Testimony of Congressman Adam B. Schiff
House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties
July 8, 2009

Mr. Chairman, I'd like to thank you for providing me with the opportunity to testify before the Subcommittee today on this important issue.

Since al Qaeda and Taliban detainees first arrived at Guantánamo in 2002, Congress has failed to adopt a framework for the detention and prosecution of unlawful combatants that could pass constitutional muster. For years the Majority in Congress was not interested in addressing, or even holding hearings on this issue, and was comfortable with delegating these difficult decisions to the executive branch and eventually the courts. I want to commend the Chairman for his leadership in convening this hearing today.

Earlier this year, the President took an important step by indicating that the detention facility at Guantánamo Bay will be closed within a year. The poorly thought-out prison, and the torture that took place there, have called into question American adherence to the rule of law and discouraged our allies from cooperating with us.

Apart from Guantánamo, however, a number of difficult questions still remain. Any post-Guantánamo system to detain unlawful combatants must meet our national security needs and also provide adequate due process to minimize the likelihood of error. Congress must be involved in the formulation of this new system, and changes should not be made solely by Executive Order.

When a suspected terrorist is captured on a foreign battlefield, the accepted laws of war allow us to hold an unlawful (or unprivileged) combatant for the duration of the war and to prosecute them for crimes. Two determinations must then be made — whether the person is an unlawful combatant, and whether the person has committed criminal offenses. The question confronting us now is: Who should make these decisions, and how?

The Bush administration established tribunals to determine whether someone at Guantánamo was an unlawful combatant, and military commissions to handle any prosecutions. The current Administration has indicated their intention to continue using military commissions after making a number of changes to the rules. Notwithstanding the changes announced by the Administration, I believe the commissions system has proved so flawed, and its due process so inadequate and discredited, that it should be completely junked.

Some have called for the creation of a new national security court to try detainees and others have advocated moving all detainees into the federal criminal courts. I have proposed what I believe is a far better solution. Earlier this year, I introduced H.R. 1315, the Terrorist Detainees Procedures Act of 2009 – legislation that would make use of the military courts-martial to prosecute detainees who are unlawful combatants.

Military courts-martial have a long history of dispensing justice without compromising military operations. Cases are tried before military judges using a set of due process protections provided for under the Uniform Code of Military Justice (UCMJ). Almost any wartime offense could be tried in a military court-martial, and their use would allow us to show the world that we are giving detainees the same procedural protections we give our own servicemembers. Military courts-martial are also well-equipped to provide for the safeguarding of classified information and to deal with unavailable witnesses or involuntary statements in a manner that is fair and provides due process.

The military courts-martial framework does not currently have a mechanism to make initial determinations of whether someone is an unlawful combatant, but this can easily be changed by Congress – and my legislation would make such a change. Specifically, it would create a new status review procedure for all detainees currently held at Guantánamo to determine whether each individual is properly designated as an unlawful combatant.

A panel of three military judges would be convened in the military courts-martial to conduct the reviews. This process, which replaces the previous Combatant Status Review Tribunals, would follow the same established pre-trial investigation procedures used before charges are referred to a court-martial under Article 32 of the UCMJ.

The prior status review tribunal proceedings were so flawed that the threshold decision has to be remade to determine whether individuals are in fact unprivileged combatants. I believe this new review must be before an independent fact finder and therefore should occur separate and apart from the current review of case files by the Administration.

After the new status determination is made, my legislation would require any person determined to be an unlawful combatant to either be tried in court, with a preference for the courts-martial avenue; transferred to a NATO-run detention facility or another country; or held in accordance with the law of armed conflict until the cessation of hostilities directly related to the initial detention, or such time as they are no longer deemed to be a threat.

Finally, my legislation would require that those determined *not* to be unlawful combatants and not suspected of violating any law, be transferred to the person's country of citizenship, place of capture, or a different country, as long as there are adequate assurances that they will not be subject to torture; or be released.

Mr. Chairman, I urge the Subcommittee to examine the courts-martial framework as an option that can both restore confidence in our detention regime while ensuring our national security needs are met.