree that U.S. personnel should be protected from prosecution for violations of Common Article 3, but disagree that U.S. personnel’s obligations under Common Article 3 should be modified. Instead, the SASC bill supporters would not provide any interpretations of Common Article 3, leaving it to be defined through the regular processes of international law (i.e., with reference to domestic, foreign, and international interpretations). U.S. personnel would remain obligated to abide by Common Article 3 itself.

The SASC bill supporters argue that any “interpretation” is, in fact, a “redefinition” of the treaty obligation, and that any attempt to “define” Common Article 3 would have adverse consequences for U.S. personnel in future conflicts. If the United States were to exercise its authority to define the meaning of the language of Common Article 3, SASC bill supporters argue, then other nations might be encouraged to issue redefinitions of Common Article 3 in the future, and those may be less protective of detainees who could potentially be U.S. operatives. Supporters acknowledge that al Qaeda does not abide by the Geneva Convention, but argue that, in future wars against *signatory* nations, U.S. personnel could be put at risk if the opposing nations were to issue redefinitions of Common Article 3.⁷³

⁷¹ John Negroponte, Conference Call Briefing, September 13, 2006, (on file with Senate Republican Policy Committee) (hereinafter “Negroponte 9/13/06 Briefing”); see also Laurie Kellman, *Bush seeks GOP support for terror bills*, Associated Press, September 14, 2006, available at <http://www.abcnews.go.com/Politics/print?id=2433765> (reporting contents of Negroponte briefing).

⁷² S. 3861, § 6(b).

⁷³ The Administration’s view on this point is that rogue nations will do what they do regardless of any U.S. initiative to define the vague phrases of Common Article 3. For some signatory states, abiding by Common Article 3 is a rhetorical exercise, as their compliance with the corpus of international humanitarian law is atrocious in practice. The State Department has found the human rights records of various signatories of the Geneva Conventions to be problematic. For example, it has found there to be “prison deaths under suspicious circumstances” in Uzbekistan, and that the security forces of Uzbekistan engage in “routine and systematic torture and abuse of detainees.” Department of State Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices, Uzbekistan (2006), available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61684.htm>. Moreover, the State Department has found Iran to engage in summary executions, disappearances, and torture. See Iran report for 2006 available at <http://www.state.gov/g/drl/rls/hrrpt/2005/61684.htm>.

The SASC bill does not leave U.S. personnel without protections. The SASC bill insulates U.S. personnel from the consequences of violating Common Article 3 by making explicit that said personnel could only be prosecuted (under the War Crimes Act) for certain grave breaches, including, for example, torture, murder, and performance of biological experiments, but *not* for general violations of Common Article 3, as is the law today.⁷⁴ Supporters acknowledge that this approach, sometimes referred to as the “Title 18 only” avenue,⁷⁵ would create an asymmetry in U.S. law, because interrogators would continue to be bound by Common Article 3, but they could not be prosecuted for violations of it. The President and the Director of National Intelligence have argued that the preservation of the vague language will deny U.S. interrogators the needed “clarity” they need to do their jobs, but the SASC bill supporters contend that the more important questions are whether (a) Common Article 3 remains unaffected by U.S. “redefinition,” so that other nations decline to redefine it, thus protecting U.S. personnel in future conflicts, (b) U.S. personnel have clarity under Title 18 about whether they can be prosecuted or not, and (c) protection against private rights of action for civil damages.

How Will the CIA Interrogation Program be Affected by Legislation?

An important consideration is the impact of the SASC bill on the CIA interrogation program. At present, the Administration contends that the SASC bill would put the program in jeopardy. President Bush stated on September 15 that “the intelligence community must be able to tell me that the bill Congress sends to my desk will allow this vital [CIA interrogation] program to continue.”⁷⁶ And Director of National Intelligence Negroponte has already stated that, if the SASC bill becomes law, the CIA Director has told him that “he did not believe the program could go forward.”⁷⁷

SASC bill supporters contend that amending Title 18 provides the protection necessary for the CIA program to continue. U.S. personnel who act in compliance with the DTA and U.S. laws need not fear prosecution under Common Article 3, they argue. They also believe that the program can continue if the Department of Justice issues opinions that certain interrogation tactics are permissible, even if they may not appear permissible based on foreign interpretations of Common Article 3. Supporters of the Administration position contend that Justice Department lawyers will be unwilling to issue opinions validating interrogation tactics given the political repercussions over the past several years when other such opinions were issued by other government attorneys.⁷⁸ Also of concern is whether the Supreme Court would find an executive branch interpretation adequate, in light of the Court’s dismissal of the executive branch’s traditional role in interpreting treaties in the *Hamdan* case.

⁷⁴ S. 3901, § 8. The SASC bill also would prevent any claim for damages based on the Geneva Convention, but, unlike the Administration proposal, it is silent as to whether habeas corpus claims could be lodged based on the Convention.

⁷⁵ Recall that the Administration’s proposal addresses both Title 18 and Common Article 3—amending Title 18 to specify which serious violations of Common Article 3 are prosecutable offenses, and providing, for the first time, an interpretation of that Article.

⁷⁶ Bush 9/15/06 Press Conference.

⁷⁷ Negroponte 9/13 Briefing.

⁷⁸ In particular, former Assistant Attorney General Jay Bybee and Deputy Assistant Attorney General John Yoo have faced substantial political attacks and accusations due to their efforts to determine what interrogation techniques should be permissible. Related attacks have been leveled against Department of Defense General Counsel William J. Haynes.

Final Point — Agreement on Clarifying the Detainee Treatment Act

When Congress passed the DTA in late 2005, one of the things it did was limit the ability of detainees to file habeas petitions against U.S. military personnel who are holding them. Instead, the DTA granted detainees facing adverse judgments in either a military commission or a CSRT a single right of appeal to the U.S. Court of Appeals for the D.C. Circuit. In *Hamdan*, the Supreme Court found that Congress had failed to articulate clearly the application of this exclusive remedy to *pending* (versus future) cases. In order to ensure that the several hundred current lawsuits filed by enemy-combatant detainees are governed by the DTA's review system, it will be necessary to expressly apply the Act to pending cases. To that end, S. 3861 amends 28 U.S.C. § 2241, where the Detainee Treatment Act is now codified, to clarify that:

Except as provided for in this subsection, and notwithstanding any other law, no court, justice, or judge shall have jurisdiction to hear or consider 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 this Act*, 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.⁷⁹

In effect, under the Administration's proposal, all of the current lawsuits against the United States filed by enemy-combatant detainees would be channeled into the D.C. Circuit for review, pursuant to the DTA.

The SASC bill agrees with the Administration's effort to restate and affirm the DTA's attempt to apply its provisions to pending cases, and provides language in Section 6 to ensure that the Supreme Court will be reviewing plain and unambiguous language to that effect.

⁷⁹ S. 3861, § 5, proposed 28 U.S.C. § 2241(e).