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Hearing on Legal Issues Surrounding the Military Commissions System

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Good morning Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner, and Members of the Subcommittee. Thank you for inviting me to testify on behalf of the American Civil Liberties Union regarding the legal and moral implications of this misguided effort to revive the military commissions at Guantanamo Bay.

Congress should not revive or continue trials under Military Commissions in either their current or some modified form. Military Commissions do not offer a fair alternative to the ability of existing, regularly constituted federal courts to protect the legitimate interests of both the government and the criminally accused. The consistent experience of federal prosecutors handling complex, high-profile terrorism cases proves that federal courts are wholly capable of protecting classified information and national security interests while conducting a trial that bears all the historic hallmarks of fundamental due process. Against this record, proponents of the Military Commissions have argued that the principal of a Military Commission is to ensure convictions while avoiding or substantially weakening basic rules of fairness and reliability. In contrast, federal courts would exclude coerced statements and enforce the right of accused to meaningful cross-examination; any conviction that occurred in this forum would inspire public confidence. By design and by definition, the trial of Guantanamo detainees before a Military Commission cannot accomplish any of the goals of a legitimate justice system: such trials will

not be fair or look fair, they will not be competent or look competent, and so they cannot produce reliable verdicts. Perhaps worst of all, no judgments under the Military Commission will ever truly be final.

As the Director of the ACLU's John Adams Project, I have attended and observed nearly all of the capital pretrial proceedings in the 9/11 conspirators' cases. When the 9/11 conspiracy trial proceedings first began last summer, I was concerned that the Military Commissions Act created the potential for sham trials, show trials. Those concerns were only strengthened by my personal observation of the proceedings in Guantanamo. I can say without hesitation that, as bad as the Military Commissions appeared on paper, they have proved to be far worse in practice. That conclusion is shared by many other observers of Commission proceedings. In twenty years of defending indigent capital clients in the Deep South I have not seen the blatant unfairness I have witnessed in these proceedings.

Some examples:

- Delayed security clearances initially prevented attorneys from meeting with clients and still prevent capital counsel, investigators, and mitigation specialists from full participation;
- The Convening Authority has denied 47 of 55 requests for defense resources, including mitigation specialists, experts, and investigators. None of the detailed military counsel is qualified to serve as "learned counsel" in a capital case and defense teams have no ability to bring in independent experts (even if they are willing to work *pro bono*) unless the government determines that they have a "need to know."

- In the most egregious of these denials, the commissions denied requests for an independent expert psychiatrist for a capital defendant who is admittedly psychotic and who was tortured in CIA custody.
- Requirements that detainees wear eye and ear coverings en route to meet with their counsel have prevented attorney-client meetings because detainees experienced this sensory deprivation during extraordinary rendition, and told the International Red Cross that such hooding was physically painful and frightening.
- Defendants who are non-English speakers are denied translations of documents necessary to their defense.
- Adding to the difficulty of travel to Guantanamo for attorney-client visits, the commissions have failed to allow for secure phone calls between clients and attorneys, and have refused to provide adequate delivery of trial materials or timely de-classification of defense matters.
- The government continues to ignore specific requests for discovery and those discovery materials provided have been unusable or irrelevant.
- The government refuses to provide defense counsel with access to a "privilege team" (an independent classification authority), which has resulted in threats of prosecution against counsel after filing motions or making routine communications.
- Protective orders prevent defense teams for the "High-Value Detainees" from necessary communications amongst themselves or with experts, investigators, and mitigation specialists.

- Requests for funding specific investigation plans, services of experts, and resources for preparation of cases are not confidential and give the prosecution a window into and a say about the defense strategy.
- And as to the request for a legal pad so that a *pro se* defendant could write a motion, the trial judge -- a Marine colonel -- denied the request because "you have to make that motion in writing."

Let me speak to the appearance of inadequacy at the Commissions proceedings.

- Not one day – not one hour – has gone by without significant translation problems. The observers who come from recent war crimes trials in Europe and Africa are especially astonished at the apparent inability or unwillingness of the Commissions to provide even adequate translation of death penalty trials to the non-English speaking defendants, some of whom are acting as their own lawyers.
- Despite repeated requests and the fact that 9/11 was the most investigated crime in the history of the United States, very few investigative documents have been provided in discovery to the defense, fortifying the perception that no real trial is contemplated.
- An entire day was lost while the court and the prosecutors debated with JTF Gitmo on how to order and conduct a cell extraction on Ramzi bin al Shibh, one of the defendants who has been diagnosed as psychotic by the Guantanamo doctors. Such "cell extractions," like the forced hoodings for attorney visits, make it look as though mistreatment is still occurring, and the day lost to debate was a direct result of the denial of adequate defense resources and opportunity to communicate with their clients. At the end of the day, the Military Judge called the proceedings "a learning experience." It is

not supposed to be a "learning experience"; it is supposed to be a capital trial conducted by a country ruled by laws.

Article III courts can and should be the venue for these trials. Article III courts will begin with the presumption of fairness: our country and our allies will accept the verdicts of these courts where many will never accept the verdict of a court that was created to give second-rate justice. Those who insist that national security requires a new court system are mistaken for any number of reasons:

- Federal courts try crimes committed in Iraq and Afghanistan, as well as other war zones around the world, and are sufficiently flexible to allow introduction of reliable evidence.
- Miranda warnings are not required in a federal court if the statement is voluntary.
- The Classified Information Procedures Act (CIPA) has proven itself time and again to provide all the protections witnesses and intelligence sources require.

Use of Evidence Obtained Through Coercion

By contrast with Article III courts, the current proposals for the Military Commissions do not meet federal standards. Most importantly, the military commissions do not conform to either the Constitution or the Geneva Conventions. The legislation reported out by the Senate Armed Services Committee less than two weeks ago will result in convictions that will eventually be found to be unconstitutional and illegal. As social science and forensic sciences teach us more about the dangers of coerced evidence, it is regressive to establish – for the first time since the witch trials of the 17th century – an American system of justice that permits coerced evidence, and accusation by shadowy unnamed accusers who cannot be challenged or confronted. The use

of such evidence is unjust, unnecessary, and unwise: It is unjust because it may lead to the conviction of the innocent; and make no mistake, there are and there have been innocents locked up in Guantanamo[1]. It is unwise because the endeavor further drags our military and our military justice system into the sordid effort to hide the details of a detainee's torture, while allowing the prosecution to exploit the tainted product of such lawlessness.

Thus, for no good reason, the legislation reported out by the Senate Armed Services Committee foregoes the ban on the use of forced confessions mandated by the Due Process Clause of the U.S. Constitution, and directs that, where the degree of coercion used to obtain a statement is disputed, the military commissions ban only statements obtained through "cruel, inhuman, or degrading treatment" (CID). There are significant differences between the standard for coerced evidence and that for CID. The domestic legal standard for use of statements obtained through coercion has been developed over centuries and is a well-established feature of criminal proceedings in both U.S. civilian courts and military courts-martial. Indeed, the ban on the use of involuntary statements or confessions as evidence against an accused is a fundamental principle of the American criminal justice system, mandated by the Due Process Clause to the U.S. Constitution.[2] In contrast, the meaning of CID under U.S. law was disputed by the last Administration. Although international and foreign courts have adjudicated the meaning of CID on a number of occasions, domestic courts have never had the opportunity to do so.

Under the Constitution, for a confession to be voluntary, a criminal suspect must "choose[] to speak in the unfettered exercise of his own will."[3] Courts will exclude confessions

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[1] The Uighur cases alone demonstrate the truth of this statement. *See, e.g., Parhat v. Gates*, 532 F. 3rd 834, 836 (C.A.D.C. 2008)(noting that "It is undisputed that [petitioner] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies.")

[2] *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944). The ban applies whether the confession is self-incriminating or incriminating towards third-parties. *See id.* at 155-56.

[3] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

"extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence."[4] They will look to "the totality of the circumstances"[5] surrounding the confession to determine "whether a defendant's will was overborne."[6] This determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."[7] Once a defendant challenges a confession, "the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary."[8]

Although courts exclude forced confessions as unreliable, they are more fundamentally concerned with offering defendants a genuine "free choice"[9] to confess and ensuring a procedure that upholds "that fundamental fairness essential to the very concept of justice."[10] The Supreme Court has recognized that "important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."[11] And although this test suggests a case by case approach—its outcome depends on both the actions of the government and the individual characteristics of the defendant—courts have consistently held that due process prohibits the use of statements obtained through certain types of physical and psychological coercion,[12] including solitary confinement, prolonged incommunicado detention, deprivation of food and sleep, beatings,

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[4] Hutto v. Ross, 429 U.S. 28, 30 (1976) (citing Bram v. United States, 168 U.S. 532, 542-43 (1897)).
[5] Frazier v. Cupp, 394 U.S. 731 (1969).
[6] Shneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).
[7] Stein v. New York, 346 U.S. 156, 185 (1953).
[8] Lego v. Twomey, 404 U.S. 477, 489 (1972).
[9] Watts v. Indiana, 388 U.S. 49, 53 (1949).
[10] Lisenba v. California, 314 U.S. 219, 236 (1941).
[11] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
[12] *See, e.g., id.* ("The efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion…. [T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.).

forced nudity, threats of death or physical harm to the defendant or to others, and promises of release, leniency in sentencing or other benefits.

Coerced confessions are also excluded under U.S. military law. The Uniformed Code of Military Justice bans as "involuntary" statements obtained "through the use of coercion, unlawful influence, or unlawful inducement."[13] The Manual for Courts-Martial offers explicit examples of such conduct, namely:

> Threats of bodily harm; Imposition of confinement or deprivation of privileges or necessities because a statement was not made by the accused, or threats thereof if a statement is not made; Promises of immunity or clemency as to any offense allegedly committed by the accused; Promises of reward or benefit, or threats of disadvantage likely to induce the accused to make the confession or admission.[14]

As in civilian courts, military courts must examine the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation, to determine "whether the confession is the product of an essentially free and unconstrained choice by its maker."[15] In assessing the totality of the circumstances, military courts will look to factors such as "the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[16]

In contrast to the coerced evidence standard, no one knows precisely what it would mean to exclude only evidence obtained through torture and CID. The Senate has provided some minimal guidance on how courts might determine the meaning of CID, through a reservation to the UN Convention Against Torture providing that:

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[13] Uniform Code of Military Justice, 10 U.S.C. § 831, Art. 31.
[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c)(2) analysis, at A22-10 to A22-11.
[15] United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996).
[16] United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002).

> the United States considers itself bound…to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[17]

There is thus at least an argument that, for purposes of adjudication before U.S. courts or military commissions, CID is coterminous with U.S. constitutional standards for detainee treatment under the Fifth, Eight and Fourteenth Amendments.[18]

But this argument only underscores the central irony behind the use of CID as the standard for admissibility for trial by military commissions: Under a certain reading of CID, it is coterminous with constitutional protections. Under any other reading, it is constitutionally suspect, and likely to be overturned by the Supreme Court. Indeed, the Justice Department's Office of Legal Counsel appears to have argued as much in a recent undisclosed opinion, as reported just last week by the *Wall Street Journal* and *New York Times*. According to these media reports, OLC concluded that some military commission convictions could be reversed as unconstitutional based on the use of coerced evidence.

In fact, in his testimony before the Senate Armed Services Committee just yesterday, Assistant Attorney General David Kris argued that the commissions should adopt the same voluntariness standard used in Federal courts and courts martial. "It is the Administration's view," he contended, "that there is a serious risk that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional."

It is thus unclear precisely why Congress would want to import such a poorly-defined and constitutionally suspect standard into the trials of terrorism suspects. Indeed, this seems like

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[17] 136 Cong. Rec. 36198 (1990).

[18] However, this Senate reservation applies only to the UN Convention Against Torture and does not purport to provide an authoritative definition of CID.

a recipe for endless litigation and delay. Even the Office of Legal Counsel under the Bush Administration, while putting forth the extreme (and incorrect) argument that "enhanced interrogation" techniques like waterboarding did not constitute CID because they do not "shock the conscience," nonetheless admitted that it could not "set forth a precise test for ascertaining" what, precisely, *was* CID.[19] (An appendix to this testimony offers legislators some examples of the circumstances in which courts have excluded evidence obtained through coercion, and where they might draw the line for evidence obtained through CID.) Instead of using the sometimes-disputed CID standard, Congress should embrace the clear rule mandated by our Constitution: no one is to be convicted under any American system of justice based on any coerced evidence. The rule should always be: no forced confessions.

Admission of hearsay evidence

The commissions are also flawed in their admission of hearsay evidence. The use of hearsay evidence in a trial by jury runs counter to both U.S. law and international standards of justice. The military commissions would allow convictions based on hearsay evidence that would be barred from every federal and state courtroom and every military court-martial in the United States.

The hearsay provision is also inconsistent with international practice. International tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) admit hearsay evidence, but only because these tribunals use highly-qualified judges as fact-

[19] Memorandum from Steven G. Bradbury, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees, at 2 (May 30, 2005).

finders, who can be trusted to treat hearsay evidence "with caution."[20] The ICC, for example, requires that its judges "possess the qualifications required in their respective States for appointment to the highest judicial offices."[21] Typically, hearsay evidence will be accorded little weight unless it is supported by corroborating testimony. In the military commissions, by contrast, hearsay evidence is to be evaluated by lay jurors.

Moreover, judges at international criminal tribunals are required to issue lengthy written opinions explaining and justifying each individual piece of evidence that they utilize. By contrast, under the military commissions, once evidence is determined to be reliable by "a preponderance of the evidence"—a decidedly low bar—there is no record of how much weight the jurors give it.

These differences might seem technical, but in practice they have an enormous effect on the legitimacy of trial proceedings. As Michael Scharf has argued before the House Armed Services Committee, "Fundamentally, the reason behind the common law's relatively inflexible approach to hearsay evidence has been to ensure that lay jurors would not be unduly influenced by evidence that judges themselves knew, from experience, to be frail and unreliable."[22] The military commissions, then, represent an appalling mishmash of common and civil law approaches—a kind of chimera—importing the evidentiary rules of one system, tailored to the needs of trained and experienced judges, into the fact-finding mechanisms of the other, namely, trial by jury.

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[20] *Prosecutor v. Laurent Semanza*, ICTR-97-20-T (May 15, 2003). *See also* Michael P. Scharf, Testimony before the House Armed Services Committee, *available at* http://armedservices.house.gov/schedules/07-26-06ScharfTestimony.pdf (permanently archived at: http://law.cwru.edu/faculty/news_detail.asp?id=232&content_id=3).

[21] Rome Statute of the International Criminal Court, art. 36, July 17, 1998, 2187 U.N.T.S. 90.

[22] Scharf, *supra* note 19.

The result may produce convictions based on accusations made by a mentally ill person, or a tortured one – with no opportunity for the defendant to challenge the basis of the statements or to confront his accuser. Indeed, even the Administration testified yesterday that the restrictions on use of hearsay evidence in the Senate Armed Services Committee proposal are insufficient. Although the Administration's proposed changes do not go far enough, they nonetheless indicate that the Senate proposal falls well short of international standards. Denunciations by anonymous accusers have no place in a democracy.

The Right to Choose Defense Counsel

Another fundamental right denied to defendants at Guantanamo is the right to choose their defense counsel. Recently, in *United States v. Gonzalez-Lopez*, the Supreme Court emphasized the importance of the right to choose one's attorney. With Justice Scalia writing for the majority, the Court held that a defendant who is wrongly denied choice of counsel is entitled to have his conviction overturned.[23] Such an error qualifies as a "structural error" under the Sixth Amendment, and is not subject to review for harmlessness.[24]

Even the defendants at Nuremberg were offered free choice of counsel. Article 23 of the Constitution of the International Military Tribunal at Nuremberg stated:

> The function of Counsel for a Defendant may be discharged at the defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.[25]

[23] United States v. Gonzalez-Lopez, 548 U.S. 140, 240 (2006).
[24] *See id.* at 148-51.
[25] Charter of the International Military Tribunal, 82 U.N.T.S. 279, Art. 16(d).

The Allies authorities drew up an initial list of lawyers for defendants to choose among, but defendants could request an attorney not on the list who then had to be approved.[26] German lawyers needed only to be qualified to conduct cases before German courts or be specifically authorized by the Tribunal, and national origin was not a factor for exclusion. In practice, no defendant was denied representation by the lawyer of his choice and a number of German lawyers appeared as defense counsel, including former members of the Nazi Party.[27]

By contrast, the revamped military commission rules will still not allow a defendant to choose his or her own attorney. Instead, the defendant can only choose from a pool of military defense lawyers, and then receive that lawyer only if he or she is available. That scheme does not meet the criteria explained by Supreme Court Justice Scalia as the standard for a fair trial.

Fair Trial Requirements in *Hamdan v. Rumsfeld*

Troublingly, the Senate Armed Services legislation does not comply with with Common Article 3 of the Geneva Conventions, requiring trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." In *Hamdan*, the Supreme Court found that a number of military commissions procedures violated "the barest of those trial protections that have been recognized by customary international law" as required by statute under the UCMJ,[28] including defendants' rights to be present, to be apprised of the evidence against them, and to legal assistance of their choosing.[29] The present legislation falls well short of correcting these flaws.

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[26] EUGENE DAVIDSON, THE TRIAL OF THE GERMANS 30 (1996).
[27] Michaïl Wladimiroff, *The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda*, 12 LEIDEN J. INT'L L. 957, 964 (1999).
[28] Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006).
[29] *See id.* at 633-35.

The Court in *Hamdan* termed the right to be present "one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself," and concluded that, "Whether or not that departure technically is 'contrary to or inconsistent with' the terms of the UCMJ, …the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"[30] The Court points out that defendants' protections like the right to be present, the right to be apprised of the evidence against oneself, and the right to counsel of one's choosing are found in Protocol I of the Geneva Conventions and the International Covenant on Civil and Political Rights, and that military commissions following World War II found their violation to violate the laws of war.[31] The Court also offers a string of foundational cases indicating that depriving defendants of access to the evidence against them is inconsistent with fundamental fair trial rights.[32]

In a portion of his concurring opinion explicitly endorsed by the majority,[33] Justice Kennedy argues that certain structural deficiencies of the commissions "remove safeguards that are important to the fairness of the proceedings and the independence of the court."[34] These deficiencies include "the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress."[35] Lastly, Kennedy elaborates on deficiencies in the commissions' rules of evidence, including hearsay evidence and evidence obtained through coercion:

> The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission

[30] *Id.* at 624.
[31] *Id.* at 633 & n.66.
[32] *Id.* at 635 n.67.
[33] *See id.* at 634.
[34] *Id.* at 651.
[35] *Id.*

> regulations specifically contemplate admission of unsworn written statements, …and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture." …Besides, even if evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military, commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence.… [T]he Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, …nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.[36]

If the Court found rules allowing evidence obtained through coercion and hearsay violative of the UCMJ in *Hamdan*, it is unclear what new "practical need" might legitimize such measures today. Indeed, federal courts will eventually find that the military commissions are illegal for violating the Geneva Conventions.

Conclusion

In summary, such obvious unfairness undermines both the perceived legitimacy and – equally important – the finality of any result. No matter how many cosmetic changes are made, when verdicts – and perhaps death sentences – are rendered in a system that refuses to provide the tools of a defense, that admits coerced testimony and unnamed accusers, and that ignores basic international human rights, those verdicts will be tainted forever.

Congress would do well to follow the prescient words of Justice Jackson in *Ashcraft v. Tennesse*e:

> There have been, and are now, certain foreign nations with governments … which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental

[36] *Id.* at 652-53.

> torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.[37]

The Military Commissions can of course be made fairer, but if the changes are to be more than skin-deep, the trials will be equivalent to trials in federal court. The current proposals for "reformed" military commissions will never be "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" as required by the Geneva Conventions and reinforced by the Supreme Court. In particular, recent decisions of the United States Supreme Court demonstrate that a coalition of both moderate and conservative Justices stands ready to reject convictions and death sentences that rest on the untested statements of unknown accusers. When that happens, it will not be the voices of defendants or defense lawyers decrying this cruel folly: it will be the voices of the families of 9/11, the citizens of this country, and allies around the world, who want this process to end, ultimately, with the truth emerging from a fair trial. The Military Commissions can never provide that result.

[37] Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).