PROPOSALS FOR REFORM OF THE MILITARY COMMISSIONS SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

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PROPOSALS FOR REFORM OF THE MILITARY COMMISSIONS SYSTEM

THURSDAY, JULY 30, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:55 p.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Delahunt, Jackson Lee, and King.

Staff present: David Lachman, Majority Subcommittee Chief of Staff; Heather Sawyer, Majority Counsel; Matthew Morgan, Majority Professional Staff Member; and Paul Taylor, Minority Counsel.

Mr. NADLER. Ladies and gentlemen, unfortunately the hearing is going to have to wait on the votes on the House floor.

As you can see, there are 8 minutes and 29 seconds, which probably means closer to 10½ minutes, left on the first vote. But after that, there are 14 more votes, most of them 2-minute votes.

But there is a motion to recommit, which is a 10-minute debate and a 25-minute—and a 15-minute vote, so it is probably going to be about an hour. And I apologize, but the hearing is going to have to wait for those votes to be completed.

So thank you for coming, but we just have to wait for the—I apologize to the witnesses, but thank you.

[Recess.]

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights and Civil Liberties will come to order, with the agreement of the minority. And we expect a minority Member here shortly.

I recognize myself—excuse me—first for an opening statement.

Today the Subcommittee—and let me, before I do the opening statement, I apologize for everyone here, including the witnesses, for the fact that this is almost 2 hours getting—late getting started, but that was unavoidably, as you know, because of the votes, which I assume you saw up there.

And you can thank everybody there. We now have, by unanimous consent, 2-minute votes, not 5-minute votes, or we would be there another hour.

I now recognize myself for an opening statement.

Today the Subcommittee examines proposals for reform in the military commissions system and, more importantly, how we in Congress can work together productively and with the Administration to clean up the terrible legacy of the Bush administration's detention policies in a manner that provides us with a legitimate legal framework going forward.

Over the past 7 years, approximately 800 individuals have been detained at Guantanamo, Cuba, with some 500 already having been released before President Obama took office in January.

In those 7 years, only three detainees have been convicted of terrorism offenses using the military commissions, and approximately 230 individuals remain at the facility.

Most of these men have been held for at least 4 years. Some have been detained for more than 6 years. By contrast, approximately 200 individuals have been charged with international terrorism, prosecuted, convicted and sentenced to long prison terms using our normal Article III Federal courts.

These numbers speak for themselves, yet the Obama administration, after initially halting use of the military commissions and beginning an in-depth case-by-case review of the individuals still being detained at Guantanamo, has said that the commissions are necessary.

Why? The general explanation is that military commissions provide the flexibility that is necessary to account for "the reality of battlefield situations and military exigencies," such as chain of custody concerns, the need to use hearsay statements, and an appropriate test for determining whether incriminating statements were coerced or voluntary under the circumstances.

This might explain the need in cases where an individual is caught in the heat of battle, but it does not explain the need for military commissions in other circumstances.

My concern remains, as I articulated at our hearings a few weeks ago, that we may be creating a system in which we try you in Federal court if we have strong evidence, we try you by military commission if we have weak evidence, and we detain you indefinitely if we have no evidence. That is not a justice system.

Mohammed Jawad's case, which was again before a Federal judge today, provides just one example. At our hearing a few weeks ago, Lieutenant Colonel Vandeveld, the lead military prosecutor responsible for bringing Mr. Jawad to justice in the military commission system, testified that he resigned because he could not ethically or legally prosecute the case.

After discovering exculpatory evidence had been withheld from the defense and determining that Mr. Jawad's confession, the only evidence against him, had been obtained through torture, Lieutenant Colonel Vandeveld was unable to convince his supervisor to reach a plea agreement that would have allowed Mr. Jawad's release and return to his family after nearly 7 years in Guantanamo.

Convinced that it was not possible to achieve justice through the military commission system, Lieutenant Colonel Vandeveld felt he had no choice but to resign his post.

A military judge and a Federal judge have since ruled that Mr. Jawad's confession was obtained through torture. In the Federal habeas corpus proceedings, the judge has called the case "an out-

rage" and has urged the Administration to send Mr. Jawad, who may have been 12 years old when captured in 2002, home.

It is my understanding that at a hearing this morning the judge, in fact, ordered his release.

Mr. Jawad's case is not an anomaly. In 26 of the approximately 31 habeas corpus cases brought by Guantanamo detainees and decided so far, Federal judges have concluded that the government does not have sufficient evidence to justify or continue the detention.

These numbers are staggering—not one case, not two, but in 85 percent of the cases when an individual finally has gotten meaningful review, Federal judges have found that there was no grounds for detention. This is a stain on American justice.

Not only has the system served as a tremendous recruiting tool for our enemies, it has proven legally unsustainable and unjust. We would challenge such a system set up by another country to detain and try Americans. We should demand no less of ourselves.

The detainees at Guantanamo and other individuals who we may capture today or tomorrow are accused terrorists. They are not terrorists. They are accused terrorists. Some may be terrorists, but right now they are accused terrorists. They have not been proven to be terrorists.

And while officials in the previous Administration were fond of claiming that its detainees at Guantanamo were the worst of the worst, the Bush administration released the vast majority of them, approximately 500 in all. Apparently the Bush administration did not really think they were the worst of the worst.

The people who we have detained because they were turned over to us by someone with a grudge or by someone who wanted to collect a bounty do not belong in custody.

We have an obligation to determine who should and should not be imprisoned and to afford fair trials to those we believe have committed crimes. This is especially important if our government plans to seek prison sentences or to execute those convicted.

There is no doubt that keeping America safe is paramount. We must decide how to deal with these individuals in a manner that ensures that our Nation is protected from those who would do us harm, in a manner that is consistent with our laws, our treaty obligations and our values.

We are the United States of America, and we have traditions and beliefs worth fighting for and worth preserving. This problem will not go away simply because we close Guantanamo. We are still fighting in Afghanistan and Iraq. We are still battling terrorists around the world.

We will continue to have to intercept and detain individuals who have attacked us or who threaten us. We need to be sure that, however we handle these cases, we do not conduct kangaroo courts.

This debate has been dominated by a great deal of fearmongering. That is no way to deal with a problem of this magnitude. Fanning the flames with the unfounded claim that it is a threat to our national security to transfer individuals to the U.S. for detention and trial defies logic and reality.

We have long housed and prosecuted dangerous criminals and terrorists in my district and elsewhere. It is an insult to our law

enforcement and military to suggest that they cannot do the same with regard to those individuals that we have been holding at Guantanamo.

Others have argued that because some individuals released from Guantanamo have turned to battle, we must now hold all others forever. But we are not a police state. In order to imprison anyone, we must have sufficient evidence to do so.

Much as some people would like to drop detainees down a hole and forget about them, this is simply not an option legally or morally. It is also not necessary.

We are not the first country in history to have to deal with potentially dangerous people. Indeed, this is not the first time this country has had to deal with potentially dangerous people.

I do not underestimate the enormity of the challenge both from a security standpoint and a legal one, but we can and will find solutions that honor the rule of law, and in so doing keep us safe.

I look forward to the testimony of our witnesses with confidence that you will be able to provide guidance as we look forward. I thank you. I yield back the balance of my time.

Now, did the gentleman from Iowa wish to give an opening statement for the minority?

Mr. KING. I would like to give an opening statement representing myself, Mr. Chairman.

Mr. NADLER. The gentleman is recognized.

Mr. KING. Thank you, Mr. Chairman.

I wanted to give my thanks and appreciation to the witnesses that are about to testify and this hearing that I am not particularly enthusiastic about having—I have watched this unfold over the last years since September 11, and it appears to me that we are moving in a direction away from national security and a direction towards making us more vulnerable to attack.

I have gone down to Gitmo and visited Gitmo. I don't believe that there has been any place or any time in history that—I won't declare them to be, let's say, accused terrorists. I will say they are enemy combatants.

And I don't think enemy combatants—and the implication includes as well prisoners of war—that have ever been treated as good as the inmates are down at Guantanamo Bay—air conditioned facilities, three squares a day, nine choices from the menu, 100 minutes of prayer time every day—the list goes on.

And yet our guards are attacked every day, multiple times a day, and we don't have any recourse to punish those prisoners.

But we are here to examine the path that might be taken and a path that might be opened, and I am concerned that it might end up in opening up our prison gates and turning people loose onto this society that are the worst of the worst.

And I don't concede that they are anything else. That is the reason they are there. This Administration wants to find a way to relieve themselves of the burden of the—you know, the inmates down at Guantanamo Bay.

I have read the executive order. The date of its—the drop-dead date to empty out Guantanamo Bay is January 22, 2010. It hangs there on the bulletin board in the commons room at Guantanamo—or the commons area at Guantanamo Bay, in English and in Ara-

bic, so that when they gather together after their soccer game or around the edge of their foosball table they can read that promise from the President of the United States that they will not be there 1 day longer than January 22, 2010.

We heard yesterday before a hearing from Mr. Forbes of Virginia that he had just returned from there within the last 2 weeks, and he articulated a path by which we might be considerably more vulnerable, and that path is the one that is charted out before us now.

So I am concerned that if we bring people to the United States, judges do things we cannot anticipate. And if we had 100 percent confidence that we had picked up battlefield evidence and that we could convict people that were actually guilty with that evidence and release people that were not guilty with that evidence, then I wouldn't have any trepidation about bringing them to the United States and trusting a Federal judge, or whatever the mechanism might be.

But in the meantime, we are dealing with what Congress has enacted and the President signed into law, a military commission system that granted unlawful enemy combatants more rights and more procedural protections than they had ever enjoyed before anywhere in the world. And that is all throughout human history.

These protections include the presumption of innocence; the imposition of the burden of proof on the prosecution; the right to counsel, either military or civilian, at American taxpayers' expense, at the discretion of the accused; the right to be presented with the charges in advance of the trial; access to interpreters, as we do in this country, so that they understand the proceedings and the charges against them.

And there will be—there is a prohibition against any negative inference from a refusal to testify. They aren't compelled to testify or be a witness against themselves or anyone, and so that is—access to reasonably available evidence and witnesses, access to investigative resources as necessary for a full and fair trial. The list goes on.

And so however this unfolds, I want America to remain as safe as it has been since the September 11 attacks in 2001. I think that this Congress acted quickly. I think that the military conducted themselves within the law in an honorable fashion. And I understand the difference in opinion that we have.

But in the end, no nation respects the rule of law more than the United States of America. No nation has treated its enemy combatants as well as we have treated these. No nation has provided air conditioning in the Caribbean the way we have.

And we need to also find a way to resolve this, and I understand that. It is a difficult conundrum that has been accelerated by the executive order, which I think was motivated more from a political judgment than it was a judgment of reality.

And I will support the President in any alteration he might have of that that will provide more safety for the American people. I look forward to the testimony.

And I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

And I now recognize the gentleman from Massachusetts for an opening statement.

Mr. DELAHUNT. Yes, I didn't intend to give an opening statement, but I think it is important that I respond to my good friend from Iowa.

I would make the point that national security and justice are not exclusive. In fact, I would submit that Guantanamo has been a prolific tool for terrorists to multiply and to recruit others. The existence of Guantanamo has led to an increasing number of terrorists all over the world. We have a different view of that.

Now, I am glad to hear that my friend has been down to Guantanamo. In my former life, I happened to be the state's attorney up in the greater Boston area. I have been to a lot of prisons. I have put a lot of people there, in some cases for the rest of their lives. But I always hoped I was doing justice.

You know, the concept of a presumption of innocence is not something that threatens me. And I think that presumption of innocence is a genuine American value. That is what we are about. That is what we are truly about.

And I have been a severe critic of the Bush administration, and I am sure that, you know, some here have applauded the policies of the former President and Vice President. But I think it is interesting to note that in excess of 500 of the worst of the worst were released by the Bush administration. That seems somewhat inconsistent to me.

But I also think it is interesting that while the gentleman from Iowa went and had the tour of Guantanamo and seems to know something about the detainees there and their daily existence, I am sure that he did not have an opportunity to talk to them.

He is shaking his head in the affirmative. I will yield to the gentleman. I would like to hear what conversations he had with the detainees.

Mr. KING. Well, thank you for yielding, and I will note first that those that have been released are the best of the worst, and the ones left are the worst of the worst.

But I did talk to some of them, and the conversation was limited, and I think that is what the gentleman from Massachusetts expects. One of them came over to the fence and he said, "I don't have a Russian-language Koran. That is unjust. You must get me a Russian-language Koran." So that was the level of the angst I——

Mr. DELAHUNT. Did you have an opportunity to have interaction with them?

Mr. KING. That was interaction, yes, although I didn't walk among them like I might other inmates because——

Mr. DELAHUNT. Okay.

Mr. KING [continuing]. It is too dangerous.

Mr. DELAHUNT. Well, let me remind the gentleman that both myself and the Ranking Member—I happen to Chair the Subcommittee on Oversight of the House Foreign Affairs Committee, and I have been invited many times to Guantanamo.

And I would have accepted that invitation, as would my colleague, Mr. Rohrabacher, if we were given an opportunity to actually sit down with the detainees and inquire of them.

Now, at a hearing—oh, I think it was maybe last week or 2 weeks ago, we had a hearing relative to the interaction between

the Chinese intelligence agents that were provided access to the Chinese Muslims called Uighurs who are a persecuted minority by the Chinese. You might have noted over the course of the past month or so there has been thousands detained.

According to a woman who leads the diaspora, Rabiya Kadir, who will be with us tomorrow—and I would hope that the gentleman could come and listen to her—there are 10,000 that are still missing.

They were given the opportunity over a 10-day period to interview the Uighurs where they were interrogated, where they were intimidated, and where they were threatened.

That is what I think we have a right to hear, because—and it might interest the gentleman that our Republican colleague Mr. Rohrabacher and I are both convinced that those Uighurs, if resettled here in the United States, would contribute to the United States because they are opposed to al-Qaida and Taliban and any form of terrorists.

I dare say they are more aptly described as the Tibetans who are persecuted by the Communist Chinese intelligence agents who haven't been heard from, who have not been heard from.

And I think I will yield there, but I think my good friend gets the message. Oh, by the way, it wasn't just the Chinese intelligence agents that were down there. And we know that their history and their record in terms of human rights, and the fact that they have executed and tortured Uighurs, according to our own State Department, for decades now.

In addition to that, there were two—there were several detainees from Uzbekistan who received—whose intelligence agents and security agents were also invited in to have the kind of interaction which I think would be very, very informative for this panel and for this Congress to have, and we were denied it.

With that, I yield back.

Mr. NADLER. I thank the gentleman.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

Without objection, the Chair will be authorized to declare a recess of the hearing, which the Chair will do only in the event of more votes or some catastrophe.

We will now turn to our witnesses. As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority on the Subcommittee, alternating between majority and minority, provided that the Member is present when his or her turn arrives.

Members who are not present when their turns begin will be recognized after the other Members have had the opportunity to ask their questions.

The Chair reserves the right to accommodate a Member who is unavoidably late or only able to be with us for a short time.

I would like to welcome our first panel. David Kris is the assistant attorney general for national security. Mr. Kris was an attorney in the criminal division from September 1992 to July 2000, where he worked primarily in appellate litigation.

As associate deputy attorney general from July 2000 to May 2003, Mr. Kris' work focused on national security issues, including

supervision the government's use of the Foreign Intelligence Surveillance Act, representing the department at the National Security Council, and assisting the attorney general in conducting oversight of the intelligence community.

Mr. Kris also taught at Georgetown University Law School and served as a non-resident senior fellow at the Brookings Institution. Mr. Kris graduated from Haverford College in 1988 and Harvard Law School in 1991. Following law school, he served as a law clerk for Judge Stephen Trott on the Ninth Circuit Court of Appeals.

Jeh Charles Johnson is the general counsel of the Department of Defense where he serves as the chief legal officer of the Department of Defense and legal advisor to the secretary of defense.

Mr. Johnson began his career in public service as an assistant United States attorney in the Southern District of New York, where he prosecuted public corruption cases. He was in private practice at the firm of Paul Weiss Rifkind Wharton & Garrison.

In October 1998, President Clinton appointed Mr. Johnson to be general counsel of the Department of the Air Force. He served in that position for 27 months.

I am pleased to welcome you both. Your written statements—and again, I apologize for the delay. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses.

[Witnesses sworn.]

If you would please stand and raise your right hand to take the oath.

Do you swear or affirm under penalty of perjury that the testimony you are about to give is true and correct to the best of your knowledge, information and belief?

Mr. KRIS. I do.

Mr. NADLER. Let the record reflect the witnesses answered in the affirmative.

You may be seated.

Mr. Kris?

TESTIMONY OF THE HONORABLE DAVID KRIS, ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE

Mr. KRIS. Thank you very much, Mr. Chairman. And thank you and all of the Members of the Committee for inviting me here to testify.

Federal prosecution in Article III courts can be an effective method of protecting national security, consistent with fundamental due process and the rule of law.

In the 1990's, I prosecuted a group of violent antigovernment extremists. And like their modern counterparts, they engaged in what would now be called "lawfare." As a result of that, the trials were very challenging.

But the prosecution succeeded not only because it incarcerated the defendants but also because it deprived them of legitimacy for their antigovernment and other extreme beliefs.

Military commissions can help do the same for those who violate the law of war—that is, not only detain them for longer than might otherwise be possible under the law of war, but also to brand them as illegitimate war criminals.

To do that effectively, however, the commissions themselves must first be reformed. And the legislation that is now pending in Congress is a tremendous step in that direction. If enacted with the changes that we have suggested, it will make military commissions both fundamentally fair and effective.

And with that, I think I will stop, and I will be happy to answer any questions. Thank you.

[The prepared statement of Mr. Kris follows:]

PREPARED STATEMENT OF THE HONORABLE DAVID KRIS

Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

"PROPOSALS TO REFORM THE MILITARY COMMISSIONS SYSTEM"

PRESENTED

JULY 30 2009

Statement of
David Kris
Assistant Attorney General
Before the
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
United States House of Representatives
For a Hearing Entitled
"Proposals to Reform the Military Commissions System"
Presented
July 30, 2009

Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for the opportunity to discuss ongoing efforts to prosecute terrorists through trials before civilian courts and military commissions. As you know, a Task Force established by the President is actively reviewing the detainees held at Guantanamo Bay to determine whether they can be prosecuted or safely transferred to foreign countries.

Prosecution is one way — but only one way — to protect the American people. As the President stated in his May 21st speech at the National Archives, where feasible we plan to prosecute in Federal court those detainees who have violated our criminal law. Federal courts have, on many occasions, proven to be an effective tool in our efforts to combat international terrorism, and the legitimacy of their verdicts is unquestioned. A broad range of terrorism offenses with extraterritorial reach are available in the criminal code, and procedures exist to protect classified information in federal court trials where necessary. Although the cases can be complex and challenging, federal prosecutors have successfully convicted many terrorists in our federal courts, both before and after the September 11, 2001, attacks. In the 1990s, I prosecuted a group of violent extremists. Those trials were long and difficult. But prosecution succeeded, not only because it incarcerated the defendants for a very long time, but also because it deprived them of any shred of legitimacy.

The President has also made clear that he supports the use of military commissions as another option to prosecute those who have violated the laws of war, provided that necessary reforms are made. Military commissions have a long history in our country dating back to the Revolutionary War. Properly constructed, they take into account the reality of battlefield situations and military exigencies, while affording the accused due process. The President has pledged to work with Congress to ensure that the commissions are fair, legitimate, and effective, and we are all here today to help fulfill that pledge.

As you know, on May 15th, the Administration announced five rule changes as a first step toward meaningful reform. These rule changes prohibited the admission of statements obtained through cruel, inhuman, and degrading treatment; provided detainees greater latitude in the choice of counsel; afforded basic protections for those defendants who refuse to testify; reformed

the use of hearsay by putting the burden on the party trying to use the statement; and made clear that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and legitimacy of the commission process without compromising our ability to bring terrorists to justice.

These five rule changes were an important first step. The Senate Armed Services Committee took the next step by drafting legislation to enact more extensive changes to the Military Commissions Act ("MCA") on a number of important issues. The Administration believes that bill identifies many of the key elements that need to be changed in the existing law in order to make the commissions an effective and fair system of justice. We think the bill is a good framework to reform the commissions, and we are committed to working with both houses of Congress to reform the military commission system. With respect to some issues, we think the approach taken by the Senate Armed Services Committee is exactly right. In other cases, we believe there is a great deal of common ground between the Administration's position and the provision adopted by the Committee, but we would like to work with Congress to make additional improvements because we have identified a somewhat different approach. Finally, there are a few additional issues in the MCA that the Committee's bill has not modified that we think should be addressed. I will outline some of the most important issues briefly today.

First, the Senate bill would bar admission of statements obtained by cruel, inhuman, or degrading treatment. We support this critical change so that neither statements obtained by torture, nor those obtained by other unlawful abuse, may be used at trial.

However, we believe that the bill should also adopt a voluntariness standard for the admission of other statements of the accused — albeit a voluntariness standard that takes account of the challenges and realities of the battlefield and armed conflict. To be clear, we do not support requiring our soldiers to give *Miranda* warnings to enemy forces captured on the battlefield, and nothing in our proposal would require this result, nor would it preclude admission of voluntary but non-*Mirandized* statements in military commissions. Indeed, we note that the current legislation expressly makes Article 31 of the Uniform Code of Military Justice — which forbids members of the armed forces from requesting any statement from a person suspected of any offense without providing *Miranda*-like warnings — inapplicable to military commissions, and we strongly support that. There may be some situations in which it is appropriate to administer *Miranda* warnings to terrorist suspects apprehended abroad, to enhance our ability to prosecute them, but those situations would not require that warnings be given by U.S. troops when capturing individuals on the battlefield. Voluntariness is a legal standard that is applied in both Federal courts and courts martial. It is the Administration's view that there is a serious likelihood that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional. Although this legal question is a difficult one, we have concluded that adopting an appropriate rule on this issue will help us ensure that military judges consider battlefield realities in applying the voluntariness standard, while minimizing the risk that hard-won convictions will be reversed on appeal because involuntary statements were admitted.

Second, the Senate bill included a provision to codify the Government's obligation to provide the defendant with exculpatory evidence. We support this provision as well; we think it strikes the right balance by ensuring that those responsible for the prosecution's case are obliged to turn over exculpatory evidence to the accused, without unduly burdening every Government agency with unwieldy discovery obligations.

Third, the Senate bill restricts the use of hearsay, while preserving an important residual exception for certain circumstances where production of direct testimony from the witness is not available given the unique circumstances of military and intelligence operations, or where production of the witness would have an adverse impact on such operations. We support this approach, including both the general restriction on hearsay and a residual exception, but we would propose a somewhat different standard as to when the exception should apply, based on whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts.

Fourth, we agree with the Senate bill that the rules governing use of classified evidence need to be changed, and we support the Levin-McCain-Graham amendment on that point.

Fifth, we share the objective of the Senate Armed Services Committee to empower appellate courts to protect against errors at trial by expanding their scope of review, including review of factual as well as legal matters. We also agree that civilian judges should be included in the appeals process. However, we think an appellate structure that is based on the service Courts of Criminal Appeals under Article 66 of the UCMJ, with additional review by the article III United States Court of Appeals for the District of Columbia Circuit under traditional standards of review, is the best way to achieve this result.

There are two additional issues I would like to highlight today that are not addressed by the Senate bill that we believe should be considered. The first is the offense of material support for terrorism or terrorist groups. While this is a very important offense in our counterterrorism prosecutions in Federal court under title 18 of the U.S. Code, there are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant likelihood that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the system's legitimacy. However, we believe conspiracy can, in many cases, be properly charged consistent with the law of war in military commissions, and cases that yield material support charges could often yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

We also think the bill should include a sunset provision. In the past, military commissions have been associated with a particular conflict of relatively short duration. In the modern era, however, the conflict could continue for a much longer time. We think after several

years of experience with the commissions, Congress may wish to reevaluate them to consider whether they are functioning properly or warrant additional modification.

Finally, I'd like to note that on July 20, 2009, the Departments of Justice and Defense released a protocol for determining when a case should be prosecuted in a reformed military commission rather than in federal court. This protocol reflects three basic principles. First, as the President put it in his speech at the National Archives, we need to use all instruments of national power to defeat our adversaries. This includes, but is not limited to, both civilian and military justice systems. Second, civilian justice, administered through Federal courts, and military justice, administered through a reformed system of military commissions, can both be legitimate and effective methods of protecting our citizens from international terrorism and other threats to national security. Third, where both fora are available, the choice between them must be made by professionals according to the facts of the particular case. Selecting between two fora for prosecution is a choice that prosecutors make all the time, when deciding where to bring a case when there is overlapping jurisdiction between federal and state courts, or between U.S. and foreign courts. Decisions about the appropriate forum for prosecution of Guantanamo detainees will be made on a case-by-case basis in the months ahead, based on the criteria set forth in the protocol. Among the factors that will be considered are the nature of the offenses, the identity of the victims, the location in which the offense occurred, and the context in which the defendant was apprehended.

In closing, I want to emphasize again how much the Administration appreciates the invitation to testify before you today on our efforts to reform military commissions. We are optimistic that we can reach a bipartisan agreement with both the House and the Senate on the important details of how best to reform the military commission system.

I will be happy to answer any questions you have.

Mr. NADLER. I thank you.
Mr. Johnson?

TESTIMONY OF THE HONORABLE JEH CHARLES JOHNSON, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. JOHNSON. Thank you, Mr. Chairman. Like Mr. Kris, I will dispense with the full reading of my prepared statement. You have

it for the record. I would just like to make a few observations very briefly and then look forward to your questions.

First, I can't help but recall that my career in public service began 32 years ago this summer, where I spent a lot of time in this room with my congressman, Hamilton Fish Junior, who rose to be Ranking Member of this Judiciary Committee when I was a college intern for him. And I remember him fondly.

It is apparent to me—and I am aware of the sharp difference of opinion about these issues concerning Guantanamo and military commissions that exist on this Subcommittee and in this Congress. And it is my hope that during this session we can try to educate—respond to your questions in a forthright, meaningful way.

The President in May decided that the Administration could go forward with reformed military commissions, after a lot of consideration and thought by the President personally and by members of the Administration. In May we in the Department of Defense proposed five rule changes to military commissions procedure.

Most significantly, and the one that I am personally most proud of, is the elimination of any possible use in evidence in a military commissions trial of statements taken as a result of cruel, inhuman, degrading treatment.

That one change alone, in my personal opinion, will do more to restore the credibility of military commissions, and it was one that we did with the unanimous support of our judge advocate generals in the military service and a lot in the military lawyer community.

The Senate, as you know, passed legislation to reform the Military Commissions Act. That legislation was passed as part of the authorization bill on July 23. We and the Administration think that the bill identifies virtually all the issues for reform and change.

We look forward to working with the Congress, House and Senate, on further changes that the Administration and the Congress may wish to make. Mr. Kris and I testified last week before the House Armed Services Committee concerning that bill.

And we look forward to responding to your questions concerning the pending legislation or detainee affairs generally.

One thing I will add concerning Guantanamo generally—and this was alluded to by the Members of the Committee—I will submit respectfully that many Members of Congress go to Guantanamo Bay, come back and are impressed with what they see today. And I will submit that is not the issue.

The issue is that al-Qaida needs recruitment tools, and al-Qaida, in fact, uses Guantanamo Bay, Abu Ghraib and other rallying cries as recruitment tools to their cause. There are published reports of al-Qaida using Guantanamo Bay as recently as 2008. Bin Laden personally uses Guantanamo Bay as one of his bumper-sticker recruitment tools.

So a cross-section of national leaders from John McCain, President Obama, General Powell—George W. Bush said he would like to see Guantanamo Bay closed—have all caused—called for the closure of Guantanamo Bay not just for symbolism reasons but for reasons of enhancing national security.

This President, when he took office, recognized that large Federal bureaucracies work best with a deadline and imposed a dead-

line on us for doing so. And we remain committed to closing Guantanamo Bay in this Administration.

Thank you very much. Look forward to your questions.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE JEH CHARLES JOHNSON

Testimony of Jeh Charles Johnson
General Counsel, Department of Defense
Hearing before the House Committee on the Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties
"Proposals on Reform to the Military Commissions System"
Presented On
July 30, 2009

Mr. Chairman and Congressman Sensenbrenner, thank you for the opportunity to testify here today.

On January 22, 2009, President Obama signed Executive Orders 13492 and 13493, which establish two interagency task forces -- one to review the appropriate disposition of the detainees currently held at Guantanamo Bay, and another to review detention policy generally. These task forces consist of officials from the Departments of Justice, Defense, State, and Homeland Security, and from our U.S. military and intelligence community. Over the past six months, these task forces have worked diligently to assemble the necessary information for a comprehensive review of our detention policy and the status of detainees held at Guantanamo Bay.

I am pleased to appear today along with David Kris of the Department of Justice to report on the progress the Government has made in a few key areas, including especially military commission reform.

Let me begin with some general observations about our progress at Guantanamo Bay. All told, about 780 individuals have been detained at Guantanamo. Approximately 550 of those have been returned to their home countries or resettled in others. At the time this new Administration took office on January 20, 2009, we held approximately 240 detainees at Guantanamo Bay. The detainee review task force has reviewed and submitted recommendations on more than half of those. So far, the detainee review task force has approved the transfer of substantially more than 50 detainees to other countries consistent with security and treatment considerations, and a number of others have been referred to a DOJ/DoD prosecution team for potential prosecution either in an Article III federal court or by military commission. Additional reviews are ongoing and the review process is on track. We remain committed to closing the Guantanamo Bay detention facility within the one-year time frame ordered

by the President. A bi-partisan cross section of present and former senior officials of our government, and senior military leaders, have called for the closure of the detention facility at Guantanamo Bay to enhance our national security, and this Administration is determined to do it.

The Administration, including the separate Detention Policy Task Force, is busy on a number of other fronts:

First, in his May 21 speech at the National Archives, President Obama called for the reform of military commissions, and pledged to work with the Congress to amend the Military Commissions Act. Military commissions can and should contribute to our national security by becoming a viable forum for trying those who violate the law of war. By working to improve military commissions to make the process more fair and credible, we enhance our national security by providing the government with effective alternatives for bringing to justice those international terrorists who violate the law of war. To that end, in May, the Secretary of Defense announced five changes to the rules for military commissions that we believe go a long way towards improving the process. (I note that those changes were developed initially within the Defense Department, in consultation with both military and civilian lawyers, and have the support of the Military Department Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff.) Significantly, these rule changes prohibit the admission of statements obtained through cruel, inhuman and degrading treatment, provide detainees greater latitude in choice of counsel, afford basic protection for those defendants who refuse to testify, reform the use of hearsay by putting the burden on the party trying to use the statement, and make clear that military judges may determine their own jurisdiction.

Over the last few weeks, the Administration has also worked with the Congress on legislative reform of the Military Commissions Act of 2006, by commenting on Section 1031 of the 2010 National Defense Authorization Act, which was reported out of the Senate Armed Services Committee on June 25, 2009. Section 1031 was adopted, with amendments, by the Senate on July 23, 2009. My Defense Department colleagues and I have had an opportunity to review the reforms to the military commissions included in the draft of the National Defense Authorization Act adopted by the Senate, and it is our basic view that the Act identifies virtually all of the elements we believe are important to further improve the military commissions process.

We are confident that through close cooperation between the Administration and the Congress, reformed military commissions can emerge from this effort as a fully legitimate forum, one that allows for the safety and security of participants, for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in an Article III federal court, and for the just resolution of cases alleging violations of the law of war.

At the same time, Mr. Kris and I have agreed upon a protocol for determining when cases for prosecution should be pursued in an Article III federal court or by military commission. By the nature of their conduct, many suspected terrorists may be charged with violations of both the federal criminal laws and the laws of war. There is a presumption that, where feasible, such cases should be prosecuted in Article III federal courts. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there. Our protocol calls for the Department of Justice and Department of Defense to weigh a variety of factors in making that forum selection assessment.

I will touch on one other issue. As the President stated in his National Archives address, there may ultimately be a category of Guantanamo detainees "who cannot be prosecuted for past crimes," but "who nonetheless pose a threat to the security of the United States" and "in effect, remain at war with the United States." The Supreme Court held in *Hamdi v. Rumsfeld* that detention of enemy forces captured on the battlefield during wartime is an accepted practice under the law of war, to ensure that they not return to the fight. For this category of people, the President stated "[w]e must have clear, defensible, and lawful standards" and "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified."

This President believes that, if any detention of this sort proves necessary, the authority to detain must be rooted firmly in authorization granted by Congress. This is why, on March 13, 2009, the Department of Justice refined the Government's definition of our authority to detain those at Guantanamo Bay, from the "unlawful enemy combatant" definition used by the prior Administration to one that is tied to the Authorization for the Use of Military Force passed by the Congress in 2001, as informed by the laws of war. Thus the Administration has been relying solely on authority provided by Congress as informed by the laws of war in justifying to federal

courts in habeas corpus litigation the continued detention of Guantanamo detainees.

Finally, I would like to take a moment to thank the men and women of the armed forces who currently guard our detainee population. From Guantanamo Bay to Baghdad to Bagram, these service members have conducted themselves in a dignified and honorable manner under the most stressful conditions. These Soldiers, Sailors, Airmen, and Marines represent the very best of our military and have our appreciation, admiration and unwavering support.

I thank you again for the opportunity to appear here today and I look forward to your questions.

Mr. NADLER. Thank you.

I will now recognize myself for a period of questioning.

First, Mr. Johnson, you have testified on a number of occasions that the Administration intends to assert its authority to detain in-

dividuals, relying on the authorization for the use of military force and the Supreme Court's *Hamdi* decision regarding the detention of individuals captured on the battlefield during wartime, for the duration of hostilities to ensure that they do not return to the fight.

How does the Administration propose to identify those who truly are "individuals captured on the battlefield?" And what proves that someone falls into this category? And what is the process that will be provided to make this determination?

And let me just amplify that a bit. We talk about military commissions for war crimes. We talk about how we convict someone of a war crime. But we also have the duty to keep someone from returning to the fight—to keep combatants off the streets whether they committed the crime or not.

If you captured someone wearing a Wehrmacht uniform in World War II in Normandy carrying a rifle, there wasn't too much question he was a combatant and he was a prisoner of war.

But how do we—the question is what process is there to determine that someone who claims he isn't a combatant is, in fact, one if he is captured, A, either near the battlefield or on the battlefield, or somewhere else?

What process do we—I mean, what kind of process will be—is afforded after the fact or before the fact?

Mr. JOHNSON. Well, if you talk about the current population in Guantanamo, virtually, I think, all of them are suing us in habeas litigation right now. One of the first things this Administration did was to revise the definition of what we say is our detention authority.

We did that in a filing by the Department of Justice in several of these cases on March 13th, 2009. And what we did was we are no longer using the phrase "unlawful enemy combatant."

And as you noted, Mr. Chairman, we are relying more closely on the authorization for the use of military force passed by the Congress in 2001 as informed by the laws of war. And there is a paragraph that we are now asserting as our detention authority which will be tested in these habeas cases case by case.

Mr. NADLER. Okay. The authority is one thing, but how—what is the process? There has got to be some process for determining going forward. And yes, the habeas corpus process, by default, is being used now for people who were in Guantanamo for a long period of time.

But if we captured someone tomorrow and we suspect he is a combatant, and he says, "No, I am not," what is the process for determining whether he is a combatant and can be held for years?

Mr. JOHNSON. Well, prior to this Administration coming to office, what existed was a review process that involved—I am going to use acronyms—ARBs and CSRTs—Administrative Review Boards and——

Mr. NADLER. Which the Supreme Court said was——

Mr. JOHNSON [continuing]. Combatant Status Review—which has been suspended.

The President called for some process of periodic review—in other words, if we prevail in a habeas case, we are not going to just simply throw away the key and forget about the person. We are going to have a process of periodic review.

Mr. NADLER. What is the initial process, a habeas case?

Mr. JOHNSON. The initial process is a form of board that should occur within a period of days after a person is captured. And we are developing that process now.

Then after a period of time—and we are—this is in the midst of review right now—whether it 6 months, 12 months—there will be another look to make the threat assessment, to review the detention authority, and then after a period of years there may be some heightened level of review.

But there will be, as the President has called, some form of periodic review to make a threat assessment that will involve——

Mr. NADLER. That is making a threat assessment after—but what due process is there for someone who says, "You got the wrong guy. I am not an enemy combatant. I had nothing to do with this?"

Mr. JOHNSON. Well, the Boumediene case——

Mr. NADLER. Which case?

Mr. JOHNSON [continuing]. Granted the Gitmo detainees the right to habeas.

Mr. NADLER. So you are saying you would have to—the only process is the habeas process?

Mr. JOHNSON. No, I would expect, as I said, that there will be some form of periodic review, initially and then over time, irrespective of the litigation.

Mr. NADLER. And this is for people captured on or near a battlefield. Do we still claim the authority to pick up someone in London or in Peoria and say they are an enemy—whatever we are calling them now—they are a combatant?

Mr. JOHNSON. Obviously, Mr. Chairman, it depends on the circumstances. There is litigation right now concerning the Bagram detainees where Judge Bates found that those captured away from Afghanistan had habeas rights. The government has appealed that. He did not find that with respect to those who were captured in Afghanistan.

And so we have asserted that those captured away from the battlefield, as you referred to it, do not have habeas rights in Afghanistan. With regard to the Guantanamo population, the Supreme Court has resolved that issue with the Boumediene case.

Mr. NADLER. The time has expired.

The gentleman from Iowa?

Mr. KING. Thank you, Mr. Chairman.

Let me pick up where that is. Mr. Johnson, as I understand what you said—is that those captured in Afghanistan have not at this point successfully made a habeas claim.

Mr. JOHNSON. That is correct.

Mr. KING. And is it the Administration's position that they would resist any habeas filings for those that—those enemy combatants that were picked up in Afghanistan?

Mr. JOHNSON. Well, we haven't really been tested in that regard. The Department of Justice has appealed the ruling of Judge Bates with regard to those captured away from the battlefield who are detained in Afghanistan, so the implication of that is that the Administration view, I believe, is that there should not be habeas for

those captured in Afghanistan, detained in Afghanistan. That is the implication or the—implication.

Mr. KING. It is not certain yet at this point.

Mr. JOHNSON. With regard to the habeas remedy.

Mr. KING. Can you tell me how many have been successful of Guantanamo detainees with their habeas filing?

Mr. JOHNSON. I don't have the exact number. The Chairman made a reference to it. I don't have the exact number offhand. I am happy to provide that to you.

Mr. KING. Let me just suspect—Mr. Kris, do you know that number?

Mr. KRIS. I don't know the exact number either, but what Chairman Nadler said sounded plausible.

Mr. KING. We are dealing with a universe, though, that would be not those that were picked up in Afghanistan or in—probably in another terror-sponsoring country, but those that were picked up either on the streets or any in America, on U.S. soil, or—do we know of any that have been picked up outside of U.S. soil that were not on what we would consider to be a battlefield that have succeeded in a habeas filing?

Mr. JOHNSON. The way I can answer that question for you, sir, is that the overwhelming majority of the Guantanamo detainees were captured in Afghanistan.

Mr. KING. Yes.

Mr. JOHNSON. Okay. I don't have the exact numbers for you, but I——

Mr. KING. No, we will look that down—and I appreciate that answer.

And I wanted to explore a little bit, too, the—Guantanamo Bay as a recruitment tool and Osama bin Laden using that as recently as 2008. I have seen a film that I believe they have used multiple times that is a film of Guantanamo detainees in orange suits that are seated with—I believe they are handcuffed with their hands perhaps in front rather than back. They show them being sat down all in a group, then back up again. Have you seen anything like that?

Mr. JOHNSON. I am sure I have seen that film, yes, sir.

Mr. KING. Yeah, and it is—I know it is fairly general. But I will submit that that film was taken when their—on their arrival at Gitmo or prior to that rather than anything that is going on at Gitmo now.

So I will suggest that whatever might happen with the closing of Gitmo, which I expect will happen by the date in the executive order, that it will not stop al-Qaida from using Gitmo as a recruiting tool, nor will they use—if we move them to a maximum security prison, since we all know that is—the human rights groups have already raised the issue and contended that they were inhumane at our Supermax prisons, we end up with the same circumstance.

Have you contemplated that with regard to the national security question about the recruitment of al-Qaida?

In other words, to put the—to compress this question down, does it really do us any good to close Gitmo if we are going to put people in maximum security prisons and have Amnesty International de-

clare that they are in an inhumane situation? Isn't that also a useful tool for al-Qaida?

Mr. JOHNSON. I would respectfully suggest to the Congress that it does make a difference that Guantanamo Bay has been allowed to become that recruitment tool, and we are determined to create an alternative situation that doesn't.

Certain rallying cries get legs and some don't. And we know that al-Qaida has been able to use Guantanamo Bay very effectively, and we are determined to disable them from doing that. And the way to do that is to close this facility as a detention facility.

Mr. KING. Okay. Under this legislation that you discuss as part of your testimony, you testified that it would eliminate the utilization of any evidence that was gathered under—cruel, unusual and inhuman treatment I believe was the language.

Now, does this bill, then—does it redefine terror—or, excuse me, does it redefine torture?

Mr. JOHNSON. The Senate bill would prohibit use of statements taken as a result of cruel, inhuman, degrading treatment.

Mr. KING. Does it redefine, though, cruel, inhuman, degrading treatment?

Mr. JOHNSON. I don't believe that it puts a definition on that phrase.

Mr. KING. Okay.

Mr. Kris, do you——

Mr. KRIS. I believe that is right. I mean, the Military Commissions Act—the prior legislation or the—legislation had prohibited admission of statements obtained by torture.

This bill goes further following the rule change that Mr. Johnson referred to in prohibiting admission of statements obtained by cruel, inhuman, degrading treatment. I don't think it tries to define that term.

But there is——

Mr. KING. I appreciate that.

I saw that light change immediately upon the ringing of the bell. But I—could I, Mr. Chairman, be indulged for 15 seconds to conclude a question? Thank you.

Mr. NADLER. [Off mike.] [Laughter.]

Mr. KING [continuing]. What I really am trying to find out here is is the meaning—is waterboarding affected by any of the language that we have discussed here? Is there any change in any language that might broaden this out to include waterboarding where it might have otherwise been interpreted to not be cruel, inhuman or degrading treatment?

Mr. KRIS. Well, in the previous Administration, I think there was a reluctance to treat or define waterboarding as torture. I think in this Administration there has been no such reluctance.

And so that would fall under the—as this Administration, I think, interprets torture, waterboarding would be out.

Mr. KING. But it has not been redefined in law.

Mr. KRIS. Well, the torture statute remains the same as it has been.

Mr. KING. Yes. And that is what I wanted to clarify. Thank you.

Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

The gentleman from Massachusetts is recognized.

Mr. DELAHUNT. Thank you.

And again, welcome to both of our witnesses.

It is good to see you again, Mr. Kris.

Mr. KRIS. Thank you.

Mr. DELAHUNT. You know, Mr. Johnson, you used the term "captured" at or near the battlefield. I think that was alluded to by my friend from Iowa.

Well, I mean, the reality is we can—I think it is important that we understand in many cases the term "capture" was a transfer from Pakistani intelligence and authorities to United States authorities. There was an intervening event. Is that a fair statement?

Mr. JOHNSON. It is true that detainees come into U.S. detention through a variety of means.

Mr. DELAHUNT. And I know this is not your intention, but to suggest that they were captured on or near the battlefield I would respectfully suggest is—or could be interpreted multiple ways, some of which are inaccurate.

Let me cite the example again of the Uighurs. I am sure you are aware that they were captured, quote/unquote, or apprehended, taken into custody in Pakistan.

They were then taken—after fleeing from Afghanistan, where they were residing because of the fear of Communist Chinese persecution, and that when they crossed the Pakistani border, they encountered a tribal group that provided them sustenance and led them to a Pakistani jail.

And then the leaders of that particular tribal group were given $5,000 for each of those particular detainees. I am referring to four of them right now. Does that comport with your understanding of the situation?

Mr. JOHNSON. I am not in a position to disagree with your characterization, Congressman.

Mr. DELAHUNT. Okay. So I just put that out there because I think it is very important that we have to understand where our information is coming from.

In these particular cases, I would suggest it is the Communist Chinese intelligence services and Pakistanis who sold them for $5,000 each. So I think it is easy to be on this side of the dais and talk about being captured at or near the battlefield.

And that leaves an impression that they were out there with guns and hiding in the hills and shooting at Americans, when that is simply not the truth according to very, very solid information on the American side.

Mr. JOHNSON. Congressman, let me—may I answer?

Mr. DELAHUNT. Sure, please.

Mr. JOHNSON. Yes. As you know, the district court ordered that the Uighurs be released——

Mr. DELAHUNT. Right.

Mr. JOHNSON [continuing]. Last year.

Mr. DELAHUNT. Right.

Mr. JOHNSON. I would like to think that given the circumstances we in this Administration, in our review process, would have got to the same result on our own.

As you know, we have spent an enormous amount of time trying to find a country——

Mr. DELAHUNT. And I know that very well, and I congratulate you——

Mr. JOHNSON [continuing]. Successful to a limited extent.

Mr. DELAHUNT. And I I have to tell you, by the way, that a Bush undersecretary, an undersecretary that was intimately involved in this, appeared before the Committee which I Chair over on the Foreign Affairs side that stated unequivocally that these Uighurs were wrongly imprisoned and that their entire story constituted a tragedy.

But some, for whatever their motives may be, continue to want to create a fear, if you will, among the American public. And I think that does a huge disservice to what you are trying to accomplish.

Having said all that, let me pose this question. And I know the task force is reviewing various plans, and I understand the difficulties.

Is it still on the table that some—a few—detainees who have been cleared—that it could be, if you will, adjudicated—were never involved in any way threatening or—in conduct or behavior deleterious to the United States might be resettled into the continental United States? Has that been taken off the table or is that still——

Mr. NADLER. The gentleman's time is expired, but the witness may answer the question.

Mr. JOHNSON. Let me answer the question this way. Whatever decisions are being made, are being made, I believe, consistent with national security, consistent with public safety, the safety of the American people and the rule of law.

We haven't, at this point, so far as I am aware, made such a determination. There have been a number of transfer decisions made which I think I alluded to in my prepared statement, and we are more than halfway through the review process.

But I want to assure everybody here that whatever decisions we make we make consistent with national security and public safety.

Mr. DELAHUNT. I would encourage consultation with the United States Congress, the appropriate Committees of jurisdiction.

Mr. NADLER. Thank you.

We will have a second round of questioning, but since for that—after the votes. But since for that second round of questioning Mr. Johnson will not be here, I gather, since he has to leave, we will start the second—I am sorry, we will start——

Mr. JOHNSON. Congressman, I am happy to stay as long as you want me to stay, sir.

Mr. NADLER. Oh, very good. Thank you.

I will recognize the gentlelady from Texas.

Ms. JACKSON LEE. Mr. Chairman, thank you, and thank you to your witnesses. We know that military commissions are—historically have been established where jurisdictional gaps exist, but they have not been—and I hope both of you agree—been created to obliterate or to ignore the importance of due process.

So I would like to, first of all, quickly ask, do you have at Guantanamo Bay, to your knowledge, any minors, underage detainees, at this point?

Mr. Johnson, I am sorry?

Mr. JOHNSON. I can think of at least two, including one referred to by the Chairman in his opening remarks, that the evidence suggests were teenagers at the time they were captured.

Ms. JACKSON LEE. And during the course of your tenure, did you prosecute underage detainees through the military commissions?

Mr. JOHNSON. Are you asking had we?

Ms. JACKSON LEE. Yes.

Mr. JOHNSON. The two detainees that I am referring to have pending military commissions cases against them.

Ms. JACKSON LEE. But previously there were 800, 240 are left. Did the military commissions prosecute underage detainees over the course of the 800 that were detained?

Mr. JOHNSON. I am sorry, I didn't hear the number, ma'am.

Ms. JACKSON LEE. I speculated that there were 800 detainees. Over the course of the detainees, did you prosecute underage detainees?

Mr. JOHNSON. There are two cases that I just referred——

Ms. JACKSON LEE. Only two out of the 800?

Mr. JOHNSON. There have been three completed prosecutions so far. I don't believe any of the three completed involved detainees who were teenagers at any point. I don't believe that to be the case.

We have seven pending cases right now. One of them the Chairman referred to.

Ms. JACKSON LEE. And only two of those are minor?

Mr. JOHNSON. That is my understanding, yes.

Ms. JACKSON LEE. Thank you. Let me just quickly go to this——

Mr. JOHNSON. At some point during their detention they were minors—you know, the evidence suggests.

Ms. JACKSON LEE. You testified—and if this was a question that has been asked, let me just quickly ask it again—at several hearings that the Administration intends to assert its authority provided by the AUMF passed by Congress to detain individuals deemed dangerous for the duration of these hostilities.

What, generally speaking, is the class of individuals who might possibly be detained under this authority regardless of the opportunity to access the criminal justice system?

Who would fall under this category that would continue to be dangerous? And would they have any rights to appear before a commission or any other authority?

Mr. JOHNSON. Well, as you know, the Boumediene case determined that the Guantanamo detainees have the right to habeas in Federal court.

In addition to that, we in the Administration are developing a periodic review process with respect to any detainees who are in what the President refers to as the fifth category, people who are not prosecuted, not transferred, not released and, for reasons of national security, public safety, the government determines should be detained for reasons of—under law of war authority.

And that category of detainees we are determined to develop a process of periodic review where they are given some access to evidence, some ability to contest what the government says about them. And as part of our detention policy review, we are developing that right now.

Ms. JACKSON LEE. If a detainee was to go through the Federal court system and be criminally acquitted, are they released or is there an additional detention that you would request?

Mr. JOHNSON. Well, as I have stated previously, if we, the government, determine that there is law of war authority to detain a person for reasons of national security, safety and because of a threat assessment, that authority, we believe, exists—and I am answering just in terms of legal authority, not what we would actually do.

As a matter of legal authority, that would be true irrespective of what happens in any criminal prosecution that Mr. Kris might bring or in a military commission. Now, whether we would actually do that, in my view, is an entirely separate matter.

And in the three cases that have been completed, two received less than life sentences, and they have been transferred. They are no longer in U.S. detention.

Ms. JACKSON LEE. Well, we thank you for your service. But as I am listening to you—and maybe as this commission finishes its work—it looks like it would be completely complex and perplexing to try to close Guantanamo Bay as the President has directed if we have continuing languishing individuals who have to be detained.

Maybe we can pursue that later. But I thank you very much for your service.

Mr. NADLER. The gentlelady's time has expired. I thank the gentlelady.

And as you notice, we have a series of votes again. There is 1 minute and 56 seconds left on this first vote. There are three 5-minute votes after this. So we will adjourn—or recess, I should say. We will recess probably for about 20 minutes.

I urge Members of the Committee to return as promptly as possible after the commencement of the last vote.

I again apologize to the witnesses.

And with that, the Committee stands in recess.

[Recess.]

Mr. NADLER. The hearing will reconvene, and I thank the witnesses again and apologize again. Hopefully this won't happen again.

I recognize myself for a few minutes.

Mr. Kris, one quick question, and then I would like to explore some of the Administration's additional suggestions on military commission——

Mr. KRIS. Yes.

Mr. NADLER [continuing]. Reform. We requested that the Department of Justice produce the May 9 OLC legal opinion regarding application of the Constitution to military commissions.

It is important that we have this as we are deliberating the reform. When do you think we might get that?

Mr. KRIS. I have to say I don't know, but I can certainly take it back and make clear that you want it quickly. This is a——

Mr. NADLER. We do want it quickly. We are going to be debating the military commissions reform presumably in the context of the conference report on the DOD authorization bill which has now passed both houses, so we will have the conference report shortly.

And if we get that OLC memo after the conference is over, it will be sort of——

Mr. KRIS. Less helpful.

Mr. NADLER. Yes. Thank you.

Now, Mr. Johnson, the Senate Armed Services Committee noted its concern with the difficulty that defense counsel has had obtaining adequate resources and ensuring learned counsel for capital cases.

In his written submission, Colonel Masciola makes several recommendations. His first suggestion is that we amend the Military Commissions Act of 2006 to afford all counsel the "equal opportunity to obtain witnesses and other evidence," thus replacing the current assurance to defense counsel only of a "reasonable opportunity."

So in other words, all counsel on both sides, prosecution and defense, would have equal opportunity to obtain witnesses and evidence, not simply the defense have a reasonable opportunity.

This seems reasonable and important—in fact, crucial—to assuring a fair process. Can the Administration support that change?

Mr. JOHNSON. Congressman, I have reviewed Colonel Masciola's submissions. I have met with him on several occasions to discuss the issue of resources, the ability for him to do his job. I have met with him with our judge advocates general of each service to ask him what we can do to help better support him.

I have not had an opportunity to carefully consider Colonel Masciola's proposal. I think that there—I could foresee problems with codifying in the law in the abstract a requirement of equal access to witnesses, but I haven't had an opportunity to carefully study his proposal. And I would want to be sure I understood the nature of it before we put something like that into law.

But I agree that we need to focus on defense resources, defense experience, defense training. One thing that I am particularly interested in ensuring is that our defense counsel in potential capital cases receive adequate training. There are standards by the American Bar Association.

And I am particularly focused on making sure that in capital cases the JAGs we send down there to do this know what they are doing, because those are obviously high-stakes cases.

Mr. NADLER. I appreciate that, but also they need the ability to get witnesses and other evidence. And again, this will probably come up in the context of the conference—in the conference deliberations, so you say you are considering that. I hope you consider it quickly before the conference convenes, which may be soon.

Mr. Kris, you have testified the Administration supports the Senate amendment that would ban statements obtained through cruel, inhuman or degrading interrogation methods, but that the Administration would recommend a voluntariness standard that goes further that "takes account of the challenges and realities of the battlefield and armed conflict."

Since the rationale of allowing flexibility for battlefield circumstances is difficulties caused by the heat of battle and the shared desire to ensure the safety of our troops, would you support or would the Administration support limiting in special circumstances consideration for military commissions to actual battle-

field capture and otherwise requiring voluntariness under standards applied by our courts in criminal cases or by the courts martial—in other words, limiting that less exacting standard to actual battlefield captures?

Mr. KRIS. Sort of a battlefield carve-out from the voluntariness standard, is that what you are——

Mr. NADLER. Yes.

Mr. KRIS [continuing]. Suggesting?

Mr. NADLER. Yes.

Mr. KRIS. So——

Mr. NADLER. In other words, you said that the—you said that the Administration would go further than the Senate——

Mr. KRIS. Yes.

Mr. NADLER [continuing]. On the voluntariness standard——

Mr. KRIS. That is right.

Mr. NADLER [continuing]. But they would have to take account of the challenges and realities of the battlefield and armed conflict.

Mr. KRIS. Yes.

Mr. NADLER. So would you support—would the Administration support going all the way off the battlefield toward the same voluntariness standard that we have in, let's say, court martials, but having the taking account limited to battlefield situations?

Mr. KRIS. Yes, if I understand your question, the Administration's position is that the voluntariness standard, which is a due-process-based standard, is the appropriate standard, and our legal experts have made judgments about why the courts would likely impose that in any event.

But we think that it is appropriate in thinking about that standard to take account of the realities of the battlefield and the military——

Mr. NADLER. I understand that and I appreciate that. My question is that taking account, which is presumably a lessening of the standard—would you limit that to battlefield capture situations?

Mr. KRIS. Well, I want to——

Mr. NADLER. Because presumably if you—if someone is not arrested in a battlefield situation, you don't have to take account of battlefield situations.

Mr. KRIS. Well, yes. I mean, I think the way to answer that is that the voluntariness test is really a totality of the circumstances test, and this—by that, I mean the voluntariness test that you apply on the streets of Newark, New Jersey as well as the voluntariness test that you apply in Tora Bora or somewhere else. It is a totality test.

And so I really think that it is not so much a different test as it is a test that accounts for the environment and the circumstances in which the statement is taken.

So I think the answer to your question is we are actually talking about a voluntariness test that is, in the abstract, the same but in its application would take account of the——

Mr. NADLER. May be different, depending.

Mr. KRIS [continuing]. Of the facts, yeah.

Mr. NADLER. Okay. And——

Mr. JOHNSON. Congressman, can I help you there?

Mr. NADLER. Sure.

Mr. JOHNSON. Let me read you some language along the lines of what I think the Administration is considering in this regard for a voluntariness standard applicable for military commissions cases. And the precise wording may be changed, but you will get the concept.

In determining whether a statement is voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities; the characteristics of the accused, such as military training, age and education level; and the lapse of time, change of place or change of identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Mr. NADLER. Okay. Thank you.

Mr. Kris, the definition of unprivileged enemy belligerent in the Senate bill was amended on the floor of the Senate to include members of al-Qaida, without any—without requiring any showing that the individual actually engaged in or supported hostilities.

What is the Administration's position on this change? Is it legally defensible to use membership alone, and how would that be shown if it is?

Mr. KRIS. Well, as I understand it, Congressman, this is a question of personal jurisdiction. And so you would have to show an actual law of war violation in order to bring a successful prosecution for that law of war violation in a commission or, if you were going to prosecute in a criminal court, you would have to show a crime there.

Mr. NADLER. Membership in a terrorist group like al-Qaida would not be——

Mr. KRIS. I don't think——

Mr. NADLER [continuing]. Would not be——

Mr. KRIS. I mean, as I understand that—that amendment, it is not meant to create an offense based on membership but that it is a jurisdictional provision. We are still, as an Administration, finalizing our position on that.

But I will say that, for example, the authorization to use military force refers to people who are part of al-Qaida, which is at least similar to the member standard.

Mr. NADLER. And is it defensible, in your opinion, to use membership alone? And how would that be shown?

Mr. KRIS. Well, again, as a jurisdictional matter, I think it probably is defensible, subject to the caveat that we are still finalizing our position and, again, with the emphasis that to show a conviction and get a sentence you would have to show a violation.

Membership could be shown in a variety of ways. I doubt you would—you sort of have to have a formal card-carrying member test.

I mean, membership in an international terrorist group, for example, is currently in Federal law, in the FISA statute—you would show it, I think, in the traditional kinds of ways—knowing, joinder and affiliation with the group.

Mr. NADLER. Thank you.

And finally, either one of you, could you highlight, please, any other changes to the Senate amendments that you think we should be considering?

Mr. KRIS. I can run down a quick list if you want of several, or—Jeh, I am sorry about that.

Mr. JOHNSON. Please.

Mr. KRIS. We have talked about the voluntariness standard. We have a position about the offensive material support for terrorism as a law of war violation. It is in our written testimony.

Have some slight differences, I think, with respect to appellate review. We are in favor of fact and law review and the role of civilians, but I think—and this is really for Jeh to elaborate on more, but have some concerns about the Court of Appeals of the Armed Forces doing that kind of review.

We favor sunset provisions——

Mr. NADLER. You would favor it going straight to a circuit court?

Mr. KRIS. No. Again, Jeh should probably talk about it, but we would go to the service court.

Mr. JOHNSON. It would be a—we actually favor the current structure that exists in the current military commissions law—in other words, trial court, court of military commissions review, D.C. circuit, Supreme Court, but with an expanded scope of review to encompass both facts and law.

Mr. KRIS. It is a fairly modest—as I say, we support a sunset. I don't think that is in the bill.

This is related to the material support provision, but if it is out, then certainly I think we would prefer a declaration about the offenses there being law of war offenses, to deal with any ex post facto concerns.

And then we have a slight difference on hearsay. And then, as I said, we are still sort of finalizing——

Mr. NADLER. And you can submit all that. That is in writing.

Mr. KRIS. Yes. I don't want to filibuster you. I am sorry to——

Mr. NADLER. No, that is all right. Well, my question inadvertently almost asked for a filibuster, but I don't want one. Thank you.

My time has expired.

The gentleman from Iowa?

Mr. KING. Thank you, Mr. Chairman.

I would ask Mr. Johnson if you could restate again or read to the Committee the exceptions that may be considered on evidence gathering, as part of it that I heard was it would be evaluated as to what kind of duress the accused might be under. That was an interesting—is that in your written testimony and I missed it?

Mr. JOHNSON. Well, first of all, I am happy to submit it for the record.

Mr. KING. I would ask that you do that and unanimous consent that—well, it already is in the record because you read it, but——

Mr. JOHNSON. Yes. Would you like me to re-read it?

Mr. KING. I would appreciate that.

Mr. JOHNSON. Yes. In determining whether a statement is voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the details of the taking of the statement, accounting for the circumstances of the conduct of

military and intelligence operations during hostilities; the characteristics of the accused, such as military training, age and education level; and the lapse of time, change of place or change of identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Mr. KING. Okay. Thank you. And that is just an interesting string there, and so it raises a number of questions in my mind, and one of them would be if the accused statement changes from the time that they are first interviewed—I will use that term—to the time they go to trial, doesn't this language open it up so the judge can consider that and consider the first statement that this accused made—it might be under duress of some type?

Mr. JOHNSON. Well, that is an interesting question. I know from my time as a prosecutor—and Mr. Kris can help me out here—that it is—and I am not sure how this would shake out in the military commissions context.

I know that from my time as a prosecutor, if a statement is suppressed because it was not voluntary, or it was not taken in accordance with law, and there is a subsequent statement made by the defendant that is inconsistent with the suppressed statement, the government might have the opportunity to then offer into evidence the suppressed statement as a prior inconsistent statement.

Maybe David can——

Mr. KING. Or the judge might throw it out on—might be able to take it into consideration and throw the original statement out and declare it to be likely suppressed because of the inconsistency between the original statement by the accused and the statement at the time of the trial.

Mr. Kris?

Mr. KRIS. There are different rules of admissibility when a prior statement is used for impeachment as an inconsistent statement, as opposed to affirmative evidence.

But the language that Jeh read I think is an effort to sort of codify in statute the Supreme Court's holding in *Colorado v. Connelly*, where you have a first statement that, let's assume, is taken in a way that is—makes the statement inadmissible and then a second statement taken under different circumstances which, standing alone, would be fine but you still have to litigate the question of whether the first has tainted the second.

And there is law on how that taint is dissipated, making the second statement admissible——

Mr. KING. It raises a question of law, which would be the discretion of the judge, as I understand this, in the final analysis.

And if I listen to the string of this, the age of the defendant, the circumstances, the battlefield circumstances, the education, the training—can you describe for this Committee a scenario by which, let's see, one might be picked up on the battlefield, and those circumstances would be tight enough that the case was not in jeopardy and left to the discretion of a Federal judge?

Mr. KRIS. Well, I mean, it is not unbounded discretion, of course, in the military judge here. But I think the concept——

Mr. KING. But this language prescribes discretion, as I understand it.

Mr. KRIS. I beg your pardon?

Mr. KING. This language prescribes discretion, as I understand it.

Mr. KRIS. I think it guides the discretion of the judge, or the judge, in applying the legal standard of voluntariness, which has a very extensive pedigree in the case law, as you know, under the fifth amendment—I think maybe the concept that underlies the first part of that language is the idea of a coerced confession, of an involuntary confession, is predicated on some kind of government overreaching, improper conduct vis-a-vis the admissibility of the statement.

Mr. KING. Okay. I think that is a good place to leave that——

Mr. KRIS. Okay.

Mr. KING [continuing]. That particular question. I think that is an important point.

And then I would like to go to the question of is the Administration's position—does the Administration support reading Miranda rights to enemy combatants when they are picked up on the battlefield?

Mr. JOHNSON. No. No, and I am happy to submit a letter for the record that I wrote to the Chairman of the House Armed Services Committee last week where, in response to inquiries from that Committee, I stated pretty unequivocally that it is not the mission of the military to read people they capture Miranda rights.

Mr. KING. But we do know that is taking place.

Mr. JOHNSON. I am happy to give you that for the record.

Mr. KING. But you do know that is—it is taking place in the battlefield, within—very recently, within the last couple of months.

And so under what circumstances is the military reading Miranda rights to those detainees that they are picking up in places like Afghanistan?

And I would point you to the congressional record that Congressman Mike Rogers from Michigan has introduced within the last couple of months as an example.

Mr. KRIS. Congressman, can I just make a couple of points in response to that?

Mr. KING. Please.

Mr. KRIS. The first is with respect to the admissibility standard, the Administration is supporting the rule under which Miranda would not be required for admissibility of statements. So there is no ambiguity on our position with respect to whether Miranda is required to admit these statements in a military commission.

With respect to the actual practice, in addition to the letter that Mr. Johnson wrote himself, there is a letter dated July 21 from the attorney general to the House Armed Services Committee that says—and I will quote you the relevant sentence; I won't read a whole long part of it, but, "the warnings"—Miranda warnings—"are given in locations removed from the battlefield and only after the military's intelligence gathering and force protection needs have been met."

So I think there is some confusion about what the ground truth is here. But the attorney general, Director Mueller and Mr. Johnson have all written letters that I think, if you take a look at them, will clear it up. At least I hope they will.

Mr. KING. All right.

Mr. JOHNSON. The other thing I would add, Congressman, is that the military commissions bill that the Senate passed expressly excludes Article 31 of the USMJ, which is the Miranda requirement, from any application to military commissions.

Mr. KING. Thank you for that clarification. Thank you for your testimony.

Thank you, Mr. Chairman. I yield back.

Mr. NADLER. Thank you.

Mr. Delahunt is recognized.

Mr. DELAHUNT. You know, we continue to hear the term "picked up on the battlefield." How many of the 800 detainees at Guantanamo were captured by American soldiers, if you know, on the battlefield, out of the—I think it is 740 or 790?

Mr. JOHNSON. I don't have the exact number for you, Congressman. We can give you that for the record.

Mr. DELAHUNT. If I told you maybe 15 or 20, would that sound outrageously minimal?

Mr. JOHNSON. Fifteen or 20?

Mr. DELAHUNT. Or 20, captured by Americans.

Mr. JOHNSON. I don't have the exact numbers for you.

Mr. DELAHUNT. American soldiers.

Mr. JOHNSON. I don't have the exact numbers for you.

Mr. DELAHUNT. Okay. I think that is very important, because we are going to continue to hear as this debate goes on about being picked up on the battlefield. And I guess it is my information, and I think it has been sufficiently corroborated, that it is a minuscule number.

In fact, if either one of you know, how many were picked up via the bounty program that was initiated by the Bush-Cheney administration?

Mr. JOHNSON. I am not sure of the number.

Mr. DELAHUNT. Couple of hundred, maybe?

Mr. JOHNSON. I wouldn't want to speculate, sir.

Mr. DELAHUNT. Okay.

Mr. Kris, do you know?

Mr. KRIS. No, I don't know the number. I mean, I will say I think your basic point is well taken, and I think it is similar to a point that Chairman Nadler made, which is that, if I understand you—maybe you are making only a narrower point, in which case—but this is a different kind of conflict in some ways, because the enemy is not wearing uniforms, and there will be, I think, perhaps more challenge in trying to determine exactly who is who.

Mr. DELAHUNT. Right.

Mr. KRIS. And I think it is incumbent on us to have procedures that are appropriate to the challenge of that determination.

Mr. DELAHUNT. I concur with that. And again, let me be very clear, too. I applaud what you are trying to accomplish. I might have some disagreements in terms of degree, but I know what you are trying to do.

You inherited a mess. And it is difficult picking up after a mess is left on your lap. But we owe it to the American people, to our justice system, to attempt to do that.

Speaking of messes, where do we stand with the CSRTs?

Mr. JOHNSON. They were suspended in January as part of the review process.

Mr. DELAHUNT. Well, again, what I found fascinating with the CSRTs—and for those who don't like the use of acronyms, that is Combat Status Review Tribunals—which I think goes to the Chairman's question about, you know, how do we initially filter them or determine that they are combatants.

And it is my understanding that the mechanism that we used was Combatant Status Review Tribunals——

Mr. JOHNSON. Well, for the——

Mr. DELAHUNT [continuing]. Along with ABRs or ARBs.

Mr. JOHNSON. ARBs, Administrative——

Mr. DELAHUNT. ARBs.

Mr. JOHNSON [continuing]. Review Boards, yes.

Mr. DELAHUNT. Right. And for the record, I wanted to note that in hearings before the Committee which I Chaired there were a number of military prosecutors that testified that described that entire process as it was—as it existed as a sham, a joke and a fraud being perpetrated.

Now, these men were, in my judgment, courageous. I am sure that there was a lot of dissatisfaction with those opinions being expressed. But they were members of the American military, and they were attorneys that participated in the process.

They weren't sitting here in comfy, cozy Room 2141 making pronouncements and preachments and reaching conclusions that varied significantly from what the reality was. And the reality was that that was a system that did not reflect well on the American justice system.

Have you been able to design or develop, as we look forward, a new screening mechanism—a grand jury, if you will, to use a legal term?

Mr. JOHNSON. We are——

Mr. DELAHUNT. Are you still in the process?

Mr. JOHNSON. Well, let me make a couple of points. First, when the process—the CSRT process for the Guantanamo detainees was suspended in January, what we did as part of the executive order mandate was to begin ourselves in the Administration a detainee-by-detainee review of every case——

Mr. DELAHUNT. Good.

Mr. JOHNSON [continuing]. Which we are more than halfway through right now, from—we are looking at the complete picture with regard to every single detainee, including any who went through the CSRT process and are still detained.

We are developing a periodic review process and a process for initial screening. There is an initial screening process that occurs irrespective of CSRTs, that occurs overseas in Afghanistan when people are captured there. There is a board that looks at them within a matter of days or hours, and that process is going to continue.

We call it a 190-8 process. And that is something that is standard military. But we are devising——

Mr. DELAHUNT. At least it has a number now, Mr. Chairman.

Mr. JOHNSON. There is a number on it, yes, sir. But we are devising a periodic review process.

Mr. DELAHUNT. And before the Chairman hits the gavel, if I could ask for another 30 seconds——

Mr. NADLER. Without objection, the gentleman is granted 30 seconds.

Mr. KRIS. Just one other point, I think, to make is that one of the five rule changes that the Pentagon—the government adopted on its own was to change the reliance on the CSRTs when determining the jurisdiction of the military commission, and that is a—another change that I think——

Mr. DELAHUNT. That is well done. And the Chair and I have had a ongoing, continuing interest in a case involving a Canadian citizen who happened to be Syrian by birth by the name of Maher Arar.

And when I hear issues regarding words such as "diminishing our national security," let me put forth that I have had multiple conversations with Canadian officials who have expressed reluctance now to cooperate with the U.S. in terms of intel because of the injustice that was done to that individual.

We intend to have a hearing once more on Maher Arar. I am going to request you, Mr. Johnson, and you, too, Mr. Kris, go back, look at the records, and let's get those who made the decisions and signed off before this Committee, because I believe ardently that it is the responsibility of these Committees to do the oversight that is necessary to repair the damage that was done in the preceding Administration to America's image.

With that, I yield back.

Mr. NADLER. I thank the gentleman.

Let me just amplify, we—as the gentleman said, we have held joint hearings on that case. That is the case where intelligence from Canada was used by the United States ultimately to highly improper purposes. Canadian investigations revealed that.

Our government, to this day, has refused—well, I don't know that—we can ask the new Administration—but refused to acknowledge any error, when error was manifest and injustice was manifest.

And the Administration should take a careful look at the Maher Arar——

Mr. DELAHUNT. Mr. Nadler, you know, I think it is important to note that the Canadians instituted a independent commission that spent 2 years that resulted in the total exoneration of Mr. Arar and, in fact, compensated him in the——

Mr. NADLER [continuing]. The Canadian Parliament voted a 10 million, I think it was, dollar indemnity—for their—part in the injustice done to him.

And I have communicated to the—the two of us have previously communicated, asking for a review of this and for information, so I hope you take that back and have it done.

I want to thank you, the two witnesses on this panel. Thank you very much for your indulgence and for your testimony.

I would ask the second panel to take its place.

And while they are taking their place, I will introduce the second panel. Colonel Peter Masciola—is that Maskiola or Masciola?

Colonel MASCIOLA. Masciola.

Mr. NADLER. Masciola. Colonel Peter Masciola is serving an active-duty tour as the chief defense counsel, Office of Military Commissions, where he is responsible for overseeing the defense of all detainees at Guantanamo accused of war crimes involving alleged terrorism against the U.S. under the Military Commissions Act of 2006.

He oversees a joint total force staff of 95 military and civilian lawyers, paralegals, investigators, intelligence analysts and administrative officers providing full-spectrum trial defense services to Gitmo detainees charged under the MCA.

During his 25 years of distinguished military service, Colonel Masciola has served as the ANGJA assistant to the commander, first Air Force commander in chief, C.C.—I assume it means that—Air Force North, Tyndall Air Force Base, Florida; principal legal advisor to the chief of the Directorate of Total Force Integration H.Q. USAF/A8F; H.Q. at SJA; H.Q. Massachusetts Air National Guard; SJA 104th Fighting Wing, Barnes Air National Guard Base, Massachusetts; supported deployment operations in Iraq and Afghanistan; and deployed with his A-10 Fighter Wing during the Bosnia conflict.

Commissioned in January 1984, Colonel Masciola served 10 years in active duty, holding progressively senior positions, including branch chief, Air Force medical tort claims and litigation; medical law consultant; circuit trial counsel; area defense counsel; and assistant SAJ—SJA.

In civilian life, Colonel Masciola is in the private practice of law. He received his juris doctorate from the New England School of Law in 1983.

David J.R. Frakt was the lead defense counsel in the Office of the Chief Defense Counsel, Office of Military Commissions in Washington, DC and Guantanamo Bay, Cuba. He was the sole defense counsel in *U.S. v. Ali Hamza al-Bahlul*, one of only two detainees to be tried by military commission.

He was also the lead defense counsel in *U.S. v. Mohammed Jawad*, one of two child soldiers facing trial by military commission. He continues to represent Mr. Jawad.

He is an associate professor of law and director, Criminal Law Practice Center, Western State University College of Law. He is a graduate of the Air Command and Staff College and the Squadron Officer's School. He holds a J.D. from Harvard Law School and a B.A. in history from the University of California, Irvine.

Steven Engel is a partner in the Washington, D.C. office of Dechert LLP. Prior to joining Dechert, Mr. Engel served as a deputy assistant attorney general, the Office of Legal Counsel of the Department of Justice.

While at the Office of Legal Counsel, Mr. Engel provided legal advice to the executive branch on matters relating to the detention and prosecution of the Guantanamo Bay detainees, and he worked with Congress in establishing the statutory military commission system following the decision of *Hamdan v. Rumsfeld*.

Mr. Engel is a graduate of Yale Law School. He obtained a master's in philosophy from Cambridge University and an A.B. from Harvard College. He served as a law clerk to Justice Anthony Ken-

nedy of the Supreme Court and to now-Chief Judge Alex Kozinski of the U.S. Circuit Court of Appeals for the Ninth Circuit.

Eugene Fidell is senior research scholar in law and the Florence Rogatz Lecturer in Law at Yale Law School. He is also a counsel at the law firm Feldesman Tucker Leifer Fidell LLP. He earned his J.D. from Harvard Law School and, perhaps most importantly, is a graduate of Queens College.

Mr. Fidell served as a judge advocate in the Coast Guard from 1969 to 1972 and in private practice has represented members of each branch of the armed services. He has also represented print and electronic media in military justice matters.

He has written extensively on military law and has taught the subject at Yale and Harvard Law Schools and the Washington College of Law, American University, where he is an adjunct professor of law.

I must say that I assume that reference to Queens College was put in because one of our counsels is from Queens.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record. I would ask each of you to summarize your testimony in 5 minutes or less.

To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow and then red when the 5 minutes are up.

Before we begin, it is customary for the Committee to swear in its witnesses.

[Witnesses sworn.]

If you would please stand and raise your right hand to take the oath.

Do you swear or affirm under penalty of perjury the testimony you are about to give is true and correct, to the best of your knowledge, information and belief? Thank you.

Let the record reflect that the witnesses answered in the affirmative.

You may be seated. I will ask each of you to testify in less than 5 minutes. We expect, I hope, to be able to get through at least the testimony before the next series of votes.

Colonel Masciola?

TESTIMONY OF COLONEL PETER R. MASCIOLA, USAFG, CHIEF DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS—DEFENSE

Colonel MASCIOLA. Chairman Nadler, distinguished Members of the Committee, I want to thank you for this opportunity to come here and testify in front of you about what I believe is as important as some of the rule changes that you have discussed in order to make any commission system fair and just, not only to the system but to the accused that—they purport to trial.

In order to do that, I first want to state for the record that while I oversee all of the defense services at Guantanamo Bay, Cuba, I do not represent any specific detainee, unlike Major Frakt, who is one of the counsel who works in my office.

Because I don't represent any specific detainee, I am going to limit my testimony to adequate resources here today and not make any opinions about whether or not military commissions should go

forward or any particular forum that any detainee should be tried upon.

Having said that, I want to follow up on a previous question asked to Mr. Johnson about adequate resources for the defense, and that is the question, Chairman Nadler, that you had stated in regards to equal access to both witnesses and evidence.

Sir, that is already the codified standard under the Uniform Code of Military Justice. And what I am simply asking for—and along a lot of the points that I made in writing—is equal access to witnesses and justice in the concept of equality of—I am sorry—to witnesses and evidence, and the concept of equality of arms, something that is woefully missing and inadequate in the resourcing under the present Military Commissions Act.

And I point to the disparity between not only the UCMJ but the Federal system, where adequate resourcing is mandated by statute under the Criminal Justice Act.

I point to several pieces of—of evidence, if you will, or documents, exhibits, that I have included in my written testimony to highlight the inadequacies of resourcing because of this unequal access to witnesses and evidence.

First, one of the exhibits are the convening authority's rulings on 56 requests by counsel who work in my office for expert witnesses. Of those 56 requests, 47 were denied right off the bat. And most of them—10, in fact, in the death penalty cases—five death penalty cases—involved mitigation experts.

One case, the Ghailani case, which was recently moved to Federal district court, which I submitted Exhibit B, shows that as soon as Mr. Ghailani was indicted and arraigned in Federal district court, the judge, ex parte and before even requests were made, subsequent requests were made by the defense counsel, granted three experts—not only a mitigation expert, but an investigator, and an intelligence officer, right away. That is the kind of requests that were being denied routinely by the convening authority.

I would like to submit, and I have submitted in writing, that the whole model of the convening authority doesn't work in the military commission system. It is based on commander justice, commander justice who has an interest in the whole part, including being fair to the accused and good order and discipline in their units.

There is no such analogy here. Alleged al-Qaida, alleged Taliban, do not belong to the convening authority's unit. In fact, the good order and discipline of JTF Guantanamo, the detention task force, does not come under the command of the convening authority.

There is no reason that the defense resources should also come under the convening authority because the convening authority, unlike the commander under the military justice system, does not have the same interest that justice be done for that accused member of their unit. And the whole unit is looking at whether justice is done.

I submit that I have in my written material made specific recommendations as to the language that would be amended for both statutory and regulatory changes that would change the convening authority and have a more fairer system to the defense that would adequately resource the defense.

I would also like to point out the change in the death penalty cases that Mr. Johnson was saying. Yes, the memo that I submitted here and the prior memos I submitted to him do address those resources.

The death penalty counsel—he mentioned training. Training is not enough in order to comply with the ABA standards and the standards—federal—for learned counsel. Unfortunately, the military doesn't have a death penalty bar because we don't have that many death penalty cases, so we don't have experienced military counsel in my office who are death-penalty qualified.

We propose under the new system that that be contracted out until the military counsel get their—I am sorry, sir.

We propose that a system be set up where death-penalty-qualified counsel in death penalty cases can be contracted, similarly as they are done in the Federal district courts and as was done initially in—when the Ghailani case was transferred there.

[The prepared statement of Colonel Masciola follows:]

PREPARED STATEMENT OF PETER R. MASCIOLA

Testimony of
Peter R. Masciola
Colonel, United States Air Force – ANGUS
Chief Defense Counsel
Department of Defense, Office of Military Commissions
House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties
30 July 2009

INTRODUCTION

I thank Chairman Nadler and the Members of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties for allowing me to testify on a topic of critical importance to the fairness of any future military commissions system – the provision of adequate resources to the defense to ensure trials that produce verdicts that are both reliable and fair to the accused. I will also have a few words to say about the standard of fairness that should be applied to military commission trials: compliance with both Common Article 3 of the Geneva Conventions and the United States Constitution. Because the latter topic has received the most attention from witnesses before this and other committees and subcommittees of both the House and the Senate, however, my testimony today is primarily devoted to the issue of defense resources, which to date has received far too little attention.

I am the fourth Chief Defense Counsel to come before the Congress as you debate the fourth iteration of these military commissions. I am therefore the fourth Chief Defense Counsel to talk to you about the fundamental and fatal flaws of the military commission system as it is currently constituted, and, in the present case, as it has been passed by the Senate. I hope to be the last. If the problems I identify today are finally addressed in the present legislation, it will go a long way toward "leveling the playing field" between the defense and prosecution in the military commissions in a way that finally brings this system into line with other American court systems, both civilian and military, and thus makes its claim to fairness far more legitimate than it ever has been in the past. VADM MacDonald set the right standard in his testimony before the House and Senate Armed Services Committees. Trial by military commission should be trials that we would expect for our own soldiers, sailors, airmen and marines.

I emphasize at the outset that I am testifying solely as The Chief Defense Counsel on behalf of the Office of Military Commission-Defense and not on behalf of any accused, as I am prevented by regulation from representing any individual charged in the military commissions. In addition, my testimony today should not be construed as an endorsement of the adoption of a military commissions system, nor should it be construed to suggest that the problems mentioned are the only deficiencies in the current or proposed system. Finally, given my role as Chief Defense Counsel, my testimony does not represent an endorsement or approval of any policy or the legal sufficiency of any action on behalf of the Government, and should not be cited as such.

DEFENSE RESOURCES IN THE MILITARY COMMISSIONS: PROBLEMS AND SOLUTIONS

In two recent memoranda to the Administration, I have detailed many ways that the commissions' current resourcing policies have prevented detailed defense counsel from carrying out their mission. *See* Memorandum for the General Counsel of the Department of Defense (13 July 2009) ("13 July Memo") (Exh. A hereto);[1] Memorandum to the Attorney General of the United States and General Counsel of the Department of Defense (9 June 2009) ("9 June Memo") (Exh. C hereto). These memoranda cover a wide range of crucial issues in the current resourcing system that make adequate representation of the accused difficult at best and in many cases, impossible.

Because these memoranda discuss the covered topics in factual and legal detail, in the testimony that follows I focus primarily on the structural issues that the memoranda do not address and otherwise simply highlight the most important aspects of memoranda topics. Please consider these memoranda incorporated by reference into this testimony, and read the individual sections of the below testimony in conjunction with the relevant memorandum section.

In each of the following subsections, I describe one of the problems that the current resourcing policies have created and, where appropriate, recommend at the end of the section an amendment to the current Senate bill to address that problem, either with specific legislative language and/or with a description of the conditions that a sufficient legislative fix must meet. Where the nature of the problem makes it more appropriately addressed at the regulatory rather than legislative level, I have suggested that language be included in the appropriate legislative reports identifying the problem and directing the Department of Defense or other regulatory agency to issue regulations that address and resolve the issue.

The Principle of "Equality of Arms"

The military commission system, like the court-martial system under the Uniform Code of Military Justice ("UCMJ") and prosecution in federal court, is an adversarial system of justice that is premised on the belief that the most reliable way of finding the truth of a criminal charge is to allow the government and the accused to present their clashing versions of the evidence of the crime. It is a given that no such system can either achieve reliable results or guarantee fairness unless the accused has an equivalent ability to investigate and present his defense as does the prosecution to investigate and prove its charges. As the United States Supreme Court put it, "[w]e recognized long ago that mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process, and that a criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1984).

In the court-martial system, this fundamental principle of "equality of arms" is embodied in UCMJ Art. 46 (10 U.S.C. § 846), which provides that the defense "shall have equal

[1] I have omitted the attachments to the 13 July memo itself because they are all included as separate exhibits to this testimony.

opportunity to obtain witnesses and other evidence" as the prosecution and the court-martial. In federal court, the principle is embodied in the Criminal Justice Act ("CJA"), which guarantees that all services "necessary for adequate representation" shall be provided to defendants unable to pay for them. 18 U.S.C. § 3006A(e).

The Military Commissions Act of 2006 ("current MCA") deliberately deviated from this model by allowing the accused, in direct contrast to the parallel UCMJ provision, only a "*reasonable* opportunity to obtain witnesses and other evidence" – that is, neither an "equal opportunity," nor the services "necessary" to obtain "adequate" access under the CJA model. *See* current 10 U.S.C. § 949j(a). This change from traditional military practice was a clear message to the Secretary of Defense, the Convening Authority, and the military judges that the UCMJ rule of "equality of arms" should not apply in the commissions, with results that can be seen in the below discussion and attached exhibits.

Inexplicably, although the Senate Armed Services Committee Report to the proposed MCA amendments refers to the problem of defense resources, the bill reported out and subsequently passed by the Senate maintains the current MCA's "reasonable opportunity" standard for defense access to evidence and witnesses. Expressions of concern in Committee Reports, however well intentioned, are not enough in this situation. The simplest solution is to restore the language of Art. 46, and amend the language of proposed § 949j(a)(1) to eliminate the current language and substitute the first sentence of Article 46 (as suitably modified by changing "court-martial" to "military commission"): "The trial counsel, the defense counsel, and the military commission shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe." Apart from its fundamental fairness, this is a standard with a long history of application in military courts with which all JAGC members and military judges are familiar, and thus can be inserted in the present system without fear of confusion.

Solution: Amend proposed § 949j(a)(1) as follows:

"(a) IN GENERAL.—(1) ~~Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.~~ *The trial counsel, the defense counsel, and the military commission shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe.*

The Military Commission Convening Authority: An Untenable Dual Role

Many of the problems associated with the funding of the defense in the commissions is a result of the untenable and inherently conflicted role of the Convening Authority ("CA"), a position that is established by statute under both the current MCA and Senate bill. *See* current 10 U.S.C. § 948h; proposed § 948h. The reality is that significant defense resourcing issues will continue to arise unless this fundamental structural flaw in the system is resolved.

Some background in conventional military law is required to understand the nature of the problem with the CA structure and how this problem arose in the formulation of the military commissions. It must be recalled that the military justice system serves a disciplinary, as well as strictly-speaking criminal, function within the military. Thus, under the UCMJ, courts-martial are convened by a commanding officer when a serious disciplinary problem, which sometimes rises to the level of criminal behavior, occurs in his command unit. In such cases, the commander convenes a court-martial of some type (depending on the seriousness of the offense), which then hears the case against the accused service member. This gives the convening authority, just because he is also the commander of the unit, the dual responsibility of not only enforcing the law but of defending the rights of the service member under his or her command. In the strictly military context, that makes sense, given the fact that the commander/convening authority in courts-martial is the officer in charge of ensuring the good order and discipline of his entire unit, including not only the accused but the prosecution (and often the witnesses) as well. In this situation, such centralized control of the case on both the prosecution and defense sides makes some sense as a matter of logic, as well as of the simple reality that the court-martial takes place in a military unit in which the convening authority, as commanding officer, is the ultimate military authority and promotes military discipline and efficiency.

Neither logic nor military reality compels any such centralization of prosecution and defense control in the hands of a single individual in the military commissions system. To say the obvious, the Convening Authority in the military commissions is not responsible for the "good order and discipline" of the Guantanamo detainees. Indeed, even Joint Task Force-Guantanamo, the military unit responsible for guarding and administering the Guantanamo prison camps, is an entirely separate military entity under a separate command that does not answer to the Convening Authority. Nor is there any military or otherwise natural necessity for the Convening Authority to hold ultimate power over funding of both the prosecution and defense. The Office of Military Commissions - Convening Authority is entirely a creature of Congressional and Department of Defense regulation, headed by a political appointee (who is currently a civilian). This structure could be entirely overhauled with no damage to either the prosecutorial or defense functions. Indeed, as we explain below, if constituted logically – that is, by separating the prosecutorial and defense functions – such an overhaul would enormously enhance the fairness of the entire system.

In any event, despite the absence of any logic or necessity, the conventional military role of the Convening Authority is replicated under the current military commission system, with disastrous consequences for the defense, and nothing in the Senate bill purports to change this situation. In part by statute but mostly by regulation, the Convening Authority is currently responsible, on one hand, for the ultimate decision to proceed with charging and trial of the accused (Regulation for Trial by Military Commission ("RTMC") § 4-1), ultimate acceptance or rejection of pretrial agreements (the military term for plea bargains) (RTMC § 12-1), and initial review and correction of all convictions (current 10 U.S.C. § 950b) – all prosecutorial or quasi-prosecutorial functions. At the same time, the Convening Authority is responsible for all of the most critical defense resource and funding decisions: the initial decision whether or not the defense is entitled to retain and fund defense experts at government expense (RTMC § 13-7); the initial decision to authorize travel funding of all witnesses (which, given the location of the

accused and trials in Guantanamo Bay, is tantamount to virtual veto power over the presentation of most witnesses) (RTMC § 13-2); and to provide for interpretation and translation service for the defense (current 10 U.S.C. § 948l(b), RTMC § 7-3(c)).

This structure has had two consequences for the defense, both of which are unjustified by any military or other need, and both of which have rendered the process fundamentally unfair.

The first consequence is that, because the Convening Authority is the *de facto* chief prosecutor as well as the arbiter of defense resources, defense requests have not been ruled upon with even a semblance of fairness or objectivity. As of 21 July 2009, of the 56 requests for expert assistance filed in 11 cases, only nine have been granted. *See* Table, "Expert Requests filed by OMC-D Counsel to the Convening Authority" (Exh. B hereto). Not a single request made by detailed counsel in the four capital cases among these has been granted. That statistic alone is astonishing, given the special need for mitigation specialists and other experts in capital cases, which has been recognized by both the United States Supreme Court and the Court of Appeals for the Armed Forces, as well as by authoritative guidelines for competent representation and resourcing of capital cases. *See* Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision) ("ABA Guidelines"); Guidelines for the Administration of the Criminal Justice Act and Related Statutes (promulgated by the Administrative Office of the Federal Judiciary and approved by the Judicial Conference of the United States) ("AO Guidelines"); s*ee generally* 13 July Memo (Exh. A), at 3-4, 5-12.

Even these data are misleading. Of the nine requests that have been granted, seven have been in the single case of *United States v. Khadr*. In all of the other cases, which include four capital defendants, only two experts have been authorized, and one of these was granted only after the intervention of the military judge. The underlying reality is thus that while the defense in the other 10 cases combined have received one grant and 41 denials; the defense in *Khadr* has received seven grants and only six denials.

The disparity between the treatment of Mr. Khadr and the other accused is highly significant and damning to, at a minimum, the appearance of fairness of the CA's actions. The accused in the *Khadr* case is a Canadian, and the former legal advisor to the Convening Authority, BG Hartmann (who was disqualified from further participation in *Khadr* and two other cases for unlawful influence or the appearance thereof), stated in testimony before the commission that during the pendency of the *Khadr* case he met with and thereafter provided regular updates to representatives of the Canadian government on the progress of the case.[2] My

[2] BG Hartman's testimony was as follows:

> Q [LCDR KUEBLER]: Sir, have you had any communications with any officials of the Canadian government concerning the Khadr case?
>
> A [BG HARTMANN]: Yes.
>
> Q [LCDR KUEBLER]: And who would that be, sir?
>
> A [BG HARTMANN]: Bernard Lee is at the Canadian embassy here in the United States, and I've spoken with him a few times. And then there was a meeting among--there was a meeting in, I believe, it was in the summer of 2007, I believe there was a meeting with the legal advisor to the

office is not aware of any other such regular contacts between the CA's office and the home governments of any of the other current accused, none of whom are from Western countries. The inevitable danger of this kind of inside contact by an accused's interested and sympathetic home government is that not just "updates" but influence is involved. In this case, that is a danger that at least gives the appearance of having come to fruition on the evidence of the disparity between the CA's treatment of Khadr's expert requests when compared to those of the other accused. No system that makes, or even appears to make, the provision of resources to the defense dependent on extraneous diplomatic and political considerations can possibly be considered fair. Whether or not the accused have the resources they need to prepare for trial should not be a function of their passport or their home government's relationship with the United States.

The second significant consequence of making the CA the source for defense resources is that simply filing a request to the CA requires our defense teams to lay out, in detail, defense strategy and privileged materials that the CA freely shares with the prosecution. Moreover, in practice, the prosecutors have enjoyed a vote on whether or not defense counsel requests will be granted. If the request is not granted, defense counsel must submit on the record filings with the military judge to reverse the CA's decision. As a result, the defense is forced to make the Hobson's choice between seeking needed expert assistance or protecting privileged information.

> Foreign Ministry--Canadian Foreign Ministry and then he had two other people with him, one of whom was a military person, another person I do not recall, and then Mr. Lee was there as well.
>
> Q [LCDR KUEBLER]: What were--was the subject matter of those meetings'?
>
> A [BG HARTMANN]: It was just one meeting. It was just a general--don't recall the subject matter exactly. It was just a general introduction for me because, I think, I only had been in the job for 2 weeks when this happened, very, very shortly after I arrived. I don't remember the entir--anything about the content of the conversations except that it was about Mr. Khadr.
>
> Q [LCDR KUEBLER]: Who initiated----
>
> A [BG HARTMANN]: And just in general the--just in general the process that we were going through and that--how the military commissions process worked.
>
> Q [LCDR KUEBLER]: Who initiated the meeting, sir?
>
> A [BG HARTMANN]: I don't know who initiated the meeting. I was invited to it.
>
> Q [LCDR KUEBLER]: Were there other DoD or administration officials present?
>
> A [BG HARTMANN]: Mr. Paul Nye was there, who was the person that I generally spoke with inside the Office of General Counsel, and I believe Mr. John Bellinger was there from the State Department.
>
> Q [LCDR KUEBLER]: And your conversations with Mr. Lee, sir, what were they related to?
>
> A [BG HARTMANN]: Generally, they had been just updates. If Mr. Lee has a question about something that appears in the press, he'll call and ask. And if he learns about a motion and the motion has been released, he may ask me to provide that to him or something like that.
>
> Q [LCDR KUEBLER]: And you have provided motions to Mr. Lee?
>
> A [BG HARTMANN]: To the extent that they've been released to the public, yes.

United States v. Omar Khadr, Transcript of Rule of Military Commission 803 Session (13 August 2008), at 600-601.

Moreover, the need to appeal the CA's decision to the military judge in virtually every case has made the proceedings grossly inefficient and has led to significant delays even if the defense requests are ultimately granted.

With regard to the logic of defense resourcing, military commissions far more resemble federal court prosecutions than they do courts-martial. Both military commissions and federal court prosecutions serve purely criminal functions where the government is in an exclusively adversarial position to the accused. Military commissions serve no military-disciplinary functions and the accused lack any status that would constitute membership in or service to the government. Accordingly, military commission applications for defense resources should be made on the same terms as federal applications -- on a purely *ex parte* basis. See 18 U.S.C. § 3006A(e)(1)("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application."); *see generally* the discussion of this problem in the 9 June Memo (Exh. C), at 2-3.

In short, the joined prosecutorial and defense functions of the current CA structure is unjustified by any military or other necessity and has proved, both in theory and, very clearly in practice, fundamentally unfair. Indeed, this structure is the source of most of the other resourcing problems discussed below and in the 13 July (Exh. A) and 9 June Memos (Exh. C).

Solutions: Any solution to this problem must meet the criterion of separating the defense resourcing functions of the position of CA from all of its other duties under the statute, and creating a firewall that prevents the CA (or any other DoD or other official affiliated with the prosecutorial functions of the government) from influencing the function of defense resourcing. In the federal system, this is the norm, and is achieved by administering the defense's resources and funding through an agency of the federal judiciary – the Administrative Office of the Federal Courts – which is in a different branch of government than the prosecution.

Assuming that that degree of separation is impossible, the solution to the problem will have to resolve the issue of how a defense funding agency within the same Department of government can be made truly independent of the rest of the Departmental agencies. Because the Office of the CA and especially its role in defense resourcing is primarily a creation of DoD regulation, a new defense funding agency itself could be established at the regulatory level. Nevertheless, there are legislative changes that can establish the principles of separation and independence that will require the regulatory scheme to avoid the concerns articulated above.

One possibility is amending proposed § 949b(a) (which prohibits unlawful influence) along the following lines (deletions are struck-through; insertions are italicized):

> "(a) IN GENERAL.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, *the defense resource funding authority*, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

''(2) No person may attempt to coerce or, by any unauthorized means, influence—

''(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

''(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; ~~or~~

''(C) the exercise of professional judgment by trial counsel or defense counsel*; or*

"(D) the action or decision making of the defense resource funding authority with respect to its acts authorizing or funding defense resources.

''(3) The provisions of this subsection shall not apply with respect to—

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

''(B) statements and instructions given in open proceedings by a military judge or counsel;*or*

''(C) requests by defense counsel to the defense resource funding authority for the authorization or funding of defense resources for use in cases to which they have been detailed.

Language along these lines, especially with an accompanying explanation in the legislative record, would go some distance in requiring the establishment of a "defense resource funding authority" within the Department of Defense with the kind of independence from outside influences – including prosecutorial and political influences – that have plagued the current system.

Finally, the problem of prosecutorial involvement and interference with defense resource requests, to the extent not covered by the above amended unlawful influence provision, could be addressed by inserting language equivalent to that of 18 U.S.C. § 3006A(e)(1)("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application.") into proposed § 949j(a)(1), which, after the amendment suggested in the first section, would result in the following amended language:

"(a) IN GENERAL.—(1) ~~Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.~~ *The trial counsel, the defense counsel, and the military commission shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Defense counsel may request the authorization or funding of resources from the defense resource funding authority in an ex parte application.*

The Special Problem of Capital Cases

Congress has recognized that capital cases pose a special need for resources since the passage of the original federal Crimes Act of 1790, in which it authorized, uniquely in capital cases, the appointment of two counsel, one of whom was required to be "learned in the law," and counsels' right to meet with their clients at all reasonable hours. That special capital provision has been carried forward with only minor modifications to the present day in the form of 18 U.S.C. § 3005, which provides in relevant part that the judge in a capital case "shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours." Other provisions of federal law, both by their terms and as interpreted by the federal judiciary's rulings and its funding Guidelines promulgated by its Administrative Office, similarly recognize the special need for mitigation specialists, experts, investigators, and other special defense services in capital cases.

These topics are covered in detail in the attached 13 July and 9 June Memos (Exhs. A and C), and rather than repeat myself I will simply incorporate those discussions by reference and highlight some the most important points here. In sum, a capital defense team that meets current professional standards of practice, as embodied in the Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision), the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (promulgated by the Administrative Office of the Federal Judiciary and approved by the Judicial Conference of the United States), the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) and relevant Supreme Court precedents requires the following (see ABA Guidelines 4.1 ("The Defense Team and Supporting Services") and 10.4 ("The Defense Team"):

a. At least two defense counsel, one of whom is "death qualified" within the meaning of the ABA Guidelines and "learned in the law applicable to capital cases" within the meaning of 18 U.S.C. § 3005. In those cases in which a death-qualified JAGC member "learned in the law applicable to capital cases" is not available, then a civilian "learned counsel" should be appointed and funded by the government to serve in that role.

b. A mitigation investigator, who is qualified to perfonn the duties described in Commentary (B) to ABA Guideline 4.1 and the Supplementary

Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008), selected by lead defense counsel.

c. A professional investigator trained in and competent to perfonn the special duties associated with the investigation of death penalty cases pursuant to ABA Guideline 10.7 ("Investigation"), selected by lead defense counsel.

d. At least one mental health expert competent to diagnose and, if necessary, treat mental health issues presented by the client, selected by lead defense counsel

e. An expert in the accused's native culture, selected by lead defense counsel f. At least one translator and interpreter fully competent to provide translation and interpretation services between the client's native language and English, selected and/or approved by lead defense counsel.

g. A privilege team.

h. When requested by the client, a foreign attorney familiar with the client's culture to serve as a member of the defense team.

All of these resources should be made available to the accused from the time that charges are preferred. Because of the enormous amount of preliminary work involved in capital cases, provision of these experts and services should not wait until the capital referral – in fact doing so will ordinarily cause significant delays in the proceedings.

The degree to which the CA has fallen woefully short of these professional norms and standard federal-court practices in the military commission capital cases is suggested by the attached Table, "Expert Requests filed by OMC-D Counsel to the Convening Authority" (Exh. B). As noted above, the CA has denied every single request for a mitigation specialist or expert made by every capital defense team that has sought one. Apart from the denials of the requests for mitigation specialists, she has denied a request for a mental health expert to assist in a competence evaluation of a capital accused to whom the government was administering anti-psychotic drugs prior to counsel's appearance, whom a panel of court-appointed government mental health experts found to be mentally ill, and for whom the military judge himself had ordered a competency hearing *sua sponte*.

This record of denials is, to say the least, inconsistent with current military practice under the UCMJ, in which there has been a growing recognition of the need for special resources in capital cases. Whether this trend is the result of the fact that eight of the last nine military death sentences have been overturned on appeal or some other reason, it is clear that military justice now recognizes that special resourcing of the defense is required if capital cases have a chance of being tried in a manner that meets appellate standards. Most recently, in a far less complex case than those being tried in the commissions, the Court of Appeals for the Armed Forces ruled that it violated the Due Process Clause to deny a capital accused the services of a mitigation

specialist, noting that "because there is no professional death penalty bar in the military services, it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation." *United States v. Kreutzer*, 61 MJ. 293, 298 n.7 (CAAF 2005). It is inconceivable that the present cases fail to meet the *Kreutzer* standard, yet in every case the Convening Authority has denied the request for a mitigation specialist.

Nevertheless, for the reasons explained above, the real point of comparison and measure of fairness of the commissions is the federal courts system. (Indeed, this is the standard implicit in the President's decision, for those Guantanamo detainees who are to be prosecuted, to try them either in federal court or by military commission – courts-martial are not an option.) Thus, to fully comprehend the magnitude of the unfairness of the CA's treatment of the capital cases, these denials should be compared with the initial funding order in the now-federal court case of *United States v. Ghailani* (*Ex Parte* Order, *United States v. Ahmed Khalfan Ghailani*, 98 Cr 1023 (LAK), U.S. District Court, Southern District of New York, 25 June 2009; Exh. D hereto). Ghailani was originally an accused in the military commissions, with capital charges preferred against him that were eventually referred non-capitally to a commission for trial. He was recently transferred for trial to federal court, and, in parallel fashion, has been charged with capital crimes but the Department of Justice has not yet decided whether or not to seek the death penalty against him. Despite the uncertainty of whether his case will ultimately be treated capitally, the judge issued the attached funding order providing for extensive resources – including 300 hours of a mitigation expert's time at the rate of $100 per hour -- given the mere possibility that the case will end up capital, and prior to the defense counsel even being required to submit a budget. This, moreover, is a standard order issued at the outset of all such capital cases in the Federal District Court for the Southern District of New York; it is not based on demonstrated need in the particular case but on the federal court's experience with the expert and funding needs in such cases as a general matter.

The disparity between Mr. Ghailani's treatment in the commissions (he was denied a mitigation specialist by the CA along with another request for a privilege team prior to being transferred) and the treatment he and other capital (and potentially capital) defendants receive in federal courts poses an enormous challenge to the legitimacy and the credibility of the entire military commissions system. The President's Detainee Task Force is currently deciding whether to charge individuals, capitally and noncapitally, in federal courts or the commissions. Under present circumstances, given the monumental disparity in defense resources between the two systems of capital prosecution, how can a decision to try a capital defendant in the commissions be viewed as anything but a government decision to increase the chances of achieving a death sentence by providing him with a third-rate or worse defense? Given this disparity, how can such a system ever be fair, or be viewed as fair by an outside observer?

Solutions: Any solution to these problems must begin with the restructuring of the CA functions as described above, to ensure that the funding decisions in all cases, including the capital cases, receive the impartial consideration of the defense's real needs and the relevant professional norms and guidelines that they would receive in federal court. But it will also require a genuine commitment on the part of the Administration not to allow this disparity to continue, and to bring its support for the defense function in the commissions up to the norms of

other legitimate American courts. The TJAGs all testified before the House Armed Services Committee that they opposed the Administration's "preference" for federal court prosecution on exactly these grounds – that no such preference will be necessary if the military commissions are made just as fair and just as legitimate as federal courts. Unless the disparate treatment of defense resourcing between commission cases generally, capital and noncapital, and parallel cases in federal court is rectified, that standard cannot be met. In the present circumstances, it is the capital cases in which the commissions' egregious failure by this measure is most evident.

Along with a change of CA structure and a change of commitment at the Department of Defense level, however, there are amendments to the Senate bill that are necessary to enable capital cases in the commissions to achieve the kind of fairness and reliability that federal court capital prosecutions provide. In particular, the primary requirement of "learned" or "death-qualified" counsel on the capital defense team cannot presently be met by JAGC attorneys alone. As the Court of Appeals for the Armed Services has recognized, "there is no professional death penalty bar in the military services," *Kreutzer*, *supra*, for the simple reason that that there are too few capital cases in the military for JAGC members to gain the experience necessary to become death-qualified.

In my office today, there are two death-qualified attorneys – a civilian who was hired specifically because of his capital experience as a resource counsel, and a Navy reservist who was called up after the capital cases were fully staffed. Neither are detailed to any of the capital defense teams, in part because I need them to remain conflict-free with the capital defendants so that they can advise them all even-handedly. As a result, none of the military lawyers detailed to the capital cases are death-qualified under the ABA standards or "learned" within the meaning of 18 U.S.C. § 3005. In an effort to provide the representation to their clients that they are well-aware is required, these fine attorneys have sought out the services of "learned" civilian co-counsel with extensive experience in capital cases in the civil courts. To date, these civilian attorneys have either been funded by non-governmental organizations or, in some cases, not at all, acting – to the extent that they have been able to afford it – on a *pro bono* basis.

This is an untenable situation, since these civilian attorneys will not be able to continue in their current capacities, especially as these cases become more active again. The correct solution – the one adopted in 18 U.S.C. § 3005 – is to appoint and pay these civilian attorneys on a contract basis during the term of the case, as is currently done in federal capital cases under § 3005 and the Criminal Justice Act. As currently enacted, however, and as proposed under the Senate bill, the government is forbidden to pay civilian attorneys serving as commissions defense attorneys, no matter how necessary they are for the adequacy of the accused's capital defense. Both current and proposed § 949a(b)(2)(C) by its terms only entitles an accused to a civilian attorney "if provided at no expense to the Government." I note that this is unfair not only as a matter of guaranteeing capital defendants the representation they need, but by the measure of "equality of arms" as well. The commission prosecution teams – and the capital HVD prosecution teams in particular – are largely staffed by Department of Justice attorneys, that is, by civilians who are being paid by the government.

One amendment to the Senate bill that would solve this problem would be to amend § 949a(b)(2)(C) as follows:[3]

> "(2) Notwithstanding any exceptions authorized by paragraph (1), the procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights:
>
> . . . . .
>
> "(C) *(i) When none of the charges preferred against the accused are capital, t*~~T~~o be represented before a military commission by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or by military counsel of the accused's own selection, if reasonably available, *or (ii) when any of the charges preferred against the accused are capital, to be represented before the military commission by at least two counsel, one of whom is learned in the law applicable to capital cases within the meaning of 18 U.S.C. § 3005 who, if necessary, may be a civilian compensated pursuant to regulations prescribed by the Secretary of Defense. Subject to these requirements, the accused may be represented by detailed defense counsel, military counsel of the accused's own selection, if reasonably available, or by civilian counsel provided at no expense to the Government.* [4]

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[3] Military courts have, to date, resisted the appointment of paid civilian counsel in capital cases (although there is some precedent for it, *see e.g. United States v. Curtis*, 33 M.J.101, 109 n.11 (C.M.A. 1991) (authorizing funding of military defense counsel "for use in their discretion to obtain the assistance of 'death qualified' civilian counsel, to retain expert consultants, or otherwise prepare their case"), as I have already explained, the nature of courts-martial is unlike other courts insofar as it has a disciplinary component and the participants in the court-martial – prosecutor, defense attorney, military judge, and convening authority – typically share a common military culture and sense of common commitment. Given these differences from federal court, it is not surprising that historically military courts have not seen the need for funding of nonmilitary counsel.

[4] Alternatively, a solution that would leave the structuring of the "learned counsel" provisions in the hands of the regulatory authority of the Secretary of Defense, could amend the same subsection with the following language:

> "(C) To be represented before a military commission by civilian counsel ~~if provided at no expense to the Government~~ *pursuant to regulations prescribed by the Secretary of Defense*, and by either the defense counsel detailed or by military counsel of the accused's own selection, if reasonably available.

This amendment would leave the Secretary to issue regulations that, for example, provided for hourly payment to death-qualified, civilian "learned counsel" in capital cases but not to civilian attorneys in noncapital cases or civilian co-counsel in capital cases who were not "learned" (or payment to "non-learned" civilians at a lower rate).

Resource Problems Common to All Cases, Capital and Noncapital

As I explain in the 13 July Memo (Exh. A), even the noncapital cases in the office are extraordinarily complex and require unusual resourcing, far beyond what is typical either in courts-martial or even federal criminal prosecutions. *See* 13 July Memo, at 5, 15-19. Foreign, non-English speaking clients; extraterritorial crimes requiring international travel, all the difficulties of investigations on foreign, non-English-speaking territories, and coordinating interaction and cooperation with the Department of State; and clients who are naturally suspicious of Americans in uniform after many of them were abused, sometimes seriously, by other Americans wearing the uniform – these are not obstacles that most defense attorneys usually face. Accordingly, as I state in the 13 July Memo, in my view an adequate defense team in a noncapital case in my office is composed, at a minimum, of the following individuals:

a. Two defense counsel, one of whom is experienced in complex criminal litigation, and preferably with experience in defending foreign defendants charged with extraterritorial crimes.

b. A professional investigator competent to perform the special requirements of extraterritorial investigations, selected by lead defense counsel.

c. A mental health expert competent to diagnose and, if necessary, treat mental health issues presented by the client, selected by lead defense counsel.

d. An expert in the accused's native culture, selected by lead defense counsel.

e. At least one translator and interpreter fully competent to provide translation and interpretation services between the client's native language and English, selected and/or approved by lead defense counsel.

f. A privilege team.

g. When requested by the client, a foreign attorney familiar with the client's culture to serve as a member of the defense team.

The justifications for these particular team members are provided in the 13 July and 9 June Memos (Exhs. A and C) and I will not repeat them here. Suffice it to say that almost all of the many difficulties that the detailed attorneys have experienced in fulfilling these requirements has stemmed from the recalcitrance of the CA, who has been no more forthcoming with requests for, for example, privilege teams than she has been with the expert requests. The privilege team denials, which are documented and explained in the 13 July Memo (Exh. A), at 17) have made representation of clients particularly difficult, especially in the HVD cases where the TS//SCI materials are concentrated. It has led to defense counsel in effect walking a high-wire with no safety net whenever the have needed to submit classified material in connection with motions or

even speak about it in court. Counsel have even been threatened with prosecution for such statements.

Among the issues discussed in my memoranda, I think it is important to highlight the problem of client access created by the over-classification of defense-relevant materials, up to and including the very words that the HVD accused speak, a security environment that separates attorneys from their clients both physically and psychologically, insofar as the accused are subjected to "security measures" every time they are taken from their cells to see the attorneys that are reminiscent of the abuse they suffered previously at the hands of Americans, and the virtual impossibility of getting experts the chance to meet, assess and/or treat the clients in many cases. Moreover, the abysmal state of the translation and interpretation services creates another difficulty in making access meaningful even when it occurs at all. While the issue of client access is discussed under the "Capital Case" heading in the 13 July memo (Exh. A) (at 12-15), because it is a particular problem in capital cases where there is an increased needs to develop a relationship with the client and obtain expert access, it is a problem that is experienced across the board, in every case. Many of the restrictions are so inhibiting with so little justification or rational explanation that, as I state in the memo, they arguably rise to the level of deliberate interference with the attorney-client relationship – certainly, at a minimum, their continued existence despite our many pleas, complaints and motions demonstrates deliberate indifference to the needs of defense attorneys to establish and maintain client relationships. None of this is good for the commission process, as any trial judge, prosecutor or appellate judge who has had to work with a *pro se* case can tell you. Why the government would want to buy this trouble is unclear, since these policies are unlikely to help any convictions stand up on review.

The problem of inadequate investigation resources is also one that appears under the "Capital" heading in the 19 July Memo but affects the fairness of the noncapital cases as well. Along with the issues raised in the 19 July Memo, there is a persistent "inequality of arms" on the investigation front that has been particularly evident in the government's differential access to witnesses and databases. It should go without saying that the defense has the right to obtain information about its own and the government's case outside the discovery process – that is, by legitimate investigatory and intelligence-gathering means. In fact, however, databases and witnesses to which the military investigators and intelligence analysts had routine access when they were detailed in the court-martial context have been foreclosed in the commissions arena. For example, the majority of personnel on our intelligence analysis team have been affirmatively denied access to various intelligence databases routinely used by members of their profession, even though they had the appropriate security clearances and "need to know" mandate.

The prosecution, on the other hand, does not suffer the same handicaps. Denials to defense analysts included requests for access to the Joint Detainee Information Management System (JDIMS), even though OMC-P and DoD OGC attorneys appear to have had access to selected JDIMS information through a file transfer protocol site at least since May of 2009. They have similarly been denied requests for specific information (RFI) submitted through the typical intelligence processes, and have been referred back to the prosecution or to databases for which their access had not been approved. The prosecution and attorneys who support habeas litigation in the DoD Office of General Counsel have the ability to submit RFIs to the Joint

Intelligence Group at JTF-GTMO, for questions such as the circumstances under which statements were made by a detainee or information supporting factual assertions use to determine enemy combatant status. Our intelligence analysts are denied any ability to submit such requests as part of their inherent investigatory function.

Prosecutorial control of information is another structural problem faced by investigators and attorneys alike. Defense counsel have been unable to obtain authorization to interview government witnesses, including interrogators responsible for extracting statements from their clients in detention. By withholding such authorization, the prosecution can effectively shield itself from defense arguments that the statements were obtained by cruel, inhumane or degrading treatment, or otherwise under conditions that made the statements involuntary or unreliable. In another case, defense counsel requested contact information for overseas witnesses known to the prosecution in preparation for travel to a predominantly traditional Muslim state cited by the U.S. State Department for a risk of terrorism, indiscriminate attacks on tourists and Westerners, and serious levels of crime. The prosecutors refused to give defense counsel the contact information they possessed, and the military judge in the case denied a request to order the prosecution to provide this information. Military defense counsel were left to seek out and locate the witnesses themselves, additionally and unnecessarily jeopardizing their personal safety.

Some of these problems could be solved by an independent defense resource funding authority that took defense needs seriously (provision of privilege teams); others will require policy changes within the DoD or by JTF-GTMO (equality of investigator access and meaningful client access). There are two problems, however, that require amendments to the proposed Senate bill to fix.

The first is the many issues my office has had with the both the quality and number of translators and interpreters provided to detailed counsel under the auspices of the CA. *See* 13 July Memo (Exh. A), at 16-17. By statute, the CA is responsible for the provision of interpretation services to the defense. Proposed § 948l(b). Its language should be amended to delete references to "defense counsel" and the "accused," and responsibility for the provision of these services should be assigned to the independent defense resource funding agency:

> "(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the military commission, and, as necessary, for trial counsel ~~and defense counsel~~ for the military commission~~, and for the accused~~."

Second, under proposed § 949c(b)(3)(A), an accused cannot be represented by a civilian unless that civilian is a United States citizen. For reasons discussed in the 13 July Memo (Exh. A) (at 17-18), this limitation is not justifiable and works a very real hardship on many accused and on their detailed counsel as well, who virtually always find it a benefit to their own relationship with the client to serve as counsel with an attorney from the accused's home country or culture. This subsection, and the related subsection § 949c(b)(3)(B), which requires

membership in the bar of a state, federal territory or federal court as a related requirement, should be deleted from the Senate bill.

HOW SHOULD THE FAIRNESS OF ANY MILITARY COMMISSIONS SYSTEM BE JUDGED?

To date, interested parties have offered various overall measures of fairness by which to test and justify any new commissions system. The TJAGs recently testified before the House Armed Service Committee that they believed that Common Article 3 of the Geneva Conventions, and no other body of law, was the correct legal standard that the new commissions must meet. The Administration, through DoD General Counsel Jeh Johnson and DOJ National Security Division head David Kris, has suggested that if the military commissions do not satisfy some ill-defined notion of constitutional "general due process," then federal courts may strike them down. Navy TJAG VADM Bruce MacDonald, in his testimony before both Senate and House Armed Services Committee, provided an informal measure: Any new commissions system must be one that we would feel comfortable in trying our own servicemen and women for violations of the law of war.

My position, and the official position of my office, is that the Commissions must meet the standards of both Common Article 3 and the United States Constitution as a whole. Because this stakes out a position somewhat different, and more stringent, than the other parties, I want to briefly discuss my reasons for believing that this standard is the correct one. Those reasons are both historical and logical, apart from the strictly-speaking legal basis for the argument. Those legalities are being fought out in commissions, so today I will address the historical and logical reasons to believe that the Constitution applies in full to the proposed military commissions.

(1) The Actual History of Military Commissions

First, understanding those reasons requires an understanding of the institution of the military commission in greater historical depth than others have generally supplied. Air Force TJAG Lt. Gen. Rives, for example, cited the history of military commissions several times in explaining his general support for the Senate bill in his testimony in the House Armed Services Committee, but his citations only reached back to World War II and the *Quirin* and *Yamashita* cases that upheld two of the more well-known (or notorious) of that period's commission verdicts. The military commission existed, however, for 100 years before World War II, since their inception in General Winfield Scott's General Order 20 issued in connection with his invasion of Mexico during the Mexican war, and when that history is included in the analysis, the picture of what military commissions actually stand for changes dramatically.

I obviously cannot tell that whole story here in any detail, and so will only review those aspects demonstrating that the current assumptions about the historical role and practices of military commissions underlying the TJAGs and Administration's positions are fundamentally inaccurate and at odds with their actual history.[5] In particular, this actual history demonstrates

[5] For that full picture, I recommend the article by David Glazier, a 20-year active-duty Navy Commander-turned law professor who has gone into this history with the greatest scholarly depth. David Glazier, "Precedents Lost: The Neglected History of the Military Commission," 46 Va. J. Int'l L. 5 (2005).

that those aspects of the Senate bill that continue to embrace procedural rules that are in patent conflict with our constitutional traditions – including the provisions permitting the introduction of coerced statements and otherwise inadmissible hearsay – are deeply inconsistent with the history and actual practice of military commissions.

The genuine history and practice of military commissions demonstrates two general propositions that have been entirely lost in the current debates:

a. A commitment to constitutional values embodied in the common law of evidence, including in particular (i) a prohibition on the admission of coerced (involuntary) statements and (ii) a prohibition on the admission of hearsay (except for the common law hearsay exceptions); and

b. A commitment to conform to court-martial procedures.

These propositions may appear strange if one is accustomed to hearing the current Senate bill's variations from constitutional norms justified on the basis of "battlefield evidence" and "military necessity." In fact, however, this use of "military necessity" is completely at odds with the original meaning of "military necessity" as it was used in connection with military commissions. The traditional justification for the use of military commissions was indeed based on "military necessity," but that term had nothing whatsoever to do with "battlefield evidence" and similar notions. Rather, from Gen. Winfield Scott's original Mexican War commissions forward, the "military necessity" for the use of commissions has been jurisdictional, and not based on any putative need for admitting otherwise patently inadmissible evidence. The jurisdictional necessity for the use of military commissions was based on the severe limitations placed on the jurisdiction of courts-martial until Congressional revision of the Articles of War in the 1912-1916 period. As a result of these limitations, civilians and enemy combatants could (with certain limited exceptions) generally not be tried in courts-martial in situations of military occupation (e.g., General Scott's march through Mexico), under martial law (e.g., military governance of parts of border states during the Civil War), and in battlefield situations involving the capture of enemy combatants who violated the law of war (i.e., "law of war military commissions" such as those established by the original MCA of 2006 and carried forward by the current proposed amendments).

The need created by that jurisdictional gap was the actual meaning of "military necessity" until the notion began to be employed by the previous Administration as a justification for commission procedures that violated the Constitution and Common Article 3 of the Geneva Conventions. *See e.g.* Benet, *A Treatise on Military Law and the Practice of Courts-Martial, 6th ed.*, Chapter XV, "Military Commissions") (1868); Winthrop, *Digest of the Opinions of the Judge Advocate General* 325 (1880), among other sources. Proof that this jurisdictional problem was the meaning of "military necessity" is provided by the fact that, with extremely limited exceptions (and none relevant to the present legislation), military commissions consistently followed the same procedures as courts-martial. Indeed, as the below points demonstrate, the one thing that the phrase "military necessity" has clearly *not* meant is that

military commissions can deviate from court-martial practice in a manner that violates the Constitution as a matter of course.

First, for 100 years, it was a cardinal principle of military commissions that they followed the procedural and evidentiary rules of courts-martial. The conformity of military commission practice with court-martial evidence rules is particularly telling, because both courts-martial and commissions followed the common law of evidence. As a result, military commissions, like courts-martial, imposed an absolute bar on the use of coerced statements and any hearsay that fell outside the scope of one of the accepted exceptions to the hearsay rule.

By way of example, during the Spanish-American War numerous military commission trials were conducted in the Phillipines during the Phillipine insurrection against American rule. These commissions were convened mid-way in the 100 year history between General Scott's original commissions and the World War II commissions upon which the former Administration, and now the current Administration as well, relies to justify its approach to commission procedures. These commissions and their rules were characteristic of the conduct of commissions during this entire history, and are cited solely as examples. Similar examples from General Scott's military commissions and "councils of war" (his name for what we would now call "law of war military commissions") could also be cited.

The precedents and rulings from the Phillipine insurrection demonstrate that, traditionally, military commissions were not only dedicated to remarkable standards of impartiality and fairness in the face of a bloody and brutal enemy, but specifically committed to the constitutional values that underlie the common law of evidence, values which are overturned in the current MCA and proposed Senate bill.

For instance, in one case – involving the murder of five United States soldiers -- a commission conviction was overturned for failure to abide by the hearsay rules:

> "In th[is] case the surprising error occurs of admitting as evidence the report of a board of officers, which had investigated the cause of disappearance of the soldiers. . .. *Every officer, even of a year's service, should be presumed to know that mere written ex parte statements are wholly inadmissible as evidence, and grossly irregular in a capital case*."

Headquarters, Division of the Philippines, Gen. Order No. 36 (Feb. 19, 1902) (emphasis added). This statement, from a military commission over 100 years ago, is an embarrassment to the hearsay provisions of the Senate bill.

The history speaks in the same voice when it comes to the admissibility of involuntary statements. Such statements were inadmissible under the common law of evidence as inherently unreliable (this evidentiary rule was the precursor of the modern constitutional requirement of voluntariness), and, accordingly, military commissions have traditionally been equally vigilant about the prohibition on coerced statements, requiring proof of voluntariness before they were admitted in evidence, and being reversed when they failed to abide by that rule. *See e.g.*

Headquarters, Division of the Philippines, Gen. Order No. 232 (Aug. 22, 1901), in 2 Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 2 (1902), at 363.

In sum, the actual history and tradition of the military commission stands for something quite different than how it has been presented over the past eight years. As one commission summed up its understanding of its role:

> "That it is better that many guilty men should escape punishment than an innocent one suffer is too well grounded in the administration of justice to pass unheeded by military commissions. So, too, it is better that no person, innocent or guilty, should be convicted unfairly, in violation of his legal rights and privileges, or in defiance of the well-established and equitable laws of evidence without which the evolution of [our] system of law and justice would be impossible."

Headquarters, Division of the Philippines, Gen. Order No. 365 (Nov. 25, 1901), in 2 Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 2 (1902), at 305.

As against this 100 year-long consistent history of respect for the rule of law and constitutional values in military commissions, proponents of the controversial and unconstitutional deviations from court-martial procedure have generally focused solely on two World War II precedents: *Ex parte Quirin*, 317 U.S. 1 (1942), and *In re Yamashita*, 327 U.S. 1 (1946). But, as the leading historical work on military commissions has definitively demonstrated, these precedents are historical anomalies. See David Glazier, "Precedents Lost: The Neglected History of the Military Commission," 46 Va. J. Int'l L. 5 (2005). It is worth noting that, after *Korematsu v. United States*, 323 U.S. 214 (1944), these are two of the most harshly criticized of the Supreme Court's precedents in the past 100 years.

Most important, that criticism has come from the Supreme Court itself, leaving the precedential status of both cases – at least insofar as they stand for the constitutionality of military commissions that deviate from the practices of courts-martial in ways that facially violate the Constitution – very much in doubt. *See e.g. Boumediene v. Bush*, 128 S.Ct. 2229, 2271 (2008) ("[T]he procedures used to try General Yamashita have been sharply criticized by Members of this Court. *See Hamdan*, 548 U.S., at 617, 126 S.Ct. 2749; *Yamashita*, *supra*, at 41-81, 66 S.Ct. 340 (Rutledge, J., dissenting). We need not revisit [Yamashita and Qurin], however."); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2774 (2006) ("We have no occasion to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions."); id., 126 S.Ct. at 2788-9 ("The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial.. . . .The force of that precedent, however, has been seriously undermined by post-World War II developments. . . . The most notorious exception to the principle of uniformity, then, has been stripped of its precedential value."); *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., joined by Stevens, J., dissenting) ("The case [*Quirin*] was not this Court's finest hour.").

Because they are in effect a new system of criminal justice that deliberately dispenses with protections embodied in the Constitution for well over 200 years, there is little doubt that any convictions arising from the new military commissions -- especially any capital convictions -- will be reviewed by the Supreme Court as a matter of course. It is a gamble at best that *Quirin* and *Yamashita*, insofar as they suggest that the fact that the mere invocation of "military necessity" – especially given the misuse to which that term has been put – will be enough to justify these kinds of wholesale and (as demonstrated above) unprecedented changes in American military justice – will withstand renewed scrutiny by today's Court. See e.g. *United States v. Robel*, 389 U.S. 258, 263 (1967) ("[T]he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit."). Congress thus proceeds at its own risk if the discredited history of the World War II military commissions will be sufficient to uphold the current Senate bill.

(2) It is Entirely Illogical to Apply the Rules of "Battlefield Evidence" and Other Battlefield Conditions to Court Proceedings that Take Place Many Years and Thousands of Miles Away from the Battlefield

In his testimony before the House Armed Services Committee, VADM MacDonald suggested that the TJAGs' proposed "reliability" test would incorporate the traditional voluntariness as one factor. That voluntariness factor, however, would be subject to a "sliding scale," whereby the further away from the battlefield the interrogation took place, the more important voluntariness became as a determining factor of the "reliability" test. Specifically, VADM MacDonald testified, in his view, all statements taken in Guantanamo should be evaluated under the voluntariness test alone because of these interrogations' distance – presumably in both time and location – from the battlefield.

There is a real logic to VADM MacDonald's analysis of the TJAGs' "reliability" test, but it is unclear why he limited this logic to the question of voluntariness alone. In fact, the farther away in time and distance from a battlefield a trial occurs, the less sense it makes to deviate from the traditional constitutional norms that govern any other criminal trials in this country. Indeed, one of the traditional limitations on the jurisdiction of "law of war" military commissions like those at issue in the Senate bill was the requirement that they actually be conducted on the battlefield itself and before the end of the war, because that geographical and temporal proximity to war-time conditions were the only possible justification for those deviations from court-martial procedure that sometimes occurred in military commissions, despite the general rule of following court-martial practice whenever possible. *See e.g.* Winthrop, *Military Law and Precedents* 836-841 (2nd ed. 1920); *Hamdan*, 126 S.Ct. at 2777 & n.29.

These criteria are not arbitrary; they were designed by common law courts to ensure that military commissions remain the exception rather than the rule of criminal adjudication, and are limited to only those exigent situations where they are actually necessary to the conduct of the military's mission. As the Supreme Court put it, these prerequisites were "designed to ensure that a military necessity exists to justify the use of this extraordinary tribunal." *Hamdan*, 126 S.Ct. at 2777.

These criteria are thus logical as well as historical. As VADM MacDonald recognized, the further away in time and space from the battlefield that a trial occurs, the less justification there is for holding trials conducted as if the bombs were falling and the only evidence available for use is that obtained, to use his example, by soldiers' kicking doors down and questioning enemy insurgents at the point of a rifle. That is hardly the case with respect either to the current military commissions or the amended versions provided by the Senate bill. In every respect, these trials will resemble, from the perspective of military exigency or "necessity," a trial in any other jurisdiction in the United States.

Thus, MCA tribunals serve a very different purpose than do genuine law-of-war military commissions. As the Supreme Court has explained the law-of-war commission, "its role is primarily a factfinding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war." *Hamdan*, 126 S.Ct. at 2776. That is, genuine law-of-war commissions are convened only after perpetrators are caught red-handed on the battlefield (as in *Yamashita*) or behind the lines (as in *Quirin*). Its function is thus limited to the relatively minimal "factfinding" required to assure the military commander (who, being "typically on the battlefield itself," is in no position to guarantee more than this) that the accused is in fact subject to his war-crime jurisdiction and in fact perpetrated the crime. That underlying reality explains both the extremely brief time period between capture and trial typical of the World War II commissions, as well as the far less formal evidentiary and procedural rules employed by genuine commissions.

The MCA military commissions, by contrast, are held far away from the exigencies of the battlefield, and long enough after the crime that there is more than enough time – as the current commission cases amply demonstrate – for traditional law-enforcement fact-finding techniques, including both traditional law-enforcement interrogations and other more sophisticated methods typical of modern prosecutions in other American criminal courts. How and why the logic of the battlefield should apply to proceedings that in every way resemble ordinary court proceedings in which the Constitution governs is a mystery to which no boiler-plate invocation of "military necessity" or "battlefield evidence" provides more than a fig-leaf of an answer.

In short, because there is no logical reason *not* to treat military commission trials like the fundamentally ordinary criminal trials that they are ("ordinary," at least, in every sense that matters to the only legitimate justifications for deviation from the Constitution and court-marital procedure), the Constitution ought to apply to them equally as well as every other criminal trial. VADM MacDonald's logic proves more, perhaps, than he intended, but it remains a valid basis for invoking the entire Constitution, and not just the constitutional proscription against the use of involuntary statements, once trials are as removed from the battlefield in time and space as the trials contemplated by the Senate bill.

CONCLUSION

In summary, any revised military commissions statute must provide the defense adequate resources to ensure trials that produce verdicts that are both reliable and fair to the accused.

Equality of arms between prosecution and defense must be the norm. The standard of fairness that should be applied to military commission trials is compliance with both Common Article 3 of the Geneva Conventions and the United States Constitution in full. Any new commissions system must be one that we would feel comfortable in trying our own servicemen and women for violations of the law of war. An accused should not be given fewer rights or opportunity to defend himself by virtue of a prosecutor's choice of forum - that is the antithesis of a "regularly constituted court."

Peter R. Masciola
Colonel, USAFG
Chief Defense Counsel

Attachments:

A. Letter from Col Peter R. Masciola, Chief Defense Counsel, OMC, to Mr. Jeh Johnson, General Counsel of the Department of Defense, and Mr. Eric Holder, Attorney General of the United States, dated 13 July 2009, Re: Request for Adequate Resources

B. Expert Requests filed by OMC-D Counsel to the Convening Authority, dated 21 July 2009

C. Letter from Col Peter R. Masciola, Chief Defense Counsel, OMC, to Mr. Jeh Johnson, General Counsel of the Department of Defense, and Mr. Eric Holder, Attorney General of the United States, dated 9 June 2009, Re: Request for Adequate Resources

D. *Ex Parte* Order, *United States v. Ahmed Khalfan Ghailani*, 98 Cr 1023 (LAK), U.S. District Court, Southern District of New York (25 June 2009)

Cc:
Mr. Jeh Johnson
Mr. Paul Koffsky
LTG Scott Black
Lt Gen Jack Rives
VADM Bruce MacDonald
BGen James Walker
Colonel Mark Martins
Mr. Brad Wiegmann
Mr. David Kris
AG Eric Holder

EXHIBIT A

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

13 July 2009

MEMORANDUM FOR GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Request for Adequate Resources (Addition to letter dated 9 June 2009)

I am writing in response to your request to discuss resources and training for the defense of Military Commissions cases, specifically capital cases. I am writing as The Chief Defense Counsel on behalf of the Office of Military Commission-Defense, and as you are aware, I do not represent any accused, and write solely in my capacity as charged in Military Commission regulations. My request for additional resources is not an endorsement of a military commissions system, and is not meant to imply that these are the only deficiencies in the current or proposed system. My requests should not be cited in support of the policy or legal sufficiency of any action on behalf of the Government.

This memorandum incorporates by reference my memorandum addressed to you and to the Attorney General of the United States, dated 9 June 2009, on this same subject. As stated therein, I believe that regardless of its other procedures, no trial system will be fair unless the severe deficiencies in the current system's approach to defense resources are rectified.[1] In the following discussion, as appropriate, I have taken account of the language of the recent bill read out of the Senate Armed Services Committee ("SASC") proposing amendments to the current Military Commissions Act of 2006, in order to facilitate practical proposals to fix the currently deficient system.

In that regard, I note that the SASC bill has not addressed one of the main problems discussed in my 9 June memorandum: the disparity between the defense's right to access to evidence in the current Military Commissions system and the parallel defense right to access to evidence under the Uniform Code of Military Justice ("UCMJ"). A cardinal principle of fairness under the UCMJ is the defense's "equality of arms," as expressed in the principle that the defense "shall have equal opportunity to obtain witnesses and other evidence" as the prosecution. Art. 46 (10 U.S.C. § 846). The SASC bill, by contrast, has not amended the parallel language of the MCA of 2006, which, in a clear repudiation of the "equality of arms" principle, allows the defense only a "reasonable opportunity" to obtain witnesses and evidence. Proposed 10 U.S.C. § 949j(a). In my view, an amendment restoring the UCMJ language (or, alternatively, adding the comparable language under the Criminal Justice Act that governs the allocation of defense resources in federal court prosecutions, 18 U.S.C. § 3006A, as proposed in my 9 June

[1] Please note that aside from the resource deficiencies discussed herein, the Office of Chief Defense Counsel suffers from a fatal structural flaw, namely too few attorneys for extremely resource-intensive needs of capital and complex non-capital cases. For example, in the case of *United States v. Zacarias Moussaoui*, in which the accused pleaded guilty, 70 attorneys were needed just to review discovery documents. Yet, the current manning structure for this office will not accommodate anything approaching that level of attorney resourcing.

memorandum) is required to rectify this unjustifiable departure from other American courts' principle of a "level playing field."

Another example of this disparity is the elimination of Article 32 hearings under the proposed bill (*see* proposed § 948b(d)(1)(C)). Such hearings have proved essential in UCMJ courts-martial of American soldiers, not only as aids to the defense, but to the prosecution as well by demonstrating before trial a lack of evidence and other weaknesses in the prosecution's case, and thus making conviction on the remaining charges that much more likely. In my view, lack of an Article 32 in Commissions has substantially contributed to delayed justice for detainees and victim family members. In sum, a restoration of the "equality of arms" principle is essential to making the new Commissions system sufficiently fair that - in the words of VADM MacDonald's testimony at the recent SASC hearing - the American military would feel satisfied in trying an American service member under its procedures.

One sign of the need for this change, and for the other changes proposed in the 9 June memorandum and herein, is the actual data regarding the extraordinary and routine denial of expert resources to the defense by the Convening Authority (CA) under the current system, a problem that has been particularly egregious in the capital cases. I have appended a spread sheet showing this data as an exhibit to this memorandum. Of 56 requests submitted to CA Crawford for the employment of expert consultants or investigators to date, she has denied 47 of them (thus approving less than 15% of all requests received), including all twelve requests submitted in capital cases. These denials include the following:

a. denial of requests for mental health experts in a capital case in which the government acknowledged that the accused was receiving psychotropic medication and in which the military judge had, *sua sponte*, ordered a hearing to determine the accused's competence to stand trial;

b. denial of all requests for investigators in capital cases; and

c. denial of all requests for mitigation specialists in capital cases.

It must be noted that these denials of requests for experts concern only the minimum resources necessary for serious criminal cases. Even if CA Crawford were replaced as Convening Authority (as has been requested in certain specific cases) the underlying issue remains: this defense office is not adequately resourced to engage in these extremely complex cases, including multiple capital cases.

From the outset of this Office's existence, attempts have been made to rectify the problem of inadequate resourcing. As the above data demonstrate, those efforts have been unavailing. Since the passage of the Military Commissions Act (MCA) in the fall of 2006, both the Office of the Chief Defense Counsel and numerous individual defense teams, have made concerted efforts to obtain the necessary resources that would allow our attorneys to accomplish their missions. These efforts were consistently thwarted by the Convening Authority and her office. Despite our clear delineation, on multiple occasions, of our resource needs, and our

offers to engage in discussions on these matters, we were always rebuffed. The response of Ms. Crawford, BG Hartmann and their staffs were consistent--essentially, "we will tell you what you will get, and when you will get it, but we won't tell you when we will tell you." This approach led to the strange situation in which the office and individuals with the needs for resources were never consulted on how those needs could best be met. It was as if our needs were irrelevant. This approach was applied to: (1) logistics related to traveling to GTMO and meeting with our clients; (2) translator services; (3) intelligence analyst services; and (4) investigative services. The defense was never consulted in the arrangements regarding any of these four areas--even though we were the ultimate "end user" or customers.

The clear lesson of this history, and of the current state of defense resourcing - which has been a major factor in the ineffectiveness of the current commissions as fair, just, or even efficient methods of conducting criminal trials -- is that the defense ought to be consulted about its needs before resourcing decisions are made. Apart from consultation about team budgeting and resources in general, the assignment of translators, interpreters, experts, and investigators to the defense office without consultation and approval of these individual service providers will inevitably result in the types of problems described below. We thus appreciate your interest and openness to our input in this regard and believe that it should be a model for future decision making about the allocation of resources within the commission system.

The organization of this memorandum: In what follows, I first lay out in summary fashion the minimum resource requirements of capital and non-capital defense teams. I emphasize that these are minimum requirements; because the prevailing professional norms and guidelines described below, as well as the relevant Supreme Court precedents, make clear that in cases of particular difficulty or complexity -- both of which describe virtually all of the cases brought to date in the Commissions -- more than the minimum may be necessary.

In the sections that follow these summaries, I then address the justifications for my specific recommendations. In particular, I discuss (a) the special resource requirements in capital cases, including the need for qualified capital counsel, mitigation specialists, investigators, and the problems posed by the current obstacles to client access for attorneys and experts that is required for adequate capital representation; (b) the special need for adequate resourcing in the non-capital cases, which also present obstacles and problems not found in typical criminal cases; and (c) certain other special issues of concern to the defense, to wit, the pressing need for independent privilege teams to help assess the classification issues that are endemic to these cases (especially those involving the HVDs), the abysmal state of the translation and interpretation services currently provided to the defense, and the problem posed by the bar on the participation of foreign attorneys.

The minimum resource requirements for a capital defense team: A capital defense team that meets current professional standards of practice, as embodied in the Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision) ("ABA Guidelines"), the Guidelines for the Administration of the Criminal Justice Act and Related Statutes (promulgated by the Administrative Office of the Federal Judiciary and approved by the Judicial Conference of the United States) ("AO Guidelines"), the

Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) ("Supplemental Guidelines") and relevant Supreme Court precedents requires the following (*see* ABA Guidelines 4.1 ("The Defense Team and Supporting Services") and 10.4 ("The Defense Team"):

a. At least two defense counsel, one of whom is "death qualified" within the meaning of the ABA Guidelines and "learned in the law applicable to capital cases" within the meaning of 18 U.S.C. §3005. In those cases in which a death-qualified JAGC member "learned in the law applicable to capital cases" is not available, then a civilian "learned counsel" should be appointed and funded by the government to serve in that role

b. A mitigation investigator, who is qualified to perform the duties described in Commentary (B) to ABA Guideline 4.1 and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) ("Supplemental Guidelines"), selected by lead defense counsel

c. A professional investigator trained in and competent to perform the special duties associated with the investigation of death penalty cases pursuant to ABA Guideline 10.7 ("Investigation"), selected by lead defense counsel

d. At least one mental health expert competent to diagnose and, if necessary, treat mental health issues presented by the client, selected by lead defense counsel

e. An expert in the accused's native culture, selected by lead defense counsel

f. At least one translator and interpreter fully competent to provide translation and interpretation services between the client's native language and English, selected and/or approved by lead defense counsel

g. A privilege team

h. When requested by the client, a foreign attorney familiar with the client's culture to serve as a member of the defense team

i. The above individuals should be appointed and/or approved for funding as soon as potentially capital charges are preferred; such appointment and funding should not wait for the capital referral. *See* ABA Guideline 1.1(B) ("These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings and any connected litigation.") Appointment of two counsel pursuant to 18 U.S.C. § 3005 and approval of funding for a mitigation specialist, an expert, and required experts upon a potentially capital indictment is the standard practice in federal courts as well, before the United States Attorney General has decided whether or not to seek the death penalty in the case. *See e.g.* initial funding order in *United States v. Ghailani* (previously provided under separate cover).

The minimum resource requirements for a noncapital defense team: For the reasons described below, the noncapital cases present exceptional challenges in comparison to typical prosecutions in military and civilian courts because of the extraterritorial nature of the crimes, the fact that English is not the accused's native language, the fact that many if not most of the current accused have been subjected to abusive treatment and/or conditions of confinement that may have affected their mental health, and the cultural differences between the accused and the commission, the prosecutors, and, most importantly, the defense attorneys appointed to represent them. For these reasons, the minimum requirements of an adequate defense team in a noncapital case should consist of the following:

a. Two defense counsel, one of whom is experienced in complex criminal litigation, and preferably with experience in defending foreign defendants charged with extraterritorial crimes

b. A professional investigator competent to perform the special requirements of extraterritorial investigations, selected by lead defense counsel

c. A mental health expert competent to diagnose and, if necessary, treat mental health issues presented by the client, selected by lead defense counsel

d. An expert in the accused's native culture, selected by lead defense counsel

e. At least one translator and interpreter fully competent to provide translation and interpretation services between the client's native language and English, selected and/or approved by lead defense counsel

f. A privilege team

g. When requested by the client, a foreign attorney familiar with the client's culture to serve as a member of the defense team

h. Because of the complex nature of the case, and in particular because the investigation of the crime is likely to be difficult and time consuming, all of the above individuals should be appointed and/or approved for funding as soon as possible, preferably when charges are preferred.

The special resources required in capital cases: In my 9 June 2009 memorandum, I explained that resourcing of capital cases under the current Commission system has been particularly unfair, especially when compared to the resourcing of comparable cases in federal court, where the capital defendant is provided with exceptional levels of expert, investigative and other services and entitled to a minimum of two defense counsel, at least one of whom is "learned in the law applicable to capital cases." A comparison of the initial funding authorization for the *Ghailani* case (which I supplied to you earlier this week under separate cover) to the similar capital cases in the commissions is one indication of the disparity between the approach to capital prosecutions in federal courts and the approach taken to date in the

military commissions. I am grateful that you have requested further input on the nature of the resources required for adequate representation in capital cases, and address this issue in this section. I also wish to emphasize, however, that while additional resources are a requirement for adequate representation in capital commission cases, as I also explained in my 9 June 2009 memorandum, the non-capital cases handled by military counsel in the commissions also present extraordinary obstacles that make their resourcing a significant problem as well. I address the requirement of non-capital defense resources in a following section.

The basic requirements for competent capital counsel:

Training: In your testimony at the Senate Armed Services Committee, you mentioned the need for training of military counsel in capital defense. Regular training is a required component of a program of adequate capital representation. *See e.g.* Guideline 8.1 ("Training"), Appointment and Performance of Defense Counsel in Death Penalty Cases (February 2003 revision) ("ABA Guidelines").[2] The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) ("Supplementary Guidelines"), which were formulated to explicate the sections of the ABA Guidelines related to the special mitigation function of death penalty team defense, are even more explicit about the need for regular training. *See* Supplementary Guideline 8.1(A) ("Training"): "All capital defense team members should attend and successfully complete, at least once every year, a specialized training program that focuses on the defense of death penalty cases offered by an organization with substantial experience and expertise in the defense of persons facing execution and committed to the national standard of practice embodied in these supplemental Guidelines and the ABA Guidelines as a whole."

There are a number of excellent training programs for capital counsel, including the annual National Legal and Defender Association's "Life in the Balance" seminar, national and regional training seminars organized by the Federal Death Penalty Resource Counsel, the annual Bryan R. Schechmeister Death Penalty College run by Santa Clara Law School, among others, as well as more specialized training seminars focusing on the special mitigation aspect of capital defense. It would be very beneficial to ensure funding for all military counsel and investigators detailed to capital cases to attend these seminars as appropriate.

The need for death-qualified counsel "learned in the law applicable to capital cases": Training of counsel with no prior capital experience, however, cannot by itself bring the

[2] As noted previously, the Supreme Court has repeatedly referred to the ABA Guidelines as the standard of professional conduct in capital cases. *See Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S.510, 524 (2003) ("Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred as 'guides to determining what is reasonable.'") (quoting *Strickland v. Washington*, 466 U.S. 667, 688 (1984)). Moreover, the Air Force Standards for Criminal Justice appear to incorporate the ABA Guidelines. See TJAG Policy Memorandum TJS-3, Air Force Standards for Criminal Justice (15 Oct 2002). The Air Force Standards were "directly adapted from the [ABA] Standards for Criminal Justice" and provide, "The following chapters of the *ABA Standards [for Criminal Justice]* apply to Air Force practice, except as indicated or qualified in the text . . . Chapter 4 The Defense Function." *Id.* at Attachment 1, page 1. The Air Force Standards apply to "all military and civilian lawyers . . . in The Judge Advocate General's Corps, USAF." Air Force Standards at Attachment 1, page 1.

adequacy of capital representation in the Commissions into line with current professional norms and standards for adequate capital representation. The federal statute that governs the appointment of counsel in federal capital cases states that the capital defendant is entitled to two counsels, "of whom at least 1 shall be learned in the law applicable to capital cases." 18 U.S.C. § 3005. The ABA Guidelines, which apply generally to capital litigation without regard to jurisdiction, require, *inter alia*, that qualified capital counsel have demonstrated (along with other skills pertinent to complex criminal litigation) "substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases." ABA Guideline 5.1(B)(2)(a).

The rules governing appointment of capital defense counsel in federal court under the Criminal Justice Act ("CJA") are the best guide for how to implement the guidelines for criminal defense services. These rules are promulgated by the Administrative Office of the Federal Judiciary ("AO") and are contained in the *Guidelines for the Administration of the Criminal Justice Act and Related Statutes* (as approved by the Judicial Conference of the United States) ("AO Guidelines"), the document that provides the definitive guidelines for the appointment of counsel and provision of resources to the defense in all federal court prosecutions under the CJA. In the chapter devoted to federal capital representation, the AO Guidelines implicitly endorse the ABA Guidelines relevant to qualifications of capital counsel by requiring that the agency recommending appointment of counsel under the CJA consider, *inter alia*, "the qualification standards endorsed by bar associations and other legal organizations regarding the quality of legal representation in capital cases," and emphasizes that "[c]ourts should ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding litigation." AO Guideline 6.01(B)(b) & (B). Most to the point, the AO Guidelines state that "[o]rdinarily, 'learned counsel' (see 18 U.S.C. § 3005) should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals or post-conviction review that, in combination with co-counsel, will assure high-quality representation." *Id.*

At the moment, there are five capital cases[3] referred for trial in the military commissions, but only one military and one civilian attorney assigned to the office who even arguably meet the criteria for "qualified" (ABA Guidelines) or "learned" (AO Guidelines) counsel. Neither of these attorneys is detailed to any of the capital cases, in part because if they were so detailed, they could not consult with and assist the other capital cases without risking a conflict of interest. None of the other military counsel in the office qualifies under either standard, including the military counsel detailed to the capital cases. Again, this is no comment on the abilities of these fine attorneys, but a function of the specialized nature of capital litigation and the rarity of such cases in the military justice system, which has meant the lack of any opportunity for the experience necessary to become death-qualified. Similar issues have faced the Judge Advocate Generals' Corps of all the military services, DOD and the courts for at least the past twenty years with respect to the provision of capital defense services at courts-martial. Indeed, the Court of Appeals for the Armed Forces has expressly acknowledged the problem, and, significantly,

[3] There are actually six capital cases, but the referral in *al Nashiri* was withdrawn after the military judge declined to grant the government's motion for a stay pending the outcome of the Executive Order Task Force deliberations.

linked it to the special need for mitigation specialists posed by the dearth of death-qualified military counsel. "We note that because there is no professional death penalty bar in the military services, it is likely that a mitigation specialist may be the most experienced member of the defense team in capital litigation." *United States v. Kreutzer*, 61 M.J. 293, 298 n.7 (CAAF 2005).

The resulting situation threatens the validity of any convictions and/or death sentences obtained under the current system. It should be recalled that among the Supreme Court's earliest decisions on the meaning of "fundamental due process" under the Due Process Clause -- the constitutional standard that has been endorsed by the Obama Administration for the new military commissions -- was *Powell v. Alabama*, 287 U.S. 45 (1932), a case that held that ineffective assistance of counsel in a capital case violated the Due Process Clause.

The need for appointment and funding of outside qualified capital counsel: The current situation is untenable from the perspective of minimal fairness to the capital accused as well as from the professional norms of capital representation and the dictates of due process. Those defense teams that have enlisted the support of qualified civilian capital counsel have only been able to do so solely because of funding provided by outside NGOs, or, in several cases, by the generosity of the civilian attorneys themselves, who have taken on these cases on a *pro bono* basis. This situation, which is precarious already, is unsustainable in the long run because of the exponentially increasing need for attorney time and effort as the cases move into the investigatory, pre-trial and then trial phases. At this point, the NGOs cannot (and should not have to) fund qualified capital counsel at the levels required to fulfill their responsibilities, and no attorney will be able to devote the time and expenses required to serve in that role on a *pro bono* basis.

The only solution that can guarantee that the representation of capital accused does not "[fall] short of the standards for capital defense work articulated by the American Bar Association," *Wiggins v. Smith*, 539 U.S.510, 524 (2003), and is commensurate with the quality of representation provided to capital defendants in federal courts (as expressed by the AO Guidelines and contemplated by President Obama), is either to allow the Office of the Chief Defense Counsel to employ the required number of qualified counsel, or, more realistically, to contract with death-qualified civilian counsel on an as-needed basis in a manner akin to the Criminal Justice Act system in federal court (the solution that would likely be more cost-effective in the long run as well).[4]

[4] In the past, military courts under the UCMJ have generally stopped short of authorizing the funding of such outside counsel to assist in the defense of capital cases. Nevertheless, there is some precedent for the practice. *See e.g. United States v. Curtis*, 33 M.J. 101, 109 n.11 (C.M.A. 1991) (authorizing funding of military defense counsel "for use in their discretion to obtain the assistance of "death qualified" civilian counsel, to retain expert consultants, or otherwise prepare their case"). Moreover, a difference in approach to funding of outside experts is justified by the different purposes and contexts of UCMJ courts-martial and military commissions. Courts-martial have traditionally served the dual purpose of enforcing military discipline and meting out deserved punishment. Indeed, even some of the capital provisions of the UCMJ serve both of these purposes. *See e.g.* Art. 85, 10 U.S.C. § 885(c) (crime of desertion punishable by death if committed during wartime); Art. 90, 10 U.S.C. § 890 (willful disobedience of lawful command of superior officer punishable by death if committed during wartime). The disciplinary aspect of courts-martial reflects the fact that the court-martial, the trial counsel, the detailed defense

Unfortunately, the bill reported out by the Senate Armed Services Committee arguably makes this solution impossible, because the language of § 949a(b)(2)(C) by its terms only entitles an accused to a civilian attorney "if provided at no expense to the Government." Rectifying this situation will thus require an amendment to the SASC bill that provides clear legislative language creating an exception to the general rule for capital cases and authorizing the funding of qualified civilian attorneys to serve as counsel "learned in the law applicable to capital cases" within the meaning of 18 U.S.C. § 3005.[5]

The need for appointment of mitigation specialists from the initiation of capital charges: Another requirement that must be satisfied in order to bring commissions capital defense in line with current minimum professional standards of capital representation is the immediate appointment of mitigation specialists upon preferral of capital charges. By way of comparison, the Court of Appeals for the Armed Forces has held that the denial of a mitigation specialist violated the Due Process Clause in what may reasonably be called a "garden variety" capital case, involving a disturbed American soldier charged with shooting other American soldiers on an American Army base. *United States v. Kreutzer*, 61 M.J. 293 (CAAF 2005). The current commission capital cases are anything but "garden variety," involving as they do foreign, largely non-English-speaking accused who have been subjected, by government admission, to treatment amounting to torture for periods of months and years, and whose culture, ideology and motivation are as far from a typical American soldier's as can be imagined.

The ABA Guidelines require that every capital defense team be composed of, at minimum, two attorneys, an investigator, and a mitigation specialist, at least one of whom (or, in the alternative, with the addition of an expert whom) is competent to diagnose mental illnesses and other mental health problems. ABA Guideline 4.1(A)(1) ("The Defense Team and Supporting Services"). The Commentary to Guideline 4.1(B) explains the immediate need for mitigation services from the outset of the case, before any determinations of, for example,

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counsel and the accused all share a common military culture and commitment to the military values that underlie the UCMJ code. In that context, it makes sense to require a special showing, as the military courts have generally done, to establish that an additional non-military attorney is so essential that special funding is required to secure the attorney's services. Military commissions, by contrast, serve solely punitive purposes, and the accused share neither the values nor the culture of the court that judges them, the prosecutors who seek to have them punished, or the defense counsel who represent them. In this, military commissions are far more similar to federal courts than they are to courts-martial, and as in federal courts – at least in the unique circumstances where the accused's life is at stake – the justification for the paid retention of civilian counsel to provide representation that meets the norms of the profession when the military defense counsel manifestly cannot, is fully justified.

[5] Alternatively, the language of § 949a(b)(2)(C) could be amended to state:

> "(C) To be represented before a military commission by civilian counsel ~~if provided at no expense to the Government~~ [*pursuant to regulations prescribed by the Secretary of Defense*], and by either the defense counsel detailed or by military counsel of the accused's own selection, if reasonably available."

Such an amendment would eliminate the absolute bar on funding of civilian attorneys and permit the Secretary to implement regulations permitting such funding for civilian attorneys who meet the qualifications of death-qualified, "learned" counsel.

competence can be made:

A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings. Mitigation specialists possess clinical and information-gathering skills and training that most lawyers simply do not have. . . . They have the clinical skills to recognize such things as congenital, mental or neurological conditions, to understand how these conditions may have affected the defendant's development and behavior, and to identify the most appropriate experts to examine the defendant or testify on his behalf. Moreover, they may be critical to assuring that the client obtains therapeutic services that render him cognitively and emotionally competent to make sound decisions concerning his case.[6]

Indeed, the ABA Guidelines require that "[a]s soon as possible after designation, lead [capital] counsel should assemble a defense team by . . . selecting and making any appropriate contractual agreements with non-attorney team members in such a way that the team includes . . . at least one mitigation specialist and one fact investigator." ABA Guideline 10.4(C)(2)(a).

As the attached exhibit demonstrates, as administered by the current Convening Authority the commissions system has fallen woefully short of this critical requirement. Any new regulatory regime relating to the resourcing of capital commission cases should contemplate the right to the immediate appointment of a mitigation specialist at the same time as the capital attorneys are authorized.

The need for appointment of investigators: Investigation is so important to capital defense that counsel are obliged to conduct thorough and independent investigations relating to both guilt and penalty issues regardless of overwhelming evidence of guilt, client statements concerning the facts of the alleged crime, or client statements that counsel should refrain from collecting or presenting evidence bearing upon guilt or penalty. ABA Guideline 10.7.A ("Investigation"). The obligation to investigate at every stage of the proceedings is so compelling, counsel must do so even if the client expressly orders no investigation or no presentation of evidence on his behalf. *Id.* Investigation for both phases must begin immediately upon counsel's entry into the case, even before the prosecution has affirmatively indicated that it will seek the death penalty. History of Guideline, ABA Guideline 1.1 ("Objective and Scope of Guidelines").

Inadequate investigation can amount to ineffective assistance of counsel. See *Williams v. Taylor*, 529 U.S. 362, 395-396 (2000) (notwithstanding fact that trial counsel "competently

[6] The Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases (2008) ("Supplementary Guidelines"), which were formulated to explicate the sections of the ABA Guidelines related to the role of mitigation specialists, are even more explicit about the need for appointment of a mitigation specialist from the outset of every case. Supplementary Guideline 1.1(B) states that the mitigation guidelines "apply from the moment that counsel is appointed and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, appeal, post-conviction review, competency-to-be-executed proceedings, clemency proceedings and any connected litigation."

handled the guilt phase of the trial," counsel's failure to begin to prepare for sentencing phase until a week before trial fell below professional standards, and counsel "did not fulfill their obligation to conduct a thorough investigation of the defendant's background"); *id.* at 415 (O'Connor, J., concurring) ("counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances" amounted to ineffective assistance of counsel); ABA STANDARDS FOR CRIMINAL JUSTICE: Standard 4-4.1(a), in ABA STANDARDS FOR CRIMINAL JUSTICE; *see generally* ABA Guideline 10.2 ("Applicability of Performance Standards"); *cited in* Commentary, ABA Guideline 1.1 ("Objective and Scope of Guidelines").

Commentary to the ABA Guidelines describes the proper investigative function in detail:

> [D]efense counsel must independently investigate the circumstances of the crime, and all evidence -- whether testimonial, forensic, or otherwise -- purporting to inculpate the client. To assume the accuracy of whatever information the client may initially offer or the prosecutor may choose or be compelled to disclose is to render ineffective assistance of counsel. The defense lawyer's obligation includes not only finding, interviewing, and scrutinizing the backgrounds of potential prosecution witnesses, but also searching for any other potential witnesses who might challenge the prosecution's version of events, and subjecting all forensic evidence to rigorous independent scrutiny. Further, notwithstanding the prosecution's burden of proof on the capital charge, defense counsel may need to investigate possible affirmative defenses -- ranging from absolute defenses to liability (e.g., self-defense or insanity) to partial defenses that might bar a death sentence (e.g., guilt of a lesser-included offense). In addition to investigating the alleged offense, counsel must also thoroughly investigate all events surrounding the arrest, particularly if the prosecution intends to introduce evidence obtained pursuant to alleged waivers by the defendant (e.g., inculpatory statements or items recovered in searches of the accused's home). Commentary, ABA Guideline 1.1 ("Objective and Scope of Guidelines").

The ABA Guidelines require that every capital defense team include an investigator. ABA Guideline 4.1(A)(1) ("The Defense Team and Supporting Services"). The prevailing national standard of practice forbids counsel from shouldering the primary responsibility for the investigation, in light of the fact that counsel lack the necessary specialized experience and have too many other duties. Moreover, counsel may need to call the person who conducted interviews of witnesses as a trial witness. *See generally* Commentary, ABA Guideline 4.1(A)(1) ("The Defense Team and Supporting Services").

Excluding defense counsel from the process of recruiting, hiring, and determining the terms of service of investigators runs contrary to guidelines for government contracts for defense services in both capital and non-capital cases. *See* NAT'L LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR DEFENSE SERVICES, Guideline III-9 (1984) ("Investigators") ("No contract clause should interfere with the contracting attorneys selection, supervision, or direction of investigators.").

The Office of the Chief Defense Counsel currently has assigned military reservists and active duty personnel, serving one-year assignments, to act as defense investigators.[7] Defense counsel were given no opportunity for input as to the number, qualifications, or terms of service of the investigators assigned here, and were completely excluded from the process of recruiting, interviewing, or hiring the current pool of investigators. As a consequence, our current personnel, while professional and dedicated to their mission, simply do not have the necessary qualifications. They are law enforcement officers in their civilian jobs, and have little to no experience with defense investigation, investigating capital or complex non-capital cases, operating without badges or other credentials, or conducting overseas investigations. None are military intelligence collectors.

There are, moreover, significant ethical concerns about the assignment of investigators to the defense without defense consultation and approval. Some of the currently assigned investigators have come from or will go to law enforcement positions investigating counter-terrorism cases, where their job will be to seek out and investigate the very type of information about accused terrorists that they would have accessed from serving as defense investigators. Each defense counsel has an ongoing ethical duty to protect privileged information received from his or her client, and the duty extends to information shared with the team investigator. *See* ABA Guideline 4.1(B)(2) ("Counsel should have the right to protect the confidentiality of communications with [persons providing expert and investigative services] to the same extent as would counsel paying such persons from private funds."); *see also e.g.* Commentary to ABA Guideline 10.7 ("Investigation") ("immediately upon counsel's entry into the case appropriate member(s) of the defense team should meet with the client to" discuss facts of case, medical history, family background, and potential aggravating factors). Regardless of counsels' faith in the investigators' adherence to restrictions on violating this privilege, concern that investigators who go on to investigate counter-terrorism cases for the government might violate this privilege, perhaps inadvertently, has had a chilling effect on counsels' ability to effectively utilize investigators. Such violation of attorney-client privilege could also be grounds for an accused's appeal of his sentence.

Interference with attorney-client, mitigation specialist-client, and expert-client relationships: The federal statute that dictates the requirements of counsel in a federal capital case states that both capital counsel "shall have free access to the accused at all reasonable hours." 18 U.S.C. § 3005. The need for regular, meaningful and rapport-building communication with the client is so important to capital defense that the ABA Guidelines devote a special guideline to describing its contours. ABA Guideline 10.5 ("Relationship with the Client"). The need for such rapport-building in a capital case goes far beyond the basic requirement of keeping the client informed of developments in the case and so on; it is the relationship of trust itself that is a key to the capital defense attorney's ability to "humanize" the client to the court and jury (or panel) in such a way that there is a chance that they will

[7] Some of the capital cases have utilized the service of a private investigator courtesy of NGO funding. Two cases currently have ongoing services, and one had limited service for a brief period of time. In no situation has defense counsel in capital or non-capital had full and ongoing access to the type of investigative services necessary for these cases.

understand, if not empathize with, the client sufficiently to consider a life sentence. Thus, as the Commentary to Guideline 10.5 explains,

> Client contact must be ongoing, and include sufficient time spent at the prison to develop a rapport between attorney and client. An occasional hurried interview with the client will not reveal to counsel all the facts needed to prepare for trial, appeal, post-conviction review, or clemency. Even if counsel manages to ask the right questions, a client will not--with good reason--trust a lawyer who visits only a few times before trial, does not send or reply to correspondence in a timely manner, or refuses to take telephone calls. It is also essential to develop a relationship of trust with the client's family or others on whom the client relies for support and advice. . . . .
>
> Overcoming barriers to communication and establishing a rapport with the client are critical to effective representation. Even apart from the need to obtain vital information, the lawyer must understand the client and his life history. To communicate effectively on the client's behalf in negotiating a plea, addressing a jury, arguing to a post-conviction court, or urging clemency, counsel must be able to humanize the defendant. That cannot be done unless the lawyer knows the inmate well enough to be able to convey a sense of truly caring what happens to him.

And the Commentary concludes, "the failure to maintain such a relationship is professionally irresponsible."

Nor is the duty to maintain regular and consistent contact with the client and build a relationship of trust limited to the capital attorney. It is an accepted norm of capital defense practice that such defense can only be effectively carried on by a team that includes not only capital counsel but mitigation specialists, investigators, and experts (in these cases in particular, experts in mental health and the cultures of the accused). ABA Guidelines 4.1 ("The Defense Team and Supporting Services"). As the Commentary to ABA Guideline 10.4 explains, "the provision of high quality legal representation in capital cases requires a team approach that combines the different skills, experience, and perspectives of several disciplines." Part of the duties of that team is to maintain that relationship of trust with the client by regular and constant availability to meet with him. The role of the mitigation specialist, in particular, depends on the ability to meet with the client on a regular basis. As the Commentary under ABA Guideline 4.1 puts it, "The mitigation specialist often plays an important role as well in maintaining close contact with the client and his family while the case is pending. The rapport developed in this process can be the key to persuading a client to accept a plea to a sentence less than death." Mental health experts also require sufficient access to the client to enable them to make the necessary evaluations.

To date, these requirements have been all but entirely frustrated by the location, security environment, and classification rules to which the clients have been subject. More than a year after their capital referrals, not a single capital accused has been able to meet with a mitigation

specialist, including those for whom mitigation specialists have been funded by outside NGOs (and thus have not been subject to the Convening Authority's *de facto* bar on their appointment). This is a situation that is inconceivable in any domestic capital prosecution in any jurisdiction, state or federal.

Moreover, many of these impediments to client access appear to be based on nothing more than bureaucratic inertia. Defense counsel and experts face barriers to attorney-client relationships that are not based upon individualized justification for legitimate government concerns, and that will not go unnoticed by courts evaluating the sufficiency of detainees' access to counsel.[8] Barriers that directly impact attorney/client and expert/client communications include inadequate opportunities to meet face-to-face; a deficiency of translators and interpreters, as described below; the lack of an avenue for the meaningful discussion of time-sensitive issues; a prohibition on approaching reticent clients directly in their cells; and unnecessary delays in translation of court filings. To put this issue in perspective, the Supreme Court has held that government interference with the attorney-client relationship in a non-capital case is *per se* reversible error that is not subject to harmless error analysis. *See Perry v. Leeke*, 488 U.S. 272 (1989); *Geders v. United States*, 425 U.S. 80 (1976). Whether the current impediments rise to that level is an issue that will certainly be litigated if the current situation continues, apart from their impact on capital counsel's ability to meet their professional duties.

Moreover, defense counsel have little or no opportunity to gather essential information about the detainee's health and well-being in order to accurately evaluate their client's mental and physical condition. They are barred from properly investigating their clients' detention conditions and circumstances of treatment, utilizing expert medical assistance through outside experts or JTF medical personnel, or even accessing the detainees' medical or mental health records. The problem of mitigation specialist and expert access in particular has been compounded exponentially by the over-classification of detainee information, including the classification of their own medical records and history, and - in the case of HVDs - even their every utterance, no matter how trivial. Combined with undue delays in the obtaining of security clearances by the required mitigation specialists and experts, this has meant that the members of the defense teams with the greatest need for access to the clients and their personal and medical history have been completely barred from access to this information.

The critical nature of these impediments may be highlighted by reference to the Supreme Court's repeated insistence that capital defendants have the right to present the sentencer with *all* mitigating information pertaining to their life history, including their medical conditions, their mental health, and their past treatment by prison officials (including, in these cases, the United States military and the Central Intelligence Agency). *See e.g. Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Lockett v. Ohio*, 438 U.S. 586 (1980). Should the present situation of blocked access to this information continue, to say that any resulting capital convictions obtained, and certainly any death sentences, are at risk of appellate reversal is to state the obvious.

[8] As a practical matter, even the fullest resourcing of the defense function will mean little if counsel and client do not have meaningful access. For this reason, this letter touches upon the problem of interference with attorney-client relationships at Guantanamo within the context of the adequate provision of resources, and I respectfully request the right to reserve the opportunity to discuss this issue with you at greater length in the near future.

Finally, the inability to investigate the client's mental health and medical needs compounds the lack of an avenue for remedies for the client's problems, which itself has an extremely adverse effect on counsel's ability to build the required relationship of trust. A defense counsel's impotence in the face of his or her client's overwhelming concern about his day-to-day needs levies a tremendous blow against their relationship, with real and lasting impact on the detainee's right to access to counsel.[9]

The need for resources in the non-capital cases.

As I explained in the 9 June memorandum, all of these cases, non-capital and capital alike, share certain characteristics that make them exceptional, insofar as they involve non-English-speaking defendants, alleged extraterritorial crimes, the need for significant expert assistance in cultural and psychological matters, and international travel for investigative purposes. In the 9 June memorandum, I suggested that comparable non-capital cases brought in federal court would receive enhanced defense resources, and that that enhanced resourcing ought to set the standard for the non-capital commission cases as well. Here I would like to re-emphasize and expand on that point by reference to actual federal court funding rules and practical realities.

The AO Guidelines for the funding of the defense in noncapital federal cases have special provisions that recognize that certain types of cases are in fact exceptional and the ordinary guideline funding maximums should not apply to them. Thus, for example, the AO Guidelines permit the appointment of an additional attorney and a corresponding increase in the maximum allowable compensation under the CJA "[i]n an extremely difficult case where the court finds it in the interest of justice." AO Guideline 2.11(B). Similarly, the AO Guidelines provide that the case compensation maximum may be exceeded "in cases involving extended or complex representation," AO Guideline 2.22(B)(3), and that the ordinary limitations on CJA payments for investigative, expert and other services may be exceeded where "necessary to provide fair compensation for services of an unusual character or duration." AO Guideline 3.02(A).

At my request, an attorney in my office contacted Mr. Steven Asin, Deputy Assistant Director of the Defender Services Division of the Administrative Office of the Federal Judiciary to discuss these provisions. Mr. Asin confirmed that the types of cases involved in the commissions -- involving non-English speaking defendants, alleged extra-territorial crimes, the need for translation and interpretation services, and special experts in cultural and/or mental health matters -- are the types of "extremely difficult cases," "cases involving extended or complex representation," and "services of an unusual character or duration" that would fall within the above provisions.

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[9] Military commission procedures have even affirmatively prevented defense counsel from providing information to the Secretary of Defense and his staff for the purposes of the review of conditions of confinement ordered by the Commander in Chief. By excluding defense counsel from the process of ensuring humane conditions at Guantanamo, the government compounds the risk of violating Constitutional and international standards for humane conditions of confinement.

The same attorney also contacted and spoke with Mr. A. J. Kramer, the Chief Federal Defender of the Washington, DC, Federal Defender office. Mr. Kramer's office has unusually extensive experience with criminal cases involving alleged extra-territorial crimes with foreign and non-English-speaking defendants because of the special venue provisions of the federal criminal code, which provide that, in general, extraterritorial crimes may only be tried in the federal district in which the defendant first arrives in the United States or in the Federal District Court for the District of Columbia, *see* 18 U.S.C. § 3228. According to Mr. Kramer, the defense of alleged noncapital extraterritorial crimes involving foreign defendants requires "inordinate resources" of his office, including both funds and attorney time. He pointed in particular to the fact that, in general, witnesses were located overseas, which required overseas investigation by attorneys and investigators, the need for translation and interpretation services, and cultural experts. He also noted that in such cases the government also employed special experts to explain to the court and jury the unfamiliar aspects of the case, which thus required the defense to retain its own experts to consult and testify in response.

It is thus clear both as a matter of policy and of practice that even the noncapital commission cases require significant defense resources to allow for a fair trial, resources that, to date, have been provided at very best in a sporadic and inadequate manner--and then, all too often only as the result of *pro bono* assistance provided by large law firms (as happened in *Hamdan*) or by NGOs.

Inadequate provision of translators and interpreters: In both capital and noncapital cases, defense counsel are hampered by difficulties associated with obtaining translators and interpreters because of limits on the available pool and anomalies in the contracting system. Again, all of the accused are foreign nationals and none of them claim English as their native language. Defense counsel must have access to quality defense linguists in order to properly communicate with their clients and to translate legal documents for them to read. Counsel have sometimes gone without interpreters, relying on the limited abilities of some of the detainees to speak English. At times, counsel have been forced to choose between forgoing interpretation or sharing an interpreter, who is then handling privileged information from multiple teams, creating the potential for conflicts of interest.

Defense attorneys in capital cases have found it to be almost impossible to communicate the volume of information necessary to allow their respective clients to make informed decisions as to how to proceed (or, in the cases where the clients are *pro se*, for the attorney to have the information necessary to assist the detainee). Badly translated documents have resulted in confusion on numerous occasions, and defense counsel have been forced to seek continuances while they worked to get documents properly translated. It must be noted that the government has yet to deliver much of the discovery material it has promised. The existing problem will increase exponentially as many (if not all) of these documents will require translation.

Substandard interpretation has also been a problem during hearings. Commission interpreters are unable to provide adequate simultaneous interpretation, and even defense counsel with substantial experience working with interpreters have been repeatedly interrupted with cautions that they need to speak more slowly so that the translators can keep up. On more than

one occasion in hearings with multiple accused, a detainee who spoke English as a non-native language noted when the court interpreter was not properly translating the statements of a co-accused. Such examples would be comical were they not so egregious.

Lack of a privilege team: The defense is further hampered by the CA's refusal to appoint privilege teams to assist defense counsel in the review, handling, and dissemination of the enormous amount of classified information involved in military commission cases. Such privilege teams are routine in U.S. District Court. On 29 May 2008, COL Steven David, JA, USAR, then Chief Defense Counsel of the Office of Military Commissions, submitted a request for the establishment of a "privilege team" to accommodate the mission of defense counsel. This request was enthusiastically endorsed by the Staff Judge Advocates from U.S. Southern Command and Joint Task Force Guantanamo, who noted that such a team was already in place and functioning in support of civil habeas corpus petitions filed on behalf of detainees. This request has been denied on more than one occasion.

Instead, the commissions function with a Court Security Officer (CSO) system, in which a great deal of information, including all statements of the accused in HVD cases, is presumptively classified at the Top Secret/SCI level. The CSO regime provides no inherent authority to overcome the TS/SCI presumptions. Privilege teams, unlike CSO/SSO regime, would provide a mechanism for overcoming the presumption.

CA Crawford's refusal to grant privilege teams has done more than add a tremendous burden to the defense's work. Despite their requests for definitive guidance, defense counsel have been left to guess at the classification status of materials they sought to disclose to experts or file in pleadings in the Commission. As a result, counsel operate with great uncertainty and at personal peril. Defense counsel have actually been threatened with prosecution for allegedly mishandling information that they believed, in good faith, was not classified or subject to lower classification restrictions--and which was handled in accord with instructions defense counsel sought, and received, from the Court Security Officer (CSO). This constant threat of personal liability affects all defense counsel handling classified information, particularly those dealing with information classified at the highest level. This chilling affect has a substantial impact on the accuseds' right to the adequate assistance of counsel.

Permitting foreign attorneys to appear as defense counsel before military commissions: The SASC bill maintains the requirement under the MCA of 2006 that civilian counsel must be a United States citizen to appear before the commission. Proposed § 949c(b)(3)(A). That requirement imposes an unnecessary hardship on many accused who, based on their cultural background or prior experience with American military and/or civilians working for the United States government, find it difficult to develop the required relationship of trust to establish a workable attorney-client relationship. Just as it would be fundamentally unfair to require that an American soldier who had been captured, abused, and then charged in an enemy court accept an attorney that he understandably identified with his abusers, it is equally unfair to expect the same from the accused charged before the commissions. Accordingly, the SASC bill should be amended to eliminate the requirement of United States citizenship, or bar membership in a U.S. jurisdiction, as a condition of representing accused.

This articulated standard of choice of counsel for a criminal defendant is not novel in American jurisprudence. Uniformly, the Federal Circuit Courts have held a "defendant's right to counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*." *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993); *see also United States v. Nolen*, 472 F.3d 363 (5th Cir 2006); *United States v. Gonzalez-Lopez*, 399 F.3d 924 (8th Cir 2005); *United States v. Walters*, 309 F. 3d 589 (9th Cir 2002); *United States v. Collins*, 920 F.2d 619 (10th Cir. 1990); *Fuller v. Diesslin*, 868 F.2d 604 (3rd Cir. 1989); *United States v. Panzardi Alvarez*, 816 F.2d 813 (1st Cir. 1987); *In re Livent*, 2004 WL 385048 (S.D.N.Y. 2004); *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493 (1971); R.C.M. 502(D)(3)(B). *See also Soriano v. Hosken*, 9 M.J. 221, 222 (CMA 1980); *United States v. Nichols*, 8 U.S.C.M.A. 119, 125 (1957).

Moreover, the prevalence of foreign attorneys, especially in cases dealing with foreign defendants and foreign or international law is such that the ABA has issued model rules for the temporary admission of foreign lawyers. Commission on Multijurisdictional Practice, Temporary Practice by Foreign Lawyers, Report 201J (2002). In addition, the Supreme Court of the United States makes specific provision for the admission of foreign attorneys *pro hac vice*, U.S.SUP.CT.R., Rule 6.2. Even the Rules of Courts-Martial contemplate representation by "any lawyer who is authorized by a recognized licensing authority to practice law and is found by the military judge to be qualified to represent the accused upon a showing to the satisfaction of the military judge that the counsel has appropriate training . . ." R.C.M. 502(D)(3)(B). Qualified foreign attorneys have traditionally acted as counsel in military proceedings. *See Soriano v. Hosken*, 9 M.J. 221, 222 (CMA 1980) ("It is the military judge assigned to a court-martial who must make the determination whether [a foreign] lawyer is minimally qualified to act as civilian counsel."). By way of historical precedent, even former members of the Nazi party served as defense counsel in the law-of-war proceedings convened to try the Nazis following WWII. See, e.g., JOSHUA GREENE, JUSTICE AT DACHAU 41 (Broadway Books 2003). A blanket exclusion of foreign attorneys thus serves no compelling interest, and there is no basis for departing from the established military practice permitting the admission of foreign attorneys to act *pro hac vice* before military tribunals.

In summary, past experience has demonstrated that either through additional internal resourcing, or through contract mechanisms, the Office of Military Commissions - Defense should be resourced with competent, zealous counsel experienced in complex litigation. Generally there should be two defense counsels per case, and where the death penalty is at issue there should be a minimum of two counsels at government expense, with at least one qualified under the ABA Guidelines. Paralegals, intelligence analysts, investigators and translator/interpreters should have the appropriate corresponding qualifications to practice in this demanding multi-dimensional team environment. Appropriate mental health, cultural and other appropriate qualified experts should be resourced when charges are preferred. Foreign attorneys from an accused's country or culture should be allowed to practice when qualified. Defense privilege teams are essential, and must be established as a matter of practice. Equality of arms and equal access to evidence and witnesses should be the standard. Article 32-type hearings are recommended. The present Convening Authority system should be overhauled and the resourcing of the defense mission should be based on federal standards of practice for defense resourcing. Finally, the principles of fairness, justice, due process and Common Article III

require that in any new or revised Military Commissions system, these minimums requirements of adequate defense resourcing are met. An accused should not be given fewer rights or opportunity to defend himself by virtue of a prosecutor's choice of forum--that is the antithesis of a "regularly constituted court."

Very respectfully,

Peter R. Masciola
Colonel, USAF-ANGUS
Chief Defense Counsel

Attachments:
1. *Expert Requests filed by OMC-D Counsel to the Convening Authority*, dated 8 July 2009
2. Letter from Col Peter R. Masciola, Chief Defense Counsel, OMC, to Mr. Jeh Johnson, General Counsel of the Department of Defense, and Mr. Eric Holder, Attorney General of the United States, dated 9 June 2009, *Re: Request for Adequate Resources*

cc:
Mr. Paul Koffsky
LTG Scott Black
Lt Gen Jack Rives
VADM Bruce MacDonald
BGen James Walker
Colonel Mark Martins
Mr. Brad Wiegmann
Mr. David Kris
AG Eric Holder

Expert Requests filed by OMC-D Counsel to the Convening Authority Current as of: 21 July 2009

Case Name	Capital Case	Type of Expert Requested	Supplemental	CA Response	Motion Filed with MC	MJ Ruling
al Hawsawi	Yes	Mental Health	No	Denied	Yes	Pending
al Hawsawi	Yes	General Practice Physician	No	Denied	Yes	Granted
al Nashiri	Yes	Mitigation Specialist	No	Denied	No	
Ali	Yes	Mitigation Specialist	No	Denied	No	
bin al Shibh	Yes	Mental Health	No	Denied	No	
bin al Shibh	Yes	Mental Health	Yes	Denied	Yes	Granted
bin al Shibh	Yes	Mitigation Specialist	No	Denied	No	
bin al Shibh	Yes	Mitigation Specialist	Yes	Denied	No	
bin al Shibh	Yes	Mitigation Specialist	Yes	Denied	Yes	Pending
bin al Shibh	Yes	Neuroimaging psychiatrist	No	Denied	Yes	Granted
bin al Shibh	Yes	Psych -- sleep deprviation	No	Denied	Yes	Granted
bin al Shibh	Yes	Learned Counsel	No	Denied	No	
Bin Attash	Yes	Mitigation Specialist	No	Denied	Yes	Pending
Ghailani	No	Mitigation Specialist	No	Denied	No	
Ghailani	No	Privilege Team	No	Denied	No	
Hamdan	No	Yemen	No	Denied	No	
Hamdan	No	Yemen	Yes	Denied	Yes	Denied
Hamdan	No	Taliban/AQ	No	Denied	No	
Hamdan	No	Taliban/AQ	Yes	Denied	Yes	Granted
Hamdan	No	Taliban/AQ	Yes	Denied	Yes	Granted
Hamdan	No	Law of War	No	Denied	Yes	Denied
Hamdan	No	Mental Health	No	Denied	No	
Hamdan	No	Mental Health	Yes	Denied	Yes	Granted
Hamdan	No	Mental Health	Yes	Denied	Yes	Granted
Hamdan	No	Mental Health	Yes	Denied	Yes	Granted
Hamdan	No	Terrorism	No	Denied	No	
Hamdan	No	Terrorism	Yes	Denied	Yes	Denied
Jawad	No	Law of War	No	Denied	No*	
Jawad	No	Law of War	Yes	Denied	No*	
Jawad	No	Law of War	Yes	Denied	No*	
Jawad	No	Law of War	Yes	Granted**	N/A	
Jawad	No	Law of War	Yes	Denied	No	
Jawad	No	Psych -- trauma	No	Denied	No	
Jawad	No	Psych -- trauma	Yes	Denied	Yes	Granted
Jawad	No	Physician -- trauma	No	Denied	No	

EXHIBIT B

Expert Requests filed by OMC-D Counsel to the Convening Authority Current as of: 21 July 2009

Jawad	No	Physician -- trauma	Yes	Denied	Yes	Denied
Jawad	No	Investigator	No	Denied	No	
Jawad	No	Investigator	Yes	Denied	Yes	Denied
Jawad	No	Ph.D scientist -- sleep dep.	No	Denied	No	
Jawad	No	Ph.D scientist -- sleep dep.	Yes	Granted	N/A	
Kamin	No	Mental Health	No	Denied	No	
Kamin	No	Mental Health	No	Denied	No	
Kamin	No	Mental Health	Yes	Denied	Yes	Granted
Kamin	No	Investigator	No	Denied	Yes	Denied
Khadr	No	Mental Health	No	Denied	Yes	Granted
Khadr	No	Mental Health	No	Denied	Yes	Denied
Khadr	No	False Confession	No	Granted	N/A	
Khadr	No	Mitigation Specialist	No	Granted	N/A	
Khadr	No	Memory	No	Denied	Yes	Denied
Khadr	No	Ballistics	No	Granted	N/A	
Khadr	No	Pathology	No	Granted	N/A	
Khadr	No	AQ/AFG	No	Granted	N/A	
Khadr	No	AQ/AFG	No	Granted	N/A	
Khadr	No	metallurgist	No	Granted	N/A	
Khadr	No	Intel Methods	No	Denied	No	
Khadr	No	Law of War	No	Denied	Yes	Denied
Khadr	No	Child Soldier Rehab	No	Denied	Yes	Denied
TOTALS		**56 Requests**	**19 Supplemental**	**9** Granted**	**25 Motions Filed**	**12 Granted** **10 Denied** **3 Pending**

*This Expert traveled to GTMO on valid Invitational Travel Orders and was permitted to testify as an expert by the Military Judge. The Military Judge later denied a defense motion for her compensation ruling he lacked the authority to issue such an order and directed the request back to the Convening Authority. The CA refused multiple additional requests to pay the Expert, prompting a motion for reconsideration before the Military Judge who "recommended" the expert be paid, at which time the CA agreed, but refused to pay the expert for travel time or preparation time.

**Granted only after Military Judge had previously accepted this person as an expert

EXHIBIT C

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

June 9, 2009

MEMORANDUM FOR ATTORNEY GENERAL OF THE UNITED STATES
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Request for Adequate Resources

I am writing as The Chief Defense Counsel on behalf of the Office of Military Commissions-Defense in response to requests for suggestions from the defense regarding changes in the process afforded to the accused currently charged in cases before the military commissions. As you may be aware, I do not represent any accused; rather, I write solely in my capacity as the official charged with the duties to "facilitate the proper representation of all accused referred to a trial before a military commission" and to "take appropriate measures to ensure that each defense counsel is capable of zealous representation." Regulation for Trial by Military Commission §§ 9-1(a)(2) & (8).

In that capacity, I will address an area critical to ensuring any system of trials going forward will meet the standards of fairness contemplated by the President's Executive Order and his other recent statements about the new military commission system: adequate resourcing of the defense. Regardless of its other procedures, no trial system will be fair unless the severe deficiencies in the current system's approach to defense resources are rectified.

Fair trials require adequate resources for the defense to perform its constitutionally mandated function: It is imperative that any effort by this Administration to make the commissions process more fair must address the problem of resources. Adequate resourcing of all defense teams, capital and non-capital, requires recognition of the special needs in these cases for adequate access to competent translation and interpretation services; retained outside experts on psychological, cultural and other issues; and other resources required to investigate and defend non-English-speaking accused in multinational cases.

The correct standard for provision of resources: The Uniform Code of Military Justice guarantees that the defense "shall have equal opportunity to obtain witnesses and other evidence" as the prosecution. Art. 46 (10 U.S.C. § 846). The Criminal Justice Act, which governs the provision of expert, investigative, and other services to the defense in federal court prosecutions, guarantees that all such services "necessary for adequate representation" shall be provided by the government to defendants unable to pay for them. 18 U.S.C. 3006A(e). By contrast, the Military Commissions Act of 2006 mandates only a "reasonable opportunity" to obtain witnesses and evidence – neither an "equal opportunity" nor the services "necessary" to obtain "adequate" access. 10 U.S.C. § 949j(a).

Whether because of this language or for other reasons,[1] to date the accused have consistently been denied needed resources or, at best, have obtained these resources only after long delays and time consuming litigation that would not have been necessary in a minimally fair system.

The standard for provision of resources should therefore be brought in line with the language of Article 46 and the Criminal Justice Act. Whatever language is used, the baseline standard for the provision of expert, investigative and other resources should comport with the practice in federal courts for cases of similar complexity and needs. Executive Order 13492 and subsequent statements by the President and the Attorney General establish federal court procedures as the benchmark of fairness for these prosecutions, with individual accused to be tried under other procedures only on the basis of some special necessity. Whatever special necessity may require different procedures in those cases, that necessity cannot justify denying these accused the same resources they would have in federal court and the same opportunity to make their defense. Federal court practice in comparable cases – involving non-English-speaking defendants, alleged extraterritorial crimes, the need for significant expert assistance in cultural and psychological matters, and international travel for investigative purposes – ought therefore set the standard. No other arrangement can satisfy the President's intention to bring military commissions "in line with the rule of law" and to ensure that the commissions are a "fair, legitimate, and effective" alternative to federal court prosecution, rather than serving as a *de facto* dumping ground for accused that the government decides to treat less fairly than others.

Fair procedures for obtaining resources: For similar reasons, the procedures by which these resources are obtained ought to comport with federal court practice. In particular, there is no basis for allowing the prosecution advance notice of the resources that will be provided to the defense, much less the right to contest the defense's need for those resources. That is the practice in courts-martial, where the military is often able to provide its own experts to aid the defense, and where a convening authority is ordinarily not an attorney, not steeped in the case, and has competing operational obligations which require him to rely heavily on trial counsel for input. Moreover, military commission trials have a more limited purpose (retribution and punishment) than traditional court-martial practice (which includes the purpose of maintaining good order and discipline in the military), and do not involve American service members who share the cultural and professional background of the military's experts. To the contrary, for the commission accused an affiliation with the American military is generally an enormous impediment to the open and free communication that is critical to expert assistance.

For all of these reasons, the practice of giving the prosecution input on defense resources makes no sense whatsoever in the context of these cases. Nor is there any justification for allowing the prosecution a preview of defense strategies that this practice allows. We already

[1] No standard, no matter how generous or fair the language and intention, can guarantee a fair defense if the administering is done in an unfair manner. Decisions by the Convening Authority in response to reasonable requests for resources in virtually every commission case have been unreasonably unfair by any measure. In light of these problems, selection of a Convening Authority (or equivalent position) in any new system will be a critical decision, one in which detailed defense counsel ought to be given a voice.

know of more than one case in which we suspect the prosecution and other government agents have taken advantage of information about proposed defense travel and investigative efforts to either (1) attempt to change or delay defense investigative efforts; and/or (2) change or expedite government investigative efforts. In short, the defense should have the right to make all requests for expert, investigative and other assistance *ex parte*, both to the Convening Authority (or similar position within the new system) and to the judge who presides over pretrial and trial proceedings. All federal criminal defendants are expressly granted this critical procedural right. *See* 18 U.S.C. § 3006A(e)(1)("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application."). The accused in the new system should have it as well.

Capital cases: Resource problems in the current commissions system have been particularly egregious in the capital cases. Federal law, both statutory and constitutional, recognizes that capital cases present exceptional issues and require significantly more expert, investigative and other services than do non-capital cases. Most importantly, federal law has long guaranteed to every federal capital defendant at least one defense counsel "learned in the law applicable to capital cases," and currently entitles capital defendants to two attorneys, one of whom must be so "learned." 18 U.S.C. § 3005.[2] This requirement has been fleshed out by American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003 Ed.).[3] The ABA Guidelines were drafted "to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction," including "military proceedings, whether by way of court-martial, military commission or tribunal, or otherwise." *Id.* at 919, 921. A rule similarly guaranteeing at least two counsel to capital accused in the new system, one of whom is "learned in the law applicable to capital cases," is critical to bring the military commissions in alignment with the current consensus about what is required to provide effective defense representation in capital cases and to avoid the likelihood that the federal courts, exercising habeas jurisdiction, would not set aside any capital verdicts obtained.[4]

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[2] 18 U.S.C. 3005 provides:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours. In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. The defendant shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

[3] *See, e.g.*, The Guiding Hand of Counsel: ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L.REV. 903 (2003).

[4] *See e.g. Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S.510, 524 (2003) ("Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar

There are currently five detainees facing capital trial by military commissions. Not one of the ten military lawyers assigned to their cases meets the minimal ABA standards (a simple function of the fact that capital cases are rare in military justice practice). Rather, the defense teams have informally associated with qualified capital counsel funded through NGOs. This situation is unstable at best – it is far from clear that the NGOs will be able to continue to fund the "learned counsel," especially if the cases proceed to trial. More important, it is flatly inconsistent with the notion that these accused are being treated as fairly as the accused who are sent to federal court. I respectfully submit that The United States should not rely on funding from outside sources to ensure fundamental fairness to individuals whom it may potentially execute. To the extent that qualified capital counsel are not available in the Office of the Chief Defense Counsel, they should be retained and funded by the United States Government at the current Criminal Justice Act rate for capital attorneys, as is done in every federal capital case.

Very respectfully,

Peter R. Masciola
Colonel, USAF-ANGUS
Chief Defense Counsel

cc:
Mr. Paul Koffsky
LTG Scott Black
Lt Gen Jack Rives
VADM Bruce MacDonald
BGen James Walker
Colonel Mark Martins
Mr. Brad Wiegmann

Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.'") (*quoting Strickland v. Washington*, 466 U.S. 667, 688 (1984)).

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against-

AHMED KHALFAN GHAILANI,

Defendant.

----------X

EX PARTE ORDER

S12 98 Cr 1023 (LAK)

Kaplan, United States District Judge

Upon the indictment of Ahmed Khalfan Ghailani, a defendant in the above captioned matter, for capital offenses, good cause having been shown and to prevent any delay in retaining those expert and other providers whose participation is necessary to commence preparing the instant case;

IT IS ORDERED THAT:

1. Prior to submitting a formal case-budget on Excel spreadsheets, Mr. Ghailani is authorized to retain the following service providers for the hours and at the rates indicated.

A.	Investigator	200 hours	$125 per hour
B.	1 Paralegal	200 hours	$35-$50 per hour
C.	2 Lawyer Paralegals	300 hours each	$80-$90 per hour
D.	1 Associate (CJA)	300 hours	$110 per hour
E.	Mitigation Expert	300 hours	$100 per hour
F.	Interpreter	150 hours	$100 per hour

2. CJA Lead and/or Learned counsel, are authorized to expend up to 300 hours each at $175 per hour, prior to submitting a formal Excel spreadsheet budget.

Dated: New York, New York
June 24, 2009

SO ORDERED:

United States District Judge

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED #: 6/25/09

Mr. NADLER. Thank you, Colonel.
Major Frakt?

TESTIMONY OF MAJOR DAVID J.R. FRAKT, USAFR, LEAD DEFENSE COUNSEL, OFFICE OF MILITARY COMMISSIONS—DEFENSE

Major FRAKT. Thank you, Chairman Nadler, Mr. King, Mr. Delahunt. Thank you for the opportunity to testify here today.

And I particularly appreciate the comments of Chairman Nadler regarding my client, Mohammed Jawad, and the injustice that has been done to him.

And I did want to inform the Committee that earlier today in the Federal district court Judge Huvelle, with the acquiescence of the Department of Justice, granted the writ of habeas corpus and ordered Mr. Jawad to be released after notifying Congress in accordance with a provision of the Supplemental Authorization Act from earlier this summer.

So after nearly 7 years, my client, an innocent man, a teenager, an adolescent boy who was brought to Guantanamo on the basis of tortured statements, will soon be free.

How did we get to this point? How is it possible that such a thing could happen in the United States, that justice could be delayed and denied for so long?

And his case is a useful example of why we need to carefully consider whether we should continue with military commissions and, if so, why they need to be drastically reformed, far beyond what has been approved in the Senate National Defense Authorization Act.

We have to go back to the original purposes of the military commissions under the Bush administration. The purposes there were not to provide fair trials, not to provide American justice.

Actually, they represented an abandonment of the rule of law that was necessitated by the abandonment of the Geneva Conventions, the approval of coercive and abusive interrogation techniques, the abandonment of the standard of humane treatment, the refusal to recognize people as POWs or to afford tribunals to those where there was a dispute.

The decision to create a legal black hole at Guantanamo, where no one was entitled to challenge the basis for their detention, no one was entitled to counsel, no one was entitled to access to the courts—that was the context and the milieu in which original military commissions were created.

And of course, ultimately they were struck down by the Supreme Court. But then the Military Commissions Act of 2006 was rushed through Congress with minimal thought, minimal consideration, to what really needed to be done and whether there really was a need for these.

The Obama administration has talked about military commissions being a suitable forum for law of war offenses, and I agree with that. They are a legitimate forum for law of war offenses. But what gets left out of the debate is that there are virtually no law of war offenses to be tried.

If you look at what people have actually been charged with, they are charged with material support to terrorism, terrorism, conspiracy and spying, all non-law-of-war offenses, all offenses which are not—do not appear in the War Crimes Act, do not appear in

the Rome Statute of the ICC, have not traditionally been law of war offenses.

The things that do look like law of war offenses, such as killing civilians or murdering civilians, did not occur during the armed conflict. I have been in the United States Air Force since 1995. I was on active duty until 2005. We were not in a state of armed conflict prior to 9/11.

And so we have a false premise that we are trying terrorism crimes—attack on the USS Cole, attack on U.S. embassies in Africa, and 9/11 itself—which were simply crimes—mass murder, hijacking. We don't need military commissions for those offenses.

So go ahead and reform the military commissions, and create ones that are limited to law of war offenses and provide a fair trial, but there is not going to be anybody to try.

Thank you.

[The prepared statement of Major Frakt follows:]

PREPARED STATEMENT OF DAVID J. R. FRAKT

Prepared Testimony to the Subcommittee on the Constitution, Civil Rights and Civil Liberties Committee on the Judiciary United States House of Representatives July 30, 2009

The Military Commissions and the Abandonment of the Rule of Law

By David J. R. Frakt, Lt Col (sel.), USAFR[1] [2]

I. Introduction

Chairman Conyers, Subcommittee Chairman Nadler, Ranking Member Sensenbrenner, members of the Subcommittee, thank you for giving me the opportunity to testify on this important subject, a subject with which I have been deeply engaged for the past couple of years.

The purpose of this hearing, as I understand it, is to consider whether military commissions are an appropriate, legitimate forum for prosecuting suspected terrorists and war criminals currently detained at Guantanamo Bay, Cuba, and other individuals who may be captured in the ongoing conflict with Al Qaeda and the Taliban. Assuming the answer to be yes, or that, regardless of the answer, military commissions are likely to continue to be utilized, a further purpose of this hearing is to determine what changes should be made to the Military Commissions Act of 2006 (MCA) to ensure that military commissions are regularly constituted courts which comport with our international treaty obligations, the law of war and the due process requirements of the U.S. Constitution. More specifically, are the amendments to MCA included in the Senate version of the 2010 National Defense Authorization Act sufficient to address the shortcomings of the MCA as enacted, or are more or different changes required to ensure that military commissions will provide fair, just trials which will withstand court challenges on appeal and be accepted as legitimate by the American public and the international community?

Before I answer these two critically important questions, let me first briefly explain my relevant experience which qualifies me to try to answer these questions. After graduating from Harvard Law School in 1994, and clerking for a year for the Honorable Monroe G. McKay of the U.S. Tenth Circuit Court of Appeals, I received a direct commission into the U.S. Air Force Judge Advocate General's Corps. I served on active duty from September 1995 to April 2005. During this time, my primary practice areas were military justice and international and operational law. In the spring of 2005, I transitioned into the Air Force Reserves, and started a second career as a law professor. At Western State University College of Law, I have taught criminal law, criminal procedure, evidence, professional responsibility (legal ethics), and a seminar on international war

[1] Lead Defense Counsel, Office of Military Commissions-Defense and Associate Professor of Law and Director, Criminal Law Practice Center, Western State University College of Law, Fullerton, California.

[2] The views expressed herein are my own, and do not reflect the views of the Air Force, the Office of Military Commissions, or the Department of Defense.

crimes, all courses which proved highly relevant when I was mobilized to active duty in April 2008 to serve as a military defense counsel with the Office of Military Commissions, Office of the Chief Defense Counsel. In the fall of 2008, I taught a seminar as an adjunct professor at Georgetown Law Center entitled "Terrorism as a War Crime: Military Commissions and Alternative Approaches" as part of their National Security Law program. In 2007, I began an intensive study of the Military Commissions Act of 2006 and the implementing regulations published by the Secretary of Defense in the Manual for Military Commissions (which includes the Rules for Military Commissions or RCMs, the Military Commission Rules of Evidence or MCREs, and the list of crimes and elements), which culminated in the publication of a law review article comparing the rules and procedures of military commissions and courts-martial. [3] In January 2008, I answered a DoD-wide solicitation for volunteers to serve as defense counsel in military commissions and I was selected for the position in February 2008. I was mobilized to active duty in late April 2008 and promptly was detailed as lead defense counsel in two referred cases, *U.S. v. Mohammed Jawad* and *U.S. v. Ali Hamza al Bahlul*. I was engaged in extensive pre-trial litigation in the military commissions from May 2008 through September 2008 in both cases, including several multi-day motion hearings.[4] In October 2008, Mr. al Bahlul became the third and final detainee to be tried by military commission at Guantanamo. He was convicted and sentenced to life in prison in early November 2008. I was his sole defense counsel at trial. His case has now been turned over to appellate counsel to file an appeal.

As you are undoubtedly aware, there have been a number of recent developments in Mr. Jawad's case. The military commission was originally scheduled to go to trial in January 2009, but due to an interlocutory appeal filed by the prosecution, his case was delayed. Because the military commissions, including appeals pending before the Court of Military Commission Review were suspended by Executive Order of President Obama in late January, the CMCR has stayed its decision until September 17, 2009. Although I completed my active duty tour in early June 2009, I continue to represent Mr. Jawad in my capacity as a Reserve JAG officer. Along with the ACLU, I also represent Mr. Jawad in his *habeas corpus* petition in U.S. District Court for the District of Columbia where we have been actively seeking Mr. Jawad's release from his illegal detention. Two weeks ago, in response to a motion to suppress, the government conceded that every statement made by Mr. Jawad since his arrest on December 17, 2002, was the product of torture. Accordingly, the District Court Judge, the Honorable Ellen Huvelle, suppressed the statements. Last Friday, July 24th, the Department of Justice filed a notice with the court that the United States no longer considers Mr. Jawad detainable under the laws of war. They informed the Court that Mr. Jawad would be transferred out of the maximum security prison where he has

[3] David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 Am. J. Crim L. 315 (2007).

[4] For further information about my experience as a Guantanamo defense lawyer and these two cases, see, David J. R. Frakt, *Closing Argument at Guantanamo: The Torture of Mohammad Jawad* 22 Harvard Human Rights Journal 1 (2009); David J. R. Frakt, *The Difficulties of Defending Detainees*, 48 Washburn Law Journal 381 (2009); see also, *The Guantanamo Lawyers: Inside a Prison Outside the Law*, edited by Mark Denbeaux and Jonathan Hafetz (NYU Press, forthcoming October 2009).

been held for six and half years into a less restrictive detention camp for detainees eligible for release. An order granting the writ of habeas corpus and ordering Mr. Jawad's immediate release is expected shortly. We are hopeful that Mr. Jawad will soon be repatriated to Afghanistan and reunited with his family. In short, as both a scholar and practitioner, I have substantial experience to bring to bear on the issues being considered by this committee.

As we ponder the questions before us, I think it is important to review where we are now and how we got to this point. As the Administration considers reviving the military commissions and Congress considers various revisions to the Military Commissions Act, everyone should have a clear understanding of why the military commissions of the Bush Administration were created and where they went wrong.

II. The Abandonment of the Rule of Law

One point on which all sides should be able to agree is that the military commissions of the Bush Administration were a catastrophic failure. The military commissions clearly failed to achieve their intended purpose. After more than seven years and hundreds of millions of dollars wasted, the military commissions yielded only three convictions, all of relatively minor figures. Not a single terrorist responsible for the planning or execution of a terrorist attack against the United States was convicted. Two of the convicted, David Hicks and Salim Hamdan, received sentences of less than one year and were subsequently released. The third trial, of my client Mr. al Bahlul, although yielding a life sentence, was far from a triumph for the military commissions. There were several problematic aspects of this trial, not the least of which was the fact that several members of Mr. Hicks' jury were actually recycled for this military commission. More disturbing was the denial of Mr. al Bahlul's statutory right of self-representation. Mr. al Bahlul, a low-level Al Qaeda media specialist, wanted to represent himself before the military commissions and this request was granted by the military judge at the arraignment, Army Colonel Peter Brownback. Soon thereafter, Col. Brownback was involuntarily retired from the Army and replaced. The new judge revoked Mr. al Bahlul's *pro se* status, although he knew that Mr. al Bahlul had refused to authorize me, his appointed military defense counsel, to represent him. As a result, there was no defense presented; Mr. al Bahlul was convicted of all charges and received the maximum life sentence.

Why, with the entire resources of the Department of Defense, the Justice Department and the national intelligence apparatus at their disposal, were the military commissions such an abysmal failure? The answer is simple: the military commissions were built on a foundation of legal distortions and outright illegality. The rules, procedures and substantive law created for the commissions were the product of, or were necessitated by, the wholesale abandonment of the rule of law by the Bush Administration in the months after 9/11. In the United States of America, any such legal scheme is ultimately doomed to fail.

If we review the origins of the military commissions, a clear picture emerges of an intentional disregard for existing legal norms. Perhaps the first indication that the rule of law was to be

abandoned was in President Bush's Military Order of November 13, 2001.[5] In this document, President Bush found: "it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." In other words, what we consider essential for a fair trial for *us* would not be required for *them*. How did the Administration know, two months after 9/11, before a single major terrorist suspect had been caught, and before a single prosecutor had reviewed a single piece of evidence, that it would be impracticable to prosecute terrorism cases using existing rules and procedures? They didn't, of course. But having made this unsupported finding, President Bush and his senior advisors set out to make it a reality.

Another major step in the abandonment of the rule of law came on February 7, 2002, when President Bush issued another order,[6] this time announcing that the Geneva Conventions would not apply to those detained in the War on Terror, who were labeled with the new and misleading term "unlawful enemy combatants." The President held not only that such persons were not entitled to be treated as prisoners of war, but also, shockingly, that they were not even legally entitled to be treated humanely. With a stroke of the pen, the President wiped out the principle source of the law of war and the entire existing legal framework for the treatment of persons captured in an armed conflict and replaced it with a policy preference for humane treatment, which could be readily discarded whenever it interfered with military or intelligence operations. The decision that humane treatment was not required created unnecessary confusion about what was permissible and cleared the way for the approval of a vast array of patently illegal and highly coercive "enhanced interrogation techniques" to be employed upon the detainees.

The abandonment of the rule of law was compounded by the decision to house the "unlawful enemy combatants" at Guantanamo Bay, Cuba, and to turn the detention facilities there into a legal black hole, a place where detainees were not even entitled to be informed of the basis for their detention, much less challenge it. Indeed, the Bush Administration, regrettably aided and abetted by Congress, made a determined (and for several years, successful) effort to prevent detainees from gaining access to courts or legal representation. In an environment with no judicial oversight or meaningful avenues for redress, the detainees were simply at the mercy of their captors -- and the captors were not in a merciful mood. The extraordinary pressure to produce "actionable intelligence" coupled with the vengeful mood of the times led inexorably to shameful abuses of detainees.[7]

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[5] Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

[6] President's Memorandum to the Vice President et al. regarding Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), (Homeland Security Digital Library), *available at* http://www.pege.us/archive/White_House/bush_memo_20020207_ed.pdf.

[7] See generally, Inquiry into the Treatment of Detainees in U.S. Custody, Report of the Senate Armed Services Committee, available at: http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf; see also, Philippe Sands, *Torture Team* (2008); Jordan J. Paust, *Beyond The Law: The Bush Administration's Unlawful Responses in the "War" on Terror* (2007); Jane Mayer, *The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals* (2008).

In 2002 and 2003, as senior Bush Administration officials drafted the rules for the President's military tribunals, they were aware of several important pieces of information about the detainees at Guantanamo. First, despite claims by high-level officials, including Secretary Rumsfeld, that the detainees represented "the worst of the worst," in reality, the vast majority of the detainees had no tangible connection with Al Qaeda, and even fewer had any provable role in any terrorist attack. Many of the detainees were completely innocent of any wrongdoing, and had simply been turned in for bounty, or were caught in the wrong place at the wrong time. The worst that could be said about many of them was that they had fought against the U.S. and Coalition forces that had invaded Afghanistan, conduct that, under the laws of war, would not be considered a war crime. A small group of those captured were likely guilty of terrorism crimes, but not crimes of war. The Administration was also keenly aware that, to the extent that there was some evidence of criminal acts by a small fraction of the detainees, much, if not most, of this evidence had been developed through highly coercive interrogations, which would not be admissible in a regular court of law.

The drafters of the original military commission rules[8] resolved each of these problems by rewriting the law. First, the rules of evidence were rewritten to allow the introduction of coerced statements and to eliminate the rules barring the fruits of torture and abuse. Second, the drafters classified as "war crimes" conduct, such as conspiracy and terrorism crimes that are violations of regular criminal law but had never previously been recognized as covered by the laws of war, largely because the laws of war rightly apply to the narrow context of armed conflict. They also created a number of "new" war crimes based on the alleged status of a person, rather than on conduct that actually violates the laws of war.[9] The most egregious examples of these were the invented crimes "Murder by an Unprivileged Belligerent," and "Destruction of Property by an Unprivileged Belligerent" which appeared in the original commission's list of offenses. These provisions made killing U.S. soldiers, destroying military property, or attempting to do so, a war crime. In other words, the U.S. declared that it was a war crime to fight, regardless of whether the fighters comply with the laws of war.

After protracted litigation, the original military commissions were invalidated by the Supreme Court in *Hamdan v. Rumsfeld* in the summer of 2006 before anyone was ever convicted. With nearly five years wasted, there was a great rush to put a new legal system in place. Within months, "new and improved" military commissions were authorized by Congress through the Military Commissions Act of 2006 (MCA). While these legislatively created commissions were undoubtedly an improvement over those created by Presidential decree, the hastily drafted and poorly considered MCA still incorporated some of the key distortions and departures from the rule of law featured in the invalidated version. Most disturbingly, Congress retained the rules of evidence (with minor variations) that permitted coerced evidence to be introduced. Congress also retained the full list of war crimes (again with minor variations), including the invented ones, and even added new ones, such as the flexible catch-all "material support to terrorism."

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[8] See, Dep't of Defense, Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002) (Homeland Security Digital Library).

[9] Military Comm'n Instruction No. 2, Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6 (2005).

The Obama Administration has now acknowledged that material support is not a traditional war crime, calling into question all three of the convictions thus far attained. (Mr. Hicks, Mr. Hamdan and Mr. al Bahlul were all convicted of material support. For Mr. Hicks and Mr. Hamdan, it was the only crime of which they were convicted.) Although the military commissions were purportedly modeled on the Uniform Code of Military Justice, the best features of that system, such as the robust pretrial investigation required by Article 32 of the Uniform Code of Military Justice (UCMJ) and equal access by the prosecution and the defense to evidence and witnesses, were removed or weakened. The implementing regulations produced by the Secretary of Defense,[10] which could have corrected or mitigated some of the glaring problems with the legislation, served only to exacerbate them. [11]

Despite the widespread criticism of the MCA by the international community, legal scholars and non-governmental organizations, identifying the myriad shortcomings of the military commissions, the Bush Administration was determined to press ahead with the military commissions and convict as many detainees as possible. It was the hope and deliberate strategy of the administration that if the military commissions were well underway by the time the next Administration assumed office, with several trials completed and convictions duly rendered (the Administration did not foresee or accept the possibility of acquittals[12]), the commissions would be difficult to derail.

This "spray and pray"[13] strategy might have succeeded but for one factor the Bush Administration never anticipated: many of the military lawyers assigned the roles of prosecutors, defense counsel and judges in the military commissions refused to put aside their ethical obligations and their training in the rule of law. Many of these judge advocates, officers with decades of expertise in the law of war, considered the military commissions an affront to the military justice system to which they had devoted their careers. Ethical and courageous military prosecutors, such as former Chief Prosecutor Colonel Morris Davis and Lieutenant Colonel

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[10] U.S. Dep't of Defense, Manual for Military Commissions (Jan. 18, 2007); U.S. Dep't of Defense, Regulation for Trial by Military Commissions (April 27, 2007).

[11] See generally, David J. R. Frakt, *An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 Am. J. Crim L. 315 (2007).

[12] See, Ross Tuttle, Rigged Trials at Gitmo, The Nation, (February 20, 2008) in which the following quotation was attributed by the Chief Prosecutor Colonel Morris Davis to DoD General Counsel William J. Haynes IV, "Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals. We've got to have convictions."

[13] This expression was used by a senior Guantanamo official, Brig Gen Gregory Zanetti, in testimony before the military commission in U.S. v. Jawad to describe the push to bring as many cases to trial as possible. See, Jane Sutton, "Guantanamo Trials Put Generals At Odds" Reuters, August 13, 2008 ("The strategy seemed to be spray and pray, let's go, speed, speed, speed," Army. Brig. Gen. Gregory Zanetti said. "Charge 'em, charge 'em, charge 'em and let's pray that we can pull this off.")

Darrel Vandeveld, who took their oaths to defend the Constitution seriously, resigned rather than be party to trials using coerced evidence or to allow political considerations to interfere with their prosecutorial judgment. Professional military judges refused to be bullied into endorsing the Administration's strained interpretations of the law of war. Tenacious military defense counsel challenged the government at every turn, exposing the many flaws in this concocted legal system and the disgraceful brutality with which their clients had been treated. Through patient, professional advocacy both inside and outside the commissions, these lawyers managed to put the brakes on the military commission freight train and slow the proceedings to the point where it was a simple matter for President Obama to suspend them almost immediately after assuming office. This suspension period allows us an opportunity for reasoned debate about the shortcomings of the military commissions and their efficacy and utility.

Although I have become known as a fierce critic of the military commissions, I want to make it clear that am not opposed to military commissions as a general matter, but rather am opposed to military commissions in their current form. I am a strong proponent of military justice and have no concerns about the military's ability to provide a fair trial, even for our worst enemies, given a fair set of rules and procedures. In my law review article, I did not propose to abolish the military commissions, but rather suggested a number of legislative and regulatory changes to convert them into a viable, acceptable legal system. After practicing in the military commissions, I developed some additional concerns with the military commissions which also would require legislative action to address. (These concerns are addressed in some detail below.) Although I still believe it is theoretically possible to amend the MCA to create valid commissions, the best solution would simply be to repeal the MCA and start over to create military commissions that are not just loosely based on the UCMJ and Manual for Courts-Martial, but are virtually identical. Any proposed deviation from court-martial procedure would have to be carefully scrutinized to ensure that it was truly necessary and appropriate and not merely an effort to favor the prosecution. Any deviations, individually and cumulatively, from the rules and procedures for general courts-martial should be minimal, and must not significantly detract from the overall fairness of the proceedings. In my view, had we adopted a military commissions scheme that truly mirrored the rules and procedures for general courts-martial, as was already authorized under federal law in 2001, we would not be in the position we find ourselves in today. The military commissions would have succeeded in providing fair trials and would not have been plagued by endless delays, challenges and setbacks.

Recognizing that it is highly unlikely that the Military Commissions Act will be repealed, and that the preferred approach of the Administration and Congress appears to be to revise it, there are a number of amendments that I would recommend.

III. Recommended Revisions to the MCA:

A. ***Admissibility of Coerced Statements*:** First and foremost, it is of the utmost importance that the military commissions categorically bar the admission of coerced evidence. The proposal in the Senate NDAA to amend § 948r to preclude the admissibility of statements made as a result of cruel, degrading and inhumane interrogation methods does not go far enough because it still allows for the admission of coerced statements so long as the government disputes "the degree of coercion," and a judge determines its reliability and that "the interests of justice would best be

served" by admission of the statement. This entire provision is built on false premises. There are no circumstances where "the interests of justice would best be served" by the introduction of involuntary statements. One significant reason that involuntary statements are inadmissible is because, as a category, such statements are not reliable. I concur with the Administration's view that due process standards apply to military commissions and endorse the proposal of the administration to require a voluntariness standard for the admissibility of all statements. The use of a voluntariness standard, a standard which pre-dates *Miranda v. Arizona*, would not mean that soldiers should be required to administer *Miranda* or Article 31, UCMJ warnings on the battlefield, or that evidence would necessarily be excluded for lack of a rights advisement. Rather, a totality of the circumstances test would be employed to determine if a statement was voluntary.

B. ***Derivative Evidence*** - Congress must also restore the ban on evidence derived from coerced, involuntary statements. When the Secretary of Defense promulgated the Military Commission Rules of Evidence, the derivative evidence rule was omitted from MCRE 304. Thus, although MCRE prohibits the introduction of statements which are the product of torture and limits the introduction of coerced statements, it does not prohibit the introduction of evidence derived from an interrogation in which torture, coercion, or cruel, degrading and inhumane interrogation methods were used. This evidentiary loophole creates a powerful incentive to use unauthorized abusive interrogation methods. MCRE 304 should be amended to mirror Military Rule of Evidence 304 which states simply "an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this rule."

C. ***Hearsay Evidence*** - Congress should significantly restrict the use of hearsay evidence to conform military commission procedures to those utilized in federal criminal court and general courts-martial. The hearsay rules currently in effect under the MCA create a presumption in favor of hearsay and inappropriately place the burden on the opposing party to prove the unreliability of the hearsay, The proposed revision to § 949a.(b)(3)(D) in the Senate NDAA goes a long way toward improving this rule and bringing the rule in line with federal practice, but still permits a greater degree of hearsay evidence than is justifiable, creating a potential for unfairness and unnecessarily infringing on the right of confrontation. This provision should be further amended to require that hearsay admitted under any special military or intelligence necessity exception must be "more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts."

D. ***Choice of counsel*** – The MCA currently requires that the accused be represented by military counsel. The Obama Administration has recently proposed a rule change which purports to give greater choice of counsel to the accused. However, the accused is still required to have an appointed military defense lawyer. This provision for the right to request individual military defense counsel does bring military commission practice more in line with court-martial practice, but does nothing to address the real problem of choice of counsel: most of the accused are unwilling to be represented by American military lawyers. I experienced this myself. I was appointed to represent Mr. Ali Hamza al Bahlul, but he refused to accept me as his attorney, as he had rejected several other previously assigned military counsel. It was not personal. It was simply that he was Al Qaeda and I was the enemy. The refusal to accept the representation of

the detailed defense counsel has been a major source of delay in the military commissions and has placed several military counsel in untenable ethical quandaries. The requirement to be represented by military counsel has caused several defendants to seek to represent themselves, which has also caused significant delay and logistical problems. Of course, the rules permit accused who have the resources to also hire a civilian counsel at their own expense, but such counsel must be U.S. citizens. The requirement of U.S. citizenship is unjustifiable and should be eliminated. Non-U.S. citizens may represent U.S. service members in courts-martial. In fact, non-citizens may serve in the U.S. Armed Forces. It is particularly unfair when attorneys from our coalition partners, such as Canada, the U.K. and Australia, are ineligible to represent detainees from their home countries. The citizenship requirement should be replaced with a rule permitting foreign counsel but requiring them to have proficiency in English and to be admitted to practice in at least one U.S. jurisdiction. Of course, the foreign counsel must also be eligible for a visa and meet other security requirements.

E. ***Pretrial Investigation*** – The MCA eliminated one of the best features of the military justice system, the Article 32 pretrial investigation. Article 32 of the UCMJ, sets forth the requirements of a "thorough and impartial investigation" prior to referral of charges to a General Court-Martial. Under Article 32, a neutral, experienced investigating officer, typically a senior JAG officer, investigates the charges, determines if there are reasonable grounds to believe the offenses were committed by the accused, explores potential legal and evidentiary issues, and makes recommendations as to the appropriate disposition of the charges. The Article 32 investigation also provides an opportunity for the defense to receive a significant amount of discovery early in the process. Article 32 investigations frequently help to winnow out weak or duplicative charges and narrow the issues for trial; they can also facilitate pre-trial agreements. The lack of any pretrial investigation is a serious limitation on the due process available in military commissions, and gives far too much power to the prosecution. It is contrary to both domestic and international practice for serious offenses (including capital offenses) to be referred to trial without any independent review. In federal court, a grand jury indictment is required for any felony. State courts require either a grand jury or a preliminary hearing in front of a judge. International war crimes tribunals such as the ICC and ICTY require approval from the pre-trial chamber. A pretrial investigation requirement modeled on Article 32 and Rule for Court-Martial 405 should be incorporated into the MCA.

F. ***Statutes of Limitation*** – There are no statutes of limitation in the MCA, even where the comparable offense under the UCMJ or federal law carries a statute of limitation. This enables disparate treatment of non-citizens tried in military commissions. This should be remedied to ensure that there are reasonable statutes of limitation in place for non-capital offenses. Provision for tolling the statute of limitations until an offense is discovered or until a suspect is captured may be appropriate.

G. ***Speedy Trial*** – There is no real requirement for a speedy trial under the MCA. The MCA specifically makes inapplicable the speedy trial requirements of the UCMJ[14] which require that a service member placed in pretrial confinement be charged and brought to trial promptly (within

[14] Article 10, UCMJ states "When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

120 days) or released. Since the detainees are ostensibly detained under the law of war, which permits combatants to be removed from the battlefield for the duration of the conflict, requiring a detainee to be charged or released within 120 days would be unreasonable. However, the government should not be able to hold detainees indefinitely before charging them, especially when the government is aware of chargeable offenses. Once a detainee in custody is suspected of involvement in a chargeable offense, there should be some reasonable window of time in which the government must bring charges, or forfeit the opportunity to do so. This time limit could be extended by the commission for good cause shown, such as the discovery of new evidence, the necessity to wait for another trial to conclude, or while awaiting evidence to be declassified.

There is a speedy trial requirement under R.M.C. 707 requiring a military commission to be assembled within 120 days of service of charges, but this requirement has proven to be illusory because the government can withdraw charges without prejudice and re-prefer them at any time, thereby granting itself a fresh 120 days. The government has repeatedly taken advantage of this provision. The MCA should be amended to close this loophole and prevent gamesmanship by the prosecution.

H. ***Credit for Pretrial Detention and Illegal Pretrial Punishment*** - The Rules for Military Commission do not include a provision found in Rules for Court-Martial 305(k) which provide for administrative credit for time served in pretrial detention. In *U.S. v. Hamdan,* the U.S. argued that no credit should be given for pretrial detention. The military judge, Captain Keith Allred, disagreed, and awarded credit for a significant period of the time served by Mr. Hamdan. The MCA should be amended to make it clear that the judge has the power to award this credit. Rule for Court-Martial 305(k) and military case law also authorize military judges to provide extra credit "for each day of pretrial confinement that involves. . . unusually harsh circumstances." This rule was omitted from the Rules for Military Commission. In two rulings by Colonel Stephen Henley in response to pretrial motions in *U.S. v. Jawad*, Judge Henley indicated that he believed this remedy to be available in military commissions. [15] Congress should affirm this power through an appropriate amendment to the MCA.

I. ***Discovery and Production of Evidence and Witnesses*** – The military commissions have been plagued by slow, incomplete and inadequate discovery on the part of the government, which has resulted in needless delay while motions to compel discovery are litigated. Routine discovery requests have gone unanswered for months. The prosecution has even gone so far as to claim

[15] Ruling on Defense Motion to Dismiss – Torture of the Detainee (D-008), 1 Military Commission Reporter 334, 336-37 (2008), "the Commission finds other remedies are available to adequately address the wrong inflicted upon the Accused, including, but not limited to, sentence credit towards any approved period of confinement.") Ruling available at http://www.defenselink.mil/news/Ruling%20D-008.pdf; Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction: Child Soldier (D-012), 1 Military Commission Reporter 338, 341 at n. 13(2008)("Nothing precludes the defense from requesting relief from the Military Commission for housing the accused while a juvenile with adult detainees, providing inadequate physical and psychological resources to a confined juvenile and any other actions that may constitute unlawful pretrial punishment of the Accused. Such relief may include, but is not limited to, specific sentence credit towards any approved period of confinement.") Ruling available at http://www.defenselink.mil/news/RULING%20D-012%20(child%20soldier).pdf

that they have no obligation under the MCA to respond in writing to defense discovery requests. In my view, part of the problem is that the MMC weakens the discovery requirements which exist in courts-martial. Instead of guaranteeing "an equal opportunity to interview witnesses and inspect evidence" as R.M.C. 701(b)(5)(3) does, the equivalent Rule for Military Commissions promises only that "no party may unreasonably impede the access of another party to a witness or evidence." Similarly, § 949j. of the MCA requires that "defense counsel shall have a *reasonable* opportunity to obtain witnesses and other evidence" where in courts-martial, R.C.M. 703(a) states that both sides "shall have *equal* opportunity to obtain witnesses and evidence." There is no justification for the weakening of this rule, which clearly provides an advantage to the prosecution.

In practice, the defense has been hampered by the requirement to submit all witness requests through the prosecution and all requests for expert witnesses to the Convening Authority, Susan Crawford, who routinely denied defense requests regardless of their merits. Merely replacing the current Convening Authority will not resolve the systemic unfairness of the current scheme. The defense needs to have an independent budget to hire experts and independent subpoena power.

The Senate NDAA proposal amends the MCA to strengthen the requirement to turn over exculpatory evidence. This is a welcome proposal as exculpatory evidence has repeatedly been withheld by the prosecution.

J. ***Age Limitations and the Treatment and Prosecution of Juvenile Detainees*** – The MCA does not contain any age limitation. Theoretically, anyone captured who meets the definition of an "unlawful enemy combatant" ("unprivileged enemy belligerent" in the Senate NDAA version) can be tried by military commission. Two juvenile detainees, Omar Khadr, aged 15 at the time of capture, and my client Mohammed Jawad, possibly as young as 12 at the time of capture according to his family and the government of Afghanistan, have had charges referred to trial by military commission. Mr. Khadr was rapidly approaching trial at the time the military commissions were suspended by President Obama. It appears, based on the government's recent concession that Mr. Jawad is no longer detainable under the laws of war, that the military commission charges against him will be withdrawn. I believe the omission of an age limitation in the MCA was an unintentional oversight by Congress and that Congress did not intend for juveniles to be subjected to trial by military commission. There is not a single mention of "minors" "child soldiers" or "juveniles" in the legislative history of the MCA. One possible reason for the oversight is that the UCMJ, upon which the MCA is based, does not include an age limit. However, since jurisdiction under the UCMJ is limited to military members and one may not join the Armed Forces until the age of 18,[16] court-martial jurisdiction is necessarily limited to adults.

If Congress did not intend for juveniles to be subject to military commissions, then this oversight must be corrected. Child soldiers, even those who perpetrate atrocities, are recognized under

[16] Seventeen year olds may enlist with the permission of a parent. However, service members are ineligible to serve in a theater of war until they turn 18, precluding the possibility of committing a war crime as a juvenile.

international law primarily as victims of war. There is no international precedent for treating child soldiers as war criminals. The United States should not be the first country in the world to prosecute child soldiers. Authorizing juveniles to be subject to the MCA arguably violates our treaty obligations under the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict. This treaty, entered into force on February 12, 2002, requires that state parties accord to child soldiers "all appropriate assistance for their physical and psychological recovery and their social reintegration." Omar Khadr and Mohammed Jawad have been housed in adult facilities and denied any opportunities for rehabilitation and reintegration. The MCA has no provisions to take into account the age of juveniles and the only sentencing option is confinement. Subjecting child soldiers to possible life imprisonment is incompatible with the requirement to provide child soldiers with rehabilitation and reintegration.

K. ***Substantive Crimes and Elements*** – Many commentators, myself included, believe that there is a serious *ex post facto* or retroactivity problem with the MCA because it authorizes trial for offenses not previously punishable under the law of war. The MCA, at § 950p, declares, inaccurately, that "the provisions of this subchapter codify offenses that have traditionally been triable by military commissions." Thus, according to the MCA:

> Because the provisions of this subchapter. . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

The proposed revision of the MCA recognizes that there is considerable debate over whether several of the listed offenses were traditionally triable under the law of war, and proposes this caveat: "To the extent that the provisions of this subchapter codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, this subchapter does not preclude trial for offenses that occurred before the date of. . . enactment." In essence, this proviso acknowledges the possibility that courts may find some listed offenses in the MCA were not traditionally law of war offenses. However, the Senate NDAA version still retains all of the offenses of the original MCA, even those widely acknowledged to be new crimes.

Allowing detainees to be tried for offenses in military commissions which are not traditional war offenses creates a strong possibility either that the charges will be dismissed by the trial judge or that the convictions will be reversed on appeal. The more prudent course of action would be to remove those offenses from the MCA which were not clearly recognized war crimes prior to the enactment of the MCA. There have been several recent comprehensive codifications of the laws of war which list law of war offenses, most notably the Rome Statue of the International Criminal Court. The U.S. had a significant role in developing the list of war crimes in the Rome Statue and in defining the elements of those offenses. There are several offenses in the MCA which do not appear in the Rome Statute or in other recent codifications of the law of war, including terrorism, conspiracy, and material support for terrorism. None of these offenses have

been traditionally been triable under the law of war.[17] All should be deleted from the Military Commissions Act.

In addition to removing offenses which are not traditional law of war offenses, Congress should clarify the meaning of certain offenses to remove ambiguity. In particular, Congress should clarify the vaguely defined offense of "murder in violation of the law of war." This offense replaced the invented offense of "murder by an unprivileged belligerent" in the list of offenses created by Executive Order of President Bush. Although the title and definition of this offense are clearly different from the predecessor offense, government prosecutors interpreted this offense to be identical to the offense of "murder by an unprivileged belligerent." Several defendants at the military commissions have been charged with the offense of "murder in violation of the law of war" and/or solicitation or conspiracy to commit this offense. The prosecution's theory, advanced in several military commissions, was that all murders committed by an "unlawful combatant" or "unprivileged belligerent" violated the law of war. Their claim was that the mere status of being an "unlawful combatant" was sufficient to establish a violation of the law of war and that no other law of war violation need be proven. This interpretation of the statute finds no support in the law of war and was emphatically rejected by three different judges (Captain Keith Allred, USN; Colonel Stephen Henley, USA; and Colonel Ronald Gregory, USAF) in three different military commissions (Hamdan, Jawad and al Bahlul). The clearest expression of this can be found in Judge Henley's ruling in *U.S. v. Jawad*.[18] According to Judge Henley:

> 10 U.S.C. § 950v(b)(15) states that "Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct." Thus, there is a dual requirement for the government to prove beyond reasonable doubt (1) that the [attempted] killings in this case were committed by an unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war. . . .
>
> If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation, they could have said so. . . .
>
> Proof the Accused is an unlawful enemy combatant, by itself, is insufficient to establish that the attempted murders in this case were in violation of the law of war.

[17] The Administration has acknowledged that material support for terrorism is not a traditional law of war offense.

[18] Ruling on Defense Motion to Dismiss, Lack of Subject Matter Jurisdiction (D-007), 1 Military Commission Reporter 331, 332 (2008) available at: http://www.defenselink.mil/news/RULING%20D-007%20(subject%20matter%20jurisdiction)%20(2).pdf;

Unsatisfied with this explanation, which undercut their entire theory of criminality, the government filed a motion for reconsideration of this ruling.[19] Once again, Judge Henley found the government arguments "unpersuasive":

> Congress did not intend to make every murder committed by an alien unlawful enemy combatant or every murder of a lawful combatant by an unlawful combatant a law of war violation. As the Military Commission held in its September 24, 2008 ruling, there is a dual requirement for the Government to prove beyond reasonable doubt (1) that the [attempted] killings in this case were committed by an alien unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war. The propriety of the charges in this case must be based on the nature of the act and not merely on the status of the Accused at the time of the alleged offenses. In other words, proof that the Accused is an alien unlawful enemy combatant alone will be insufficient at trial to find the alleged acts of attempted murder in this case were in "in violation of the law of war." The Military Commission's position is consistent with case precedent, international law and Congressional intent.

The government attempted to resurrect the theory of the meaning of "murder in violation of the law of war" in the trial of Mr. al Bahlul, in their proposed jury instructions. Colonel Gregory, the military judge, rejected the government's proposed jury instructions and substituted instructions based on Judge Henley's ruling in *U.S. v. Jawad*. Despite the repeated rejection of their theory, the government has continued to charge detainees with this crime, or allow charges previously referred to go forward despite a complete lack of any evidence of a violation of the law of war. Congress could resolve this situation and eliminate any ambiguity about legislative intent by providing a definition for "in violation of the law of war" in the MCA. This phrase appears in the offense of "destruction of property in violation of the law of war" and "intentionally causing serious bodily injury" as well. I recommend adding a definition to § 948a as follows:

> IN VIOLATION OF THE LAW OF WAR – The term 'in violation of the law of war' means in a method or manner or under circumstances which violate the law of war. The mere status of being an unprivileged enemy belligerent, without more, is insufficient to establish that an act was 'in violation of the law of war'.

IV. Conclusion

In short, the revisions of the MCA in the SASC proposal fall well short of what is required to transform the deeply flawed MCA into a law Americans can be proud of. The suggestions I have provided above are just a partial list of many aspects of the MCA that require revision. However, by adopting these recommendations and others proposed by the witnesses on this panel and others who have testified before this committee, the Military Commissions Act could be modified to create a fair, legitimate legal system to try law of war offenses.

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[19] Ruling on Government Motion for Reconsideration (D-007), 1 Military Commission Reporter 347, 348 (2008). Available at: http://www.defenselink.mil/news/d20081104JawadD007Reconsider.pdf

The question this committee, and the rest of Congress, must consider is whether there is any point in continuing with military commissions. As President Obama has stated, military commissions are a legitimate forum in which to try offenses under the law of war, but this begs the question of whether there are any law of war offenses to try. If one were to review the charges brought against all of the approximately 25 defendants charged in the military commissions, as I have, one would conclude that 99% of them do not involve traditionally recognized war crimes. Rather, virtually all of the defendants are charged with non-war crimes, primarily criminal conspiracy, terrorism and material support to terrorism, all of which are properly crimes under federal criminal law, but not the laws of war. In fact, in my estimation, there has been only one legitimate war crime charged against any Guantanamo detainee, the charge of "perfidy" against Abdal-Rahim Al-Nashiri for his alleged role in the attack on the U.S.S. Cole in October 2000. But even though perfidy is a traditional offense under the law of war, convicting Mr. Al-Nashiri of this offense requires accepting the dubious legal fiction that the United States was at war with Al Qaeda nearly a year before 9/11, for the law of war only applies during a war. In fact, most of the offenses with which the so-called "high value detainees" are charged relate to events which occurred on or before 9/11, when the U.S. was not involved in an armed conflict with Al Qaeda. Perhaps more to the point, Mr. Al- Nashiri was also charged with several other non-law of war offenses arising out of the same conduct, including multiple charges carrying the death penalty, making the charge of perfidy redundant. The Senate bill acknowledges that it includes non law of war offenses in §948b "This chapter establishes procedures governing the use of military commissions. . .for violations of the law of war *and other offenses triable by military commission.*" (emphasis added)

If there are no real war crimes to prosecute, are there any good reasons to continue with military commissions? The Bush Administration's motive for creating military commissions was to establish a forum in which American standards of due process did not apply and convictions could be obtained for terrorism crimes (not law of war offenses) under summary procedures using evidence which would not be admissible in a regular court of law. The Obama Administration has now rightly concluded that Constitutional due process standards should apply to military commissions, and that normal rules of evidence should apply. Modifying the military commissions to comport with due process and the rule of law will mean eliminating the very reason for their existence. Partially amending them with some minor cosmetic changes will result only in many more years of protracted litigation.

Among the over two hundred detainees still at Guantanamo, there are perhaps a few dozen who have committed serious offenses. I have yet to hear any compelling reason why any of these men could not be prosecuted under existing law in Federal Court. As the recent report by Human Rights First conclusively demonstrates,[20] the federal courts are open, and have a long track record of successful prosecutions of terrorism crimes. Military commissions have not proven to be faster, more efficient or less costly than the alternative. The logistical difficulties in trying cases in Guantanamo have proven to be incredibly vexing. With Guantanamo slated to be closed in the next six months, the military commissions will have to be relocated and a whole new infrastructure created to support the commissions. This could further delay the commissions

[20] In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008) and 2009 Update and Recent Developments available at http://www.humanrightsfirst.org/us_law/prosecute/

for months or even years. Military lawyers, unlike federal prosecutors and federal public defenders, have no special expertise in prosecuting or defending complex international terrorist conspiracies. The entire military commissions experiment has been a massive drain on DoD resources and personnel at a time when the military can least afford it.

The only other reason I have heard advanced for the use of military commissions is the belief that a person who could not be successfully prosecuted in Federal Court because of evidentiary problems might be successfully prosecuted in a military commission. Those who make this argument are essentially conceding that military commissions do not and should not provide the same due process as a regularly constituted American court.

The desire to achieve convictions at all costs is simply not an acceptable basis for the creation of an alternative legal system. The reason that the military commissions failed, indeed, the primary mistake of the entire "War on Terror" was the pervasive abandonment of the rule of law by the prior administration. We must not repeat the mistakes of the past and continue to cut corners. We must remember that this war is ultimately a war about ideas and values. True American values guarantee justice and fairness for all, even for the vilified and unpopular. If there are terrorists and war criminals to be tried, let's do it the old-fashioned way, in a fair fight in a real court with untainted evidence. America is better than the last eight years. It is time to prove it to the world, and to ourselves. Thank you.

Mr. NADLER. Thank you. Can I just clarify one question before we go on to the next statement? Why did you say there would be nobody to try in a properly constituted military commissions for law of war violations?

Major FRAKT. Because, Mr. Chairman, none of the people that have been charged have been charged with actual law of war offenses.

Now, I want to say there is one exception to that. There is a crime called murder in violation of the law of war, which sounds like a war crime. Certainly, if a murder was in violation of the law of war, that would be a war crime.

However, the prior Administration took the position that murder in violation of the law of war was simply murder by an unprivileged belligerent or murder by an enemy combatant.

In other words, the mere status of being an unlawful combatant—the jurisdictional prerequisite was—converted any act of fighting, any act of attempt to kill U.S. soldiers, into a war crime, and there have been—that has been challenged by the defense counsel in the military commissions.

We have three different judges in three different cases decide that the government's interpretation of that law was wrong and that what Congress really intended was that in violation of the law of war means that there was something in the manner or method or circumstances that violated the law of war beyond simply being an unlawful combatant.

So we don't have examples of during the actual armed conflict of people committing traditional law of war offenses.

Mr. NADLER. Mr. Engel?

TESTIMONY OF STEVEN A. ENGEL, DECHERT LLP

Mr. ENGEL. Thank you, Chairman Nadler and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss the current proposals for the reform of the military commission system.

During the prior Administration, I served for almost 3 years in the Department of Justice's Office of Legal Counsel, and in that capacity I worked with Congress in developing the military commissions—the military commission system that was established under the Military Commissions Act.

As President Obama recently recognized, the United States has long employed military commissions for prosecuting captured enemies for violations of the laws of war.

Indeed, the list of Presidents who have employed commissions reads like a "Who's Who" of our greatest wartime leaders—George Washington, Abraham Lincoln, Franklin Delano Roosevelt—in other words, far from an invention of the last Administration, the United States has long recognized that military commissions represent the traditional means by which this country has tried captured enemies for war crimes.

Because of this history and because of their particular use in the present conflict, it should not be surprising that President Obama has chosen to retain the military commission system for the trials of the Guantanamo detainees.

Our Article III courts have an important role to play in our counterterrorism efforts. Article III courts have been particularly useful in this conflict when it comes to individuals apprehended in our borders by traditional law enforcement methods.

When it comes, however, to enemy combatants captured by our military, the Obama administration, like its predecessor, has concluded that military commissions may be necessary and appropriate to permit the consideration of evidence and intelligence information that likely could not be used under the strict procedural rules of Article III courts.

It is equally unsurprising that the Obama administration would seek to work with Congress to improve both the workings of the commissions and the public perception of their ability to fairly dispense justice in this armed conflict.

Though I differ with some of the details of the proposals under consideration, I believe that there is much to recommend. The amendments in the Senate's defense authorization bill in particular reflect, in many respects, our experience in actually witnessings military commission prosecutions over the past 3 years.

The bill also reflects a number of critical legal developments, including the Supreme Court's decision in the Boumediene case, which held that Guantanamo detainees have the right—the constitutional right to habeas corpus, and suggested in all likelihood that they would be entitled to other constitutional rights as well.

Although much less publicized, the military judges who preside over the commission system itself have made a number of important rulings in interpreting the Military Commissions Act, and the Senate bill appropriately addresses these decisions.

I would like to just comment briefly on two of the proposals that the Obama administration has made. I agree with the Administration that special attention needs to be given to the rule governing the admissibility of detainee statements, which, frankly, has become a lightning rod for critics who charge that it would permit convictions based upon so-called coerced evidence.

Although the existing rule is actually quite similar to those employed by U.N.-authorized international war crimes tribunals, and military judges have considerable discretion under the statute which they have carefully exercised to ensure the fairness of the trials, I agree that amending the rule could have a positive impact on the commissions and particularly on the positive—on the perceptions of those commissions.

I disagree with the Obama administration's proposal to remove the material support offense from prosecutors' arsenal. During the Civil War, the United States prosecuted by military commission those who provided horses and other support to Confederate guerillas.

We are similarly entitled under the law of war to prosecute those who join or support unlawful forces such a al-Qaida, and our prosecutors have so far made good use of that authority.

Although we can and should discuss how military commissions may be improved, I do not want to lose sight of the bigger picture here. Apart from any particular details, the endorsement of the military commission system by the Obama administration and by this Congress will establish the commissions on a sound, bipartisan basis.

Despite our historical tradition, it is no secret that the use of commissions against al-Qaida has been a matter of some controversy and considerable litigation over the past several years.

Those challenges have impeded the commissions' ability to mete out justice to the terrorists who have committed war crimes against Americans, including those who perpetrated the attacks of September 11.

I am hopeful that the proposed reforms will remove some of the objections now extant to the commissions, place them on a sounder legal footing and allow the trials once again to move forward.

I appreciate the opportunity to participate in the Subcommittee's discussion today, and I look forward to your questions.

[The prepared statement of Mr. Engel follows:]

PREPARED STATEMENT OF STEVEN A. ENGEL

STATEMENT OF STEVEN A. ENGEL[1]

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND CIVIL LIBERTIES COMMITTEE ON THE JUDICIARY UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON PROPOSALS FOR REFORM OF THE MILITARY COMMISSION SYSTEM

JULY 30, 2009

Thank you, Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee. I appreciate the opportunity to appear here today to discuss current proposals for the reform of the military commission system.

During the prior Administration, I served as a Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice. While at the Office, I worked with others in the Executive Branch and with Congress in developing the military commission system established under the Military Commissions Act of 2006 ("MCA"). Those commissions, in turn, reflected a substantial renovation of the commissions system that President Bush had established, based on historical models, to try enemy combatants shortly after the U.S. invasion of Afghanistan.

As President Obama recognized during his recent speech at the National Archives, the United States has long employed military commissions for prosecuting captured enemies for

[1] Steven A. Engel is a partner in the Washington, DC office of Dechert LLP. From February 2007 to January 2009, he served as a Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, and from June 2006 to January 2009, as counsel in that office. Mr. Engel graduated Yale Law School, Cambridge University, and Harvard College *summa cum laude*, and he served as a law clerk to Justice Anthony M. Kennedy of the Supreme Court of the United States and now-Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

violations of the laws of war. Among other historical examples, George Washington employed military commissions during the Revolutionary War. President Lincoln used them during the Civil War. President Franklin Delano Roosevelt used commissions to try German saboteurs captured on American soil during World War II. In other words, far from an invention of the last Administration, many of our greatest Presidents have recognized in our past conflicts both the lawfulness and the utility of military commissions. Indeed, it is fair to say that commissions represent the traditional means by which this country has tried captured enemies for war crimes.

Because of this history, and because of their particular use in the present conflict, it should not be surprising that President Obama and his Administration have chosen to retain the military commission system for use in the trials of those detained at Guantanamo Bay. It is equally unsurprising, particularly in view of the legal developments since 2006, that the Obama Administration would seek to work with Congress to improve the workings of the commissions and, concomitantly, to improve the public perception of their ability to fairly dispense justice in this armed conflict.

Although I do not regard every proposed modification as an improvement, I do believe that there is much to recommend in the existing proposals. The Senate's version of the National Defense Authorization Act for Fiscal Year 2010, S. 1390, as well as the amendments suggested by the Obama Administration, reflect our experience in witnessing military commission prosecutions over the past three years and incorporate a number of critical legal developments since then. Most notably, in *Boumediene v. Bush*, 553 U.S. __ (2008), the Supreme Court held that the aliens detained by our military at Guantanamo Bay have the constitutional right to habeas corpus, and the Court suggested that they may well have other rights as well. In addition,

although much less publicized, the military judges who preside over the commission system have themselves made a number of important rulings in interpreting and implementing the MCA, and those rulings too are appropriately addressed in the proposals under consideration.

More significantly, and apart from any particular details, the endorsement of the military commission system by the Obama Administration and by this Congress will establish the commissions on a sound bipartisan basis. It is no secret that the despite our historical traditions, the use of military commissions in this untraditional conflict against international terrorist organizations has been a matter of some controversy and considerable litigation. Those challenges have impeded the commissions' ability to mete out justice to the terrorists who have committed war crimes against Americans, including those who perpetrated the attacks of September 11, 2001. In addition, since January of this year, President Obama has halted all commission trials, including the September 11th trial, while his Administration evaluates the commission system. I am hopeful that the Obama Administration's proposed reforms will remove some of the objections to the commissions, place them on a sounder legal footing, and allow these trials once again to move forward.

This afternoon, I would like briefly to address three issues relevant to the present discussion. *First*, why has the United States turned to military commissions? *Second*, when should military commissions be used? And *third*, I would like to comment on two of the Obama Administration's proposed amendments to the MCA's procedures.

Why Use Military Commissions?

The United States has traditionally employed military commissions for the prosecution of enemy combatants for two reasons: (1) military commissions are the appropriate forum for trying

our captured enemies, whose war crimes are not matters for ordinary law enforcement; and (2) military commission procedures are better suited than Article III courts for trying cases arising out of wartime circumstances.

As President Obama has recognized, the United States is engaged in an armed conflict with Al Qaeda, the Taliban, and affiliated forces. As with past conflicts, we have recognized the military justice system to be the appropriate forum for prosecuting captured enemies who commit war crimes against American service members and civilians. The defendants in military commission prosecutions are not ordinary civilian criminals. Their actions arise out of an armed conflict, and they breach the laws of war, not our domestic criminal code.

While it is sometimes the case—and particularly so, when it comes to our war against Al Qaeda terrorists—that the crimes committed by our enemies may also violate our domestic laws, the United States has traditionally not treated its wartime enemies as ordinary domestic criminals. For instance, when the FBI arrested eight German saboteurs in the United States during World War II, President Roosevelt did not present them for trial to the civilian justice system, although he surely could have done so. Rather, he determined that such captures—even though they were effected by law enforcement and took place on American soil—were incident to an armed conflict, and so he directed that they be prosecuted by military commission. The same circumstances are presented here. During the present armed conflict, we have relied on our military not simply to fight Al Qaeda, but to detain them under the law of armed conflict. So too it is appropriate to regard their offenses, not as ordinary violations of our domestic laws, but as war crimes, and to turn to the military justice system to hold them accountable.

The second justification for military commissions is a more practical one. In contrast with our civilian courts, military commissions are simply better tailored to handling the challenges of wartime prosecutions. Military commissions have special rules better able to handle the significant amounts of classified information that are implicated by the trials of those apprehended during wartime and by our military and intelligence services. Military commissions can better, and more easily, provide for the safety and security of the participants than can the federal courts located in our communities.

Most significantly, military commissions employ more flexible rules of evidence that allow for the consideration of battlefield evidence that likely would not be admissible under the strict procedural rules of the federal courts. As the Obama Administration's Detention Policy Task Force explained in its July 20, 2009 preliminary report:

> Some of our customary rules of criminal procedure, such as the *Miranda* rule, are aimed at regulating the way police gather evidence for domestic criminal prosecutions and at deterring police misconduct. Our soldiers should not be required to give *Miranda* warnings to enemy forces captured on the battlefield; applying these rules in such a context would be impractical and dangerous. Similarly, strict hearsay rules may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from the battlefield, which may be reliable, probative and lawfully obtained.

By contrast with our federal courts, the military commissions do not require *Miranda* warnings, and they permit the consideration of hearsay, when reliable and appropriate, under circumstances considerably broader than in Article III courts. Military commission rules thus are adapted to wartime circumstances, and they can permit full and fair trials under circumstances where trials in Article III courts would not be feasible.

When Should Military Commissions Be Used?

The Obama Administration has acknowledged these two justifications underlying the military commissions system, but it is not yet clear whether it accords them equal weight. The Administration at times has recognized that the commissions are the appropriate forum for hearing war crime cases, but other times, it has suggested that commissions should function solely as a court of last resort—suitable only where Article III prosecutions would not be feasible.

The Bush Administration agreed that Article III terrorism prosecutions played an important part in our Nation's counter-terrorism efforts, and we counted many successes in winning convictions against terrorists and terrorist supporters apprehended in the United States through the traditional methods of law enforcement. When it came to the prosecution of aliens captured and detained abroad by our military and intelligence forces, however, President Bush determined, consistent with historical precedents, that military commissions were the appropriate forum for trying the "unlawful enemy combatants" or "unprivileged belligerents" who had committed war crimes against our civilians or our military forces.

This month, in passing S. 1390, the Senate expressed its agreement with this approach. Section 1032 of the Senate bill expresses the "Sense of Congress" that "the preferred forum for the trial of alien unprivileged enemy belligerents" subject to military commissions "is trial by military commissions." In other words, according to the Senate, the Guantanamo detainees are military detainees and where they have committed crimes, they should be treated as war criminals and prosecuted before military commissions, not Article III courts.

In contrast with the Senate, the Obama Administration's view has been less clear. In his speech at the National Archives, President Obama stated that "whenever feasible," his

Administration would try individuals who violated U.S. criminal law in Article III courts. In its Preliminary Report, the Detention Policy Task Force echoes the President's statement by identifying "a presumption that, where feasible, referred cases will be prosecuted in an Article III court." At the same time, the Task Force suggests that the feasibility of Article III prosecutions would not be the only interest at stake, for "where other compelling factors make it more appropriate to prosecute a case in a reformed military commissions, it may be prosecuted there." Those other factors require prosecutors to look at "the nature of the offenses to be charged," the "identity of the victims of the offense," "the location in which the offenses occurred," "the context in which the individual was apprehended," and the "investigating entities" that gathered the relevant evidence.

Read one way, the Administration would establish a presumption that military commissions would be used only as a last resort, when Article III prosecutions could not go forward. If that were the case, the Administration would risk undermining the legitimacy of the commission system, creating a perception of a two-tiered justice system, wherein the question whether a detainee was tried in the Article III system or in the military commission would turn solely upon the quality of the prosecution's evidence. Where feasible, detainees would receive full due process, while in other cases, detainees would receive "due process lite." Such a system of discrimination, however, gives short shrift to the military judges and military lawyers who operate the military commission system and would hardly be a recipe for building domestic and international confidence in the system.

Read another way, however, the presumption is merely that, a thumb on the scale, and the Task Force asks prosecutors to examine the nature of the underlying case, so as to separate

terrorism cases sounding in civilian law enforcement from those that are primarily military in nature, such as where the asserted war crimes took place in Afghanistan or where they were directed at American military forces. In other words, even if an Article III prosecution may be theoretically possible on a terrorism charge, the Task Force would leave the door open to trying Guantanamo detainees before military commissions where there offenses are primarily war crimes. If that were the case, most of the Guantanamo detainees would likely remain within the military commission system, which as the Senate has recognized, is the appropriate forum for the prosecution of such wartime detainees.

No doubt the most important decision the Obama Administration will have to make in this regard is assessing the appropriate venue for the prosecution of those who conspired to commit the attacks of September 11, 2001. Right now, the United States has brought military commission charges against five individuals for their involvement in the attack, including Khalid Sheikh Mohammed, who has admitted to being the mastermind of the plan. Will the United States continue to regard the September 11th attack as an act of war, or will we treat the attacks as mere violation of criminal law, like the Oklahoma City bombing, suitable for prosecution in our ordinary criminal courts? The Obama Administration has not yet spoken with one voice on this issue, but it will make its views on this and related matters clearer in the context of the prosecution decisions it makes in the months ahead.

Reforms in the Military Commission System

In recent weeks, Congress and the Obama Administration have discussed a number of amendments to the MCA. The Senate's reform proposals are reflected in Section 1031 of S. 1390. The Administration has expressed support for most, but not all, of those proposed

modifications, and in addition, has recommended some additional changes. Although I would be happy to discuss any of those proposals this afternoon, I would like to say a brief word about two off them, the Obama Administration's proposal to adopt a "voluntariness" standard for the admissibility of statements and the suggestion that Congress should remove "material support for terrorism" as a war crime under the MCA.

Voluntariness Standard

The Administration's proposed "voluntariness" standard would take aim at the rule that has proven to be the most controversial provision of the MCA, the rule that purportedly would allow the admissibility of so-called "coerced statements." I think it is prudent for the Administration to seek to amend this rule given the taint that it has given to the military commission proceedings. That said, the controversy over the rule has in many ways been unfortunate, because military commissions no more permit the admission of "coerced statements" than do the International War Crimes Tribunals for the Former Yugoslavia or for Rwanda. Reflecting the realities of wartime circumstances, both the U.N. war crimes tribunals and the American military commissions direct the judges to evaluate the reliability of proffered statements and the impact that their admission could have on the nature of the proceedings, what the U.N. tribunals call the "integrity of the proceedings" and what the MCA describes as the "interest of justice." In practice, our military judges have proven themselves quite adept at determining which statements are reliable and appropriate for use as evidence in court, and I am aware of no instances of "coerced statements" being admitted at commission trials.

Under the MCA, any statements obtained by torture are flatly deemed inadmissible, as are any statements obtained in violation of the Detainee Treatment Act of 2005's prohibition on

"cruel, inhuman, and degrading treatment." Beyond those rules, however, it can be difficult to assess the "voluntariness" of statements obtained under inherently coercive wartime circumstances. We do not want captured enemies to believe they have the "right to remain silent" when it comes to our intelligence-gathering efforts. And when the accused has been questioned while surrounded by armed U.S. soldiers, it may be difficult to assess what constitutes a truly "voluntary" statement. For these reasons, rather than focusing on voluntariness as such, the MCA provides that statements should only be admitted where they are "reliable" and it would serve the "interest of justice" to admit them.

The Administration would propose to amend this standard so as to replace the existing rule with a "voluntariness" standard. There is something to be said for amending the rule, so as to dispel once and for all the perception that commission verdicts are tainted by coerced evidence and to bring the commission standard closer in line with the constitutional standard applied by the federal courts that will sit in review on those judgments. Senior military lawyers, however, have expressed concern that the "voluntariness" standard, developed originally in the domestic law enforcement context, would not be sufficiently tailored for wartime circumstances. Those concerns perhaps may be addressed by ensuring that any amendment adopting a "voluntariness" standard provides military judges with appropriate guidance so as to ensure its proper application in the wartime context. In practice, military judges have come close to adopting a voluntariness standard by making their admissibility decisions on a case by case basis. An amendment that takes those decisions into account could both improve both the workings and the perceived legitimacy of the commission proceedings.

Material Support for Terrorism

The Administration also has questioned whether the offense of "providing material support for terrorism" has sufficient roots under the law of war to be properly charged by military commission. The "material support" offense recognizes that it is an offense under the law of war to enlist oneself in a terrorist organization, such as Al Qaeda, or to otherwise provide funds or materials to help that organization accomplish its goals. Under the MCA, Congress exercised its constitutional authority to "define and punish … Offences against the Law of Nations" and declared that "material support" was among those war crimes we would prosecute by military commission. Not surprisingly, in the three years since, the "material support" offense has been a common charge in the military commission cases, one found in most, if not all, of the two dozen cases that have been charged so far. Like some in the Administration, the Al Qaeda members in the commission cases have questioned whether "material support" constitutes an established offense under the law of war, but so far, the military judges have squarely rejected those claims.

In truth, there is a strong basis for Congress's recognition that "material support" constitutes a war crime. It is no doubt true that the term "material support" was first coined under Title 18 of the U.S. Code, but the offense under Title 18 is broader than that of the MCA, extending beyond conduct associated with an armed conflict and beyond the "unlawful enemy combatants" or "unprivileged belligerents" who are triable by military commission. For purposes of the law of war, the question whether "material support" states an established offense does not turn upon the origins of the label, "material support," but upon whether the underlying wartime conduct has been recognized as a violation.

As the military judge explained in *United States v. Hamdan*, in rejecting the defendant's motion to dismiss the charge, the United States recognized long ago that those who provided support to an unlawful armed forces could themselves be subject to punishment under the law of war. *See United States v. Hamdan*, Ruling on Motion to Dismiss (Ex Post Facto) at 4-6 (July 14, 2008). During the Civil War, for instance, the United States prosecuted by military commissions "numerous rebels … that furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation" for the purpose of engaging in sabotage operations behind Union lines. *Id.* at 4 (quoting H.R. Doc. No. 65, 55th Cong. 3d Sess. 234 (1894)). Indeed, the United States found such individuals "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission." *Id.* (quoting Winthrop, *Military Law and Precedents* 784). In view of these historical precedents, the United States is well justified in prosecuting Al Qaeda members who do the same in support of the enemy in Afghanistan or elsewhere.

Moreover, it cannot be denied that acts of terrorism themselves constitute a violation of international law and, when associated with armed conflict, a war crime. U.N. Security Council Resolutions condemn terrorism and require that all States criminalize it, and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, the murder of innocent civilians, and other acts of terrorism. *See Hamdan*, *supra*, at 3. The MCA defines an act of "terrorism" itself to be a war crime, and the Administration has not questioned the legitimacy of that charge. Insofar as the underlying acts of terrorism would violate the law of war, Congress was well within its authority to conclude that those who provide material support

to a terrorist force, and therefore make such acts of terrorism possible, could themselves be charged with a separate offense triable by military commissions.

The "material support" charge gives the prosecutors an important weapon in building their cases, and prosecutors have used the offense successfully in obtaining verdicts or guilty pleas in the early commission cases. I believe it would be a mistake, absent any adverse court decision, for Congress to adopt the losing arguments of the Al Qaeda members in those cases and simply to remove "material support" charge from the prosecutors' arsenal. Rather, prosecutors should be permitted to charge "material support" when the evidence would support the claim and to defend the lawfulness of the charge in court, as they so far have been successful in doing.

* * *

The use of military commissions for the prosecution of members of Al Qaeda, the Taliban, and its affiliates has been the subject of great discussions since the attacks of September 11th. It is certainly a worthwhile subject for the attention of this Subcommittee. I appreciate the opportunity to participate in the discussion today, and I look forward to your questions.

Mr. NADLER. I thank you.
Mr. Fidell?

TESTIMONY OF EUGENE R. FIDELL, SENIOR RESEARCH SCHOLAR IN LAW AND FLORENCE ROGATZ LECTURER IN LAW, YALE LAW SCHOOL

Mr. FIDELL. Thank you.

Mr. Chairman, I am not going to read my statement at all. I would just like to make a few comments. To begin with, I appreciate your mention of my alma mater. As Daniel Webster said of Dartmouth College, "it is a small school, yet there are those who love it."

Second, I would like to comment that I am here in my capacity as president of the National Institute of Military Justice. We have been deeply involved with the military commissions issues from the beginning.

We have had observers from our staff and our advisory board and board of directors go to Guantanamo. We have generated a little pamphlet, which I can leave with you if you like.

We don't have a party line. Our observers see things differently from person to person. I think they are quite interesting reading. I commend this to you.

And let me mention that I am extremely proud that we have generated a volume of law reports, the Military Commission Reporter, gathering in one place all of the rulings of the military judges and the military commissions as well as the rulings—the unclassified ones—of the Court of Military Commission Review.

Frankly, we had thought this would be a historical document, and it turns out, of course, that events seem to be heading in a direction where we are going to be living, for better or worse, with military commissions for some time.

And before I leave that subject, I am happy to say that there are two members of the NIMJ staff present observing democracy in action here today. I am extremely pleased to recognize them. They spent the morning in Judge Ellen Huvelle's courtroom watching the proceedings that have been mentioned already. So what an exciting day for these young people.

There are three points I would like to make. First, I would like to talk about transparency. Second, I would like to talk about appellate review. And third, I would like to talk about voluntariness.

On the transparency point, you already mentioned, anticipating a point that I wanted to stress, the real importance of everyone seeing the Office of Legal Counsel opinion that has been mentioned.

You can't have a discussion—and I think no Member of the House should—can be expected to act responsibly, to vote responsibly and intelligently on pending legislation without access to that opinion.

We have lived through several years now of secret law from the Office of Legal Counsel. It has been a national disgrace.

And right-minded people such as Dawn Johnson, whose nomination, surprisingly, is still pending in the other body, has worked to reform the Office of Legal Counsel, reform that process and keep it on a very solid, professional footing.

We really all ought to see the Office of Legal Counsel opinion. That is this Administration's view of what due process entails.

Second, with respect to, again, transparency, I would hope that some effort could be made to require the Department of Defense to use notice and comment rule-making when it changes the manual for courts martial—manual for military commissions.

This is an easy one. It will help foster public confidence in the administration of justice. Yes, changes to the manual do have to be reported to Congress in advance, but why not use the normal process that we are familiar with through the Administrative Procedure Act, which admittedly doesn't apply here?

But still, Congress might give serious attention to either amending the MCA or putting in some real, real strong language in a conference report saying, "Look, let the people participate in the rulemaking process." That is where a lot of the implementing rules get made. So I would like to put that on the table.

The final point with respect to transparency—and it goes back to our "1 M.C." law reporter—I hope that the Defense Department can be encouraged to get a more user-friendly Web site. We are happy to do this. We think it is important. We are proud of our work in putting out the Commission Reporter.

It was a lot harder than it should have been. I think we, members of the public, people around the world, Members of Congress, your staffs should be able, with much less difficulty, to find out what the rulings have been rather than have it haphazard.

With respect to appellate review, it is a good thing that the Senate bill includes appellate review by the Court of Appeals for the Armed Forces. It is incomprehensible to me that the MCA, which as previously was indicated, was passed kind of under the gun in 2006, provided for a review by the D.C. circuit.

I have infinite respect for the D.C. circuit. I have practiced there for many years. I have also practiced for many years before the now Court of Appeals for the Armed Forces. You are dealing with military law of a kind, and that is supposed to be our expert body.

Make sure, I hope, that the House conferees are solidly behind the Court of Appeals for the Armed Forces. They can do the job. They have the time. And it will provide a sort of coherence to these bodies of law.

My final point concerns voluntariness. Voluntariness should be the test for admissibility of statements. I will say, as I think Mr. Johnson pointed out, Article 31 of the UCMJ does not apply. It was specifically carved out in the MCA. It should be carved back in.

All you have to do is look at Article 31(d) of the UCMJ. That is the provision that says you cannot use evidence obtained by unlawful threats or even unlawful inducements. I cannot come up with a plausible reason for having a different test in this context than in the court-martial context.

That is all I have, Mr. Chairman.

[The prepared statement of Mr. Fidell follows:]

PROPOSALS TO REFORM THE MILITARY COMMISSIONS SYSTEM

Testimony of

Eugene R. Fidell

President, National Institute of Military Justice

and

Senior Research Scholar in Law and Florence Rogatz

Lecturer in Law, Yale Law School

Hearing Before the Subcommittee on

the Constitution, Civil Rights and Civil Liberties

Committee on the Judiciary

U.S. House of Representatives

July 30, 2009

Chairman Nadler, Ranking Member Sensenbrenner, Chairman Conyers, and Members of the Subcommittee:

Thank you for inviting me to testify about military commissions.

I am a Senior Research Scholar and Florence Rogatz Lecturer in Law at Yale Law School, where I have taught military justice since 1993. I am also president of the National Institute of Military Justice, a nonprofit organization founded in 1991 to advance the fair administration of justice in the armed forces and to foster improved public understanding of military justice. NIMJ has been deeply involved in military commission issues since shortly after President George W. Bush revived them in November 2001. We have published an annotated guide to the original military commission rules, four volumes of *Military Commission Instructions Sourcebooks*, and, earlier this month, the first volume of the *Military Commissions*

Reporter, which collects all of the commissions' rulings from 2006 to 2009. We have presented congressional testimony on several occasions and have filed numerous amicus curiae briefs. We have sent observers to Guantanamo to attend and report on military commission hearings. We do not represent individuals, and neither NIMJ nor I have ever personally represented a Guantanamo detainee or military commission defendant.

I would like to make four basic points.

First, military commissions are not "normal," and we must never lose sight of that. Although they have been used in a variety of contexts since the Mexican War, they plainly are not one of the brighter chapters in our legal tradition—unless you think the mass hanging of Indians in Minnesota or the military trial of the Lincoln Conspirators while the local courts here were open was a good thing. Other doubtful chapters include the use of military commissions in our

effort to suppress the Philippine Insurrection and the unfair proceedings against General Yamashita after World War II.

Military commissions remain a far cry from the familiar process of military justice that we employ in ensuring good order and discipline within our armed forces. They are an even farther cry from trials in our federal district courts. Those courts—the jewel in the crown of our legal system—have earned the respect not only of our own people but of fair-minded observers around the globe. Public confidence in the administration of justice is a key element of our national strategy to defeat terrorism. That means public confidence both here and abroad. We cannot get from where we are now to where we need to be by trying to fashion a "reformed" military commission system 3.0.

Earlier this year, President Obama spoke of military commissions (among other things) at the National Archives. His remarks unfortunately could be interpreted as

suggesting that commissions are a normal part of the fabric of American law. The temptation to do so should be resisted, for reasons I set forth in an op-ed in *The New York Times*. I request that it be made a part of the hearing record. Without suggesting that the history of military commissions is all negative, they have too often been put to uses of which we have little reason to be proud. We must remain alert to the danger that they will, by degrees, become normal rather than a disfavored exception.

Second, and as a corollary to the first, every effort should be made to ensure that military commissions, assuming they are ever to be used, are used no longer than is strictly justified. This means careful policing both at the beginning and the end of the pertinent time-frame. Only if the very limited conditions warranting military commissions have been met should they be employed, and then they should be terminated once the need has passed. Any military

commission legislation should therefore be subject to a sunset provision. Military commissions should never be a permanent feature of our legal system. Remember: we got along without them for over half a century following World War II, despite our involvement in numerous armed conflicts, large and small.

Third, every aspect of military commissions should be governed by a policy to limit rather than to expand their use. Thus, the jurisdictional definitions, both as to what kinds of conduct would be subject to trial by military commission (in other words, subject matter jurisdiction) and as to who should be subject to such trial (personal jurisdiction), should be as narrow as possible. If an offense is not known to the law of armed conflict, such as conspiracy, "material support" or spying, try it in some other forum. Any doubt should be resolved against, rather than for, the exercise of jurisdiction by these exceptional courts. If we do not apply this stringent

test at every turn, you will have created a "national security court" in camouflage. I do not believe our country is ready for such courts.

Fourth, even if a case and an individual are plausibly within the jurisdiction of a military commission, the strongest preference must be given to available trial options in the Article III courts. The recent Sense of the Senate resolution favoring trials by military commission has the telescope turned in precisely the wrong direction. It is fortunate that the resolution lacks the force of law.

In 2006, I testified before the Senate Armed Services Committee that Congress should insist that no case be tried by a military commission unless the Attorney General has personally certified that it could not be tried in district court. That still seems to be the best approach, and I hope the current Administration will apply it or something like it. However, it is important to stress that mere prosecutorial

difficulty or inconvenience or embarrassment to the government arising from a district court prosecution cannot be enough to justify resort to the extraordinary process of a military commission. Only when the politically-accountable Attorney General assures the country, with particularity, that a given case lies outside the complex web of PATRIOT Act-era or earlier civilian criminal law prohibitions should charges be referred to a military commission.

The process described in the Detention Policy Task Force's July 20, 2009 protocol on Determination of Guantanamo Cases Referred to Prosecution falls short. It speaks of "feasibility" of prosecution in federal court, but the preference for civilian trial is merely a presumption, and one that can be overridden based on broad factors that leave far too much to discretion: "strength of interest," "efficiency" and "other prosecution considerations." For example, "evidentiary problems that might attend prosecution in the

other jurisdiction" enables forum-shopping that should be rejected. Similarly, it is difficult to see why the fact that the armed forces have sunk investigative costs in a case should play any role in deciding whether an offense should be tried in a military commission rather than in district court. This is not to suggest congressional micromanagement of prosecutorial decisions, as these are quintessentially within the ken of the Executive given the President's duty under Article II, § 3 of the Constitution, to "take Care that the Laws be faithfully executed." Still, Congress can and should impose limits rather than permit a matter as sensitive as this to be so unstructured.

In 2006, Congress enacted the Military Commissions Act under tremendous pressure from the White House and, as far as I could determine as an observer of the passing scene, out of concern for permitting the subject to be made an issue in that year's congressional elections. The result

was most unwise. It left us with the traditional military justice system which permits war crimes to be tried by general courts-martial, a set of military commissions for trying war crimes by lawful combatants, and yet another set of military commissions for trying war crimes (and other offenses) by unlawful combatants.

The result is senseless. We don't need two flavors of military commissions; indeed, we may not even need one. I would therefore advise that the MCA be repealed and if military commissions prove necessary, let them conform with general court-martial procedures and rules subject to a very few exceptions such as dispensing with the need for a pretrial investigation. The current arrangement, whereby three distinct systems exist, is needlessly complex and an open invitation for yet more years of litigation.

Two weeks ago I prepared some notes on aspects of the Senate bill (as it then stood) that might have been improved.

I ask that my slightly updated version be made part of the record. Even if all of the questions in those notes were resolved in the manner indicated, I would still restore the (pre-MCA) status quo ante. And in any event I would encourage the Subcommittee as well as those who will be responsible for both the administration and judicial review of any future military commissions to bear in mind the four basic points set out in this testimony as a way to minimize the insult to our constitutional system.

I will be happy to respond to your questions.

EUGENE R. FIDELL is Senior Research Scholar and Florence Rogatz Lecturer in Law at Yale Law School, where he teaches military justice, among other subjects. He also serves as president of the National Institute of Military Justice, a nonprofit organization affiliated with the American University Washington College of Law. He served on active duty as a judge advocate in the U.S. Coast Guard from 1969 to 1972 and is co-author, with Prof. Elizabeth Lutes Hillman and Colonel Dwight H. Sullivan, of MILITARY JUSTICE: CASES AND MATERIALS (LexisNexis 2007). He is of counsel to the Washington firm Feldesman Tucker Leifer Fidell LLP.

The New York Times

June 14, 2009

OP-ED CONTRIBUTOR

The Trouble With Tribunals

By EUGENE R. FIDELL

IN a Manhattan courtroom last week, the first Guantánamo detainee to face a trial in a civilian court pleaded not guilty. President Obama has indicated that other terrorism cases will likewise be tried in the federal courts, but that does not necessarily spell the end for military commissions. In a speech at the National Archives in May, he confirmed that the commission system won't be abolished, merely revised.

Whether his proposed changes will substantially improve the military commissions and increase public confidence in the commissions' administration of justice will be the subject of debate in the coming months and years. There is, however, a more fundamental question: the president's assertion that military commissions have long played a respectable role in American legal history.

The history is more ambiguous than many have assumed, and is not one of which we have much reason to be proud. Let's consider the high points typically cited.

A board of general officers conducted an inquiry into the spying case of Maj. John André, a British officer, in 1780. Whether that board or the one convened in another Revolutionary War spying case constituted a military commission is open to doubt. At the time, of course, the country was an actual battleground and there were not yet any civilian federal courts. But these inquiries were isolated events and hardly a solid starting point for an entire system of justice.

Fast forward more than half a century to the Mexican-American War. Gen. Winfield Scott, who commanded the American contingent in southern Mexico, found his forces in a partial legal vacuum, as the Articles of War — the Army predecessor of the Uniform Code of Military Justice — did not cover non-military offenses. He had no alternative but to create a system of military commissions to try both American soldiers and enemy civilians.

Congress did not even acknowledge Scott's system until 1862, when it did so backhandedly: the legislation dealing with the position of judge advocate general simply noted his duty to review military commission cases.

During the Civil War and Reconstruction, military commissions were used in a variety of settings. Famously, the Supreme Court forbade their use in states that had not seceded and in which the courts were open. In the South, however, civilian courts were closed or could not be relied on to prosecute offenders against the Union.

A commission was actually convened to try the conspirators in the Lincoln assassination. Why? The Civil War was for all practical purposes over by then and it was almost certainly the wrong impulse not to trust the

District of Columbia's courts.

Military commissions were occasionally used during the so-called Indian wars. An 1862 commission trial after a Sioux uprising in Minnesota led to the largest mass hanging in American history, even after Abraham Lincoln spared a number of those who had been condemned. Is the genocidal war our country waged against the original inhabitants a chapter of which we are proud?

We used military commissions in the aftermath of the Spanish-American War. But our efforts to suppress the Philippine insurrection of 1898 were brutal and in service of a blatantly imperialistic cause; and whether these commissions were conducted fairly or not, the setting is not one to be held out as a model for the 21st century. At least those commissions were conducted in the field — unlike the Guantánamo commissions.

Many Americans have heard of the military commission that convened in 1942 to try eight German saboteurs. But few are aware that a major reason the case was tried by commission rather than in the federal courts was that federal law at the time did not prescribe harsh enough penalties for what they had attempted to do. That is obviously not so today, thanks to the Patriot Act and other legislation passed since World War II.

In its review of the saboteurs' case, Ex parte Quirin, the Supreme Court did sustain the military commission's jurisdiction — but, in a discomfiting move, did not even release its legal reasoning until months after six of the Germans had been electrocuted. Though the ruling was unanimous, Justice Felix Frankfurter declared that Quirin was "not a happy precedent."

Other commissions were held in the aftermath of World War II. Gen. Tomoyuki Yamashita, the Japanese commander in Manila, was hanged after an appallingly unfair military commission trial. Here again, at least his case was held overseas, not in territory over which the United States had full power to use its regular courts.

In 1950, Congress passed the Uniform Code of Military Justice, which substantially upgraded the military justice system and reduced the disparities among the disciplinary laws governing the various branches of the armed forces. From 1951, when the code took effect, until 2001, when President George W. Bush set the stage for the Guantánamo tribunals, we did perfectly well without military commissions, despite numerous armed conflicts, large and small — and despite a growing engagement with terrorism.

This is not to say that no military commission has ever been conducted fairly or in a worthy cause. At times the commissions' work has been acceptable, especially when they applied general court-martial standards. Nonetheless, the history of our military commissions brings little credit on our country. We should not invoke that history without recognizing the combination of doubtful goals and missed opportunities to use other forums. The coming new-and-improved model of military commissions — our third effort in less than a decade — is unlikely to inspire confidence here or abroad in our administration of justice.

There is a second point to be made concerning President Obama's recent speech. At no point did he give a detailed explanation of why military commissions had to be used rather than the federal district courts, or why some detainees will have full procedural safeguards in federal court while others will be afforded fewer rights before a military commission.

This is not a matter to be addressed generically. Rather, it is incumbent on the administration to state why any particular case cannot be tried in the federal courts. Those courts are open, and have demonstrated that they can try terrorists in ways that bring honor on our country and fully respect our legal values.

The issue is not whether it is easier or more convenient to use military commissions, but whether the conduct sought to be punished is literally outside the complex web of criminal provisions Congress has enacted over the years, including the Patriot Act.

President Obama justifiably reminded his audience at the National Archives that the last administration left the country with a terrible, and terribly complicated, legal mess. His personal commitment to the rule of law cannot be doubted. Nonetheless, unless his administration explains why specific cases cannot be prosecuted in the federal courts, it will have done no better than its predecessor on a pivotal threshold issue.

Eugene R. Fidell teaches military law at Yale Law School.

S. 1390, NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2010

NOTES ON § 1031, MILITARY COMMISSIONS

1. Section 948b(d): why exclude application of the speedy trial rule and UCMJ art. 31?

2. Section 948c: overbroad definition of persons subject to trial by military commission. This would confer jurisdiction over persons who have never been on the battlefield, for nontraditional war crimes like material support and terrorism.

3. Section 948d would permit military commissions to try spying charges

4. Section 948j makes no provision for terms of office for military judges, in contrast to Army regulations that provide for 3-year terms for military judges in courts-martial.

5. Section 948r would permit evidence obtained by means of cruel, inhuman, and degrading treatment so long as it's reliable and not a product of one of the specific methods noted in § 1003 of the Detainee Treatment Act.

6. Section 949a(b) authorizes the Secretary of Defense to depart from general court-martial procedures under a very fuzzy standard ("unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need"). Any guaranteed opportunity for public comment before submission to Congress? *See* § (d) (last page).

7. Section 949a(b)(2) is unclear: does the accused have a right to probe the government's non-live evidence by interrogatories or other means of discovery?

8. Section 949a(b)(3)(D) allows the use of hearsay evidence that would never be admitted in a general court-martial or district court, and well beyond the parameters actually applied in international criminal tribunals such as the International Criminal Tribunal for the Former Yugoslavia.

9. Section 949d(c)(4) seems to depart from general court-martial procedures for classified information. Why is any departure necessary? Why is there no provision for dismissal if the military judge finds there is no adequate substitute and the information is deemed essential to the defense?

10. Section 949j erects a "reasonable opportunity" standard in place of UCMJ art. 46's "equal opportunity" standard for access to witnesses and other evidence. Why the difference? The military commissions had denied the defense access to high-

value detainees. Will that denial continue to be possible under the amendments? If so, why?

11. Section 950f provides for review as of right by the Court of Appeals for the Armed Forces. If enemy combatants are entitled to this, why not our own military personnel, who (except for those sentenced to death) must show "good cause" under the UCMJ. This part of the bill is good, but raises a question as to why most court-martial appellants cannot even seek certiorari from the Supreme Court (because the Court of Appeals has denied discretionary review). Congress should pass this provision, but it would be a disgrace to do so without putting GIs' cases on the same footing with respect to eligibility for Supreme Court review. *See* S. 357 (Sen. Feinstein); H.R. 569.

12. Section 950p(c) permits military commission trials only if the offense is committed in the context of and associated with armed conflict. This loose standard could sweep in non-battlefield conduct not subject to trial by military tribunals under the law of armed conflict.

13. Section 950u: four Justices in *Hamdan* did not believe conspiracy is a crime under the law of armed conflict. Including it is a misuse of the military commission as an institution.

14. What new matter in the amendments made by § 1031 addresses the specific problems of independence of trial and defense counsel that have repeatedly arisen under the MCA?

Mr. NADLER. I thank you.

We are expecting votes soon, and so I am going to be fairly strict in adhering to the 5-minute time line. I hope we will be able to get

this all in before the votes, so that we don't have to ask you to stay until the votes are over.

I recognize myself first.

Mr. Fidell, in your written statement, you note that any military commission system must be appropriately limited in terms of who can be charged and for what crime.

Do the amendments made by the Senate bill to the MCA set the correct standards of jurisdiction? What, if any, further changes are needed?

Mr. FIDELL. The changes go in the right direction, but as you will see from my statement—and here, I have to respectfully disagree with Mr. Engel, or at least a part of Mr. Engel's presentation. I think it is quite dangerous to accede to the notion that military commissions are kind of normal and accepted.

I personally disagree that they date back to President Washington's—not his Administration, but to his term as commander in chief of the Continental Army.

They should be limited in duration and subject matter and in personal jurisdiction, and any——

Mr. NADLER. And do you——

Mr. FIDELL [continuing]. Anything that can be done in that direction should be done——

Mr. NADLER. Can you give us in writing your recommendations as to what those limitations should be?

Mr. FIDELL. Yes. Some of those——

Mr. NADLER. Thank you.

Mr. FIDELL [continuing]. Appear in an appendix to my testimony.

Mr. NADLER. Thank you.

Major Frakt, you note the lack of a minimum age limitation for military commissions. Your client has been referred to by some as a child soldier. You testify he may have been as young as 12 when captured in 2002.

How might an age limit have changed his confinement and possible prosecution?

Major FRAKT. I am sorry, Mr. Chairman. I didn't hear the last sentence.

Mr. NADLER. How might an age limit have changed his confinement and possible prosecution, if we had had an age limit?

Major FRAKT. Well, Mr. Chairman, it certainly would have precluded a prosecution. Had we complied with the optional protocol on the involvement of children in armed conflict, which the United States signed and ratified in 2002, he would have been treated very differently.

He would not have been confined with adult prisoners. He would have been provided opportunities for rehabilitation and reintegration. And the U.S. in a report to that committee did acknowledge that both he and Omar Khadr were juveniles.

Mr. NADLER. Thank you.

Now, Major Frakt, the Administration has indicated that it will seek to detain individuals deemed dangerous, even if acquitted, based on its authority to hold individuals for the duration of hostilities, presumably as enemy combatants or whatever it is calling them these days.

What, in your view, is the extent of this authority? Who would it possibly cover?

Major FRAKT. Well, I am skeptical about this alleged category of people that are too dangerous to release but yet can't be prosecuted. No one has ever identified any such individual.

If we are confident that a person is—poses a danger to the United States, that should be based on past conduct, which should be prosecuteable, at a minimum, for material support of terrorism, which is a very flexible crime and it covers——

Mr. NADLER. So you are skeptical——

Major FRAKT [continuing]. A lot of conduct.

Mr. NADLER [continuing]. That there could be anybody in this third category.

Major FRAKT. Yes. But if there were, and it is troubling, the idea of someone being acquitted and then continuing to be held. But I do understand the distinction between the authority to hold someone under the law of war and the—versus for criminal prosecution.

What I would say—and this is what we do in the Air Force—if someone is prosecuted and acquitted, then whatever they were charged with cannot be the basis for subsequent administrative action—for example, if we wanted to administratively discharge someone.

So if there were some other basis, other than what they were prosecuted for and acquitted, to hold them, then—then potentially there could be a lawful——

Mr. NADLER. Let me ask you one further question, and please answer briefly. In your view, what evidence would be required to authorize indefinite detention, and what process would be needed to determine that?

Major FRAKT. Indefinite detention should not be authorized under any circumstances.

Mr. NADLER. Well, indefinite detention during hostilities is what we are talking about, I presume.

Major FRAKT. Well, in that case, the nature of the hostilities need to be more clearly defined.

Mr. NADLER. In law or in the case?

Major FRAKT. In law or in——

Mr. NADLER. Or in the specific case.

Major FRAKT. Well, I think the Administration needs to define how—what the conflict is and how we will know when it ends.

Mr. NADLER. And until it defines that, you can't hold someone as an enemy combatant?

Major FRAKT. Well, I think there is—clearly, we are in an armed conflict in Afghanistan, as well as Iraq, but let's say that that conflict comes to a close, as I hope it will. Are we still going to be in a war against al-Qaida and Taliban elsewhere? Probably.

So I think we have to define what the conflict is.

Mr. NADLER. That is defining the conflict in Afghanistan as one conflict, the conflict with—in Somalia as another, as opposed to a worldwide conflict.

Major FRAKT. Yes.

Mr. NADLER. Mr. Fidell, could you comment on that very briefly, please?

Mr. FIDELL. The idea, unfortunately, took root under the administration of President George W. Bush that we were in basically perpetual war.

We cannot have such a doctrine and yet also have indefinite detention, because that means detention to the end of time. It is for reasons like that that we have to rely on the Federal courts to be available in a meaningful way, as they have proven to be, ultimately, in the habeas cases.

Mr. NADLER. Thank you. Thank you.

Colonel Masciola, what are the key reforms—no, skip that one. Okay. I have exhausted my time. I yield.

I recognize the gentleman from Massachusetts.

Mr. DELAHUNT. First of all, thank you all for excellent testimony, and you are providing a great service to the country and to this particular discussion, which is very important.

I can assure you, Colonel, that I agree totally with you in terms of adequate resources, and when I hear the convening authority—you know, 46 out of 57, I am reminded of the fact that we had a convening authority that allegedly made statements about, you know, "This is about convictions, not about acquittals. We are not going to have any acquittals." It was reported in the newspaper.

That doesn't mean it is true, but if that is the case, that I find repugnant and offensive, and again adds to why we need to do—to close Guantanamo and to move forward in a way that I think you are all suggesting.

Mr. Engel, I heard you say captured on the battlefield. You know, when we talk about the military commission, and you use terms like captured by our forces—that is why I posed the question to the earlier panel about, you know, how many were actually captured by our forces.

Would you make a distinction between individuals that are captured by American forces or are bought by Americans to—on the basis of some poor Afghani or Pakistani saying that they are terrorists?

Mr. ENGEL. Well, I wouldn't distinguish the legal matter specifically with respect to who made the capture. I fully agree with you that it is very important that we make sure that the folks that we are holding are, in fact——

Mr. DELAHUNT. Is that truly——

Mr. ENGEL [continuing]. Enemies of our country. That is——

Mr. DELAHUNT. Is that truly——

Mr. ENGEL. We agree about that.

Mr. DELAHUNT. Is that truly a capture?

Mr. ENGEL. Sorry? I mean, we——

Mr. DELAHUNT. Is that a capture when we buy them?

Mr. ENGEL. I think when we invaded Afghanistan at the time——

Mr. DELAHUNT. Right.

Mr. ENGEL [continuing]. We fought with a number of local forces there and——

Mr. DELAHUNT. I understand.

Mr. ENGEL [continuing]. Benefitted from that. When we were successful in routing Afghan and al-Qaida forces at Tora Bora, they

went east and they went into Pakistan, and we had a number of highly significant captures and the like——

Mr. DELAHUNT. That is fine.

Mr. ENGEL [continuing]. Which was done by—you know, by our allies and co-belligerents, and folks—you know, and people from the government of Pakistan as well.

It is important to make sure that we have the right people, clearly.

Mr. DELAHUNT. Right.

Mr. ENGEL. And it——

Mr. DELAHUNT. We got a lot of the wrong people, unfortunately.

Mr. ENGEL [continuing]. It becomes more—it becomes more difficult when there are circumstances——

Mr. DELAHUNT. Right.

Mr. ENGEL [continuing]. In which other governments or——

Mr. DELAHUNT. But would——

Mr. ENGEL [continuing]. Foreign governments are providing that.

Mr. DELAHUNT [continuing]. Would you feel comfortable relying on information coming from the Pakistani—you know, the ISI, who were, you know, given by tribal leaders, you know, four Uighur detainees——

Mr. ENGEL. I——

Mr. DELAHUNT [continuing]. Who had absolutely, you know, nothing at their disposal to determine whether they were terrorists or not?

Mr. ENGEL. As a general matter, not speaking about the specific cases——

Mr. DELAHUNT. Okay.

Mr. ENGEL [continuing]. And intelligence information, we have relied and continue to rely upon the Pakistani intelligence services for very important information. They are an important ally in—you know, in this armed conflict, both since——

Mr. DELAHUNT. Both for——

Mr. ENGEL [continuing]. Early 2001 and——

Mr. DELAHUNT [continuing]. Us and for our enemy, I would suggest. Right. I mean, we——

Mr. ENGEL. Your other jurisdiction.

Mr. DELAHUNT. Right.

Mr. ENGEL. I think think the Uighurs is a difficult case. And it was recognized, you know——

Mr. DELAHUNT. Early on.

Mr. ENGEL [continuing]. By the—early on.

Mr. DELAHUNT. Early on by the Bush administration.

Mr. ENGEL. I mean, the Uighurs were not cleared for release on January 21, 2009——

Mr. DELAHUNT. Well, because we didn't have CSRTs then.

Mr. ENGEL. Sorry?

Mr. DELAHUNT. We didn't have CSRTs.

Mr. ENGEL. Yes—I——

Mr. DELAHUNT. On January 21?

Mr. ENGEL. Oh. Oh, right—CSRTs. Well, I mean, that system was stopped, frankly, after the Boumediene decision made clear that we would move all of the litigation to Federal court——

Mr. DELAHUNT. Do you have any comments about that system?

Mr. ENGEL. Well, that system was devised and developed based upon the model of Article 5 of the Geneva Conventions. I know that there have been individuals within the Department of Defense who have expressed critical opinions as to the administration of the CSRT system.

Mr. DELAHUNT. It was in the implementation.

Mr. ENGEL. I also know that there have been a—there have been many folks within the Department of Defense who have come and testified and defended the system.

Certainly, in its rules it was modeled after Article 5 of the Geneva Conventions, based really upon the Supreme Court's guidance.

Mr. DELAHUNT. Mr. Fidell, give me your—I will throw this out, because I do have a particular interest.

Mr. FIDELL. Look, this train ran off the tracks when the government decided not to use the procedures set out in Army Regulation 190-8. That regulation had been on the books for years. We used the Article 5 screening tribunals that are supposed to separate the wheat from the chaff, who is a POW and who isn't, to very good effect in the first Gulf War.

And it turned out that I think two-thirds or maybe three-quarters of the people who had been apprehended, have come into our custody——

Mr. DELAHUNT. Arrived on our doorstep.

Mr. FIDELL [continuing]. Arrived on our doorstep——

Mr. DELAHUNT. For $5,000.

Mr. FIDELL [continuing]. Were sent home. They served the purpose. And that is what should have been done. For that, the Bush administration has to accept responsibility. It was——

Mr. DELAHUNT. One more final question.

Mr. FIDELL. It was a blunder.

Mr. DELAHUNT. Major, I will tell you what I find particularly aggravating—and I don't usually attend classified briefings because I find they have very little value.

And I can always read them the next day in the newspaper, because they are leaked by the executive. We all know that. And of course, they are concerned about us leaking, which I really find kind of humorous.

In any event, I have heard of plea agreements where even release—paroles, I think, is the right term—where as part of the parole agreement the detainee is—has to sign something that he will not in any way discuss anything about his treatment, et cetera, et cetera. Can you comment on that?

Major FRAKT. Yes, Mr. Delahunt. There has only been one plea agreement that has come to fruition at Guantanamo, and that involved Mr. David Hicks, an Australian. And he did sign a number of conditions as part of that agreement.

And you know, people will sign anything to get out of Guantanamo. And whether that was under duress and whether it was legal I don't have any special insight into.

But I would note that what he was convicted of, which was material support for terrorism, the Obama administration has now acknowledged is not a war crime. So his conviction is very seriously in question.

Mr. FIDELL. There ought to be a law forbidding the——

Mr. NADLER. The gentleman's time has expired.

Mr. KING. Mr. Chairman, I will yield my time.

Mr. NADLER. The gentleman's——

Mr. FIDELL. There ought to be a law forbidding the extraction of any kind of signed statement as a condition of release.

Only today or yesterday the newspapers reported that the Iranian authorities, when they released young people who had been taken into custody during the recent upheaval in Iran, were being required to sign documents saying they had been treated nicely by the Iranian prison authorities.

So anything like that should be really taken with a very large grain of salt.

Mr. NADLER. I thank the gentleman.

I thank the gentleman for yielding.

All time is expired. We have 2 minutes left on the vote. Without objection, all Members—I thank the witnesses.

Without objection, all Members have 5 legislative days to submit to the Chair additional written questions for the witnesses which we will forward and ask the witnesses to respond as promptly as they can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record.

Again, we thank the witnesses for their patience and for their testimony.

With that, this hearing is adjourned.

[Whereupon, at 5:43 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

July 16, 2009

Dear Senator:

As you consider the military commission provisions in the National Defense Authorization Act (NDAA), the undersigned organizations want to make clear our opposition to resuming the use of military commissions to try terrorist suspects, even with the changes in the NDAA, as reported out of the Senate Armed Services Committee. Military commissions would be incapable of delivering on the twin goals of any effective judicial system: ensuring that justice is fair, and ensuring that justice is swift.

The military commissions, even if revised by the NDAA, depart in fundamental ways from the trial procedures that apply in Article III courts and courts-martial. These federal criminal court and court-martial procedures are designed to ensure fairness and to guard against erroneous convictions. Departing from them would result in a second-class system of justice that would lack legitimacy to the American public and around the world.

Unfair procedures not only taint trials and convictions, but also delay them. After more than seven years and two iterations of the military commissions at Guantánamo Bay, the government has secured only three convictions. If Congress revives the use of military commissions that differ from this nation's regularly constituted courts, past will become prologue: trials and convictions will be delayed by challenges in federal court, and any convictions will likely be reversed on appeal.

Instead of Congress and the Executive Branch setting up a third version of the discredited military commissions, the federal government should take advantage of the tried and true system of justice that has been available all along: the federal criminal courts, which are the same Article III courts that try and convict criminals every day. Experienced and highly-qualified federal judges are more than capable of delivering timely and legitimate trials of terrorist suspects, and dealing with sensitive classified evidence through use of the Classified Information Procedures Act (CIPA). Indeed, roughly 200 defendants have been convicted of international terrorism crimes in federal court in recent years.

Moreover, as reported out of committee, the military commission provisions of the NDAA do not meet the constitutional and policy concerns of the U.S. Department of Justice. The Justice Department testified before the Senate Armed Services Committee last week that courts are highly likely to find that the Due Process Clause of the Constitution applies to military commissions, and that some of the military commission provisions of the NDAA do not meet constitutional requirements. The Justice Department also articulated some compelling policy

concerns. It urged the Senate to address the following problems, among others, which were not resolved in the NDAA, as reported out of committee:

Inadmissibility of evidence obtained by coercion: The Justice Department testified that the NDAA provision permitting the use of at least some coerced evidence should be changed to a voluntariness standard, which is the standard that applies in federal criminal courts and courts-martial. The Supreme Court has held that coerced evidence is unreliable and its use unconstitutional. No forced confessions or other coerced evidence should be admitted. The Justice Department testified that any use of coerced evidence causes a serious risk that hard-won convictions will be reversed on appeal.

Inadmissibility of hearsay evidence: The military commission provisions of the NDAA would allow the commissions to admit hearsay evidence that would be excluded before any court in the United States, including courts-martial. The Sixth Amendment and military courts-martial rules limit the use of hearsay. The provisions should be revised to meet constitutional requirements. The Justice Department argued for additional restrictions on the use of hearsay than are included in the NDAA. However, these recommendations fall short of the hearsay rules used in federal criminal courts and courts-martial.

Adequate provision of resources to the defense: Defense teams at the military commissions have operated under resource constraints that would violate the right to effective assistance of counsel guaranteed by the Sixth Amendment, and would not be tolerated in any courtroom or court-martial in America. Although the Defense Department and Justice Department made verbal commitments to provide adequate resources, including investigatory, legal, and translation support for defendants, there is no statutory guarantee included in the NDAA as reported out of committee.

Classified evidence procedures: The Justice Department asked Congress to replace the bill's classified evidence provisions with provisions similar to those used by federal criminal courts, which apply the Classified Information Procedures Act (CIPA). CIPA provides proven procedures governing the use of classified evidence, and there is no good reason for the commissions to deviate from it. The Justice Department testified that, "importing a modified CIPA framework into the statute will provide certainty and comprehensive guidance on how to balance the need to protect classified information with the defendant's interests."

Sunset provision: The Justice Department urged the Congress to add a sunset provision to the military commissions. Congress should add a three-year sunset provision. The commissions that the NDAA would establish represent a brand new and untested justice

> system; they are, necessarily, an experiment. A sunset provision would set a date on which Congress must evaluate the commissions' performance and decide whether they should be continued, discontinued, or amended.

In addition to the problems raised by the Obama Administration with the NDAA, there are other significant problems. In particular, the definition of who can be tried before military commissions remains overly broad. The NDAA defines "unprivileged enemy belligerent" to include, not only those who have engaged in hostilities, but also those who have "purposefully and materially supported hostilities." Several recent district court opinions have held that there is no basis in the law of war for treating people who merely "support" hostilities as "belligerents." Indeed, if mere "support" were sufficient, Rosie the Riveter would have been a "belligerent" during World War II, subject to detention and trial by a military tribunal. In addition, the NDAA provisions continue to deny defendants the same opportunity that the prosecution has to obtain witnesses and other evidence. And, while the bill requires the Secretary of Defense to apply the rules of courts-martial except where otherwise specified, the bill also gives the Secretary of Defense broad authority to make exceptions – an exception that effectively swallows the rule.

While fixing the problems detailed above would improve the military commissions, it would not render them a sensible alternative to federal criminal courts under Article III of the Constitution. The reforms needed to make military commissions fair would result in commissions that are functionally identical to Article III courts or courts-martial. Under those circumstances, it makes little sense to use a duplicative system that, because it is new and untested, will be subject to protracted litigation and will be suspect in the eyes of the world.

Moreover, the commissions would lack the institutional competencies that our established courts have developed over the centuries. They would inevitably continue to be plagued with logistical "growing pains," even if their rules were scrupulously fair. Reviving the broken military commissions system once again cannot be justified when our federal criminal courts stand ready, willing, and able to dispense justice to our enemies in a manner that is consistent with the U.S. Constitution and American values.

Sincerely,

Alliance for Justice
American Civil Liberties Union
Amnesty International USA
Appeal for Justice
Arab-American Anti-Discrimination Committee
Asian American Justice Center

The Brennan Center for Justice
Center for Constitutional Rights
Constitution Project
Government Accountability Project
Human Rights First
Human Rights Watch
International Justice Network
Japanese American Citizens League
National Association of Criminal Defense Lawyers
National Institute of Military Justice
Open Society Policy Center
Religious Action Center for Reform Judaism
Rights Working Group
United Methodist Church, General Board of Church and Society

Defending Liberty
Pursuing Justice

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July 20, 2009

United States Senate
Washington, DC 20510

Dear Senator:

I write to express the views of the American Bar Association as you consider the military commission provisions in S. 1390, the National Defense Authorization Act for Fiscal Year 2010 (NDAA).

The ABA has a long history of urging the President and Congress to ensure that military commissions provide detainees the rights afforded in courts-martial under the Uniform Code of Military Justice (UCMJ) and comply fully with our international treaty obligations. These obligations include representation by counsel of choice, respect for the attorney-client privilege, adequate time and facilities to prepare the defense, the ability to examine all evidence and confront witnesses, and an independent and impartial tribunal. Longstanding ABA policy calls for zealous and effective assistance of counsel in any case, including military commission trials.

When the Military Commissions Act of 2006 was considered by Congress, the ABA expressed its concerns regarding various provisions. And since its enactment, the ABA has continued to urge the federal government to establish fair procedures that comport with due process and justice. Despite some improvements, the proposed revisions embodied within the NDAA fail to address a number of significant concerns, including those related to the use of coerced evidence, the admission of hearsay evidence, and the resource constraints under which defense counsel must operate.

First, the proposed revision to §948r of Chapter 47A of title 10, U.S. Code, would still permit the consideration of coerced evidence in military commission proceedings. The Supreme Court has held that coerced evidence is unreliable and its use unconstitutional, and the UCMJ prohibits its use.

Second, under 949a(b)(3)(D), the proposed revision to the Military Commissions Act would still permit the use of hearsay evidence. Such evidence would be excluded before any court in the United States, including courts-martial proceedings.

Third, the proposed revisions do not address any of the resource issues identified by defense counsel at the military commissions who have operated under constraints that violate the right to effective assistance of counsel guaranteed by the Sixth Amendment. The office of the Chief Defense Counsel is seriously understaffed. Legitimate requests for funding for investigators, experts, and mitigation specialists have been denied, and

even pro bono independent experts cannot participate unless the government determines that they have a "need to know." There are restrictions on the ability of defense lawyers communicating with each other and with experts, and there are still substantial problems with defense translators. Thus, there remains a serious and unfair imbalance compared to prosecution resources.

In August 2003, the ABA adopted a policy calling upon the Congress and the Executive Branch to insure that all defendants before any military commission receive the zealous and effective assistance of counsel. The importance of this representation is even greater when the death penalty is sought. In recognition of the unique demands upon counsel in death penalty cases, the ABA promulgated Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the "Guidelines") in 1989. These Guidelines have become the preeminent nationally recognized standards on this subject, have been adopted by numerous jurisdictions, and are widely relied upon by the bench and bar in setting forth the minimal requirements for defense counsel in capital cases. The Guidelines were revised in 2003 to apply specifically to military commission proceedings.

The Guidelines call for defense teams – consisting of at least two qualified attorneys, one investigator, and one mitigation specialist – with sufficient experience and training to provide high quality legal representation to those who face execution if convicted. We are concerned that there still exists a significant imbalance between the resources allocated to the prosecution, including assistance from experienced Department of Justice prosecutors, and those provided to the Office of the Chief Defense Counsel.

Because of the flaws discussed above, we do not believe military commission trials as currently envisioned will provide the level of fairness that is consistent with our values and essential to our credibility in the rest of the world. Indeed, in February 2009, the ABA called for "all individuals who have been or are expected to be charged with violations of criminal law" to be "prosecuted in Article III federal courts, unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice."

The ABA believes that federal courts have proved themselves fully capable of handling these prosecutions. However, if new military commissions are established, we urge that the provisions governing the commissions and their proceedings be amended in accordance with the issues raised above.

Sincerely,

Thomas M. Susman

AMERICAN BAR ASSOCIATION

TASK FORCE ON TREATMENT OF ENEMY COMBATANTS
SECTION OF CRIMINAL JUSTICE
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
BEVERLY HILLS BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association calls upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances, and

FURTHER RESOLVED, that the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:

1. The government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client;

2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;

3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing;

4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing;

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

FURTHER RESOLVED, that Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).

REPORT

I.
INTRODUCTION

In response to the horrific attacks of September 11, 2001, the President undertook a series of extraordinary steps to bring Al Qaeda terrorists to justice and protect the American homeland. One of the most controversial was a Military Order issued by the President on November 12, 2001, which authorized the detention and trial by military commissions of Al Qaeda terrorists and others.

The structure and procedures for the proposed military commissions drew immediate and widespread criticism. Senator Patrick Leahy (D-VT), who chaired Senate Judiciary Committee hearings on the Military Order, received a letter signed by over 400 law professors and noted that legal "experts around the country are concerned that the President's Order does not comport with either constitutional or international standards of due process."[1]

The controversy intensified this year, as the Department of Defense (DoD) issued detailed procedural rules for the operation and conduct of military commission proceedings and named a military Chief Prosecutor and a Chief Defense Counsel. Media reports indicated that court facilities, more permanent prison facilities, and even an execution chamber, were being constructed at Camp X-Ray on the Guantanamo Bay Naval Base in Cuba, where more than 680 detainees from at least 40 countries were being held.[2]

On July 3, 2003, the White House announced that six Guantanamo detainees had been declared "eligible" for prosecution by a military commission.[3] While the six detainees were not officially identified by name, reports quickly surfaced that at least two were British and Australian citizens. A firestorm of criticism erupted in both countries. Members of Parliament called the planned proceedings a "charade of justice" and a "kangaroo court"[4] and 218 Members of Parliament -- one third of the lower House of Commons -- "signed a petition asserting that the British detainees could not get a fair trial from U.S. military tribunals and calling for their repatriation."[5]

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[1] Statement of Senator Leahy, "The Continuing Debate on The Use of Military Commissions" December. 14, 2001, at: http://www.senate.gov/~leahy/press/200112/121401a.html.

[2] *See* "U.S. prison camp may get death row," MSNBC, June 2, 2003, at: http://www.msnbc.com/news/919725.asp.

[3] *See* "Bush: 6 al-Qaida Captives for Tribunals," Associated Press, July 3, 2003, at: http://www.washingtonpost.com/wp-dyn/articles/A5877-2003Jul3.html.

[4] *See* Independent (UK), "Ministers condemn US treatment of suspects," July 8, 2003, at: http://news.independent.co.uk/world/americas/story.jsp?story=422737; *see also* The Guardian (UK), "MPs' fury at secret US trials of 'terror' Britons," July 8, 2003, at: http://www.guardian.co.uk/uk_news/story/0,3604,993746,00.html.

[5] *See* Reuters, "Blair under pressure over Guantanamo," July 11, 2003, at: http://www.reuters.co.uk/printerFriendlyPopup.jhtml?type=topNews&storyID=338051&basket=UK_TOPNEWS_PKG&item=PackageComponent

One of the major criticisms of the military commissions is that the fate of each detainee is wholly in the hands of their captors. The military serves as accuser, jailer, prosecutor, defense lawyer, judge, jury, and appellate authority, and are not subject even to the *procedural* rules governing courts martial, which include the right of appeal to a higher court and, ultimately, to the Supreme Court of the United States.

The rules and procedures for military commissions do allow detainees to seek the assistance of Civilian Defense Counsel (CDC) but, unlike the military justice system, the detailed (military) defense lawyer cannot be discharged, regardless of the wishes of the detainee or the CDC.

Moreover the rules, as now drafted, do not sufficiently guarantee that CDC will be able to render zealous, competent, and effective assistance of counsel to detainees.

Indeed, on August 2, 2003, the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) -- a cosponsor of this Recommendation -- decided by a unanimous vote that it would be unethical for a criminal defense lawyer to represent an accused before these military commissions because the restrictions imposed upon defense counsel make it impossible for counsel to provide adequate or ethical representation.[6]

Because the unwarranted restrictions on CDC raise serious questions about whether military commissions will be, and will be perceived by the international community to be, fundamentally fair and consistent with the high standards of American justice, the ABA Task Force on Treatment of Enemy Combatants was asked to examine the issues.[7]

Our review of the relevant Military Commission Instructions convinces us that the American Bar Association should call upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of CDC, and should oppose any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances.

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[6] We do not, by these recommendations, question the dedication of military defense lawyers. Lawyers in the military, like their civilian counterparts, are expected to give independent and zealous representation, without regard to personal consequences. Rules for Courts Martial 502(b)(6)(B). In addition, rule 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation "because of the zeal with which such counsel represented any accused." Zealous criminal defense is a military tradition and duty.

[7] The Task Force previously examined the detention of United States citizens designated as enemy combatants, resulting in policy approved by the House of Delegates in February, 2003.

II.
BACKGROUND

A. The President's Military Order

On November 13, 2001, President Bush issued a "Military Order" regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"[8]

The President's Military Order (hereafter "PMO") cited his authority as President and Commander in Chief of the Armed Forces, the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224), and Title 10 U.S.C. §§821[9] and 836,[10] and found that "for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof[11] to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."

The PMO directed the Secretary of Defense to "issue...orders and regulations... for the appointment of one or more military commissions"[12] as well as rules for the conduct of such proceedings, "including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and **qualifications of attorneys..."**[13]

The language of the PMO authorized a lower standard of admissibility of evidence,[14] permitted secret evidence and closed proceedings, and allowed convictions -- including the imposition of the death

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[8] 66 F.R. 57833 (Nov. 16, 2001), at www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

[9] 10 U.S.C. §821, which is Article 21 of the Uniform Code of Military Justice (UCMJ), provides that the "provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals."

[10] 10 U.S.C. §836, Article 36 of the UCMJ, authorizes the President to prescribe procedures "in courts-martial, military commissions and other military tribunals" and "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

[11] Pursuant to §2(a), any non-citizen whom the President determined was a current or former member of al Qaeda, or had aided or abetted terrorist acts against the United States, or had knowingly harbored such persons, would be subject to detention and prosecution.

[12] PMO, §4(b).

[13] PMO, §4(c) (emphasis supplied).

[14] Pursuant to §4(c)(3) of the PMO, evidence would be admissible if it has "probative value to a reasonable person."

penalty – by a less-than-unanimous vote. Moreover, the PMO excluded review by any state, federal, foreign, or international court.[15]

B. The ABA Response to the President's Military Order

1. ABA Task Force on Terrorism and the Law

Shortly after the 9/11 attacks, the ABA had formed a task force of experts in diverse areas of the law "to offer counsel to the country's political leaders as they consider legislation in the wake of the September 11 terrorist attacks."[16] Thus, the ABA Task Force on Terrorism and the Law (hereafter TFTL) was asked to examine the PMO, and it issued a Report on January 4, 2002.[17]

While the TFTL found historical authority supporting the establishment of military commissions in wartime under the Constitution and laws of the United States, and noted that military commissions had been used in periods other than declared war, its Report cautioned that:

> Trying individuals by military commission would be a controversial step. Military commissions probably will not afford the same procedural protections as civilian courts. The United States has protested the use of military tribunals to try its citizens in other countries. If conducted under reasonable procedures, however, military commissions can deliver justice with due process. Nevertheless, regardless of their actual fairness, many will view the verdict of a military commission with skepticism.

TFTL Report, *supra*, at pp. 13-14. The TFTL Report urged that procedures for military commissions "be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial, Manual for Courts-Martial, Preamble, paragraph 2(b)(2), and . . .conform to Article 14 of the International Covenant on Civil and Political Rights"[18] *Id.* at pp. 16-17.

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[15] *Id.* at §§4(c)(8) and 7(b)(2).

[16] News Release, "ABA Names Task Force on Terrorism and Law," September 20, 2001, at: http://www.abanet.org/media/sep01/terrorismtaskforce.html.

[17] American Bar Association Task Force on Terrorism and the Law: Report and Recommendations on Military Commissions, January 4, 2002 (hereafter TFTL Report), accessible at: http://www.abanet.org/leadership/military.pdf .

[18] The Report set forth the procedures in Article 14, which include: an independent and impartial tribunal, with the proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the defendant: presumption of innocence; prompt notice of charges, and adequate time and facilities to prepare a defense; trial without undue delay; to be present, and to be represented by counsel of choice; to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses in his behalf under the same conditions as the witnesses against him; to the free assistance of an interpreter; not to be compelled to testify against himself or to confess guilt; and to review of any conviction and sentence by a higher tribunal. *Id.*

2. Action of the ABA House of Delegates

Since the TFTL Report did not represent official policy of the ABA until approved by the ABA House of Delegates, a group of bar associations and ABA entities[19] submitted a more formal Recommendation and Report to the House of Delegates at the 2002 MidYear Meeting the following month.

Report 8C[20] urged that "procedures for trials and appeals be governed by the Uniform Code of Military Justice . . . and provide the rights afforded in courts-martial thereunder, including but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases."

Report 8C also urged that procedures "comply with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances." *Id.*

C. Military Commission Order No. 1

The first implementation of the President's Order took the form of a March 21, 2002 Department of Defense Military Commission Order No. 1, "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" ("MCO No. 1").[21]

MCO No. 1 provided for some "choice of counsel" by allowing an accused to select a "Military Officer who is a judge advocate of any United States armed force to replace the Accused's Detailed Defense Counsel..." and contained a further provision regarding civilian attorneys:

> (b) The Accused may also retain the services of a civilian attorney of the Accused's own choosing and at no expense to the United States Government ("Civilian Defense Counsel"), provided that attorney: (I) is a United States citizen; (ii) is admitted to the

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[19] The primary sponsoring entities included: The Bar Association of the District of Columbia; The Association of the Bar of the City of New York; The Bar Association of San Francisco; The Beverly Hills Bar Association; and the ABA Section of Individual Rights and Responsibilities.

[20] http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf.

[21] http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

> practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.* * * Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

See MCO No. 1, §4(C)(3)(b). The Order did not include the form of the "written agreement" required to be signed, nor did it elaborate on the provisions of the "applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings" with which civilian attorneys would have to comply.

The provisions of MCO No. 1, adopted many of the recommendations that had been made by the ABA House of Delegates in Report 8C a month earlier. As ABA Robert Hirshon observed, [22] the improvements included "basic standards of due process such as the presumption of innocence, proof beyond a reasonable doubt, unanimous verdicts in capital cases and representation by counsel of choice." However, President Hirshon stated:

> We are concerned, however, with other provisions, most notably the relaxation of the rules of evidence and the lack of an appeal to an independent appellate body with the right to certiorari review by the U.S. Supreme Court. *** We urge the Department to work with the Congress to clarify these issues before actually implementing the regulations. ***We commend the Defense Department for its efforts and look forward to a continuing dialogue.

D. The Military Commission Instructions

On February 28, 2003, DoD released a draft Military Commission Instruction that detailed the crimes and elements for prosecutions before military commissions and invited public comment. A variety of organizations and individuals provided thoughtful comments in response.

[22] http://www.abanet.org/media/mar02/hirshoncomments.html.

On April 30, 2003, thirteen months after the issuance of MCO No. 1, the DoD issued the final Military Commission Instruction for Trials and Elements for Trials by Military Commission to "facilitate the conduct of possible future military commissions."[23] At the same time, the DoD issued seven other Military Commission Instructions (MCI) which had never been released in draft form for comments.[24] The full package of eight MCIs encompassed crimes and elements of offenses, administrative guidance, and procedures for Military Commission participants.[25]

III.
THE MILITARY COMMISSION INSTRUCTIONS DO NOT ENSURE THAT DETAINEES WILL HAVE THE OPPORTUNITY TO RECEIVE ZEALOUS AND EFFECTIVE ASSISTANCE OF CIVILIAN DEFENSE COUNSEL

These recommendations focus on the issue of whether MCI No. 5, "Qualification of Civilian Defense Counsel," unduly restricts the ability of CDC to render zealous and effective assistance of counsel to detainees who may be tried by military commissions.[26]

A. The Requirements of MCI No. 5

MCI No. 5 "establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel" authorized by MCO No. 1.[27] It not only provides the basis for

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[23] The MCIs were described by DoD Deputy General Counsel Whit Cobb as "another step... towards being prepared to conduct full and fair military commissions." See, DoD News Release, May 2, 2003, at: http://www.dod.gov/news/May2003/b05022003_bt297-03.html.

[24] What had been draft MCO No. 1 appeared in final form as MCI No. 2. The National Institute of Military Justice (NIMJ) recently produced an authoritative analysis of all of the MCIs which includes copies of many of the comments submitted to DoD. In their discussion of MCI No. 2, Eugene R. Fidell and Michael F. Noone demonstrate that many of the comments were incorporated into the final Instruction. *See* Annotated Guide: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (2002), available from http://www.nimj.org.

[25] The full set of military instructions include: MCI No. 1 - Guidance on Military Commission Instructions; MCI No. 2 - Crimes and Elements for Trials by Military Commission; MCI No. 3 - Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors; MCI No. 4 - Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel; MCI No. 5 - Qualification of Civilian Defense Counsel; MCI No. 6 - Reporting Relationships for Military Commission Personnel; MCI No. 7 - Sentencing; and MCI No. 8 - Administrative Procedures.

[26] As noted above, the American Bar Association has previously urged that trials and appeals be governed by the UCMJ, with the rights afforded in courts-martial and provision for certiorari review by the Supreme Court of the United States in addition to the right to petition for a writ of habeas corpus, and that trials comply with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights. It is regrettable and unsatisfactory that the MCIs have failed to meet those standards of fairness and due process.

[27] MCI No. 5, §I.

civilian lawyers to establish their qualifications and eligibility to serve as CDC, it also enumerates critical limitations on lawyers who may seek to serve in that capacity.

The requirements for service as CDC are set forth in the Instruction and also in an "Affidavit and Agreement by Civilian Defense Counsel" attached as Annex B to MCI No. 5, which "shall be executed and agreed to without change (i.e., no omissions, additions, or substitutions)."[28] Those requirements, and the language of the Affidavit place unwarranted limitations upon the ability of lawyers to serve as CDC and render zealous and effective advocacy to their clients.

While the Affiant must acknowledge that "nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s),"[29] a later violation of the terms of the Affidavit could support a federal criminal prosecution for violation of 18 U.S.C. §1001, as happened in the Lynne Stewart case.[30]

We will deal with each of those unduly burdensome limitations in the context of each of the principles the Recommendation endorses for the conduct of any military commission trials that may take place.

1. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel aud client

Section ll (I) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following:

> I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

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[28] MCI No. 5, §3(A)(2)(e). MCI No. 5 and the Affidavit, Annex B, also reference other Instructions and Orders. We focus on this Instruction, however, because the Affidavit, a prerequisite to qualification, is what binds the CDC to abide by all of the other rules.

[29] MCI No.5, Annex B, §II(K).

[30] *United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002), later opinion *United States v. Sattar*, 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of §1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand).

That provision, which forces CDC to agree to an "invasion of the defense camp" by the government as a condition of service, clearly violates the attorney-client privilege, chills the attorney-client relationship of trust and confidence, and forces CDC to contravene the requirements of the Model Rules of Professional Conduct.

The ABA has long played a leading role in developing policies and standards governing the attorney-client privilege, the attorney-client relationship, and the preservation of client confidences. The ABA Model Rules of Professional Conduct (e.g., MR 1.6 and 3.8) and the ABA Standards for Criminal Justice, Prosecution Function and Defense Function (e.g., Standard 4-3.1), as well as many other ABA policies, are premised upon the fundamental principle that the attorney-client relationship and the attorney-client privilege are essential elements of a system of justice and have real meaning only when clients are free to have full and frank communications with their lawyers.

The core purpose of the attorney-client privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is the oldest confidential communications privilege known to the common law. *United States v. Zolin*, 491 U.S. 554, 562 (1989).

The privilege serves the interests not only of those charged with crimes, but also of society as a whole. It reflects pragmatic considerations and serves utilitarian ends. It proceeds from the recognition that the interests of justice are best served when attorneys are fully informed of all facts relating to the legal issues confronting their client.

The privilege is necessary because many clients – both the innocent and the guilty – would be afraid to speak frankly with their attorneys if the information they provided could be disclosed to others. *See Upjohn Co. v. United States, supra*, ("assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure"); *United States v. Chen*, 99 F. 3d 1495, 1499 (9th Cir. 1996) ("[T]o get useful advice, [clients] have to be able to talk to their lawyers candidly without fear that what they say to their own lawyers will be transmitted to the government.").

The guarantee of confidentiality afforded attorney-client consultations therefore serves not only the client's interest in receiving well-informed legal advice, but also the broader public interest in ensuring that the legal system produces just and accurate results.

CDC will already face daunting challenges in attempting to establish a relationship of trust and confidence with clients, because language and cultural barriers, and the clients' distrust of the military commission process.

These difficulties will be exacerbated if CDC must inform the client that even confidential and privileged conversations may be monitored without notice, and that the very officials who serve as their captors, jailers, accusers, and prosecutors will be listening to all their communications with their

attorneys.[31] Under such circumstances, the barriers to effective representation may become virtually insurmountable.

Moreover, the monitoring provision in MCI No. 5 may actually be counterproductive to the purpose behind the decision to monitor these privileged conversations. In a letter commenting on a similar Bureau of Prisons (BOP) regulation promulgated by the Attorney General in October 2001, the ABA wrote:

> . . . the monitoring will have a chilling effect on legitimate attorney-client communications that could actually harm public safety. Some detainees may well have valuable information concerning past or future terrorist activities that it would be important for the government to obtain.* * * If the detainee cannot be assured of a confidential consultation with his or her attorney, the detainee will likely not let the attorney know that he or she has this information. * * *As a result, the monitoring may cause the government to lose swift access to valuable information that could save lives or bring terrorists who are still at large to justice.

Those observations are equally relevant to the monitoring of military commission detainees. Such monitoring is unwarranted and unnecessary, and will severely limit the ability of civilian lawyers to serve as CDC and to effectively represent detainees. The government should not monitor privileged conversations, or interfere with confidential communications, between defense counsel and client.

2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial

Section I (B) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following provision:

> I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

This provision seriously hampers the ability of CDC to represent the client. He must acknowledge, and by the terms of the Affidavit, agree, that he can be excluded from critical portions of the trial and that the military defense counsel, who can not be so excluded, can not even inform him – or

[31] CDC would be ethically bound to advise the client of the monitoring provision. ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed.), Standard 4-3.1 (Commentary) ("Because it is critical to a healthy lawyer client relationship that a client not be surprised by the revelation of confidences made by an attorney sometime in the future, counsel should fully and clearly explain to the client the applicable extent of (and limitations upon) confidentiality in the relevant jurisdiction.").

the client – of what transpired. Moreover, pursuant to MCI No. 4, CDC can be denied access to "protected information" admitted against the client.

Such closed, secret proceedings are inconsistent with American standards of fairness and due process. As one prominent commentator observed:

> . . . the civilian counsel is not guaranteed presence at closed sessions of the commission and may be denied access to "protected information" admitted against the client, which would be revealed only to the detailed defense counsel, who would be prohibited from sharing that information with the civilian counsel (and possibly with the client as well -- raising issues of conviction on the basis of information to which the accused has been denied access). This provision denying counsel of choice access to critical evidence is perhaps the most important of the limitations imposed by these instructions and one that clearly has an impact on the ability of counsel to provide effective representation.

See Kevin J. Barry, "Military Commissions: American Justice on Trial," *The Federal Lawyer*, 50-JUL Fed. Law. 24, 27 (July 2003).

Since a fundamental prerequisite for service as CDC is that lawyers "must possess a valid current security clearance of SECRET or higher," the need to exclude CDC from closed portions of trials and from access to "protected information" is not readily apparent.

Indeed, in federal criminal cases involving classified information, the Classified Information Procedures Act, 18 U.S.C. App. III. Sections 1-16 ("CIPA"), has been able to balance the need to protect classified information and the right to a full and fair defense. Adoption of the procedures employed in CIPA cases would strike a better balance between ding lawyers from proceedings or barring them from effectively defending against evidence admitted at trial.

3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing

Section I (B) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following provision:

> I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the

> Defense Team in accordance with applicable, rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case.

At the outset, we should note with some approval that the above quoted language represents a recent and positive modification of the original provisions of MCI No. 5, which barred CDC from any communication with persons who were not "designated as members of the Defense Team"[32]

In addition, the revision B no longer requires that CDC perform all "work relating to the proceedings, including any electronic or other research, at the site of the proceedings."

Nevertheless, the language regarding "other individuals with particularized knowledge" is still unclear. Does it limit contact to potential fact or expert witnesses, or does it allow, as it should, that CDC are free to consult with other attorneys and seek expert assistance, advice, or counsel outside the defense team?

Based on our informal discussions with DoD officials, we are hopeful that there is no intent to unduly restrict the ability of CDC to prepare. However, because this provision is contained in an Affidavit that CDC must sign before being qualified to serve, it is important that the language is clarified -- and be precise -- in accordance with the principle set forth above.

4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing

Section II (F) of MCI No.5, Annex B, the Affidavit, requires the following attestation:

> At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

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[32] *See* Freedus, Barry, and Lattin, NIMJ Military Commission Instructions Sourcebook, *supra*, Supplemental Discussion of Military Commission Instruction No. 5 ("After releasing MCIs 1-8 on April 30, 2003, and publishing them in the Federal Register on July 1, 2003, 68 FED. REG. 39,374, DoD modified Annex B of MCI 5 without formally announcing that it had done so. Instead, it simply replaced the original version of MCI 5 on its website with a revised version that continues to bear the original April 30 date, despite the fact that it is actually Change 1)."

As Kevin J. Barry wrote in *The Federal Lawyer*, *supra*:

> This seems to be a permanent gag order, covering a very wide range of material -- for example the definition of "protected information" in ¶ 6(D)(5)(a) of the PTMC includes classifiable information, a term both broad and vague. Regrettably, the provision is not further explained or justified.

And, as Freedus, Barry, and Lattin, *supra*, observed:

> The civilian lawyer is further silenced by his promise, applicable even after the proceedings have ended, not to make any statement "public or private" "regarding" any closed sessions or any classified information. This is very broad language and could cover statements such as "I think there were far too many closed sessions," or "The Accused was unduly hampered from putting on a case because he wasn't able to see most of the evidence which was, in my opinion, unnecessarily classified."

We believe that the government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing. We urge DoD to modify this provision accordingly.

5. The government should provide for travel, lodging, and required security clearance backgrouud investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

As noted above, CDC must possess a valid security clearance of SECRET or higher. If the CDC applicant does not currently possess such clearance, he or she is required to "submit to a background investigation" and "to pay any actual costs associated with the processing of the same." MCI No. 5, § 3(A)(2)(d)(ii).

There is little doubt that most civilian lawyers who volunteer to serve as CDC will be doing so pro bono, as a public service, since few of the detainees currently at Camp X-Ray will have the financial ability to retain private civilian counsel. The costs of a background investigation can run thousands of dollars, and the cost of travel and lodging at Guantanamo may also incur substantial costs.

A DoD official has indicated that CDC will be housed at hotel quarters on the Guantanamo base, but that the hotel facility normally charges non-military personnel. Since security clearance investigations will be done for the benefit of the government, and since travel may well be by military transport and lodging will be in government facilities, it does not seem burdensome to suggest that the government should provide those "in kind" reimbursements to civilian lawyers, who will experience other financial hardships as a result of their service.

In addition, §I (B) of MCI No.5, Annex B, the Affidavit, requires CDC to attest to the following provision:

> I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

The implications for the private practitioner with existing professional obligations to other courts and clients cannot be overstated, since few lawyers would wish sign an Affidavit which binds them to jettison or ignore existing clients and pending trial obligations.

DoD officials, in informal conversations, have indicated that there was no intent to require CDC to forego or abandon his or her professional and/or family obligations. We hope and trust that is the case, but we strongly believe that the language must be clarified and amended so that it is clear that CDC can and should expect appropriate consideration will be given in scheduling proceedings to accommodating conflicting professional and ethical obligations of CDC.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

MCI No. 5 currently requires United States citizenship as a qualification to serve as CDC. We believe that a blanket ban on participation by non-U.S. citizen lawyers who otherwise possess appropriate qualifications is unwise. The Guantanamo detainees come from more than forty countries, and many may wish to have assistance from a lawyer who practices in their home country.

We recognize that the nature and extent of participation by non-citizen lawyers may be complicated in some instances by difficulties in processing security clearances, additional costs of travel and lodging, and even issues of education, training, and familiarity with the English language, and we acknowledge that the government should have discretion and flexibility in such circumstances. We note, however, that arrangements were recently made for British and Australian lawyers to participate in the trials of detainees from those countries and we believe that similar consideration should also be given to qualified foreign lawyers for other detainees.

Finally, to the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

B. Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).

In 1989, the ABA House of Delegates adopted Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Death Penalty Guidelines") which were designed to "amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel."[33]

Guideline 1.1.B of the Revised Edition, adopted by the ABA House of Delegates in February, 2003, provides that:

> These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

The Comment to that Guideline states:

> The use of the term "jurisdiction" as now defined has the effect of broadening the range of proceedings covered. **In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.**
>
> * * *
>
> These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought. (emphasis supplied).

The ABA Death Penalty Guidelines represent a consensus within the profession regarding the essential principles to guide capital defense counsel, and have been widely recognized by the courts, including the United States Supreme Court this term in *Wiggins v. Smith*, 123 S.Ct. 2527 (June 26, 2003).

The United States has long been criticized for imposing the death penalty in criminal cases, and many of those who face prosecution for death penalty offenses are citizens of those nations that have

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[33] *See also* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 12 (3d ed. 1992) ("ABA Providing Defense Services Standards") ("These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards]."); ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993) ("ABA Prosecution Function and Defense Function Standards") ("Defense counsel should comply with the [ABA Death Penalty Guidelines].").

outlawed the death penalty. If, indeed, our government decides to proceed with death penalty prosecutions, every step must be taken to insure that those detainees will have competent lawyers who are qualified to defend capital cases, and that the ABA Death Penalty Guidelines are followed and honored.

IV
CONCLUSION

The commencement of military commission trials will not only be a milestone in this nation's war against terror, it will be a pivotal moment in our nation's history. The world will be watching us as we bring these accused terrorists to trial.

In our Report concerning U.S. citizen enemy combatants, we observed that the United States is a great nation not just because it is the most powerful, but because it is the most democratic. We must not create military commission trials that are inconsistent with fundamental due process and the Bill of Rights, the very fabric of our great democracy.

The ABA House of Delegates should adopt the proposed Recommendations. Ensuring that we do not dishonor our cherished Constitutional safeguards in the name of our war against terror and that we continue to strengthen the rule of law is vital to our standing in the world community – and to our nation's very soul.

Respectfully submitted,

NEAL R. SONNETT
Chair
Task Force on Treatment of Enemy Combatants

August 2003

EXECUTIVE SUMMARY

A. Summary of Recommendation

These Recommendations relate to the conduct of military commission trials. They urge Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and they oppose any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances. They also endorse principles for the conduct of any military commission trials that would protect against unwarranted intrusion into the attorney-client privilege and ensure that CDC will be able to fully prepare and fully participate in the defense of their clients, consistent with the protection of classified and/or protected information. They also urge compliance with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003) in any military commission prosecution in which the death penalty may be sought.

B. Summary of the Issue this Recommendation Addresses

The government has created military commissions to try non-U.S. citizens and will allow them to retain CDC. These Recommendations address the issue of whether the rules governing those proceedings should contain restrictions that would restrict the full participation of CDC who have received appropriate security clearances.

C. How the Proposed Policy Position will Address the Issue

It will extend the ABA's long history of protecting fundamental due process, the attorney-client privilege, and the ability of counsel to render zealous and effective assistance to those detainees who are tried before military commissions.

D. Summary of Minority Views

None known.

GENERAL INFORMATION FORM

Submitting Entity: **Task Force on Treatment of Enemy Combatants**

Submitted By: **Neal R. Sonnett, Chair**

1. Summary of Recommendation(s).

Through these Recommendations, the American Bar Association urges Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances. The American Bar Association also endorses principles for the conduct of any military commission trials that may take place, including (1) The no government monitoring of privileged or confidential conversations between any defense counsel and client; (2) CDC with appropriate security clearances should be present at all stages of the proceedings and be afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence; (3) CDC should be able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as a military commission may determine are required by the circumstances in a particular case after notice and hearing; (4) CDC should be able to speak publicly, consistent with their obligations under the Model Rules, subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing; (5) The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings; (6) The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense; and (7) The government should seek modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation. The American Bar Association further urges that death penalty prosecutions should fully comply with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).

2. Approval by Submitting Entity.

The ABA Task Force on Treatment of Enemy Combatants, approved this Recommendation and Report by email votes during the week of August 4, 2003. The Criminal Justice and Individual Rights and Responsibilities Sections approved it at their August 8, 2002 and August 9, 2003 Council meetings. The Section of Individual Rights and Responsibilities approved it at its Council meeting on October 18, 2002.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

No similar Recommendations are known to have been previously submitted. A related Recommendation, Report 8C which dealt with other aspects of military commissions, was approved at the February 2002 MidYear meeting.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

The ABA has a long history of protecting due process and the right to counsel. This Recommendation would complement and extend those existing policies to insure that detainees who are tried by military commission have access to the zealous and effective representation of lawyers opportunity to receive the zealous and effective assistance of CDC who are not bound by unwarranted restrictions.

5. **What urgency exists which requires action at this meeting of the House?**

Military commissions have been created, and plans are underway to try selected Guantanamo detainees. These circumstances present an important challenge to the rule of law on which the American Bar Association should speak out.

6. **Status of Legislation.**

On June 11, 2003, Rep. Joseph Hoeffel (D-PA) introduced H.R. 2428, "To Proved for Congressional Review of Regulations Relating to Military Tribunals. As of this date, no action has been taken on the proposed legislation, adoption by the House would lend support to this legislative effort.

7. **Cost to the Association.**

The adoption of the Recommendation would not result in any direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the Recommendation adopted and implemented. Such costs should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. **Disclosure of Interest. (If applicable)**

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office, it is being circulated to the following:

Standing Committees/Task Forces:
Law and National Security

Sections, Divisions and Forums:
Administrative Law
Government and Public Sector Lawyers
International Law and Practice
Judicial Division
National Conference of Federal Trial Judges
Law Student Division
Litigation
Young Lawyers Division

Affiliated Organizations:
The Federal Bar Association
National Association of Criminal Defense Lawyers

10. Contact Person. (Prior to the meeting)

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2 South Biscayne Boulevard
Miami, FL 33131-1804
Tel: 305-358-2000
Fax: 305-358-1233
Email: <nrs@sonnett.com>

11. Contact Person. (Who will present the report to the House)

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Revised 10A

AMERICAN BAR ASSOCIATION

NEW YORK STATE BAR ASSOCIATION
SECTION OF INTERNATIONAL LAW
BAR ASSOCIATION OF ERIE COUNTY
BEVERLY HILLS BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that consistent with the Supreme Court's directive in *Boumediene v. Bush* and President Obama's January 22, 2009 Executive Order on "Review and Disposition Of Individuals Detained At The Guantanamo Bay Naval Base And Closure of Detention Facilities," the American Bar Association urges the U.S. Government to ensure that:

(a) All individuals who have been or are expected to be charged with violations of criminal law should be prosecuted in Article III federal courts, unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice;

(b) All individuals currently detained at Guantanamo who, upon review, are determined to have been improperly classified as or no longer considered to be "enemy combatants" should be promptly released or resettled; and

(c) All remaining individuals currently detained as enemy combatants at Guantanamo are granted a prompt habeas corpus hearing with full due process rights and provided access to counsel and the right to review and confront the evidence against them, including potential exculpatory evidence within the government's possession, whether or not used, or intended to be used at trial, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainee and the requirements of national security; and

(d) No individual should be detained as an "enemy combatant" except pursuant to an act of Congress defining this term.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, DC 20301-1600

GENERAL COUNSEL

JUL 21 2009

The Honorable Ike Skelton
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to correct a serious misimpression that has arisen in recent weeks, that the United States military may be providing *Miranda* warnings to terrorist suspects in Afghanistan. This is completely inaccurate.

The record should be clear: The essential mission of our nation's military, in times of armed conflict, is to capture or engage the enemy; it is not evidence collection or law enforcement. Members of the U.S. military do not provide *Miranda* warnings to those they capture.

Meanwhile, it has been the longstanding practice of the U.S. government, spanning administrations of both parties, to use all instruments of national power to defeat terrorist extremists. This has included, and will continue to include, the prosecution of some terrorists in Article III courts. In that event, U.S. law enforcement personnel have, in a handful of situations, been permitted to question detainees who are potential prospects for prosecution, accompanied by *Miranda* warnings. Such interviews, accompanied by *Miranda* warnings, are permitted by the Department of Defense only after the military's intelligence-gathering functions have been completed with respect to that detainee. These types of interviews are not given, and should not be given, if the military commanders on the ground conclude that doing so will hinder our military operations or intelligence-gathering efforts.

Though the instances of "Mirandized" interviews of U.S. military detainees are few and far between, we oppose any legislative effort to ban them altogether. Our commanders themselves would say doing so is contrary to national security, because it would limit the option to prosecute terrorists in Article III courts, and jeopardize those cases that we do prosecute. Our government must maintain all lawful options for fighting international terrorism, not limit them.

Sincerely,

Jeh Charles Johnson

Determination of Guantanamo Cases Referred for Prosecution

This protocol governs disposition of cases referred for possible prosecution pursuant to Section 4(c)(3) of Executive Order 13492, which applies to detainees held at Guantanamo Bay, Cuba.

1. Process for Determination of Prosecution. When a case is referred, it will be assigned to a team composed of Assistant United States Attorneys, attorneys from the National Security Division (NSD) of the Department of Justice (DOJ), and personnel from the Department of Defense (DOD), including prosecutors from the Office of Military Commissions, which will further investigate and develop the case for prosecution.

Thereafter, the prosecution team will recommend, based on the factors set forth below, whether the case should be prosecuted in an Article III court (including venue) or a reformed military commission. If the prosecution team concludes that prosecution is not feasible in any forum, it may recommend that the case be returned to the Executive Order 13492 Review for other appropriate disposition.

NSD and the participating DOD entities will then jointly determine whether the case is feasible for prosecution, and the appropriate forum (and if necessary, venue) for that prosecution. They will transmit that determination to the Attorney General through the Deputy Attorney General, along with materials from any DOJ or DOD entity that disagrees with the determination. The Attorney General, in consultation with the Secretary of Defense, will make the final decision as to the appropriate forum and (if necessary) venue for any prosecution. Where a case is to be prosecuted, both DOJ and DOD will be expected to support the prosecution regardless of forum and venue.

2. Factors for Determination of Prosecution. There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there. That inquiry turns on the following three broad sets of factors, which are based on forum-selection factors traditionally used by federal prosecutors:

A. Strength of Interest. The factors to be considered here are the nature of the offenses to be charged or any pending charges; the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities.

B. Efficiency. The factors to be considered here are protection of intelligence sources and methods; the venue in which the case would be tried; issues related to multiple-defendant trials; foreign policy concerns; legal or evidentiary problems that might attend prosecution in the other jurisdiction; and efficiency and resource concerns.

C. Other Prosecution Considerations. The factors to be considered here are the extent to which the forum, and the offenses that could be charged in that forum, permit a full presentation of the wrongful conduct allegedly committed by the accused, and the available sentence upon conviction of those offenses.

3. Independence of Authorities. Nothing in this protocol is intended to restrict, and will not restrict, the appropriate exercise of independent discretion within the respective justice systems, including disposition of cases not referred to trial. Federal prosecutors will evaluate their cases under traditional principles of federal prosecution, including the standards set forth in Sections 9-27.220 and 9-27.240 of the United States Attorneys' Manual.

4. Disclaimer of Rights. This document is not intended to create any rights, privileges, or benefits to prospective or actual defendants in any forum. See *United States v. Caceres*, 440 U.S. 741 (1979).

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1500 DEFENSE PENTAGON
WASHINGTON, DC 20301-1500

July 27, 2009

The Honorable Jerrold Nadler
United States House of Representatives
Washington, D.C. 20515-3208

Subj: Proposal to amend Military Commissions Act to exclude former child soldiers from jurisdiction

Dear Representative Nadler,

My name is Lieutenant Commander William Kuebler and I represent Omar A. Khadr. Mr. Khadr is a 22 year-old Canadian citizen, currently detained at the Guantanamo Bay Naval Station. Mr. Khadr was apprehended at the age of 15 following a firefight in Khost, Afghanistan in 2002. Mr. Khadr is charged with five offenses to be tried by military commission under the Military Commissions Act of 2006 (MCA). Proceedings in his case were suspended pursuant to President Obama's January 2009 Executive Order halting military commission proceedings at Guantanamo Bay. The purpose of this letter is to ask for your support in amending the MCA to ensure that neither Mr. Khadr nor any other former child soldier is subjected to a military trial as an adult for war crimes in contravention of U.S. obligations under international law.

Mr. Khadr is one of two detainees charged with offenses under the MCA who were under the age of 18 when allegedly employed as child soldiers by Al Qaeda, the Taliban, or associated forces. As such they are protected under Convention on the Rights of the Child's Optional Protocol on the involvement of children in armed conflict (Child Soldier Protocol). The Child Soldier Protocol requires, among other things, that child soldiers detained in the course of armed conflict be afforded "all appropriate assistance for their physical and psychological recovery and their social reintegration" and further requires states-parties to "cooperate in the implementation of the present Protocol, including . . . in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance." The United States is a party to the Child Soldier Protocol, the Senate having ratified the treaty in June, 2002, a month prior to Mr. Khadr's detention in Afghanistan.

Contrary to a generally-observed policy of providing detained child soldiers age-appropriate treatment, the Bush Administration utterly disregarded Mr. Khadr's age and status as a "victim of acts contrary to" the Child Soldier Protocol throughout the course of his detention, interrogation, and proposed trial for "war crimes" under the MCA. Mr. Khadr's mistreatment by the Bush Administration has thus drawn widespread condemnation from a

host of individuals and organizations, including the United Nations Special Representative for Children in Armed Conflict, UNICEF, the French Government, and many others. In the spring of 2008, the Canadian Parliament conducted comprehensive hearings on the Khadr case, which resulted in the issuance of a report calling on Prime Minister Stephen Harper to demand Mr. Khadr's release from Guantanamo Bay and repatriation to Canada. More recently, Canadian courts – pursuant to litigation commenced by Mr. Khadr's Canadian counsel – have found that Mr. Khadr's mistreatment by the United States violated international prohibitions against torture and other forms of cruel, inhuman and degrading treatment, and ordered the Prime Minister to request Mr. Khadr's release and return to Canada.

In litigation concerning the application of the MCA to persons who were minors at the time of their alleged misconduct, the Bush Administration took the position that the MCA applied to detained "unlawful enemy combatants" irrespective of age. This notwithstanding the universally-recognized distinction between adults and children for purposes of criminal prosecution and punishment, the historical limitation on the exercise of military jurisdiction to adults, and the Child Soldier Protocol's clear mandate that detained child soldiers be treated primarily as "victims" of those who placed them in harm's way. Mr. Khadr's counsel have never taken the position that any of these considerations serves as an absolute bar to criminal prosecution, however, the clear effect of the Child Soldier Protocol is to require any criminal prosecution of a former child soldier to conform to generally-recognized standards for juvenile prosecution and to serve a purpose that is primarily rehabilitative in nature.

It goes without saying that the MCA does not establish tribunals that conform to recognized standards for juvenile criminal prosecution and does not provide for the imposition of sentences that are primarily rehabilitative in nature. Indeed, there is no reason to believe that Congress either contemplated or intended the prosecution of detained child soldiers as adult "war criminals" when it enacted the MCA in 2006. It is thus almost beyond question that the Bush Administration exceeded the scope of its authority under the MCA in attempting to try Mr. Khadr and one other former child soldier, Mohamed Jawad, as adult war criminals.

The current Administration has yet to take a position on the application of the MCA to minors. It has, however, stated its intention to seek legislative revision of the MCA prior to proceeding with any military commission prosecutions of Guantanamo Bay detainees. It is my understanding that there is amending legislation working its way through Congress as part of the National Defense Authorization Act right now.

This legislative effort now affords Congress the opportunity to resolve the ambiguity exploited by the previous Administration and amend the MCA to include language expressly limiting its application to persons who were adults at the time of the alleged misconduct forming the basis for their prosecution by military commission. Not only would such action ensure that the United States complies with its international legal obligations under the Child Soldier Protocol, it would appropriately distinguish these cases in procedural and evidentiary terms from cases involving adult detainees. As a general proposition, the interrogation of minors presents a host of unique legal and evidentiary issues relating to the admissibility and

reliability of statements resulting therefrom. It is simply impossible to adopt "one-size-fits-all" rules for the admissibility of such evidence that would treat juvenile detainees such as Mr. Khadr fairly and equitably. These considerations militate in favor of limiting the application of the MCA to persons who were adults at the time of their alleged misconduct.

I am hopeful that you will give this matter the attention it deserves. While the Child Soldier Protocol protects only a handful of the detainees currently detained at Guantanamo Bay, the current Administration has said that it intends for reformed military commissions to serve as a platform for the trial of suspected terrorists and war criminals detained in the future. I am sure you will agree that it is imperative that such tribunals are convened and conducted in accordance with all applicable U.S. obligations under the law of armed conflict, including the Child Soldier Protocol. Congress can ensure that outcome through appropriate action now.

Should you have additional questions or concerns regarding this matter, please do not hesitate to contact me at (202) 761-0133 (ext. 116).

Sincerely,

William C. Kuebler
Lieutenant Commander,
Judge Advocate General's Corps,
United States Navy

Statement for the Record
Larry Cox
Executive Director
Amnesty International USA
US House of Representatives
Committee on the Judiciary
Sub-Committee on the Constitution, Civil Rights and Civil Liberties
Proposals for Reform of the Military Commissions System
July 30, 2009 at 1pm

Amnesty International USA is grateful to the committee for the opportunity to submit a statement for the record. Amnesty along with a number of other human rights groups submitted a letter to the US Senate on July 16 outlining our continued opposition to the resumption of military commissions which we believe is at odds with the desire to try cases fairly and swiftly.

Years after commissions were introduced at Guantanamo Bay, and after two iterations, the government has only secured three convictions. The return of military commissions will do nothing to restore public confidence domestically or internationally, and will instead mire the process in challenges in federal court and result in unsafe convictions which will bring us neither security nor safeguard our civil liberties.

Military commissions have had a place historically in addressing violations of the laws of war, and the Uniform Code of Military Conduct has an important and legitimate role in upholding military discipline. But Amnesty respectfully disagrees that this is either the most appropriate tool to use, or the most effective, in disposing of these cases or in upholding international and domestic legal standards which can be seen to be beyond reproach.

We commend the House and Senate for their efforts in trying to fix the system, but we respectfully disagree with their conclusions that the commissions process can be fixed in any way which will meaningfully afford defendants a fair trial, or which will increase public confidence in US justice system.

The proposals outlined by the Senate Armed Services Committee legislation, now contained within the National Defense Authorization Act 2010 are clearly well intentioned and an improvement. We also welcome the recognition that the military commissions system as it stands is fundamentally flawed. However, even within the limited confines that the Senate Armed Services Committee set itself there are some profound reasons to be concerned.

The essential test that the administration has placed on trying a detainee is that where "feasible" it will seek to try them in federal court, this is their stated preference and one which some members even of the last administration favored. However if they cannot produce evidence, they will seek to convict them in military commissions. The administration itself set up the commissions as a lesser standard, and if they can't even meet this lower standard and prisoners are acquitted, to paraphrase the General Counsel for the Department of Defense, Jeh Johnson – it would detain them anyway. This Alice in Wonderland formulation can be called many things but it cannot be called justice.

In the words of Rear Admiral John D. Hutson US Navy retired and former Judge Advocate General:

"You can't have a legitimate court unless you are willing to risk an acquittal. If you aren't willing to accept the possibility that a jury will acquit the accused based on the evidence fairly presented, then it isn't really a court. It's a charade."

The military commissions' process will not breed international support nor will it be seen as a legitimate forum internationally as long as it is founded on a double standard. The forum will not be used to try American citizens who will always be tried in federal court, and will be reserved for foreign nationals. As such they violate US obligations to treat all persons equally before the law, without any reservations.

The underlying resource inequalities between the prosecution and the defense are so substantial as to warrant concern over the fairness of the underlying system. There have been numerous witnesses and observers who have commented on the lack of expertise and capacity to support an adequate defense to the extent that it violates the right to effective assistance of counsel guaranteed by the Sixth Amendment. There have been verbal commitments to provide adequate resources including investigatory, legal and translation support, but there is nothing in the current bill to underline these. Such a process makes a mockery of our attempts to conduct a fair trial. This in itself is so substantial that it belies the stated intent of Congress to create a system to which we would be satisfied to subject an American serviceman. The lack of expertise in the defense also raises a concern, that they would not meet the standards set down by the American Bar Association for defense attorneys in capital cases. We seek to afford detainees these protections not as a reflection of their rights, but in seeking to uphold the constitution and our most sacred values.

Even the administration which has praised the motives and intent of the Senate in trying to bring this bill forward highlighted several crucial and pressing concerns with the language in the bill as it came out of committee.

The administration stressed the overriding need to place a sunset clause in the bill, to afford Congress an opportunity to revisit this process and to make amendments and changes to it over time. The administration has said repeatedly that it is important to allow elected representatives a continued voice on a process that has such fundamental implications for our national security, our judicial system and our international standing.

The benchmark that the administration has set is that statements have to meet the voluntariness standard. As the Assistant Attorney General David Kris said at a Congressional hearing earlier this month "There is a serious risk that courts would hold that admission of involuntary statements of the accused in military commissions' proceedings is unconstitutional". Amnesty believes that this standard is one which has been settled internationally and domestically. By instead accepting a standard which bans the use of evidence obtained through cruel inhuman and degrading treatment, we would be defacto accepting a much more constrained standard on a critical issue, and increase the likelihood of introducing doubt and error into the system which should outweigh the consideration of any gain.

The standards of fairness in criminal trials are not something that can lawfully be made to depend on the circumstances of particular accused persons or the situation in which they came into government custody, even more so here where the government would arrogate to itself the power to determine whether individuals in identical circumstances receive the full ordinary protection of the law or a reduced form, and where vulnerability to such deprivation of fair trial rights is itself applied on an unreasonable discriminatory basis (with identically-situated US citizens automatically being guaranteed a higher standard of fairness in criminal justice than nationals of other origin).

Amnesty International is opposed to the death penalty in all cases, unconditionally. But we would mark one fundamental objection, that in these instances the defendants themselves seek to become martyrs. Nothing could be more counterproductive from a national security view point than allowing convicted terrorists their ultimate wish to score a dubious moral and propaganda victory at our own hands. Countless examples have proven the point that it is better to treat terrorists as criminals and to dispose of their cases in court, as with other 911 conspirators such as Zacarias Moussaoui.

There is even more reason to be concerned given the number of detainee's who face charges who are, or were alleged to have been juveniles at the time of their apprehension. Amnesty calls for juveniles not to be tried in military commissions and not to face capital charges. A number of the detainees who fall into this category have also allegedly been victims of abuse in

custody and the public confidence in the justice system will not be increased by trying juveniles in questionable circumstances in capital cases.

In closing we would add that we applaud the administration's desire to close the detention facility at Guantanamo Bay. But closure is not simply an issue about location but about the flawed nature of an entire system. We believe that the system itself presents a threat to national security. It does nothing to make us safer and is itself the source of threats to our wellbeing, as an international rallying point for terror, and as a recruiting sergeant for our enemies. In suggesting a way forward we would urge members to consider the best and most reliable way to unravel the Gordian knot that was created by the last administration is to place our faith in the federal court system we already have and which has been tried and tested over time.

Sincerely,

Larry Cox
Executive Director,
Amnesty International USA

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 8, 2009

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, and
Civil Liberties
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

During the subcommittee hearing held on July 30, 2009, you made a request of Assistant Attorney General David Kris for an Office of Legal Counsel Memorandum dated May 4, 2009 (the OLC memorandum).

The Executive Branch has substantial confidentiality interests with respect to the OLC memorandum. It consists of pre-decisional attorney-client advice from OLC to another Executive Branch office in furtherance of internal Executive Branch deliberations concerning possible and actual legislative proposals.

In order to accommodate the Committee's interest in understanding the Department's assessment of how courts might apply due process protections in military commission proceedings, we are happy to provide staff with the following analysis of that question by the Department.

I hope this information is helpful.

Sincerely,

Ronald Weich

Enclosure

Cc: The Honorable F. James Sensenbrenner, Jr.
Ranking Minority Member

After careful consideration and legal review, the Administration has concluded that, whether military commissions are convened in the United States or at Guantánamo, there is a significant risk courts will apply a baseline of due process protection in commission proceedings. We do not believe this means courts will provide commission defendants with the same array of constitutional rights that defendants receive in article III criminal trials. We do believe, however, there is a significant risk courts would afford commission defendants with those due process protections that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). In particular, we have concluded that there is a substantial risk courts would hold the Constitution requires application of a due process voluntariness test for admission of statements of the accused, although we do not believe courts would apply the *Miranda* rules prohibiting admission of unwarned statements. In light of these risks, the Administration urges Congress to design a commissions system that will satisfy constitutional due process standards whether the proceedings are conducted in the United States or at Guantánamo. If the recent Senate Armed Services Committee draft amendment of the Military Commissions Act were modified along the lines the Administration has suggested, we believe the bill would satisfy those constitutional standards, no matter where the commissions are convened.

As the Assistant Attorney General for the National Security Division testified before the Senate Armed Services Committee, the Administration has concluded that if commissions are convened in the United States, there is a significant risk courts would afford the accused with baseline constitutional protections under the Fifth Amendment's Due Process Clause. The Supreme Court has held that this Clause "applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). We recognize that there are contrary arguments based on Supreme Court precedents concerning World War II-era commissions conducted in U.S. territories. But, in light of intervening developments, there are reasons to doubt that these precedents would be applied to preclude recognition of any due process rights for detainees being tried before military commissions in the United States.

We also believe that even if the commissions were convened at Guantánamo, there is a significant risk the courts would apply a baseline of due process protections in commissions proceedings. Senator Graham touched on this concern at the recent Armed Services hearing, remarking that "just the location [of the commission] alone is not going to change the dynamic the court would apply in a dramatic way." To be sure, certain older Supreme Court precedents, especially *Johnson v. Eisentrager*, 339 U.S. 763 (1950), were often read to suggest that aliens detained overseas have no constitutional protections at all. In its recent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), however, the Court rejected the notion that, as a categorical matter, the Constitution provides no protection to aliens outside the *de jure* sovereignty of the United States. The Court instead held that the Guantánamo detainees are entitled to the guarantee, implicit in the Suspension Clause, of the right to petition for the writ of habeas corpus challenging the legality of their detention.

In reaching this conclusion, the Court recognized a "common thread uniting" its former cases dealing with the extraterritorial application of the Constitution—namely, "the idea that questions of extraterritoriality turn on objective factors and practical concerns, not formalism." *Id.* at 2258. The Court then emphasized the unique attributes of the detention facilities at Guantánamo, given that the United States exercises an unusual degree and exclusivity of control over the Naval Base there.

The decision in *Boumediene* concerned the writ of habeas corpus, but we believe there is a significant risk the Court could further hold that baseline due process protections would apply to the Guantánamo detainees, as well. Writing for the Court in *Boumediene*, Justice Kennedy explained that in determining whether habeas applies outside the United States, a court should look, in particular, to whether such a result would be "'impracticable and anomalous.'" *Id.* at 2255 (quoting *Reid v. Covert*, 354 U.S. 1, 74-75 (1957)). Justice Kennedy also relied in part on the *Insular Cases*, *see id.* at 2253-55, which held that residents of U.S. territories have certain individual constitutional rights that are deemed "fundamental." To be sure, the *Insular Cases* can be distinguished on the ground that they involved the government of a general civilian population in U.S. territories, not the specific context of alleged enemy aliens detained and prosecuted by a military commission on a U.S. military base in a foreign country, where application of the Bill of Rights would perhaps be more "impracticable and anomalous." But in light of the Supreme Court's extension of the writ of habeas corpus under the Suspension Clause to detainees at Guantánamo, along with the Court's discussion of the *Insular Cases*, there is a significant risk the Court would conclude that not only the writ of habeas corpus, but also certain due process protections, would apply at Guantánamo.

We emphasize that even if the courts hold that the Due Process Clause "applies" to aliens detained at Guantánamo, that conclusion would not mean the Clause would apply in the same way that it applies to U.S. citizens, or even to aliens, in the United States. "As Justice Harlan put it, 'the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case.'" *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring) (quoting *Reid*, 354 U.S. at 75). Thus, whether commissions are convened inside the United States or at Guantánamo, we do not believe courts would afford aliens tried in such commissions with the entire panoply of constitutional rights that defendants in article III courts enjoy. In particular, we believe the Supreme Court is likely to reaffirm its precedents that defendants in such commissions are not entitled to a grand jury indictment or a jury trial. We also do not believe courts would hold that defendants in commission proceedings are entitled to all of the Fifth and Sixth Amendments procedural trial rights for criminal defendants that apply in article III courts.

Instead, we think it likely the courts would rely upon a balancing test to determine which fundamental procedural safeguards would be constitutionally required in commissions as a matter of due process, and how those fundamental protections should be applied given the particular context of these trials. Courts would be most likely to

afford commission defendants with those due process protections that are "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), and "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

Although we do not express an independent position on the question here, we do think that under this approach there is a significant risk courts would afford Guantánamo detainees with certain fundamental due process trial protections, even for commissions conducted at Guantánamo. *Cf. Weiss v. United States*, 510 U.S. 163, 178 (1994) (noting that in the context of both the criminal and military justice systems, "[i]t is elementary that 'a fair trial in a fair tribunal is a basic requirement of due process'") (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).* We also believe there is a substantial risk the courts would hold that one such fundamental protection is the prohibition on the use in military commissions of coerced statements by the accused, even if the coercion did not rise to the level of torture or cruel, inhuman or degrading treatment. As we have explained, we do not believe this approach would lead courts to conclude that the rule of *Miranda v. Arizona*, 384 U.S. 436 (1966) (excluding unwarned statements) would apply. It also does not mean that legal forms of interrogation could not be used to obtain valuable intelligence from captured unprivileged belligerents. It would mean instead that courts would not allow evidence to be used as the basis for convicting persons in commission proceedings without showing it satisfies a due process voluntariness inquiry.

Because of the substantial risk that courts will require baseline due process protections in military commissions, whether in the U.S. or at Guantánamo, and in light of the Supreme Court's recent rejections of detention and commissions policies at Guantánamo, we think it would be unwise to risk another confrontation between the Court and the political branches—one that could result in another derailing of the commissions process many years after the accused were apprehended. The Administration therefore strongly believes Congress should take the more secure path,

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* The United States has recently argued in *Rasul* v. *Myers*, on behalf of officers sued in their individual capacities for damages arising out of alleged torture and other abuse at Guantánamo, that the Due Process Clause does not protect Guantánamo detainees as a matter of *stare decisis* in the U.S. Court of Appeals for the District of Columbia Circuit. In a decision issued February 18, 2009 (*Kiyemba v. Obama*), the Court of Appeals had concluded that *Boumediene* did not affect the court of appeals' earlier decisions holding that aliens detained overseas have no constitutional due process rights, and that therefore detainees at Guantánamo who were entitled to release from detention on habeas do not have a right under the Due Process Clause (or the Suspension Clause) to be brought to the United States. In *Rasul v. Myers*, which was briefed in March of this year, the Department of Justice argued that even though "plaintiffs argue that *Kiyemba* was wrongly decided, that ruling is binding Circuit precedent." The Department did not further address the merits of the due process question. The court of appeals in *Rasul* ultimately ruled for the individual defendants based on qualified immunity and special factors weighing against recognition of a cause of action under *Bivens* in that setting, without resting its decision on whether the Due Process Clause applied to the detainees at Guantanamo. 563 F.3d 527, 532-533 (2009). Meanwhile, the detainees' petition for a for a writ of certiorari seeking review of the D.C. Circuit's decision in the *Kiyemba* case is pending before the Supreme Court. The Government's brief opposing certiorari states with respect to the question of due process at Guantánamo that "[f]or purposes of this case . . ., the dispositive question is not whether petitioners have any due process rights, but instead whether they have a due process right to enter the United States from abroad. As the court of appeals explained, it has long been established that aliens have no constitutionally protected interest in coming to the United States from abroad.

and design a commissions system that will satisfy the constitutional standards there is a significant risk the Court will insist upon. In our view, the recent Senate Armed Services Committee draft amendment of the Military Commissions Act, if it is modified by the Administration's proposals, would satisfy those constitutional standards, no matter where the commissions are convened.

human rights *first*

In Pursuit of Justice

Prosecuting Terrorism Cases in the Federal Courts

2009 Update and Recent Developments

Richard B. Zabel
James J. Benjamin, Jr.

July 2009

About Us

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, intolerance, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

This report is available for free online at
www.humanrightsfirst.org

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Preface

As the Obama Administration takes steps to shut down the Guantánamo Bay detention facility, the heated debate over when and how to prosecute suspected terrorists continues. Some commentators have asserted that bringing accused terrorists to the United States to face trial and incarceration poses a danger to American communities. Others have argued for the creation of a new, untested legal regime to preventively detain and/or prosecute persons suspected of complicity in terrorism. Often missing from this debate is the fact that the federal courts are continuing to build on their proven track record of serving as an effective and fair tool for incapacitating terrorists.

Because of the importance of resolving the question of when and how to try and detain terrorism suspects to our national security, our legal culture, and our standing in the world, we have updated our May 2008 report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, to include cases and developments from the past year. Together, we believe *In Pursuit of Justice* along with this 2009 Report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts—2009 Update and Recent Developments* (hereinafter "2009 Report"), are the most comprehensive analysis ever undertaken of criminal cases arising from terrorism that is associated—organizationally, financially, or ideologically—with self-described "jihadist" or Islamist extremist groups like al Qaeda. And we hope these reports will continue to help focus the debate on these important issues. In total, we have analyzed 119 cases with 289 defendants. Of the 214 defendants whose cases were resolved as of June 2, 2009 (charges against 75 defendants were still pending), 195 were convicted either by verdict or by a guilty plea. This is a conviction rate of 91.121%, a slight increase over the 90.625% conviction rate reported in May of 2008.

Our research also found:

- The statutes available to the Department of Justice for the prosecution of suspected terrorists continue to be deployed forcefully, fairly, and with just results.
- Courts are authorizing the detention of terrorism suspects under established criminal and immigration law authority and, now through the time-tested common law system, are delimiting the scope of military detention to meet the demands of the current circumstances.
- The Classified Information Procedures Act (CIPA), although subject to being improved, is working as it should: we were unable to identify a single instance in which CIPA was invoked and there was a substantial leak of sensitive information as a result of a terrorism prosecution in federal court.
- The *Miranda* requirement is not preventing intelligence professionals from interrogating prisoners, and recent court decisions have not interpreted *Miranda*, even in the context of foreign law en-

forcement interrogations, as a bar to criminal prosecution.

- Prosecutors are able to make use of a wide array of evidence to establish their cases.
- Convicted terrorists continue to receive stiff sentences.
- The Federal Bureau of Prisons has been detaining accused and convicted hardened terrorists in U.S. prisons on a continuous basis since at least the early 1990s without harm to the surrounding communities.

In sum, the federal courts, while not perfect, are a fit and flexible resource that should be used along with other government resources—including military force, intelligence gathering, diplomatic efforts, and cultural and economic initiatives—as an important part of a multi-pronged counterterrorism strategy. In contrast, the creation of a brand-new court system or preventive detention scheme from scratch would be expensive, uncertain, and almost certainly controversial. The analysis of additional data from the past year confirms our conclusion from *In Pursuit of Justice* that the criminal justice system has been and should continue to be an important tool in confronting terrorism.

The primary authors of this 2009 Report are Richard B. Zabel and James J. Benjamin, Jr., partners in the New York office of Akin Gump Strauss Hauer & Feld LLP. They, along with a dedicated team at Akin Gump, devoted much hard work and many long hours to prepare this report on a pro bono basis. Members of the Akin Gump team include Joseph Sorkin, Jessica Budoff, and Amit Kurlekar, who provided indispensable leadership and assistance throughout the process, as well as Peter Altman, Daniel Chau, Russell Collins, Jane Datillo, Ryan Donohue, Monica Duda, Jonathan Eisenman, Daniel Fisher, Jessica Herlihy, Leslie Lanphear, Sherene Lewis, Isabelle Liberman, Kathleen Matsoukas, Andrew Meehan, Elizabeth Raskin, Gary Thompson, Ashley Waters, and Elizabeth Young. Although Akin Gump is proud of the firm's commitment to pro bono work, the views expressed in this 2009 Report include those of the primary authors and Human Rights First; they are not the views of Akin Gump as a whole or other Akin Gump attorneys.

Table of Contents

I.
Introduction and Overview

In May 2008, Human Rights First released *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*.[1] Based on a comprehensive review of more than 120 actual prosecutions dating back to the 1980s, *In Pursuit of Justice* concluded that the criminal justice system is well-equipped to handle a broad variety of criminal cases arising from terrorism that is associated—organizationally, financially, or ideologically—with self-described "jihadist" or Islamist extremist groups like al Qaeda. The roster of cases chronicled in *In Pursuit of Justice* ranges from blockbuster trials against hardened terrorists who planned or committed grievous acts around the world to complex terrorism-financing prosecutions and "alternative" prosecutions based on non-terrorism charges such as immigration fraud, financial fraud, and false statements. Many of these cases have been preemptive prosecutions focused on preventing and disrupting terrorist activities. *In Pursuit of Justice* acknowledged that terrorism prosecutions can present difficult challenges, and that the criminal justice system, by itself, is not "the answer" to the problem of international terrorism, but it found that the federal courts have demonstrated their ability, over and over again, to effectively and fairly convict and incapacitate terrorists in a broad variety of terrorism cases.

In the year since *In Pursuit of Justice* was issued, there have been a number of important developments. On his second day in office, President Obama issued Executive Orders mandating the closure of the Guantánamo Bay detention facility within one year and establishing a Detention Policy Task Force to examine U.S. policy regarding the detention, interrogation, and trial of individuals suspected of participating in terrorism.[2] The effort to close Guantánamo has proved to be fraught with difficult policy and political choices and, more generally, our country continues to wrestle with the complex problems posed by the scourge of terrorism. Apart from Guantánamo, our military forces remain deployed in Iraq and Afghanistan; the situation in Pakistan is unstable; and radical Islamist groups continue to threaten our national interests in many corners of the globe.

In this environment, there is broad consensus that the government must continue to deploy all available resources—including military, intelligence, diplomatic, economic, and law enforcement tools—to address the threat of international terrorism. It seems self-evident that, as an important part of an integrated counterterrorism strategy, the government must have a reliable, stable system in place for prosecuting accused terrorists when such prosecutions are appropriate in light of the evidence and the law. The question remains as to where, and under what set of rules, terrorism prosecutions should occur.

President Obama has expressed a preference for trying accused terrorists in federal court whenever possible,

but in two separate public statements in May 2009, he signaled that the government expects to prosecute some detainees in reconstituted military commissions with revised procedural rules.[3] The President also noted that the government intends to develop "clear, defensible and lawful standards" for longer-term detention of individuals who cannot be prosecuted but who the government believes pose an unacceptably high risk to release.[4]

The President offered these remarks against the backdrop of a vigorous and ongoing debate about how the government should prosecute terrorists. Some commentators have agreed with the conclusion of *In Pursuit of Justice* that the justice system is equal to the task of handling a broad swath of terrorism prosecutions, while others have posited that the federal courts are unable to do so effectively—or that the risk of a prosecution that does not yield a conviction is unacceptable—and that, as a result, Congress should authorize a new "national security court" with lower evidentiary standards or other prosecution-friendly features that would supplant the Article III courts in some terrorism cases.[5]

This update to *In Pursuit of Justice* takes a renewed look at the capability of the federal courts to handle terrorism cases based on developments in the year since the White Paper was written. As was the case with the White Paper, this 2009 Report is grounded in actual data and experience rather than abstract or academic theories. We have set out to identify, examine, and analyze the terrorism cases that have been prosecuted in federal court in the past year, including cases that were pending when *In Pursuit of Justice* was issued a year ago. In addition, outside the body of traditional criminal prosecution case law, we have examined emerging case law sketching the contours of permissible law-of-war detention in the terrorism context. Although we might have missed some cases, we have continued the development of substantial data that, we believe, provides a sound foundation for examining the adequacy of the court system to cope with terrorism cases.

This 2009 Report begins with an updated presentation of data about terrorism prosecutions, including statistics through June 2, 2009. The 2009 Report then addresses some of the key legal and practical issues that were presented in international terrorism cases within the past year. As was the case with the White Paper, we address topics as diverse as the scope and adequacy of criminal statutes to prosecute alleged terrorists; the sufficiency of existing legal tools to detain individuals suspected of involvement in terrorism; and means of dealing with classified evidence. We also address the courts' experience with evidentiary issues in terrorism cases; recent developments regarding the applicability of the *Miranda* rule in overseas interrogations; observations about sentencing proceedings in terrorism cases; and information confirming that the federal prisons have been able to maintain a high degree of security over the accused and convicted terrorists confined within them.

We believe that the experience with terrorism cases in the past year strongly supports the conclusion in the White Paper that prosecuting terrorism defendants in the court system generally leads to just, reliable results and does not cause serious security breaches or other problems that threaten the nation's security. As a result, we continue to believe that the need for a new "national security court" is not apparent, especially given the numerous false starts and problems associated with the prior failed effort to establish military commissions at Guantánamo.[6] Nor is it evident that the case has been made for a brand-new legal regime to preventively detain individuals without charge—especially when one considers the potentially damaging effects such a momentous step could have on our legal system and culture. At the same time, as in the White Paper, we continue to believe that there are several important qualifications on our conclusion about the efficacy of the Article III courts to handle terrorism cases—namely that the justice system is not, by itself, "the answer" to the problem of terrorism; that terrorism cases can pose significant burdens and strains on the courts; and that

the court system is not infallible and will stumble from time to time.

It must be emphasized that the efficacy of the criminal justice system in any particular case ultimately depends on the evidence. We commend the government for finally undertaking a detailed case-by-case review of the evidence regarding each of the Guantánamo detainees, and we strongly believe that the disposition of those cases should be guided, first and foremost, by the evidence. For many individuals, we anticipate that the evidence will be sufficient to support federal-court prosecutions; but for some individuals, that may not be the case. It remains to be seen, and may never be known, how much damage to the viability of criminal prosecutions was caused by the years of delay, among other things, that occurred before a comprehensive assessment of admissible evidence took place.

Assuming sufficient evidence is available to bring a prosecution, we have observed that the most difficult challenges come up when the potential criminal case arises out of or substantially overlaps with military or intelligence operations. The military services and our intelligence agencies are proud institutions with deeply rooted traditions and practices, and they do not always coexist easily with the norms and legal requirements of the criminal justice system. But experience shows that when the government decides to bring terrorism prosecutions in federal court, the different arms of the Executive Branch are capable of working together in order to ensure that the cases proceed properly. The key is to institutionalize this sort of coordination so that it can be replicated and in effect becomes "muscle memory" among the relevant agencies and departments. We hope that the current Detention Policy Task Force will provide a framework for better coordination in the future among the Department of Justice, intelligence agencies, and the military.

Another significant challenge is that of resources. Managing large terrorism cases is expensive and labor-intensive for all participants, including prosecutors, defense lawyers, the courts, and the prison system. It is critical that sufficient resources be devoted on all sides so that cases are handled correctly.

As in the White Paper, we recognize that views on the subject matter of this report continue to be charged and will vary. We acknowledge the difficulty of finding definitive answers and reaching consensus on a subject that intertwines fundamental questions of security, justice, and what our Nation exemplifies to the world. We believe that a serious and objective analysis of the subject must rely on facts, and that idealized theories and doctrinaire approaches are not useful. We hope that by extending our findings and analysis we can advance the ongoing—and critically important—debate about how to reconcile our commitment to the rule of law with the imperative of assuring security for all Americans.

II.
The Data on Cases Prosecuted in Federal Court

As we discussed in *In Pursuit of Justice*, we have sought to ground our analysis, as much as possible, in actual data and experience rather than abstract or academic theories. In order to make observations and draw conclusions about the criminal justice system's approach to terrorism prosecutions and ability to manage them effectively, we built a data set of relevant terrorism cases and examined the court system's handling of everything from pre-trial detention to sentencing. In this 2009 Report, we have updated our quantitative analysis to reflect activity between December 31, 2007, and June 2, 2009, in the cases that were pending when the White Paper was issued. We have also used the screening and search methods outlined in the White Paper to add additional cases to our data set that were filed between September 12, 2001, and June 2, 2009. In some cases, this meant revisiting previously screened cases to determine whether new information about those cases made them appropriate for inclusion in our data set. As a result, we added 7 cases to our data set that were filed between September 12, 2001, and December 31, 2007, but that were not included in the White Paper.

As in *In Pursuit of Justice*, we have defined "terrorism cases" to encompass prosecutions that are related to Islamist extremist terrorist organizations such as al Qaeda or individuals and organizations that are ideologically or organizationally linked to such groups.

Although other categories of cases, including prosecutions of domestic militias or violent international groups such as the FARC in Colombia, might reasonably be considered to be aimed at "terrorism," we have restricted our definition as outlined above in light of the legal, intelligence, and security concerns that are thought to make al Qaeda and similar groups a special threat to our national security. In building our data set of terrorism cases, we have attempted to capture prosecutions that seek criminal sanctions for acts of terrorism, attempts or conspiracies to commit terrorism, or providing aid and support to those engaged in terrorism. We have also sought to identify and include prosecutions intended to disrupt and deter terrorism through other means, for example, through charges under "alternative" statutes such as false statements, financial fraud, and immigration fraud. We have included these cases if the indictment or information charges that the criminal activity was connected to terrorist organizations or activities or if there are other assertions or evidence in the case that concretely demonstrate the government's belief that there is such a connection in the particular case. As in *In Pursuit of Justice*, we have limited our analysis to criminal prosecutions; we have not sought to analyze military tribunals or non-criminal immigration proceedings.

As noted above and in the White Paper, the process of identifying and gathering terrorism cases is inevitably an

imperfect one, and our data set almost certainly does not contain the full universe of prosecutions involving Islamist extremist terrorist groups and individuals and organizations that are ideologically, financially, or organizationally linked to them. However, we believe that our collection of cases is sufficiently robust and representative to permit us to identify certain recurring factual and legal circumstances in terrorism prosecutions, analyze the judiciary's response to those circumstances, and draw conclusions based on that analysis.

Terrorism Prosecutions Filed and Defendants Charged, 9/12/2001 – 6/2/2009

As in the White Paper, our analysis in this 2009 Report is based on both pre- and post-9/11 cases, and many pre-9/11 cases play a significant role in our consideration of the practical and legal issues presented in terrorism prosecutions. However, for purposes of our quantitative analysis, we have restricted our data set to cases filed after September 11, 2001. In Appendix A, we include a list of all of the terrorism cases that we have identified and examined, including both pre- and post-9/11 cases. Cases added for the first time in this 2009 Report are denoted with an asterisk.

As shown in Figure 1, we have identified 119 cases filed since September 11, 2001, that meet the criteria outlined above and in the White Paper. There were 289 defendants charged in those cases.

Figure 1: Total Number of Terrorism Cases and Defendants

	Cases	Defendants
Total	119	289

As compared to the data presented in the White Paper, these figures represent an 11% increase in the number of cases filed and a 12% increase in the number of defendants charged over the comparable figures for December 31, 2007.[7] For purposes of tabulating the number of cases filed and defendants charged, we have counted an individual charged as a defendant in more than one case as a defendant in each case. If a prosecution is dismissed in one jurisdiction and related charges are pursued in a separate jurisdiction, we generally have treated that circumstance as a single case in the second jurisdiction, with data from the prior prosecution noted as relevant procedural background.[8]

Figure 2 shows the cases in our data set broken down by the year of filing and by the number of defendants first charged by year of the charging instrument.

Figure 2: Number of Terrorism Cases and Defendants by Year[9]

	Cases	Defendants
2001	21	35
2002	23	60
2003	18	71
2004	14	31
2005	14	26
2006	12	22
2007	11	35
2008	2	2
Jan.–June 2009	4	7

These figures indicate that while there was a general declining trend in the number of cases filed in each succeeding year since 2001, there was an increase in the number of defendants charged in 2007 over the three prior years and there has been an increase in new cases filed in the first five months of 2009 over the number of cases filed in 2008. In assessing the year-over-year data, 2008 is a clear outlier, with a dramatically lower number of new cases filed and new defendants charged as compared to all other full years

since 9/11. Although one could speculate as to the reasons for this apparent anomaly, the empirical data, standing alone, do not provide an answer. The data in Figure 2 is shown graphically on page 8 in Figures 5 and 6.

Terrorism Prosecutions Filed by Jurisdiction

Figures 3 and 4 summarize the geographical distribution of cases in our data set. The leading jurisdictions, both by number of cases and number of defendants, continue to be the Eastern District of Virginia, the Southern District of New York, and the Eastern District of New York. This data is shown graphically on pages 10-11 in Figures 9, 10, and 11.

Figure 3: Top Jurisdictions by Cases Filed

		Cases	Defendants
1	E.D. Va.	22	34
2	S.D.N.Y.	18	52
3	E.D.N.Y.	9	19
4	D.N.J.	6	13
5	N.D. Ill.	5	9
6	D. Mass.	5	8
7	E.D. Mich.	3	19
7	S.D. Fla.	3	14
7	D. Ariz	3	4
7	D. Conn.	3	4
7	S.D. Ohio	3	3
7	S.D. Tex	3	3
7	S.D. Cal.	3	8
7	N.D. Ohio	3	6
7	D.D.C	3	13
20 jurisd.		2 or fewer	80 total
Total		119	289

Figure 4: Top Jurisdictions by Defendants Charged

		Defendants	Cases
1	S.D.N.Y.	52	18
2	E.D. Va	34	22
3	E.D.N.Y.	19	9
4	E.D. Mich.	19	3
5	N.D. Tex.	16	2
6	S.D. Fla.	14	3
7	D.N.J.	13	6
7	D.D.C.	13	3
8	M.D. Fla.	11	2
9	N.D. Ill.	9	5
25 jurisd.		8 or fewer	46 total
Total		289	119

Pre-Trial Detention

Of the 289 defendants in our data set, 45 have yet to be brought into custody because they are fugitives, currently are subject to extradition proceedings or cannot be extradited, are deceased, or for some other reason. Another 7 defendants are legal entities rather than individuals, and bail information was not available for 10 individuals. Thus, 227 individual defendants have been arrested and have had a bail determination made by the court.

Of these 227 defendants, 157 were ordered detained without bail and 82 were released on conditions. These figures reflect a detention rate of approximately 69%, slightly higher than the 67% detention rate reported in the White Paper for cases through December 31, 2007.[10] In the 2009 Report, we counted 12 defendants in each category (i.e., ordered detained and released on bail) because either they were initially detained but later were granted release on conditions, or initially were granted release on conditions and later had bail revoked. Figure 13 on page 12 presents graphically the data showing pre-trial detention compared to release on conditions.

Figure 5: Number of Terrorism Cases Filed, 9/12/2001 – 6/2/2009

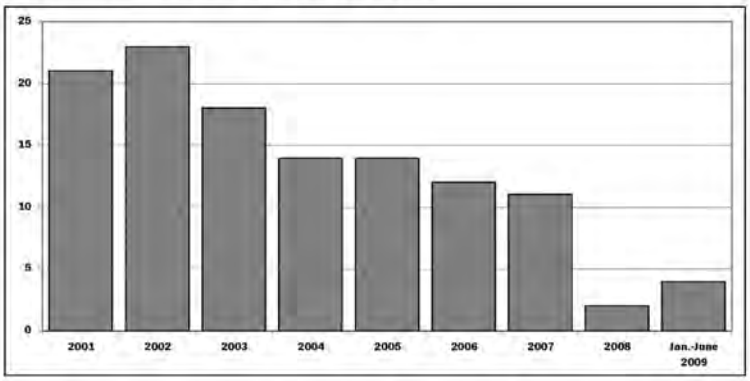
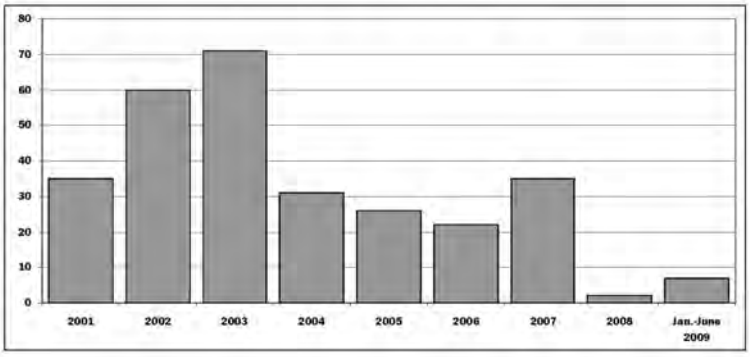


Figure 6: Number of Defendants Charged in Terrorism Cases Filed, 9/12/2001 – 6/2/2009



Outcomes in Terrorism Prosecutions

Of the 289 defendants in our data set, 75 still have charges pending against them. This leaves 214 defendants who have had charges against them "resolved," which we define to mean that the charges were terminated either by conviction at trial or in a plea agreement, or by acquittal or dismissal of charges following arraignment.[11] As compared to the data reported in the White Paper for cases through December 31, 2007, these figures reflect an approximately 34% increase in the number of defendants who have had all terrorism charges resolved.[12]

Of the 214 defendants who have had charges resolved, 195 were convicted of at least one count, either by a verdict of guilty after trial or by a guilty plea. And of those 214, 19 defendants have been acquitted of all charges or have had all charges against them dismissed following arraignment.[13] However, it must be emphasized that many of the defendants in this latter category did not ultimately "win" in any normal sense of the word. For example, in cases such as *Arnaout*, *Benkhala*, *Hammoudeh*, and *Elmardoudi*, even though the defendant obtained an acquittal or dismissal of the charges that were originally filed, the government subsequently brought new charges and ultimately won a conviction and lengthy sentence or an order of removal.[14] Further, even if a defendant obtains an acquittal or dismissal and is not re-prosecuted on new criminal charges, the government may transfer the defendant into immigration detention pending removal from the United States.[15]

Figure 7 shows the conviction data for the defendants whose cases have been resolved using the definition set forth above. The same data is shown graphically in Figures 14 and 15 on page 12. The conviction rate of 91.121% represents a slight increase from the rate of 90.625% that was reported in *In Pursuit of Justice* for cases through December 31, 2007. *See In Pursuit of Justice*, at 26.

Figure 7: Outcomes in Terrorism Cases, 9/12/2001 – 6/2/2009

Defendants	289	
Charges still pending	73	
Charges resolved	214	
Convicted of any charge	195	91.121%
-Convicted at trial	67	31.308%
-Guilty plea	128	59.813%
Acquitted of all charges or all charges dismissed	19	8.878%

Figure 8 summarizes the sentencing data for defendants who have been convicted of at least one offense and, at the time of writing this 2009 Report, had been sentenced.

Figure 8: Sentencing Data From Terrorism Prosecutions, 9/12/2001 – 6/2/2009

Total defendants sentenced	171
Defendants sentenced to imprisonment (excluding probation or time served)	151
Defendants receiving no additional prison term (i.e., probation or time served)	20
Defendants sentenced to a term of life imprisonment	11
Average term of imprisonment (excluding life sentences)	100.98 Months (8.41 Years)
Median term of imprisonment	58 Months (4.83 Years)
Median term of imprisonment, excluding defendants receiving no additional time	69 months (5.75 Years)

Figure 9: Number of Terrorism Cases Filed by Jurisdiction, 9/12/2001 - 6/2/2009

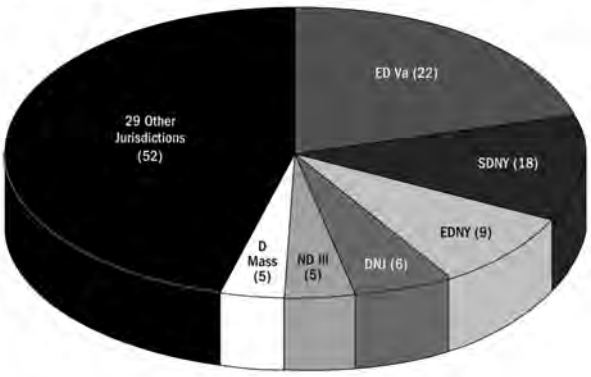
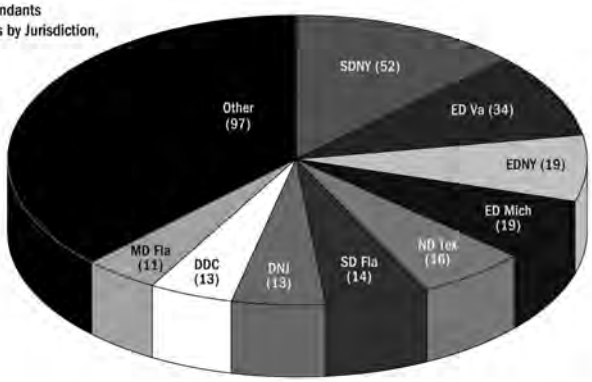


Figure 10: Number of Defendants Charged in Terrorism Cases by Jurisdiction, 9/12/2001 - 6/2/2009



This data is consistent with the sentencing information reported in the White Paper. There was virtually the same rate of imprisonment (89% in the White Paper for cases through December 31, 2007 versus 88% in this 2009 Report for cases through June 2, 2009), with an increase in the number of life sentences (5 in the White Paper and 11 in the 2009 Report) and virtually no change in the average term of imprisonment, excluding life sentences (100.71 months in the White Paper and 100.98 months in this 2009 report).[16]

Offenses Charged in Terrorism Prosecutions

Figure 12, on page 12, shows the statutes most commonly charged against defendants in cases within our data set. A single defendant may be counted multiple times in this chart, once for each statute that he is alleged to have violated. As we noted in the White Paper, although the most commonly charged statutes in our data set are the federal aiding-and-abetting statute, 18 U.S.C. § 2, and the federal conspiracy statute, 18 U.S.C. § 371, we have omitted these statutes from the table because they are always accompanied by substantive offenses, and because we feel there are limited useful inferences to be drawn from the frequency of these charges.

The most commonly charged substantive offenses in our data set continue to be the material support statutes, 18 U.S.C. §§ 2339A and 2339B. The rest of the list remains largely the same, with the addition of 18 U.S.C. § 2332, killing a U.S. national, and the narcotics distribution and importation conspiracy statutes, 21 U.S.C. § 846, and 21 U.S.C. § 963, respectively.

The table also shows conviction data for these statutes using the methodology we outlined in the White Paper. *See In Pursuit of Justice*, at 28. As we noted in the White Paper, we believe the most important measure is whether the prosecution secured a conviction on any charge against the defendant; the precise statute of conviction is often, though not always, of lesser significance.

Figure 11: Number of Cases Filed by Year, Selected Jurisdictions (9/12/2001 – 6/2/2009)

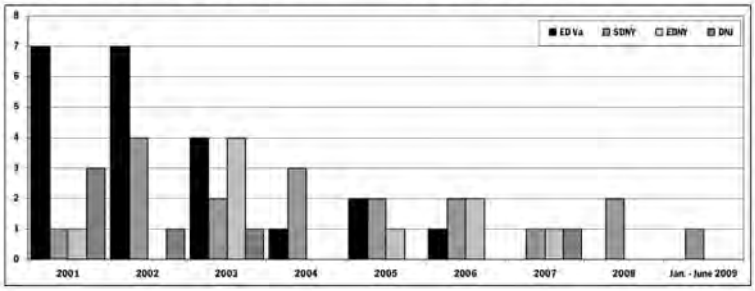


Figure 12: Table of Offenses Charged and Outcomes

Offense			Defts	Defts with charge resolved	Defts convicted of the specific charge	Defts convicted of any offense
1	18 U.S.C. § 2339B	Material support	83	69	40	57
2	18 U.S.C. § 2339A	Material support	60	47	33	37
3	50 U.S.C. §§ 1701-1706	IEEPA	53	38	26	30
3	18 U.S.C. § 1956	Money laundering	53	37	28	34
4	18 U.S.C. § 924	Weapons charge	45	32	20	29
5	18 U.S.C. § 1001	False statements	42	35	21[17]	31
6	18 U.S.C. § 956	Conspiracy to commit murder	29	17	9	14
7	21 U.S.C. § 846	Controlled substances	26	21	10	19
7	18 U.S.C. § 2332	Killing of U.S. national	26	11	6	11
8	18 U.S.C. § 1962	RICO	25	18	12	16
9	21 U.S.C. § 963	Controlled substances	24	18	12	16

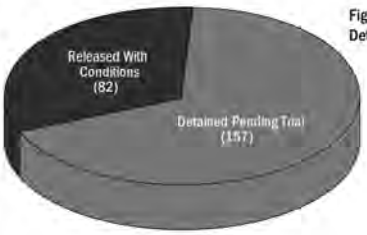
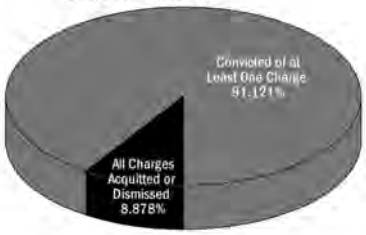


Figure 13: Number of Defendants Detained vs. Released on Conditions

Figure 14: Conviction Rates in Terrorism Cases, 9/12/2001 – 6/2/2009



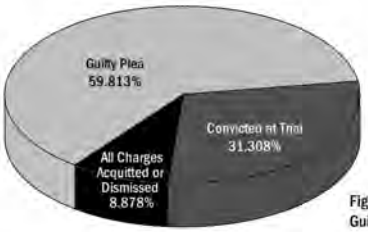


Figure 15: Conviction Rates in Terrorism Cases, Guilty Plea vs. Trial, 9/12/2001 – 6/2/2009

III.
Recent Developments in Material Support Law and the Emergence of Narco-Terrorism Prosecutions

In *In Pursuit of Justice*, we catalogued and analyzed the broad array of federal criminal statutes that have been invoked against accused terrorists. As that discussion made clear, Congress has given prosecutors a formidable arsenal of criminal statutes to deploy in terrorism prosecutions. The list of available charges ranges from specially tailored terrorism offenses to generally applicable crimes such as murder to "alternative" charges such as false statements or financial fraud. In particular, as described at some length in *In Pursuit of Justice*, the statutes criminalizing "material support" of terrorist activities or organizations, 18 U.S.C. §§ 2339A and 2339B, have been among the most effective for the Department of Justice. In the past year, the government has successfully invoked those statutes in a number of important terrorism prosecutions. In the following discussion, we outline some of the significant material support prosecutions of the past year. We also describe the advent of a new and potentially powerful tool for prosecutors, a 2006 statute criminalizing narcotics offenses that are carried out to support terrorism.

A. Material Support Statutes (18 U.S.C. §§ 2339A and 2339B)

The original material support statute, 18 U.S.C. § 2339A, makes it a crime to provide "material support," which is defined to include money, property or services, lodging, training, false identification, communications equipment, personnel (including oneself), weapons or lethal substances, explosives, transportation, safe houses, facilities, or expert advice or assistance, knowing that the support is to be used by someone else in connection with a range of offenses including murder, kidnapping, and the violation of terrorism statutes. 18 U.S.C. § 2339A. As we noted in *In Pursuit of Justice*, § 2339A "can be likened to a form of terrorism aiding and abetting statute." *In Pursuit of Justice*, at 32. Section 2339B, enacted two years after § 2339A, has a slightly different focus. It prohibits the provision of material support to groups, including al Qaeda and the Taliban, that have been designated as foreign terrorist organizations by the State Department. 18 U.S.C. § 2339B. In total, almost half the terrorism cases we surveyed since 9/11 have included charges for offenses under § 2339A or § 2339B.[15] In the past year, material support cases have demonstrated the wide breadth of conduct that these statutes encom-

pass—from cases involving sleeper terrorists to individuals setting up jihad training camps in the United States to individuals providing broadcasting services for a terrorist organization's television station.

Perhaps the highest-profile material support case of the past year is that of Ali Saleh Kahlah al-Marri. As chronicled in *In Pursuit of Justice*, al-Marri underwent a circuitous and heavily litigated eight-year journey from the criminal justice system, where he was originally charged shortly after 9/11 with financial fraud, false identity, and false statement crimes; to the naval brig in South Carolina, where he was detained without charge in military custody for more than five and a half years as an "enemy combatant"; and then back to the criminal justice system in February 2009 to face criminal charges of violating § 2339B based on his close ties to al Qaeda. *In Pursuit of Justice*, at 73-74; *see also* Indictment, *United States v. al-Marri*, No. 09-cr-10030 (C.D. Ill. Feb. 26, 2009) (Dkt. No. 3). In April 2009, al-Marri pled guilty to conspiracy to violate § 2339B, admitting in connection with his guilty plea that: (1) he conspired with Khalid Sheikh Mohammed to work for al Qaeda; (2) pursuant to that conspiracy, he attended terrorist training camps from 1998 to 2001; (3) Mohammed instructed him to enter the United States as a sleeper agent no later than September 10, 2001; (4) he enrolled at Bradley University as a pretext for residing in the United States; and (5) he spent considerable time researching the manufacture of poison gases, learning the kind of information that is taught in "advanced poisons courses" given at terrorist training camps. Plea Agreement and Stipulation of Facts, *al-Marri* (C.D. Ill. Apr. 30, 2009) (Dkt. No. 22). Under the terms of his plea agreement, al-Marri faces a maximum sentence of fifteen years' imprisonment. *Id.* at 3.[19]

In May 2009, in another prominent material support case, a Southern District of New York jury convicted Oussama Kassir of violating the material support statutes based on his role in running a terrorist training camp in Bly, Oregon (at which he taught students hand-to-hand combat and discussed plans to kill truck drivers and hijack their cargo to fund terrorist operations) and for setting up websites instructing how to "build bombs and make poisons." Indictment, *United States v. Mustafa*, No. 04-cr-00356 (S.D.N.Y. Feb. 6, 2006) (Dkt. No. 6); Jury Verdict, *Mustafa* (S.D.N.Y. May 12, 2009) (reflecting conviction on eleven counts of Indictment, including seven material support counts). Kassir's sentencing has been set for September 9, 2009. Order, *Mustafa* (S.D.N.Y. May 13, 2009) (Dkt. No. 91). And in other recent cases, four defendants have pled guilty to material support counts based on various acts to support Islamist extremist terrorism. *See* Superseding Information, *United States v. Ahmed*, No. 07-cr-00647 (N.D. Ohio Jan. 15, 2009) (Dkt. No. 129) (charging conspiracy to violate § 2339A based on defendants' extensive planning to harm U.S. forces in Iraq and Afghanistan); Plea Agreement as to Zubair Ahmed, *Ahmed* (N.D. Ohio Jan. 15, 2009) (Dkt. No. 132); Plea Agreement as to Khaleel Ahmed, *Ahmed* (N.D. Ohio Jan. 15, 2009) (Dkt. No. 133); Press Release, U.S. Dep't of Justice, Chicago Cousins Plead Guilty to Conspiracy to Provide Material Support to Terrorists (Jan. 15, 2009)[20]; *see also* Indictment, *United States v. Iqbal*, No. 06-cr-01054 (S.D.N.Y. June 20, 2007) (Dkt. No. 42) (Count Two charges violation of § 2339B based on defendants' alleged broadcasting of programming from Hezbollah's television station Al Manar); Judgment, *Iqbal* (S.D.N.Y. Apr. 27, 2009) (Dkt. No. 111) (reflecting sixty-nine month sentence for both defendants pursuant to guilty plea to Count Two of indictment).

In the past year, the government has also achieved successes in material support prosecutions where it had encountered problems previously. In the third trial in Miami of the "Liberty City Six" (originally the "Liberty City Seven" who were accused of planning to blow up the Sears Tower and selected federal buildings), following two prior mistrials, the government was able to obtain material support convictions against five of the six

defendants. Jury Verdicts, *United States v. Batiste*, 06-cr-20373 (S.D. Fla. May 12, 2009) (Dkt. Nos. 1291-96). The outcome of the Liberty City Six trial may be seen as an illustration of the significance of the material support charge because, in a case fraught with difficulties, the government fared much worse with its two *non*-material support counts against the Liberty City Six, gaining convictions on its felony explosives count against only two of the six defendants and on its seditious conspiracy count against only one of the six defendants. *See id.*

Similarly, in the past year, the government finally succeeded in its material support prosecutions of the Holy Land Foundation ("HLF") and five of its officers in federal court in Texas. As discussed in *In Pursuit of Justice*, the first HLF trial, in the fall of 2007, ended in a hung jury on some counts and acquittals on others, but with no convictions against any of the defendants. *In Pursuit of Justice*, at 37. A year later, however, the government retried six defendants (two remain at large), and this time secured material support convictions against each one. Jury Verdict, *United States v. Holy Land Foundation for Relief & Dev.*, 04-cr-00240 (N.D. Tex. Nov. 24, 2008) (Dkt. No. 1250). HLF was sentenced to a year of probation and subjected to joint and several liability with the individual defendants for a $12.4 million criminal forfeiture. Judgment, *Holy Land Foundation* (N.D. Tex. May 29, 2009) (Dkt. No. 1297). And the five individual defendants have been sentenced, with each defendant subjected to fifteen years in prison for the material support offenses. Judgments, *Holy Land Foundation* (N.D. Tex. May 28-29, 2009) (Dkt. Nos. 1293-95, 1298-99). Four of the five individual defendants were sentenced on other offenses as well, with the longest sentence totaling sixty-five years. *Id.*

Courts, meanwhile, have by and large continued to uphold the material support statutes against constitutional challenges. *See, e.g.*, *United States v. Chandia*, 514 F.3d 365, 371 (4th Cir. 2008) (upholding § 2339B against First Amendment freedom of association and vagueness challenges); *United States v. Warsame*, 537 F. Supp. 2d 1005, 1013-22 (D. Minn. 2008) (upholding § 2339B against First Amendment freedom of association, free speech, overbreadth and vagueness challenges, as well as Fifth Amendment vagueness challenge); *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 173-85 (E.D.N.Y. 2008) (upholding § 2339B against First Amendment freedom of association and overbreadth challenges and Fifth Amendment absence of personal guilt and vagueness challenges); *United States v. al-Kassar*, 582 F. Supp. 2d 488, 498 (S.D.N.Y. 2008) (upholding § 2339B against challenge that it fails to satisfy Fifth Amendment due process requirement of personal guilt); *United States v. Amawi*, 545 F. Supp. 2d 681, 683-85 (N.D. Ohio 2008) (upholding § 2339A against First Amendment overbreadth and Fifth Amendment vagueness challenges).

The government suffered a setback, however, in its material support prosecution of Hassan Abu Jihaad. *See United States v. Abu Jihaad*, 600 F. Supp. 2d 362, 401-02 (D. Conn. 2009) (granting defendant's Motion for Judgment of Acquittal as to charges under § 2339A). The government alleged that while Abu Jihaad was serving aboard a U.S. Navy destroyer in 2001, he "disclosed classified information regarding the movement of the Fifth Fleet Battle Group, which included the aircraft carrier, the *U.S.S. Constellation*, to individuals in London associated with Azzam Publications, an organization that the Government alleged supported violent Islamic jihad," with the knowledge or intent that "the information he disclosed would be used to kill United States nationals." *Id.* at 364. In March 2008, a jury found Abu Jihaad guilty of two separate offenses–(1) improperly disclosing national security information in violation of 18 U.S.C. § 793(d) and (2) providing material support to terrorists in violation of § 2339A–based on Abu Jihaad's alleged disclosure. *Id.* With particular respect to the material support charge, the government had alleged in its indictment that Abu

Jihaad's disclosure of intelligence constituted provision of a "physical asset" or "personnel" under § 2339A. *Id.* at 394.[21]

After trial, however, the court threw out the material support conviction, reasoning that the government had not provided sufficient evidence that Abu Jihaad's sharing of intelligence constituted giving Azzam Publications (Azzam) either a "physical asset" or "personnel." *Id.* at 394-402. (The court upheld the jury's verdict as to the other charge under § 793(d). *Id.* at 384-94.) In particular, the court ruled that the government could only secure a conviction on the "physical asset" predicate if it showed that Abu Jihaad had intended to pass the information on to Azzam in a tangible medium (i.e., a floppy disk). *Id.* at 394-96. Similarly, the court reasoned that in order to show that Abu Jihaad was providing himself as "personnel" by giving information to Azzam, the government needed to prove additional facts establishing that Abu Jihaad was more broadly putting himself at Azzam's service, and not merely providing information "on a whim . . . on one occasion, not knowing if Azzam wanted it and without any pre-disclosure or post-disclosure communication with Azzam about the information." *Id.* at 401-02 ("In those circumstances . . . it would be linguistically odd to describe that lone, voluntary act as making personnel available to Azzam.").

At first blush, *Abu Jihaad* could be seen as a case that exposed a dangerous gap in the conduct covered by the material support statutes: specifically, one could consider the provision of intelligence as something that should indisputably constitute material support, and could find troubling both the result in *Abu Jihaad* and the court's statement that "providing information alone to Azzam [is] an act that was not directly prohibited by § 2339A[.]" *Id.* at 401. For two reasons, however, we do not believe that the result in *Abu Jihaad* is indicative of any fundamental flaw in the material support laws. First, if another case like Abu Jihaad's arises, the government could choose a different predicate of material support on which to base its case. For instance, rather than casting a disclosure like Abu Jihaad's as the provision of "property" or "personnel," the government could argue that the intelligence constitutes any of at least three other categories of material support under § 2339A: (1) "intangible" property, (2) a "service," or (3) "expert advice or assistance" derived from the defendant's "specialized knowledge" that he gained as an enlisted person in the U.S. armed forces. 18 U.S.C. § 2339A(b).[22]

Second, even if the current statutory definition of "material support" does not encompass the providing of intelligence, there is no reason why this omission is set in stone; Congress can simply react to the *Abu Jihaad* case as it did to the *Humanitarian Law Project* cases, *see In Pursuit of Justice*, at 35, and amend the definition to include the giving of intelligence. In other words, if the *Abu Jihaad* case has indeed exposed a gap in the coverage of § 2339A, that gap should be addressed by Congress, as it is inconceivable that Congress would intend for the disclosure of intelligence to be left unaddressed. In short, even where gaps might temporarily exist in the reaches of sweeping statutes like §§ 2339A and 2339B, there is no evidence that the array of statutes available in the criminal justice system as a whole has irremediable gaps that would allow terrorist activity to go unpunished.[23]

B. Narco-Terrorism Statute (21 U.S.C. § 960a)

From the mid-1990s until they were removed from power in late 2001, the Taliban ruled Afghanistan based on a strict and oppressive version of Sha'ria. *See, e.g.*, John F. Burns, *Stoning of Afghan Adulterers: Some Go To Take Part, Others Just Watch*, N.Y. Times, Nov. 3, 1996, at 18.[24] Since being deposed, the Taliban have carried out a brutal insurgency in Afghanistan, and more recently in Pakistan, punctuated by suicide bombings, improvised explosive devices, shootings, and kidnap-

pings for which they have claimed credit. *See, e.g.*, John Ward Anderson, *Kabul Bus Bombing Kills 30*, Wash. Post, Sept. 30, 2007, at A23[25] (reporting Taliban assertion of responsibility for a suicide bombing aboard an Afghan National Army bus killing at least thirty people and injuring twenty-nine and detailing other terror tactics); *Taliban claim credit for Pakistan blast*, CNN.com, Aug. 20, 2008[26] (reporting Taliban claim of responsibility for suicide bombing at Pakistani hospital killing twenty-nine and wounding thirty-five). The Taliban's targets have included soldiers, police officers, political leaders, and civilians in Afghanistan and Pakistan. In the wake of the Taliban's role in assisting al Qaeda and its rising campaign of terror, on July 3, 2002, President Bush added the group to the list of Specially Designated Global Terrorist Groups. *See* Exec. Order No. 13,268, 3 C.F.R. 240 (2002); *see also* Superseding Indictment, *United States v. Khan*, No. 08-cr-00621 (S.D.N.Y. Apr. 21, 2009) (Dkt. No. 14) (alleging defendants provided financial support to Taliban in violation of 21 U.S.C. § 960a).

For years, Afghanistan has been the world's primary source of heroin, accounting for approximately ninety percent of the opium poppy used in the production of heroin. *See* United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2007*, at iii (October 2007)[27]; *see also* Karen DeYoung, *Afghanistan Opium Crop Sets Record*, Wash. Post, Dec. 2, 2006, at A01[28]; Del Quentin Wilber, *Afghan Farmer Helps Convict Taliban Member in U.S. Court*, Wash. Post, Dec. 23, 2008, at A01.[29] The presence of the Taliban insurgency in the heart of the world's opium poppy fields has sealed an unholy symbiosis among these Islamist extremists and Afghan heroin producers and traffickers. *See* Gov't's Sentencing Mem., *United States v. Mohammed*, No. 06-cr-00357 (D.D.C. Aug. 26, 2008) (Dkt. No. 73) (quoting trial testimony from agent of the U.S. Drug Enforcement Administration ("DEA") that Taliban has taken on a central role in every stage of opium/heroin production and transportation in Afghanistan, relies on it as main source of funding, and asserting that the Taliban is involved in over fifty percent of the DEA's Afghanistan heroin cases); *see also id.* (quoting United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2007*, at iii) ("opium cultivation in Afghanistan is now closely linked to insurgency").[30] In 2006, seeking to give prosecutors a new tool to combat the lethal combination of terrorism and drug trafficking, Congress enacted the narco-terrorism statute, 21 U.S.C. § 960a, which prohibits conduct that would be punishable under the primary federal narcotics statute, 21 U.S.C. § 841(a), if such conduct were committed within the jurisdiction of the United States and if the defendant "know[s] or intend[s] to provide, directly or indirectly, anything of pecuniary value to any person or organization that has engaged or engages in terrorist activity . . . or terrorism[.]" 21 U.S.C. § 960a(a). Section 960a, among other things, is a powerful statute that doubles the minimum punishment that would be imposed on a defendant under the ordinary federal narcotics statute, 21 U.S.C. § 841. *Id.*

In two recent cases, *United States v. Mohammed* and *United States v. Khan*, the government has invoked § 960a to prosecute heroin traffickers aligned with the Taliban.[31] Superseding Indictment, *Mohammed*, No. 06-cr-00357 (D.D.C. Jan. 23, 2008) (Dkt. No. 18); Superseding Indictment, *Khan*, No. 08-cr-00621 (S.D.N.Y. Apr. 21, 2009) (Dkt. No. 14). The trial of Khan Mohammed was reportedly the first ever under the narco-terrorism statute and, according to the government, is believed to be the first trial of a Taliban member in a U.S. court. *See* Gov't's Sentencing Mem. at 2, *Mohammed* (D.D.C. Aug. 26, 2008) (Dkt. No. 73). The case was the product of a well-executed investigation by the DEA. The investigation began when an Afghan farmer, who later testified under the pseudonym "Jaweed," was summoned by a Taliban leader and instructed to find Mohammed and assist him in obtaining rockets to attack a U.S. air base in Jalalabad, not far from Jaweed's village. Wilber, *Afghan Farmer Helps*

Convict Taliban Member in U.S. Court. Jaweed, who did not want to participate in the violence, instead secretly approached an Afghan police chief who in turn introduced him to a DEA agent at the air base. *Id.*; *see also* Gov't's Sentencing Mem. at 4, *Mohammed* (D.D.C. Aug. 26, 2008) (Dkt. No. 73). Jaweed agreed to assist the DEA and was equipped with a recording device. Gov't's Sentencing Mem. at 4, *Mohammed* (D.D.C. Aug. 26, 2008) (Dkt. No. 73). Ultimately, Jaweed made numerous audio recordings in which Mohammed admitted to prior acts of terrorism such as "blowing up government vehicles and shooting rockets at the police chief's office" and expounded on his intent to explode bombs and fire missiles at the air base. *Id.* On instructions from the DEA, Jaweed approached Mohammed purportedly to purchase opium for which he and Mohammed would split the profit. *Id.* at 6. The DEA provided Jaweed with "buy money" and then video-recorded the purchase of opium by Mohammed. *Id.* at 7. According to prosecutors, Mohammed was planning to use commissions from drug sales to support the Taliban and their "terrorist activity." Wilber, *Afghan Farmer Helps Convict Taliban Member in U.S. Court*. Mohammed was also recorded expressing his view that sending the heroin to the United States was "jihad" and "may God turn all the infidels to dead corpses," adding "[w]hether it is by opium or by shooting, this is our common goal." *Id.* Mohammed was arrested on October 29, 2006 (after which he was held for more than a year at Bagram Air Base in Afghanistan), *see* Def.'s Sentencing Mem. at 1, *Mohammed* (D.D.C. Sept. 26, 2008) (Dkt. No. 76), convicted at trial on May 15, 2008, *see* Gov't's Sentencing Mem. at 8, *Mohammed* (D.D.C. Aug. 26, 2008) (Dkt. No. 73), and sentenced to life imprisonment on December 22, 2008, *see* Judgment, *Mohammed* (D.D.C. Dec. 23, 2008) (Dkt. No. 84).

Although the case of Haji Juma Khan remains pending, the indictment's allegations describe a massive heroin organization, and the overt acts described in the conspiracy count detail narcotics transactions, terrorist incidents, and payments being made on Khan's behalf to the Taliban. *See* Indictment, *Khan* (S.D.N.Y. Oct. 21, 2008) (Dkt. No. 1). The specificity of the allegations suggests that the government has a well-developed body of evidence and perhaps cooperating witnesses, as was the case in *Mohammed*.

Federal prosecutors and law enforcement agents have generations of experience in carrying out creative and sometimes daring narcotics-trafficking investigations against many of the largest, most dangerous, and most sophisticated narcotics organizations in the world. The prospect of using that well-developed foundation of experience against narco-terrorists is intriguing and suggests that the government may enjoy future successes against heroin traffickers and their Taliban patrons.[32]

IV.
Detention of Individuals Suspected of Involvement with Terrorism

In approaching the problem of how to deal with suspected terrorists, a recurring and difficult question is that of detention. Is the existing legal framework sufficient to ensure that dangerous terrorists are incapacitated so that they cannot wreak havoc and hurt innocent victims? Or is it necessary to create new legal authority to allow the government to carry out long-term "preventive detention" of persons who may never be charged or brought to trial?

In the past year, there has been ongoing debate over proposals to institutionalize a system for preventive detention. Some commentators have argued that existing law is inadequate and that Congress should fill the perceived gap with a new law permitting preventive detention.[33] Others have questioned the premise that such a system is necessary, and have pointed out that many preventive detention proposals lack essential detail.[34] Although reasonable persons can differ on these questions, we discussed in *In Pursuit of Justice* how existing law grants broad authority to the government to detain alleged terrorists and, accordingly, that proponents of preventive detention have not made a convincing case for the advisability, let alone necessity, of dramatic new measures to give the government additional detention powers outside our traditional legal framework. We also noted that proponents of preventive detention often ignore or downplay the substantial negative consequences of their proposals, including delay, confusion, constitutional vulnerability, and damage to our national ideals and traditions as well as our standing in the world.[35] Too often, the analysis of preventive detention merely looks at the immediate "benefit" of an increased ability to incapacitate and ignores the negative consequences of such a regime, consequences that admittedly are difficult to quantify but that are real and that may well increase the longer-term danger to the United States.

In *In Pursuit of Justice*, we noted that the government has four well-established sources of legal authority that it can invoke, in appropriate circumstances, to detain individuals suspected of involvement in terrorism: (1) it can seek to detain individuals under the Bail Reform Act after criminal charges are filed; (2) it can detain aliens pending their removal from the United States under the immigration laws; (3) it can detain grand jury witnesses under the material witness statute, 18 U.S.C. § 3144, though detention under this statute is subject to close judicial supervision and is generally available only for a limited period of time; and (4) it can detain members of the enemy under the law of war in order to prevent them from attacking U.S. troops. *In Pursuit of Justice*, at 65-75. In the year since *In Pursuit of Justice* was issued, there has been little change in the legal framework applicable to detention under the bail statute, the immigration laws, or the material witness statute. In

particular, detention under the bail statute continues to be an important tool for prosecutors.

Detention under the law of war, however, has been the subject of significant litigation and substantial attention in the past year. Although a comprehensive discussion of this subject is beyond the scope of this 2009 Report, we offer a few observations about the developing legal landscape in this area. In short, we believe that in light of recent court decisions, it is becoming increasingly clear that the law of war affords a manageable and credible framework for determining whether adherents of al Qaeda or associated groups can be detained by the military to prevent them from harming the United States. The law of war has a history that dates back over centuries. In the past year, this body of law has continued to develop and adapt to address the novel features of today's struggle against Islamist extremist terrorists.

In *Hamdi v. Rumsfeld*, the Supreme Court held, in the case of a prisoner captured during the international phase of the armed conflict in Afghanistan, that the government may capture and detain enemy combatants under the law of war "to prevent captured individuals from returning to the field of battle and taking up arms once again." 542 U.S. 507, 518 (2004); *see also id.* (detention under the law of war is a "fundamental and accepted . . . incident to war" and may extend "for the duration of the particular conflict in which [a prisoner is] captured"). The purpose of military detention is not to punish the prisoner; it is instead to disable him from returning to the fight. *See* William Winthrop, *Military Law and Precedents* 788 (rev. 2d ed. 1920) ("A prisoner of war is no convict; his imprisonment is a simple war measure[.]"); *In re Territo*, 156 F.2d 142, 145 (9th Cir. 1946) ("The object of capture is to prevent the captured individual from serving the enemy."). For this reason, the duration of military imprisonment is dictated primarily by the length and ongoing nature of the armed conflict, and not necessarily by the severity of the detainee's individual conduct.

In the terrorism context, U.S. courts have determined that the government's military detention authority flows from the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), the post-9/11 congressional resolution that authorized the Executive Branch to "use all necessary and appropriate force against those nations, organizations, or persons" associated with the 9/11 attacks. *Id.* at § 2(a).[36] In *Hamdi*, the Supreme Court held that the AUMF authorizes law-of-war detention of "individuals who fought against the United States in Afghanistan as part of the Taliban" because that organization is "known to have supported the al Qaeda terrorist network responsible for [the September 11] attacks" and thus was targeted by Congress when it enacted the AUMF. 542 U.S. at 518. At the same time, however, the Court recognized that the boundaries of the government's law-of-war detention authority are somewhat uncertain and would have to "be defined by the lower courts as subsequent cases are presented to them." *Id.* at 522 n.1. The question remains, therefore, whether the law of war permits the government to detain individuals who did not actually take up arms against U.S. forces in an international armed conflict or who were captured far away from any combat zone. More pointedly, can the government invoke the law of war to detain, for example, a participant in an al Qaeda supply chain apprehended in Malaysia, or a financier arrested in London, or a sleeper cell agent caught in Virginia?

For a time, it appeared that the Supreme Court might provide further guidance on these questions in the case of *al-Marri v. Pucciarelli*. 129 S. Ct. 680 (2008). In *al-Marri*, which was analyzed extensively in *In Pursuit of Justice* and is discussed above, a Qatari citizen lawfully present in the United States was arrested by the FBI in 2001 in Peoria, Illinois and was held without bail on criminal fraud charges. *Al-Marri v. Wright*, 487 F.3d 160, 164 (4th Cir. 2007). In 2003, shortly before trial, the government abruptly dismissed al-Marri's criminal case with prejudice, designated him as an "enemy

combatant," and transferred him to the Consolidated Naval Brig in Charleston, South Carolina, where it held him for years without charge under the law of war. *Id.* at 164-65. After extensive habeas corpus litigation in the lower courts, the en banc Fourth Circuit held, in fractured opinions, that al-Marri could lawfully be held under the law of war—even though he was arrested by the FBI half a world away from the battlefield of Afghanistan—but that he had not been accorded sufficient process to challenge the designation. *See al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008).

In late 2008, the Supreme Court granted certiorari to determine whether the AUMF authorizes, and if so whether the Constitution allows, the detention of a lawful resident alien as an enemy combatant. *See al-Marri*, 129 S. Ct. 680 (granting certiorari). However, in early 2009, while the case was pending before the Supreme Court, the Obama administration indicted al-Marri on criminal charges that he conspired to provide and provided material support for terrorist organizations under 18 U.S.C. § 2339B. Indictment, *United States v. al-Marri*, No. 09-cr-10030 (C.D. Ill. Feb. 26, 2009) (Dkt. No. 3). The government transferred al-Marri out of the Naval Brig and returned him to the criminal justice system in Illinois. Carrie Johnson, *Terrorism Suspect Headed to U.S. Court*, Wash. Post, Feb. 28, 2009, at A2.[37] Two months after being indicted, al-Marri entered a guilty plea to the first count of the indictment and is currently awaiting sentencing. Plea Agreement, *al-Marri* (C.D. Ill. Apr. 30, 2009) (Dkt. No. 22). By transferring al-Marri back to the criminal justice system, the government effectively mooted the Supreme Court litigation. The Supreme Court, in turn, vacated the Fourth Circuit's decision, stripping the lower court ruling of precedential value. *See al-Marri v. Spagone*, 129 S. Ct. 1545 (2009) (granting application to move al-Marri from military custody to criminal justice system and instructing Fourth Circuit to dismiss appeal as moot).[38] Thus, despite the years of litigation in *al-Marri*, the contours of law-of-war detention are still largely undefined by the Supreme Court, though with the passage of time, the issue has continued to percolate in the lower courts.

The principal catalyst for this lower-court percolation has been *Boumediene v. Bush*, the landmark decision in which the Supreme Court held that Guantánamo detainees are entitled to challenge their detention through habeas corpus litigation in the federal district court in Washington, D.C.[39] 128 S. Ct. 2229 (2008). In the wake of *Boumediene*, scores of prisoners have argued in habeas litigation that they are being unlawfully detained at Guantánamo. The government, in response, has invoked the law of war as the basis for detaining many of the Guantánamo prisoners. All of this has caused the federal district court in Washington, D.C. to focus closely on the boundaries of the government's law-of-war detention authority.

In an early post-*Boumediene* decision rendered shortly before the 2008 presidential election, Judge Richard J. Leon adopted the standard for law-of-war detention that had been offered by the Bush Administration in 2004:

> An 'enemy combatant' is an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Boumediene v. Bush, 583 F. Supp. 2d 133, 135 (D.D.C. 2008). This expansive language would seemingly authorize the military detention of a broad range of individuals who were "supporting" al Qaeda anywhere in the world.

In January 2009, shortly after President Obama's inauguration, the Department of Justice asked for a stay of proceedings in the Guantánamo litigation so that it could reassess its position on the government's law-of-war detention authority. *See Gherebi v. Obama*, 609 F. Supp. 2d 43, 52-53 (D.D.C. 2009). On March 13, 2009, at the request of several judges in the D.C.

district court, the government offered a slightly revised statement of its authority to detain individuals under the law of war:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Resp'ts' Mem. Regarding the Gov't's Detention Authority Relative to Detainees Held at Guantánamo Bay at 2, *In re Guantánamo Bay Detainee Litig.*, No. 08-mc-00442 (D.D.C. Mar. 13, 2009) (Dkt. No. 1690). The government argued that detention under this definition is authorized by the AUMF as informed by traditional law-of-war principles. Not surprisingly, a number of detainees took issue with the government's definition. They argued that under the Geneva Conventions, in a "non-international" conflict between a state (i.e., the United States) and a non-state organization such as al Qaeda, the government may only detain those individuals who participate "*actively and directly* in hostilities as part of an organized armed force." *See, e.g.*, Pet'rs' Joint Mem. in Reply to Resp'ts' Mem. of Mar. 13, 2009 at 3-4, *Hamlily v. Obama*, No. 05-cv-00763 (D.D.C. Mar. 27, 2009) (Dkt. No. 189) (citing U.S. Navy Handbook) (emphasis in original).

To date, three D.C. district court judges have ruled on this dispute, and all of them have concluded that the government enjoys broad latitude to detain al Qaeda adherents under the law of war even if they did not actually participate in combat against U.S. troops. In an opinion issued on April 22, 2009, Judge Reggie B. Walton strongly rejected the detainees' arguments under the Geneva Conventions and affirmed that the United States is engaged in an armed conflict against al Qaeda even though it is an organization rather than a state. *See Gherebi*, 609 F. Supp. 2d at 67 ("The Court therefore rejects the petitioners' argument that the laws of war permit a state to detain only individuals who 'directly participate' in hostilities in non-international armed conflicts."). Judge Walton stated pointedly that the Geneva Conventions are "not a suicide pact" providing a free pass to members of an enemy's organization simply because they did not at that moment engage in combat or violence, *id.*; instead, he affirmed the government's definition of its detention authority under the AUMF, but cautioned that the government may detain only those individuals who are associated with al Qaeda in the same way as a member of enemy armed forces in a traditional international armed conflict between two states. *Id.* at 67-69. In this regard, Judge Walton explained that even though al Qaeda is an organization rather than a state, it has a "'leadership and command structure[], however diffuse,'" that resembles the analogous structures in state armed forces. *Id.* at 68 (quoting Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2114-15 (May 2005)). According to Judge Walton, it is essential to focus on this structure when considering whether an individual may be detained under the AUMF. *Id.* at 68-69. Thus, Judge Walton held that only those persons who "receive and execute orders" from al Qaeda's "command structure" may be detained as "members of the enemy's armed forces." *Id.* at 68 (internal quotation marks omitted). "Sympathizers, propagandists, and financiers who have no involvement with this 'command structure,' while perhaps members of the enemy organization in an abstract sense, cannot be considered part of the enemy's 'armed forces' and therefore cannot be detained militarily unless they take a direct part in hostilities." *Id.* at 68-69. At the same time, Judge Walton cautioned that an individual may qualify for detention even if he is not an actual fighter:

> an al-Qaeda member tasked with housing, feeding, or transporting al-Qaeda fighters could be detained as part of the enemy armed forces notwithstanding his lack of involvement in the actual fighting itself, but an al-Qaeda doctor or cleric, or the father of an al-Qaeda fighter who shelters his son out of familial loyalty, could not be detained assuming such individuals had no independent role in al-Qaeda's chain of command.

Id. at 69. Although Judge Walton ultimately upheld the government's revised standard for law of war detention, he expressed some discomfort with the concept of "support," which he viewed as a criminal law concept and not one historically inherent in the law of war. *See id.* at 69-70. Nevertheless, Judge Walton held that the "support" standard passed muster so long as it was strictly interpreted to encompass only individuals who "were members of the enemy organization's armed forces, as that term is intended under the laws of war, at the time of their capture." *Id.* at 71.

In a subsequent opinion dated May 19, 2009, Judge John D. Bates agreed with much of Judge Walton's reasoning, including his rejection of the detainees' Geneva Conventions arguments. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009). However, Judge Bates rejected the concept of "support" as an independent basis for detention under the law of war, and ultimately he pared back the government's detention authority in some respects. *Id.* at 69-70. Judge Bates held that the government may detain individuals who were "part of" the Taliban, al Qaeda, or "associated forces" (which he defined to mean "co-belligerents" under the law of war), regardless of whether those individuals actually participated in hostilities. *Id.*[40] In explaining how to determine whether an individual was "part of" an enemy organization such as al Qaeda, Judge Bates adopted Judge Walton's approach:

> The key inquiry . . . is not necessarily whether one self-identifies as a member of the organization (although this could be relevant in some cases), but whether the individual functions or participates within or under the command structure of the organization—*i.e.*, whether he receives and executes orders or directions.

Id. at 75. In contrast to Judge Walton, however, Judge Bates held that the government lacks authority to detain individuals who merely "substantially supported" the Taliban or al Qaeda, or "directly supported hostilities" against U.S. forces. *Id.* at 75-77.[41] At the same time, Judge Bates held that evidence that an individual "substantially supported" al Qaeda could be probative in determining whether the person was "part of" the organization. *Id.* at 76-77.

On May 21, 2009, Judge Royce K. Lamberth of the federal court in Washington adopted Judge Bates' conclusions and reasoning. *See Mattan v. Obama*, ---F. Supp. 2d ---, No. 09-cv-00745, 2009 WL 1425212, at *1 (D.D.C. May 21, 2009). In his brief opinion, Judge Lamberth agreed with Judge Bates that evidence that a detainee offered "support" to "Taliban, al Qaeda, or associated enemy forces" should be considered "in determining whether a detainee should be considered 'part of' those forces." *Id.* at *2.

As this discussion makes clear, U.S. jurisprudence delimiting contours of the government's detention authority under the law of war is still developing, but the picture has come into focus more sharply within the past year. In his May 21, 2009 speech at the National Archives, President Obama indicated that the administration may suggest a more formalized approach to the detention of dangerous individuals who cannot be prosecuted but who "in effect, remain at war with the United States." Barack Obama, U.S. President, Remarks by the President on National Security (May 21, 2009).[42] As Congress and the Executive Branch approach this complex and difficult problem, we believe they should do so with caution and restraint. Our time-tested

common law system is already defining the permissible scope of military detention under existing law, interpreted and adapted to address modern circumstances. It may well be the case that the government's existing military detention authority as interpreted by the district courts—coupled with the established legal authority for detention under criminal and immigration law—offers ample latitude to detain dangerous individuals without the need for wholesale creation of new and untested administrative detention regimes that will almost inevitably cause legal and practical headaches and that could, unless great care is taken, undermine our Nation's deepest values and traditions.

V.
Balancing the Demands of Due Process with the Need to Protect Classified Information

As discussed at some length in *In Pursuit of Justice*, the Classified Information Procedures Act (CIPA) establishes a detailed set of procedures designed to balance the defendant's right to a fair trial with the need to protect sensitive evidence that could endanger national security if disclosed. *See In Pursuit of Justice*, at 81-84. In the past year, courts have continued to apply CIPA in terrorism prosecutions, *see, e.g.*, *United States. v. Kassar*, 582 F. Supp. 2d 498, 499-501 (S.D.N.Y. 2008) (considering defendants' request pursuant to CIPA to use classified information at trial and ruling that classified information lacked any probative value and was inadmissible), and we are not aware of any instances in which CIPA's procedures failed and there was a substantial leak of sensitive information as a result of a terrorism prosecution in federal court.

Since last year, appellate courts have reviewed the application of CIPA in two significant terrorism prosecutions. In *United States v. Abu Ali*, the defendant argued that the district court violated his Sixth Amendment Confrontation Clause rights by refusing to allow Abu Ali himself and one of his trial attorneys, who had not obtained the necessary security clearance, to attend and participate in the closed hearings conducted under CIPA. 528 F.3d 210, 244-45 (4th Cir. 2008). A second attorney, who had obtained the requisite security clearances, attended the hearings and advocated on Abu Ali's behalf. *Id.* at 250-52, 252 n.20. Consistent with CIPA and the rulings of numerous other courts, the Fourth Circuit had little trouble affirming the district court's decision to exclude Abu Ali and his uncleared counsel from the CIPA proceedings in which the district court considered whether a particular document was relevant and material. *See id.* at 253-54 ("A defendant and his counsel, if lacking in the requisite security clearance, must be excluded from hearings that determine what classified information is material and whether substitutions crafted by the government suffice to provide the defendant adequate means of presenting a defense and obtaining a fair trial."). This ruling seems plainly correct, and had the court held otherwise CIPA's purpose would have been thwarted.

Abu Ali also raised a second, more substantial challenge to the CIPA procedures that were used in his case. He argued that the government had improperly shown the jury unredacted versions of two classified documents that Abu Ali himself had only been permitted to view in a redacted form. *Id.* at 244, 253. The documents were coded communications between Abu Ali and the second-in-command of the al Qaeda cell in Medina, Saudi Arabia. *Id.* at 222, 249-50. Although the government did not seek to withhold the substance of the communications from Abu Ali or his uncleared counsel, it contended that certain identifying and forensic information contained on the documents would, if disclosed, reveal sensitive sources and methods used

to collect intelligence. *Id.* at 250-51. Accordingly, the government only provided redacted versions of the documents to the defendant and his uncleared counsel. *Id.* at 253. Despite this, the government requested, and the court allowed, that the unredacted documents be submitted to the jury as evidence, without providing unredacted versions to Abu Ali and his uncleared counsel. *Id.* at 254.[43] On appeal, the Fourth Circuit held that it was improper for the district court to "hide the evidence from the defendant, but give it to the jury." *Id.* at 255. Nevertheless, the court went on to find that the submission of the classified documents to the jury was harmless because the substance of the documents was merely cumulative of Abu Ali's own confessions. *Id.* at 257.

Like the Fourth Circuit, the Second Circuit had little difficulty in upholding the exclusion of the defendant from in camera CIPA proceedings and his preclusion from viewing classified documents. *See In re Terrorist Bombings of U.S. Embassies in E. Africa*, 552 F.3d 93, 115-30 (2d Cir. 2008). In *In re Terrorist Bombings*, one of the convicted defendants argued that his exclusion from CIPA proceedings and the entry of a protective order that limited access to classified information to those who could obtain security clearance violated his constitutional rights to counsel, to cross-examine the witnesses against him, to be present at a crucial stage in his trial, to testify at trial, and to present a defense. *Id.* at 115-20. The Second Circuit rejected these arguments, holding that many of the documents were de-classified, others were not relevant, and for others the government agreed to stipulate to certain facts that would obviate the need for their use at trial. *Id.* at 120-30. In addition, the Second Circuit expressly found that "CIPA authorizes district courts to limit access to classified information to persons with a security clearance as long as the application of this requirement does not deprive the defense of evidence that would be 'useful to counter the government's case or to bolster a defense.'" *Id.* at 122 (internal citation omitted).

In *al-Odah v. United States*, a Guantánamo habeas case, the D.C. Circuit did not, strictly speaking, apply CIPA itself, but the court looked to the standards established under CIPA to determine when detainees are entitled to classified information in the discovery stage of habeas proceedings. 559 F.3d 539, 544-45 (D.C. Cir. 2009). The D.C. Circuit relied on settled law in holding that classified information may be disclosed to cleared defense counsel only if it "is both relevant *and material*—in the sense that it is at least helpful to the petitioner's habeas case." *Id.* at 544 (emphasis in original) (relying on precedents such as *Roviaro v. United States*, 353 U.S. 53 (1957); *United States v. Rezaq*, 134 F.3d 1121 (D.C. Cir. 1998); and *United States v. Yunis*, 867 F.2d 617 (D.C. Cir. 1989)). In the unusual (and unusually tangled) posture of Guantánamo habeas litigation, the D.C. Circuit went on to observe that "materiality" in the habeas context could be satisfied if classified evidence were not "directly exculpatory" but, for example, could cast doubt on the reliability of the affirmative evidence proffered by the government as the grounds for continued detention. *Id.* at 545. The D.C. Circuit did not make any determinations of materiality in *al-Odah*, choosing instead to remand the case so that the district court could undertake its own review of the particular items potentially subject to discovery. *Id.* at 546. One influential commentator has criticized the D.C. Circuit's ruling in *al-Odah* as having "dealt a crushing blow to national defense" because it potentially expands the discovery material that the government will be required to disclose in defending Guantánamo habeas litigation. Andrew C. McCarthy, *The War is Over*, Nat'l Rev., Mar. 10, 2009.[44] The actual impact of *al-Odah*, however, remains to be seen, most importantly because the district court has not yet ruled on whether cleared defense counsel is, in fact, entitled to additional discovery. Furthermore, it must be emphasized that if the district court does allow classified discovery to cleared defense counsel in *al-Odah*, CIPA procedures such as substitution and redaction will undoubtedly be invoked, and those

procedures have historically served as an effective means of preventing the release of sensitive information that could jeopardize national security. Finally, *al-Odah* was decided in the unique context of Guantánamo habeas litigation, and its implications for conventional criminal cases are uncertain at best.

VI.
The *Miranda* Requirement in Terrorism Cases

A defendant's post-arrest statements often have significant evidentiary value at trial, and indeed can be the central evidence against the defendant. For more than forty years, law enforcement officers have been required to administer *Miranda* warnings—"You have the right to remain silent" and so forth—at the outset of custodial interrogation in order to ensure that any statements made by the defendant will later be admissible in court.

In the intelligence context, *Miranda* does not prevent intelligence officers from interrogating a prisoner, without warnings, after his arrest or capture. *See In Pursuit of Justice*, at 102 (discussing *United States v. Bin Laden*, 132 F. Supp. 2d 168, 189 (S.D.N.Y. 2001)). However, if the government later decides to prosecute the detainee, statements elicited during custodial interrogation but without *Miranda* warnings may not be admissible. In the past year, this scenario of un-*Mirandized* intelligence interrogations has assumed significance. It has been reported that the government conducted extensive intelligence interrogations of Guantánamo detainees without *Miranda* warnings, and the Obama Administration has reportedly expressed doubts about the admissibility of statements made during these interrogations.[46]

It is difficult to assess this issue because it depends on a careful evaluation of the facts, most of which are not a matter of public record, and because the applicability of *Miranda* in the context of intelligence gathering, as opposed to criminal investigations, is still uncertain. However, a few general observations can be made. On one hand, a straightforward application of *Miranda* could indeed pose an obstacle to the admissibility of a defendant's statements during Guantánamo interrogations, especially if they occurred in controlled circumstances resembling traditional police questioning. However, there is a question as to whether courts would uniformly apply the *Miranda* requirement in the context of intelligence gathering, which may be quite different from the domestic law-enforcement scenario for which the *Miranda* doctrine was created.

In *In Pursuit of Justice*, we discussed a related issue—the applicability of *Miranda* in situations where an enemy fighter is captured on the battlefield. *See In Pursuit of Justice*, at 103-05. We noted that soldiers and sailors do not, and need not, administer *Miranda* warnings to individuals who are captured in combat. We also noted that such detainees rarely face criminal prosecution in a domestic court, meaning that the applicability of *Miranda* to battlefield captures is unlikely to be an issue in many actual cases. *See id.* at 103. However, in the event that the government does seek to use a battlefield detainee's post-capture statements in a civilian criminal prosecution, as was the case with John Walker Lindh, there are substantial questions as to whether *Miranda* would apply at all, or whether an exception based on *New York v. Quarles*, 467 U.S. 649 (1984), would obviate the need to administer the warnings. These issues were briefed in

the *Lindh* case but were not decided because of Lindh's decision to plead guilty. If a court were to accept the arguments proffered by the government in *Lindh* in the context of at least some intelligence interrogations, then a detainee's post-arrest statements could potentially be admissible if they were made voluntarily, without regard to whether *Miranda* warnings were issued.

Furthermore, even under an orthodox application of *Miranda* doctrine, it is possible that some Guantánamo detainees' statements could be admissible even if no warnings were given. For example, under *Rhode Island v. Innis* and its progeny, *Miranda* does not bar the admissibility of incriminating statements that are not made in response to police questioning or its functional equivalent. 446 U.S. 291, 300-03 (1980). It has been reported that some of the Guantánamo detainees made incriminating statements at preliminary proceedings before military commissions. Most notably, Khalid Sheikh Mohammed spoke to the tribunal convened on March 10, 2007, to determine whether he was properly designated as an enemy combatant against the United States. At that hearing, he made a statement through his designated personal representative in which he pledged allegiance to Bin Laden and confessed to being involved in the planning of about thirty terrorist attacks, including 9/11 and several other completed acts of terrorism. *See* Tr. of Combatant Status Review Tribunal Hr'g for ISN 10024 at 17-19 (Mar. 10, 2007). In a portion of the statement that Khalid Sheikh Mohammed personally delivered to the Tribunal, he referred to himself as a "jackal[] fighting in the night[]" in the "war against America" and an "enemy combatant." *Id.* at 21-22. Such statements could potentially be admissible without regard to *Miranda* because they were not made in response to questioning by interrogators.[46]

In addition, the government might be able to "cleanse" the taint of prior un-*Mirandized* statements by commencing new questioning with proper warnings. A line of cases, including *Oregon v. Elstad* and *Missouri v. Seibert*, holds that failure to provide a *Miranda* warning in advance of an incriminating statement does not necessarily invalidate a later statement given after a *Miranda* warning was properly administered, especially if the two rounds of interrogation are separated by time and place, are carried out by different interrogators, and are not continuous or overlapping. *See Elstad*, 470 U.S. 298, 314 (1985); *Seibert*, 542 U.S. 600, 615 (2004).[47]

In the future, the government could avoid, or at least substantially reduce, the risk of inadmissible confessions in intelligence interrogations by incorporating a prophylactic *Miranda*-type warning at the outset of questioning. If the detainee waived *Miranda* rights, then his statements would likely be admissible; if not, then the intelligence interrogation could proceed but the defendants' statements would potentially be inadmissible. Intelligence officers might object to the introduction of a law enforcement procedure into their norms and practices, and adding such a step would need to be considered carefully given the obvious importance of developing intelligence that is as robust and accurate as possible in the terrorism context.[48] However, years of experience and empirical data show that the vast majority of arrested defendants waive their *Miranda* rights.[49] This research suggests that it may be worth considering whether to incorporate some form of *Miranda* warnings into intelligence interrogations from which criminal prosecutions may ensue.

More concretely, in the past year the federal appeals courts issued two significant decisions, *Abu Ali* and the *Embassy Bombings* appeal, which clarified the scope of *Miranda* in terrorism cases where defendants were captured and interrogated overseas. We believe both cases will provide effective guidance for prosecutors and agents who seek to conduct overseas interrogations with a view toward ensuring the admissibility of any statements in a federal court.

In *United States v. Abu Ali*, the Fourth Circuit held that *Miranda* warnings are not required when an individual is

interrogated by foreign officials unless those officials are acting as agents of or in a "joint venture" with U.S. law enforcement. 528 F.3d 210, 227-28 (4th Cir. 2008). In such situations, the defendant's statements are admissible in a U.S. court as long as they meet the traditional standard of voluntariness. *Id.* at 227. Separately, in the *Embassy Bombings* appeal, the Second Circuit assumed without deciding that some variation of the traditional *Miranda* warning is required when U.S. law enforcement officers interrogate a captured individual overseas and the government later seeks to offer the defendant's statements in court. *In re Terrorist Bombings of U.S. Embassies in E. Africa* (Fifth Amendment Challenges), 552 F.3d 177, 205 (2d Cir. 2008). However, the Second Circuit noted that, even if it were to hold that Miranda governed in these situations, *Miranda* would have to be "applied in a flexible fashion to accommodate the exigencies of local conditions." *Id.* What follows is a more detailed discussion of these two decisions.

A. The *Abu Ali* Case

In *Abu Ali*, the defendant was a United States citizen raised in Northern Virginia who moved to Saudi Arabia at age twenty-one. 528 F.3d at 221. After he arrived in Saudi Arabia, the defendant became affiliated with an al Qaeda cell; planned possible terrorist attacks in the United States, including plots to kill the President; and received training in firearms, explosives, and forgery. *See id.* at 221-24. In 2003, after being arrested by Saudi authorities, the Saudi counterterrorism agency, the Mabahith, interrogated the defendant over the course of a two-week period. *See id.* at 224-25. The interrogations resulted in several written confessions and a videotaped confession. *Id.* at 224. During one day of interrogation, June 15, 2003, the Mabahith asked Abu Ali certain questions that the FBI submitted, and the Mabahith allowed the FBI to observe that interrogation via a one-way mirror. *See id.* at 225. In 2005, Abu Ali was turned over to the United States to face criminal charges in federal court. *Id.* At the trial, the government presented evidence of the defendant's incriminating statements during his interrogation in Saudi Arabia, and he was convicted and sentenced to thirty years' imprisonment. *Id.* at 225-26. On appeal, the defendant argued that he had not been given *Miranda* warnings and that, as a result, his statements to the Saudi authorities should have been suppressed. *Id.* at 228.

A Fourth Circuit panel rejected the defendant's arguments and held, by a 2-1 vote, that *Miranda* did not apply to the questioning by the Saudi authorities. *Id.* at 227-30. With respect to the interrogation observed by the FBI, the panel majority found that the Saudis were not engaged in a "joint venture" that would trigger *Miranda* because the Saudis "rejected a majority of the questions proposed by the FBI," and U.S. agents were not actually "present in the interrogation room," and therefore the U.S. agents did not "actively participate" in the interrogation. *Id.* at 228-29, 229 n.5. The panel derived the "general rule" that "mere presence at an interrogation does not constitute the 'active' or 'substantial' participation necessary for a 'joint venture,' but coordination and direction of an investigation or interrogation does." *Id.* at 229 (citations omitted). The majority reasoned that to expand the application of *Miranda* to cases where U.S. law enforcement officials were present, but did not actively participate, would stray from *Miranda*'s purpose of regulating the conduct of U.S. law enforcement officers and "could potentially discourage the United States and its allies from cooperating in criminal investigations of an international scope." *Id.* at 229 n.5. The majority emphasized that "[t]o impose all of the particulars of American criminal process upon foreign law enforcement agents goes too far in the direction of dictation, with all its attendant resentments and hostilities." *Id.*[50]

Later in the *Abu Ali* opinion, all three members of the panel affirmed the lower court's ruling, which was based on an exhaustive fourteen-day evidentiary hearing, that

the defendant had voluntarily made his post-arrest statements to the Saudi authorities. *Id.* at 232-34. The Fourth Circuit emphasized the testimony of both Saudi and American officials who observed Abu Ali during the period of his interrogation and testified that he "showed no physical or psychological signs of impairment" despite Abu Ali's claims that he was tortured by Saudi authorities. *Id.* The Fourth Circuit's discussion underscores the importance of making accurate contemporaneous observations of a defendant who is being interrogated overseas—including obtaining contemporaneous medical exams if possible—in order to deter or detect any possible improper behavior by foreign law enforcement officers and to rebut fabricated claims of torture that may later be offered by defendants who are seeking to have their post-arrest statements excluded. *See id.* at 232-33 (noting approvingly that the lower court had issued a 113-page opinion in which it expressed doubts about the credibility of Abu Ali's claims of torture and that the lower court had carefully weighed the evidence in this regard).

B. The *Embassy Bombings* Case

The *Embassy Bombings* case presented a different factual scenario in which the overseas interrogation was carried out directly by U.S. law enforcement officials including FBI agents, a New York Police Department detective, and an Assistant United States Attorney (AUSA). 552 F.3d at 181. The questioning occurred over a nine-day period in Kenya in the aftermath of the 1998 bombings of the U.S. embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania. *Id.* at 181-83. The defendant was given a variant of the traditional Miranda warnings on a pre-printed FBI "Advice of Rights" (AOR) form. *Id.* at 181. Although this form advised the defendant that he had the right to remain silent, it did not give any information about a right to counsel, stating only that the defendant would have a right to counsel if he was being interrogated in the United States but that "[b]ecause we are not in the United States, we cannot ensure that you will have a lawyer appointed for you before any questioning." *Id.* Before trial, the lower court had held that *Miranda* was applicable to the interrogation, even though it occurred halfway around the world, and that the AOR form was defective because it too easily dismissed the availability of counsel. *Id.* at 188-90. The lower court held, however, that oral clarifying remarks by the AUSA were sufficient to cure the deficiencies of the AOR form, that the defendant had knowingly waived his clarified *Miranda* rights, and that the defendant's statements after the AUSA's clarifications were therefore admissible. *Id.* at 190-91.

On appeal, the Second Circuit assumed (but did not expressly decide) that "the *Miranda* 'warning/waiver' framework generally governs the admissibility in our domestic courts of custodial statements obtained by U.S. officials from individuals during their detention under the authority of foreign governments." *Id.* at 203. The Second Circuit held, however, that the lower court had applied *Miranda* too rigidly in rejecting the language of the AOR. *Id.* at 205-09; *see also id.* at 205 ("[W]here *Miranda* has been applied to overseas interrogations by U.S. agents, it has been so applied in a flexible fashion to accommodate the exigencies of local conditions."). Unlike the lower court, the Second Circuit found that the "AOR substantially complied with whatever *Miranda* requirements were applicable," *id.* at 209, noting that it "presented defendants with a factually accurate statement of their right to counsel under the U.S. Constitution" and that "it also explained that the effectuation of that right might be limited by the strictures of criminal procedure in a foreign land," *id.* at 206. Emphasizing that U.S. law enforcement officers working overseas are not required to "study local criminal procedure and urge local officials to provide suspects with counsel," *id.* at 207, the Second Circuit summarized that "*Miranda* requires government agents to be the conduits of information to detained suspects—both as to (1) their rights under the U.S. Constitution to the presence and appointment of counsel at custodial

interrogations and (2) the procedures through which they might be able to vindicate those rights under local law. It does not compel the police to serve as advocates for detainees before local authorities, endeavoring to expand the rights and privileges available under local law," *id.* at 208 (emphasis omitted).[51]

VII.
Broad Array of Evidence Successfully Introduced in Terrorism Prosecutions

As with all prosecutions, evidence is the foundation on which any terrorism prosecution is built, and evidence must be legally admissible before it can be considered by a jury. In federal court, the admissibility of evidence is governed by the Federal Rules of Evidence and, in some situations, by the requirements of the Constitution. The events of the past year confirm that, in general, federal evidentiary rules do not preclude prosecutors from introducing reliable, probative evidence in terrorism prosecutions. Again, the *Abu Ali* case is instructive. In that case, the Fourth Circuit provided a road map for how the government can secure testimony from witnesses who are located overseas without violating a defendant's constitutional right to confront the witnesses against him. *Abu Ali*, 528 F.3d 210, 238-43 (4th Cir. 2008). Separately, the Second Circuit reversed a major terrorism-financing conviction in *United States v. al-Moayad* based on a litany of trial errors by the presiding judge. 545 F.3d 139 (2d Cir. 2008). The *al-Moayad* reversal stands as a reminder of the importance of careful attention to evidentiary requirements. Finally, two new terrorism prosecutions, *United States v. Ahmed* and *United States v. al-Delaema*, illustrate the broad array of evidence, including electronic communications, that may be available to the government in particular cases. *See Ahmed*, No. 07-cr-00647 (N.D. Ohio); *al-Delaema*, No. 05-cr-00337 (D.D.C.).

A. *United States v. Abu Ali*— the Confrontation Clause

The Sixth Amendment to the United States Constitution guarantees that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Traditionally, the Confrontation Clause mandates that the defendant be given "a face-to-face meeting with witnesses appearing before the trier of fact." *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988). In some terrorism cases, however, the witnesses are located far away in foreign countries, which raises the question whether it is possible to reconcile the defendant's right to confront the witnesses against him with the practical difficulties of securing live, in-person testimony from foreign witnesses. In *Abu Ali*, the Fourth Circuit answered this question in the affirmative, endorsing the careful steps taken by the trial judge to ensure that the defendant and his counsel had a fair opportunity to confront adverse witnesses in Saudi Arabia.

The defendant in *Abu Ali*, a native of Virginia, moved at age twenty-one to Saudi Arabia, where he became affiliated with an al Qaeda cell and planned serious terrorism attacks in the United States. 528 F.3d at 221-24. On June 8, 2003, a little over a month after deadly al Qaeda bombings in Riyadh, the Mabahith, Saudi

Arabia's anti-terrorism law enforcement agency, arrested Abu Ali in Saudi Arabia and held him in custody there. *Id.* at 224. Abu Ali eventually gave incriminating written and videotaped confessions to the Saudi authorities. *Id.* at 238. He was subsequently turned over to the United States to face terrorism charges in federal court in Virginia. *Id.* at 225. Before trial, Abu Ali moved to suppress his confessions, arguing that he had been tortured by the Mabahith, and that his confessions were therefore inadmissible. *Id.* at 225-26, 232.

In order to assess Abu Ali's claims of torture, it was necessary for the trial court to hear testimony from the Mabahith officers who had interrogated Abu Ali. Also, in order to admit the confessions at trial, it was important for the Mabahith officers to explain to the jury the circumstances under which the confession had been obtained. All of this presented a logistical conundrum, however, because the Saudi government did not permit the Mabahith officers to travel to the United States, and they could not be compelled to travel because they fell outside the subpoena power of a U.S. court. *Id.* at 239. The Saudi government allowed the Mabahith officers to participate in a pre-trial deposition held in Saudi Arabia, which could be videotaped and played before the jury at trial under Rule 15 of the Federal Rules of Criminal Procedure, but this procedure would not allow Abu Ali to have a face-to-face encounter with the witnesses unless he could somehow be transported back to Saudi Arabia for the depositions—a scenario that could not be arranged because of security considerations. *Id.*

Attempting to resolve this logistical dilemma, the district court devised an elaborate solution under which the prosecutors, a translator, and two defense attorneys attended the depositions in Saudi Arabia while a third defense attorney sat with Abu Ali in a courtroom in Virginia. *Id.*

> A live, two-way video link was used to transmit the proceedings to a courtroom in Alexandria. This permitted Abu Ali and one of his attorneys to see and hear the testimony contemporaneously; it also allowed the Mabahith officers to see and hear Abu Ali as they testified. . . . [B]oth the witnesses and Abu Ali were videotaped during the depositions, so that the jury could [later] see their reactions.

Id. at 239-40. The judge was present in the courtroom with Abu Ali in Virginia to rule on evidentiary objections, and Abu Ali had a cell phone link with his attorneys in Saudi Arabia to permit private conferences during breaks. *Id.* at 240. With these arrangements in place, the trial judge presided over seven days of testimony, in which the Mabahith officers testified extensively and were subject to full cross-examination about all aspects of Abu Ali's treatment by the Saudi authorities, including the events leading up to his confessions. *Id.* At trial, relevant portions of the deposition videotape were played for the jury. *Id.* at 241-42.

On appeal, the Fourth Circuit upheld these procedures under the Confrontation Clause. Noting the strong preference for in-person confrontation rights, the Fourth Circuit nevertheless relied on Supreme Court precedent holding that testimony may be received without in-person confrontation if: (a) "the denial of 'face-to-face confrontation' [is] 'necessary to further an important public policy,'" and (b) "the district court . . . ensure[s] that protections are put in place so that 'the reliability of the testimony is otherwise assured.'" *Id.* at 240 (quoting *Maryland v. Craig*, 497 U.S. 836, 850 (1990)). In *Abu Ali*, the Fourth Circuit found that both of these conditions were satisfied. *Id.*

First, the Fourth Circuit found that "[t]he prosecution of those bent on inflicting mass civilian casualties or assassinating high public officials is . . . just the kind of important public interest contemplated by" the Supreme Court's decision in *Maryland v. Craig*. *Id.* at 241. The court held that insisting on in-person confrontation in all circumstances would "in some circumstances limit the ability of the United States to further its fundamental interest in preventing terrorist attacks." *Id.* The court added:

> It is unquestionable that the struggle against terrorism is one of global dimension and that the United States depends upon its allies for logistical support and intelligence in this endeavor. This cooperation can result in foreign officials possessing information vital to prosecutions occurring in American courts. If the government is flatly prohibited from deposing foreign officials anywhere but in the United States, this would jeopardize the government's ability to prosecute terrorists using the domestic criminal justice system.

Id.

Turning to the other prong of the *Maryland v. Craig* test, the Fourth Circuit held that the procedures devised by the trial court were sufficiently robust to assure the reliability of the deposition testimony, thus permitting the videotape to be shown to the jury. *Id.* at 241-42. Accordingly, the Fourth Circuit upheld the admissibility of the videotaped testimony. Going forward, it is likely that prosecutors and courts will look to *Abu Ali* as a template for how to secure testimony from foreign witnesses in important terrorism cases.[52]

B. *United States v. al-Moayad*—the importance of attention to evidentiary requirements

The government suffered a setback in *al-Moayad*, in which the Second Circuit threw out a major terrorism-financing conviction and remanded for a new trial based on a series of trial errors by the presiding judge. In *al-Moayad*, the lead defendant, a Yemeni cleric, was arrested in Germany along with a co-defendant after an undercover FBI investigation featuring a controversial informant whose strange behavior became a focus of the trial. 545 F.3d at 145-50. The informant, Mohammed al-Anssi, had approached the FBI soon after 9/11 and offered to assist in an investigation of al-Moayad, who al-Anssi stated was involved in supplying money, arms, and recruits to terrorist groups. *Id.* at 145-46. The FBI sent al-Anssi on three separate trips to Yemen, where he met with al-Moayad and ultimately proposed a sting operation under which al-Moayad would travel to Frankfurt, Germany to meet with a "donor" (in reality, another FBI informant) who was purportedly interested in donating millions of dollars to support terrorism. *See id.* at 146-48. The meeting in Germany was secretly recorded by the government, and al-Moayad and a co-defendant were arrested shortly after the meeting ended. *See id.* at 150.

At trial, the defense argued that al-Moayad ran legitimate charitable organizations and that the government had entrapped him into meeting with the informants. *Id.* at 153-54. In support of this theory, the defense pointed to many of the taped conversations from the meetings in Germany where al-Moayad seemingly resisted discussing terrorist activities and instead emphasized purportedly legitimate charitable activities. *See id.* at 148-50. In a bold tactical move, the defense also called al-Anssi as a witness in the defense case. *See id.* at 154-55. (The government had chosen not to call al-Anssi as a witness during its case-in-chief despite his central role in the investigation. *See id.* at 145-46.)

In his testimony, al-Anssi admitted that the FBI paid him $100,000 but that he sought millions of dollars more and that, in a bid to get more money from the FBI, he set himself on fire in front of the White House. *See id.* at 146, 154. Al-Anssi also admitted that he had a prior felony conviction for writing bad checks. *See id.* at 154. Seeking to further undermine al-Anssi's testimony, defense counsel emphasized that al-Anssi had not recorded any of his meetings with al-Moayad in Yemen and repeatedly asked al-Anssi questions suggesting that there was no "recording or . . . piece of paper that's prior to Frankfurt" demonstrating that al-Moayad had funneled money for jihad. *Id.*; *see also id.* at 155 ("'I ask you before you went to Frankfurt, was there anything, any document or any recording supporting what you've told this jury today?'"). On cross-examination, in

an effort to rehabilitate al-Anssi's credibility, the government offered incriminating notes that al-Anssi had taken during his unrecorded meetings with al-Moayad in Yemen. *Id.* at 155. The trial court admitted the notes as substantive evidence, despite their quality as hearsay, and the government argued from the notes extensively in its summation. *See id.* at 155, 170.

In its rebuttal case, the government also offered an unrelated piece of documentary evidence—an "application for a mujahidin training camp" that had been filled out in 1999 by an unknown individual named "Abu Jihad" who had listed al-Moayad as a reference on the form. *See id.* at 156. The government did not offer evidence about the identity or background of Abu Jihad; it merely offered the form at trial to show al-Moayad's connection to terrorism. *See id.* The government also offered the testimony of a cooperating defendant named Yahya Goba, an American citizen who had attended an al Qaeda training camp in 2001 and who had filled out a similar form. *See id.* Goba did not have any dealings with al-Moayad or "Abu Jihad," but he nevertheless was permitted to offer extensive testimony about his experience in a training camp in Afghanistan, including two visits to the camp by Osama bin Laden. *See id.* at 156-57.

The jury convicted al-Moayad and his co-defendant, and the trial judge sentenced them to extensive terms of imprisonment. *Id.* at 158-59. On appeal, however, the Second Circuit threw out the convictions, highlighting various pieces of evidence that had been improperly admitted. *See id.* at 159-79. In particular, the Second Circuit found that the trial court had allowed the government to elicit improperly wide-ranging testimony from Goba, whose inflammatory testimony about his experience in an al Qaeda training camp was, according to the Second Circuit, unfairly prejudicial to al-Moayad. *See id.* at 162-63.[53] The Second Circuit also criticized the trial judge for admitting al-Anssi's notes as substantive evidence given their status as hearsay, though the Second Circuit suggested that the notes could potentially have been admitted for a more limited purpose if a proper jury instruction had been given. *See id.* at 166-69. Finally, although the Second Circuit held that the mujahidin form had been properly authenticated despite the less-than-perfect chain of custody, *see id.* at 172-73 (quoting *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007) (noting that "'the bar for authentication of evidence is not particularly high,' and proof of authentication may be direct or circumstantial"), the court noted that the form was hearsay and that the government had not met the necessary requirements for admissibility as a co-conspirator statement, *see id.* at 172-74.

Although the reversal in *al-Moayad* was a significant blow for the government, analysis of the Second Circuit's opinion reveals that most of the trial court's errors were garden-variety trial mistakes that do not suggest any systemic or structural flaw particular to terrorism prosecutions. Further, had the trial court made a more careful record of its evidentiary rulings, and had the court more diligently required the use of limiting instructions and proper evidentiary foundations, it is probable that at least some of the disputed evidence could have been properly admitted. Therefore, we do not believe the *al-Moayad* reversal reveals any particular weakness in the overall ability of the federal courts to handle terrorism cases. Nevertheless, the Second Circuit's decision is a strong reminder of the importance of adhering to the Federal Rules of Evidence, even in important and high-profile terrorism cases.

C. *United States v. Ahmed* and *United States v. al-Delaema*—illustrating the breadth of available evidence in terrorism cases

In the past year, the government secured guilty pleas in two terrorism prosecutions that were filed, respectively, in Toledo and Washington, D.C. *See* Plea Agreement as to Zubair Ahmed, *Ahmed* (N.D. Ohio Jan. 15, 2009)

(Dkt. No. 131); Plea Agreement as to Khaleel Ahmed, *Ahmed* (N.D. Ohio Jan. 15, 2009) (Dkt. No. 132); Plea Agreement, *al-Delaema* (D.D.C. Feb. 26, 2009) (Dkt. No. 92). Although these cases are unrelated, they illustrate the tremendous breadth of evidence that is potentially available to the government in prosecuting alleged terrorists. In particular, both the *Ahmed* and *al-Delaema* cases exemplify the government's successful use of electronic evidence to build strong terrorism cases.

In *Ahmed*, two Chicago cousins, Zubair Ahmed and Khaleel Ahmed, each pled guilty to one count of conspiracy to provide material support to terrorists in violation of 18 U.S.C. § 2339A. Superseding Information, *Ahmed* (N.D. Ohio Jan. 15, 2009) (Dkt. No. 129); *see also* Press Release, U.S. Dep't of Justice, Chicago Cousins Plead Guilty to Conspiracy to Provide Material Support to Terrorists (Jan. 15, 2009).[54] The theory of the prosecution was that the cousins had conspired, over a period of almost three years, to provide themselves as "personnel" to perform violent acts against U.S. military forces in Iraq or Afghanistan. Superseding Information, *Ahmed* (N.D. Ohio Jan. 15, 2009) (Dkt. No. 129). In its original indictment, the government laid out in detail the evidence of the cousins' plot. *See* Indictment, *Ahmed* (N.D. Ohio Dec. 13, 2007) (Dkt. No. 1). The indictment contains an impressive array of evidence that is as noteworthy for its variety as for its probative force. Among other things, it describes the following types of evidence against the Ahmed cousins:

- Travel records showing that the cousins traveled together to Egypt in 2004, *id.* ¶¶ 15-17;
- Intercepted emails in which Zubair Ahmed wrote to another individual about "the need to prepare for 'the final war of Islam'" and plans to reach "the 'third' level, their code word for active participation in violent jihad," and in which the two men discussed overcoming their family members' objections to violent jihad, *id.* ¶¶ 22-23, 31;
- Testimony of a cooperating witness with a military background who agreed to provide the cousins with "weapons, tactical, and other military-style training," *id.* ¶¶ 18-19;
- Intercepted telephone conversations in which Zubair Ahmed spoke to another person about the plan to engage in violent jihad, and in which Zubair and Khaleel Ahmed discussed cleaning computer files to delete references to the 2004 Egypt trip and obtaining particular types of firearms in Illinois, *id.* ¶¶ 34-42;
- False statements to federal agents who interviewed both cousins, *id.* ¶¶ 43-45; and
- Records of Zubair Ahmed's purchase of a firearm in Illinois and the cousins' purchase of ammunition at a different location, *id.* ¶¶ 46-47.

Taken as a whole, this body of evidence exemplifies the many ways the government can prove its case, from cooperating witnesses to traditional business records and travel records to intercepted telephone calls and emails.

Al-Delaema was the first case in which U.S. courts were used to prosecute an individual for terrorism against U.S. troops in Iraq. *See* Gov't's Sentencing Mem. at 1, *al-Delaema* (D.D.C. Apr. 3, 2009) (Dkt. No. 99). The defendant, Wesam al-Delaema, was a native of Iraq who settled in the Netherlands in 1993, became a Dutch citizen in 2001, and worked in the Netherlands as a hairdresser and in an auto repair shop. *Id.* at 5. In 2003, al-Delaema became outraged when U.S. forces invaded Iraq. *See id.* at 5-6. In October 2003, he and a friend drove their cars from the Netherlands to Iraq, videotaping much of the trip, and al-Delaema then proceeded to videotape himself meeting in Iraq with masked figures at night outside Fallujah as the group planted improvised explosive devices (IEDs) in the roadway in an effort to kill U.S. troops. *See id.* at 7-14. The videotapes were remarkably comprehensive and incriminating; they depicted al-Delaema and others

making impassioned speeches in which they described their plan to mine the roadway in explicit detail. *See id.* at 11-14. For example, the videotape depicts al-Delaema himself saying:

> We, the Mujahideen of Fallujah, have a plan. God willing, for today. With God's help, and if the Americans enter, we will hit them with timed mine, by way of remote. . . . Controlled by remote from afar. God willing, if the hit is successful, we will hunt them. . . . We will show you, in a short while, the site where we hide the mines and how the operation is conducted.

Id. at 10. The government was able to document the time and location where the videotapes were filmed by comparing the images in the video to known aerial photographs of the Fallujah area as well as tables showing the position of the sun at various longitudes and latitudes at various times of the year. *See id.* at 15. The government's analysis of the Fallujah video also matched up with locations of known IED attacks in the month of October 2003. *Id.*

After al-Delaema returned to the Netherlands, the Dutch police imposed a court-ordered wiretap on his phone. *See id.* at 16. On the wiretap, the Dutch authorities intercepted conversations in which al-Delaema spoke with others about martyrdom, war, insurgent attacks in Iraq, and obtaining video recordings of attacks. *See id.* at 16-17. In one intercepted call, al-Delaema offered to obtain a video camera for a colleague to take to Iraq to use in filming attacks against Americans. *See id.* at 17. Later, after he had been extradited to the United States, al-Delaema challenged the admissibility of the Dutch wiretap evidence, but the district judge ruled that the wiretaps had been lawfully conducted under Dutch law after holding a week-long evidentiary hearing for which Dutch law enforcement agents traveled to Washington, D.C. to give testimony. *See id.* at 2-4.

At the time of al-Delaema's arrest in the Netherlands, the Dutch authorities seized numerous incriminating videos from his residence, including the October 2003 video of the IED operation outside Fallujah. *See id.* at 19. Also, al-Delaema made numerous, videotaped false exculpatory statements when the Dutch police asked him about his activities in Iraq. *See id.* at 21-29.

In January 2007, after losing an extradition battle, al-Delaema was transported to Washington, D.C. to face federal terrorism charges. *See id.* at 2. On February 26, 2009, after extensive pre-trial motion practice, al-Delaema pled guilty to one count of conspiracy to murder U.S. nationals abroad in violation of 18 U.S.C. § 2332(b)(2).[65] *See* Plea Agreement at 2, *al-Delaema* (D.D.C. Feb. 26, 2009) (Dkt. No. 92). He stipulated to a twenty-five-year prison sentence which will be served in the Netherlands. *See id.* at 2, 4-5. Assessing the case, it is clear that the success of the prosecution rests in large part on the varied and vivid electronic and videotaped evidence that was available for use against the defendant.

VIII.
Recent Developments in Sentencing Terrorism Defendants

In the past year, courts have continued to impose severe sentences on defendants convicted of terrorism-related offenses, whether by trial or guilty plea. Much of the litigation has focused on the special provision of the Sentencing Guidelines, § 3A1.4, which provides for dramatically increased sentencing exposure for defendants who are convicted of a crime that "involved, or was intended to promote, a federal crime of terrorism." U.S.S.G. § 3A1.4. In most cases, this provision would automatically trigger a Guidelines range of no less than 210-262 months.

Since *In Pursuit of Justice* was released, courts have continued to apply the terrorism sentencing enhancement under § 3A1.4. The Fourth Circuit addressed the application of the terrorism enhancement in two recent cases. *See United States v. Benkahla*, 530 F.3d 300 (4th Cir. 2008); *United States v. Chandia*, 514 F.3d 365 (4th Cir. 2008). In *Benkahla*, the court affirmed the district court's application of the terrorism enhancement against a defendant who was convicted of making false statements to the FBI and obstructing justice in a terrorism investigation after being acquitted on underlying terrorism charges. 530 F.3d at 311-13. In *Chandia*, the Fourth Circuit vacated the defendant's 180-month sentence and remanded for resentencing on the grounds that the district court appeared to have incorrectly determined that the terrorism enhancement automatically applied to a conviction under the material support statute. *See* 514 F.3d at 375-76. The court remanded for a determination of whether the defendant had the intent required for the enhancement to be applicable. *Id.* at 376.

Several courts have found that application of the terrorism enhancement does not require "transnational conduct." In *United States v. Salim*, the defendant attacked a corrections officer in New York City while awaiting trial on charges related to the 1998 Embassy Bombings in East Africa. 549 F.3d 67, 70 (2d Cir. 2008). The facts showed that the attack was in retaliation for the court's refusal to allow a substitution of counsel in the underlying case. *See id.* at 70-71. The trial court had declined to include the terrorism enhancement in its calculation of the applicable Guidelines range on the grounds that the defendant did not engage in a "federal crime of terrorism" because his conduct in attacking the guard was not "conduct transcending national boundaries" under § 2332b(a)(1). *Id.* at 72.

On the government's cross-appeal, the Second Circuit found that application of the terrorism enhancement does not require "transnational conduct." *See id.* at 76-79. The court held that:

> The sentencing enhancement for a federal crime of terrorism is not limited to conduct that constitutes an offense under section 2332b; it applies to any con-

> duct that meets the definition of subsection (g)(5). Congress could have defined 'Federal crime of terrorism' to include a requirement that the offense conduct transcend national boundaries, but it did not. Instead, it defined two distinct terms, 'Federal crime of terrorism' and 'conduct transcending national boundaries,' and neither term references the other.

Id. at 78. The court concluded that the sentence was unreasonable based on the procedural failure to calculate the appropriate Guidelines range, and remanded to the district court for resentencing. *See id.* at 79. In a separate case, the Eleventh Circuit agreed with this analysis. *See United States v. Garey*, 546 F.3d 1359, 1361-63 (11th Cir. 2008) (rejecting requirement of "transnational conduct" for application of the terrorism enhancement).

In *United States v. Abu Ali*, perhaps the most interesting terrorism-related sentencing decision of the past year because of the breadth of issues it covers, the Fourth Circuit found that the district court abused its discretion in deviating downward from the applicable Guidelines range. *See* 528 F.3d 210, 258-65 (4th Cir. 2008). The dissent suggested that, in so doing, the Fourth Circuit created a standard of review for terrorism sentences that is less deferential than the ordinary abuse-of-discretion standard. *See id.* at 270-72 (Motz, J., dissenting).

As outlined above, Abu Ali was convicted of serious crimes including material support, conspiracy to assassinate the President, and conspiracy to destroy aircraft. *See id.* at 225-26. Although Abu Ali was subject to a life sentence under the Guidelines, the district court deviated downward, sentencing him to 360 months imprisonment. *See id.* at 258-59. In reaching that sentence, the district court compared Abu Ali's case with the *Lindh* case—in which a U.S. citizen received a twenty-year sentence after being captured in Afghanistan fighting alongside the Taliban against U.S. forces—along with the Oklahoma City bombing prosecutions of Timothy McVeigh and Terry Nichols. *See id.* at 259. The trial court found that Abu Ali's case was similar to the *Lindh* case and distinguishable from *McVeigh* and *Nichols*. *See id.* As a result, the court reasoned, under 18 U.S.C. § 3553(a)(6), the need to avoid unwarranted sentence disparities merited a downward adjustment from the Guidelines range. *See id.*

On appeal, the Fourth Circuit vacated Abu Ali's sentence and remanded for resentencing on the grounds that the forty percent reduction imposed by the trial court was not reasonable. *See id.* at 261-65. The court held that the *Lindh* case was not comparable based on a number of factors, including that Lindh pled guilty, expressed remorse, and never intended to fight against the United States. *See id.* at 262-64. Conversely, the court held that the *McVeigh* and *Nichols* cases should not have been distinguished on the ground that Abu Ali's plans were thwarted, because Abu Ali had taken significant steps and the offense "clearly contemplates incomplete conduct." *Id.* at 264. In dissent, Judge Motz argued that the *Abu Ali* majority in effect created a less deferential standard apparently applicable only for terrorism cases, *see id.* at 271 (Motz, J., dissenting); the majority disagreed, insisting that it had merely applied settled sentencing law in light of the "immensity and scale of wanton harm that was and remains Abu Ali's plain and clear intention," *id.* at 269.

Finally, the recent case of *United States v. al-Delaema* illustrates the complications that may arise in extraditing and trying foreign citizens for terrorism crimes under the laws of the United States, given the tendency of the U.S. system to dole out harsh sentences for such violations. As outlined above, al-Delaema, a native of Iraq who became a Dutch citizen in 2001, traveled from his home in the Netherlands to Iraq, where he helped bury improvised explosive devices (IEDs) in and around Fallujah with the intent that the IEDs would explode and destroy American vehicles, killing Americans riding inside. *See* Statement of Offense, *United States v. al-Delaema*, No. 05-cr-00337 (D.D.C. Feb. 26, 2009)

(Dkt. No. 93); Gov't's Sentencing Mem. at 5-15, *al-Delaema* (D.D.C. Apr. 3, 2009) (Dkt. No. 99). Al-Delaema was indicted in the District of Columbia in September 2005, and fought vigorously against extradition to the United States, arguing that he would not be treated fairly and humanely in the U.S. criminal justice system. *See* Indictment, *al-Delaema* (D.D.C. Sept. 9, 2005) (Dkt. No. 5); Gov't's Sentencing Mem. at 1-2, *al-Delaema* (D.D.C. Apr. 3, 2009) (Dkt. No. 99). Al-Delaema was extradited in January 2007, and as in other extraditions between the United States and the Netherlands, the United States agreed that, upon the defendant's conviction and sentencing, the United States would not oppose any request by the defendant to serve his sentence in the Netherlands. *See* Gov't's Sentencing Mem. at 1, *al-Delaema* (D.D.C. Apr. 3, 2009) (Dkt. No. 99); Plea Agreement at 4-5, *al-Delaema* (D.D.C. Feb. 26, 2009) (Dkt. No. 92).

Al-Delaema subsequently pled guilty to one count of conspiracy to kill a national of the United States outside the United States in violation of 18 U.S.C. § 2332(b). *See* Judgment, *al-Delaema* (D.D.C. Apr. 17, 2009) (Dkt. No. 109). Pursuant to the plea agreement, the parties agreed that a sentence of twenty-five years was appropriate. *See* Plea Agreement at 2, *al-Delaema* (D.D.C. Feb. 26, 2009) (Dkt. No. 92). The plea agreement also stated that the United States agreed not to oppose defendant's request to serve his sentence in the Netherlands, should he request it, and that all parties understood that the defendant would be re-sentenced by a judge in the Netherlands upon his return to that country. *See id.* at 4-5. On April 16, 2009, al-Delaema was sentenced to twenty-five years in accordance with the plea agreement. *See* Minute Entry, *al-Delaema* (D.D.C. Apr. 16, 2009); Judgment, *al-Delaema* (D.D.C. Apr. 17, 2009) (Dkt. No. 109).

Al-Delaema will likely be transported to the Netherlands in the coming months and the issue of his sentence be revisited by a Dutch court. Al-Delaema's attorney has stated that he is confident that al-Delaema will receive a reduced sentence in the Netherlands because the sentencing rules there are not as severe as in the United States. *See* Nedra Pickler, *Judge Urges Dutch to Match Insurgent's US Sentence*, Associated Press, Apr. 15, 2009.[55] Nevertheless, the government views the conviction as a victory, with U.S. Attorney Jeffrey A. Taylor stating that "[t]his case, which represents the first use of the United States criminal courts to prosecute an individual for terrorism offenses against Americans in Iraq, demonstrates our resolve to use every tool at our disposal to defend Americans, both at home and abroad." Press Release, U.S. Dep't of Justice, Iraqi-Born Dutch Citizen Sentenced to 25 Years in Prison for Terrorism Conspiracy Against Americans in Iraq (Apr. 16, 2009).[57] While the *al-Delaema* case illustrates that cooperation and often compromise will be required in order to prosecute foreign citizens in the American court system, it also demonstrates a willingness on the part of foreign governments to entrust their citizens to the American court system for trial and, to a degree, for sentence in terrorism cases. It is not self-evident that other countries will cooperate to the same extent or extradite their citizens for proceedings in which the defendant's rights would be curtailed as has been proposed in a new national security court or in military commissions.

IX.
Safety and Security of Communities Near Prisons Holding Terrorism Defendants

In *In Pursuit of Justice*, we examined the ability of the federal criminal justice system to assure the safety and security of the judges, jurors, and witnesses, as well as the ability of the Bureau of Prisons to maintain security within the prison system. *See In Pursuit of Justice*, at 121-27. While terrorism cases have tested the system and its resources, and there has been at least one tragic incident in which a prison guard was severely injured, *see id.* at 121 (detailing the attack on Louis Pepe by Mamdouh Mahmud Salim), we concluded that in general the justice system was able to manage the security challenges of terrorism cases, and indeed has been doing so for more than twenty years. As terrorism prosecutions have continued in the past year, the security issues posed by terrorism prosecutions have continued to be managed successfully within the Article III courts and the Bureau of Prisons.

As it has in other areas of the terrorism debate, Guantánamo, with its over 200 detainees, has provoked new questions about safety and security. The current debate has focused on the capacity of the court system and U.S. prisons to protect the safety and security of the communities to which the detainees will be sent to be detained pending trial and beyond, if they are convicted. The debate has largely been driven by elected representatives from around the country who have objected to the prospect of Guantánamo detainees being incarcerated in correctional facilities in their districts. *See, e.g.*, David D. Kirkpatrick & David M. Herszenhorn, *Guantánamo Hands G.O.P. A Wedge Issue*, N.Y. Times, May 24, 2009, at A1[58] (Kansas Senator Pat Roberts opposing any transfer of Guantánamo detainees to the maximum security facility in Ft. Leavenworth, Kansas); *Sen. Hatch Opposes Closing Guantánamo, Transferring Enemy Combatants to U.S.*, US Fed. News, Mar. 13, 2009[59] (quoting Sen. Hatch as stating "Bringing these detainees to the continental United States is tantamount to injecting a virus into a healthy body" and characterizing the availability of maximum security prison space within the federal prison system as inadequate if the U.S. is unable to place these detainees into the custody of other countries); Mike Sunnucks, *Rep. Trent Franks looks to keep Guantánamo prisoners out of Arizona*, Phoenix Bus. J., Feb. 10, 2009[60] (discussing efforts of Congressman Trent Franks of Arizona and several state senators to introduce legislation to prohibit Guantánamo detainees from being transferred to federal prisons or military bases in Arizona); Charles Hurt & Carl Campanile, *'The Terrorists Will Now Cheer'* , N.Y. Post, Jan. 23, 2009, at 9[61] (quoting New York Congressman Peter King regarding transferring prisoners out of Guantánamo: "This is madness. These are hardened terrorists who should not be detained in the US. We live in a dangerous world. Guantánamo is a necessary evil."). Indeed, President Obama's plans to shut down

Guantánamo and move its detainees have met stiff resistance from Congress generally. *See* David M. Herszenhorn, *In Shift, Leaders of Senate Reject Guantánamo Aid*, N.Y. Times, May 20, 2009[62] (discussing the Senate's 90-6 vote blocking the transfer of Guantánamo detainees to the United States and denying the administration the funding for closing the facility); *see also* Supplemental Appropriations Act, 2009 Pub. L. No. 111-32 § 14103 (2009) (restricting the use of funding for transfer of detainees from the Guantánamo Bay detention facility).

On June 9, 2009, the Department of Justice issued two important press releases relating respectively to the transfer of an important Guantánamo detainee to pretrial detention in a U.S. prison and the capacity of the prison system to handle accused terrorists. The first press release announced that Ahmed Khalfan Ghailani, a Tanzanian national who had been held in Guantánamo since September 2006, had arrived that morning at the Metropolitan Correctional Center in Manhattan to face charges for his role in the 1998 bombings of the U.S. Embassies in Tanzania and Kenya. *See* Press Release, U.S. Dep't of Justice, Ahmed Ghailani Transferred from Guantánamo Bay to New York for Prosecution on Terror Charges (June 9, 2009).[63] The second press release set forth a record of the criminal justice system's long history of dealing with terrorists. *See* Press Release, U.S. Dep't of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009).[64] The second press release does not mention the roiled debate over the safety and security issues of bringing Guantánamo detainees to the United States, but it seems designed to address it by marshaling facts regarding the justice system's successful efforts in prosecuting and incarcerating convicted terrorists. *See id.* It lays out the record of the U.S. Attorney's Office for the Southern District of New York in prosecuting major terrorism cases, as well as recent cases in 2008 and 2009 prosecuted by that office. *See id.* The press release then provides important statistics which give some context to how many terrorists are already detained in the federal prison system, even before any Guantánamo detainees are counted. *See id.* According to the release, "[t]here are currently 216 inmates in Bureau of Prisons (BOP) custody who have a history of/or nexus to international terrorism." *Id.*[65] After providing detail on the number of these prisoners who were extradited, not extradited, and who are citizens, the press release provides information on the facilities in which these individuals have been housed:

> The "Supermax" facility in Florence, Colo. (ADX Florence), which is BOP's most secure facility, houses 33 of these international terrorists. There has never been an escape from ADX Florence, and BOP has housed some of these international terrorists since the early 1990s. In addition to the ADX Florence, the BOP houses such individuals in the Communications Management Units at Terre Haute, Ind., and Marion, Ill., as well as in other facilities among different institutions around the country.

Id. The press release then also lists prominent terrorists who are currently incarcerated in BOP prisons and discusses the availability of Special Administrative Measures (SAMs), which it points out "can be initiated to prevent acts of terrorism, acts of violence, or the disclosure of classified information." *Id.*[66]

The press release seems aimed at assuaging some of the fear that has been stoked about the safety of prosecuting terrorist suspects due to the unique effect Guantánamo has had on this issue. The press release does so by providing facts that demonstrate what was already well-known to many: the U.S. justice system has a long and successful history of prosecuting suspected terrorists by generally achieving just results without causing danger to the nation's or local communities' safety and security.

The upsurge of "NIMBY" (i.e., "not in my back yard") refusals by some elected representatives to receive detainees for prosecution, or potentially military deten-

tion, appears to be based mainly on fears being fanned rather than facts being aired. While it is no small matter to receive dangerous accused terrorists in any district, and must be treated with the utmost seriousness, detaining accused and convicted terrorists in U.S. prisons has been done on a continuous basis since at least the early 1990s without harm to the surrounding communities. Nor are the accused terrorists in Guantánamo a breed apart from the terrorists who have been detained and remain detained in the United States. Certainly, Guantánamo detainees such as Khalid Sheikh Mohammed and Ramzi bin al-Shibh are infamous accused terrorists, but we believe they are no more threatening by their potential presence in a U.S. prison than Ramzi Yousef; the "Blind Sheikh" Omar Abdel Rahman; the "Millenium Bomber" Ahmed Ressam; Wadih el-Hage, one of the U.S. Embassy bombers; the "Shoe Bomber" Richard Reid; Zacarias Moussaoui; and Ali Saleh Kahlah al-Marri, all of whom were held in custody in U.S. prisons in various parts of the country before their convictions and are serving their sentences. Some of these defendants have already been incarcerated for approximately fifteen years. *See In Pursuit of Justice*, at 14-17. Therefore, there seems to be little empirical basis for treating the prospect of Guantánamo detainees being transferred to facilities in the United States as creating a security problem for which there is no precedent or past experience to guide our government officials.

X.
Conclusion

In the year since *In Pursuit of Justice* was released, the dread specter of terrorism continues to blight societies and afflict people around the globe. On a daily basis, the U.S. government confronts the challenge of remorseless extremists seeking to unleash horror on our citizens and our land. Our country has deployed a broad array of its powers—military, intelligence, diplomatic, economic, cultural, and law enforcement—to combat this threat.

It may well be that the struggle against terrorism will be the defining conflict of this generation. This is not simply because of the threat it poses to our country but because of the threat it poses to our national character. That terrorism must be met with an iron resolve cannot be disputed, but terrorism's unconventional nature has caused us to question how our Nation channels that resolve. Regarding our Nation's criminal justice system, there continues to be vigorous debate about creating new systems for accused terrorists. Some have argued for a "national security court"—with untested rules and procedures—to be used to try suspected terrorists, according them a different form of due process than other defendants at the bar of American justice. Similarly, some argue that, for the sake of our safety, suspected terrorists need to be able to be detained without being charged—by any measure a profound change to the nature of our legal system. Well-intentioned people can argue these issues with passion and force, but it cannot be argued that these proposed steps would not change the character of our criminal justice system.

In the past year, our country has learned that new systems, such as the Guantánamo military commissions, are more easily conceived than carried out. And in fact, wrong choices not only fail to meet their objectives, but they can affirmatively damage our Nation's standing in the world. When we damage our moral standing in the world, we risk increasing the danger to our Nation. Yet in the past year, while new systems have failed and new "fixes" have been floated, the criminal justice system has continued to build on its long record of being an effective and fair tool for incapacitating terrorists. The evidence collected in this 2009 Report confirms what was demonstrated in *In Pursuit of Justice*; that is, that the justice system, while not perfect, continues to adapt to handle all manner of terrorism prosecutions without sacrificing our national security interests or our commitment to fairness and due process for all. As we move forward, using all our available military, intelligence, diplomatic, and economic resources, we should continue with confidence to call upon the criminal justice system as a potent tool to combat terrorism and to demonstrate the character of American justice.

Appendix A: Terrorism Prosecution Cases

1. United States v. Abdhir, No. 5:07-cr-00501-JF (N.D. Cal. Aug. 1, 2007)
2. United States v. Abdi, No. 1:01-cr-00404-TSE (E.D. Va. Oct. 23, 2001)
3. United States v. Abdi, No. 2:04-cr-00088-ALM (S.D. Ohio June 10, 2004)
4. United States v. Abdoulah, No. 3:01-cr-03240-TJW (S.D. Cal. Nov. 2, 2001)
5. United States v. Abdulah, No. 2:01-cr-00977-PGR (D. Ariz. Oct. 25, 2001) (related cases: No. 2:02-cr-00164-PGR (D. Ariz. Feb. 20, 2002) and No. 2:02-cr-00004-UA (C.D.Cal. Jan. 3, 2002))
6. United States v. Abu Ali, No. 1:05-cr-00053-GBL (E.D. Va. Feb. 3, 2005)
7. United States v. Abuali, No. 2:01-cr-00686-WHW (D.N.J. Oct. 25, 2001)
8. United States v. Abu-Jihaad, No. 3:07-cr-00057-MRK (D. Conn. Mar. 21, 2007)
9. United States v. Afshari, No. 2:01-cr-00209-RMT (C.D. Cal. Feb. 26, 2001)
10. United States v. Ahmad, No. 3:04-cr-00301-MRK (D. Conn. Oct. 6, 2004)
11. United States v. Ahmed, No. 1:06-cr-00147-CC-GGB (N.D. Ga. Mar. 23, 2006)
12. United States v. Ahmed, No. 1:07-cr-00647-JGC (N.D. Ohio Dec. 13, 2007)*
13. United States v. Ahsan, No. 3:06-cr-00194-JCH (D. Conn. June 28, 2006)
14. United States v. Akhdar, No. 2:03-cr-80079-GCS (E.D. Mich. Feb. 3, 2003)
15. United States v. Alamoudi, No. 1:03-cr-00513-CMH (E.D. Va. Oct. 10, 2003)
16. United States v. al-Arian, No. 8:03-cr-00077-JSM-TBM (M.D. Fla. Feb. 19, 2003)
17. United States v. al-Delaema, No. 1:05-cr-00337-PLF (D.D.C. Sept. 9, 2005)*
18. United States v. al-Draibi, No. 1:01-cr-00393-TSE (E.D. Va. Oct. 10, 2001)
19. United States v. Alfauru, No. 1:02-cr-00147-TSE (E.D. Va. Apr. 10, 2002)
20. United States v. al-Hussayen, No. 3:03-cr-00048-EJL (D. Idaho Feb. 13, 2003)
21. United States v. Alishtari, No. 1:07-cr-00115-AKH (S.D.N.Y. Feb. 14, 2007)
22. United States v. al-Marri, No. 1:03-cr-10044-MMM (C.D. Ill. May 22, 2003) (related cases: No. 1:02-cr-00147-VM (S.D.N.Y. Feb. 6, 2002); No. 1:03-cr-00094-VM (S.D.N.Y. Jan. 22, 2003)); and No. 1:09-cr-10030-MMM-JAG-1 (C.D. Ill. Feb. 26, 2009)*
23. United States v. al-Moayad, No. 1:03-cr-01322-SJ (E.D.N.Y. Dec. 15, 2003)
24. United States v. al-Mughassil, No. 1:01-cr-00228-CMH (E.D. Va. June 21, 2001)
25. United States v. Alrababah, No. 1:02-cr-00096-GBL (E.D.Va. Nov. 16, 2001)
26. United States v. al-Timimi, No. 1:04-cr-00385-LMB (E.D. Va. Sept. 23, 2004)
27. United States v. Amawi, No. 3:06-cr-00719-JGC (N.D. Ohio Feb. 16, 2006)
28. United States v. Aref, No. 1:04-cr-00402-TJM (N.D.N.Y. Aug. 6, 2004)
29. United States v. Arnaout, No. 1:02-cr-00892-SBC (N.D. Ill. Oct. 9, 2002) (related case: No. 1:02-cr-00414-JBG (N.D. Ill. May 29, 2002))

30. United States v. Assi, No. 2:98-cr-80695-GER (E.D. Mich. Aug. 4, 1998)
31. United States v. Awadallah, No. 1:01-cr-01026-SAS (S.D.N.Y. Oct. 31, 2001)
32. United States v. Awan, No. 1:06-cr-00154-CPS-VVP (S.D.N.Y. Mar. 10, 2006)
33. United States v. Azmath, No. 1:02-cr-00045-SAS (S.D.N.Y. Jan. 14, 2002)
34. United States v. Babar, No. 1:04-cr-00528-VM (S.D.N.Y. June 2, 2004)
35. United States v. Badri, No. 4:01-cr-0323-FJG (W.D. Mo. Nov. 14, 2001)
36. United States v. Batiste, No. 1:06-cr-20373-JAL (S.D. Fla. June 22, 2006) (the "Liberty City Seven" case)
37. United States v. Battle, No. 3:02-cr-00399-JO (D. Or. Oct. 3, 2002)
38. United States v. Benevolence International Foundation, No. 1:02-cr-00414-JBG (N.D. Ill. May 29, 2002)
39. United States v. Benkahla, No. 1:06-cr-00009-JCC (E.D. Va. Feb. 9, 2006)
40. United States v. Biheiri, No. 1:03-cr-00365-TSE (E.D. Va. Aug. 7, 2003)
41. United States v. Budiman, No. 1:02-cr-00074-GBL (E.D. Va. Feb. 21, 2002)
42. United States v. Chandia, No. 1:05-cr-00401-CMH (E.D. Va. Sept. 14, 2005)
43. United States v. Cromitie, No. 7:09-cr-00558-CM (S.D.N.Y. June 2, 2009)*
44. United States v. Damrah, No. 1:03-cr-00484-JG (N.D. Ohio Dec. 16, 2003)
45. United States v. Defreitas, No. 1:07-cr-00543-DLI (E.D.N.Y. June 28, 2007)
46. United States v. Doha, No. 1:01-cr-00832-RWS (S.D.N.Y. Aug. 27, 2002)
47. United States v. Dumeisi, No. 1:03-cr-00664-SBC (N.D. Ill. July 16, 2003)
48. United States v. Elashi, No. 3:02-cr-00052-SAL (N.D. Tex. Feb. 20, 2002)
49. United States v. Elfgeeh, No. 1:03-cr-00133-SJ (E.D.N.Y. Feb. 3, 2003)
50. United States v. el-Gabrowny, No. 1:93-cr-00181-MBM (S.D.N.Y. Mar. 17, 1993) (the "Sheikh Abdel Rahman/Landmarks and Tunnels" case)
51. United States v. el-Hage, No. 1:98-cr-01023-KTD (S.D.N.Y. Sept. 21, 1998) (the "Embassy Bombings" case)
52. United States v. el-Jassem, No. 1:73-cr-00500-JBW (E.D.N.Y. Mar. 17, 1973) (related case: United States v. al-Jawary, No. 1:73-cr-00481-UA (S.D.N.Y. May 23, 1973))
53. United States v. Elzahabi, No. 0:04-cr-00282-JRT-FLN-1 (D. Minn. July 7, 2004)*
54. United States v. Faris, No. 1:03-cr-00189-LMB (E.D. Va. Apr. 30, 2003)
55. United States v. Gadahn, No. 8:05-cr-00254-UA (C.D. Cal. Oct. 12, 2005)
56. United States v. Galicia, No. 1:01-cr-00411-LMB (E.D. Va. Oct. 25, 2001)
57. United States v. Goba, No. 1:02-cr-00214-WMS-HKS (W.D.N.Y. Oct. 21, 2002) (the "Lackawanna Six" case)
58. United States v. Grecula, No. 4:05-cr-00257-KPE (S.D. Tex. June 16, 2005)
59. United States v. Hamed, No. 1:02-cr-00082-JCC (E.D. Va. Feb. 26, 2002)
60. United States v. Hammoud, No. 3:00-cr-00147-GCM-CH (W.D.N.C. July 31, 2000)
61. United States v. Haouari, No. 1:00-cr-00015-JFK (S.D.N.Y. Jan. 19, 2000)
62. United States v. Hashmi, No. 1:06-cr-00442-LAP (S.D.N.Y. May 24, 2006)
63. United States v. Hassan, No. 1:03-cr-00171-SJ (E.D.N.Y. Feb. 13, 2003)
64. United States v. Hassoun, No. 0:04-cr-60001-MGC (S.D. Fla. Jan. 8, 2004) (the "Jose Padilla" case)
65. United States v. Hayat, No. 2:05-cr-00240-GEB (E.D. Cal. June 16, 2005)
66. United States v. Holy Land Foundation for Relief and Development, No. 3:04-cr-00240-JAS (N.D. Tex. July 26, 2004)
67. United States v. Hussain, No. 2:01-cr-01328-JS (E.D.N.Y. Dec. 4, 2001)
68. United States v. Hussein, No. 1:01-cr-10423-REK (D. Mass. Nov. 14, 2001)
69. United States v. Islamic American Relief Agency, No. 4:07-cr-00087-NKL (W.D. Mo. Mar. 6, 2007)

70. United States v. Idris, No. 1:02-cr-00306-CMH (E.D. Va. Mar. 21, 2002)
71. United States v. Iqbal, No. 1:06-cr-01054-RMB (S.D.N.Y. Nov. 15, 2006)
72. United States v. Isse, No. 1:02-cr-00142-JCC (E.D. Va. Apr. 3, 2002)
73. United States v. Jabarah, No. 1:02-cr-01560-BSJ (S.D.N.Y. Dec. 12, 2002)
74. United States v. Jaber, No. 5:05-cr-50030-JLH (W.D. Ark. Aug. 11, 2005)
75. United States v. James, No. 8:05-cr-00214-CJC (C.D. Cal. Aug. 31, 2005)
76. United States v. Janjalani, No. 1:02-cr-00068 (D.D.C. Feb. 12, 2002)
77. United States v. Khadr, No. 1:06-cr-10028-GAO (D. Mass. Feb. 28, 2006)
78. United States v. Khan, No. 1:08-cr-00621-NRB (S.D.N.Y. July 8, 2008)*
79. United States v. Lafi Khalil, No. 1:99-cr-01134-JBW (E.D.N.Y. Dec. 14, 1999)
80. United States v. Naji Khalil, No. 1:04-cr-00573-GBD (S.D.N.Y. June 17, 2004) (related case: No. 4:05-cr-00200-GH (E.D. Ark. July 26, 2005))
81. United States v. Khoury, No. 4:01-cr-00751-DH (S.D. Tex. Oct. 3, 2001)
82. United States v. Mustafa Kilfat, No. 2:01-cr-00792-AMW (D.N.J. Dec. 11, 2001)
83. United States v. Ahmad Kilfat, No. 2:01-cr-00793-AMW (D.N.J. Dec. 11, 2001)
84. United States v. Koubriti, No. 2:01-cr-80778-GER (E.D. Mich. Sept. 27, 2001) (the "Detroit Sleeper Cell" case)
85. United States v. Kourani, No. 2:03-cr-81030-RHC-RSW (E.D. Mich. Jan. 15, 2004)
86. United States v. Lakhani, No. 2:03-cr-00880-KSH (D.N.J. Dec. 18, 2003)
87. United States v. Lindh, No. 1:02-cr-00037-TSE (E.D. Va. Feb. 5, 2002)
88. United States v. Lopez-Flores, No. 1:01-cr-00430-GBL (E.D. Va. Oct. 24, 2001)
89. United States v. Maflahi, No. 1:03-cr-00412-NG (E.D.N.Y. Apr. 9, 2003)
90. United States v. Maldonado, No. 4:07-cr-00124-GHM (S.D. Tex. Apr. 2, 2007)
91. United States v. Mandhai, No. 0:02-cr-60096-WPD (S.D. Fla. May. 16, 2002)
92. United States v. Martinez-Flores, No. 1:01-cr-00412-TSE (E.D. Va. Oct. 25, 2001)
93. United States v. Marzook, No. 1:03-cr-00978 (N.D. Ill. Oct. 9, 2003)
94. United States v. Mehanna, No. 1:09-cr-10017-GAO (D. Mass. Jan. 15, 2009)*
95. United States v. Mohammed, No. 1:06-cr-00357-CKK-1 (D.D.C. Dec. 13, 2006)*
96. United States v. Moussaoui, No. 1:01-cr-00455-LMB (E.D. Va. Dec. 11, 2001)
97. United States v. Mubayyid, No. 4:05-cr-40026-FDS (D. Mass. May 11, 2005)
98. United States v. Mustafa, No. 1:04-cr-00356-JFK (S.D.N.Y. Apr. 19, 2004)
99. United States v. Niazi, No. 8:09-cr-00028-CJC (C.D. Cal. Feb. 11, 2009)*
100. United States v. Noman, No. 2:02-cr-00431-JWB (D.N.J. May 21, 2002)
101. United States v. Noorzai, No. 1:05-cr-00019-DC-1 (S.D.N.Y. Jan 6, 2005)*
102. United States v. Obeid, No. 3:05-cr-00149-TMR (S.D. Ohio Oct. 25, 2005)
103. United States v. Paracha, No. 1:03-cr-01197-SHS (S.D.N.Y. Oct. 8, 2003)
104. United States v. Paul, No. 2:07-cr-00087-GLF (S.D. Ohio Apr. 11, 2007)
105. United States v. Pervez, No. 1:02-cr-00174-JES (S.D.N.Y. Feb. 13, 2002)
106. United States v. Qureshi, No. 6:04-cr-60057-RFD-CMH (W.D. La. Oct. 13, 2004)
107. United States v. Rahimi, No. 1:03-cr-00486-DC (S.D.N.Y. April 17, 2003)*
108. United States v. Raissi, No. 2:01-cr-00911-EHC (D. Ariz. Oct. 9, 2001) (related case: No. 2:01-cr-01075-SRB (D. Ariz. Nov. 27, 2001))
109. United States v. Ranjha, No. 1:07-cr-00239-MJG (D. Md. May 23, 2007)
110. United States v. Ranson, No. 3:05-cr-00016-TSL-JCS (S. D. Miss. Feb. 18, 2005)
111. United States v. Rashed, No. 1:87-cr-00308-RCL (D.D.C. July 14, 1987)

112. Unites States v. Ressam, No. 99-cr-00666-JCC (W.D. Wash. Dec. 22, 1999) (the "Millenium Bomber" case)
113. United States v. Reid, No. 1:02-cr-10013-WGY (D. Mass. Jan. 16, 2002) (the "Shoe Bomber" case)
114. United States v. Rezaq, No. 1:93-cr-00284-RCL (D.D.C. July 15, 1993)
115. United States v. Rizvi, No. 1:01-cr-00418-WDM (D. Colo. Nov. 28, 2001)
116. United States v. Royer, No. 1:03-cr-00296-LMB (E.D. Va. June 25, 2003) (the "Virginia Jihad Network" case)
117. United States v. Salameh, No. 1:93-cr-00180-KTD (S.D.N.Y. Mar. 17, 1993) (the "World Trade Center I" and "Bojinka Plot" case)
118. United States v. Salim, No. 1:01-cr-00002-DAB (S.D.N.Y. Jan. 3, 2001)
119. United States v. Sattar, No. 1:02-cr-00395-JGK (S.D.N.Y. Apr. 9, 2002) (the "Lynne Stewart" case)
120. United States v. Serif Mohamed, No. 8:07-cr-00342-SDM-MAP (M.D. Fla. Aug. 29, 2007)
121. United States v. Tarik Shah, No. 1:05-cr-00673-LAP (S.D.N.Y. June 27, 2005)
122. United States v. Syed Shah, No. 3:02-cr-02912-MJL (S.D. Cal. Oct. 30, 2002)
123. United States v. Shannaq, No. 1:02-cr-00319-AMD (D. Md. July 2, 2002)
124. Unites States v. Shareef, No. 1:06-cr-00919 (N.D. Ill. Dec. 8, 2006)*
125. United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. June 5, 2007) (the "Fort Dix Plot" case)
126. United States v. Siddiqui, No. 1:08-cr-00826-RMB-1 (S.D.N.Y. Sept. 2, 2008)*
127. United States v. Siraj, No. 1:05-cr-00104-NG (E.D.N.Y. Feb. 9, 2005)
128. United States v. Subeh, No. 6:04-cr-06077-CJS-MWP (W.D.N.Y. Apr. 22, 2004)
129. United States v. Tabatabai, No. 2:99-cr-00225-CAS (C.D. Cal. Mar. 10, 1999)
130. United States v. Taleb-Jedi, No. 1:06-cr-00652-BMC (E.D.N.Y. Sept. 29, 2006)
131. United States v. Ujaama, No. 2:02-cr-00283-BJR (W.D. Wash. Aug. 28, 2002)
132. United States v. Villalobos, No. 1:01-cr-00399-GBL (E.D. Va. Oct. 17, 2001)
133. United States v. Walker, No. 3:04-cr-02701-DB (W.D. Tex. Dec. 8, 2004)
134. United States v. Warsame, No. 0:04-cr-00029-JRT-FLN (D. Minn. Jan. 20, 2004)
135. United States v. Yunis, No. 1:87-cr-00377 (D.D.C. Sept. 15, 1987)

Endnotes

[1] *Available at* http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf. *In Pursuit of Justice* is also referred to herein as the "White Paper." In this 2009 Report, page number references to the White Paper are to the version available at the link above.

[2] Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities. Exec. Order No. 13,492, 74 Fed. Reg. 4,897 (Jan. 22, 2009); Review of Detention Policy Options, Exec. Order No. 13,493, 74 Fed. Reg. 4,901 (Jan. 22, 2009).

[3] *See* Barack Obama, U.S. President, Statement of President Barack Obama on Military Commissions (May 15, 2009), *available at* http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions; Barack Obama, U.S. President, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

[4] Remarks by the President on National Security (May 21, 2009).

[5] *Compare* The Constitution Project, Liberty and Sec. Comm. & Coalition to Defend Checks and Balances, *A Critique of "National Security Courts"* (June 23, 2008), *available at* http://www.constitutionproject.org/pdf/Critique_of_the_National_Security_Courts.pdf (arguing in favor of capability of criminal justice system to handle terrorism cases); Hon. Leonie Brinkema, Address at the Am. U. Washington College of Law/Brookings Institution Conference: "Terrorists and Detainees: Do We Need A New National Security Court," (Feb. 1, 2008), *audio available at* http://www.wcl.american.edu/podcast/ audio/20080201_WCL_TAD.mp3 (same); *with* Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 Cal. W. Int'l L.J. 87 (2008) (arguing in favor of national security courts); Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court*, (Series on Counterterrorism and American Statutory Law, Working Paper No. 5, 2009), *available at* http://www.brookings.edu/~/media/files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf (same); Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (Penguin Press 2008) (same); Amos N. Guiora & John T. Parry, *Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists*, 156 U. Pa. L. Rev. PENNumbra 356 (2008) (same). In a forthcoming symposium essay, Professor Robert Chesney concludes that many of the leading criticisms of the capability of the criminal justice system regarding terrorism are overstated, but notes "three sets of procedural safeguards that do tend to limit the reach of the criminal justice system in comparison to existing or proposed alternatives" and discusses "modest steps Congress might take to optimize the criminal justice system for the task of prevention-oriented prosecution." Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventive Detention Debate* (working draft) at 2, forthcoming, S. Tex. L. Rev., *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306733. For a useful summary and trenchant critique of national-security-court proposals, *see* Stephen I. Vladek, *The Case Against National Security Courts*, 45 Willamette L. Rev. 505 (2009). Benjamin Wittes and Colleen A. Peppard of the Brookings Institution have recently issued a detailed procedural blueprint for new statutory detention authority that would supplement existing legal grounds for detaining alleged terrorists. *See* Benjamin Wittes & Colleen A. Peppard, *Designing Detention: A Model Law for Terrorist Incapacitation* (Governance Studies at Brookings 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf. We summarize the Wittes/Peppard proposal below in note 33.

[6] Even with the Obama Administration's effort to develop a military commission system that will withstand constitutional challenge, there appear to be divisions over the extent to which detainees must be afforded constitutional rights. For example, it has been reported that based on legal guidance issued by the Department of Justice's Office of Legal Counsel, detainees have a constitutional right to protection against the use of statements taken through coercive interrogations. *See* Jess Bravin, *New Rift Opens Over Rights of Detainees*, Wall St. J., June 29, 2009, at A1, *available at* http://online.wsj.com/article_email/SB124623153856866179-lMyQjAxMDI5NDI2ODIyMzgxWj.html; David Johnston, *New Guidance Issued on Military Trials of Detainees*, N.Y. Times, June 29, 2009, at A14, *online version available at* http://www.nytimes.com/2009/06/29/us/29gitmo.html. That view, however, is reportedly not shared by the Department of Defense. *See* Bravin, *New Rift Opens Over Rights of Detainees*.

[7] As reported in the White Paper, there were 107 terrorism cases filed and 257 defendants charged between September 11, 2001, and December 31, 2007. *See In Pursuit of Justice*, at 23.

[8] Consistent with this approach, we have treated the cases filed against Ali Saleh Kahlah al-Marri as a single case for statistical purposes. The government initially filed charges against al-Marri in 2003 in the Central District of Illinois, but moved to dismiss the charges in order to transfer al-Marri to military custody. *Al-Marri v. Pucciarelli*, 534 F3d 213, 219 (4th Cir. 2008); *see also In Pursuit of Justice*, at 73. In February 2009, al-Marri was transferred from military custody back into the criminal justice system, and the government filed new charges against him. *See* Indictment, *United States v. al-Marri*, No. 09-cr-10030 (C.D. Ill. Feb. 26, 2009) (Dkt. No. 3). We have treated these two prosecutions as a single case in our quantitative analysis. For further explanation of the procedural history regarding al-Marri, *see infra* at 14, 20-21.

Similarly, we have treated the prosecutions of Khalil Ahmed and Zubair Ahmed as a single case in our data set. In 2007, the government charged the Chicago cousins and three co-defendants with conspiring to murder or maim American military forces abroad. *See* Superseding Indictment, *United States v. Amawi*, No. 06-cr-00719 (N.D. Ohio Feb. 7, 2007) (Dkt. No. 186). On December 13 2007, a grand jury separately indicted the Ahmed defendants for conspiracy and material support offenses that included or arose from conduct charged in the *Amawi* indictment, but also included broader conduct. *See* Indictment, *United States v. Ahmed*, No. 07-cr-00647 (N.D. Ohio Dec. 13, 2007) (Dkt. No. 1). The government moved to dismiss the Ahmed defendants from the *Amawi* case in order to proceed against them in the separate indictment, which the court granted. *See* Order, *Amawi* (N.D. Ohio Dec. 27, 2007) (Dkt. No. 525). We view these prosecutions as a single case for purposes of our quantitative analysis.

[9] Because we have re-evaluated the data going back to September 11, 2001, there are slight changes in historical data for some years as compared to the data that was presented in the White Paper.

[10] In the White Paper, we reported that 203 defendants were arrested and subjected to a bail determination in cases filed between September 11, 2001, and December 31, 2007, and that 139 of these defendants were detained while 70 defendants were released on conditions. *See In Pursuit of Justice*, at 24.

[11] We have not counted the charges as "resolved" where they were dismissed prior to arraignment because we do not believe useful inferences about the efficacy of the justice system can be drawn from the dismissal in this circumstance. There are two such cases in the overall data set. First, the government dismissed the charges against Habis al-Saoub in *United States v. Battle* after al-Saoub was killed in Afghanistan but before he was arraigned in court. *See* Order, No. 02-cr-00399 (D. Or. July 1, 2004) (Dkt. No. 430); Fed. Bureau of Investigation, The Portland Division: A Brief History, http://portland.fbi.gov/history.htm (last visited July 23, 2009). This outcome, commonly known as a "death nolle," does not in our view provide any useful way to assess the success of the prosecution. Second, the government dismissed the charges against an organization called Hamza, Inc. in *United States v. Ranjha* after the individual defendants pled guilty but before Hamza, Inc. was arraigned. *See* Docket, 07-cr-00239 (D. Md.). Again, the dismissal prior to arraignment does not in our view provide meaningful information about the success or failure of the prosecution, especially because Hamza, Inc. was a corporation rather than an individual.

[12] In the White Paper, we reported that 97 defendants still had charges pending while all charges were resolved for 160 defendants. *See In Pursuit of Justice*, at 26.

[13] The 19 defendants for whom all charges were resolved by acquittal or dismissal are the following: Abdullahi Jama Amir, *United States v. Abdoulah*, No. 01-cr-03240 (S.D. Cal.); Sameeh Taha Hammoudeh, *United States v. al-Arian*, No. 03-cr-00077 (M.D. Fla.); Ghassan Zayed Ballut, *United States v. al-Arian*, No. 03-cr-00077 (M.D. Fla.); Sami Omar al-Hussayen, *United States v. al-Hussayen*, No. 03-cr-00048 (D. Idaho); Benevolence International Foundation Inc., *United States v. Arnaout*, No. 02-cr-00892 (N.D. Ill.) and *United States v. Benevolence International Foundation Inc.*, No. 02-cr-00414 (N.D. Ill.); Osama Awadallah, *United States v. Awadallah*, No. 01-cr-01026 (S.D.N.Y.); Naudimar Herrera, *United States v. Batiste*, No. 06-cr-20373 (S.D. Fla.); Lyglenson Lemorin, *United States v. Batiste*, No. 06-cr-20373 (S.D. Fla.); Enaam Arnout, *United States v. Benevolence International Foundation Inc.*, No. 02-cr-00414 (N.D. Ill.); Isahn Elashi, *United States v. Elashi*, No. 02-cr-00052 (N.D. Tex.); Farouk Ali-Hammoud, *United States v. Koubriti*, No. 01-cr-80778 (E.D. Mich.); Abdel Ilah Elmardoudi, *United States v. Koubriti*, No. 01-cr-80778 (E.D. Mich.); Youssef Megahed, *United States v. Mohamed*, No. 07-cr-00342 (M.D. Fla.); Samir al-Monla, *United States v. Mubayyid*, No. 05-cr-40026 (D. Mass); Abdur Rashid, *United States v. Rahimi*, No. 03-cr-00486 (S.D.N.Y.); Shah Wali, *United States v. Rahimi*, No. 03-cr-00486 (S.D.N.Y.); Sabri Benkhala, *United States v. Royer*, No. 03-cr-00296 (E.D. Va.); and Caliph Abdur-Raheem, *United States v. Royer*, No. 03-cr-00296 (E.D. Va.). In *Mubbayid*, al-Monla was convicted at trial of tax and false statement offenses. After trial, the district court found that the government had presented "substantial evidence at the trial that all three defendants supported and promoted jihad and the mujahideen, that is, religious-based violence and people who engage in it, through newsletters, financial donations, lectures and otherwise," but the court granted al-Monla's motion for judgment of acquittal on grounds that the prosecution was barred by the statute of limitations. *See* Tr. of Hr'g at 5, *Mubayyid* (D. Mass. June 3, 2008) (Dkt. No. 536). The government has appealed the trial court's decision.

In preparing this 2009 Report, we determined that the White Paper erroneously included one defendant, Habis al-Saoub, in the list of defendants for whom all charges were resolved by acquittal or dismissal. *See In Pursuit of Justice*, at 150 n.127. As noted above, al-Saoub was never arraigned and the charges against him were dismissed following his death in Afghanistan. *See supra* note 11.

[14] In some instances, including *Benkhala* and *Arnaout*, the subsequent charges are based on terrorism and are thus included in our data set. *See United States v. Benkhala*, No. 06-cr-00009 (E.D. Va.); *United States v. Arnaout*, No. 02-cr-00892 (N.D. Ill.). In other cases, however, the subsequent prosecutions do not meet our criteria for a demonstrated link to allegations of Islamist terrorism and thus are excluded from the data set, even though they resulted in the defendant's conviction and imprisonment or removal. *See United States v. Hammoudeh*, No. 04-cr-00330 (M.D. Fla.); *United States v. Elmardoudi*, No. 06-cr-00262 (D. Minn.). In another case, the government obtained a conviction at trial but the conviction was overturned on appeal because the Fifth Circuit determined that the government was barred from prosecuting the defendant as a result of an earlier conviction and guilty plea. *See United States v. Elashyi*, 554 F.3d 480 (5th Cir. 2008).

[15] For example, the government reportedly commenced removal proceedings against Youssef Megahed and Lyglenson Lemorin soon after their acquittals on terrorism charges. *See* Damien Cave, *Cleared of Terrorism Charges, but Then a Target for Deportation*, N.Y. Times, June 4, 2009, at A01, *online version available at* http://www.nytimes.com/2009/06/04/us/04terror.html; Peter Whoriskey, *Man Acquitted in Terror Case Faces Deportation*, Wash. Post, Mar. 2, 2008, at A03, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/03/01/AR2008030101566.html.

[16] Sentencing data for the White Paper can be found in *In Pursuit of Justice* at page 26.

[17] In the White Paper, we reported that 23 defendants had been convicted of violating 18 U.S.C. § 1001. Since the White Paper's publication, two defendants have had their convictions for this offense vacated or dismissed by the court. *See United States v. Elashyi*, 554 F.3d 480 (5th Cir. 2008) (vacating defendant's conviction where prosecution ran afoul of prior plea agreement with defendant); *See* Tr. of Hr'g, *Mubayyid* (D. Mass. June 3, 2008) (Dkt. No. 536) (granting al-Monla's motion for judgment of acquittal).

[18] The government's continued reliance on § 2339B is hardly surprising, as "[t]he DOJ counterterrorism enforcement manual describes 2339B as 'the closest thing American prosecutors have to the crime of being a terrorist.'" Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. Nat'l Security L. & Pol'y 297, 301 (2008) (quoting Jeffrey A. Breinholt, *Counterterrorism Enforcement: A Lawyer's Guide* 264 (U.S. Dep't of Justice Office of Legal Educ. 2004)).

[19] The fifteen-year maximum likely represents a negotiated capped exposure that reflects the unusual history and circumstances of al-Marri's case. Indeed, if the court credits al-Marri's time in military detention against his sentence, his sentence may be less than fifteen years. *Cf.* Kirk Semple, *Padilla Gets 17-Year Term for Role in Conspiracy*, N.Y. Times, Jan. 23, 2008, at A14, *online version available at* http://www.nytimes.com/2008/01/22/us/22cnd-padilla.html (noting that sentencing judge "gave Mr. Padilla credit for time served during his 3 1/2-year detention in a South Carolina military brig"). The financial fraud, false identity, and false statements crimes with which al-Marri was originally charged, and which also exposed him to substantial penalties, *see* Indictment, *United States v. al-Marri*, No. 03-cr-00094 (S.D.N.Y. Jan. 22, 2003) (Dkt. No. 4), were dismissed with prejudice at the government's request, *see* Order, *United States v. al-Marri*, No. 03-cr-10044 (C.D. Ill. June 23, 2003) (Dkt. No. 16), when al-Marri was transferred into military custody approximately one month before his original criminal trial was scheduled to begin in 2003. *See* Scheduling Order, *al-Marri* (C.D. Ill. May 29, 2003) (Dkt. No. 7) (setting trial for July 21, 2003). Thus, those charges were no longer viable when al-Marri was returned to the criminal justice system in 2009. It is, therefore, possible that al-Marri's ultimate sentence will be less than it might have been had he been expeditiously prosecuted on the original charges that were filed against him 2002. Had the government done so, it still could have later begun a separate prosecution on material support charges, and al-Marri might well have faced an aggregate sentence longer than the one he is currently facing.

[20] *Available at* http://www.usdoj.gov/opa/pr/2009/January/09-nsd-041.html.

[21] The words "physical asset" no longer appear in the statutory definition of material support. 18 U.S.C. § 2339A(b)(1); *see also* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, § 6603(b), 118 Stat. 3638 (2004) (establishing most recent formulation of definition).

[22] Based on our research, both the case law and legislative history discussing the material support statutes are silent as to the applicability of these terms to the circumstances of Abu Jihaad's case. It is true that the Ninth Circuit has found the terms "service" and "specialized knowledge" (when used, as here, in a non-scientific or technical way) to be unconstitutionally vague as part of the definition of material support in § 2339B. *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122, 1135-36 (9th Cir. 2007), *amended and superseded*, 552 F.3d 916 (9th Cir. 2009). Other courts, however, have held that the Ninth Circuit's vagueness ruling would not render those terms unconstitutional when applied in a § 2339A prosecution–like Abu Jihaad's–because of § 2339A's more robust mens rea requirement. *See, e.g.*, *Amawi*, 545 F. Supp. 2d at 684 (citing *United States v. Abdi*, 498 F. Supp. 2d 1048, 1058 (S.D. Ohio 2007)).

[23] Some may view the *Abu Jihaad* decision as an example of the problems that arise in the Article III system, whether due to a gap in the statutory arsenal deployed or due to the decisions of the independent juries or judges who are the lifeblood of the system. However, as already discussed, Abu Jihaad was convicted on another count that clearly covered his conduct, and Congress may address any gap in the statute. New systems, without the maturity and breadth of statutes of the Article III system, although intended to ease the government's burden, are not necessarily an improvement and have proven unpredictable in ways that have discouraged their proponents. For example, in one of only three military commission convictions that came out of Guantánamo, that of Salim Ahmed Hamdan, Bin Laden's former driver, the results were not only lackluster but controversial in ways that would not have occurred in an Article III prosecution. Specifically, on August 6, 2008, Hamdan was acquitted on both conspiracy specifications, and was acquitted on three of eight material support specifications. *See* Press Release, U.S. Dep't of Defense, Detainee Convicted of Terrorism Charge at Military Commission Trial (Aug. 6, 2008), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12118; *see also* William Glaberson, *Panel Convicts bin Laden Driver in Split Verdict*, N.Y. Times, Aug. 6, 2008, at A1, *available at* http://www.nytimes.com/2008/08/07/washington/07gitmo.html. Moreover, before trial the presiding military judge had rejected a motion to dismiss the material support charges on grounds that they violated the Ex Post Facto Clause, *see* Ruling on Motion to Dismiss (Ex Post Facto), *United States v. Hamdan* (Mil. Comm'n July 14, 2008), but the validity of the material support charges was likely to be a significant issue on appeal, *see* Glaberson, *Panel Convicts bin Laden Driver in Split Verdict*. That critical issue was never reached because of another controversial event the day after Hamdan's conviction: Hamdan received a sentence from a jury of military officers of only five and a half years, far less than he almost certainly would have received had he been convicted in an Article III court. *See* Press Release, U.S. Dep't of Defense, Hamdan Sentenced to 66 Months (Aug. 7, 2008), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12128. Because the military judge then awarded him credit for his time in custody, Hamdan faced only six months in custody before he would be removed from the United States. This sentence was viewed as an absurdly lenient one by many who had been defenders of the military commission system. *See, e.g.*, Andrew McCarthy, *Hamdan's Disgraceful Sentence*, Nat'l Rev. Online, Aug. 7, 2008, http://corner.nationalreview.com/post/?q=MzEzYTMyZWRmNTVmNmUzM2YyZTk1NDowNzk3ODhmODI= (calling the sentence "the worst sentence I have ever heard of" and pointing out that in comparison "[civilian court] judges . . . have shown they take terrorism seriously—they have routinely sentenced lesser players than a personal aide to bin Laden . . . to 30 and more years.") Before he completed his sentence, in November 2008, Hamdan was transported to Yemen. *See* Press Release, U.S. Dep't of Defense, Detainee Transfer Announced (Nov. 25, 2008), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12372; Josh White & William Branigin, *Hamdan to be Sent to Yemen*, Wash. Post, Nov. 25, 2008, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/11/24/AR2008112403159.html.

[24] *Available at* http://www.nytimes.com/1996/11/03/world/stoning-of-afghan-adulterers-some-go-to-take-part-others-just-to-watch.html.

[25] *Available at* http://www.washingtonpost.com/wp-dyn/content/article2007/09/29/AR2007092900508.html.

[26] http://edition.cnn.com/2008/WORLD/asiapcf/08/20/pakistan.blast/index.html.

[27] *Available at* http://www.unodc.org/pdf/research/Afghanistan_Opium_Survey_2007.pdf.

[28] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/01/AR2006120101654.html.

[29] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/12/22/AR2008122202359.html.

[30] The United Nations report provides some history regarding the Taliban's history with heroin production:

> [T]he Taliban are again using opium to suit their interests. Between 1996 and 2000, in Taliban-controlled areas 15,000 tons of opium were produced and exported—the regime's sole source of foreign exchange at the time. In July 2000, the Taliban leader, Mullah Omar, argued that opium was against Islam and banned its cultivation (but not its export). In recent months, the Taliban have reversed their position once again and started to extract from the drug economy resources for arms, logistics and militia pay.

United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2007*, at iv.

[31] Other recent cases in which the narco-terrorism statute was not invoked, presumably because the conduct occurred prior to the enactment of the statute, have also involved the prosecution of Afghan heroin traffickers who were linked to the Taliban. *See* Indictment, *United States v. Rahimi*, No. 03-cr-00486 (S.D.N.Y. Apr. 17, 2003) (Dkt. No. 35); Indictment, *United States v. Noorzai*, No. 05-cr-00019 (S.D.N.Y. Jan. 6, 2005) (Dkt. No. 1). Baz Mohammad was the first defendant ever extradited to the United States from Afghanistan and was convicted upon his plea of guilty and sentenced to 188 months imprisonment. Judgment as to Baz Mohammad, *Rahimi* (S.D.N.Y. Oct. 11, 2007) (Dkt. No. 253); *see also* Press Release, U.S. Att'y S.D.N.Y, Heroin Kingpin—First Defendant Ever Extradited From Afghanistan—Sentenced in Manhattan Federal Court to Over 15 Years in Prison (Oct. 5, 2007), *available at* http://www.usdoj.gov/usao/nys/pressreleases/October07/bazmohammadsentencingpr.pdf. Mohammad's organization was closely aligned with the Taliban and supported them financially through his organization's heroin trafficking which was extensive in the United States. Superseding Indictment as to Baz Mohammad at 1-3, *Rahimi* (S.D.N.Y. Oct. 20, 2005) (Dkt. No. 161). In return, the Taliban provided Mohammad's

organization with protection for its opium crops, heroin laboratories, drug-transportation routes, and members and associates. *Id.* at 3. Indeed, Mohammad reportedly told co-conspirators that selling heroin in the United States was a "jihad" because it killed Americans and took their money. *Id.* at 9.

In *Noorzai*, the defendant was convicted at trial on narcotics trafficking charges, *see* Jury Verdict, *Noorzai* (S.D.N.Y. Sept. 23, 2008), and on April 30, 2009, he was sentenced to life imprisonment, see Judgment, *Noorzai* (S.D.N.Y. Apr. 30, 2009) (Dkt. No. 176). Interestingly, Baz Mohammad testified against Noorzai, and in addition to detailing Noorzai's heroin operations, Mohammad testified that he had been told that Noorzai was a member of the Taliban's ruling *shura* council. Gov't's Sentencing Letter at 2-3, *Noorzai* (S.D.N.Y. Feb. 20, 2009) (Dkt. No. 166). Further, according to the government, Noorzai had admitted that he had provided weapons and "400 fighters" to the Taliban. *Id.* at 8. Unlike Mohammad, Noorzai was not extradited but rather was lured to the United States to demonstrate that he had valuable information which could assist the United States in Afghanistan and elsewhere in combating terrorism. See Bill Powell, *The Strange Case of Haji Basher Noorzai*, Time, Feb. 19, 2007, at 28, *online version available at* http://www.time.com/time/magazine/article/0,9171,1587252,00.html. After reportedly being debriefed for days, he was told he could not return to Afghanistan and was placed under arrest. *See id.*

[32] According to recent reports, the United States is shifting its drug policy in Afghanistan away from the eradication of opium poppy fields, which had largely proved unsuccessful, and toward interdiction of drug supplies into and out of Afghanistan, as well as the prosecution of the traffickers and even corrupt government officials. *See* Rachel Donadio, *U.S. Plans New Course for Antidrug Efforts in Afghanistan*, N.Y. Times, June 27, 2009, at A12, *available at* http://www.nytimes.com/2009/06/28/world/asia/28holbrooke.html. This new policy may lead to an increase in the number of prosecutions under 21 U.S.C. § 960a.

[33] For example, Professor Jack Goldsmith argues that the debate over *whether* to preventively detain suspected terrorists is "largely a canard" and that the debate should focus on the legal framework describing *how* preventive detention should occur. See Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 2 (Series on Counterterrorism and American Statutory Law, Working Paper No. 5, 2009), *available at* http://www.brookings.edu/~/media/files/rc/papers/2009/0209_detention_goldsmith/0209_detention_goldsmith.pdf. Concluding that the federal courts for the District of Columbia are already de facto national security courts—by virtue of the extensive Guantánamo Bay litigation taking place there—Goldsmith argues that Congress should enact procedures to govern the detention of terrorism suspects. *See id.*; *see also* Amos N. Guiora, *Military Commissions and National Security Courts After Guantánamo*, 103 Nw. U. L. Rev. Colloquy 199 (2008); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 Cal. W. Int'l L.J. 87 (2008).

In a detailed proposal issued in June 2009, Benjamin Wittes and Colleen Peppard of the Brookings Institution laid out proposed legislation that would establish a scheme for long-term, court-supervised detention of alleged terrorists outside the criminal justice system, the law of war, or any other established legal framework. See Benjamin Wittes & Colleen A. Peppard, *Designing Detention: A Model Law for Terrorist Incapacitation* (Governance Studies at Brookings 2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0626_detention_wittes/0626_detention_wittes.pdf. Wittes and Peppard propose that, as a complement to its law-of-war and criminal detention powers, the government be allowed to preventively detain any person who is neither a U.S. citizen nor a legal U.S. immigrant, if the President reasonably believes that the person is (1) "an agent of a foreign power" as that term is defined in FISA, (2) "against which Congress has authorized the use of force," and (3) "the actions of the [person] in his capacity as an agent of the foreign power pose a danger both to any person and to the interests of the United States." *Id.* at 6-13, 16; *see also id.* at 29-31 (Sections 3(a) and 4(b) of proposed legislation, setting forth criteria for detention). If the government wished to detain the person for more than fourteen days, it would have to seek approval from the U.S. District Court for the District of Columbia in an adversarial proceeding; the court could authorize further detention for no more than six months, after which the government could petition the court for an extension of the detention period for up to six additional months, and so on. *Id.* at 15-16, 20, 30-37. The detention authority would "sunset" after three years in order to force Congress to reexamine the efficacy of the authority in deciding whether to reauthorize it. *Id.* at 21, 38.

[34] *See, e.g.*, Stephen I. Vladeck, *The Case Against National Security Courts*, 45 Willamette L. Rev. 505 (2009); *see also* The Constitution Project, Liberty and Sec. Comm. & Coalition to Defend Checks and Balances, *A Critique of "National Security Courts"* (June 23, 2008); Deborah Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 Case W. Res. J. Int'l L. 577 (2009).

[35] *See In Pursuit of Justice*, at 7-8, 65-75; *see also* The Constitution Project, *A Critique of "National Security Courts"*.

[36] Under the Bush Administration, the government also asserted that the detentions of Guantánamo detainees were justified by the President's Article II powers as Commander-in-Chief, but the government appeared to abandon its Article II argument in litigation after President Obama took office. *See Hamlily v. Obama*, 616 F. Supp. 2d 63, 66 n.1 (D.D.C. 2009).

[37] *Available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/02/27/AR2009022701692.html.

[38] This tangled series of events bears an uncanny resemblance to the gyrations of the *Padilla* litigation, which are discussed at length in *In Pursuit of Justice*. See *In Pursuit of Justice*, at 72-73. In *Padilla*, the government initially held the defendant as a material witness under the criminal justice system; it then designated him as an "enemy combatant" and moved him into military detention; and then, with Supreme Court review looming, the government indicted the defendant and transferred him back to the criminal justice system, where he was convicted of serious crimes. *See id.* As with *Padilla*, the government's decision to return al-Marri to the criminal justice system put an abrupt end to the Supreme Court litigation and left us without any further guidance from the Court on whether law-of-war detention extends broadly to persons captured in the United States.

[39] It remains unclear whether *Boumediene* authorizes prisoners held outside the United States at locations other than Guantánamo to commence habeas corpus litigation in the United States. In one case brought by detainees at Bagram Airfield in Afghanistan, Judge John Bates of the U.S. District Court for the District of Columbia held that certain of the prisoners being held at Bagram could indeed challenge their detention via habeas corpus litigation in the United States. *See al-Maqaleh v. Gates*, 604 F. Supp. 2d 205, 208-09 (D.D.C. 2009). The court applied the "practical, functional analysis . . . mandated in *Boumediene*," *id.* at 232, to each habeas petitioner, inquiring into: "(1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.'" *Id.* at 214-15 (quoting *Boumediene*, 128 S. Ct. at 2259). Judge Bates concluded that detainees *moved into* Afghanistan are materially no different than those moved into Guantánamo Bay, and are equally entitled to habeas review—unless the detainees in question are Afghan citizens. *Id.* at 231. For Afghans being held in their own country, the possibility of friction between the U.S. judiciary and the Afghan government proved too much of a "practical obstacle" to allow judicial review of detention. *Id.* at 229-30. Judge Bates has since stayed his ruling and granted the government leave for an interlocutory appeal to the D.C. Circuit. *Al-Maqaleh v. Gates*, --- F. Supp. 2d ---, No. 06-cv-01669, 2009 WL 1528847, at *5 (D.D.C. June 1, 2009). Given the controversial nature of the issue and the uncertainty over the proper application of the *Boumediene* standard, it is clear that the scope of *Boumediene* will continue to be debated in appellate courts and perhaps, eventually, the Supreme Court as well.

[40] In a later portion of the opinion, Judge Bates also held that the AUMF authorizes detention of those who "committed a belligerent act," noting that this language covers "any person who has directly participated in hostilities." *Hamlily*, 616 F. Supp. 2d at 70 (internal quotations omitted). Judge Bates held, however, that the government does not have authority to detain those who "directly supported hostilities." *Id.* at 77.

[41] Judge Bates concluded that the concept of "support" "evidences an importation of principles from the criminal law context" but "is simply not authorized by the AUMF itself or by the law of war." *Hamlily*, 616 F. Supp. 2d at 76.

[42] *Available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

[43] At trial, the district court employed the silent witness rule, an evidence presentation technique that limits disclosure of evidence to the judge, jury, counsel, and witnesses—and not the public. *See In Pursuit of Justice*, at 86. The Fourth Circuit expressed no opinion about whether the use of the silent witness rule would have been proper if the defendant had been provided unredacted copies of the documents. *Abu Ali*, 528 F.3d at 255 n.22.

[44] *Available at* http://article.nationalreview.com/?q=ZDQyYjEzMTg3ZDBjZTA4MzExNjU1MTE2MzkwYTRiMTc=.

[45] On May 15, 2009, President Obama announced the reform and continuation of the military commission process at Guantánamo Bay, Cuba. Press Release, Office of the White House Press Secretary (May 15, 2009). In deciding to reform rather than abandon the military commissions, President Obama was reportedly influenced by top national security aides who argued that major legal hurdles existed to prosecuting certain detainees in civilian courts, including un-*Mirandized* statements taken by the FBI in 2006 or 2007. *See* Michael D. Shear & Peter Finn, *Obama to Revamp Military Tribunals*, Wash. Post, May 16, 2009, at A1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/15/AR2009051501771.html; Carol J. Williams & Julian E. Barnes, *Critics Pounce on Obama's Tribunal Plan*, Chi. Trib., May 17, 2009, at C23, *online version available at* http://www.chicagotribune.com/news/nationworld/chi-military-tribunals_bdmay17,0,1837831.story; Evan Perez, *Miranda Issues Cloud Gitmo Cases*, Wall St. J., June 12, 2009, at A4, *available at* http://online.wsj.com/article/SB124476465967008335.html.

[46] *See also* Tr. of Combatant Status Review Tribunal Hr'g for ISN 10014 at 4-5, 7-9 (Mar. 12, 2007) (Walid Bin Attash, through personal representative, generally agreeing with the government's allegations concerning his participation in the attacks on the USS *Cole* and admitting that he "put together the plan for the operation a year and a half prior to the operation").

[47] The Supreme Court has held that failure to provide a *Miranda* warning in advance of an incriminating statement did not necessarily invalidate a later statement given after a *Miranda* warning was properly administered. *Elstad*, 470 U.S. at 314. The Court's ruling in that case, however, was predicated at least in part on the prior statement not being coerced. *Id.* at 315. As the Court explained, "absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the

conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the suspect made a rational and intelligent choice whether to waive or invoke his rights." *Id.* at 314. The Supreme Court later elaborated on when a prior statement taken in violation of *Miranda* was separate enough from a subsequent statement given after a *Miranda* warning to render the latter admissible. *Seibert*, 542 U.S. at 615. The Court explained that several factors may determine whether *Miranda* warnings delivered in between statements "could be effective enough to accomplish their object," including "the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.*

[48] The administration of *Miranda* warnings to accused terrorists captured outside the United States has also sparked political controversy. On June 18, 2009, the House Permanent Select Committee on Intelligence approved an amendment to prohibit the use of funds to provide *Miranda* warnings to terrorists captured abroad. See H.R. Rep. No. 111-186, at 37 (2009) (recommending passage of Intelligence Authorization Act for Fiscal Year 2010, Section 504 of which would prohibit any "funds authorized to be appropriated by this Act" from being used to provide *Miranda* warnings to any non-U.S. person located outside the United States who is "(1) suspected of terrorism, associated with terrorists, or believed to have knowledge of terrorists; or (2) a detainee in the custody of the Armed Forces of the United States"); *see also* Press Release, U.S. House of Representatives Permanent Select Committee on Intelligence Minority, Hoekstra, Republicans Fault Flawed Intelligence Bill (June 19, 2009), *available at* http://intelligence.house.gov/Media/PDFS/HoekstraRelease061909.pdf. Although this amendment seems to have been motivated by an understandable desire to ensure that intelligence interrogations are effective, its scope seems overly broad and it could, if enacted, frustrate the government's ability to use probative evidence to bring dangerous terrorists to justice.

[49] Studies report that between sixty-eight percent and eighty-three percent of suspects waived their rights under *Miranda* and willingly gave statements to authorities without the assistance of counsel. *See, e.g.*, Paul G. Cassell & Bret S. Heyman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. Rev. 839, 859 (1996) (reporting waiver rate of 83.7%); Richard A. Leo, *Inside the Interrogation Room*, 86 J. Crim. L. & Criminology 266, 276 (1996) (reporting waiver rate of 78.29%); George C. Thomas III, *Stories About Miranda*, 102 Mich. L. Rev. 1959, 1972 (2004) (reporting waiver rate of 68%).

[50] In a footnote, Judge Diana Gribbon Motz dissented from this portion of the panel's holding. She concluded that the level of coordination between U.S. agents and their Saudi counterparts rose to the level of "'active' or 'substantial' participation" triggering application of the "joint venture" doctrine and thus the requirement that *Miranda* warnings be administered. *Abu Ali*, 528 F.3d at 230 n.6. However, Judge Motz agreed with the other two members of the panel that even if the trial court had erroneously admitted the defendant's post-arrest statements in violation of *Miranda*, the error was harmless. *Id.* at 231.

[51] With respect to the AUSA's oral warnings, the Second Circuit agreed with the district court that the warnings were sufficient under *Miranda* and rejected defendants' argument that the AUSA's testimony regarding the warnings rendered was not credible. *In re Terrorist Bombings*, 552 F.3d at 209-10. Further, the court rejected defendants' argument that the oral warnings were inadequate because "the AUSA did not apprise them of whether they could obtain legal representation under Kenyan law." *Id.* at 211. Consistent with the court's analysis of the ACR, the court explained that "the AUSA's oral warning need not have explained (1) whether and how local defense counsel could be obtained and (2) whether and how local defense counsel, once obtained, could then participate in a custodial interrogation conducted under Kenyan auspices." *Id.*

[52] In considering the prosecution's motion to conduct a pre-trial deposition under Federal Rule of Criminal Procedure 15 of a prospective government witness who resides in another country, the court in *Ahmed* expressly endorsed the procedures adopted by the *Abu Ali* court. *United States v. Ahmed*, 587 F. Supp. 2d 853, 855 (N.D. Ohio 2008) ("[I]f the government meets its burden of showing relevance and materiality [of testimony of foreign witness], it and the defendants' attorneys, with whatever assistance of the court is needed, shall implement the procedures the Fourth Circuit approved in *U.S. v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).").

[53] The Second Circuit also faulted the trial court for allowing wide-ranging testimony from Gideon Black, a survivor of a Hamas bombing in Tel Aviv that was the subject of discussion at a wedding attended by al-Anssi and al-Moayad in Yemen. *See al-Moayad*, 545 F.3d 159-62. The Second Circuit found that the probative value of Black's testimony was outweighed by its potential for unfair prejudice under Federal Rule of Evidence 403. *See id.* The Second Circuit also faulted the trial court for receiving in evidence a videotape of the Yemen wedding, at which a Hamas leader referred to the Tel Aviv bombing, and for admitting certain documents seized in Croatia from two Yemenis who were crossing from Bosnia into Croatia. *See id.* at 157, 175-76. The court found that some of these items were hearsay. *See id.*

[54] *Available at* http://www.usdoj.gov/opa/pr/2009/January/09-nsd-041.html.

[55] Separately, al-Delaema pled guilty to one count of aggravated assault for a December 2007 incident in which he kicked a prison guard to the point of unconsciousness. As part of his plea agreement, al-Delaema stipulated to an eighteen-month sentence on the assault charge. *See* Plea Agreement.

United States v. al-Delaema, No. 05-cr-00337 (D.D.C. Feb. 26, 2009) (Dkt. No. 92); *see also* Press Release, U.S. Dep't of Justice, Iraqi-Born Dutch Citizen Pleads Guilty to Terrorism Conspiracy Against Americans in Iraq (Feb. 26, 2009), *available at* http://www.usdoj.gov/opa/pr/2009/February/09-nsd-168.html.

[56] *Available at* http://abcnews.go.com/US/wireStory?id=7343765.

[57] *Available at* http://washingtondc.fbi.gov/dojpressrel/pressrel09/wfo041609.htm.

[58] *Online version available at* http://www.nytimes.com/2009/05/24/us/politics/24gitmo.html.

[59] *Available at* 2009 WLNR 4814238.

[60] *Available at* http://phoenix.bizjournals.com/phoenix/stories/2009/02/09/daily27.html.

[61] *Available at* http://www.nypost.com/seven/01232009/news/politics/the_terrorists_will_now_cheer_151497.htm.

[62] *Online version available at* http://www.nytimes.com/2009/05/21/us/politics/21detain.html.

[63] *Available at* http://www.usdoj.gov/opa/pr/2009/June/09-ag-563.html.

[64] *Available at* http://www.usdoj.gov/opa/pr/2009/June/09-ag-564.html.

[65] The release also states that "[i]n addition to those inmates with an international terrorism history or nexus, there are approximately 139 individuals in BOP custody who have a history of/or nexus to domestic terrorism," including individuals like Theodore Kaczynski, the Unabomber, and Terry Nichols, convicted for his part in the 1995 Oklahoma City bombing. Press Release, U.S. Dep't of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System; *see also* Solomon Moore, *Doubts on Handling Terror Detainees End at U.S. Prison Gates*, N.Y. Times, June 17, 2009, at A14, *online version available at* http://www.nytimes.com/2009/06/17/us/17victorville.html (discussing fact that no international terrorist has escaped from any part of the federal prison system and that prison officials believe they can handle such prisoners).

[66] The release states that "[a]s of May 22, 2009, there were 44 inmates subject to SAMs, out of a total federal inmate population of more than 205,000" and that out of those forty-four, twenty-nine were incarcerated on terrorism-related charges, while eleven were either gang or organized crime members, and four were incarcerated on espionage charges. Press Release, U.S. Dep't of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System. We discussed SAMs at some length in *In Pursuit of Justice*. *See In Pursuit of Justice*, at 124-27.