S. HRG. 111–190

LEGAL ISSUES REGARDING MILITARY COMMISSIONS AND THE TRIAL OF DETAINEES FOR VIOLATIONS OF THE LAW OF WAR

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JULY 7, 2009

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JULY 7, 2009

LEGAL ISSUES REGARDING MILITARY COMMISSIONS AND THE TRIAL OF DETAINEES FOR VIOLATIONS OF THE LAW OF WAR

TUESDAY, JULY 7, 2009

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m. in room SD–106, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Lieberman, Reed, Bill Nelson, Ben Nelson, Webb, Udall, Hagan, Begich, McCain, Inhofe, Sessions, Chambliss, Graham, Thune, Martinez, and Collins.

Committee staff members present: Richard D. DeBobes, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Gerald J. Leeling, counsel; Peter K. Levine, general counsel; and William G.P. Monahan, counsel.

Minority staff members present: Joseph W. Bowab, Republican staff director; Richard H. Fontaine, Jr., deputy minority staff director; Michael V. Kostiw, professional staff member; and David M. Morriss, minority counsel.

Staff assistants present: Mary C. Holloway, Paul J. Hubbard, and Christine G. Lang.

Committee members' assistants present: James Tuite, assistant to Senator Byrd; Christopher Griffin, assistant to Senator Lieberman; Carolyn A. Chuhta, assistant to Senator Reed; Neal Higgins, assistant to Senator Bill Nelson; Ann Premer, assistant to Senator Ben Nelson; Patrick Hayes, assistant to Senator Bayh; Gordon I. Peterson, assistant to Senator Webb; Roger Pena, assistant to Senator Hagan; Lindsay Young, assistant to Senator Begich; Gerald Thomas, assistant to Senator Burris; Anthony J. Lazarski, assistant to Senator Inhofe; Lenwood Landrum and Sandra Luff, assistants to Senator Sessions; Clyde A. Taylor IV, assistant to Senator Chambliss; Adam G. Brake, assistant to Senator Graham; Jason Van Beek, assistant to Senator Thune; Dan Fisk and Brian W. Walsh, assistants to Senator Martinez; and Chip Kennett, assistant to Senator Collins.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody. The committee meets today to consider the important issue of military commissions and the trial of detainees for violations of the law of war.

On June 25, the committee unanimously voted to include a provision on military commissions in the National Defense Authorization Act (NDAA) for Fiscal Year 2010. This bill has now been sent to the full Senate for its consideration. I thank Ranking Member Senator McCain as well as Senator Graham and all the members of the committee for their work on this important matter.

In its 2006 decision in the Hamdan case, the Supreme Court held that Common Article III of the Geneva Conventions prohibits the trial of detainees for violations of the law of war, unless the trial is conducted "by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples." The court concluded that: "The regular military courts in our system are the courts-martial established by congressional statutes," but that a military commission can be regularly constituted by the standards of our military justice system "if some practical need explains deviations from court-martial practice."

Similarly, the court found that the provision for "judicial guarantees which are recognized as indispensable by civilized peoples" requires at a minimum that any deviation from the procedures governing courts-martial be justified by evident practical need.

The Supreme Court found that the military commissions established pursuant to President Bush's military order of November 13, 2001, fail to meet that test. The military commissions subsequently authorized by Congress in the Military Commissions Act (MCA) of 2006 also clearly fail to meet that test as well because they deviate from court-martial practice by permitting the routine use of coerced testimony, by authorizing reliance on hearsay evidence even when direct evidence is reasonably available, and by establishing a presumption that the procedures and precedents applicable in trials by court-martial will not apply to military commissions.

The double failure that I've just described to establish a system that provides basic guarantees of fairness identified by our Supreme Court has placed a cloud over military commissions and has led some to conclude that the use of military commissions can never be fair, credible, or consistent with our basic principles of justice. While the previous Congress's effort failed to meet the standards established by the Supreme Court in the Hamdan case, I believe that military commissions can be designed to meet those standards and that if they do they can play a legitimate role in prosecuting violations of the law of war.

President Obama has said that he believes this as well. In his May 21, 2009, speech at the National Archives, the President said: "Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in Federal courts."

Continuing the quote of President Obama: "Instead of using the flawed commissions of the last 7 years, my administration is bringing our commissions in line with the rule of law. We will no longer permit the use of evidence as evidence statements that have been

obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay, and we will give detainees greater latitude in selecting their own counsel and more protections if they refuse to testify.

"These reforms," he said, "among others, will make our military commissions a more credible and effective means of administering justice, and I will work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective."

The procedures for military commissions have varied over the years, as the procedures followed in our military justice system have varied. The Supreme Court noted in the Hamdan case that, while procedures governing trials by military commission are typically those governing court-martial, the "uniformity principle" is not an inflexible one. It does not preclude all departures from the procedures dictated for use by court-martial, but any departure, the Supreme Court said, "must be tailored to the exigency that necessitates it."

That is the standard that we've tried to apply in adopting the procedures for military commissions that we have included in the bill that we referred to the full Senate. This new language addresses a long series of problems with the military commission procedures currently in law. For example, relative to the admissibility of coerced testimony, the provision in our bill would eliminate the double standard in existing law under which coerced statements are admissible if they were obtained prior to December 30, 2005.

Relative to the use of hearsay evidence, the provision in our bill would eliminate the extraordinary language in the existing law which places the burden on detainees to prove that hearsay evidence introduced against them is not reliable and probative.

Relative to the issue of access to classified evidence and exculpatory evidence, the provision in our bill would eliminate the unique procedures and requirements which have hampered the ability of defense teams to obtain information and have led to so much litigation. We would substitute the more established procedures based on the Uniform Code of Military Justice (UCMJ), with modest changes to ensure that the government cannot be required to disclose classified information to unauthorized persons.

Of great importance, the provision in our bill would reverse the existing presumption in the MCA of 2006 that rules and procedures applicable to trials by court-martial would not apply. Our new language says, by contrast, that "Except as otherwise provided, the procedures and rules of evidence applicable in trials by general court-martial of the United States shall apply in trials by military commission under this chapter."

The exceptions to this rule are, as suggested by the Supreme Court, carefully tailored to the unique circumstances of the conduct of military and intelligence operations during hostilities.

Three years ago when the committee considered similar legislation on military commissions, I urged that we apply two tests. First, will we be able to live with the procedures that we establish if the tables are turned and our own troops are subjected to similar

procedures? Second, is the bill consistent with our American system of justice and will it stand up to scrutiny on judicial review? I believe those remain the right questions for us to consider and that the language that we have included in the NDAA for Fiscal Year 2010 meets both tests.

Over the last 3 years, we have seen the legal advisor to the Convening Authority for Military Commissions forced to step aside after a military judge found that he had compromised his objectivity by aligning himself with the prosecution. We have had prosecutors resign after making allegations of improper command influence and serious deficiencies in the military commission process. We have had the chief defense counsel raise serious concerns about the adequacy of resources made available to defendants in military commission cases, writing that, "Regardless of its other procedures, no trial system will be fair unless the serious deficiencies in the current system's approach to defense resources are rectified."

So even if we're able to enact new legislation that successfully addresses the shortcomings in existing law, we still have a long way to go to restore public confidence in military commissions and the justice that they produce. However, we will not be able to restore confidence in military commissions at all unless we first substitute new procedures and language to address the problems with the existing statute.

Again, I want to thank Senator McCain, Senator Graham, and the other members of the committee for all of the work that they've put into this bill and to this issue. The Senate will be considering the entire bill, including these provisions, hopefully starting next Monday or Tuesday.

Senator McCain.

Senator MCCAIN. Mr. Chairman, Senator Inhofe has asked to make a brief comment if that's agreeable to you.

Chairman LEVIN. Sure, of course.

Senator INHOFE. I thank the ranking member for this courtesy. I'm the ranking member on the Environment and Public Works Committee, and we have a hearing that's going on at the same time. I do have a list of questions I'll be submitting for the record, including such things as the impact of placing detainees in the U.S. prison system pre-trial and post-trial, the security risks of escape, where these detainees will be tried and at what risk, the advantages of using the complex we've all seen down there, the Expeditionary Legal Complex that is designed for tribunals, the rules of evidence that are between a tribunal and a Federal court system, and lastly some questions about the advisability of reading Miranda rights to captured terrorists.

I thank you, and I will be submitting these and I appreciate the opportunity to make that statement.

Chairman LEVIN. Thank you, Senator Inhofe.

Senator McCain.

STATEMENT OF SENATOR JOHN MCCAIN

Senator MCCAIN. Thank you, Mr. Chairman. I want to join you in welcoming our witnesses on both panels this morning. I appreciate your scheduling the hearing and I appreciate the expert ad-

vice and experience in these matters that our witnesses bring to our discussions on military commissions and detainee policy.

This committee has led the way in dealing with detainee issues and developing legislation on detainee matters, sometimes in cooperation with the White House and sometimes over its strong objections. The NDAA for Fiscal Year 2010, which was reported out of this committee unanimously on June 25, 2009, again takes a leading role by including changes to the MCA of 2006.

I'm pleased to have worked with you and Senator Graham and others on this legislation. While we haven't resolved all the thorny issues that military commissions and other aspects of detainee policy present, I believe we've made substantial progress that will strengthen the military commissions system during appellate review, provide a careful balance between protection of national security and American values, and allow the trials to move forward with greater efficiency toward a just and fair result.

The first panel is composed of experts in national security and legal matters from within the government, including senior officials of the Department of Defense (DOD), Department of Justice (DOJ), and our uniformed Judge Advocate General (JAG) Corps. The witnesses on our second panel have similar practical and academic experience, but are now outside the government. I'm particularly interested in hearing the views of witnesses on both panels on problems that have been encountered implementing the current military commissions system, including the speed of bringing cases to trial and what should be done to make the system work more smoothly, ways in which to deal with the important issue of protection of classified information, whether the current military commissions system adequately addresses alleged terrorist acts by al Qaeda and its operatives that occurred before the attacks on September 11, 2001, such as the bombing of the USS *Cole* and our East African embassies, whether the rules on use of hearsay testimony at trial strike the right balance between the conditions of an ongoing war or whether improvements should be made, whether the definition of "unlawful enemy combatant" or "unprivileged belligerent" should be modified, whether changes should be made in the appellate review of military commissions.

While our hearing today is focused on military commissions and the trial of detainees for violations of the law of war, there are a number of enormously difficult issues related to detainee policy that we must also come to grips with in a comprehensive fashion before we can close the detention facility at Guantanamo Bay, as President Obama has pledged to do.

Mr. Chairman, the issues presented by the detainees at Guantanamo and overseas in Afghanistan are among the most difficult policy decisions this administration faces. I look forward to hearing the views of our witnesses and working with you on these matters as the DOD bill moves forward toward floor consideration and conference with the House of Representatives.

Thank you, Mr. Chairman.

[The prepared statement of Senator McCain follows:]

PREPARED STATEMENT BY SENATOR JOHN MCCAIN

Mr. Chairman, I want to join you in welcoming our witnesses on both panels this morning. I appreciate you scheduling this hearing, and I appreciate the expert advice and experience in these matters that our witnesses bring to our discussions on military commissions and detainee policy.

This committee has led the way in dealing with detainee issues and developing legislation on detainee matters, sometimes in cooperation with the White House and sometimes over its strong objections. The National Defense Authorization Act for Fiscal Year 2010, which was reported out of this committee unanimously on June 25, again takes a leading role by making recommendations for changes to the Military Commissions Act of 2006. I have worked with you in this effort, as has Senator Lindsey Graham. While we have not resolved all the thorny issues that military commissions and other aspects of detainee policy present, I believe we have made substantial progress that will strengthen the military commissions system during appellate review, provide a careful balance between protection of national security and American values, and allow the trials to move forward with greater efficiency toward a just and fair result.

Our first panel is composed of experts in national security and legal matters from within the government, including senior officials of the Defense Department, Justice Department, and our uniformed Judge Advocate General's Corps. The witnesses on our second panel have similar practical and academic experience who are now outside the government. I am particularly interested in hearing the views of witnesses on both panels on:

- Problems that have been encountered implementing the current military commissions system, including the speed of bringing cases to trial, and what should be done to make the system work more smoothly;
- Issues dealing with the protection of classified information and the process of providing declassified substitutes or summaries to the detainee and his legal team and whether these procedures can be made more efficient while still protecting national security;
- Whether the current military commissions system adequately addresses alleged terrorist acts by al Qaeda and its operatives that occurred before the attacks on September 11, 2001, such as the bombing of the USS *Cole* and our East Africa embassies;
- Whether the rules on use of hearsay testimony at trial strike the right balance given the conditions of an ongoing war or whether improvements should be made;
- Whether the definition of "unlawful enemy combatant" or "unprivileged belligerent" should be modified;
- Whether changes should be made in the appellate review of military commissions.

While our hearing today is focused on military commissions and the trial of detainees for violations of the law of war, there are a number of enormously difficult issues related to detainee policy that we must also come to grips with in a comprehensive fashion before we can close the detention facility at Guantanamo Bay, as President Obama has pledged to do. I would also like the witnesses to provide their views on:

- How would you propose sorting cases that should be tried in Article III Federal courts and those that should be tried before a military commission;
- What happens to detainees who are found "not guilty" at trial;
- Where should detainees who are convicted of war crimes be incarcerated;
- What sort of system should apply to those detainees who we cannot try, but who are too dangerous to release;
- What sort of review should apply to those detainees captured off the battlefield, but who are held in battlefield detention facilities such as those at Bagram Air Base in Afghanistan;
- How can we best ensure that those detainees who are released to another country don't return to the fight;
- If all the detainees cannot be tried or repatriated to another country by January 2010, what should we do about closing Guantanamo?

Mr. Chairman, the issues presented by the detainees at Guantanamo and overseas in Afghanistan are among the most difficult policy decisions this administration faces. I look forward to hearing the views of our witnesses and to working with you on these matters as the National Defense Authorization Act moves ahead toward floor consideration and conference with the House of Representatives. I am

convinced that we must solve these difficult issues now and I am committed to doing so. Thank you.

Chairman LEVIN. Thank you so much, Senator McCain.

We'll first now hear from our inside panel, first the General Counsel for DOD, Jeh Johnson.

STATEMENT OF HON. JEH C. JOHNSON, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Mr. JOHNSON. Thank you very much, Mr. Chairman, Senator McCain, members of this committee. You have my prepared statement. I will dispense with the full reading of it and just make some abbreviated opening comments here.

Chairman LEVIN. All the statements will be made part of the record in full.

Mr. JOHNSON. Thank you.

I want to thank this committee for taking the initiative on a bipartisan basis to seek reform of military commissions. In his speech, as the chairman remarked, at the National Archives on May 21, President Obama called for the reform of military commissions and pledged to work with Congress to amend the MCA of 2006. Speaking on behalf of the administration, we welcome the opportunity to be here today and to work with you on this important initiative.

Military commissions can and should contribute to our national security by becoming a viable forum for trying those who violate the laws 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 laws of war.

Those are the remarks I wanted to make initially. Senator, I look forward to your questions.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT BY JEH CHARLES JOHNSON

Mr. Chairman and Senator McCain, thank you for the opportunity to testify here today.

I also thank this committee for taking the initiative, on a bipartisan basis, to seek reform of military commissions. In his speech on May 21 at the National Archives, President Obama called for the reform of military commissions, and pledged to work with Congress to amend the Military Commissions Act. So, speaking on behalf of the administration, we welcome the opportunity to be here today, and to work with you on this important initiative.

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.

In May, the administration 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). My Defense Department colleagues and I have had an opportunity to review the language this committee has included in the National Defense Authorization Act, and it is our basic view that the committee has identified virtually all of the same elements we believe are important to further improve the military commissions process. We are confident that through close cooperation between the ad-

ministration and 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 Federal court, and for the just resolution of cases alleging violations of the law of war.

There are several changes to the Military Commissions Act reflected in the proposed legislation which I would like to highlight here, and which the administration supports:

First, consistent with the rules changes approved by the Secretary of Defense and submitted to Congress in May, the legislation codifies a ban on the use in court of statements that were obtained by interrogation methods that amount to cruel, inhuman, or degrading treatment. In my view, this change is a big one. The most prominent criticism we hear of the current Military Commissions Act is that it permits the use of such statements, if obtained before December 30, 2005. The statutory change which eliminates this possibility—by itself—will go a long way towards enhancing the legitimacy and credibility of commissions.

Second, I note that the legislation amends current law to clarify the government's obligations to disclose exculpatory evidence to the accused, including evidence that would tend to impeach the credibility of a government witness, or serve as mitigation evidence at time of sentencing. This clarification of the government's obligations would be consistent with the obligations prosecutors have now in civilian courts.

Third, the legislation would modify the rules on hearsay evidence, more closely resembling the rules used in civilian courts and in courts-martial.

Fourth, the legislation codifies our rules change to provide the accused with more latitude in the selection of military defense counsel, again making commissions' rules closer to those in courts-martial.

Fifth, the legislation discontinues the use of the phrase "unlawful enemy combatant." We in the administration, effective March 13, have also discontinued using the phrase in our court filings identifying who we believe we have the authority to detain at Guantanamo.

The administration supports these changes to existing law, though you will note that we prefer somewhat different language in several instances. As I said before, we believe that reformed military commissions can and should contribute to national security by affording a venue for bringing to justice those who violate the law of war, and for doing so in a manner that reflects American values of justice and fairness. We believe these reforms serve that purpose.

When considering this legislation, the administration asks that Congress also consider the following:

First, in section 948r, concerning statements of the accused that can be admitted at trial, we ask that you consider the express incorporation of a "voluntariness" standard that, consistent with current law, takes account of the unique challenges and circumstances of the battlefield setting. We do not believe that soldiers on a battlefield should be required or even encouraged to provide Miranda-like warnings to those they capture—and we note that the current legislation expressly states that Article III1 of the Uniform Code of Military Justice is not applicable to military commissions. Article III1 requires Miranda-like warnings prior to official questioning of servicemembers regarding alleged crimes.

The essential mission of our Nation's military is to capture or kill the enemy, not to engage in evidence collection for eventual prosecution. However, in both American civilian courts and courts-martial, statements of an accused are normally admitted only in the event they are found to be "voluntary." There is a concern that, as military commissions prosecutions progress, military commission judges and courts may apply this standard without taking adequate account of the critical circumstances. Thus, rather than jeopardize future prosecutions and convictions because a statement was admitted at trial that was not considered "voluntary," the administration believes we should specifically codify a standard to assess voluntariness that, consistent with current law, accounts for the realities of military operations. This will decrease the likelihood that combat objectives may be confused with a law enforcement mission, while ensuring that valid convictions before military commissions will be sustained on appeal.

Second, we note that the legislation incorporates certain of the classified evidence procedures currently applicable in courts-martial, where there is relatively little precedent and practice regarding classified information. We, in the administration, believe that further work could be done to codify the protections of classified evidence, in a manner consistent with the protections that now exist in Federal civilian courts. We believe that those protections would work better to protect classified information, while continuing to ensure fairness and providing a stable body of precedent and practice for doing so.

Third, concerning hearsay, while welcoming the committee's further regulation of the use of such evidence, we in the administration recommend somewhat different language for achieving this result that we look forward to discussing in more detail.

Fourth, we look forward to working with Congress to ensure that the offenses that may be prosecuted in a military commission are consistent with the law of war. We note that section 950p of the Military Commissions Act contains a statement recognizing that the offenses codified by that Act are "declarative of existing law," and "do not preclude trial for crimes that occurred before enactment" of the law. The committee replaced the language currently in section 950p with similar, but not identical, language. The administration supports this type of statement, though we prefer the existing language in section 950p. I note also that the committee bill retains the offense of providing material support for terrorism. After careful study, the administration has concluded that appellate courts may find that "material support for terrorism"—an offense that is also found in Title 18—is not a traditional violation of the law of war. The President has made clear that military commissions are for law of war offenses. We thus believe it would be best for material support to be removed from the list of offenses triable by military commission, which would fit better with the statute's existing declarative statement.

We also believe that conspiracy, unlike material support, can in many cases be properly charged in military commissions as a traditional law of war offense, and we welcome the retention of that offense in the committee bill. As a former prosecutor, it is my belief that by definition, many material support cases are also conspiracy cases.

With the removal of material support, we are supportive of recognizing the law of war origins of all codified offenses.

Fifth, we agree with the committee that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that an appellate court paralleling that of the service Courts of Criminal Appeals under Article 66 of the Uniform Court of Military Justice, with additional review by the U.S. Court of Appeals for the DC Circuit, would best achieve the legitimacy and credibility we all seek.

In conclusion, I thank you again for taking the initiative in this important area of national security, and I look forward to your questions.

Chairman LEVIN. Thank you very much, Mr. Johnson.

Next is the Assistant Attorney General for National Security Division (NSD) at DOJ, David Kris.

Mr. Kris.

STATEMENT OF HON. DAVID S. KRIS, ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF JUSTICE

Mr. KRIS. Thank you, Mr. Chairman, Senator McCain, and members of the committee. I come from DOJ and this is my first appearance before this committee. I thought I might begin just by briefly explaining how I think my work relates to that of the committee with respect to military commissions.

NSD, which I lead, combines all of DOJ's major national security personnel and functions. Our basic mission is to protect national security consistent with the rule of law and civil liberties. In keeping with that, we support all lawful methods for achieving that protection, including but not limited to prosecution in an Article III court or before a military commission.

In the last administration, NSD assembled a team of experienced Federal prosecutors drawn from across the country to assist the DOD Office of Military Commissions (OMC) and litigate cases at Guantanamo Bay, Cuba (GTMO). I can assure you that assistance will continue. The man who led that team for NSD is now my deputy and a member of that team has since been recalled to active duty and is now the lead prosecutor at OMC.

As the President explained, when prosecution is feasible and otherwise appropriate we will prosecute terrorists in Federal court or in military commissions. In the 1990s, I prosecuted a group of violent extremists and, like their more modern counterparts, they engaged in extensive "law-fare," which made the trials challenging. But the prosecution succeeded, not only because it incarcerated these defendants, some of them for a very long time indeed, but also because it deprived them of any shred of legitimacy.

Military commissions can help do the same for those who violate the law of war—not only detain them for longer than might otherwise be possible under the law of war, but also brand them as illegitimate war criminals. To do this effectively, however, the commissions themselves must first be reformed, and the committee's bill is a tremendous step in that direction. As you know from my written testimony and that of Mr. Johnson and Admiral MacDonald, the administration appreciates the bill very much and supports much of it. You have made an incredibly valuable contribution with the bill.

I want to thank you again for inviting me here and I look forward to answering your questions.

[The prepared statement of Mr. Kris follows:]

PREPARED STATEMENT BY HON. DAVID KRIS

Chairman Levin, Ranking Member McCain, and members of the Armed Services Committee, thank you for the opportunity to discuss legislation that would reform the Military Commissions Act (MCA) of 2006. 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. As the President stated in his May 21 speech at the National Archives, where feasible we plan to prosecute in Federal court those detainees who have violated our criminal law. Prosecution is one way—but only one way—to protect the American people, and the Federal courts have proven on many occasions to be an effective mechanism for dealing with dangerous terrorists.

The President has also made clear that he supports the use of military commissions 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. I thank this Committee for leading the effort to develop legislation on this important national security issue.

On May 15, 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. This committee has now taken the next step by drafting legislation to enact more extensive changes to the MCA on a number of important issues. The administration believes the committee's 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 you on it. With respect to some issues, we think the approach taken by the 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 you 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 committee's 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 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 III1 of the Uniform Code of Military Justice (UCMJ) 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 risk 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 committee has 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 committee 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 committee that the rules governing use of classified evidence need to be changed, but we would do so in a fashion that is more similar to the system provided in the Classified Information Procedures Act (CIPA), as it has been interpreted by Federal courts. While CIPA may need to be revised and updated in important respects to address terrorism cases more effectively, we believe it has generally worked well in both protecting classified information and ensuring fairness of proceedings. 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. It will also allow military judges to draw on the substantial body of CIPA case law and practice that has been developed over the years.

We are concerned with a provision in the committee bill that allows the use of traditional CIPA practices—the use of deletions, substitutions, or admissions—only after an agency head or original classifying authority has certified that the evidence has been declassified to the maximum extent possible. This provision has no analogue in CIPA or the UCMJ, and it suggests a potentially burdensome process of declassification where the traditional alternatives would be more efficient and would adequately protect the rights of the accused. We also believe there are a number of elements of CIPA law and practice that would substantially improve the way classified information issues are dealt with by the commissions, including for example establishing clear guidance on the propriety of ex parte hearings on classified information issues and setting substantive standards for provision of classified evidence to the defense in discovery. We would be happy to work with you and your staff on these issues.

Fifth, we share the objective of the 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 U.S. 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 committee 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 risk that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby reversing 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 that cases that yield material support charges could often yield such conspiracy charges. Further, material support charges could be pursued in Federal court where feasible.

Finally, we 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.

In closing, I want to emphasize again how much the administration appreciates the committee's leadership, and the very thoughtful bill it has drafted. While there may be some areas of the bill on which we disagree with the approach taken or the specific language adopted, we think this bill represents a major step forward and we are optimistic that we can reach agreement on the important details. We would welcome the opportunity to conduct further discussions.

Thank you again for the opportunity to testify today, and I will be happy to answer any questions you have.

Chairman LEVIN. Thank you very much, Mr. Kris.

Admiral MacDonald.

STATEMENT OF VADM BRUCE E. MACDONALD, USN, JUDGE ADVOCATE GENERAL, UNITED STATES NAVY

Admiral MACDONALD. Thank you, Mr. Chairman, Senator McCain, members of the committee. Thank you very much for providing me with the opportunity to present my personal views of section 1031 of the NDAA.

In 2006 when this committee was working to establish a permanent framework for military commissions through the MCA, I had the opportunity to share my views with the Senate Judiciary Committee and the House Armed Services Committee (HASC). At that time I recommended that a comprehensive framework for military commissions should clearly establish the jurisdiction of the commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe substantive offenses. I stated that the UCMJ should be used as a model for the commissions process.

I am pleased to say that this committee's legislative proposal addresses the concerns I had in 2006 following the enactment of the MCA. Overall, I believe that this legislation establishes a balanced framework to provide important rights and protections to an accused, while also providing the government with the means of prosecuting alleged alien unprivileged enemy belligerents.

In reviewing your legislation, I would identify two areas where additional clarity would be most helpful to our practitioners. First, the legislation relies upon the current courts-martial rules of evidence to address the handling of classified information. Unfortunately, the cognizant military rule, MRE–505, does not have a very robust history. Over time we have discovered that, while MRE–505 has some benefits, the military rules on the use of classified information fall short of our overall goals.

On the other hand, for over 20 years Article III courts have relied upon the Classified Information Procedures Act (CIPA). In light of the history and experience of CIPA, as well as the practical difficulties with the use of MRE–505 to date, I recommend using a modified CIPA process as a touchstone for military commissions going forward.

Second, I agree with the provision calling for the military judge to evaluate the admissibility of allegedly coerced statements using a totality of the circumstances test to determine reliability. However, to assist our practitioners in the field, I recommend that you develop a list of considerations to be evaluated in making this determination. Those considerations should include: the degree to which the statement is corroborated; the indicia of reliability in the statement itself; and to what degree the will of the person making the statement was overborne.

Once again, thank you, Mr. Chairman, for the opportunity to testify and I look forward to answering your questions.

[The prepared statement of Admiral MacDonald follows:]

PREPARED STATEMENT BY VADM BRUCE MACDONALD, USN

Chairman Levin, Ranking Member McCain, and members of the Armed Services Committee, thank you very much for giving me the opportunity to testify today on the subject of military commissions.

In 2006, when this committee was working to establish a permanent framework for military commissions through the Military Commissions Act, I had the opportunity to share my views with the Senate Judiciary Committee and House Armed Services Committee. At that time, I recommended that a comprehensive framework for military commissions should clearly establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe substantive offenses. I stated that the Uniform Code of Military Justice (UCMJ) should be used as a model for the commissions process. Although our experiences of the last few years have shaped my perspectives on some of the rules that should apply to military commissions, I am pleased to say that this committee's legislative proposal addresses the concerns I had in 2006. Overall, I believe that this legislative proposal establishes a balanced framework to provide important rights and protections to an accused while also providing the government with the means of prosecuting alleged alien unprivileged enemy belligerents.

This legislation provides each accused with critical legal protections. These include:

- The right against self incrimination, the right to compulsory process and a reasonable opportunity to obtain witnesses and evidence, along with an expanded right to exculpatory, as well as mitigating and impeachment evidence.
- The right to be present during all sessions of trial when evidence is to be offered and the right to confront witnesses.
- The right to self representation and the right to be represented by detailed military counsel, an expanded right to counsel of the accused's own choice if reasonably available, and the right to civilian counsel at the accused's expense.

- The right to appellate review, to include a review of factual sufficiency identical to the type of review currently conducted for courts-martial under the UCMJ.

Prosecution of alien unprivileged enemy belligerents has proven a challenge over the last few years. Your legislation establishes a more balanced framework to prosecute accused by modeling the procedures used in general courts-martial under the UCMJ while recognizing the exigencies that exist on the battlefield in time of war.

Specific highlights of the legislation that I support include:

- A requirement that the government prove its case beyond a reasonable doubt.
- Protection against double jeopardy.
- A requirement that the proponent of hearsay evidence establish its reliability to an extent required by rules long recognized in trials by general courts-martial.
- Exclusion of statements obtained through the use of torture or cruel, inhuman or degrading treatment. For other statements, permits the military judge to determine admissibility in the interests of justice based upon the reliability of the statement under a totality of the circumstances analysis.
- Establishes clearly defined criminal offenses.
- Continues to recognize and rely upon an independent trial judiciary that has been the hallmark of military trials under the UCMJ.

In short, this legislation strikes the right balance between affording an accused the judicial guarantees recognized as indispensable by civilized people and our national security concerns.

In reviewing your legislation, I believe that there are two areas in which our practitioners would benefit from some additional clarity.

- Section 949d provides for the use of rules of evidence in trials by general courts-martial in the handling of classified evidence. This is consistent with our overall desire to use those procedures found within the UCMJ and the Manual for Courts-Martial whenever possible. However, experience has shown that practitioners struggle with a very complex and unclear rule within the Military Rules of Evidence. The military rules do not have a robust source of informative or persuasive case law. Frankly, prosecutions using Military Rule of Evidence 505 are rare. In developing the rules for the handling of classified material during a military commission, it would be more prudent to rely upon the Classified Information Procedures Act (CIPA) used in Article III courts as a starting point. The use of CIPA as a touchstone for drafting provisions for use in the litigation of classified evidence in military commissions, complete with the definitional guidance that has developed over more than 20 years of jurisprudence in Federal district courts, would provide practitioners with additional clarity in the area of classified evidence.
- Section 948r provides a test for determining the admissibility of allegedly coerced statements. I recommend you include a list of considerations a military judge should use in evaluating the reliability of those statements. Those considerations should include the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether and to what degree the will of the person making the statement was overborne.

Once again, thank you very much for this opportunity to share my personal views on your legislation. I look forward to answering your questions and working with the committee on this important endeavor.

Chairman LEVIN. Thank you very much, Admiral MacDonald.

As the Judge Advocate General of the U.S. Navy, your testimony is obviously very, very important to us. You emphasize that you're speaking in a personal capacity here today and we understand that. We would ask, however, if there are some differences between the uniformed Navy and your own personal views. We will ask the Secretary if there are any such differences. We assume Mr. Johnson is speaking for the entire DOD, but since you put it that way we will make that inquiry of the Secretary of the Navy.

Let's try a 6-minute round for questioning here. We have not only two panels, but we also have a room which is reserved for

some other purpose previously at 12:30. I hope we'll have enough time. We'll try a 6-minute first round.

Let me ask you first, Mr. Johnson. I quoted from the Hamdan case in my opening remarks, saying that the court in Hamdan said that "the regular military courts in our system are the courts-martial established by congressional statutes," but they also said that a military commission can be regularly constituted if there's a practical need that explains deviations from court-martial practice. We attempted in our language to do exactly that.

My question first of you is, in your view does our bill conform to the Hamdan standards?

Mr. JOHNSON. Senator, as you noted, Hamdan was at a time that the MCA of 2006 did not exist, as I recall. But the holding of Hamdan was that military commissions—and I'm not going to get this exactly right—but that military commissions should depart from UCMJ courts only in situations of evident practical need.

The proposed legislation, in our view definitely brings us closer to the UCMJ model and the circumstances under which the military commissions contemplated by this bill and UCMJ courts differ are in our judgment circumstances that are necessary given the needs here. For example, there is no Miranda requirement imposed by this legislation. Article III1 of the UCMJ is specifically excluded from application here. Article III1 is what calls for Miranda warnings in UCMJ circumstances.

The legislation also takes what I believe is a very appropriate and practical approach to hearsay. As you noted in your opening remarks, Mr. Chairman, the burden is no longer on the opponent to demonstrate that hearsay should be excluded. There is a notice requirement in the proposed legislation and if the proponent of the hearsay can demonstrate reliability and materiality and that the declarant is not available as a practical matter, given the unique circumstances of military operations and intelligence operations, the hearsay could be admitted.

Military commissions are fundamentally different from UCMJ courts in that most often what you have in military justice is the punishment of a member of the U.S. military for some violation of the UCMJ, very often directed—of some sort of domestic nature. Military commissions are obviously for violations of the law of war. They are very often prosecuting people captured on the battlefield and, just given the nature of the way evidence is collected, there needs to be a recognition that the military can't be expected to change how it does business to engage in evidence collection on the battlefield.

The way this legislation deals with the hearsay rules I think is quite appropriate and is certainly an example of evident practical need.

I would say the same when it comes to the rules on authenticity set forth in this proposed legislation. There is not a requirement like you would see in UCMJ courts or in civilian courts for what we in civilian courts would know as a strict chain of custody. There is a more practical approach, given the needs of military operations and intelligence collection.

Chairman LEVIN. Can I interrupt you there because of our short time. If you could expand for the record any places where you be-

lieve we fall short of complying with the Hamdan standards, I'd appreciate that if you could do that for the record.

Mr. JOHNSON. Yes, I'd be happy to.

Chairman LEVIN. You could expand your answer, too.

Mr. JOHNSON. Sorry for going on so long, Senator.

Chairman LEVIN. We only have 6 minutes.

Mr. Kris, let me ask you, representing DOJ: In your judgment, do you believe that this bill as drafted, that these provisions conform to the Hamdan standards?

Mr. KRIS. Yes. To the extent that the uniformity principle from Hamdan applies to a statutorily created system of commissions, I think it is met here. Jeh mentioned some of the differences and I think his justifications make sense. We have some recommendations for change, but those aren't rooted in the uniformity principle at all.

Chairman LEVIN. While I'm asking you questions, it's been argued that it's not appropriate for DOD to prosecute terrorists. Do you believe that it is appropriate for DOD to prosecute alleged terrorists with these military commissions, instead of DOJ doing all of the prosecuting in Article III courts?

Mr. KRIS. Yes. I think the President made clear in his May 21 speech that we will prosecute in Federal court and where there is a law of war violation, we will also prosecute under a reformed system of military commissions, we will also prosecute law of war violations in those commissions. I think the President said it best when he said that we need to be using all instruments of national power against this adversary, and that includes military commissions.

Chairman LEVIN. Thank you. My time has expired.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman.

Mr. Johnson and Mr. Kris, if trials were held in Guantanamo or the United States would there be any difference in the proceedings?

Mr. JOHNSON. Senator, if military commissions were held in the continental United States I think that we have to carefully consider the possibility that some level of due process may apply that the courts have not determined applies now. I think that that assessment has to be carefully evaluated and carefully made.

Senator MCCAIN. What you're saying is that you believe there could be some significant difference in procedure if the trials were held in Guantanamo or in the United States of America?

Mr. JOHNSON. I'm not sure I would be prepared to say significant difference, Senator.

Senator MCCAIN. I think it would be important for this committee to know what your view is. It might have something to do with the way that we shape legislation. If they're going to have all kinds of additional rights if they are tried in the United States of America as opposed to Guantanamo, I think that the committee and the American people should know that.

Mr. JOHNSON. One of the things that I mentioned in my prepared statement, Senator, is that when it comes to the admissibility of statements the administration believes that a voluntariness standard should apply that takes account of the realities of military operations. We think that is something that due process may require,

particularly if the commissions come to the United States, that the courts may impose a voluntariness standard.

Senator MCCAIN. I hope that you and Mr. Kris will provide for the record what you think the differences in the process would be as to the location of those trials. I think it's very important. Certainly it is to me.

Mr. Kris, in your statement on page 2 you said: "It's the administration's view that there is a serious risk that courts would hold the admission of involuntary statements of the accused in military commission proceedings is unconstitutional." Does that infer that these individuals have constitutional rights?

Mr. KRIS. Yes.

Senator MCCAIN. They do? What are those constitutional rights of people who are not citizens of the United States of America, who were captured on a battlefield committing acts of war against the United States?

Mr. KRIS. Our analysis, Senator, is that the due process clause applies to military commissions and imposes a constitutional floor on the procedures that would govern such commissions, including against enemy aliens.

Senator MCCAIN. What would those be, Mr. Kris?

Mr. KRIS. They'd be a number of due process-based rights, one of which Mr. Johnson just mentioned, is we think there is a serious risk that courts will find that a voluntariness standard is required by the due process clause for admission of——

Senator MCCAIN. You are saying that these people who are in Guantanamo, were part of September 11 or have committed acts of war against the United States, are entitled to constitutional rights of the Constitution of the United States of America?

Mr. KRIS. Within the framework that I just described, I think the answer is yes. The due process clause guarantees and imposes some requirements—that's the way I think I would put it—on the conduct and rules governing these commissions.

Senator MCCAIN. Well, that's very interesting because I had never proceeded under that assumption in drafting this legislation and previous legislation. The fact is that they are entitled to Geneva protections under the Geneva Conventions, which apply, and the rules of war. I did not know nor know of any time in American history where enemy combatants were given rights under the U.S. Constitution.

Mr. KRIS. I do think, Senator, there's a difference between their rights—for example, they would not be entitled to the rights under Geneva for prisoners of war because these are——

Senator MCCAIN. No, their rights under the treatment of enemy combatants, the Geneva Conventions Common Article III.

Mr. KRIS. Yes. Okay, thank you.

Senator MCCAIN. We now have established that it is the view of the administration that enemy combatants or belligerents, whatever new name you'd like to call them, are now entitled to the constitutional rights of U.S. citizens?

Mr. KRIS. Not at all. I don't think that that's right. I mean, both in terms of how we would describe this as a due process requirement that applies to the commissions even if they are prosecuting enemy aliens; and also I don't think it's right to equate the rights

or the rules that are required for commission proceedings against aliens necessarily with those that would apply against U.S. citizens. Those might come out differently. This is an extremely complicated area of law.

Senator MCCAIN. It certainly is, Mr. Kris. But your statement for the record was "It's the administration's view that there are serious risks that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional."

Mr. KRIS. Yes.

Senator MCCAIN. Therefore it means that they have some constitutional rights.

Mr. Chairman, I know that there are other questions of the witnesses, and if there's a second round maybe I'll take advantage of it. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator McCain.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thanks to the witnesses.

Mr. Johnson, let me begin with an expression of appreciation for the process that the administration has gone through to come to the point that you're at today. For me as we've gone through this deliberation about how to treat what I call prisoners of war, that is those suspected of violating the laws of war, it seems to me that we've had a hard time putting this in the context of our own sets of fairness related to the unique war we're in.

Obviously, this is a war against terrorists. They don't fight in uniform. They don't fight, for the most part, for nation states. This war may go on for a long time. Nonetheless, it seemed to me along the way that there was no sense to those who are arguing that these individuals apprehended for violations of the law of war should be tried in our Federal courts. In the sense that Senator McCain has just said, I don't think they have the constitutional rights that we associate with American citizenship. Also they have not in my opinion violated Federal criminal law. They've violated the laws of war.

I know that there were some who expected that the Obama administration's review would end up recommending that all of these cases go to Federal court, and I appreciate the fact that you have not come to that conclusion, although I have some questions about some of the subparts of what you've done. I think this is really a very significant, very open-minded, very fair, very ultimately historic process you went through and reached I think generally speaking the right balance, and I appreciate it.

You were asked just a moment ago whether you thought that the military commission provisions of the NDAA were within the Hamdan ruling of the Supreme Court. I want to ask you whether your judgment is that the military commission provisions of the NDAA are within the requirements of the Geneva Convention?

Mr. JOHNSON. Yes, Senator, with room to spare, yes. One of my personal objectives, frankly, is that we devise a system that comports with the Geneva Conventions as well as Hamdan, as well as applicable U.S. laws. I think the answer to your question is yes, sir.

Senator LIEBERMAN. I thank you for that answer. I agree with you, and I particularly appreciate the clause you added, which is that the military commission provisions of the NDAA are not only within the requirements of the Geneva Conventions, but, as you said, with room to spare. I agree that we hold ourselves to very high standards, sometimes standards that are so high that they are unrealistic and in some sense self-destructive in the context of the war we're in.

I agree with you that what we've provided for in this legislation of this committee is well within the Geneva Conventions.

Let me ask you a specific question that came up in the last exchange and testimony of Mr. Kris. In light of the judgment of the Supreme Court in the Hamdan case that certainly to me suggested approval of the U.S. Court of Appeals for Armed Forces (CAAF) as the place that the accused here can appeal from a judgment of the military commission—and the CAAF is not a standard Article III Federal court, as you well know. Why is the administration seeking a right of appeal from the military commissions to Article III Federal courts? Mr. Kris or Mr. Johnson?

Mr. JOHNSON. Senator, let me take a stab at that initially at least. First, we agree and endorse the position expressed in the bill that it should be an expanded scope of review, review of the facts as well as the law. Our view is that we should retain the Court of Military Commission's review and then have appeal directly to the DC Circuit. That would be in effect a four-tiered level of review, beginning with the trial court, and in our view would resemble in many respects UCMJ justice because you have that intermediate level of appellate court, rather than an appeal directly from the military commission's trial level court to the CAAF. It would be our preference to have an appeal directly to the DC Circuit.

But we agree with the concept of the expanded scope of review.

Senator LIEBERMAN. Is it fair to say, then, that the administration's suggested changes in this regard are not rooted in the Supreme Court's uniformity principles as stated in Hamdan, but they're rooted in some other requirement or some sense of the administration about what's fair and just here?

Mr. JOHNSON. I think that's a fair statement, Senator.

Senator LIEBERMAN. Let me ask you just to comment, to go back to what I said at the beginning and just describe in the time that's left in my questioning period, why you reached the judgment on behalf of the administration or why the President ultimately reached the judgment that these cases that we're talking about should not primarily go to our Federal courts?

Mr. JOHNSON. As you probably know, the President signed an Executive order mandating a review of each detainee's situation. That review is ongoing and, as you've seen in at least one instance, a detainee who had a pending military commissions case against him was transferred for prosecution in the Southern District of New York.

I think it is fair to say that what the President and the administration have concluded is at least some of these detainees should be prosecuted for violations of the laws of war, that military commissions justice is the more appropriate forum, dependent upon a

variety of factors. In some situations, you have a situation where a detainee has violated both Title 18 and the laws of war, and we want to retain military commissions as a viable and realistic option. Whether almost everyone or everyone who is now a pending military commissions defendant will stay that way, I couldn't say. The review is ongoing.

Senator LIEBERMAN. Thanks.

I want to just close the loop on the previous question, because my time is up, which is that I think the committee has made the right judgment in saying that the right of appeal from the military commissions should be to the CAAF and that there shouldn't be an appeal to the Circuit Court for the District.

Thank you.

Chairman LEVIN. Thank you, Senator Lieberman.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. I'd like to, one, compliment you and Senator McCain for trying to come up with a new bill. I think it would help the country if we could reform the process and I think we're very close to a bill that we all can be proud of.

About the appeals, the main thing for the public to understand is that any verdict rendered in a military commission trial will work its way into the civilian courts. Is that correct?

Mr. JOHNSON. Yes, sir.

Senator GRAHAM. No one will be imprisoned in this country based on a military commission verdict that does not have a chance to have their day in Federal court, civilian court?

Mr. JOHNSON. Assuming they appeal, that's correct, yes, sir.

Senator GRAHAM. Okay. Now, when it comes to the idea of location, the courtroom at Guantanamo Bay is uniquely set up, I think, to do these trials. I would be interested to get your thoughts about how the location would matter. I'm not so sure, after the Supreme Court decisions treating Guantanamo Bay as an extension of the United States, that it would matter greatly. Like Senator McCain, I'd like to know how location would matter.

Admiral MacDonald, one of the issues that we're grappling with is the "material support for terrorism." I think I understand the administration's view that that is not a traditional charge under the law of armed conflict. But under the UCMJ, we incorporate the Assimilated Crimes Act (ACA). Could that doctrine be used here?

Admiral MACDONALD. Yes, sir. You could incorporate it in under Title 18 through the ACA into the UCMJ and it could be charged.

Senator GRAHAM. I think, Mr. Johnson, that gets back to your point. Some of these people can be charged under both sets of laws. Is that what you were trying to tell us?

Mr. JOHNSON. Yes, sir.

Senator GRAHAM. Now, Mr. Kris, do you agree with that theory, that we could use the ACA to incorporate material support using a Title 18 offense?

Mr. KRIS. I think you could do that as a formal matter. There still remains the question whether material support historically was a law of war offense, under that label or a different label.

Senator GRAHAM. I totally agree with that debate. But if you were able to incorporate Title 18 offenses, that would resolve that issue, isn't that correct?

Mr. KRIS. It would, again to the extent that it's a viable law of war offense.

Senator GRAHAM. All right, thank you.

Now, when it comes to evidentiary standards, are you familiar with The Hague procedures when they try international war criminals?

Mr. KRIS. I am not.

Senator GRAHAM. One thing I would suggest that you look at, I think our hearsay rules are much more restrictive, quite frankly. Do you agree with that, Admiral MacDonald?

Admiral MACDONALD. Yes, sir, I do. We talked about this in 2006. We looked at the International Criminal Tribunal for Rwanda and for Yugoslavia, and both of those tribunals have very liberal hearsay rules.

Senator GRAHAM. When it comes to involuntariness, what kind of standard do they use in terms of admitting statements from the accused?

Admiral MACDONALD. It's the reliability of the statement.

Senator GRAHAM. The point I'm making to the committee is that if you compare our military commissions system, particularly the reformed version, to an international court trial at The Hague, we're much more, for lack of a better word, liberal in terms of providing due process and protections to the accused than you would get if you were going to The Hague. I have no problem with that, quite frankly. I think that's a good thing.

Let's get back to what the courts are likely to look at in a military commission trial, Mr. Kris. I think the debate is a bit confusing. It's not so much whether the individual accused has a constitutional status as an American citizen, but the courts will look at these trials in terms of due process and they will make a judgment as to whether or not it meets some minimum standard expected of an American court; is that correct?

Mr. KRIS. That is essentially exactly what I was saying to the Senator.

Senator GRAHAM. I think that is correct. When you look at the history of military commissions, the World War II German saboteurs trials is not exactly the showcase you would want to use. Those trials were conducted in a matter of days from the time the evidence was received to the time judgment was rendered, and they passed scrutiny, but I think when we look back in time it's not something we would want to repeat. Is that your opinion?

Mr. KRIS. I think I essentially agree with what you just said, and I think Justice Scalia has referred to the Quirin case as not the court's finest hour. I think there is some question about whether you could apply those precedents straight on, given recent developments in the law.

Senator GRAHAM. Do you have a problem with the totality of the circumstances test if we fill in the blanks in terms of admission of statements?

Mr. KRIS. No, on the contrary, I think the totality of the circumstances test is the right test. Of course, the administration's

position is that it should be used to determine voluntariness, albeit voluntariness that reflects the realities of a wartime situation. But I do think totality of the circumstances is what the judge would look at.

Senator GRAHAM. The final thought here is about the difference between an Article III trial and a military commission trial. One of the big concerns that we have as a Nation, Mr. Johnson, is what percentage of the Guantanamo Bay detainees do you believe will be held off the battlefield but never go to an Article III court or a military commission trial?

Mr. JOHNSON. A percentage or a number is tough to say at this point, Senator. As I mentioned a moment ago, our review of these detainees is ongoing. I do think that we should all assume that for purposes of national security and the protection of the American people there will be at the end of this review a category of people that we in the administration believe must be retained for reasons of public safety and national security. They're not necessarily people that we'll prosecute.

Senator GRAHAM. Either the evidence is not the type you would take to a beyond a reasonable doubt trial or it has some national security implications.

I'd just like to finish on this note. Admiral MacDonald, under domestic criminal law is there any theory that would justify an indefinite detention of a criminal suspect without a trial?

Admiral MACDONALD. In our own domestic law?

Senator GRAHAM. Right.

Admiral MACDONALD. Not that I know of, Senator.

Senator GRAHAM. In the military setting, is it a permissible behavior of a country to hold someone under the theory that they're a belligerent enemy combatant indefinitely if the evidence justifies that finding?

Admiral MACDONALD. Yes, sir, it is. That's a recognized principle of the law of war.

Senator GRAHAM. Do you agree with that, Mr. Johnson?

Mr. JOHNSON. Yes. The Supreme Court held that in Hamdi in 2004.

Senator GRAHAM. Do you agree with that, Mr. Kris?

Mr. KRIS. Yes, I agree with Mr. Johnson, yes.

Senator GRAHAM. To conclude, the only theory that would allow this country to indefinitely detain someone without a criminal trial would be the fact that we find them to be part of the enemy force, they're still dangerous, and they're not subject to being released; is that correct? The process that would render that decision?

Mr. KRIS. I'm not sure that dangerousness is actually even part of the initial judgment under the——

Senator GRAHAM. That's true, it's not required.

Mr. KRIS. I think their status—and that's obviously being litigated now in the habeas cases. I do think under Hamdi the court said that at some point that authority to detain could run out. But essentially I agree, I think, with what you're saying, yes.

Senator GRAHAM. Thank you.

Chairman LEVIN. Thank you, Senator Graham.

Senator Ben Nelson.

Senator BEN NELSON. Thank you, Mr. Chairman.

I think what you said in terms of geography is that "geography matters" in terms of Article 22 court-martial or commissions, or geography may matter? In other words, where these military commission hearings are held, if outside the continental United States then perhaps a U.S. court would not or, could I say, could not intervene to provide extra protections under the Constitution? Mr. Kris?

Mr. KRIS. The analysis really depends on a variety of factors and it may be—I think it is the case that geography would have some impact on it. But it is very difficult to be precise and predict exactly what would happen.

Senator BEN NELSON. Would there be a difference between Guantanamo and, let's say, Bagram Air Base, in terms of geography and what the courts may do with an Article 2 hearing?

Mr. KRIS. I want to be very careful. That is a matter that is currently in litigation, so I think I want to just be very careful to say that I think there could be some differences, but probably not go much further than that.

Senator BEN NELSON. Mr. Johnson, what are your thoughts about geography?

Mr. JOHNSON. Senator, much of this is unchartered territory in the courts in terms of what rights, if any, would apply to these detainees. I would say that it's our view that the detainees—whether in the United States or anyplace else, do not enjoy the full panoply of constitutional rights that an American citizen in this country would enjoy.

Senator BEN NELSON. On a continuum, what I hear you saying at the present time under the current law, their rights are at this level, but it's not clear whether or not the courts could rule that the rights increase in numbers or in depth?

Mr. JOHNSON. Let me try it this way. I think it is fair to say that it is our view that some level of a voluntariness requirement would be applied to statements that we would seek to offer in a military commissions case, a military commissions prosecution and that the ex post facto clause in the Constitution would apply if, hypothetically, these cases were prosecuted in the United States.

I would note, however, that in practice our military commissions judges have engaged in an ex post facto analysis anyway in assessing the prosecutability of certain of these detainees at Guantanamo. Judge Allred specifically went through an ex post facto analysis at Guantanamo. I'm advised that in practice many of our military commissions judges have gone through a voluntariness analysis in assessing the admissibility of statements.

Senator BEN NELSON. Mr. Johnson, can you speak to the progress of the Guantanamo review task force? I think there were 779 people who were detained at Guantanamo. As I understand it, 544 have been transferred, with 229 remaining. Is that a fairly accurate number as far as you know?

Mr. JOHNSON. Those numbers sound accurate to me, Senator.

Senator BEN NELSON. Do we know the status of the remaining detainees? I understand that there are those that could be tried under either Article 2 or Article III courts, but do we know how many have already been determined to be, let's say, under Article III? Because as I understand it Article III means that they would be coming to Federal courts for prosecution.

Mr. JOHNSON. At this point we have not completed our review, so I don't have precise numbers for you. But I think it is fair to assume that at the end of the review we will have detainees in the five categories that the President outlined in his May 21st speech. There will be some prosecuted in Article III or we would seek to prosecute in Article III, some in military commissions, and some in that fifth category, some that are not prosecuted for various reasons, but for reasons of the safety of the American people and national security we want to continue to detain pursuant to the authority granted by this Congress with the Authorization for Use of Military Force (AUMF) and the Supreme Court holding.

Senator BEN NELSON. Do you have any idea when that review may be completed?

Mr. JOHNSON. Before the end of the year.

Senator BEN NELSON. This year?

Mr. JOHNSON. Yes, sir.

Senator BEN NELSON. Okay.

Admiral MacDonald, in your written testimony you addressed the proffered amendment to the MCA reported out by your committee and indicated that for the most part it addressed all of the matters that are and were of concern with regard to the MCA. Beyond the two issues that you highlight in your testimony, are there any other matters that ought to be addressed?

Admiral MACDONALD. No, sir. Those are the two that I was referring to that we were unable to get back in 2006.

Senator BEN NELSON. I suppose in asking where the administration proposes to hold the military tribunals, Article 2 cases—is it fair for me to ask what the administration's view is of where to hold these, based on the fact that geography may matter?

Mr. JOHNSON. We've certainly made no decisions about that. Congress in the supplemental that was recently passed asserted its rights and prerogatives to know what we have in mind in this regard.

Senator BEN NELSON. I suppose that's why I'm asking.

Mr. JOHNSON. No decisions have been made and we continue to consider various options.

Senator BEN NELSON. I assume there might be some advise and consent in conjunction with that?

Mr. JOHNSON. I think in the supplemental language you've pretty much mandated that.

Senator BEN NELSON. Thank you.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Nelson.

Senator Martinez.

Senator MARTINEZ. Mr. Chairman, thank you very much.

Mr. Johnson, I'd like to ask, how will the Executive Branch make a determination of who gets tried under Article III and who may get tried in the MCA?

Mr. JOHNSON. Senator, that is something that Mr. Kris and I have actually been working on as the representative of DOJ and I as the representative of DOD. As Mr. Kris stated, the President stated that where feasible we would seek to prosecute detainees in Article III courts. We are working through an expression of factors.

Senator MARTINEZ. Do you have a preference for an Article III court proceeding as opposed to a military commission proceeding? Is that by your preference or is that by rights that may be imbued upon the detainee?

Mr. JOHNSON. I would state it in terms of, where feasible, we would prosecute people in Article III courts, but then you have to go through a variety of factors. For example: the identity of the victims; is there a law of war offense that could be more effectively prosecuted versus a Title 18 offense; identity of the place of capture, for example.

We're working through now a variety of factors for our prosecution teams to consider in terms of what direction to go. But I think the intent is to have a flexible set of factors, because it is the case that many of these detainees, those that are prosecutable, viewed to have violated both the laws of war in Title 18.

Senator MARTINEZ. Admiral MacDonald, I wanted to ask you about the appeal process as envisioned, with the four-tiered process. It seems to me that if a defendant were charged with a Federal crime, a U.S. citizen was charged with a Federal crime somewhere in Florida, that defendant essentially has a one-tier appellate system, from a Federal district court to a circuit court of appeal, with a very unlikely appeal to the Supreme Court.

A defendant in an American court, a citizen of this country, would not have as many appellate tiers as would one of the detainees in this instance, is that correct?

Admiral MACDONALD. Yes, sir. But remember, Senator, we're talking about conforming the commissions to the UCMJ and to our courts-martial process, and our court-martial process has—all of the services have a court of criminal appeals as a first tier of appellate rights. After that they appeal to the CAAF, which is the first civilian court within our military justice system to which they can appeal, and after that they have the right of appeal to the Supreme Court.

I think what we're saying is that if you want to, to the extent that you can, stay faithful to the UCMJ, that one way to approach it on appeal would be to allow the Court of Military Commission's review, either military judges that currently sit on that court now or a combination of military and civilian judges, that they would have factual and legal sufficiency review powers, and then after that you could either go into the Federal system, to the DC Circuit as it's constituted today, or you could go to CAAF and mirror the UCMJ system. Either of those paths would lead you ultimately to the Supreme Court.

Now, can CAAF do legal or factual sufficiency? Yes, Senator, they can. They're very skilled jurists. If the bill contains and continues to contain an appeal to the CAAF and that body is given both factual and legal sufficiency review, CAAF can do that. I think I would prefer the current system because our military judges are used to doing factual and legal sufficiency. But if you choose to go the CAAF route, the CAAF judges are capable of doing it.

Senator MARTINEZ. You made recommendations with regards to how to handle classified evidence and also the standard for the admission of coerced statements. Do you have any other recommendations that you would make?

Admiral MACDONALD. No, sir, those are the two. Senator McCain mentioned that we have to get these commissions moving and the practical aspects. That's really what my two recommendations go to. We are finding—and this is through discussions with the chief prosecutor—that they are having a lot of difficulty in using Military Rule of Evidence (MRE)–505 to govern classified evidence.

The recommendation to you is a CIPA-like process, a CIPA type of process. I would call it CIPA-plus, where we import the good parts of MRE–505, which is to close a proceeding, a military commission when classified, close it to the public when classified evidence is being introduced; that we would take that in, add it to the CIPA rules, where we have 20 years of Federal practice that our judges can rely upon. My personal opinion is that's probably a better approach to get these commissions moving.

One of the complaints from the prosecutors is that the judges are demanding that they do everything with written submission, instead of what CIPA allows, which is an ex parte hearing where you can go in before the judge, you can get the issues resolved, and we can move on. That's why I recommended that the committee take a look at CIPA-plus as a substitute perhaps for the provision that talks about MRE–505.

On the voluntariness piece, I do disagree with the administration on this. I think the committee has it right on the reliability standard that exists in the bill. I think fundamentally there is a difference between a voluntariness standard that grew up in a law enforcement environment, that that's different than the law of war context we find ourselves in.

I am worried that a military judge that has a voluntariness standard imposed upon them is going to look at a statement taken at the point of a rifle when a soldier goes in, breaks down the door, and takes a statement from a detainee—I'm worried that they're going to apply a voluntariness standard to that. I would argue that's an inherently coercive environment, when you have a rifle pointed at you. I'm concerned a judge is going to look at that under a strict voluntariness standard and say that statement doesn't come in.

I would rather see this as part of a totality of the circumstances leading to is the statement inherently reliable. What I proposed is a series of factors that would give the judge more guidance perhaps on how to do that analysis.

Senator MARTINEZ. Thank you very much.

Chairman LEVIN. If you have actual language on your factors, you might want to share it with us, not now but for the record.

Admiral MACDONALD. Yes, sir. Yes, Senator, I will.

[The information referred to follows:]

I propose the following language:

§948r. Treatment of statements obtained by torture or cruel, inhuman, or degrading treatment; self-incrimination; other statements by the accused

(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT —No Statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(c) OTHER STATEMENTS OF THE ACCUSED.-A statement of the accused may be admitted in evidence in a military commission under this chapter only if one of the following conditions is met:

(1) the statement was made during a force-protection, tactical, or intelligence interrogation in reasonable proximity in time and location to the point of capture; the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and the interests of justice would best be served by admission of the statement into evidence. In determining the issue of reliability, the military judge shall take into consideration all of the circumstances surrounding the taking of the statement, including but not limited to the degree to which the statement is corroborated and the indicia of reliability within the statement itself.

(2) the statement was voluntary. In determining whether a statement was 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 in identify of the questioners between the statement sought to be admitted and any prior questioning of the accused.

(d) OTHER USES PERMITTED.-Notwithstanding the above, where the statement was not obtained by use of torture or by cruel, inhuman, or degrading treatment, this

section does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

I also support the following language, which has the support of the Administration, and the Army and Air Force 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:

"§948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

"(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) at least one of the following:

"(A) That the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.

"(B) That the statement was voluntarily given.

"(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

"(2) The characteristics of the accused, such as military training, age, and education level.

"(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Senator MCCAIN. But you're basically in agreement with the legislation passed through the committee?

Admiral MACDONALD. Yes, Senator, I am.

Senator MCCAIN. Thank you.

Chairman LEVIN. Senator Udall.

Senator UDALL. Good morning, gentlemen. Thank you, Mr. Chairman. Senator McCain, Senator Graham, and I know Senator Reed, have all worked very, very diligently on this important set of questions.

I have to note, can you imagine a lot of other countries in the world having this kind of discussion? It's a tough discussion. It's been contentious. But here we sit, in the best American tradition, deciding something as important as this.

I was a member of the Armed Services Committee in the House for 4 years and I voted for legislation identical to the bill being pro-

posed by this committee in 2006 that I thought struck a balance between military necessity and basic due process. That bill didn't pass and I voted against the MCA that we're discussing today. At the time, I thought that it risked tieing up—that is, the bill we passed—the prosecution of terrorists with new, untested legal norms that didn't meet the requirements of the Hamdan decision. I thought it might endanger our servicemembers by attempting to rewrite and limit our compliance with Common Article III of the Geneva Conventions. I thought it might undermine the basic standards of U.S. law and it departed from a body of law well understood by our troops.

Given that, I'm really glad we're here today looking at this opportunity to revisit this important legislation.

Admiral MacDonald, if I might turn to you, I was a member of the HASC almost 3 years ago when you testified about the importance of reciprocity. I want to quote you. You said that you would be concerned about other nations looking in on the United States and making a determination that if it's good enough for the United States it's good enough for us, and perhaps doing a lot of damage and harm internationally if one of our service women or service men were taken and held as a detainee.

How do you think the military commission provisions in Senate bill 1390 measure up in terms of reciprocity? Are these provisions good enough for the United States in your view?

Admiral MACDONALD. Yes, Senator, they are, and I would get back to what Senator Levin said. The two major points here that we have to be concerned about are the reciprocity issue and creating a just and fair system. I think we need to be prepared to take any unlawful or unprivileged enemy combatant to one of these commissions.

If we believe that we have created a fair and just process with this bill, we should not be shy about taking anyone before these commissions for, I think, Senator, just that reason. I would be very comfortable having a U.S. servicemember subjected to these rules.

Senator UDALL. Thank you for that answer.

Mr. Kris and Mr. Johnson, if I might turn to you on the question of sunset provisions. Mr. Kris, you state that the DOJ supports such a sunset provision. Could you talk a little bit more along those lines? Then Mr. Johnson, I'd like to hear the DOD's views on a sunset provision, if you would.

Mr. KRIS. Yes, thank you, Senator. With respect to the sunset, of course, I'm not representing DOJ alone, but all of my testimony is representing the administration as a whole. Our basic idea that underlies the sunset—and we haven't specified any specific number of years—is as long as there's a continuity provision to allow pending cases to continue past the sunset, that it's a good idea for Congress to come back and take another look at this after the passage of some time and see whether there have been any developments that counsel some changes or a fresh look. That's really I think what it boils down to.

Senator UDALL. Mr. Johnson?

Mr. JOHNSON. Senator, I would agree with what Mr. Kris said, provided that it doesn't jeopardize ongoing prosecutions. We think, in the administration, a sunset provision is a good idea. We don't

have a magic period of years. But given the reality of changing circumstances on an international level and lessons that could be learned from military commissions prosecutions in the immediate years forward, we think a sunset provision is a good idea.

Senator UDALL. Thank you for those insights.

If I might, let me turn to a follow-up question on comments that the chairman made in his opening statement on providing the resources for the defense side of the efforts that we're discussing today. The chief defense counsel issued a memo that I thought raised some troubling issues and I'd be interested in the views of each of the panelists on the current military commissions system and whether the committee bill addresses the needs of the defense efforts appropriately.

Maybe we can start with Admiral MacDonald and move back across.

Admiral MACDONALD. Sir, actually I agree with the concerns expressed in the senior defense counsel's memorandum. These have been longstanding concerns about resources, about access to experts. I think it's something that needs to be addressed.

I don't see anything, to your point about is it in the current bill, I don't see anything in terms of resourcing that would get at that, that particular issue. But I do think that the defense counsel needs more resources.

Senator UDALL. Mr. Johnson?

Mr. JOHNSON. Senator, the legislation itself codifies a rule change we made in May to permit the detainee more latitude in selecting his defense counsel. But in terms of resources, at present Colonel Maciola, who I consult with often, who is the chief defense counsel, has 43 military lawyers assigned to him, 5 civilian, and I'm told he's authorized to go up to 52.

In response to your question about can we do better, one of the things that I'm focused on, that I'm concerned about, whether or not it's in this legislation is something that I intend to push on, is making sure that our defense counsel are adequately trained in capital cases. In the civilian world you have the concept of "learned counsel." There are American Bar Association standards for what are learned counsel for capital cases. I think we owe it to the system to make sure that our defense counsel are adequately trained to handle capital cases.

Senator UDALL. Mr. Kris, my time's expired, so if you could be succinct, I'd like to hear your answer.

Mr. KRIS. Fortunately, I can be. This is primarily a DOD issue and so I'd just like to associate myself with the remarks of my colleagues. One thing to point out is that the committee's bill does follow our rule change in allowing a choice of counsel. I think it doesn't define the pool from which that choice would be made, and that would be something I think we'd like to work with you on.

Senator UDALL. Thanks again, gentlemen, for your enlightening testimony. It will help us answer some important questions. Thank you.

Chairman LEVIN. Thank you, Senator Udall.

Senator Reed.

Senator REED. Thank you, Mr. Chairman. Thank you, gentlemen.

I just want to clarify some issues that have been previously touched upon. It's my understanding that in the Boumediene case in 2008 that the Supreme Court recognized the right of habeas corpus, that it's a constitutional right. Is that correct, Mr. Kris?

Mr. KRIS. Yes.

Senator REED. So there is at least one constitutional right that's been recognized in terms of enemy aliens and that is habeas corpus; is that correct?

Mr. KRIS. Yes.

Senator REED. That's the only one?

Mr. KRIS. So far, I believe that's the only right the Supreme Court has said applies there.

Senator REED. The issue that we've talked about with respect to sort of the geography of these trials is that—and it's just at this point to get your opinion—moving some of this military commission to the United States might engender other appeals that could trigger requests for additional constitutional rights?

Mr. KRIS. I think, regardless of where these cases are held, there will be appeals, depending on which appellate process is adopted, and there are a number of them under consideration, including in the bill. What results from those appeals I think, as Mr. Johnson and I have both said, is very difficult to predict because there's been quite a lot of development in the law over the last 50 years since commissions were last used.

Obviously, there is some standard of due process that applies to a military commission. Exactly what that standard is, as I say, is sometimes difficult to discern. In light of developments like the Boumediene decision, it can be I think also increasingly difficult to be sure. I do think geography may play a role in the rights or the procedures that are required. But again, it's hard to know for sure.

Senator REED. Let me also raise another issue. That is, Admiral MacDonald pointed out that the law of war recognizes the indefinite detention of combatants until the end of hostilities. My impression is that Hamdan reserved that issue and did not decide it. Is that accurate, Mr. Kris?

Mr. KRIS. I think you may be referring to Hamdi.

Senator REED. Hamdi?

Mr. KRIS. Which is the decision in which the court recognized the authority to detain under the law of war, and the court left open, I think, the question whether that authority would at some point run out. I think that's an accurate statement.

Senator REED. I would presume that the category of individuals, that fifth category, those that have to be held because of their potential, will have the right to habeas to, periodically at least, raise the issue of whether they still should be detained? Mr. Johnson?

Mr. JOHNSON. In fact almost all, if not all, of the Guantanamo detainees are suing the government in habeas. The President in his May 21 remarks stated with respect to that fifth category that there would be some form of periodic review, even subsequent to habeas proceeding, and that is something that we're working on now.

Senator REED. Thank you.

One of the other reasons to move quickly but thoughtfully in this process of military commissions is that this is a way in which to

ensure due process prior to a court deciding one of the habeas cases; is that accurate?

Mr. JOHNSON. That's a fair statement.

Senator REED. That's a fair statement. I think it would serve us well to move with dispatch, but thoughtfully, on this legislation.

Mr. JOHNSON. Yes, sir.

Senator REED. Admiral MacDonald, you commented about the voluntariness standard and your concerns, legitimate concerns, it might tend to, I won't say confuse, but it might tend to complicate the decisionmaking of military judges. Ultimately aren't we in a practical position trying to speculate about what the Supreme Court will hold, because that's one reason why we're here today doing this again?

Admiral MACDONALD. Yes, sir. I would agree with everything that's been stated this morning about how unsettled the law is in this particular area. What I would propose is using voluntariness, not as the only standard, but subsuming that as one of a number of factors, others being the extent to which a statement is corroborated, looking at the reliability of the statement within the four corners of the document itself.

My opinion is that the Supreme Court or a Federal court would recognize that there are fundamental differences between a standard that grew up in a law enforcement paradigm versus one that we're trying to understand in a law of war paradigm. The reason I talk about this balancing test, this totality of the circumstances and the number of factors, is I think that will provide the judge with a kind of a guidepost. For example, if you're evaluating a statement that was taken at the point of capture, you might weigh voluntariness less, because it's a more coercive environment, than you would corroboration and the four corners of the document.

As you become more attenuated from the battlefield, for example 6 months to a year after the detainee is removed from the battlefield and is in a facility like Guantanamo, then perhaps voluntariness in the judge's mind would be more important. But we would leave that to the military judge to determine on a case-by-case basis as he or she sees it.

Senator REED. Thank you very much, Admiral.

If I may have one final question, please, of Mr. Johnson. Is it your intention or have you decided to either try, give everyone who's in Guantanamo some type of due process, either military commission or a trial in Article III courts, or are there some people that simply will not get any procedure at all, that will be deemed to be an enemy combatant who will be detained?

Mr. JOHNSON. Putting aside anyone who has been released or may be transferred to a third country in the future, I think it's accurate to say that the remaining population will either be detained because we've been upheld in the habeas litigation and they're subject to that periodic review I referred to a moment ago, or those that violate the laws of war, that we feel we can and should prosecute, we prosecute in a military commission, and those that can be prosecuted for violations of Title 18 will be referred to DOJ and Article III courts.

Senator REED. Thank you, Mr. Johnson.

Chairman LEVIN. Thank you, Senator Reed.

Senator Hagan.

Senator HAGAN. Thank you, Mr. Chairman, and thank you, gentlemen.

Over the course of many years the former administration has released a number of detainees from Guantanamo. Obviously, we are hoping that many of the other countries will take some of these detainees that are remaining. We need to be mindful of the fact that the countries in the region, such as Yemen, are currently incapable of mitigating the threat posed by the returned Guantanamo Bay detainees. Whether the country lacks the appropriate institutions or mechanisms of enforcement, such as a counterterrorism law, or just the ability to prosecute these detainees. Additionally, many countries in the region may not be willing to accept them.

I think we need to work with the countries in the region that have a proven track record in rehabilitating the terrorists to accept detainees transferred from Guantanamo Bay. According to the Office of the Secretary of Defense (OSD), Saudi Arabia remains one of the most reliable counterterrorism partners in accepting detainees that have transferred from Guantanamo Bay. The Saudis have actually institutionalized a rehabilitation program that was developed by the ministry of interior to de-radicalize and rehabilitate the former detainees for reintegration into the society in Saudi Arabia.

According to OSD, efforts are under way to convince Saudi Arabia to accept some of the Yemeni detainees that have Saudi tribal affiliations into the Kingdom's rehabilitation program.

My question for all of you is, how is DOD addressing the problem that many countries in the region are just simply not capable of mitigating the threat posed by the Guantanamo Bay detainees and they lack the appropriate institutions and mechanisms to prosecute them? Also, can you provide your opinion on working with the countries in the region, such as Saudi Arabia, to accept these Yemeni detainees that are transferred from Guantanamo Bay that share the same tribal affiliations?

Mr. JOHNSON. Senator, I agree with just about everything you said. Many people do not understand that it's not as simple as, oh, XYZ country is willing to take the detainee back, so we can send them back. There needs to be in place an adequate rehabilitation program where the circumstances warrant or the ability to monitor in that accepting nation so that the detainee doesn't simply return to the fight and that we minimize to the fullest extent possible any acts of recidivism for those who are transferred or released.

The safety of the American people is the utmost concern. We believe strongly that rehabilitation programs like the one you referred to are something that we should encourage, promote, and it's something we're very, very focused on.

Senator HAGAN. Mr. Kris?

Mr. KRIS. I agree with everything that Mr. Johnson said. It is absolutely essential that when we transfer these people to foreign countries that we do so under conditions that ensure safety. The rehabilitation program that the Saudis have is an excellent program from what I understand.

Admiral MACDONALD. Senator, I would agree with Mr. Johnson on this. Particularly with our military members, we're concerned

about returning fighters to the battlefield. This is a big issue for us. I think the way Mr. Johnson characterized it is exactly right.

Senator HAGAN. Thank you.

Also, I think that we need to be mindful that, although the interrogation of detainees produces obviously valuable information and sources of intelligence, we also know that they can compromise the ability to prosecute detainees, obviously, if the evidence obtained is through an interrogation method that would involve torture.

Mr. Kris, can you just describe the process in which DOJ is reviewing the evidence associated with each of the Guantanamo Bay detainees to determine if they can in fact be prosecuted and how DOJ is working with DOD in this regard?

Mr. KRIS. Yes, I'd be happy to do that, Senator. Mr. Johnson and I are working closely together on this. There is obviously the review by the task force that was set up by the Executive order, that makes judgments about whether cases are potentially prosecutable. At that point they need to be reviewed both by DOJ and DOD, working together to try to figure out, are these cases really appropriate to indict either in an Article III court or to bring before a military commission.

As Mr. Johnson and I have talked about, this is a fact-intensive judgment. It requires a careful assessment of all of the evidence, identity of the victims, location of the offense, and a variety of other factors.

I would point out that these kinds of forum selection choices are not unfamiliar to Federal prosecutors. They have to make these kinds of choices in other cases as well, whether it's between Federal and State or United States and foreign or even UCMJ and Article III courts. So there has to be a process by within the case is really carefully reviewed and worked up by a joint team and then a judgment made about whether and where it ought be prosecuted.

Senator HAGAN. Thank you.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Hagan.

We're going to have a 2-minute second round with this panel. I wish it could be a lot longer.

First to Admiral MacDonald. I didn't ask you this question the first round, so let me ask you now. Do you believe that our language conforms to the Hamdan standards?

Admiral MACDONALD. Yes, sir, I do.

Chairman LEVIN. Second, Admiral, I think Mr. Johnson said that the preference here would be to have more Article III trials. We will I think hear some testimony that all the trials should be Article III, that there shouldn't be any military commissions. I'm wondering if you could tell us as kind of a military man, but a JAG officer in the Navy, why military commissions at all? What are those circumstances which make it difficult, that I think Mr. Kris and Mr. Johnson are working through, as to why would you want to try anyone under military commissions or need to try anybody with military commissions?

Admiral MACDONALD. Well, Senator, I think again it goes back to the UCMJ and Federal law is designed for a different model. It's designed for law enforcement. We're in a wartime environment.

Chairman LEVIN. Give us some practical parts of that environment which would lead you to conclude we ought to have military commissions try people or that we need to have the military commissions?

Admiral MACDONALD. Again, Senator, it would go to that very coercive environment. We're relying upon our soldiers to go into a dangerous environment, where in many instances they have to break down doors, and we're worried about their safety. They're worried about it. We don't want them to have to stop and think about giving Miranda rights or giving Article III1B rights under the UCMJ. We don't want them thinking, in my personal opinion, about whether or not the statements that they are getting from someone in a house that they've just broken into, whether that statement is purely voluntary or not.

I think that's recognized and the Supreme Court recognized that in the Hamdan case, that there are these unique circumstances that come up in a law of war environment that just cannot be handled under two different systems that were created for a completely different reason.

The other thing that I would say, sir—and this is to your point in your opening about a fair and just process. I think we need to be clear. As we go forward with these commissions, we need to feel that these commissions can try anyone, anyone that fits within the jurisdictional definition that you've put in the bill, the personal jurisdiction section. We ought to feel very comfortable taking anyone.

Now, I understand that the President prefers Article III courts. But in my opinion, when we leave here today we ought to be looking at this bill and saying to ourselves, it is fair and just. To Senator Udall's question, we would feel very comfortable having our own servicemembers tried under this kind of a process.

I don't think we should kid ourselves. Any enemy combatant should be able to be tried under this process.

Chairman LEVIN. Admiral, just quickly, relative to your totality of the circumstances point as to whether or not a statement obtained is coercive; in our bill, a statement that is obtained through cruel, inhuman, and degrading treatment is not admissible, period. What you are suggesting is that, instead of adding a "voluntary standard" to that, that there be something much more carefully defined so a judge can look at the totality of the circumstances to take into account these factors involving warfare and the use of force. Is that accurate?

Admiral MACDONALD. Yes, Senator. We pushed in 2006 to eliminate the discrimination between statements taken before December 30, 2005, the date of the Detainee Treatment Act, and a standard imposed to statements after. Your bill eliminates that distinction and so statements taken under torture are eliminated. CID statements, they're eliminated. I'm talking about some level of coercion below those two standards.

Chairman LEVIN. Torture is defined by the Geneva Conventions.

Admiral MACDONALD. Yes, sir.

Chairman LEVIN. There's one more thing I have to clear up and it is this question of location. Our bill clearly is not going to distinguish what procedures are dependent on the location of the mili-

tary commission. I mean, there's no way that our statutory language can make that distinction.

I think that you were pressed, Mr. Johnson, and I think Mr. Kris to some extent, to describe where it might make a difference, I guess in terms of a judicial or court or a judge's opinion as to depending on where the location is. I don't see that at all. I must tell you, I don't see how the location of a military commissions hearing can have an effect at all. It won't have an effect nor can it in the way we write the procedures.

Finally, however, on the other side of the coin, if you're going to try people for Article III crimes, which is your preference, there's no way practically those folks can be tried in Guantanamo. You cannot have a jury empanelment that takes months, with hundreds of citizens dragged down to Guantanamo to live while a jury is being empaneled in an Article III criminal case.

There are many reasons why we need to bring people, if we're going to try them for crimes under Article III, which we want to, to the United States as a practical matter. As far as where a military commission is held, I don't see that there is a difference. You've been asked for the record to give us any thoughts on that, and of course that request I know you will honor and give some thought to.

But I just don't offhand see that it could make any difference as to the procedures as to where a military commission is held. That's a statement. It's not a question. I'm way over my time. If you want to react to that for the record—Mr. Kris?

Mr. KRIS. First, I agree with you that it's hard to imagine an Article III prosecution occurring at Guantanamo. Second, in talking about location, Jeh and I have been, I think, perhaps cautious just because these are difficult issues, and we will get you something for the record.

But third, I just want to make clear, despite the difficulties, our best prediction is that voluntariness will be required as a matter of due process here. It's a voluntariness standard that is based on totality of the circumstances and it's very similar, I think, to what Admiral MacDonald was talking about. That is, you have to take account of the realities of war. But I do want to make clear that we've come to that conclusion.

Chairman LEVIN. That is the position of the administration. We'll welcome language from both of you on that. But our bill as it stands does incorporate the Geneva Conventions.

[The information referred to follows:]

[See responses to questions number 28 and 29.]

Chairman LEVIN. Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I think we'll find some common ground here about the evidentiary standard as far as a statement goes. I think we both view it the same. Admiral MacDonald, you described the situation very well. When you're in detention outside the battlefield, the analysis will be different than if you're in the middle of a firefight. The judges should be able to accommodate those circumstances. I don't think there's really a whole lot of difference, Mr. Kris, between you and Admiral MacDonald when you get there.

This location issue is very important because of the politics of this, for lack of a better word. Mr. Johnson, is it your view that closing Guantanamo Bay would be an overall benefit to the war effort and starting over on detainee policy?

Mr. JOHNSON. It's my view, Senator, which is also the view of the administration, but it's my view that closing Guantanamo enhances national security.

Senator GRAHAM. Maybe being the odd guy out as a Republican, I believe that also, simply because Generals Petraeus, Odierno, and every other combat commander has said that being able to start over with detainee policy would take a tool off the table used by our enemies, because Guantanamo Bay, quite frankly, is the best-run military prison in history right now. Do we all agree with that, the current state, Admiral?

Admiral MACDONALD. Yes, sir, I do.

Senator GRAHAM. Mr. Johnson?

Mr. JOHNSON. I've been there. The professionalism of the Guards at Guantanamo is remarkable. I've visited civilian clients in a few Federal Bureau of Prisons places and I agree that the professionalism of our personnel there is really remarkable.

Mr. KRIS. I too have visited GTMO and I also was quite impressed.

Senator GRAHAM. To the Guard force families who may be listening, what your loved one goes through every day at Guantanamo Bay is a real sacrifice. That is a tough place to do duty. Having said that, it is what it is, and starting over with detainee policy I think could help the country.

Mr. Kris, you said one of the goals of a reformed commission is to let the international community know that there's a formal legitimacy to the commission that we haven't been able to have otherwise; is that correct?

Mr. KRIS. I do think it is important, and I take it to be one of the main reasons that we're doing this work, that the committee is doing this work, is to enhance the legitimacy.

Senator GRAHAM. I totally agree. But the last thought is, I just can't believe, quite frankly, given the Supreme Court cases, that if you close Guantanamo Bay, move the detainees within the United States and performed a military commission trial like we did in World War II, that there'd be a substantial difference. What I don't want to have taken away from this hearing is that if we close Guantanamo Bay and move the detainees within the United States that there will be conferred upon them a plethora of legal rights they wouldn't have otherwise.

Can you just address that?

Mr. KRIS. It may be helpful if we say this. There are a number of I think relatively modest differences between the committee's bill and the administration's proposal. As you've said, they're not vast and we do approve of and support the bill.

The changes that we're recommending we think would be ample to survive constitutional review even if the commissions were held in the United States.

Senator GRAHAM. Just the location alone is not going to change the dynamic the court would apply in a dramatic way?

Mr. KRIS. No. We think that what we're proposing will pass muster comfortably in the United States.

Mr. JOHNSON. Senator, we're not suggesting—and I want to emphasize that—that the full range of constitutional rights would apply depending upon location. We have referred in this hearing today to voluntariness. Mr. Kris is right, when you look at the suggestion from the administration on a totality of the circumstances voluntariness test it's really not that different from what Admiral MacDonald has described.

Admiral MACDONALD. Senator, I think as you have just pointed out, this is really coming down to that, that particular right, and the voluntariness test. I would align myself with Mr. Kris, that blaming the sites of the military commission in terms of additional constitutional rights should not matter in this. I think we probably can reach some common ground between what I would consider to be a balancing test using voluntariness and what the administration's position is right now.

Chairman LEVIN. Thank you, Senator Graham.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman.

Chairman Levin asked Admiral MacDonald a question, a rhetorical question of why would you try any of these people in a military commission setting, as our bill requires? I thought your answer, Admiral MacDonald, was compelling and very principled. To a certain extent, I suppose what I really want to do is ask the question from a different perspective of Mr. Johnson and Mr. Kris, which is: Why would anyone prefer to try people apprehended for violations of the law of war in an Article III Federal court? As you said, Mr. Johnson—I was disappointed with your answer and it kind of pulled me back a little bit from my feeling of appreciation toward the administration for accepting the role for the military commissions in handling these people.

I mean, the fact is that from the beginning of our country, from the Revolutionary War, we've used military tribunals to try war criminals or people we have apprehended, captured, for violations of the law of war. Again, I think the unique circumstances of this war on terrorism against the people who attacked us on September 11 may have led us down, including the Supreme Court, some roads that are not only to me ultimately unjust, but inconsistent with the long history that we've had here.

We talked before about how military commissions are not only within the Hamdan decision, but certainly within the Geneva Convention, which is the international standard for fairness and justice in handling people captured during a war.

Why would you, in light of all that, say that the administration prefers to bring these people before Article III Federal courts instead of military commissions, which are really today's version of the tribunals that we've used throughout our history to deal in a just way with prisoners of war?

Mr. JOHNSON. Senator, please don't misinterpret my remarks. I applaud this committee's effort and this committee's initiative to reform the MCA. I think that military commissions should be a viable, ready alternative for national security reasons for dealing with those who violate the laws of war, and I'm glad we're having

this discussion right now and I thank the committee for undertaking this.

As we said, by and large we definitely support what you're doing. The President has made that clear. I'm going to say this on behalf of the administration, when you're dealing with terrorists, who have a fundamental aim of killing innocent civilians, it is the administration's view that when you direct violence on innocent civilians, let's say in the continental United States, that it may be appropriate that that person be brought to justice in a civilian public forum in the continental United States because the act of violence that was committed against the civilians was a violation of Title 18 as well as the law of war.

We believe strongly that both alternatives should exist.

Senator LIEBERMAN. Well, I hear you. I respectfully disagree insofar as the administration has stated today a preference for trying these people in Article III courts. I think, based on what you've just said, essentially the effect of it is to give these war criminals, people we believe are war criminals—that's why we captured them—the greater legal protections of the Federal courts because they have chosen to do something that has pretty much not been done before in our history, which is to attack Americans, to kill people here in America, as they did on September 11, civilians, innocents, it doesn't matter, and to do it outside of uniform.

I think it puts us in a very odd position. We're giving these terrorists greater protections in our Federal courts than we've given war criminals at any other time throughout our history, even though in my opinion they are at least as brutal and inhumane, probably more brutal and inhumane, than any war criminals we've apprehended over the course of the many wars we've been involved in.

Yes, it may be also an act of murder to have killed people who were in the Twin Towers on September 11, but it was an act of war and the people who did that don't deserve the same constitutional protections in our Federal courts as people who may be accused of murder in New York City. I say New York City because the attack was there.

I'm over my time. This is a very important discussion which I look forward to continuing with respect, with you and others in the administration.

Thank you.

Chairman LEVIN. Thank you, Senator.

Senator Martinez.

Senator MARTINEZ. Thank you, sir.

To follow up on that, I think that it's fascinating for us to discuss a person like Khalid Sheikh Mohammed, who didn't wear a uniform and in fact inflicted great harm upon civilians, not only here but in other parts of the world. He considers himself to be a part of a movement, of a political movement, that we would then consider a person like that to have a preference for trying him as a criminal under Title 18 in an Article III court and according him an additional set of legal rights as opposed to in a military tribunal.

That begs another question. If we are doing Article III trials, as the chairman was suggesting, we then also are talking about clos-

ing Guantanamo by the end of the year. There's no way for 220-some odd people to be processed through some proceeding, whether Article III or military commissions, in that timeframe. Where will they then be? I guess they'll be here. What about those that are then acquitted? Where do they go? What happens to them?

Would you mind touching on those issues?

Mr. JOHNSON. You're correct, you can't prosecute some significant subset of 229 people before January. Those that we think are prosecutable and should be detained we will continue to detain, whether it's at Guantanamo or someplace else.

The question of what happens if there is an acquittal is an interesting question. We talk about that often within the administration. I think that as a matter of legal authority if you have the authority under the laws of war to detain someone—and the Hamdi decision said that in 2004—that is true irrespective of what happens on the prosecution side.

Senator MARTINEZ. Therefore the prosecution becomes a moot point?

Mr. JOHNSON. No, no, I'm not saying that at all. I'm saying you raised the issue of what happens if there is an acquittal.

Senator MARTINEZ. Right.

Mr. JOHNSON. In my judgment, as a matter of legal authority—you could get there—there might be policy judgments one would make, but as a matter of legal authority, if a review panel has determined this person is a security threat and they've lost in their habeas and we've gone through our periodic review and we've made the assessment the person is a security threat and should not be released, if for some reason he's not convicted for a lengthy prison sentence, then as a matter of legal authority I think it's our view that we would have the ability to detain that person.

Whether in fact that actually happens I think would depend upon the circumstances and the facts of the particular case. But as a matter of legal authority, I think we have law of war authority, pursuant to the authority Congress granted us with AUMF as the Supreme Court interpreted it, to hold that person, provided they continue to be a security threat and we have the authority in the first place.

Senator MARTINEZ. Thank you.

My time is up, but I will just conclude with a comment, that I truly believe that these are not criminals, that these are people engaged in a very profound battle against this country as part of a non-state actor for some of them, but they nonetheless do not really belong treated as criminals, but as people that are involved in something much deeper and greater than that.

Chairman LEVIN. Thank you, Senator Martinez.

Senator Udall.

Senator UDALL. Thank you, Mr. Chairman. I'll be brief.

I want to thank the three panelists for your excellent testimony. I want to also acknowledge the fact that the civilian judicial system is interfacing and working with the military judicial system. I speak as a non-lawyer, I'm already getting into deep water here. It seems to me that our judicial system is a living, evolving, growing thing, if you will, and we're working here to make sure that it's nurtured. Another way to look at this perhaps is that you have

two different kinds of software systems that we're trying to integrate and understand together. Again, I want to thank the civilian and the defense establishments for working together.

Any time I have remaining, Mr. Chairman, I pre-yield it to the great questions from the JAG officer who sits on this Senate committee, Senator Graham, who I thought has been very, very informative, very incisive with his questions and comments today.

Senator GRAHAM. Really, we do have two legal systems. Habeas rights have been granted to Guantanamo Bay detainees. While I don't agree with that, under the bill that Senator Levin and I wrote, every detainee would wind up in Federal court, the DC Circuit Court of Appeals. The Supreme Court ruled that habeas rights apply to the detainees.

We need to look as a Nation about creating uniformity to these habeas rights. Do we as a Nation want habeas petitions to allow for lawsuits against our own troops? A medical malpractice case was brought under the old habeas system. I think, Senator Udall, we can streamline the habeas process. There is a role for an independent judiciary.

I would just like to conclude with this. No one should be detained in America for an indefinite period of time that doesn't go to a civilian court or a military court without an independent judicial review. I don't want people to believe that folks are in jail because somebody like Dick Cheney or fill in the blank with a politician said so. It doesn't bother me at all that all of our cases will go to civilian judges and the military and the Central Intelligence Agency has to prove to a civilian court that these people are dangerous and they're part of the enemy. Once that's been done, then I think it's crazy just to arbitrarily say you have to let them go. If our intelligence community, upon a periodic annual review believes that they present a danger to this country, I think it would be crazy to say you have to let them go, because you don't under the law of armed conflict.

Just to end, Senator Udall, we need a hybrid system. We need civilian judges involved in this war because it's a war without end. As the President said last week, there will never be a definable end to this war. An enemy combatant determination can be a de facto life sentence. I don't want to put people in a dark hole forever. I want them to have a way forward based on their own conduct. Some of them will be able to get out of jail because they've rehabilitated themselves and some of them may in fact die in jail. But I want it to be a process that's not arbitrary, that's not based on a politician saying so, but a collaborative process with an independent judiciary legitimizing our actions.

I think that's what this country has been lacking and that's what we need to go forward. That's not being soft on terrorism. That's applying American values to this war.

Chairman LEVIN. Thank you.

Senator Reed.

Senator REED. Thank you.

This has been a very thoughtful discussion. There's been a discussion about the value of trying everyone in a military tribunal, military commission, or trying people in civilian courts. I think, just for the record, that there is a value to trying some of these in-

dividuals in civilian courts because they are criminals, and because when they try to claim a mantle of warrior, that is feeding into their appeal out in the greater Islamic world, but in fact they're criminals. They have committed premeditated murder. In that situation, if we can mount a case effectively in court, we should not only do that, but they should be not only convicted, but also identified as criminals, not as soldiers, not as warriors, etcetera.

There are other cases where, captured on the battlefield or because of practical considerations, a military tribunal will work. I just wonder, Admiral MacDonald, as a uniformed officer do you have a reaction to that?

Admiral MACDONALD. Senator, I guess my only point would be this, I think we need at the end of the day to have full faith and confidence that what we're creating in this bill is a fair and just process. I am sensitive, too, that there may be situations where going to an Article III court, going to Federal court, may be the right decision, given the facts and circumstances that exist in a case.

I think it's absolutely vital that when we leave here at the end of the day it's not because we believe that what we've created is a second class legal system. We need to look at this, that this can stand alone in the world and we are willing to be judged by what we're putting together today. That's my only point, is that you ought to feel very comfortable sending anybody to these commissions process with these changes because we believe it's a fair and just system.

Senator REED. The ultimate test would be if an American service man or service woman were subject to these procedures we would consider them to be appropriate.

Admiral MACDONALD. Yes, Senator.

Senator REED. Thank you.

Chairman LEVIN. Thank you.

I will just conclude by saying what our bill does not address, does not purport to decide or address. One, we do not decide whether a person, who's going to be tried, is tried by an Article III court or a military commission. We've been told there's going to be some of each for various reasons. We do not make that decision in this bill at all, don't try to, don't purport to.

Second, we do not address the question of where a trial takes place. That is not addressed in this bill.

Third, what we do is address the procedures that would apply where there are military commission trials. It's pretty obvious to me as chairman that those procedures will apply regardless of where the military commission is held. There can't be any difference in the way we write a bill on that. I disagree with the suggestion that somehow or other it will make a difference in terms of a court ruling, Supreme Court or otherwise, as to whether or not a military commission proceeding is held in the United States or in Guantanamo. I just, as a lawyer, cannot imagine the Supreme Court or any other court saying, well, this commission was held in one place, therefore one rule, constitutional rule, applies; if it were held in another place, a different constitutional rule applies.

Given what the court has decided in Boumediene and what the court has decided in Hamdan, I just can't imagine there would be

any difference in that decision, whether trial court or Supreme Court, as to where this military commission proceeding took place.

Finally, on the voluntariness issue, hopefully we can come up with some common language on that. But in any event, we have language in the bill which incorporates the requirements of the Geneva Conventions in terms of coercion, in terms of whether or not a statement can be used against a defendant.

Thank you all very much for your wonderful testimony here. Your very carefully thought out testimony will be made part of the record. We'll have some additional questions for the record, and we'll now move to our second panel. [Pause.]

On the second panel we have three distinguished experts on military commissions from outside of the government. You're our outside panel.

First, Rear Admiral John Hutson capped a distinguished 27-year career as a Navy lawyer, serving as the Judge Advocate General of the Navy from 1997 to 2000. He is currently Dean and President of the Franklin Pierce Law Center.

Second, retired Major General John Altenburg completed a 28-year career as an Army lawyer, serving as Assistant Judge Advocate General of the Army from 1997 to 2001, and as the first Appointing Authority for Military Commissions from 2003 to 2006.

Finally, Daniel Marcus served as General Counsel of the 9/11 Commission, after spending a number of years in the White House Counsel's Office and DOJ. He now teaches national security law and constitutional law at the Washington College of Law at American University.

Gentlemen, we thank you. We didn't give you much notice about this hearing. It's a very important hearing and we greatly appreciate your attendance and the work that you put in all your lives for this Nation.

Admiral Hutson, we'll start with you.

STATEMENT OF RADM JOHN D. HUTSON, USN (RET.), FORMER JUDGE ADVOCATE GENERAL OF THE NAVY

Admiral HUTSON. Thank you, Mr. Chairman. I very much appreciate this opportunity. The honor and privilege is not lost on me.

I'll be brief. We don't ask DOJ to fight our wars and I think we shouldn't ask DOD to prosecute our terrorists. I respectfully disagree with Senator Martinez. I think that they are criminals and they ought to be treated as such, and to somehow elevate them to the status of, say, Major Andre I think is inappropriate.

I have two concerns particularly. One is that right now the U.S. military is, if not the most highly respected institution in the United States, it's certainly among the very top. There are a couple of reasons for this. One is that the military carefully restricts itself to its primary mission, which is to fight and win our wars, to provide the time and the space necessary for the real solutions, social, cultural, religious and otherwise, to take place. Then, once that mission is limited to warfighting, the military does that very, very well, just as DOJ prosecutes criminals very, very well.

The other aspect for me is that DOJ has scores of experienced prosecutors, decades of precedent and experience, lots of judges, and great credibility, justifiable credibility in this area, that DOD

simply doesn't have. DOD personnel policy is to rotate people every 2, 3, or 4 years. They will never ever get the experience that Federal prosecutors have or that Federal judges have.

I think we're missing an opportunity to display the greatest judicial system on the face of the Earth, to shout it from the rooftops. Rather than doing that, we're sort of hiding it under a bushel and bringing out the uniformed service persons. I admire and am proud of the job that they do, but it's simply not the primary responsibility of DOD or the U.S. military or the Armed Forces to perform that function, and I'd rather see it where it should be, in the very capable hands of DOJ.

Thank you, sir.

[The prepared statement of Admiral Hutson follows:]

PREPARED STATEMENT BY RADM JOHN D. HUTSON, USN (RET.)

I am the Dean and President of the Franklin Pierce Law Center. I served as a Judge Advocate in the United States Navy from 1973–2000 and as the Judge Advocate General of the Navy from 1997–2000. I am very aware of the honor and privilege of testifying before this committee on the matter of military commissions. I thank the committee for this opportunity.

Even greater than democracy itself, the greatest export of all from the United States is justice. Daniel Webster once said, "Justice, sir, is the greatest interest of man on Earth. It's the ligament which holds civilized beings and civilized nations together." But Justice is fragile and easily disparaged. It must be nurtured and handled with great care.

I was an early and ardent supporter of military commissions. Initially, I was drawn to their historical precedents and, more importantly, I was confident that the United States Armed Forces could and would conduct fair trials even of reprehensible defendants. My own experience gained during 28 years in the Navy and our long history of providing due process while trying our own military personnel in courts-martial gave me this confidence.

Unfortunately, as it turned out, the commissions that were created did not live up to the traditions of the Uniform Code of Military Justice (UCMJ). Predictably, they became a significant distraction for the military. I hasten to add that this was in spite of the stalwart, honorable effort of many, many military personnel themselves. Indeed, that is one of the great tragedies of this saga, and largely makes one of the points that I wish to underline.

The primary role of the military is to fight and win our Nation's wars or, stated more precisely, to provide the time and space necessary for real solutions—economic, cultural, social, religious—to take place. Prosecution of miscreants is an occasionally necessary sidebar to that mission but shouldn't distract from it. We have the UCMJ and the military court-martial system to expedite the legitimate role of the military, not interfere with it.

If a sailor on a ship is alleged to have committed a crime, we must expeditiously and fairly resolve that problem. Otherwise, it can fester and interfere with unit cohesion and impede an effective fighting force. The UCMJ and the Manual for Courts Martial serve that purpose alone. They solve problems for the armed forces; not create them. Our recent history with military commissions has been the opposite. I've come to realize that even a perfect commission regime would be a distraction for the military. It's simply not part of its mission. I am very concerned when the military is called upon to perform functions outside of its core mission even when I'm confident that it can do it well. Preserving and ensuring justice in the United States is the primary mission of the Department of Justice (DOJ), not the Department of Defense (DOD).

If there will be criticism of our prosecution of alleged terrorists—and there will be—DOJ and the U.S. Federal Court system are equipped to deal with that criticism. Indeed, it is part of their responsibility to face it, address it, and resolve it.

Notably, the criticism will come not only from critics outside the judicial process such as the media, foreign allies and enemies, and domestic commentators but also from the legitimate appeal process. Some of the criticism may actually be justified or, at least, defensible. There is no reason in law or logic for the military to be the target of that. Convictions from military commissions will be appealed until Dooms Day just because of the forum of the conviction. Federal courts are impervious to that.

It is decidedly not the responsibility of DOD or the U.S. military to deal with criticism of such prosecutions. It would, in fact, be detrimental to the military mission. There are valid and important reasons why our military is the most highly respected institution in America. One of them certainly is that the military limits itself to its mission and performs that mission very well. Taking on duties outside of that core mission on an ongoing basis will surely undermine the public's confidence in the military . . . and divert important resources, human and otherwise, from that mission in order to take on the new one.

We already have proof of this. Besides being a distraction to the vital mission of DOD, military commissions have, to a large extent, become a discredit in spite of the valiant and highly credible efforts of many, many people in uniform. Rather than showcasing the military justice system of which we all are justifiably proud, commissions represent something else entirely. They have not worked often or well. "Fixing" them would help, but won't eliminate undeserved but inevitable criticism.

On the other hand, during the same period, U.S. District Courts have successfully prosecuted literally hundreds of terrorists who now reside in Federal prisons around the country, keeping all Americans safer. Federal courts, including judges, prosecutors, marshals, and other court personnel have decades of experience in these cases. They have developed a justifiable and universally held reputation for fairness, and consequently, they are largely immune to criticism.

There is also now a large body of law that has been developed over the years in the Federal court system. It would take an equal number of cases and decades of trials for DOD to match the Federal precedent contained in the Federal Reporters.

Military judges, prosecutors, and defense counsel rotate out of one assignment into another every 3 years or so. Without significant changes to longstanding DOD personnel policy, none of them will ever, ever gain the experience in these cases that is enjoyed by scores of their civilian Federal counterparts. We could do that, we could change longstanding DOD personnel policy but again, if we did we would have the tail of terrorist prosecutions wagging the warfighting dog.

It is not only unnecessary, it is inappropriate for DOD to operate a system of justice in parallel to DOJ. The UCMJ and the courts-martial it creates are absolutely necessary to ensure our effective fighting force. But for some of the same reasons that the Posse Comitatus Act prevents the military from enforcing laws against U.S. civilians, we should resist the temptation of using the military to prosecute foreign criminals when DOJ can perform that critical function quite well.

Let us not forget, these are not legitimate warfighters. They are common criminals. They are thugs, cowards who target innocent civilians. We should treat them as such and not elevate their status to that of legitimate enemies. They don't belong in the same category as Major Andre or the German saboteurs.

We don't ask DOJ to fight wars. We shouldn't ask DOD to prosecute terrorists.

If the point of this exercise is to create a court system that will ensure convictions of alleged terrorists against whom we don't have sufficient admissible evidence, then we have missed the point. 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 corollary to that is that you can't have a real court if the rules of evidence and procedure are so stacked against the defendant that he has no real chance to present his case or defend against the government's case. The admissible evidence against him based on the facts may be so overwhelming that conviction is assured but that must be the consequence of facts, not rules of evidence tilted in favor of the prosecution.

Over the years, Federal courts have displayed remarkable ingenuity, flexibility, and resourcefulness in prosecuting terrorists. The Federal Rules of Evidence and Procedure are sufficiently adaptable to accommodate the vagaries of trying those individuals who are captured overseas by military personnel in the midst of performing military operations. I believe the image of the "strategic corporal" having to give Miranda warnings after risking his life to break into the bunker is a red herring.

If you as members of this committee believe or suspect that the Federal Rule of Evidence or the Federal Rules of Criminal Procedure should be amended to accommodate certain cases and situations, it is preferable to superimpose modest new rules on an extant, tried and true judicial system than to create a whole new system—particularly in light of recent efforts.

It might be wise to set up a task force of experienced judges, prosecutors, and defense counsel to make recommendations to Congress in this regard.

However, if we create yet another military commission system that "contains all the judicial guarantees considered to be indispensible by all civilized peoples" as re-

quired by Common Article III of the Geneva Conventions, then we have essentially duplicated our own Federal courts. There is no logical reason to create a system that mirrors one already in existence and is functioning so well. We should strive for the minimum change necessary to accomplish the purpose, not a wholesale change to an already effectively functioning system.

Clearly and undeniably, the administration and this committee are dedicated to untying this Gordian knot in a way that serves the very best interest of the country. We are now operating under the Military Commission Act of 2006 which many find to be badly flawed. I very much respect and admire your effort to improve it. My recommendation, however, is to repeal it rather than improve it. In the process, I urge you to express this body's preference to prosecute alleged terrorists in Federal court and thereby demonstrate to the world, friend and foe alike, what kind of Justice the United States wishes to export.

Chairman LEVIN. Thank you, Admiral, very much.

General Altenburg.

STATEMENT OF MG JOHN D. ALTENBURG, JR., USA (RET.), FORMER APPOINTING AUTHORITY FOR MILITARY COMMISSIONS

General ALTENBURG. Thank you, Chairman Levin and members of the committee.

Military commissions are an appropriate, long validated, constitutional mechanism for law of war violations. Military commissions have always adapted to both the operational needs of the particular conflict and to the then-existing state of criminal law.

This proposed statute tracks the current state of criminal law in its most important respects and codifies or incorporates advanced thinking in criminal law since the 1940s use of commissions by the United States. This is true, especially in areas such as hearsay and self-incrimination, including the reliability concern that the Supreme Court has emphasized in the last 50 years.

Our military in the 21st century fights in a more complex manner. This means that Congress must forthrightly acknowledge how this complexity impacts military commissions. This includes evidence gathered by intelligence personnel, not just conventional forces, operations and places and under circumstances that would not serve our security, diplomatic posture, or stability of other nations to be made public. In addition, confronting an enemy of uncommon ruthlessness and ability to reach anywhere, at any time, making personal security of participants in the investigative and trial process an especially sensitive and appropriate consideration.

I applaud the efforts of the committee in proposing this amendment to the MCA. I think that there are several reasons why these people should be prosecuted at military commissions, among them the fact that we're prosecuting them for war crimes and not violations of Title 18. They may have also committed violations of Title 18, but we're prosecuting them for war crimes.

It is a part of the Commander in Chief's authority to prosecute war criminals during a war and just after a war. It serves as a deterrent to others. Sometimes we use the word "UCMJ" and we act like it's just court-martial and that military commissions are different. The UCMJ includes four tribunals. Court-martials are the one we're most familiar with and therefore oftentimes we shorthand and say "UCMJ" when we mean courts-martial.

But military commissions have been around for a couple hundred years and courts of inquiry for well over 100 years, and the provoso

courts are the least used. I think that's an important distinction that we should all keep in mind.

I would ask the same question that a couple of Senators have asked in response to my colleagues' comments, and that is, why would we apply domestic criminal law due process for alien unlawful belligerents who've abandoned all civility and respect for international law?

Just two things that I'd like to comment on that I think need to be addressed. One is, that I believe, because the Service courts have the experience of the factfinding role, the experience and the expertise honed over years and years, that a more appropriate place for the intermediate appeal would be the existing Court of Military Commissions Review and not the CAAF. The CAAF I'm sure, as an earlier speaker mentioned, certainly has the expertise to do the factfinding role. I just think it's better placed with the military appellate judges because of their experience in that regard. I think it would be somewhat onerous to place that on the CAAF. Their experience is with criminal law for the most part. Military criminal law is very similar to domestic criminal law, and we're now into an area of law of war, something that's fairly arcane, in dealing with these types of crimes.

The other thing that I think needs to be addressed is the issue of the death penalty. It's somewhat ambiguous in the MCA, and I'll just kind of state the scenario. If a detainee wants to plead guilty to a capital offense, he can do that. But the way the MCA is written, it says that he has to be found guilty by a jury, guilty by commissions. There's a way to wordsmith that to make sure that it's very clear and that we don't spend hours and days litigating at the military commissions proceedings whether he really can do that and exactly what that means. I'd be happy to submit that in additional comments or in response to questions as to what proposed language it would be. It would just make it very clear, because I know that prosecutors and defense lawyers and judges are trying to grapple with that, because some people want to plead guilty to a capital offense. Of course, they want to be a martyr for their cause and that's another discussion. I think that it should be possible for them to plead guilty to a capital offense and then be sentenced by the court.

Thank you, sir.

[The prepared statement of General Altenberg follows:]

PREPARED STATEMENT BY MG JOHN D. ALTENBURG, JR., USA (RET.)

Chairman Levin, Ranking Member McCain, other distinguished members of the Committee, thank you for this opportunity to discuss Military Commissions, the Military Commissions Act, and proposed amendments to the Military Commissions Act, 2006. Military Commissions are an appropriate, long-validated, Constitutional mechanism for Law of War violations. U.S. Military Commissions have always adapted to both the operational needs of the particular conflict, and to the then existing state of criminal law.

This proposed amendment tracks the current state of criminal law in its most important respects, and codifies or incorporates advanced thinking in domestic and international law since President Roosevelt's World War II military commissions, endorsed by the Supreme Court in *United States* v. *Quirin*. These advances are most notable in areas such as hearsay and self-incrimination, including the reliability concerns that the Supreme Court has emphasized since the Military Commissions of the 1940s.

As our Nation fights in a more complex manner, Congress must in the 21st century give Military Commissions the tools to adapt to 21st century opponents. This means that Congress must forthrightly acknowledge how this complexity affects our Nation's ability to bring war criminals to justice—including through the long validated process of military commissions. Concrete areas that require careful integration of the truth-seeking function of a system of justice with the realities of warfighting include evidence gathered by combat and intelligence personnel and Special Operations Forces; operations in places and under circumstances that would not serve our security, diplomatic posture, or the stability of other nations if made public; and confronting an enemy of uncommon ruthlessness with the ability to reach anywhere at any time, making personal security of participants in the investigative and trial process an especially sensitive and appropriate consideration.

Military commissions historically have been a singular forum, repeatedly recognized by statute, international law, and Supreme Court decisions as an incident of war, not arising from the judicial power of the United States, but firmly within the power and authority of a military commander as authorized by Congress. This distinction is anything but academic; it is the seminal point from which flowed post-2001 misunderstandings of military commissions.

Historical validity aside, the necessity of military commissions in the current conflict has been occluded by: (1) the decades during which they were not deemed by a military commander to have been necessary for a particular conflict or set of circumstances (we did not use commissions during the Korean or Vietnam conflicts); and (2) the unprecedented evolution in criminal procedure and evidence seen during those decades, which complicated the setting in a way that policy makers failed to recognize in drafting the President's Military Order of November 13, 2001.

The proposed amendment to the Military Commission Act may successfully culminate a process that began in October 2004 in the Office of Military Commissions. Several government lawyers, military and former military, worked diligently to create a proposed Uniform Code of Military Justice amendment (Article 135a) and a proposed Manual for Military Commissions. The product of nearly an entire year's work by Brigadier General Tom Hemingway, Michael Chapman, Kevin Carter, Ronald White, Colonel Lee Deneke, Colonel Wendy Kelly, Colonel Patricia Wildermuth, and Mary Alice Kovac was presented for approval by appropriate authority in August 2005. If approved and implemented, many believe it would have made more likely a Supreme Court decision favorable to the government in the Hamdan case. The proposed Article 135a and Manual for Military Commissions were not favorably considered. The Supreme Court's decision in Hamdan led directly to the Military Commissions Act. The proposed amendment will finally produce Military Commissions procedures that meet all Law of Armed Conflict standards and exceed International Law standards for war crimes trials.

Unprivileged belligerent is a better term, in my opinion, than enemy combatant. The proposed definition, in section 948a(7)(a) now also includes those who engage in hostilities against our coalition partners. This as well is a positive change.

Section 948c says that "any unprivileged enemy belligerent having engaged in hostilities or having supported hostilities against the United States is subject to Military Commissions." This language seems somewhat inconsistent with 948a(7) language that defines unprivileged enemy belligerent as one who "purposefully and material supports hostilities." More important, 948a(7)(b) defines unprivileged enemy belligerents as those who "purposefully and materially support hostilities," which is more expansive and useful and appropriate language, in my view.

I consider the language authorizing a military commission to determine its own jurisdiction to be an improvement as well.

Regarding self incrimination, the focus on "reliability" is welcome, but it cannot be the sole touchstone without at least some clarification. Such statements are routinely admitted into evidence in both Federal district court and courts-martial. Therefore Congress may want to consider modifying the proposed language so that either side can introduce statements for reasons other than their truth. I recommend language that considers the totality of the circumstances in determining whether the statement is reliable for the purpose for which it is offered.

The hearsay provisions of the proposed legislation are a substantial improvement, as they balance the truth-seeking function of the right to confront evidence against an accused with the realities of the modern battlefield and especially the protracted nature of the post-September 11 conflicts. There remain some potential refinements in this area. The amendment seems to assume that all statements are taken by government agents, which is frequently true, but not always the case. Sometimes "rank hearsay," including statements from one detainee to or about another may be offered; the defense likely requires more flexibility in this regard than does the government.

Most important, the rule should state clearly the threshold requirement that the military judge determine, under the totality of the circumstances, that a statement is reliable for the purpose for which it is offered. The proposed bill is not explicit regarding this factor. The proposed amendment says also that the necessary predicate is witness unavailability. This may lead to extensive litigation regarding what constitutes unavailability. There may be times when justice is served if it's a material fact (an appropriate requirement) and in the interests of justice. Where reliability is a required consideration, then the judge has more than adequate guidance for making fair and appropriate determinations of admissibility.

The section 949j discovery language is more broad than that governing Article III courts. The disclosure obligation for witness statements is "as soon as practicable" compared to the traditional (Federal) practice of disclosing when the witness testifies. It's not clear why we would want military commissions to deviate from the Federal standard, which is frequently espoused by military commission critics. I propose language along the lines of requiring disclosure a "reasonable time before the witness testifies". This proposed language is closer to the court-martial norm without unduly burdening the prosecution's discovery responsibility.

More significant is determining what is government evidence and how accountable the prosecutors must be when as a practical matter they don't know the universe of available evidence, and not all organs of government share the prosecutors' interest in trying the cases. The prosecution arm of the government is, no doubt, comfortable with bearing some of the burden here—but other government agencies may need statutory inducement to produce evidence in a timely manner. Still, section (b)(4), says, "the disclosure obligations under this subsection encompass evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case. . ."

I recommend replacing "and" after "investigation" and before "prosecution" with "or"—to be clear that prosecutors must examine only that which they possess or are able to access. In short, prosecutors must have access to the evidence before they can be held accountable for its examination and production. This reflects the unique context of combat operations evidence collection, which is not accomplished by police investigators and crime scene experts who pass it to forensic experts through elaborate, precise custody systems. Rather, it is most frequently collected by riflemen or intelligence operatives whose priorities are safeguarding themselves and others while collecting information that may assist their fight against an enemy determined to kill them and others. The potential for its subsequent use as evidence in a criminal trial is not the paramount basis for its collection at the time. This goes to the heart of why alleged war crimes should be tried by military commissions that meet or exceed all Law of Armed Conflict and other International Law standards. The burden must be on the government, but the legislation must be realistic in its burden, recognizing that multiple organs of the government collect, analyze, and store evidence, often for other than law enforcement purposes.

Regarding supervision of counsel, it may be appropriate, based on experience since 2006, to add to Section 949b(a)(2)(C) the following language: "This does not preclude the exercise of appropriate supervisory authority over trial or defense counsel."

Section 949j (pg. 32): codifies what has been the practice in that the Military Judge can authorize the Trial Counsel to provide redacted or unclassified summaries of documents to the defense.

The current statute says that Geneva Conventions are not a "source of rights" that detainees may invoke, but the new bill says that the Geneva Conventions may not be invoked as a basis for a "private cause of action." The intent seems to be that an accused may not base a civil claim on a Geneva violation, but still permit him to base trial motions on asserted Geneva violations. This may be an untenable threading of the needle because it may well expose the government to liability in areas other than Military Commissions. When in other realms individuals, including non-citizens, claim that Geneva or other treaties, traditionally considered not to be self-executing, form a basis for trial-level relief or in any way are considered to grant personal rights rather than binding the government of the United States.

The proposed amendment retains the apparent contradiction of the Military Commissions Act that allows one to plead guilty to a capital offense but prohibits sentencing to death unless the accused is found guilty by the 12 member commission. I propose the following language be inserted in the proposed amendment: "In order to be sentenced to death the accused must have been found guilty by commission of members or have plead guilty and been found guilty by a military judge." This language should eliminate the confusion inherent in the Military Commissions Act. More important, the proposed amendment does not retain the Military Commissions Act language that the death penalty is available if the offense carries that punish-

ment under "this chapter" or Law of War. Furthermore, the amendments should provide a mechanism for an accused to plead guilty and choose to be sentenced by the Military Judge alone, as is the standard in court-martial practice.

I recommend that the appellate process delineated in the 2006 Military Commissions Act be retained in the proposed legislation rather than naming the Court of Appeals for the Armed Forces as the intermediate appellate court. The Court of Military Commissions Review has functioned well since its establishment in the Military Commissions Act. The judges who populate this court from the Service Courts of Criminal Appeals have extensive experience in the factfinding role. The service appellate courts are unique in United States jurisprudence because of their factfinding authority. If we are to include the same factfinding power we provide for soldiers at the intermediate appellate court then we should ensure that the intermediate court is one with the expertise and experience to exercise that function.

The proposed amendment says to assign defense counsel "as soon as practicable". This is conventionally assumed to be at charging by the Prosecution, consistent with military and most public defender practices. But there needs to be some flexibility by which Chief Defense Counsel can appoint defense counsel earlier—so that, in appropriate cases there can be charging negotiations that are beneficial to both the defense and the prosecution. Chief Defense Counsel authority to appoint defense counsel earlier than the charging stage should be limited to occasions that respond to requests from the Chief Prosecutor.

The amendment retains provisions that imply that an accused has the option not to appear in court, as section 949a lists presence at trial as a "right" of the accused. I believe this provision frustrates both the delivery of effective justice and the appearance of justice, which we hope confidently to portray to the accused, our Nation, and the world, whose scrutiny we should welcome. I recognize that requiring an accused to appear may lead to disruptive behavior in court. There are provisions to remove the accused if the behavior disrupts the process. The decision whether or not the accused remains in court after such disruptive conduct should be left to the judge; there should be no "opt out" by which the judge permits an accused, perhaps weary or in protest, not to appear at a session of court.

The proposed amendment addresses the right to "suppress" evidence. I recommend that more appropriate language would be to "exclude" evidence from the factfinder or sentencing authority as a sanction for illegal conduct by the government.

It is encouraging to see Congress actively engaged in improving military commissions. There now seems to be a greater understanding that we—as a Nation—are challenged by a Law of War problem rather than a matter to be addressed solely by domestic criminal law. Military commissions historically represented an advance in the law—a civilizing, judicial measure, rooted in the due process of the Western legal tradition and the principles of restraint, discrimination, and accountability of the maturing Law of Armed Conflict. I recognize that the proposed amendments are intended to foster those traditions. In making fine changes to a system that is functional and just, we must be mindful that commissions stand on a distinct legal footing not because they are a "lesser" form of justice, but because they are uniquely able to bring justice in light of factors unique to how we, a nation of laws, defend our freedoms, and fight and win our Nation's wars.

Chairman LEVIN. Thank you very much.

Mr. Marcus.

STATEMENT OF DANIEL MARCUS, FELLOW IN LAW AND GOVERNMENT, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. MARCUS. Thank you, Mr. Chairman. I appreciate the opportunity to testify today.

I do believe there is a role for Article III courts in some cases involving some of the Guantanamo detainees and some of the other individuals who've been treated as enemy combatants at one time or another since September 11. I believe our Article III courts have shown themselves able to effectively try terrorists in Federal courts in the Moussaoui case, the Padilla cases, and some of the earlier cases.

For example, someone like Padilla or someone like al-Marri, who was arrested by law enforcement authorities in the United States, far from the traditional battlefield, is an appropriate candidate for Article III criminal prosecution.

I notice that one of the Guantanamo detainees was recently transferred to the Federal court system and will be tried in the Southern District of New York in connection with crimes connected with the bombing of the East Africa embassies in 1998. I think he is also an appropriate candidate for an Article III court because it's not clear that he's appropriately treated by a military tribunal since his acts were committed at a time when we arguably were not at war with al Qaeda in a strict military sense.

I do believe that, while the Federal courts can try many terrorism cases, there are a lot of terrorism cases involving the Guantanamo detainees that would be difficult, not impossible but difficult, to try in a Federal court. I think that an improved military commissions system is an appropriate way of trying these defendants.

I think this committee's bill takes major steps toward perfecting the existing military commission system, which was already improved significantly by the MCA. But I do think there are some additional steps that could be taken and I've outlined some of those in my testimony.

[The prepared statement of Mr. Marcus follows:]

PREPARED STATEMENT BY DANIEL MARCUS

Chairman Levin, Senator McCain, and other members of the committee: Thank you for inviting me to testify on one of the most important of the difficult set of issues facing Congress and the Administration with respect to the detainees held at Guantanamo Bay: In what forum should detainees who are believed to have committed war crimes be tried—Article III courts, courts-martial, or military commissions?

Unlike my colleagues on this panel, I am not an expert on military justice. But as a Government official and a law professor, I have been following these issues closely for the last six years—first, as General Counsel of the 9/11 Commission, and since 2005, teaching National Security Law and Constitutional Law at the Washington College of Law, American University. Before that, I was for many years a partner in the law firm of Wilmer, Cutler & Pickering, and I served in the White House Counsel's Office and in several positions at the Department of Justice, including Associate Attorney General, from 1998–2001.

The questions surrounding detention and trial of the Guantanamo detainees have become more complicated than they looked in late 2001 and early 2002, when the first detainees were captured in Afghanistan and sent to Guantanamo. In the wake of the September 11 attacks, Congress had quickly enacted the Authorization to Use Military Force (AUMF), essentially authorizing the President to conduct an armed conflict against al Qaeda and the Taliban. Pursuant to the AUMF, the President had sent thousands of U.S. troops to Afghanistan to depose the Taliban as the de facto government of Afghanistan and to capture or kill the al Qaeda fighters and leadership. While the opponents in this armed conflict were not nation-states, the conflict seemed very much like a traditional armed conflict or "war."

In the years since then, however, we have come to the realization that this is a different kind of war that is not so easy to define or limit, territorially or temporally. While the traditional battlefield is in Afghanistan (and to some extent, arguably, the adjacent western border areas of Pakistan to which al Qaeda and the Taliban have fled), al Qaeda continues to operate in other parts of the world, either directly or through other, loosely affiliated organizations. It has become clear that this conflict is one of indefinite duration, which will not end with a truce or surrender. Finally, we have learned that even on the Afghanistan battlefield itself, it is not nearly as easy as in traditional wars against uniformed members of regular armed forces to determine who is and is not an enemy combatant.

These problems have been compounded, in my view, by some serious mistakes and over-reaching by the last administration in the years immediately following the September 11 attacks—the reliance on strained legal arguments to minimize or avoid entirely the application of the Geneva Conventions and the Convention Against Torture; the effort to deny the Guantanamo detainees any opportunity to challenge the determination that they were enemy combatants; and the creation of a system of military commissions that almost no-one outside the Administration believed provided anything close to a fair process for trying detainees for war crimes. This last mistake has delayed for years bringing the Guantanamo detainees to justice for their crimes.

Thanks largely to the Supreme Court and Congress (in the Detainee Treatment Act and the Military Commissions Act (MCA)), there has been significant progress in correcting these mistakes and providing a legal process for the detainees that can be defended as consistent with the basic principles of our military and civilian justice systems. But more remains to be done, and there are important decisions that this Congress and this Administration still have to make. I congratulate this committee for taking the initiative in addressing these issues.

So, where should we go from here with respect to trials of the detainees? Some argue for abandoning the military justice model (if not the entire law of war paradigm) and prosecuting the detainees only in Article III district courts (or perhaps some new special national security court staffed by Article III judges). I believe there is a role for Article III courts in some types of cases and that our U.S. district courts—in cases such as *Moussaoui* and *Padilla*—have shown themselves capable of trying major terrorism cases. I also believe that it is inappropriate to use military tribunals to try U.S. citizens (such as Padilla) or others lawfully in the United States (such as al-Marri) who are arrested by law enforcement authorities in the United States, far from any traditional battlefield. The same is true for some of the Guantanamo detainees who were captured, not in Afghanistan, but in countries such as Bosnia or Algeria, and whose alleged crimes are unrelated to the events of September 11 or the war in Afghanistan. A good example is Ahmed Khalfan Ghailani, who was recently transferred from Guantanamo to a Federal prison in New York for trial in U.S. District Court on charges arising out of his alleged participation in the bombing of the U.S. embassies in East Africa in 1998. He is charged with a very serious terrorist act, but not one properly regarded as a war crime triable by a military commission or court-martial.

I have become convinced, moreover, that while the Federal courts can try many terrorism cases, there are some cases in which it would be very difficult to try Guantanamo detainees in Federal court. Of course, I am not privy to the evidence that the Government has gathered with respect to any detainee. But I gather that there are two main reasons why it is difficult to try some detainees in Federal court: First, in some cases the key evidence of guilt is statements of the defendant that could not be introduced in Federal court because they were made without prior Miranda warnings or were the "fruit of the poisonous tree" of coerced statements. Of course, some of these statements would not be admissible under the MCA or this committee's bill, but a significant number would.

Second, and perhaps more important, the more public nature of trials in Federal court—where it is extremely rare to close any proceedings to the public—and the hearsay rules that apply in Federal courts make it very difficult to conduct a trial involving certain kinds of highly sensitive national security information. The prime example of this is where important evidence against the detainee is from an intelligence source whose identity cannot be made public. These difficulties are also present, to a large extent, with court-martial trials. Under the MCA as it would be amended by this committee's bill, however, and under changes in military commission procedures already adopted by the new administration, some hearsay evidence found reliable by the presiding judge could be admitted. And the greater flexibility that the military judge has to close portions of a military commission trial (with the defendant and his counsel still present) will enable the fair presentation of more sensitive national security information.

I was initially of the view that it would be preferable to try all detainees by court-martial (or in Article III courts)—not because I thought military commissions could not be conducted in a fair manner that adequately protected the rights of defendants, but because I thought that the original military commission regime that was held unlawful by the Supreme Court in its 2006 Hamdan decision had given military commissions such a bad image around the world that we ought to choose some other forum to try the detainees. But I have become convinced that an improved system of military commissions, while not the ideal choice, is the best—or perhaps one should say the least worst—of the alternatives before us for trying many of the detainees.

In opting for an improved military commission system, I am also influenced by the interrelationship of this issue with the very difficult issue of indefinite or preventive detention of those detainees who cannot be tried or safely released. President Obama came into office, it appears, hoping that we could not only close Guantanamo, but also try (and convict) or release all the Guantanamo detainees. It seems likely, however, that the administration will conclude that this cannot be done—that because of evidentiary problems and national security sensitivities, there will be some "guilty" and dangerous detainees who cannot be tried in any forum and who therefore should continue to be detained under the law of armed conflict (with periodic court review and additional safeguards). Such a longer-term detention system may be necessary, but it is certainly undesirable from a civil liberties standpoint. One reason I conclude that improved military commissions are our best option for trying many detainees is that I believe it will result in more detainees being tried, thus reducing the number of detainees who continue to be detained without trial.

Finally, let me list some of the important ways that the commission system established by the MCA can and should be improved, bringing it closer to the standards of courts-martial. (Some of these are already addressed in the committee's bill.):

- The overbroad definition of "enemy combatant" should be narrowed to be more consistent with the law of armed conflict and the traditional battlefield concept.
- The list of offenses triable by military commissions should be revisited, to assure that it can be defended as consistent with the law of armed conflict. In particular, a fresh look should be taken at whether "material support of terrorism" and conspiracy can be deemed war crimes.
- Hearsay evidence should be admissible under more limited circumstances, with the burden on the prosecution to establish the reliability of the evidence.
- Statements obtained as a result of all cruel, inhuman, or degrading treatment, regardless of when that treatment took place, should be excluded. Only statements that meet basic standards of voluntariness should be admitted.
- There should be more robust requirements for disclosure by the prosecution of potentially exculpatory and mitigating evidence to the defense.
- The reviewing court (whether it is the Court of Appeals for the Armed Forces or the Court of Appeals for the District of Columbia Circuit) should have full appellate authority to review the military commission's judgment and findings, comparable to that of a Federal court of appeals reviewing a district court judgment of conviction.
- Habeas actions should be available to defendants in military commission cases to the same extent that they are available to court-martial defendants.

Thank you for the opportunity to testify. I would be happy to answer your questions.

Chairman LEVIN. Thank you very much, Mr. Marcus.

Why is it difficult to try some of or most of the Guantanamo detainees in Article III courts?

Mr. MARCUS. I think there are two main reasons and I think they were adverted to in the testimony of the first panel. There are some Federal court rules with respect to admissibility of statements. The Miranda rules, for example, the fruit of the poisonous tree doctrine, that would make it difficult to admit some statements by detainees that should be admitted as reliable, voluntary statements under all the circumstances.

I think I would associate myself with the very interesting dialogue between DOJ and DOD representatives and Admiral MacDonald about the issue of voluntary statements and the "all of the circumstances" test. I would align myself with Mr. Johnson and Mr. Kris and with the administration, that I think we need a totality of the circumstances test, but it has to be anchored to voluntariness. I do think the principle in our system that confessions should be admitted only if they are voluntary is a very important constitutional and policy principle and we ought to adhere to it. I think it

may well be possible, as you and Senator Graham have suggested, to work out some language between that of the committee's bill that would satisfy these concerns, but I haven't seen the administration's language.

The second reason I think is that in military commissions it will be easier to close proceedings to handle classified evidence and to handle sensitive national security issues. Obviously we don't want completely closed proceedings, but I think there's more flexibility in the military commissions system to ensure that we can get the national security information that we need to convict these guys without compromising national security.

Chairman LEVIN. General Altenburg, why do we need military commissions? Go to some of the practicalities? Then I'm going to ask you, Admiral, to comment on their testimony.

General ALTENBURG. Senator Levin, we don't need military commissions unless we want to prosecute some of these people. We can just detain the people who we captured on the battlefield and have discussions and debates with international legal scholars about, what does this 21st century non-state actor paradigm mean for the right under the Geneva Convention to detain people you've captured until the war is over if you can't really define when the war is over. You're not capturing territory, there's no capital to get, so forth and so on.

We can just detain them and not worry about it.

Chairman LEVIN. Why is it desirable from a practical perspective?

General ALTENBURG. First of all, it's desirable because we can show the American people just how bad these people are and also we can show the international community just how bad these people are.

The reason we have to have military commissions is, quite frankly, some of these people can't be tried in Article III courts. There's just not the evidence to try in Article III courts. My own view is that alien, unprivileged belligerents captured on the battlefield should not be entitled to the constitutional protections that American citizens have. I don't think we should settle for some second-rate system, but in my mind the MCA together with what you've put together in the last few weeks exceeds all international standards. It certainly exceeds anything that's being done at The Hague.

One of the great failings several years ago in our government was in failing to educate the public as to what the standards are and what is at stake that the law of war applies. Instead, critics have been able to define the terms of the debate and the debate has been framed in the context of domestic criminal law. That's not what the debate should have been about. There were many issues to debate—How do you tell when the war is over? What do we do about non-state actors? How do we characterize them? There were lots of things to debate.

Senator, I know you've probably heard before the comment that throughout the Vietnam war the U.S. Government's position was consistent with regard to the people that were captured and kept by the North Vietnamese. That position was: You take care of them. Even though you're not a signatory to the Geneva Conven-

tions, we expect you to treat them with dignity and respect. When the war is over, you will return them to us.

The U.S. Government, Democratic and Republican, never said: When do they get a lawyer? When do they get a trial? How can you hold them? This isn't fair. That was never an issue. We never heard anybody 7 or 8 years ago talking about that and educating our public that that's what the standard should be, and not domestic criminal law.

Chairman LEVIN. General, you've said that these procedures as we've drafted them exceed the procedures at The Hague in terms of protection for people. You've also indicated that you have a couple suggestions that you've made relative to our language. Other than those two suggestions, do you believe this is the right direction for us to go as we've drafted it?

General ALTENBURG. Yes, Senator I do.

Chairman LEVIN. Now, Admiral Hutson, let me put the question to you a little more precisely. We've had witnesses, not just today but long before today, that point to the implausibility of some of the procedures being provided to detainees. These include Miranda warnings to prisoners that are captured in the course of hostilities, the impracticability of documenting the chain of custody for physical evidence collected on the battlefield, and the difficulties posed by the need to use highly sensitive national security information, including evidence from intelligence sources whose identity cannot be made public.

Tell us why is it not appropriate to use military commissions, providing those commissions meet the standards that the Supreme Court has set out in Hamdan?

Admiral HUTSON. Mr. Chairman, I'm not sure that it is inappropriate to use military commissions. I'm only suggesting that I think that the much better avenue is to use the tried and true U.S. district court system, the Federal system, that has tried many, many, many terrorists quite successfully over the years. I think fundamentally what this debate comes down to for me is that I think I have more faith in the flexibility and adaptability of the Federal courts than others perhaps have.

Miranda is a judge-made law. The word "Miranda" is no place in the Constitution. Voluntariness has a place in the Constitution. I think that U.S. district courts are going to be fundamentally capable of dealing with the vagaries of those issues, and they are not going to, as somebody suggested earlier, require the soldier to give Miranda rights after he breaks down the door and holds somebody at gunpoint. That's not the mission. It's not a law enforcement mission. At that point it's not an intelligence-gathering mission. That's all part of the war.

I don't think that the Federal Rules of Evidence or the Federal Rules of Criminal Procedure are going to require that. Now, if I am wrong about that I would urge that this committee—and the Judiciary Committee I suspect would have a dog in that fight—might want to look at those rules and make modest changes to the extent you feel it's necessary, rather than creating this whole parallel system, because this whole parallel system to the extent it complies with Common Article III and provides all the judicial guarantees considered to be indispensable by civilized people, then we've dupli-

cated to a large extent the Federal court system and there's just no reason to do that.

Moreover, I think you lose a lot of expertise and experience and precedent. You're going to bring down on the shoulders of the U.S. Armed Forces a lot of criticism, because we've tried this twice before and just as surely as God made little green apples, this process is going to be criticized. Fairly or unfairly, it's going to be criticized by appellate lawyers, by media, by critics.

The military doesn't need it. DOJ won't have to endure it. We'll end up with the world being preoccupied not with the crimes of the terrorists, but with the perceived alleged deficiencies in our system. I'd just rather use the system that's out there and has worked so well over the years.

Chairman LEVIN. I think a parallel system has existed for a long time. This is not a creation of a parallel system.

Senator Graham.

Senator GRAHAM. Admiral Hutson, I have a lot of respect for you and we've had a lot of debates about this, but I'm going to be very blunt with you. On July 12, 2006, you came before the House and the Senate and you urged us to use the UCMJ as the model, and you said: "I was an early supporter of the concept of military commissions and their use in the war on terror. I believed then and I still believe now that they are historically grounded and the proper forum to prosecute alleged terrorists." You submitted to the committee changes to the UCMJ that you thought were practical.

What's changed?

Admiral HUTSON. I think I was an early supporter of military commissions, before we actually put flesh on the bones. I was convinced in those days, quite frankly, that if you populated commissions with people like John Altenburg they were going to fly, it was going to be great. As it turned out, they weren't. We have been here now for how many years, and we've tried two cases.

Senator GRAHAM. Yes, but my point is that you said that the UCMJ should be the starting point and that you believed that the military system was a sound way to try terrorists, and you suggested to Congress that you would deviate from the UCMJ, but only when necessary. Quite frankly, I agree with you. I do not agree with you now when you say that we should abandon the military commission as an option. I do believe, as the other two witnesses have indicated, that it has a very strong role to play in this fight we're in, and historically it's been used in the past.

I would like to submit, Mr. Chairman, the testimony of Admiral Hutson from July 12, 2006, to the House.

Chairman LEVIN. That'll be received.

[The information referred to follows:]

STATEMENT OF REAR ADM. JOHN D. HUTSON, (RET.), PRESIDENT AND DEAN, FRANKLIN PIERCE LAW CENTER, FORMER JUDGE ADVOCATE GENERAL, U.S. NAVY

Admiral HUTSON. Thank you, Mr. Chairman. Mr. Skelton, thank you. Thank you for holding what I think are incredibly important hearings on the issue of the day right now in prosecution of the war.

I want to start out by saying unequivocally that I want to be able to successfully prosecute terrorists; however, I believe that successful prosecution entails a full and fair hearing which complies with the dictates of Common Article 3 to the extent that it is a regularly constituted court that comports with the judicial guarantees recognized as indispensable by all civilized peoples. I don't believe that there is any part of that, a regularly constituted court or judicial guarantees recognized as indispensable by civilized peoples, that the United States should or could try to avoid or evade in any way. We shouldn't make this too hard or too complicated or try to get too cute with it. We know what those guarantees are. We should enthusiastically embrace them, we should celebrate them, we should shout them from the rooftops. We can do that from a position of strength, not from a position of weakness. It is those guarantees that make us strong.

We are the strongest Nation militarily on the face of the Earth, there is no doubt about that. Our strength as a Nation comes not from our military strength or from our economy or from our natural resources or the essential island nature of our geography; our strength comes from what we have stood for for generations. That is what gives us strength, and we should be proud of that and celebrate it.

I was an early supporter of the concept of military commissions, and I still am. I think it is the way to go. I was not a supporter of the way in which they were implemented in the second order. We should use commissions as a means whereby we demonstrate to the world what it is we are fighting so valiantly to preserve. I was talking with a lawyer yesterday from Human Rights First about the Hamdan decision and my testimony in this hearing, and she made a comment to me that I thought was very profound and compelling, which was that Hamdan was not—the Hamdan decision was not a revolution, it was a return. It was returning us to where we should be. It shouldn't have been a shock, it should have been ho-hum. It was return to business as usual.

The United States stands for the rule of law, and we have for

years. It is not a rule of law if you only apply it when it is convenient. It is something else. For too long this has been a discussion between the executive branch and the courts, and it is time, as you know by conducting these hearings, to return the conversation to the proper forum, which is to say Congress.

If Hamdan stands for anything, it stands for the proposition that Congress has to engage thoughtfully and deliberately in these issues. There are those who advocate the Congress simply reaffirm what the President did prior to Hamdan with military commissions. I think that would be a dramatic mistake. There are those that would say we should start out and pull out a clean sheet of paper and start writing. I think that is not the easy way to do this. This can be easy, and I mean E-A-S-Y. It can be easy. On every bookshelf of every U.S. military lawyer stationed anyplace in the world sits a burgundy soft-covered book. That book is the envy of every armed force on the face of the Earth. It contains the Uniform Code of Military Justice and the Manual for Courts-Martial. We should use that as the model.

I am glad that the prior witnesses have talked about the strength and the beauty of the Uniform Code of Military Justice and the Manual for Courts-Martial. Those documents can be modi12 fied in such a way as to avoid the list of horribles that have been listed. Article 32 can be modified or eliminated.

I agree the media talks about it generally as the military equivalent of the grand jury investigation, and that is not even close. Article 32 is so much more than the grand jury investigation. The modifications—and I don't want to use the word relax, relaxing the UCMJ or the rules of evidence—the modifications to the UCMJ and the military rules of evidence and procedure have to be very narrow, they have to be very specifically tailored, they have to be justified, and if those things are done, I don't think any court is going to have any problem with using the UCMJ and the Manual for Courts-Martial.

We decided, this Nation decided, early on that this was going—we were going to deal with terrorism as a war rather than as a criminal activity, and I think that was a good decision, but that in itself is a new paradigm, and what we have done is say in this war we are now going to start prosecuting people. We didn't prosecute Hitler's driver or bodyguard and probably wouldn't have if we had captured him. This is different. We are taking people who are coming in off the battlefield, and rather than just holding them, which we could do, we want to prosecute them. That is fine, but if we are

going to do that, we have to do it in accordance with certain rules that are generally accepted as indispensable by civilized people. I am proud to be a lawyer. I think our system of justice defines how good this country is. I think that we have the opportunity now to demonstrate to the rest of the world what that system looks like, and, with some minor modifications to the UCMJ, we can do that. We shouldn't reverse-engineer the commissions, assuming that everybody is guilty, and then create a commission that is geared to proving that point. We have to start at the beginning. And I would suggest that we do that with the Uniform Code of Military Justice.

Thank you, sir. I look forward to your questions.

Senator GRAHAM. I don't want to belabor the point. What we're trying to do is find a way to make the commissions as effective as possible. Let's get back to this idea about what Senator Reed said, who is a dear friend, if we looked at every detainee as a common criminal. Mr. Marcus, as a domestic crime, what legal theory would we have to hold someone indefinitely if they were all viewed as a domestic criminal law prism? How could you do that?

Mr. MARCUS. Senator, I don't think there is any existing authority. I'm not sure there should be.

Senator GRAHAM. Mr. Chairman, it would be the biggest mistake this country could make, to use the criminal model, but yet still hold people indefinitely without trial. I do not believe that is a choice we have to make, but if we're going to view these people as common criminals across the board, then we've lost the ability to use military law, which would allow detention. Do you agree, if you use the law of armed conflict you could detain someone indefinitely?

Mr. MARCUS. Yes, I do, Senator, subject to the caveat of Justice O'Connor's opinion in the Hamdi case, saving the issue of forever.

Senator GRAHAM. General Altenburg, in the Hamdi case Justice O'Connor said you have to have something akin to Article 5 under the Geneva Convention to make the initial determination. Under the Geneva Convention, all that's required under Article 5 to determine status is an independent tribunal; is that correct?

General ALTENBURG. Yes.

Senator GRAHAM. In the battlefield world that could be one person. Is that right, Admiral Hutson?

Admiral HUTSON. Yes, I think that's right.

General ALTENBURG. Senator, under the Geneva Convention that's true. The United States, however, has implemented it so that it requires three officers. You cannot, for example, use just one officer.

Senator GRAHAM. Okay, so it's a three-officer decision. The point I'm trying to make is that I don't want to use the Article 5 dynamic because, Admiral Hutson, you said before, this is a war without end. We're going to need something new. It goes back to Senator Udall's statement, we have to come up with a hybrid system.

For those people that we're not going to try or be able to try, we're going to have to do something beyond Article 5. That's where

I think civilian courts under habeas play a very important role. I want to make sure we preserve that.

Admiral HUTSON. I think we've already, in some respects, made a decision that they're criminals, in the sense that we're prosecuting them in the first place. First of all, I don't think you have to make the choice of prosecuting them or holding them. If you want to hold them, you can hold them.

Senator GRAHAM. Under what theory?

Admiral HUTSON. Under the theory that they are prisoners presumably caught in the war. But in World War II, in Korea, and in Vietnam, we didn't prosecute Hitler's driver.

Senator GRAHAM. Right.

Admiral HUTSON. We held him if we had him, until the cessation of the hostilities.

Putting aside Khalid Sheikh Mohammed and people like that, once you decided that you're going to prosecute somebody like Hicks, you've already in my mind made the decision that he's a criminal.

Senator GRAHAM. A criminal under the law of armed conflict. The point I'm trying to make is that domestic criminal law applied to the detainee population would not allow this Nation to honorably hold someone indefinitely. Do you all agree with that?

General ALTENBURG. I do.

Admiral HUTSON. I do, yes, sir.

Mr. MARCUS. Yes, sir.

Senator GRAHAM. Do any of you doubt that some of the people being held at Guantanamo Bay, if released tomorrow, would go back to killing Americans?

General ALTENBURG. I agree with that statement.

Senator GRAHAM. Admiral Hutson?

Admiral HUTSON. I haven't looked at their files, but it's certainly possible. I would presume that would be the case.

Senator GRAHAM. I'll just end with this, Mr. Chairman. I want to compliment this committee. I think you have taken a very reasoned approach to military commissions. They're historically valid. The Supreme Court has told us how they should be formed. What we are doing with this bill, in my opinion, is setting a standard beyond what international law would require if they were brought to The Hague and is something the Nation can be proud of. I don't think we've weakened ourselves at all. I think the extra process that we're providing these detainees will confer a legitimacy to the trials that is necessary for us to win this war. I think we're very close to producing a product the Nation can be proud of, and I've enjoyed working with you.

Chairman LEVIN. Thank you very much, Senator Graham, for all the energy and effort and experience that you've put into this effort. It's been invaluable.

Senator Begich.

Senator BEGICH. Mr. Chairman, thank you very much. Thank you, Mr. Chairman and Senator Graham, for your work on this.

I have some clarification questions. Admiral Hutson, I'm following up on what Senator Graham said. In 2006 you made some comments in regards to the commission and the concept of the commission with some recommendations. Then in your explanation

that you just gave you indicated you supported the concept if it would have had certain people on it, and then you kind of stopped there in your explanation.

I'm trying to find out the difference from then to now, so I understand. Then I have another follow-up for you.

Admiral HUTSON. I think the difference is time. We can't walk that cat back. We've tried this twice. It's been roundly criticized. I very much admire the work that this committee has done with this proposed legislation. The question is what do we get out at the other end of the process, and I have to say that I've changed my mind. I've come to believe that the Federal courts have demonstrated over the years their ability to do this.

As I said before, I worry about the criticism that it's going to bring on the military. We're asking the military to try to be the organization responsible for prosecuting the worst criminals, among the worst criminals in our Nation's history. That's just not part of DOD's mission. I think it's a distraction that is unnecessary, given the fact that we have this well-regarded DOJ and Federal court system.

Senator BEGICH. Let me ask you this. First a comment. I don't worry too much about criticism for DOD or others. It's life. No matter what you make, in decisions you're going to get criticized for something, even if you do something that you think is very well intended. That's the way life is and I think DOD has withstood criticism on many fronts over the decades and I'm not too worried about that. That shouldn't be a reason why we design policy, if you're going to get criticized or not.

Do you then believe that all detainees should go through the Federal court system and there should be no commission of this kind or any element of this? When I say "this," in this situation that we're in now or any future situation in any conflict?

Admiral HUTSON. I was gratified when I heard Jeh Johnson say—although not everybody was—that there was an administration preference for Article III courts. I'm not saying that I can't conceive of a situation in which the military commission would be appropriate. I don't see these terrorists or the alleged terrorists as being warriors or combatants. I see them as being criminals and thugs that sort of mindlessly and heedlessly commit war crimes. I'd prosecute them as criminals.

Senator BEGICH. I want to make sure we're on the same page with what I'm hearing and what you're saying. That is, in this situation the commission is not necessarily the best idea. You did not rule out that in other conflicts in the future a commission may not be a bad idea.

Admiral HUTSON. No, absolutely.

Senator BEGICH. Then why not just set it up now? Let's just do it. Your earlier argument was we've tried this, gone down this path twice, and it didn't work, and you kind of wrote it off. Now you've said that it's okay maybe in the future with some other conflict, that may not be determined yet. Why not just set it up? We have a good format now. Let's just do it.

Admiral HUTSON. I didn't want to get into that because it's not a bad argument. Just once I've set it up I wouldn't use it unless we're talking about Himmler and Goering.

Senator BEGICH. My thought on this is—and I have listened to the chairman explain this to me in a variety of ways, most recently in one of our committee meetings—I'm convinced that it seems to be a logical approach. I'm struggling on your rationale why it isn't in this situation. I guess I would just respectfully disagree. But I appreciate your comments.

To the other two, I don't know if you have any comments. I'm just trying to get clarification. I don't know if you two have any additional comments.

Mr. MARCUS. I would just say it's an interesting dialogue. There is a real debate as to whether we should treat the situation we're in as an armed conflict or whether we should treat it as a law enforcement, criminal law matter. I think Congress made the decision in September 2001 to treat this as an armed conflict, to authorize the President to use military force.

As I said in my prepared statement, we do have to take account of the fact that this is not a traditional war and that's why I think the committee has taken some steps, by changing the definition of "enemy combatant," "unlawful enemy combatant," from the way it was in the MCA, to try to limit the scope of the armed conflict approach to this.

I think as long as we're in an armed conflict authorized by Congress it's appropriate to use the military justice system to prosecute people for war crimes.

Senator BEGICH. Thank you very much.

General?

General ALTENBURG. Senator, I think that the fact that we cherish our military and what our military does for this country traditionally, and especially today, can lead us astray in trying to ennoble all people that are warriors or consider themselves warriors around the world. There's lots of bad soldiers in lots of countries and they're still protected by the law of war and they're still treated as soldiers.

My good friend Dean Hutson I think misses the mark a little bit when he talks about how he doesn't want to give them credit for that or he doesn't want to somehow ennoble them by considering them warriors. He's right that they're criminals. They're war criminals. He's right that they should be disparaged and that they're despicable and all of that. But still, based on what they've done, they have made themselves into soldiers and they made themselves into, quite frankly, a formidable enemy of this country. That's why I think that the use of military commissions and the use of military law is not only consistent, but paramount and should be used.

I agree that the Article III courts where they can be used may be appropriate, especially where you have Title 18 offenses and you don't have war crimes. I think it's an important tool for this government and that they should use military commissions in the context of this war.

Senator BEGICH. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Begich.

I think Senator Begich's point is a critical one here, that, regardless of whether or not people think that most or all of the detainees should be tried in Article III courts, we're not addressing that issue

in this legislation. We are trying to reform our military commission law so that it passes muster in the Supreme Court. That's our goal.

We're not deciding here where people would be tried, whether Guantanamo or here. We're not deciding whether or not they be tried by military commission or Article III courts. What we are doing is what I think everybody really wants us to do, including you, Admiral, which is to have procedures here which will pass muster. You very forthrightly acknowledged in your answer to Senator Begich, I thought, exactly that point. That's what our goal is here.

It can be argued elsewhere about Guantanamo or here. If you're going to have Article III trials, you clearly have to have those trials here in the United States, whether it's 10 percent, 30 percent, 70 percent. Whatever the percent is of people held in Guantanamo, you cannot empanel juries for Article III crimes down in Guantanamo. It's not practical to do it.

There's many reasons why we have to reform these procedures so that they pass muster and we're going to continue to make that effort.

We thank the three of you for your contribution to that effort. You have differences of opinion, obviously, but they're all valuable to us. If there are any suggested changes in the language that you have specifically, other than the ones that you may have addressed here today, feel free to get those to us this week for the record because we're going to be taking this bill to the floor next week.

We also have a written statement that's been presented to the committee from Professor David Glazer, Loyola Law School in L.A.; an article prepared by retired Federal Judge Patricia Wald for the National Institute of Military Justice. These materials will also be included in the record.

[The information referred to follows:]

STATEMENT OF
DAVID GLAZIER

PROFESSOR OF LAW
LOYOLA LAW SCHOOL LOS ANGELES

HEARING ON

LEGAL ISSUES REGARDING MILITARY COMMISSIONS AND THE TRIAL OF DETAINEES FOR VIOLATIONS OF THE LAW OF WAR.

UNITED STATES SENATE
COMMITTEE ON ARMED SERVICES

July 07, 2009

Introduction

I would like to express my sincere appreciation to the Chairman and members of the Committee for the opportunity to submit this statement for the record.

My name is David Glazier and I am a professor of law at Loyola Law School Los Angeles. I began researching the history of U.S. military commissions in January 2002. Having never heard of these tribunals during twenty-one years as a Navy surface warfare officer, I began by exploring their origin, jurisdiction, and procedure, publishing a note in 2003 detailing their Mexican War roots and suggesting that the Uniform Code of Military Justice (UCMJ) might require conformance between court-martial and military commission procedure.[1] I continued my research as the tribunals unfolded, publishing three additional articles providing a more comprehensive view of military commission history,[2] analyzing applicable international law standards,[3] and assessing Guantánamo commission proceedings through February 2008.[4]

While there is no doubt that the Congress has made substantial improvements to the current military commission process over that initially implemented by the executive branch, I believe that there are still major legal and practical flaws with their procedure and jurisdiction that undermine their credibility as viable legal institutions.

Historical Commission Employment

The military commission has a distinguished history as a tool for administering high standards of justice in the face of statutory gaps in criminal law coverage. Although proponents of the current commissions typically refer to ambiguous events in the Revolutionary War era and early 19th century as precedents, the military commission was specifically created, and named, by the commanding general of the U.S. Army, Winfield Scott, during the Mexican War. The statute governing the American army in that era, known as the Articles of War, only criminalized military-specific offenses such as desertion, disobedience of lawful orders, and submission of false musters. It mandated that soldiers committing ordinary criminal offenses be turned over to civil magistrates for trial.[5] When the Army entered Mexico in 1846 it was outside the jurisdiction of any U.S. state, and the limited federal criminal law of the day made no provision for extraterritorial application. There was thus no American criminal jurisdiction over even the most serious non-military offenses, and the Secretary of War determined that all that could be done even to a soldier committing murder was to discharge him and send him home.

Scott's solution was to promulgate a martial law order, essentially establishing a criminal code for territory occupied by his army and providing for the trial of offenses committed by, or upon,

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[1] David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV 2005 (2003).
[2] David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L 5 (2005).
[3] David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L. J. 55 (2006).
[4] David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008).
[5] An Act for Establishing Rules and Articles for the Government of the Armies of the United States, Apr. 10, 1806, 2 Stat. 359, 364 (1845).

his troops by military commissions. These commissions were convened, conducted, and subject to post-trial review in close conformity to court-martial practice, even to the point of convening separate tribunals for the trial of volunteer and regular soldiers as was mandated for courts-martial by the Articles of War.[6] Military commissions tried at least 409 individuals during the course of the war, a substantial majority of which were Americans.[7] Scott's initiative in using military courts to maintain order in occupied territory subsequently gained broad acceptance and is now explicitly authorized by Article 66 of the Fourth Geneva Convention of 1949.[8]

A separate tribunal, known as the Council of War, was used in a much smaller number of cases to try alleged law of war violations. Although Scott's general orders authorized their use for trying irregular Mexican fighters or bandits known as "guerillos and rancheros,"[9] the only trials that I found documented largely concerned charges of encouraging U.S. soldiers to desert. In any event, the Council of War was not used again after the Mexican War and the military commission became the single "common law" tribunal employed by the United States for trials permitted by the law of war but falling outside the statutory jurisdiction of the court-martial.

The first military law treatise recognizing the existence of a common law of war court was published by Army captain Stephen V. Benét in 1861. Incorporating the Mexican War experience in his book, Benét stated that military commissions could be used to try offenses "which are not triable or punishable by courts-martial, and which are not within the jurisdiction of any existing civil courts."[10] He observed that "commissions should be ordered by the same authority, be constituted in a similar manner, and their proceedings should be conducted according to the same general rules as courts-martial."[11]

Military commissions saw substantial use during the Civil War although given the large influx of volunteer officers who assumed senior positions with no understanding of military law or the law of war, one must be careful about attempting to draw lessons from individual trials. Government records, for example, reveal a number of Union soldiers executed following trials by low level courts-martial legally barred from imposing capital punishment and even summary execution without any trial at all.[12] Nevertheless, this era saw the first statutory treatment of the military commission. Congress formally created the position of Army Judge Advocate General in 1862 and among his assigned tasks was reviewing "the records and proceedings of all courts-martial and military commissions."[13] This language implies congressional endorsement of Scott's practice of giving both types of trials the same post-trial review, which continued into the

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[6] *See* Glazier, *supra* note 2 at 33-34.
[7] *See id.* at 37.
[8] Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].
[9] Winfield Scott, Gen. Order No. 372 (Dec. 12, 1847) in Orders and Special Orders, Headquarters of the Army, War with Mexico, 1847-1848, Vol. 41½, at 575, Records Group 94, Nat'l Archives and Records Administration, Washington D.C..
[10] STEPHEN V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 15 (2d ed. 1862).
[11] *Id.*
[12] *See* List of U.S. Soldiers Executed by U.S. Military Authorities During the Late War (1885), *microformed on* Nat'l Archives Microform Publication, M1523, Proceedings of U.S. Army Courts-Martial and Military Commissions of Union Soldiers Executed by U.S. Military Authorities, 1861-1866.
[13] Act of July 17, 1862, An Act to amend the Act calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions, ch. 201, § 5, 12 Stat. 597, 598 (1863).

twentieth century. This post-trial review was far from a mere formality, a number of military commission verdicts were overturned by Judge Advocate General Joseph Holt for "legal technicalities" such as improper charges or failure to comply with court-martial procedure.[14] In 1863 Congress amended the Articles of War to permit courts-martial to try American servicemen for a broad range of ordinary civilian offenses during "time of war, insurrection, or rebellion,"[15] obviating the need to employ common law military commissions in this role.

The Civil War also saw the first federal judicial review of military commission trials, with two key cases confirming that these tribunals would receive the same scrutiny as courts gave actual courts-martial. In *Ex parte Vallandigham*[16] the Supreme Court held that it lacked appellate authority over military commission convictions, exactly as it had for courts-martial five years previously in *Dynes v. Hoover*.[17] In the more famous *Ex parte Milligan*[18] decision, the Court established that it could hear habeas challenges to military commission jurisdiction, as it did with courts-martial, en route to overturning the military trial of a civilian while regular courts were open. Military commissions continued in the South for several years after the Confederate surrender, with Congress specifically approving this practice in the 1867 Reconstruction Act.[19]

Military commissions saw extensive use again during the Philippine Insurrection of 1899-1902 which followed U.S. acquisition of the islands in the Spanish-American War. The brutality of that conflict, particularly the violence done by the insurgents to fellow islanders suspected of collaborating with the United States, bears striking resemblance to events in Iraq a century later. As an occupying power, the United States used military commissions to try both serious civilian criminal offenses and law of war violations, while soldiers were tried by court-martial. These commissions continued the historic practice of close conformance to court-martial procedure, including faithful application of the same common law rules of evidence employed in U.S. federal courts, including restrictions on hearsay evidence, protection against self-incrimination, and refusal to admit confessions absent a showing of voluntariness.[20]

In 1911 Enoch Crowder, who had served as the senior judge advocate in the Philippines during the insurrection, was appointed as the Army Judge Advocate General. He promptly undertook a comprehensive rewrite of the Articles of War which was introduced in Congress in 1912. Several of his revisions were enacted in 1913, including the grant of statutory authority to general courts-martial to try law of war violations; the balance of his changes were ultimately incorporated in the Army's appropriation bill in 1916. These included two articles addressing military commissions which were carried over into the UCMJ and which, prior to the Military Commissions Act of 2006, were interpreted by the Supreme Court as constituting congressional delegation of authority to the President to conduct such trials. The first of these, article 15 of the 1916 Articles of War (now UCMJ article 21)[21] was a "savings clause," declaring that the

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[14] MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 162-64 (1991).
[15] An Act for Enrolling and Calling Out the National Forces, and for Other Purposes, ch. 75, § 30, 12 Stat. 731, 736 (1863).
[16] 68 U.S. (1 Wall.) 243 (1863).
[17] 61 U.S. (20 How.) 65 (1857).
[18] 71 U.S. (4 Wall.) 2 (1866).
[19] An Act to Provide for the More Efficient Government of the Rebel States, ch. 153, § 3, 14 Stat. 428 (1867).
[20] *See* Glazier, *supra* note 2 at 49-55.
[21] 10 U.S.C. § 821.

statutory grant of court-martial jurisdiction over law of war violations did not strip military commissions of concurrent jurisdiction over the same offenses. Crowder's Senate testimony explained the purpose of this language, indicating that concurrent jurisdiction was desirable "so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient."[22]

Some modern commentators and government officials have mistakenly seized upon this language as support for the idea that military commissions could depart from court-martial procedure for reasons of convenience in trying law of war violations. To reach this result, however, requires deliberately ignoring Crowder's very next sentence, in which he testified that "[b]oth classes of courts have the same procedure,"[23] as well as lack of familiarity with military justice procedures of that era. Although modern court-martial convening authorities directly determine which cases will be tried, standard practice in earlier days was to issue general orders designating the officers comprising a court and where it would sit so that subordinate commanders could refer offenders under their control to trial. The convening authority typically only learned details of individual cases when records of convictions were forwarded to him for post-trial review. Virtually identical orders were issued to convene courts-martial and military commissions, and a field commander having custody of a law of war violator could, as of 1916, refer them to trial by either military commission or court-martial, depending upon which court was more "convenient" in terms of timing and location, *not* procedure.

The second article adopted in 1916, now UCMJ article 36, authorized the President to make rules for "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals."[24] Crowder's intention was to overcome the difficulty of serving officers in the field having to keep abreast of formalities of the common law rules of evidence by having the President issue a manual (i.e., the Manual for Courts-Martial) explaining the applicable rules. Officers on the Army's General Staff opposed the inclusion of this article, believing it could be used to allow the admission of "opinions, affidavits, questionable records, hearsay, etc."[25] But both Crowder and the Secretary of War argued that this authority was to be interpreted narrowly, and the article mandates that the President "shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ."[26] Military rules of evidence used in courts-martial have continued to closely track those employed in federal courts to this day.

The first deliberate downward departure from the practice of military commissions following the same procedural and evidentiary rules as the court-martial was the infamous trial of eight Nazi saboteurs in July 1942. Recruited by the German military, the saboteurs received extensive training before crossing the Atlantic in two U-boats. They were issued uniform items to wear ashore so they could claim Prisoner of War (PW) status if captured in the act of landing. They were subsequently rounded up by the FBI only after one of their number turned himself in and

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[22] S. Rep. No. 64-130 at 40-41 (1916) (testimony of Army Judge Advocate General Enoch Crowder).
[23] Id.
[24] 10 U.S.C. § 836.
[25] Glazier, *supra* note 2 at 62 (quoting the Report of a Committee on the Proposed Revision of the Articles of War).
[26] 10 U.S.C. § 836.

provided information on how to locate the others. News of the arrests provoked widespread public calls for the saboteurs' prompt execution. Unfortunately U.S. criminal law lacked any suitable offense for which more than a few years in prison could have been awarded. The solution proposed to President Roosevelt by Attorney General Francis Biddle was to try the saboteurs by a closed military commission, and his memo to the President suggested, without any precedential support, that the tribunal could take procedural shortcuts. The memo included a proposed military order which Roosevelt signed, purporting to deny judicial oversight and providing only for his personal post-trial review while authorizing the panel to make its own rules of procedure and to admit any evidence "probative to a reasonable man."[27]

The use of a military commission to try the saboteurs at a time when U.S. federal courts were open, and the subsequent Supreme Court decision upholding the trial,[28] have attracted substantial modern criticism, but the reality is that the use of a commission applying the law of war to these facts seems generally consistent with their traditional employment as jurisdictional gap fillers. The saboteurs military affiliation and use of uniform items to establish claims to PW status support finding that their subsequent efforts to disguise themselves as civilians in preparation for conducting clandestine acts of sabotage placed them in violation of the law of war. It is not the fact of their military trial or even the secrecy, given the real need to keep the Nazis from learning how vulnerable the United States was to this type of operation, which should be at issue, but rather the unjustified departure from accepted due process standards. The irony is that this was wholly unnecessary; the FBI had assumed the saboteurs would be tried in federal court and had fully complied with established criminal procedure standards. The trial record shows that each saboteur had freely admitted their role.[29] Also generally overlooked today is the fact that when confronted with the case of two spies landed by U-boat in 1944, FDR issued a new military order restoring much of the commonality between military commission and court-martial procedure, including re-imposing the same post-trial review process.[30]

There are several lessons relevant to current commission employment that I think should be drawn from the World War II (WWII) era experience. First, careful judicial scrutiny of any commission trials should be expected. Although habeas review of military trials was still strictly limited to matters of jurisdiction in the 1940s, the Court nevertheless heard arguments and issued opinions in a series of cases.[31] Given the Court's recent Boumediene decision finding detainees at Guantánamo have a constitutional right to habeas review,[32] it seems inevitable the any commission trials, whether conducted there or in the United States, will receive collateral review in federal courts in addition to whatever direct review Congress may authorize. And it is important to note that the scope of matters considered under habeas review of military trials has been considerably expanded in the half-century since the last cases stemming from WWII were

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[27] President Franklin D. Roosevelt, Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942).
[28] *Ex parte* Quirin, 317 U.S. 1 (1942).
[29] See Nazi Saboteur Commission, Transcript of Proceedings before the Military Commission to Try Persons Charged With Offenses Against the Law of War and Articles of War, available at http://www.soc.umn.edu/~samaha/nazi_saboteurs/indexnazi.htm (last visited July 5, 2009).
[30] *See* Military Order, 10 Fed. Reg. 549 (Jan. 16, 1945).
[31] Cases decided include: Quirin, *supra* note 28; *In re* Yamashita, 327 U.S. 1 (1946); Duncan v. Kahanamoku, 327 U.S. 304 (1946); In re Homma, 327 U.S. 759 (1946); Hirota v. MacArthur, 338 U.S. 197 (1948); and, Johnson v. Eisentrager, 339 U.S. 763 (1950).
[32] Boumediene v. Bush, 553 U.S. ____; 128 S. Ct. 2229, (2008).

heard.[33] Given the coercive interrogation practices known to have been used on many current detainees, we should also be mindful of the ultimate results of the Malmédy trial which stemmed from an incident during the Battle of the Bulge in which members of a German SS unit shot approximately one hundred disarmed American prisoners. The incident produced a huge U.S. outrage and demands for rapid justice, leading to the trial and conviction of seventy-three Germans, ranging from junior soldiers to several generals. Forty-three were sentenced to death. It later emerged that the convictions were based on statements obtained through coercive practices (tame by Guantánamo standards) and public opinion rapidly reversed, resulting in the reprieve of all the condemned and no one ended up spending more than ten years in prison.[34]

Commission Use Today

Perhaps the fundamental question that should be asked today is why use military commissions at all? In the immediate aftermath of the September 11, 2001 attacks (9/11), it seemed plausible that military trials could be legally sound. Although doubters remain to this day, the United States clearly has the right to consider itself in an armed conflict with al Qaeda and the Taliban. The international community, including the North Atlantic Treaty Organization (NATO), has generally recognized 9/11 as an armed attack and Congress specifically authorized the use of force against the perpetrators of those events and supporting forces. This permits holding adversaries criminally liable for law of war violations, and since only a partial subset of possible offenses have been codified as federal crimes,[35] a military tribunal based on customary law of war authority would be required to try the full scope of potential war crimes. But it is not necessary to use military commissions for this purpose; UCMJ article 18 retains the 1913 Articles of War language placing "any person who by the law of war is subject to trial by a military tribunal" within the jurisdiction of a general court-martial.[36] Concerns articulated about evidence collection under battlefield conditions and protection of classified evidence seem to fundamentally be red herrings. Actual courts-martial deal with these same issues on a routine basis in wartime, and the Supreme Court has held Fourth Amendment search provisions inapplicable to aliens outside the United States.[37] Furthermore, the President already has statutory authority to further modify court-martial rules of evidence where he finds that it is not "practicable" to apply those used in federal district courts. It thus seems likely that the real reason military commission use continues to be advocated despite the seven years of serious adverse publicity which they have accrued is a desire to secure convictions based at least on part on statements obtained through coercive interrogation.

As the Malmédy example highlights, any use of evidence obtained through coercion is liable to backfire politically. But this is likely to be particularly true in the case of military commissions given the documented history of the migration of techniques used in the Survival, Evasion, Resistance, and Escape (SERE) training provided to U.S. serviceman into post-9/11 interrogation practices. The techniques to which U.S. servicepersons are exposed in SERE were not developed by our adversaries to be truth-seeking, but rather specifically for the purpose of

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[33] *See, e.g.*, Burns v. Wilson, 346 U.S. 137 (1953) and United States v. Augenblick, 393 U.S. 348 (1969).
[34] *See, e.g.*, JAMES J. WEINGARTNER, CROSSROADS OF DEATH (1979).
[35] *See* War Crimes Act of 1996, 18 U.S.C. § 2441.
[36] 10 U.S.C. § 818.
[37] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

obtaining false admissions to be used in show trials or for propaganda purposes. And a key point the SERE curriculum made to students is that while most can successfully resist providing useful intelligence information in the face of openly coercive practices, they are much more likely to be vulnerable to rapport-building type techniques. Both the Axis and Allied powers relied almost exclusively upon the latter type approach in WWII to gain useful information from captured enemy personnel.[38]

Trials admitting evidence based on coerced evidence will also undermine U.S. credibility in our foreign relations. Press accounts from this past weekend report that Iran has used practices such as "sleep deprivation, solitary confinement, and torture" to induce opposition figures to confess to their involvement in recent post-election demonstrations being part of a plot to bring down the government.[39] It is inconceivable to me how allowing evidence obtained through such means can enhance our national security given that we are essentially engaged in a counter-insurgency with al Qaeda and the Taliban in which we fundamentally must persuade rank and file Muslims that we are morally superior to our adversaries.

Judicial Review of Military Commissions

Continued commission use raises distinct legal questions as well. It seems all but inevitable that federal courts will entertain collateral challenges to military commission trials which are likely to drag proceedings out for years even if Congress makes no statutory provision for direct appellate review by Article III courts. The Military Commissions Act of 2006 and the proposed further revisions this committee is now considering are likely to resolve the issue of inadequate congressional delegation which the Court found at issue in Hamdan.[40] But that will only be the starting point of judicial inquiry. First, of course, courts will evaluate whether or not the commissions at issue have complied with whatever mandates Congress ultimately chooses to impose. But I think it extremely likely that courts will go much further and evaluate whether commission procedures comply with external legal criteria, just as the Hamdan court considered both compliance with the UCMJ and Common Article 3 of the Geneva Conventions.

Since the primary source of authority for congressional legislation in this area is Article I's grant of power to "define and punish . . . Offences against the Law of Nations,"[41] courts may read this authority as limited by a requirement that enactments based on the law of war do in fact comply with that law. In my opinion one of the most problematic aspects of the government's conduct of operations against al Qaeda and the Taliban has been the failure to soundly ground it within the law of war. A prime example has been the ambiguous classification of detainees as "enemy combatants," a term crafted by Department of Defense leadership in early 2002 which lacks any clear legal foundation. The law of war conditions who may be attacked and when, who may be detained and under what conditions, and who may be tried and by what tribunals on recognized classifications of combatant and civilian. Because the law of war immunizes combatants from

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[38] For a more detailed discussion of these issues with supporting citations, see pp. 61-65 of David Glazier, *Playing by the Rules: Combating al Qaeda Within the Rule of Law*, forthcoming 51 WILLIAM & MARY L. REV (2009), available at http://ssrn.com/abstract=1374613.

[39] Michael Slackman, *Top Reformers Admitted Plot, Iran Declares*, N.Y. TIMES, July 3, 2009.

[40] Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

[41] U.S. Constitution, Art. 1, §8, cl. 10.

prosecution under ordinary domestic laws for the wartime violence they commit, it must regulate their conduct and provide for the prosecution of acts exceeding its permissible bounds. Civilians, in contrast, have no legal right to participate in hostilities and correspondingly, no immunity from domestic law. It is thus unnecessary for the law of war to regulate their conduct because they can be tried by any ordinary criminal court having jurisdiction over the locus of their actions. While civilians have frequently been tried by past military commissions, the legal basis of such trials was normally the tribunal's role as an occupation law court authorized by the law of war to enforce domestic or martial law and not as a law of war tribunal per se.

The precise locus of unlawful combatants within this classification scheme is debated even among experts. While many argue that they are actually civilians; my personal opinion is that the better interpretation is that they are a subset of combatants subject to attack at any time and place but who lose their immunity from prosecution by willful failure to distinguish themselves from civilian populations. I think this result is consistent with the treatment of the Nazi saboteurs. Given this uncertainty, however, the United States could fairly choose to treat our terrorist adversaries as either combatants or civilians so long as it faithfully conformed to the chosen regime.[42] But I believe that the current government practice, which I would characterize as attempting to cherry-pick the most advantageous elements of each classification while accepting none of the concurrent restrictions, is logically indefensible, and will only serve to invite greater critical judicial scrutiny and prolonging the duration of resulting litigation.

Even if the current detainees are validly subject to law of war tribunals, the current commission process may still be problematic. If the Third Geneva Convention is applicable to this conflict, for example, or if key provisions have come be declarative of customary international law, then it may limit trials to the same tribunals that can try U.S. service personnel, i.e., courts-martial and regular federal courts, and bar any coercive pressure to admit guilt.[43] If the government is correct that the detainees fall outside the protections of the Third (PWs) and Fourth (civilians) Geneva Conventions, then they should fall under the catch-all ambit of Art. 75 of Additional Geneva Protocol I of 1997. Although the United States has not ratified this treaty, administration officials from the Reagan and even the second Bush administrations have publicly declared this article to be declaratory of customary law.[44] Current commission procedures seem to violate several requirements contained in this article, including mandates for equal access to witnesses as the government enjoys, a prohibition against compulsion to admit guilt, and bar against ex-post facto crime definition.[45] The MCA's provision that the defense shall have only a "reasonable opportunity" to obtain witnesses also seems to fall short of the "equality of arms" standard adopted by current international war crimes tribunals.

The charges being levied against the detainees are another highly problematic aspect of current military commission practice. Most defendants to date, for example, have been charged with conspiracy despite general agreement among scholars who have examined this issue that it fails

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[42] *See generally,* Glazier, *supra* note 38.

[43] *See* Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Arts. 99 & 102.

[44] *See, e.g.*, William H. Taft, IV, *The Law of Armed Conflict After 9/11: Some Salient Features*, 28 YALE J. INT'L L 319, 322 (2003)

[45] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3-608, Article 75.

to state a violation of the law of war, an opinion shared by at least four justices participating in the Hamdan decision. Providing material support to terrorism is another example of a valid offense under ordinary federal criminal law that seems to lack credible precedent as a law of war violation. Even where the law of war does clearly authorize prosecution, military commission prosecutors have seemed either ignorant of, or willing to ignore, limits placed by that law. Omar Khadr, for example, is charged with spying against U.S. forces in June of 2002 but the same charge sheet then declares that he received extended training on land mines the next month.[46] The problem is that spying, which is distinct from the domestic crime of espionage, can only be prosecuted if the accused is caught behind enemy lines; successfully returning to one's own forces is a permanent bar to prosecution.[47] So the government's own charging document provides prima facie evidence that Hamdan cannot be lawfully prosecuted for this offense.

Federal courts are unlikely to require military commissions to comport with the full Bill of Rights, regardless of where trials are conducted. But it is quite probable that they will ultimately conclude that any trials conducted by officers of the United States must at least comport with the due process constraints of the Fifth Amendment, a position advocated more than a half-century ago by the dissent in *Ex parte* Yamashita.[48] This conclusion has reportedly been reached by the Obama administration's Office of Legal Counsel, at least with respect to trials conducted in the United States.[49] But given the degree of control the United States exercises over Guantánamo, I believe that Boumediene predicts that the same result would be reached there too.[50]

The scope of Fifth Amendment due process requirements can be somewhat ambiguous, but two areas addressed in past decisions could have significant impact on the military commissions as currently structured. First, courts have held that the Fifth Amendment is to be read to incorporate equal protection,[51] and commissions which exclude Americans by statute, Britons by policy, and have given Australians and Canadians special privileges denied defendants from Muslim countries are hard to see as meeting this standard. Since due process has also been held to require any admissions by an accused to meet a "voluntariness" standard to be admissible,[52] this should also doom any efforts to admit statements obtained via any degree of coercion at all.

Alternatives to Military Commissions

The administration has at least three viable alternatives to pursuing trials of Guantánamo detainees by military commissions. Trials in regular federal courts provide the most credible means to convict suspected terrorists and have the clear advantage of providing a broad range of proven offenses such as providing material support to terrorism that cover conduct of many

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[46] *See* Department of Defense, Charge Sheet, Omar Ahmed Khadr, approved Apr. 24, 2007 *available at* http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf

[47] This is a long-standing law of rule, now codified in Additional Geneva Protocol I article 46. See, e.g., U.K. Ministry of Defence, The Manual of the Law of Armed Conflict

[48] 327 U.S. at 26 (J. Murphy dissenting).

[49] Jess Bravin, *New Rift Opens Over Rights of Detainees*, WALL ST. J., June 29, 2009, *available at* http://online.wsj.com/article/SB124623153856866179.html.

[50] *See* 128 S. Ct. at 2246, 2252-59.

[51] *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[52] *See, e.g.*, Dickerson v. U.S., 530 U.S. 428, 432-34 (2000).

Guantánamo detainees. Such trials should also provide the narrowest possible bases for appeal or collateral challenge.

For those detainees who can be credibly established to both be subject to the law of war and to have violated its tenets, trial by regular general court-martial should be appropriate. Courts-martial have well-defined procedures that have stood up to prior judicial scrutiny, and should therefore provide substantially less grounds for judicial review than the unproven and highly controversial military commissions. We should be clear that U.S. courts-martial are not the "gold standard" of military justice as sometimes proclaimed by their champions. A number of democracies such as Germany and the Netherlands have done away with courts-martial altogether, conducting military trials in regular civilian courts.[53] Our closest allies and common heirs of English military legal tradition, Canada and the United Kingdom, have been forced to substantially alter courts-martial processes that were very much like our own because of concerns over the problematic multiple roles entrusted to the convening authority and the lack of judicial independence.[54] Nevertheless, the implicit endorsement of trial by courts-martial in the Third Geneva Convention should effectively minimize any criticism on these grounds, and they should be substantially better received than the current military commissions.

Finally, for those detainees reasonably determined to pose a valid continuing threat to U.S. security but unable to be tried for whatever reason, preventive detention fully compliant with the law of war should be a lawful option as what the Supreme Court termed a "fundamental incident" of the authorization to use military force against al Qaeda.[55] Although current conditions at Guantánamo do not comply with the law of war,[56] there is no practical reason why this cannot be readily corrected.

Conclusion

Given both the many problematic legal issues associated with military commission use and the substantial adverse publicity that has stemmed from efforts to employ them over the past seven years, it is my opinion that Congress would best serve our national interest by abandoning efforts to improve them and instead direct the administration to end their use in this conflict. Congress has already provided the executive a robust set of criminal statutes enforceable in federal courts, a formal statutory court-martial process authorized to try law of war violations, and implicit authority to conduct preventive detention in compliance with the law of war. It need not do more.

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[53] *See, e.g.*, Friedhelm Krueger-Sprengel, The German Military Legal System, 57 Mil. L. Rev. 17 (1972); Bart Damen, The 1991 Revision of the Military Jurisdiction System of the Netherlands (2003).

[54] See, e.g., R. v. Généreux, [1992] 1 S.C.R. 259 (holding Canadian courts-martial violated that country's Charter of Rights and Freedoms) and Findlay v. The United Kingdom, (1997) 24 E.H.R.R. 221(holding U.K. courts-martial violated the European Convention on Human Rights).

[55] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

[56] *See* Glazier, *supra* note 38 at 56-61.

Foreword

Patricia M. Wald*

The military commissions whose published rulings have been compiled by the National Institute of Military Justice in this informative volume may soon be a footnote to history. Conceived in controversy in the immediate aftermath of 9/11, denounced by civil libertarians for their deviations from traditional due process guarantees, and delayed for years in getting started, the commissions were pronounced an unconstitutional exercise of unilateral executive power by the Supreme Court of the United States in the 2006 *Hamdan* case[1] before a single trial could be held. Ricocheted back to Congress, an intense period of hearings and negotiations produced the Military Commissions Act of 2006 (MCA) which, in the view of original critics, was arguably more restrictive of individual rights under domestic and international law. In the last few years, a handful of Guantánamo detainees have been designated for trial before the MCA commissions but only one full-scale trial has been completed. A former Chief Prosecutor publicly labeled the Commission's handling of evidence as so "chaotic" as to make successful prosecution impossible.[2] Most recently, the Convening Authority who oversees the post-MCA military commission system refused to convene a trial because the defendant had been subjected to torture,[3] and a new President promised in his election campaign to abandon the commissions altogether.[4] Their future looks problematical, at best.

So, why, one may ask, pay attention to their work product, confined as it is to the pretrial rulings and one interlocutory appeal in four cases, apart from history for history's sake? There is, I believe, a good answer. Although this genre of military commissions may disappear, as such, a national debate continues within government and outside among the press and public: should al-Qaeda adherents and other terrorists accused of war crimes against the United States be tried in our regular civilian courts or instead relegated to special "national security courts" which would operate under different rules as to openness, use of classified information, availability of privileges against self-incrimination and admissibility of evidence secured by torture or coercive methods? Before giving serious consideration to the creation of a separate and less restrictive system of criminal justice for one group of defendants, we would do well to look at how this military commission experiment has played out and what if any lessons can be learned from its brief lifespan.

One thing can be said for sure. The handful of defendants represented in the four military commission cases had vigorous representation from military and civilian counsel. There were

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[1] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[2] Peter Finn, *Evidence in Terror Cases Said to Be in Chaos*, WASH. POST, Jan 14, 2009, at A08.

[3] Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A01.

[4] Remarks by Senator Barack Obama, Washington, D.C., Aug. 10, 2008 ("As president, I will close Guantanamo, reject the Military Commissions Act and adhere to the Geneva Conventions.").

well over a hundred motions—jurisdictional motions to dismiss, motions to compel discovery, motions complaining of unlawful command influence over the military judges trying the cases, motions to suppress evidence obtained through coercion, motions for expert witnesses, speedy trial motions, and motions for access to classified information. Insofar as it is possible to evaluate the energy and stamina of defense counsel from the commissions' rulings alone, it appears that they left no stone unturned in advocating for their unpopular clients.

But MCA mandates and rules issued by the Department of Defense did not make for a level playing field. From my experience as a federal judge and jurist at the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), which prosecuted and tried crimes very similar to those under the military commissions' jurisdiction, I was struck by the almost hopeless lopsidedness of the process. For instance, in the early stages of the *Hamdan* case (which eventually did go to trial, resulting in a conviction and a net sentence, after allowing for time served, of 4½ months), the defense sought to compel the production of nine witnesses, five of them detainees at Guantánamo, where the trials would be held. The government resisted making the detainees available, despite their relevance to the defense, because they were "highly placed members of Al Qaeda" and their testimony might reveal national security information. The trial judge would go no further than to allow the defense to propose written questions for the five requested detainee-witnesses from which a government security officer, not associated with the Prosecution, would then redact questions or answers that he deemed to pose a security risk. If, additionally, the security officer thought that the answers attempted to transmit sensitive information to enemy comrades through the defense team, he could delete them entirely. The military judge had no say in the matter.[5] Still, the defense team fared better in that instance than when it was told by the judge that "a witness who cannot, because of security prohibitions resulting from his association with al-Qaeda, appear to testify is 'unavailable' ... [and] the Defense is not entitled to the production of an unavailable witness."[6] Defendants of course had no access to classified information or in many cases even to the names of witnesses against them. This adversarial disadvantage is, I have been told by military lawyers, exacerbated by the notorious paucity of Arabic speaking translators who can produce for counsel and clients the kind of comprehensible translations that are necessary for effective trial preparation. Statements made by the defendants are presumptively classified and the Defense cannot make public its own pleadings without permission from the Commission. Classified information to which only military counsel has access in many cases is endemic in these proceedings, and unlike civilian courts that operate under the Classified Information Procedures Act (CIPA),[7] if the government chooses not to make the classified mattter or an adequate substitute available to the defense, the court will not dismiss the charges. In one bizarre ruling, the defense was allowed, over the objection of the Prosecution, to view the physical conditions of detention but subject to counsel's

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[5] *United States v. Hamdan*, 1 M.C. ___ (Mar. 14, 2008) (Ruling on Reconsideration on Motion for Stay and Access to High Value Detainees).

[6] *United States v. Hamdan*, 1 M.C. ___ (Apr. 24, 2008) (Ruling on Defense Motion to Compel Production of Out-of-Country Witnesses).

[7] 18 U.S.C. App. III §§ 1-16.

agreement to be blindfolded on the way there.[8] There is a distinctly Kafkaesque quality to the proceedings.

Even though only a few judges were involved in the four cases, their approaches toward the proceedings varied widely. One judge appeared to be endeavoring within the restrictions imposed by MCA and implementing rules to approximate regular criminal justice norms. Thus, he granted a suppression motion in the case of a juvenile accused of throwing a hand grenade at a car in which two American servicemen were wounded. The juvenile, he found, had been interrogated while under the influence of drugs by Afghan police who threatened to kill him and his family if he did not confess to being part of a terrorist network.[9] The judge also suppressed confessions made hours later to American interrogators on the ground that the Prosecution had not shown that the coercive effect of the Afghan police interrogation had been dissipated when American interrogators took over his custody. The juvenile was still drugged, hooded and shackled[10] (The ruling has been appealed to the Court of Military Commission Review, the intermediate appellate body created by the MCA.[11]). Other judges, however, ruling summarily, denied without explanation what seemed like plausible defense arguments. Typically, one held: "The Commission finds that the documents sought are not relevant."[12] That's it. Should these inherently controversial commissions continue to operate, minimal fairness requires that the presiding judges explain the bases of their rulings apart from mere citation to the Act or the rules.

The danger of unlawful command influence on these commissions has been highlighted by critics. That charge surfaced repeatedly in the proceedings memorialized in this volume, focusing on remarks made to the Chief Prosecutor by the Legal Adviser to the Convening Authority (as well as the Defense Department's General Counsel) about bringing more "sexy" cases, making greater use of classified information and being less resistant to the use of information elicited by coercive methods in preparing cases for trial.[13] One Chief Prosecutor resigned for alleged command "nano-management," declaring publicly that "full, fair and open trials were not possible under the current system."[14] Charges were made in one case that a military trial judge had been replaced under suspicious circumstances.[15] In another, the Legal Adviser whose duties usually encompassed making recommendations to the Convening Authority

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[8] *United States v. Mohammed*, 1 M.C. ___ (Oct. 26, 2008) (Motion for Access to View and Inspect the Conditions of Confinement).

[9] *United States v. Jawad*, 1 M.C. ___ (Oct. 28, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities).

[10] *United States v. Jawad*, 1 M.C. ___ (Nov. 19, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody).

[11] 10 U.S.C. §§ 948a-950w.

[12] *United States v. Khadr*, 1 M.C. ___ (Apr. 23, 2008) (Ruling on Defense Motion to Compel Discovery).

[13] *United States v. Hamdan*, 1 M.C. ___ (May 9, 2008) (Ruling on Motion to Dismiss).

[14] Morris Davis, *AWOL Military Justice*, LA TIMES, Dec. 10, 2007, at A-15.

[15] *United States v. Khadr*, 1 M.C. ___ (Aug. 15, 2008) (Ruling on Defense Motion to Dismiss for Unlawful Command Influence-Removal of Military judge).

after a trial was completed was disqualified by the trial judge from any participation in the post-trial phase:

> The Commission finds the current Legal Adviser's editorial writings and interviews defending the military commissions system combined with his active and vocal support of and desire to manage the military commissions process and public statements appearing to directly align himself with the prosecution team have compromised the objectivity necessary to dispassionately and fairly evaluate the evidence and prepare the post trial recommendation.[16]

Of course it is not possible to judge from these rulings whether unlawful command influence actually occurred, but they do point up the great risk of a system that was created uniquely for a widely despised group of defendants with substantially fewer rights or protections, precedents or traditions than the one used for regular civilian or military populations. Lawyers inside the military commission system place independent judges as their highest-priority concern. Despite the MCA's assurance of judicial independence from unlawful command influence,[17] these early cases are troubling.

It bears comment how many significant substantive rulings were made in this troubled process. While not binding or even citable in any other tribunal,[18] they could still have some effect on future cases. Among these are holdings that Guantánamo defendants—even after the 2008 Supreme Court's *Boumediene* decision[19] granting them habeas corpus rights—had no other constitutional rights. Thus it was decided that a statutory right against self incrimination in the MCA[20] applied only to testimony given at trial and not to interrogations conducted prior to trial, and the Fifth Amendment did not apply so as to fill the gap;[21] that multiple charges for acts of terrorism and supporting a terrorist organization could be based on a single act of tossing a hand grenade;[22] that juveniles could be prosecuted in the military commission system;[23] and that Congress could itself legislate as to what the common law of war encompassed and include conspiracy even though international customary law does not recognize it as such.[24] It was disap-

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[16] *United States v. Jawad*, 1 M.C. ___ (Sept. 24, 2008) (Ruling on Defense Motion to Dismiss).

[17] 10 U.S.C. § 949b(a)(2).

[18] 10 U.S.C. § 948b(e).

[19] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

[20] 10 U.S.C. § 948r.

[21] *United States v. Hamdan*, 1 M.C. ___ (Jun. 6, 2008) (Ruling on Motion to Suppress Statements of the Accused).

[22] *United States v. Khadr*, 1 M.C. ___ (Mar. 14, 2008) (Ruling on Defense Motion to Dismiss Specification 2 of Charge IV for Multiplicity and Unreasonable Multiplication of Charge).

[23] *United States v. Khadr*, 1 M.C. ___, (Apr. 30, 2008) (Ruling on Defense Motion For Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier).

[24] *United States v. Hamdan*, 1 M.C. ___, (Apr. 2, 2008) (Ruling on Motion to Dismiss); *compare Hamdan, supra*, at 2777, *with* 10 U.S.C. § 950v(b)(28).

pointing to me that in these rulings there were few if any references to decisions by international courts that have ruled on similar issues. The Commission decisions—right or wrong—seem to have been made in a vacuum. The spirit of the MCA's rejection of international law in interpreting war crimes prosecuted in U.S. courts[25] appears to have pervaded military commission law as well. The creation of a separate body of constitutional and international common law in a radically different setting and under dramatically different procedures and rules of evidence poses vexing questions for the integrity and consistency of U.S. law which proposals for new hybrid national security courts must confront as well.

Finally, the publication of these rulings verifies the practice of torture and coercion at Guantánamo which is still disputed by some government officials. Intentional sleep deprivation designed to "disorient selected detainees ... disrupt their sleep cycles ... make them more compliant and break down their resistance to interrogation" was found to have been practiced on a juvenile as part of an officially abandoned "frequent flyer" program that moved him from cell to cell, mostly at night at three-hour intervals, shackled much of the time. The same juvenile was "beaten, kicked and pepper sprayed" and had his nose broken for disobeying a guard; subjected to "excessive heat, constant lighting, loud noise, linguistic isolation ... and ... physical isolation," when, according to the judge, he had "no intelligence value." It was, the judge found, "cruel and inhuman treatment" indicating "flagrant misbehavior" on someone's part but in the end not sufficient to dismiss the charge in the military commission system.[26]

A new Administration is in pursuit of a safe and fair way to handle detainees, including those charged with war crimes, as it fulfills its promise to close Guantánamo. It may conclude—as many already have—that the MCA military commission system is a failed experiment. The National Institute of Military Justice deserves much credit for assembling these rulings. A careful reading should assist the government and the bench and bar in deciding how to go forward and what history not to repeat.

Washington, D.C., February 2009

[25] 10 U.S.C. § 948b.

[26] *United States v. Jawad*, 1 M.C. ___ (Nov. 19, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused While in U.S. Custody).

Chairman LEVIN. Any additional questions, Senator Begich?

Senator BEGICH. No, thank you.

Chairman LEVIN. If not, again with our thanks, we will stand adjourned.

[Questions for the record with answers supplied follow:]

QUESTIONS SUBMITTED BY SENATOR DANIEL K. AKAKA

HEARSAY EVIDENCE

1. Senator AKAKA. Mr. Johnson and Mr. Kris, President Obama announced recently, on May 15, 2009, that he will revive the military commission system to pros-

ecute Guantanamo (GTMO) detainees. Prior to the President's announcement, it was reported that the administration had expressed concerns that obstacles could be raised by Federal judges to prevent the prosecution of some of the Guantanamo detainees, specifically by barring the use of hearsay evidence gathered by intelligence agencies and the prosecution of detainees who had been subjected to harsh interrogation methods. Are the administration's reported concerns valid?

Mr. JOHNSON. Pursuant to Executive Order 13492, we have assembled an interagency team of personnel who are carefully reviewing each detainee's file to assess whether or not prosecution is feasible. To date, our team has reviewed over half of the cases, and a significant number of them have been referred to a joint Department of Justice (DOJ) and Department of Defense (DOD) prosecution team for potential prosecution in either civilian court or military commission. There are a number of factors that go into the decision as to the best forum for prosecution, which are detailed in the attached protocol (see Annex A) that has been agreed to by DOJ and DOD. As the President has made clear, we do not intend to rely on any statements obtained through torture or cruel, inhuman, or degrading treatment. Admission of hearsay will have to meet the hearsay standards applicable in Federal courts or military commissions. See, e.g., Fed. R. Evid. 801–807; § 949a(b)(3) of section 1031 of the 2010 National Defense Authorization Act (NDAA) (passed the Senate on July 23, 2009).

Mr. KRIS. Pursuant to Executive Order 13492, we have assembled an interagency team of personnel who are carefully reviewing each detainee's files to assess whether or not prosecution is feasible. To date, our team has reviewed over half of the cases, and a significant number of them have been referred to a joint DOJ and DOD prosecution team for potential prosecution in either civilian court or military commission. There are a number of factors that go into the decision as to the best forum for prosecution, which are detailed in the attached protocol (see Annex A) that has been agreed to by DOJ and DOD. As the President has made clear, we do not intend to rely on any statements obtained through torture or cruel, inhuman, or degrading treatment. Admission of hearsay will have to meet the hearsay standards applicable in Federal courts or military commissions. See, e.g., Fed. R. Evid. 801–807; § 949a(b)(3) of section 1031 of the 2010 NDAA (passed the Senate on July 23, 2009).

POST-TRIAL

2. Senator AKAKA. Mr. Johnson and Mr. Kris, if the Federal Government's ability to prosecute the detainees is constrained, and the detainees are set free because they are either acquitted or never put on trial, will the detainees be able, as some have asserted, to settle anywhere in the Nation and presumably continue to plot to do harm to its citizens and institutions?

Mr. JOHNSON. No. We intend to use all lawful and appropriate means to protect the American people. As the President stated in his National Archives address on May 21, 2009, although we are going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country, 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." For the detainees at Guantanamo, the President has stated that "[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." Any such detention will be based on authorization from Congress, i.e., the 2001 Authorization for Use of Military Force (AUMF). As the Supreme Court held in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2005), and as the administration has explained in its filings in recent habeas cases, the detention authority Congress has conferred under the AUMF should be informed by the laws of war, which have long permitted detention of enemy forces for the duration of the armed conflict to ensure that they do not return to the fight.

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3. Senator AKAKA. Mr. Johnson and Mr. Kris, will a detainee who is either acquitted or not put on trial go straight from the chambers of a Federal judge to that of an immigration judge?

Mr. JOHNSON. We intend to use all lawful and appropriate means to protect the American people. The authority to detain individuals under the immigration laws pending their removal from the United States, particularly where they pose a threat to national security, is one (but only one) mechanism that may be relied upon, if necessary, to ensure that detainees will not endanger our citizens.

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QUESTIONS SUBMITTED BY SENATOR JOHN MCCAIN

OVERVIEW OF MILITARY COMMISSIONS

4. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, I have a long record expressing my support for military commissions as the correct forum for trying detainees for alleged violations of the law of war. That said, trials under the system established by Congress in the fall of 2006 have not gone forward rapidly and there have been a number of issues in implementing the system that have led to delays. Are military commissions a viable forum for trying detainees alleged to have committed war crimes?

Mr. JOHNSON. Yes. As the President indicated in his May 21 National Archives speech, reformed military commissions should be available for prosecuting law of war violations. We appreciate that the Senate, on a bipartisan basis, has undertaken the initiative to reform military commissions by amending the Military Commissions Act (MCA) of 2006, and section 1031 of the 2010 NDAA passed by the Senate on July 23 identifies many of the key elements we believe are important to further improve the military commissions process. We are confident that through close cooperation between the administration and Congress, reformed military commissions can emerge as a fully legitimate and sustainable forum.

Mr. KRIS. Yes. As the President indicated in his May 21 National Archives speech, reformed military commissions should be available for prosecuting law of war violations. We appreciate that the Senate, on a bipartisan basis, has undertaken the initiative to reform military commissions by amending the MCA of 2006, and section 1031 of the 2010 NDAA passed by the Senate on July 23 identifies many of the key elements we believe are important to further improve the military commissions process. We are confident that through close cooperation between the administration and Congress, reformed military commissions can emerge as a fully legitimate and sustainable forum.

Admiral MACDONALD. Yes Senator; in my personal view Military Commissions are a viable and necessary forum for trying detainees alleged to have committed war crimes. I believe that the Military Commissions rule changes recently implemented within the executive branch and the statutory changes now under consideration in Congress will improve the Military Commissions process. However, I also believe that we need to fully invest resources—fiscal and personnel—to ensure that Military Commissions go forward in the interests of justice. In my view, this is our last and best opportunity to implement a Military Commissions system that will promote respect for the laws of war and provide justice for the innocent victims of war; while also affording accused war criminals the judicial guarantees that are recognized as being indispensible to civilized peoples.

Admiral HUTSON. They are in theory but have not been in practice. Unfortunately, we are now at a point where they would not be seen as being legitimate by most observers even if they are revamped and improved.

General ALTENBURG. Yes.

Mr. MARCUS. Military commissions, with improved procedures that the Committee has under consideration, are a viable forum for trying many of the GTMO detainees for war crimes. In some cases, however, Federal courts are a more appropriate

forum—e.g., where detainees are prosecuted for crimes committed before September 11, 2001.

5. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what have been the major reasons why military commission trials have taken so long?

Mr. JOHNSON. Only three commission cases have been completed to date. There are several explanations for this, including the Supreme Court decision in *Hamdan* v. *Rumsfeld*, 548 U.S. 557 (2006) (see Annex C), which necessitated a restart of the process (including dismissal and refiling of all charges), resourcing issues with respect to full-time agents, paralegals, attorneys, and military judges, and the need for travel to and from the trial location at GTMO.

We are working to ensure that adequate resources are devoted to the commission process—for prosecution, defense and judicial functions—so that any commission proceedings will be fair, thorough and efficient.

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We are working to ensure that adequate resources are devoted to the commission process—for prosecution, defense, and judicial functions—so that any commission proceedings will be fair, thorough, and efficient.

Admiral MACDONALD. In my personal view, the delay has been caused by a combination of factors, including flaws in the original Commissions Order and its implementing rules of evidence and procedure; defects in structure and organization; shortcomings in fiscal and personnel investment at both the investigative and trial level; legal uncertainty stemming from Habeas litigation and in particular the aftermath of the Hamdan decision, which essentially required a reset of the entire process; and finally, the unique nature of the enemy we face—a worldwide network of non-State actors who, by definition, choose terrorism and reject the fundamental notion that the means and methods of warfare must be limited, by law and humanity, to protect the innocent, prevent unnecessary suffering, and promote a just and lasting peace. This new type of war has presented complex legal and policy challenges to the political branches of our Government and the Courts.

Admiral HUTSON. We initially tried to reverse engineer the process by starting at "conviction" and work backward to ensure that result. That didn't work but we weren't willing to start fresh and create a system that would work.

General ALTENBURG. Implementing regulations for the MCA were not completed until April, 2007. At that time the convening authority began referring cases to trial. Three cases were completed in 2008, and at least three more would have been completed in 2009 if the new administration had not directed a halt to the proceedings. *U.S.* v. *Khadr* was set for trial in January 2009 (witness travel was scheduled for Inauguration weekend); *U.S.* v. *al Darbi* was set for July, 2009; and *U.S.* v. *Ghalaini* was set for September 2009. Numerous other cases were approaching trial, including the trial of the five September 11-related detainees. About 20 cases had been charged, and the prosecution intentionally withheld charging cases between November and January to avoid the appearance of manipulating the commission process. All of the cases referred to Military Commissions involve complex criminal litigation for which timelines of 1–2 years would be common in Article III courts. The novelty of the new MCA necessarily added time to the initial cases as the legality of the forum and its procedures were properly, repeatedly, and creatively challenged by defense attorneys. It is important to remember in this context that it took the Article III courts nearly 5 years to complete the prosecution of Zacharias Moussaoui; that case was ultimately resolved by a guilty plea.

Mr. MARCUS. The main reason for the unfortunate delay in bringing detainees to trial for war crimes was the last administration's creation of a commission system that was woefully lacking in fundamental fairness. This led to litigation challenging the legality of the commission system that resulted in the Supreme Court's Hamdan decision and Congress's subsequent enactment of the MCA of 2006. While the MCA improved the procedures substantially, experience since then has shown, as the committee has recognized, that additional procedural improvements are needed.

6. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, have the issues contributing to delays involved the MCA itself, policy decisions implementing it, or other issues such as resources

provided to prosecutors and defense counsel, and the difficulties raised by the amount of classified evidence?

Mr. JOHNSON. Please see the answer to question 5. Additionally, we believe that the proposed amendments in section 1031 concerning classified evidence will make commissions proceedings more efficient.

Mr. KRIS. Please see the answer to question 5. Additionally, we believe that the proposed amendments in section 1031 concerning classified evidence will make commissions proceedings more efficient.

Admiral MACDONALD. Please see my previous answer. With regard to the volume of classified evidence, although it has resulted in some delay, that factor is not significant, in my view, compared to the factors mentioned in my preceding answer.

Admiral HUTSON. I think all of those factors have contributed to the delays.

General ALTENBURG. I do not believe lack of resources has significantly delayed the proceedings. There have been delays in providing relevant discovery to the defense, largely created by the policies of the intelligence agencies; e.g., classifying all statements by High Value Detainees as TS/SCI when they obviously contain no national security information, and reluctance by the intelligence agencies to provide necessary discovery to properly cleared defense counsel. These issues generate lengthy litigation before the Military Judges. At the time the Executive order stayed military commissions, DOD had not only substantially increased staffing for both prosecution and defense, but also had given the Chief Prosecutor and Chief Defense Counsel the discretion to approve or disapprove JAG candidates offered to them by the Services. This screening process greatly improved the overall experience level and quality of counsel being assigned to commissions.

Mr. MARCUS. See answer to question 5. I am not in a position to comment on resource issues. There is no question that the problems of dealing with classified evidence have contributed to delays, requiring difficult choices for prosecutors as to what charges to bring.

7. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what aspects of the MCA would you highlight as issues that should be reviewed or changed in terms of fairness and efficiency?

Mr. JOHNSON. As this committee has recognized on a bipartisan basis, commissions and the MCA should be reformed. In May, the administration announced five changes to the rules for military commissions that we believe go a long way towards improving the process. We appreciate that the Senate, on a bipartisan basis, has further undertaken the initiative to reform military commissions by amending the MCA of 2006, and section 1031 of the 2010 NDAA passed by the Senate on July 23 identifies many of the key elements we believe are important to further improve the military commissions process. There are additional modifications we would like to see to the Senate bill, and we are working with Congress and staff on these modifications. Specifically, the administration proposes the following:

Statements of the Accused (§ 948r): The Administration believes there is a significant risk courts will find that the Due Process Clause applies to military commission proceedings, and that due process requires that statements of the accused offered in the context of commission proceedings must have been voluntarily given. A standard based on reliability and the "interests of justice" would be vulnerable to a constitutional due process challenge in those cases where a military commission construed it to allow the admission of involuntary statements of the accused. The use of such statements might then be subject to reversal on appeal. Accordingly, there are compelling legal and policy reasons to include an express voluntariness requirement. That said, we believe that any voluntariness requirement for military commissions cases should account, consistent with the law, for the context in which statements later considered by military commissions can occur. Specifically, the Administration has proposed the following as an alternative to §948r of the Senate bill, which includes a voluntariness standard for military commissions cases, as well as a clearer prohibition on the use of any statement obtained by torture or cruel, inhuman, or degrading treatment:

> **"§948r. Treatment of statements obtained by torture or cruel, inhuman, or degrading treatment; self-incrimination; other statements by the accused**
>
> "(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No Statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not

under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

"(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds that the statement was voluntarily given. 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.

The Administration can also support the following, which has the support of the Army, Navy, and Air Force 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:

"§948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

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"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) at least one of the following:

"(A) That the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.

"(B) That the statement was voluntarily given.

"(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

"(2) The characteristics of the accused, such as military training, age, and education level.

"(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Material support for terrorism (§950w(25)) and Section 950p: As you know, the President has made clear the Administration's view that military commissions are for trying law of war offenses. After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" -- an offense that is also found in Title 18 -- is not a traditional violation of the law of war, and that it should be removed from the list of offenses at §950w. We believe that conspiracy, unlike material support, can in many cases be properly charged in military commissions as a traditional law of war offense, and we urge retention of that offense in the Senate bill.

Section 950p of the existing Military Commissions Act contains a statement recognizing that the offenses codified by that Act are "declarative of existing law," and "do not preclude trial for crimes that occurred before enactment" of the law. The Senate bill eliminated this clear Congressional statement that the listed offenses codify existing law, and replaced it with a different statement about the nature of the listed offenses. *See* §950p(d) of Section 1031 of S. 1390. If the offense of material support for terrorism is removed from the legislation, we also recommend that portions of §950p of the Senate bill be deleted, and alternate wording be substituted to include a clear statement that the offenses contained in the bill codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, as follows:

"§950p. Definitions; construction of certain offenses; codification; effect

"(a) DEFINITIONS.—In this subchapter:

* * * *

"(c) COMMON CIRCUMSTANCES AND PURPOSE.—An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with armed conflict. The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not

exist before its enactment, but rather codifies those crimes for trial by military commission.

"(d) ~~OFFENSES ENCOMPASSED UNDER LAW OF WAR~~ EFFECT.— ~~To the extent that~~ Because 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 the enactment of this chapter ~~the National Defense Authorization Act for Fiscal Year 2010~~.

Jurisdiction over pre-9/11 conduct (§948d(a) of existing law). The current law also includes a provision that military commissions have jurisdiction to try offenses committed "before, on, or after September 11, 2001." The Senate legislation does not contain this language. We recommend that this language be retained from the current law by inserting it into §948d of the Senate bill as follows:

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

"A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

Hearsay evidence (§949a(b)(3) of the Senate bill). The Senate bill modifies the rules on hearsay evidence to more closely resemble the rules used in civilian courts and in courts-martial. We support the approach taken in the Senate legislation, but also propose some additional modifications to clarify the types of situations in which hearsay might be admitted, taking into consideration the circumstances of the conduct of military and intelligence operations during hostilities. We recommend that portions of §949a(b)(3) of the Senate bill be deleted, and alternate wording substituted, as follows:

"**§ 949a. Rules**

* * * * *

"(b) EXCEPTIONS.—

* * * * *

"(3) In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide the following:

''(A) Evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization.

''(B) ~~A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.~~

''~~(C)~~ Evidence shall be admitted as authentic so long as—

''(i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and

''(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

''(~~D~~C) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

''(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

''(ii) the military judge~~, after taking into account all of the circumstances surrounding the taking of the statement, the degree to which the statement is corroborated, and the indicia of reliability within the statement itself,~~ determines that—

''(I) the statement is offered as evidence of a material fact;

''(II) ~~either—~~

~~''(aa) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness and the unique circumstances of the conduct of military and intelligence operations during hostilities; or~~

~~''(bb) the production of the witness would have an adverse impact on military or intelligence operations~~ the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts, taking into consideration the circumstances of the conduct of military and intelligence operations during hostilities; and

''(III) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

In determining the probative value of a hearsay statement, the military judge shall take into consideration all of the circumstances surrounding the taking of the statement (including whether the will of the declarant was overborne),

the degree to which the statement is corroborated, and the indicia of reliability within the statement itself.

Appellate review structure (§950c-h of the Senate bill). We agree with the Senate that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that a four-tier appellate structure should be retained. The Senate bill eliminates the Court of Military Commission Review (CMCR) and eliminates appeals from that court to the United Court of Appeals for the District of Columbia Circuit. The Senate bill would instead route appeals directly from the trial level military commission to the U.S. Court of Appeals for the Armed Forces, thus replacing the current four-tiered appeals structure with a three-tiered one. The Administration believes that it is important to retain a four-tiered structure, given the complexity of the cases and issues likely to arise, and that the United States Court of Appeals for the D.C. Circuit should be retained in the structure.

Preference for military commissions over Article III courts (§948e, in Section 1032 of the Senate bill): We disagree with this provision and urge that it be deleted. By the nature of their conduct, many suspected terrorists can be charged with violations of both the federal criminal laws and the laws of war. It is the policy of the Administration that there be a "presumption that, where feasible, [these suspected terrorists] will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution." Federal courts have a proven and recent track record of prosecuting and convicting terrorists, and in many cases the terrorists ought to be brought to justice in a civilian court. The Administration's policy is reflected in a prosecution protocol that the Department of Justice and the Department of Defense have recently adopted, which also includes three broad sets of factors traditionally used by federal prosecutors. These factors will necessarily require a fact-intensive, case-by-case analysis. We believe that these determinations by the Executive branch should not be compromised by a forum selection preference stated by Congress.

Restriction on *Miranda* warnings (Section 1033 in Senate bill). The Administration recommends this section be deleted from the bill. This provision is apparently motivated by a serious misimpression that the United States military may be providing *Miranda* warnings to terrorist suspects in Afghanistan. This is completely inaccurate. *Miranda* warnings are never given by our soldiers on the battlefield or in any other circumstance where they could have an adverse impact on military or intelligence operations. 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.

Under policies that have been in place for years (including under the previous administration), *Miranda* warnings are only given in a very small

number of cases after an individual has been removed from the battlefield, and only when consistent with military and intelligence needs. This Administration is committed to using all instruments of national power to defeat terrorist extremists. This includes, and will continue to include, the prosecution of some terrorists in Article III courts. To preserve that option, 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. The warnings are not given if doing so will hinder our counterterrorism efforts.

Though the instances of "Mirandized" interview 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

Sunset provision. We recommend that Congress include a sunset provision that would require Congress to reevaluate the legislation after a term of years. We believe that, given the uncertain duration of this conflict and the unique challenges it poses, it would be wise for Congress to revisit this legislation after a period of time to determine whether commissions ought to be continued or, perhaps, reformed based on what we may have learned in the intervening years. We recommend that the following new subsection be added at the end of Section 1031 of the Senate bill:

> (e) SUNSET OF MILITARY COMMISSIONS STATUTE.—
> (1) REPEAL.—Effective on December 31, 2014 [or some other date], chapter 47A of title 10, United States Code, is repealed.
> (2) CONTINUITY OF ONGOING PROCEEDINGS.—As provided in section 109 of title 1, United States Code—
> (A) the repeal of chapter 47A of title 10, United States Code by paragraph (1) shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such chapter; and
> (B) such chapter shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any such penalty, forfeiture, or liability.
> (3) CLERICAL AMENDMENTS .—Effective on the date specified in paragraph (1), the tables of chapters at the beginning of subtitle A, and at the beginning of part II of subtitle A, of such title are amended by striking the items relating to chapter 47A.

Technical amendments: There are several proposed changes to the Senate bill of a technical nature that we will submit separately to Committee staff for consideration.

Mr. KRIS. As this committee has recognized on a bipartisan basis, commissions and the MCA should be reformed. In May, the administration announced five changes to the rules for military commissions that we believe go a long way towards improving the process. We appreciate that the Senate, on a bipartisan basis, has further undertaken the initiative to reform military commissions by amending the MCA of 2006, and section 1031 of the 2010 NDAA passed by the Senate on July 23 identifies many of the key elements we believe are important to further improve the military commissions process. There are additional modifications we would like to see to the Senate bill, and we are working with Congress and staff on these modifications. Specifically, the administration proposes the following:

Statements of the Accused (§ 948r): The Administration believes there is a significant risk courts will find that the Due Process Clause applies to military commission proceedings, and that due process requires that statements of the accused offered in the context of commission proceedings must have been voluntarily given. A standard based on reliability and the "interests of justice" would be vulnerable to a constitutional due process challenge in those cases where a military commission construed it to allow the admission of involuntary statements of the accused. The use of such statements might then be subject to reversal on appeal. Accordingly, there are compelling legal and policy reasons to include an express voluntariness requirement. That said, we believe that any voluntariness requirement for military commissions cases should account, consistent with the law, for the context in which statements later considered by military commissions can occur. Specifically, the Administration has proposed the following as an alternative to §948r of the Senate bill, which includes a voluntariness standard for military commissions cases, as well as a clearer prohibition on the use of any statement obtained by torture or cruel, inhuman, or degrading treatment:

"§948r. Treatment of statements obtained by torture or cruel, inhuman, or degrading treatment; self-incrimination; other statements by the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No Statement obtained by use of

torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

"(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds that the statement was voluntarily given. 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.

The Administration can also support the following, which has the support of the Army, Navy, and Air Force 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:

"§948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

"(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) at least one of the following:

"(A) That the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active

combat engagement, and the interests of justice would best be served by admission of the statement into evidence.

"(B) That the statement was voluntarily given.

"(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

"(2) The characteristics of the accused, such as military training, age, and education level.

"(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Material support for terrorism (§950w(25)) and Section 950p: As you know, the President has made clear the Administration's view that military commissions are for trying law of war offenses. After careful study, the Administration has concluded that appellate courts may find that "material support for terrorism" -- an offense that is also found in Title 18 -- is not a traditional violation of the law of war, and that it should be removed from the list of offenses at §950w. We believe that conspiracy, unlike material support, can in many cases be properly charged in military commissions as a traditional law of war offense, and we urge retention of that offense in the Senate bill.

Section 950p of the existing Military Commissions Act contains a statement recognizing that the offenses codified by that Act are "declarative of existing law," and "do not preclude trial for crimes that occurred before enactment" of the law. The Senate bill eliminated this clear Congressional statement that the listed offenses codify existing law, and replaced it with a different statement about the nature of the listed offenses. *See* §950p(d) of Section 1031 of S. 1390. If the offense of material support for terrorism is removed from the legislation, we also recommend that portions of §950p of the Senate bill be deleted, and alternate wording be substituted to include a clear statement that the offenses contained in the bill codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission, as follows:

"§950p. Definitions; construction of certain offenses; codification; effect

"(a) DEFINITIONS.—In this subchapter:

* * * *

"(c) COMMON CIRCUMSTANCES AND PURPOSE.—An offense specified in this subchapter is triable by military commission under this chapter only if the offense is committed in the context of and associated with armed conflict. The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

"(d) ~~OFFENSES ENCOMPASSED UNDER LAW OF WAR~~ EFFECT.— ~~To the extent that~~ Because 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 the enactment of this chapter ~~the National Defense Authorization Act for Fiscal Year 2010~~.

Jurisdiction over pre-9/11 conduct (§948d(a) of existing law). The current law also includes a provision that military commissions have jurisdiction to try offenses committed "before, on, or after September 11, 2001." The Senate legislation does not contain this language. We recommend that this language be retained from the current law by inserting it into §948d of the Senate bill as follows:

"§948d. Jurisdiction of military commissions

"A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter, sections 904 and 906 of this title (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war, whether such offense was committed before, on, or after September 11, 2001, and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized under this chapter. A military commission is a competent tribunal to make a finding sufficient for jurisdiction.

Hearsay evidence (§949a(b)(3) of the Senate bill). The Senate bill modifies the rules on hearsay evidence to more closely resemble the rules used in civilian courts and in courts-martial. We support the approach taken in the Senate legislation, but also propose some additional modifications to clarify the types of situations in which hearsay might be admitted, taking into consideration the circumstances of the conduct of military and intelligence operations during hostilities. We recommend that portions of §949a(b)(3) of the Senate bill be deleted, and alternate wording substituted, as follows:

"§ 949a. Rules

* * * * *

"(b) EXCEPTIONS.—

* * * * *

"(3) In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide the following:

"(A) Evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization.

"(B) ~~A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.~~

"~~(C)~~ Evidence shall be admitted as authentic so long as—

"(i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and

"(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

"(~~D~~C) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

"(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

"(ii) the military judge~~, after taking into account all of the circumstances surrounding the taking of the statement, the degree to which the statement is corroborated, and the indicia of reliability within the statement itself,~~ determines that—

"(I) the statement is offered as evidence of a material fact;

"(II) ~~either—~~

~~"(aa) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness and the unique circumstances of the conduct of military and intelligence operations during hostilities; or~~

~~"(bb) the production of the witness would have an adverse impact on military or intelligence operations~~ the statement is more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts, taking into consideration the circumstances of the conduct of military and intelligence operations during hostilities; and

"(III) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

In determining the probative value of a hearsay statement, the military judge shall take into consideration all of the circumstances surrounding the taking of the statement (including whether the will of the declarant was overborne), the degree to which the statement is corroborated, and the indicia of reliability within the statement itself.

Appellate review structure (§950c-h of the Senate bill). We agree with the Senate that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that a four-tier appellate structure should be retained. The Senate bill eliminates the Court of Military Commission Review (CMCR) and eliminates appeals from that court to the United Court of Appeals for the District of Columbia Circuit. The Senate bill would instead route appeals directly from the trial level military commission to the U.S. Court of Appeals for the Armed Forces, thus replacing the current four-tiered appeals structure with a three-tiered one. The Administration believes that it is important to retain a four-tiered structure, given the complexity of the cases and issues likely to arise, and that the United States Court of Appeals for the D.C. Circuit should be retained in the structure.

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completely inaccurate. *Miranda* warnings are never given by our soldiers on the battlefield or in any other circumstance where they could have an adverse impact on military or intelligence operations. 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.

Under policies that have been in place for years (including under the previous administration), *Miranda* warnings are only given in a very small number of cases after an individual has been removed from the battlefield, and only when consistent with military and intelligence needs. This Administration is committed to using all instruments of national power to defeat terrorist extremists. This includes, and will continue to include, the prosecution of some terrorists in Article III courts. To preserve that option, 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. The warnings are not given if doing so will hinder our counterterrorism efforts.

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Sunset provision. We recommend that Congress include a sunset provision that would require Congress to reevaluate the legislation after a term of years. We believe that, given the uncertain duration of this conflict and the unique challenges it poses, it would be wise for Congress to revisit this legislation after a period of time to determine whether commissions ought to be continued or, perhaps, reformed based on what we may have learned in the intervening years. We recommend that the following new subsection be added at the end of Section 1031 of the Senate bill:

(e) SUNSET OF MILITARY COMMISSIONS STATUTE.—

(1) REPEAL.—Effective on December 31, 2014 [or some other date], chapter 47A of title 10, United States Code, is repealed.

(2) CONTINUITY OF ONGOING PROCEEDINGS.—As provided in section 109 of title 1, United States Code—

(A) the repeal of chapter 47A of title 10, United States Code by paragraph (1) shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such chapter; and

(B) such chapter shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any such penalty, forfeiture, or liability.

(3) CLERICAL AMENDMENTS.—Effective on the date specified in paragraph (1), the tables of chapters at the beginning of subtitle A, and at the beginning of part II of subtitle A, of such title are amended by striking the items relating to chapter 47A.

Technical amendments: There are several proposed changes to the Senate bill of a technical nature that we will submit separately to Committee staff for consideration.

Admiral MACDONALD. There are three areas of the MCA that, in my view, should be reviewed further: Appellate review standards, classified information procedures, and the admissibility of statements made by an accused. Before providing my recommendations on these three areas, I would like to offer the following information by way of background.

The MCA and the rules initially promulgated thereunder contained provisions which were questioned in terms of both fairness and efficiency. The hearsay rule that placed the burden of establishing unreliability on the opponent was roundly criticized as forcing an opponent to establish a negative, and was the reverse of the standard generally recognized in domestic courts, where the proponent of any evidence generally must establish it is sufficiently reliable for admission. The standards for discovery were generally considered insufficient, in that the rules required disclosure of exculpatory evidence, but left unaddressed evidence that might mitigate the degree of guilt or the sentence of the accused or that might serve to impeach a government witness. The provisions addressing classified evidence permitted a military judge to determine reliability of underlying evidence, and redact classified sources and methods, preventing a defense counsel from obtaining even a substitute for the redacted materials. Counsel rights for the accused did not provide for a right to a military counsel of the accused's own selection, if reasonably available. Commissions were forbidden from determining whether a particular accused was subject to the jurisdiction of the commissions, instead forced to rely upon a determination made by the Combat Status Review Tribunal (CSRT). Appellate review was not as robust as that provided in courts-martial, limiting review to only legal review rather than factual and legal review, as is the norm for courts-martial. The rules regarding coerced statements contained the facially offensive provision that would permit the introduction of statements obtained by cruel, inhuman or degrading treatment so long as the statement was obtained before the enactment of the Detainee Treatment Act, and so long as the statement was reliable and in the interests of justice. Finally the rules addressing classified information failed to provide clear guidance to military judges and practitioners regarding the standards for discovery and the procedures to be used in obtaining ex parte review of petitions from the government. The rules governing classified information have no clear analogue in either courts-martial or Article III courts, depriving commissions of the benefit of the jurisprudence that exists under established norms in either courts-martial or district courts. Without such clear guidance, counsel have been unable to obtain ex parte hearings to expedite the resolution of classified information issues, and have had to seek multiple protective orders to ensure all information, regardless of source, is properly protected.

In May, the President forwarded five rule changes for the commissions that became effective in July, which addressed the above issues with the exception of the appellate review standards and the handling of classified information. I recommend that the appellate review standards mirror those found in courts-martial, vesting the reviewing court at the first level of appellate review with factual sufficiency authority. I also recommend that the classified information rules be altered, relying on the Classified Information Procedures Act (CIPA) as a touchstone for starting the draft, incorporating the lessons learned from commissions to date, and those provisions of MRE 505 that permit closure of the proceedings when warranted. Counsel and military judges will then have the benefit of more than 20 years of jurisprudence from CIPA application to guide the use of the rules.

With regard to statements made by an accused, as I testified, I support an admissibility standard based on reliability, the interests of justice, the realities of the battlefield on the one hand, and voluntariness, when statements are obtained appropriately removed in time and distance from the battlefield on the other. To that end, I propose the following language:

§948r. Treatment of statements obtained by torture or cruel, inhuman, or degrading treatment; self-incrimination; other statements by the accused

(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No Statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

(c) OTHER STATEMENTS OF THE ACCUSED.-A statement of the accused may be admitted in evidence in a military commission under this chapter only if one of the following conditions is met:

(1) the statement was made during a force-protection, tactical, or intelligence interrogation in reasonable proximity in time and location to the point of capture; the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and the interests of justice would best be served by admission of the statement into evidence. In determining the issue of reliability, the military judge shall take into consideration all of the circumstances surrounding the taking of the statement, including but not limited to the degree to which the statement is corroborated and the indicia of reliability within the statement itself.

(2) the statement was voluntary. In determining whether a statement was 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 in identify of the questioners between the statement sought to be admitted and any prior questioning of the accused.

(d) OTHER USES PERMITTED.- Notwithstanding the above, where the statement was not obtained by use of torture or by cruel, inhuman, or degrading treatment, this section does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

I also support the following language, which has the support of the Administration, and the Army and Air Force 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:

"§948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

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"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) at least one of the following:

"(A) That the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.

"(B) That the statement was voluntarily given.

"(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

"(2) The characteristics of the accused, such as military training, age, and education level.

"(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Admiral HUTSON. Key is the review process. If we are going to use Military Commissions, we should use the same review process that is authorized by the Uniform Code of Military Justice (UCMJ) for courts-martial.

General ALTENBURG.

(a) The inconsistency in the statute and rules which allows a defendant to plead guilty to a capital offense, but then prohibits imposition of the

death penalty unless the defendant is found guilty by a unanimous jury must be resolved.

(b) The initial level of appeal for military commissions should remain as a special appellate court composed of military appellate judges from the Service Courts of Criminal Appeals. These judges are trained and experienced in the unique fact finding role that only military appellate courts exercise. They will provide far more expedited interlocutory and post-trial reviews than will the Court of Appeals for the Armed Forces.

(c) The revised MCA should contain a provision which allows non-capital defendants the right to elect to be tried and sentenced by the Military Judge alone, as is standard in Court-Martial practice.

Mr. MARCUS. My recommendations for changes to the MCA are set forth at page 6 of my prepared statement.

CLASSIFIED INFORMATION

8. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, today, trials during an ongoing war present greater risks to national security through the unintended release or compromise of classified material than the military tribunals at the end of World War II when fighting had ended. During the development of the MCA in 2006, many experts from the Judge Advocates General to experienced prosecutors and national security officials in DOJ felt that use of the CIPA standards could inadvertently expose some classified information, including sensitive sources and methods, through the process of discovery and trial. What are your views on how military commissions can best protect classified information?

Mr. JOHNSON. We believe that rules addressing classified information that are modeled on CIPA, but modified for the military commissions context, will best protect classified information and ensure fairness to the accused. We have worked closely with the Committee staff on the Levin-Graham-McCain amendment, which was adopted by the Senate on July 23. Specifically, the provision draws on the procedures in CIPA, with some key modifications to reflect lessons learned from past terrorism prosecutions. The amendment has the support of both DOD and DOJ. We are grateful for the work of the Committee staff in developing procedures that will adequately protect classified information and advance the President's objective of ensuring that commissions are a fair, legitimate, and effective forum for the prosecution of law of war offenses.

Mr. KRIS. We believe that rules addressing classified information that are modeled on CIPA, but modified for the military commissions context, will best protect classified information and ensure fairness to the accused. We have worked closely with the committee staff on the Levin-Graham-McCain amendment, which was adopted by the Senate on July 23. Specifically, the provision draws on the procedures in CIPA, with some key modifications to reflect lessons learned from past terrorism prosecutions. The amendment has the support of both DOD and DOJ. We are grateful for the work of the committee staff in developing procedures that will adequately protect classified information and advance the President's objective of ensuring that commissions are a fair, legitimate, and effective forum for the prosecution of law of war offenses.

Admiral MACDONALD. As noted in my answer to question 7, the rules addressing classified information failed to provide clear guidance to military judges and practitioners regarding the standards for discovery and the procedures to be used in obtaining ex parte review of petitions from the government. The rules governing classified information have no clear analogue in either courts-martial or Article III courts, depriving commissions of the benefit of the jurisprudence that exists under established norms in either courts-martial or district courts. Without such clear guidance, counsel have been unable to obtain ex parte hearings to expedite the resolution of classified information issues, and have had to seek multiple protective orders to ensure all information, regardless of source, is properly protected.

In 2006, I advocated the use of MRE 505 as a way of protecting classified information, because under MRE 505, military courts have the ability to close a proceeding to the public to protect classified information. CIPA provides no such authority, nor is it permitted in district courts. However, experience has shown us that the breadth and depth of CIPA's jurisprudence provides something that MRE 505 lacks: practical guidance in the application of the rules governing the handling of classified information. Combining the best of CIPA with the best of MRE 505, and avoiding novel standards that have no analogue in established rules, is a better solution.

I recommend that the classified information rules be altered, relying on CIPA as a touchstone for starting the draft, incorporating the lessons learned from commissions to date, and those provisions of MRE 505 that permit closure of the proceedings when warranted. Counsel and military judges will then have the benefit of more than 20 years of jurisprudence from CIPA application to guide the use of the rules.

Admiral HUTSON. CIPA has worked exceedingly well in Federal courts. There is no reason in law or logic why it wouldn't be equally useful in military commissions. You can't have a real trial without providing that evidence to the defense. Otherwise, it is just a sham.

General ALTENBURG. A system for safeguarding classified information and providing the intelligence community with the ability to help assess the potential national security risks of going forward with prosecution of a given case is best provided within the framework of RMC and RCM 505. However, it must be recognized that in order to have a fair trial when classified information is to be provided to the panel (jury) as evidence, defendants must be provided access to that information. The intelligence community must be forthright and comprehensive in providing information to the prosecution. The prosecution has adequate tools available under the rules to protect national security (they are national security equities, not "intelligence community equities") while protecting the defense right to confront evidence and guarantee a reliable result.

Mr. MARCUS. I believe that CIPA has worked well in Federal court criminal cases without compromising national security, and I see no reason why it cannot work as effectively in military commission proceedings. The ability of military judges to close sensitive parts of the trial to the public is an additional safeguard.

9. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, have the originators of classified information cooperated with the prosecutors in providing all the required classified information in a timely manner and providing declassified substitutes for the defense?

Mr. JOHNSON. We are very satisfied with the level of cooperation we have received from the Intelligence Community. Sifting through classified information on detainees is a time-consuming process. We fully understand that this takes significant time and resources, and we appreciate the level of effort and cooperation we are receiving.

Mr. KRIS. We are very satisfied with the level of cooperation we have received from the Intelligence Community. Sifting through classified information on detainees is a timeconsuming process. We fully understand that this takes significant time and resources, and we appreciate the level of effort and cooperation we are receiving.

Admiral MACDONALD. There is good cooperation; however, we can and should continue to make timeliness a priority.

Admiral HUTSON. I have no personal knowledge of this.

General ALTENBURG. No. The current process is exceptionally timeconsuming and unpredictable. Intelligence organizations are not designed to support prosecution of criminal cases. From the perspective of the prosecution function the various intelligence agencies do not cooperate; the Guantanamo Joint Task Force and Joint Intelligence Group are also uncooperative when viewed from the perspective of judicial system participants.

Mr. MARCUS. I am not in a position to answer this question.

10. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what changes would you recommend to the MCA's classified information protection provisions based on military commission trial and discovery experience to date?

Mr. JOHNSON. See the answer to question 8.

Mr. KRIS. See the answer to question 8.

Admiral MACDONALD. As noted in my answer to questions 7and 10, the rules addressing classified information failed to provide clear guidance to military judges and practitioners regarding the standards for discovery and the procedures to be used in obtaining ex parte review of petitions from the government. The rules governing classified information have no clear analogue in either courts-martial or Article III courts, depriving commissions of the benefit of the jurisprudence that exists under established norms in either courts-martial or district courts. Without such clear guidance, counsel have been unable to obtain ex parte hearings to expedite the resolution of classified information issues, and have had to seek multiple protective orders to ensure all information, regardless of source, is properly protected.

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Admiral HUTSON. I would make whatever changes would bring MCs in line with CIPA.

General ALTENBURG. This is a difficult issue. The problem is that the intelligence agencies want to be the sole decisionmakers regarding relevance of any information, and not turn over anything else. It seems to me that the prosecutors should be properly entrusted with this responsibility, but encounter difficulty with intelligence personnel. When defense counsel object to prosecutor determinations then judges will resolve the matters. Prosecutors must be empowered to make the initial relevancy determinations. Those determinations will, of course, be reviewable.

Mr. MARCUS. The committee's bill contains provisions partially embracing CIPA principles and procedures, and I understand that the Justice Department has suggested additional steps to move further in that direction. I encourage the committee to adopt CIPA principles and procedures for treatment of classified information to the greatest extent practicable.

CRIMES COMMITTED BEFORE SEPTEMBER 11

11. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, the MCA addresses crimes that were committed before September 11 in two ways. First, it includes a statement that military commissions have jurisdiction over offenses committed "before, on, or after September 11, 2001" (section 948d). Second, the MCA notes that it did not establish new crimes that did not exist before its enactment, but codifies those crimes that could be tried by military commissions so trials for crimes that occurred before the date of enactment are not precluded (section 950p). What are your views on the MCA's treatment of offenses that occurred before September 11? Does this raise a constitutional "ex post facto law" problem?

Mr. JOHNSON. Article I, section 9 of the Constitution prohibits the Federal Government from enacting laws with certain retroactive effects, including laws that "make an action done before the passing of the law, and which was innocent when done, criminal." *Stogner* v. *California*, 539 U.S. 607, 610–12 (2003) (quoting Calder v. Bull, 3 Dall. 386, 390–91 (1798)). The MCA authorizes trial by military commission of a number of substantive offenses. If an offense were clearly not previously a crime under the law of war, section 950p of the MCA would not save a prosecution for that offense from potential dismissal on ex post facto grounds. Prosecution of a law-of-war offense committed during armed conflict would not raise ex post facto concerns, regardless of when the trial takes place.

Mr. KRIS. Article I, section 9 of the Constitution prohibits the Federal Government from enacting laws with certain retroactive effects, including laws that "make an action done before the passing of the law, and which was innocent when done, criminal." *Stogner* v. *California,* 539 U.S. 607, 610–12 (2003) (quoting *Calder* v. *Bull,* 3 Dall. 386, 390–91 (1798)). The MCA authorizes trial by military commission of a number of substantive offenses. If an offense were clearly not previously a crime under the law of war, section 950p of the MCA would not save a prosecution for that offense from potential dismissal on ex post facto grounds. Prosecution of a law-of-war offense committed during armed conflict would not raise ex post facto concerns, regardless of when the trial takes place.

Admiral MACDONALD. In my opinion, it does not. There is precedent and practice, both domestically and internationally, to charge and try persons for alleged violations of the laws and customs of war, which by definition, are not exhaustively codified into positive criminal statutes. The International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and the International Criminal Court all contain residual clauses granting the tribunals jurisdic-

tion to hear cases of alleged violations of the "laws and customs of war." The burden is on the prosecutor to show that at the time of the alleged offense, there existed a customary rule under the laws of war, which applied to the accused at the time of the alleged offense.

Admiral HUTSON. It clearly raises "ex post facto" issues. This is a good example of why we should use the already existing Federal court system and not military commissions and certainly not base convictions on newly minted laws.

General ALTENBURG. It does not raise an ex post facto problem as long as the crimes which are charged are rooted in the traditional law of war and were actually punishable prior to September 11, 2001. The MCA should state expressly that it is codifying existing law rather than establishing new crimes; this will resolve a confusing issue.

Mr. MARCUS. I am troubled by prosecuting most pre-September 11 offenses by GTMO detainees as war crimes because we were not engaged in an armed conflict with al Qaeda or the Taliban before September 11. Of course, crimes such as the 1998 attacks on the U.S. embassies in Kenya and Tanzania or the 2000 attack on the U.S.S. *Cole* can and should be prosecuted in U.S. Federal courts or appropriate criminal tribunals in other countries. Most of the offenses set forth in the MCA were clearly understood to be war crimes triable before military commissions before the MCA was enacted. There is controversy as to only a few—particularly conspiracy and material support of terrorism. I think it is appropriate for Congress to deem conspiracy and terrorism to be war crimes triable before military commissions. I think, however, that "material support of terrorism" is problematic because of its broad sweep and unclear basis in the law of armed conflict.

12. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, have "ex post facto law" issues been raised during military commission trials? How have the judges ruled on that issue?

Mr. JOHNSON. Military commissions have ruled on ex post facto issues in three cases: *United States* v. *al Darbi* (see Annex B), *United States* v. *Hamdan* (see Annex C), and *United States* v. *Khadr* (see Annex D). In those cases, the defense moved to dismiss specific charges for lack of subject-matter jurisdiction. Al Darbi and Hamdan challenged the charges brought against them for conspiracy, 10 U.S.C. § 950v(b)(28), and for providing material support to terrorism, 10 U.S.C. § 950v(b)(25). Khadr challenged the charge of providing material support for terrorism.

In all three cases, the Commission judge denied the relief requested on grounds that the ex post facto clause of the U.S. Constitution was not violated.

The defense has filed motions to dismiss based on ex post facto arguments in the cases of *United States* v. *Mohammed et al.* (September 11 case) and *United States* v. *al Qosi*. Those motions remain pending.

Mr. KRIS. Military commissions have ruled on ex post facto issues in three cases: *United States* v. *al Darbi* (see Annex B), *United States* v. *Hamdan* (see Annex C), and *United States* v. *Khadr* (see Annex D). In those cases, the defense moved to dismiss specific charges for lack of subject-matter jurisdiction. Al Darbi and Hamdan challenged the charges brought against them for conspiracy, 10 U.S.C. § 950v(b)(28), and for providing material support to terrorism, 10 U.S.C. § 950v(b)(25). Khadr challenged the charge of providing material support for terrorism.

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Admiral MACDONALD. Military commissions have ruled on ex post facto issues in three cases: *United States* v. *al Darbi, United States* v. *Hamdan*, and *United States* v. *Khadr*. In those cases, the defense moved to dismiss specific charges for lack of subject-matter jurisdiction. Darbi and Hamdan challenged the charges brought against them for conspiracy, 10 U.S.C. § 950v(b)(28), and for providing material support to terrorism, 10 U.S.C. § 950v(b)(25). Khadr challenged the charge of providing material support for terrorism. In all three cases, the Commission judge denied the relief requested on grounds that the ex post facto clause of the U.S. Constitution was not violated.

Admiral HUTSON. I have no personal knowledge.

General ALTENBURG. The defense has raised this issue in most, if not all, of the pending cases. No judge has granted any motion to dismiss the case on this basis.

Mr. MARCUS. I am not aware of how the "ex post facto" issue has been treated in military commission proceedings since the MCA was enacted.

13. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, should the MCA continue to authorize trial of offenses that occurred before September 11?

Mr. JOHNSON. As President Obama said in his May 21 speech at the National Archives, military commissions are an appropriate venue for "trying detainees for violations of the law of war." We believe it is important for the system's legitimacy that commissions try only conduct that was a violation of the laws of war when it occurred, and that took place during a relevant period of conflict. This could include some offenses that were committed as part of an armed conflict prior to September 11, 2001. The administration will work to ensure that prosecutions under the MCA, including any amendments that may be enacted to refine the offenses defined in that statute, meet both of these standards.

Mr. KRIS. As President Obama said in his May 21 speech at the National Archives, military commissions are an appropriate venue for "trying detainees for violations of the law of war." We believe it is important for the system's legitimacy that commissions try only conduct that was a violation of the laws of war when it occurred, and that took place during a relevant period of conflict. This could include some offenses that were committed as part of an armed conflict prior to September 11, 2001. The administration will work to ensure that prosecutions under the MCA, including any amendments that may be enacted to refine the offenses defined in that statute, meet both of these standards.

Admiral MACDONALD. Yes. As the 9/11 Commission documented, members of al Qa'ida and associated organizations intentionally attacked U.S. civilians, civilian objects, and U.S. Armed Forces in violation of the laws and customs of war prior to September 11. Military Commissions are a war crimes tribunal, and they should have jurisdiction to hear cases that predated September 11.

Admiral HUTSON. I don't think there is a legal prohibition but I think it is bad policy.

General ALTENBURG. Yes.

Mr. MARCUS. No.

14. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what changes, if any, would you recommend?

Mr. JOHNSON. The administration is committed to working with Congress to address ex post facto and other legal concerns potentially raised by prosecutions under the MCA. Among these recommendations is that Congress consider amending section 950w to remove the offense of "material support for terrorism," which the administration has concluded appellate courts may find is not a traditional violation of the law of war. If this offense is removed, the administration further recommends that Congress consider amending section 950p to include a clear statement that the offenses contained in the bill codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission. Please see the answer to question 7 for the administration's recommendations regarding additional modifications we would like to see to the Senate bill.

Mr. KRIS. The administration is committed to working with Congress to address ex post facto and other legal concerns potentially raised by prosecutions under the MCA. Among these recommendations is that Congress consider amending section 950w to remove the offense of "material support for terrorism," which the administration has concluded appellate courts may find is not a traditional violation of the law of war. If this offense is removed, the administration further recommends that Congress consider amending section 950p to include a clear statement that the offenses contained in the bill codify offenses that have traditionally been triable under the law of war or otherwise triable by military commission. Please see the answer to question 7 for the administration's recommendations regarding additional modifications we would like to see to the Senate bill.

Admiral MACDONALD. I personally do not believe any changes are needed regarding pre-September 11 offenses.

Admiral HUTSON. I would prosecute those cases which are not barred by the statute of limitations in U.S. District Court.

General ALTENBURG. None.

Mr. MARCUS.I would eliminate the crime of material support of terrorism.

HEARSAY

15. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, the MCA provides broad authority to

use hearsay evidence at trial so long as the judge finds it is reliable and probative. However, the burden to show that hearsay was not reliable or probative was put on the party opposing the evidence, which normally is the detainee. Who should have the burden of showing that hearsay is reliable and should be admitted at trial?

Mr. JOHNSON. In May the administration announced five rule changes to the military commissions. One of those changes deals with this issue—making sure that the party seeking admission of hearsay has the burden to prove that it is reliable and probative, which is where the administration believes the burden belongs.

Mr. KRIS. In May, the administration announced five rule changes to the military commissions. One of those changes deals with this issue—making sure that the party seeking admission of hearsay has the burden to prove that it is reliable and probative, which is where the administration believes the burden belongs.

Admiral MACDONALD. I fully support the change to this standard that was forwarded by the President in a rule change that became effective in July. The proponent of hearsay evidence, just like the proponent of any evidence offered for admission, should have the burden of establishing reliability and admissibility.

Admiral HUTSON. The proponent.

General ALTENBURG. The party offering the evidence should have the burden of establishing its admissibility. The trial judge then must determine, as with any evidence offered by either party, whether the evidence is probative and reliable, and therefore admissible. I disagree with the assertion in this question that the government is usually the party offering hearsay. I believe that the relaxed hearsay provisions of the MCA will benefit the accused, who does not have the unlimited access to live witnesses that the government does, at least as much they will benefit the government.

Mr. MARCUS. The prosecution should have the burden of establishing admissibility of hearsay evidence.

16. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, is the hearsay exception in the MCA too broad? If so, how should it be narrowed and yet still take into account the realities of wartime circumstances when witnesses may be involved in combat or intelligence operations and foreign intelligence service personnel who may not be compelled to attend trial may be involved?

Mr. JOHNSON. The administration supports the general approach taken by the committee in reforming the use of hearsay evidence under the MCA, which includes a general restriction on hearsay and a residual exception. The administration, however, recommends a somewhat different standard for when the residual exception should apply, based on whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts. We believe this exception accounts for the realities of wartime circumstances, while limiting the use of this exception to circumstances in which it is warranted. Please see the answer in question #7 for the administration's recommendation on this issue.

Mr. KRIS. The administration supports the general approach taken by the committee in reforming the use of hearsay evidence under the MCA, which includes a general restriction on hearsay and a residual exception. The administration, however, recommends a somewhat different standard for when the residual exception should apply, based on whether the hearsay evidence is more probative than other evidence that could be procured through reasonable efforts. We believe this exception accounts for the realities of wartime circumstances, while limiting the use of this exception to circumstances in which it is warranted. Please see the answer in question #7 for the administration's recommendation on this issue.

Admiral MACDONALD. As a general matter, I believe that a hearsay standard requiring that the proponent establish reliability is not overly broad. However, I believe that that broad admissibility standard should only be permitted when the proponent has established that there is a sound, practical need to use hearsay evidence in place of direct testimony from the declarant. I support a formulation similar to the Senate proposal which contains a requirement that the proponent establish that the declarant is unavailable, basing that unavailability in the realities of wartime circumstances.

Admiral HUTSON. It is too broad. The FRE are sufficient to account for war time scenarios. Evidence will not be barred by hearsay unless the context and motive is criminal investigation vice warfighting.

General ALTENBURG. The proposed amendments to the MCA are a substantial improvement, but should be further refined to require that the military judge determine, under the totality of the circumstances, that a statement is reliable for the purpose for which it is offered. In addition, the current requirement that a witness be unavailable before hearsay is admitted, while furthering the goal of confronting

witnesses, will create extensive litigation in each case over the unavailability of the witness and could make prosecutions by commissions untenable. The military judge should be granted statutory discretion to balance these factors when deciding admissibility of a particular statement. It is worth remembering that flexibility in hearsay is warranted not as a way to reduce the rigor or reliability of the trial process but as a recognition of the way our combat troops fight and the fact that evidence gathering in a war zone simply cannot meet the strictures with which we are familiar in Stateside civilian settings.

Mr. MARCUS. I endorse the standard for admissibility contained in the committee's bill.

COERCION AND DUE PROCESS RIGHTS OF DETAINEES

17. Senator MCCAIN. Mr. Johnson and Mr. Kris, the Wall Street Journal and the New York Times reported last week that the DOJ Office of Legal Counsel issued guidance in May that detainees have some level of due process rights that could bar use at trial of statements made under coercion. What is your opinion of the level of due process rights enjoyed by detainees and the degree of coercion that would violate a detainee's due process rights?

Mr. JOHNSON. The administration believes that, whether military commissions are convened in the United States or at Guantanamo, there is a significant risk, in light of the circumstances of the Guant namo detainees, that courts will apply a baseline of due process protections in commission proceedings. This does not mean that courts would provide commission defendants with the same array of constitutional rights that defendants receive in Article III criminal trials. We do believe, however, that 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 believe there is a substantial risk that courts will hold that the Constitution requires application of a due process voluntariness test for admission of statements of the accused, although we do not believe that courts would apply the Miranda rules prohibiting admission of unwarned statements. This is so regardless of whether the commission proceedings take place in Guantanamo or the United States.

Mr. KRIS. The administration believes that, whether military commissions are convened in the United States or at Guantanamo, there is a significant risk, in light of the circumstances of the Guantanamo detainees, that courts will apply a baseline of due process protections in commission proceedings. This does not mean that courts would provide commission defendants with the same array of constitutional rights that defendants receive in Article III criminal trials. We do believe, however, that 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 believe there is a substantial risk that courts will hold that the Constitution requires application of a due process voluntariness test for admission of statements of the accused, although we do not believe that courts would apply the Miranda rules prohibiting admission of unwarned statements. This is so regardless of whether the commission proceedings take place in Guantanamo or the United States.

18. Senator MCCAIN. Mr. Johnson and Mr. Kris, would a prohibition on use of testimony obtained through interrogation techniques amounting to cruel, inhuman, or degrading treatment be sufficient to satisfy due process if the evidence was otherwise deemed reliable and probative by the military judge and its admission served the best interests of justice?

Mr. JOHNSON. See our answer to question 17. A standard based on reliability and the "interests of justice" would be vulnerable to a constitutional due process challenge in those cases where a military commission construed it to allow the admission of involuntary statements of the accused. The use of such statements might then be subject to reversal on appeal. Accordingly, there are compelling legal and policy reasons to include an express voluntariness requirement.

That said, we believe that any voluntariness requirement for military commissions cases should account, consistent with the law, for the context in which statements later considered by military commissions can occur. Specifically, the administration has proposed the following as an alternative to § 948r of the Senate bill, which includes a voluntariness standard for military commissions cases, as well as

a clearer prohibition on the use of any statement obtained by torture or cruel, inhuman, or degrading treatment:

"§948r. Treatment of statements obtained by torture or cruel, inhuman, or degrading treatment; self-incrimination; other statements by the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No Statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

"(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds that the statement was voluntarily given. 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.

The Administration can also support the following, which has the support of the Army, Navy, and Air Force 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:

"§948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

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"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) at least one of the following:

"(A) That the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.

"(B) That the statement was voluntarily given.

"(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

"(2) The characteristics of the accused, such as military training, age, and education level.

"(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

Mr. KRIS. See our answer to question 17. A standard based on reliability and the "interests of justice" would be vulnerable to a constitutional due process challenge in those cases where a military commission construed it to allow the admission of involuntary statements of the accused. The use of such statements might then be subject to reversal on appeal. Accordingly, there are compelling legal and policy reasons to include an express voluntariness requirement.

That said, we believe that any voluntariness requirement for military commissions cases should account, consistent with the law, for the context in which statements later considered by military commissions can occur. Specifically, the administration has proposed the following as an alternative to § 948r of the Senate bill, which includes a voluntariness standard for military commissions cases, as well as a clearer prohibition on the use of any statement obtained by torture or cruel, inhuman, or degrading treatment:

"§948r. Treatment of statements obtained by torture or cruel, inhuman, or degrading treatment; self-incrimination; other statements by the accused

"(a) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE OR CRUEL, INHUMAN, OR DEGRADING TREATMENT.—No Statement obtained by use of torture or by cruel, inhuman, or degrading treatment (as defined by section 1003 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd)), whether or not under color of law, shall be admissible in a military commission under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made.

"(b) SELF-INCRIMINATION PROHIBITED.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds that the statement was voluntarily given. 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.

The Administration can also support the following, which has the support of the Army, Navy, and Air Force 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:

"§948r. Exclusion of statements obtained by torture or cruel, inhuman, or degrading treatment; prohibition of self-incrimination; admission of other statements of the accused

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"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds—

"(1) that the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

"(2) at least one of the following:

"(A) That the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would best be served by admission of the statement into evidence.

"(B) That the statement was voluntarily given.

"(d) DETERMINATION OF VOLUNTARINESS.—In determining for purposes of subsection (c)(2)(B) whether a statement was voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the following:

"(1) The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities.

"(2) The characteristics of the accused, such as military training, age, and education level.

"(3) The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

DEFINITION OF "UNLAWFUL ENEMY COMBATANT" OR "UNPRIVILEGED BELLIGERENT"

19. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, the Obama administration has developed a somewhat different standard for detention authority for use in the ongoing habeas cases and is not using the term "unlawful enemy combatant." Should the definition of "unlawful enemy combatant" as used for the purpose of jurisdiction of military commissions be changed? If so, how?

Mr. JOHNSON. The administration supports the determination to discontinue the use of the term "unlawful enemy combatant" in the military commission legislation that passed the Senate on July 23. The administration believes that it is unnecessary to establish a new term of art for persons subject to trial by military commission.

Mr. KRIS. The administration supports the determination to discontinue the use of the term "unlawful enemy combatant" in the military commission legislation that passed the Senate on July 23. The administration believes that it is unnecessary to establish a new term of art for persons subject to trial by military commission.

Admiral MACDONALD. The authorities provided under the laws of war to detain people are separate from jurisdictional definitions for war crimes tribunals, and I support the administration's 13 March standard on detention authority. With regard to the distinctions in terminology between "unlawful enemy combatant" and "unprivileged enemy belligerent," the two terms are synonymous under Defense Department Directive 2310.1E, and both may be found in commentary from leading jurists. As a technical matter, the phrase "unprivileged belligerent" predates "unlawful combatant" and is the more commonly used term under the laws of war.

Admiral HUTSON. "Enemy combatant" or perhaps "Unprivileged enemy combatant."

General ALTENBURG. The proposed change to the term "unprivileged enemy belligerent" is a positive change, which will now include those who engage in hostilities against our coalition partners.

Mr. MARCUS. Yes. The definition of "unlawful enemy combatant" in the MCA should be changed to reflect the substance of recent decisions by U.S. District Judges in GTMO habeas cases, most of which have limited the scope of detention authority to individuals who have taken part in hostilities against the United States as part of al Qaeda or the Taliban or who have provided substantial support to those hostilities.

APPELLATE REVIEW OF MILITARY COMMISSIONS

20. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, different routes for appellate review of military commissions have been considered. The current MCA system includes a new court within DOD, the Court of Military Commission Review (CMCR), and mandatory review by an Article III court, the U.S. Court of Appeals for the District of Columbia Circuit, with the possibility of review by the U.S. Supreme Court. Other alternatives have included the U.S. Court of Appeals for the Armed Forces. What are your views on appellate review for military commissions? Should an Article III court be involved, or should the U.S. Court of Appeals for the Armed Forces conduct the appellate review as is the case for courts-martial?

Mr. JOHNSON. We agree with the Senate that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that a four-tier appellate structure should be retained. The Senate bill eliminates the CMCR and eliminates appeals from that court to the United Court of Appeals for the District of Columbia Circuit. The Senate bill would instead route appeals directly from the trial level military commission to the U.S. Court of Appeals for the Armed Forces, thus replacing the current four-tiered appeals structure with a three-tiered one. The administration believes that it is important to retain a four-tiered structure, given the complexity of the cases and issues likely to arise, and that the United States Court of Appeals for the DC Circuit should be retained in the structure.

Mr. KRIS. We agree with the Senate that the scope of appellate review must be expanded to include review of factual as well as legal matters. However, we believe that a four-tier appellate structure should be retained. The Senate bill eliminates the CMCR and eliminates appeals from that court to the United Court of Appeals for the District of Columbia Circuit. The Senate bill would instead route appeals directly from the trial level military commission to the U.S. Court of Appeals for the Armed Forces, thus replacing the current four-tiered appeals structure with a three-tiered one. The administration believes that it is important to retain a four-tiered structure, given the complexity of the cases and issues likely to arise, and that the United States Court of Appeals for the DC Circuit should be retained in the structure.

Admiral MACDONALD. I support review of military commissions by a civilian court. For courts-martial, convictions are reviewed first by a Service Court of Criminal Appeals, authorized to review a conviction and sentence for factual and legal sufficiency, sentence appropriateness and prejudicial legal error. Convictions are

then reviewed by the Court of Appeals for the Armed Forces for legal sufficiency and prejudicial legal error, and if a petition for review is granted, further legal review is available by the Supreme Court. I support that same construct. While my preference would be to conduct factual sufficiency review by military judges who have experience conducting that type of review in courts-martial, the Court of Appeals for the Armed Forces is fully capable of conducting a factual and legal sufficiency review.

Admiral HUTSON. If we use military commissions, then the military court martial review process should be used. Bouncing into the civilian system at the review level makes no sense.

General ALTENBURG. The current appellate review structure should be preserved. The Court of Appeals for the Armed Forces is an inappropriate forum for deciding interlocutory appeals, initial post-trial appeals, and fact finding. These functions in the military system belong exclusively to the Service Courts of Criminal Appeals, which are experienced and trained in those functions. The CMCR, composed of service appellate judges, provides the best mechanism for dealing with these appellate review functions. The service appellate judges are experienced by virtue of the fact that many have been trial judges with fact finding authority; they have acquired more fact finding experience as service appellate judges because of the unique Congressional provisions for those courts. Only the best of this already select group of judges are then nominated for the CMCR. Their staffs, both uniformed and civilian, also have considerable experience analyzing and processing hundreds of cases and applying fact finding analysis in all of the cases, even guilty plea cases; the service appellate court culture is replete with nearly 60 years of appellate factfinding experience and precedent. The service appellate court caseloads, affected by mandatory appeal considerations, generate more experience for their participants than courts whose members accept a finite caseload and have minimal, if any, experience with the fact finding function. Appeal beyond the CMCR should also be preserved in the United States Court of Appeals for the DC Circuit, an Article III appellate court.

Mr. MARCUS. Review in either the Court of Appeals for the DC Circuit or the Court of Appeals for the Armed Forces is appropriate.

21. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, should appellate review at some level include both facts and law, as under the first level of review of courts-martial?

Mr. JOHNSON. Yes. We concur with the expanded scope of appellate review in section 1031, which includes review of factual as well as legal matters.

Mr. KRIS. Yes. We concur with the expanded scope of appellate review in section 1031, which includes review of factual as well as legal matters.

Admiral MACDONALD. As I noted in my answer to question 20, I do support review of both facts and law. Our military judges are well versed in the practice, and I support using a review that mirrors that found under the UCMJ to the maximum extent possible.

Admiral HUTSON. Yes.

General ALTENBURG. Because the Commissions system is rooted in military law and court-martial practice, the fact finding function of the initial level appellate court represents uniformity with that system. It works well in court martial practice; I see no reason to change it for Commissions. I reiterate, however, that this court must be composed of military appellate judges who are trained and experienced in this unique appellate function.

Mr. MARCUS. Yes—facts and law.

EXECUTIVE ORDER ON LONG-TERM DETENTION

22. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, on June 27, 2009, the Washington Post reported that the White House was considering issuing an Executive order reasserting the President's authority to incarcerate terrorism suspects indefinitely. In your opinion, does the President currently have authority under the AUMF to hold terrorists, including members of al Qaeda and the Taliban, until the end of hostilities?

Mr. JOHNSON. 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." For this category of people, the President stated "[w]e must have clear, defensible, and lawful stand-

ards" 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, DOJ refined the Government's definition of our authority to detain those at Guantanamo Bay, from the "enemy combatant" definition used by the prior administration to one that is tied to the AUMF passed by Congress in 2001, as informed by the laws of war. Thus, with regard to the current detainee population at Guantanamo, this administration relies 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.

Mr. KRIS. 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." 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."

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Admiral MACDONALD. Yes; under the laws of war, unprivileged enemy belligerents can be detained for the duration of hostilities in a non-international armed conflict. The Supreme Court has ruled that the armed conflict with al Qa'ida is a non-international armed conflict, or what is sometimes referred to as a Common Article III armed conflict. The Court has also ruled that the President's authority under the AUMF includes detention authority.

Admiral HUTSON. I do not believe the AUMF gives him that authority by its terms but he does have it under the Geneva Conventions and the common law of armed conflict. However, his political, diplomatic, practical and humanitarian power to do so may be significantly more limited.

General ALTENBURG. Yes.

Mr. MARCUS. Yes. The President has the authority to hold al Qaeda and Taliban detainees until the end of hostilities. But given the indefinite nature of this conflict, detainees should be tried for war crimes or released if at all possible. There should be a more robust and independent system for reviewing the status of those who continue to be detained.

23. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, does the President's authority to detain extend to other individuals or groups?

Mr. JOHNSON. Please see the answer to question 22. The administration has adopted a detention standard for the detainees at Guantanamo that is based on the AUMF, as informed by the law of war. This standard reads as follows:

> 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 Qaeda 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.

Mr. KRIS. Please see the answer to question 22. The administration has adopted a detention standard for the detainees at Guantanamo that is based on the AUMF, as informed by the law of war. This standard reads as follows:

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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.

Admiral MACDONALD. On March 13, the administration submitted a legal position on the authority under the AUMF to detain the persons now held at Guantanamo Bay, and to date, the relevant Federal courts have entered rulings supporting that position. I also support the March 13 position, which follows:

> 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 Qaeda 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.

Admiral HUTSON. It extends to anyone who is engaged in a war (as opposed to criminal activity) against the U.S.

General ALTENBURG. International law and the Geneva Conventions provide that enemy combatants, both lawful and unlawful, may be detained until the end of hostilities.

Mr. MARCUS. The changing nature of al Qaeda and affiliated terrorist groups makes this a difficult question to answer. But the AUMF should not be construed to authorize detention of individuals who are members of groups not clearly and closely affiliated with al Qaeda or the Taliban.

24. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, during his May speech at the National Archives, President Obama indicated his intent to seek authorization from Congress and provide for judicial review of long-term detention of terrorists who could not be tried, but were too dangerous to release. How could President Obama achieve those objectives if he issues an Executive order?

Mr. JOHNSON. Congress has already provided authorization through the AUMF to detain persons who the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, persons who harbored those responsible for those attacks, and persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners. Habeas courts are actively reviewing the government's detention decisions. The administration is not currently seeking additional authorization.

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Admiral MACDONALD. I must respectfully defer to the administration on this question; however, I would note that in my view the President already has authority under the laws of war and the AUMF to detain members of al Qaeda, Taliban, and associated forces and others as described in the March 13 position (see previous answer), for the duration of hostilities. In this regard, I would like to emphasize that the armed conflict confronting us was not of our choosing and the duration of hostilities will depend in large measure on the actions of the enemy.

Admiral HUTSON. If that power is authorized, it is better to come from Congress than from an Executive order.

General ALTENBURG. By expanding the role of military judges to include this function, but any expansion of Federal judicial jurisdiction would, in my opinion, require congressional authorization.

Mr. MARCUS. While the President could issue an executive order on detention, consistent with the AUMF, it seems to me that he would need legislation to establish a judicial review mechanism. I also think that it would be desirable to have Congress authorize any longer-term detention system.

SORTING CASES FOR TRIAL

25. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, how would you propose sorting cases that should be tried in Article III Federal courts from those that should be tried before a military commission?

Mr. JOHNSON. DOJ and DOD have agreed upon a protocol for evaluating whether detainees at Guantanamo Bay who may be prosecuted should be prosecuted in an Article III civilian court or by military commission. That protocol is attached (see Annex A).

Mr. KRIS. DOJ and DOD have agreed upon a protocol for evaluating whether detainees at Guantanamo Bay who may be prosecuted should be prosecuted in an Article III civilian court or by military commission. That protocol is attached (see Annex A).

Admiral MACDONALD. There may be individual instances where a determination may be warranted to criminally prosecute a case in an Article III court, depending on factors such as the citizenship of the accused, the location of the offense, the status of the victims, or the particularities of the crime. Ultimately, it is a policy determination as to whether the Nation chooses to pursue a case in one forum or another. No matter whether or how that determination is made, however, I think it is important that the system for military commissions this country establishes is fair, and that our confidence in the fairness and legality of their rules and procedures is so high that we are able to accept trial of our own servicemembers before similar tribunals for allegations of war crimes brought by another country.

Admiral HUTSON. I would try all the cases in Article III courts. These are the courts with the unimpeachable credibility and vast experience to do it well. They have proven success and military commissions have demonstrated failure.

General ALTENBURG. Those cases whose core facts more reasonably are rooted in law of war violations should be tried by Military Commission; those which are more reasonably rooted in criminal violations should be tried by Article III courts. This is, however, not the most workable distinction to make, because most offenses can be characterized as violations of the law of war or as conventional crimes (consider, e.g., Lockerbie, indisputably the war crime of murdering innocent civilians, but also an extra-territorial murder prosecutable under the U.S. Code). Employing military commissions, then, fulfills a strategic purpose that transcends the elements of a crime, because it is a singularly appropriate, specialized forum in which we have tried war crimes since George Washington commanded our forces. It can accommodate, within the context of a contested criminal proceeding, the unique demands of national security, personal security, evidence gathering, and intelligence. Under no circumstances should Military Commissions be reserved for cases where the evidence would not support findings beyond a reasonable doubt; such a distinction would invalidate the legitimacy of the Commissions process.

Mr. MARCUS. One or the other forum—military commissions or Federal courts—may be the more desirable depending on the facts and litigation problems of particular cases. I think some categories of cases should be tried in Federal courts—e.g., those against detainees (such as Padilla or al-Marri) who were captured or arrested while lawfully in the United States, and those against detainees who committed crimes that occurred before, and were unrelated to, the September 11 attacks. Military commissions should only be used for September 11-related or post-September 11 war crimes.

26. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, if a terrorist attack on civilians is a war crime, why shouldn't all trials be by military commission?

Mr. JOHNSON. The administration believes that reformed military commissions are appropriate for trying our enemies for war crimes—with a long tradition dating back to the Revolutionary War. That does not mean, however, that we should ignore other available means to fight our enemy—including intelligence gathering, diplomacy, and traditional law enforcement, including prosecution in Federal court. The same conduct that constitutes a war crime may also constitute an offense under our criminal code. We need to use all elements of national power to combat terrorism, including all legitimate means to prosecute terrorists. Military commissions are one important option among many. So are Federal courts.

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same conduct that constitutes a war crime may also constitute an offense under our criminal code. We need to use all elements of national power to combat terrorism, including all legitimate means to prosecute terrorists. Military commissions are one important option among many. So are Federal courts.

Admiral MACDONALD. As I said in question 25, it is a policy determination as to whether the Nation chooses to pursue a case in one forum or another. So long as the military commissions are fair, and we are able to accept trial of our own servicemembers before similar tribunals for allegations of war crimes brought by another country, I believe trial by military commission is appropriate.

Admiral HUTSON. Because at its core, it is a crime. We don't ask DOJ to fight our wars; we shouldn't ask DOD to prosecute our criminal cases.

General ALTENBURG. If your premise is that all terrorist attacks on civilians are war crimes, then certainly all such trials could be by military commission. This is not the case, however, as they are not necessarily violations of the law of war, and the UCMJ limits the use of military commissions to violations of the law of war. Moreover, the Supreme Court made clear in its Civil War-era cases that commissions could not be used to enforce domestic law against U.S. citizens when the courts are open and operating—a principle that is not applicable when U.S. citizens are tried for war crimes violations. Domestic terrorists such as Timothy McVeigh, Theodore Kaczynski, and Eric Rudolph carried out terrorist attacks on civilians to bring attention to their political agendas, but were U.S. citizens whose cases were properly handled as conventional criminal cases.

Mr. MARCUS. I am uncomfortable with the notion of a permanent "war on terrorism." I think it is more consistent with our own systems of civilian and military justice, as well as international law, to limit the use of military commissions to war crimes committed during an actual armed conflict.

27. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, doesn't use of different forums open the door for criticism that the United States is going back to a law enforcement focus on terrorism, or that military commissions are only for cases that can't be successfully tried in Article III courts and therefore amount to "second-class justice?"

Mr. JOHNSON. This administration is committed to using all instruments of national power to defeat terrorist extremists. This includes, but is not limited to, the prosecution of some terrorists in Article III courts. As the President said in his May 21 National Archives speech, we are at war against al Qaeda, and military commissions have a long history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war, and we believe that some detainees should be prosecuted in the law-of-war context. Military commissions are not "second-class justice." The differences between the rules and procedures in Article III courts and military commissions are designed to account for the different issues attendant to prosecuting law of war violations. These rules are different; they are not "second-class." We believe that section 1031 of the 2010 NDAA passed by the Senate on July 23 is an important step toward additional reforms that are needed.

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Admiral MACDONALD. Domestically, individual States, DOJ, and the military often have overlapping jurisdiction, and determinations are made in individual cases as to which sovereign and which forum is appropriate. Rules, criminal statutes, and potential penalties vary between the jurisdictions, but all forums are considered "fair." Federal criminal disposition is often sought in some jurisdictions precisely because Federal statutes carry with them mandatory minimum sentences that are unavailable in state tribunals.

In individual cases, different forums may be appropriate for different cases. So long as the military commissions are fair, and we are able to accept trial of our own

servicemembers before similar tribunals, trial by military commission is appropriate, and military commissions should not be viewed as "second-class justice."

Admiral HUTSON. Precisely so.

General ALTENBURG. Yes, but only one would have any credibility to it. The issue of "going back to a law enforcement focus" suggests a binary choice which has long been discredited by most serious participants in this debate. The fight against al Qaeda in particular and terrorism in general certainly has a law enforcement component—witness the extraordinary work of the FBI among many other manifestations; it simply is not exclusively a law enforcement function. The danger of suggesting that commissions are a forum for second-class justice warrants the sober attention of law makers. Commissions long have functioned supplementary to the conventional court system because of the unique functions and features of this forum. A selection process that suggests that commissions are only employed for cases "too weak" for Article III courts will damage the functioning, credibility, and future use of this long-validated forum for bringing justice. Such inevitable criticisms can be alleviated by (1) referring only those cases strongly rooted in law of war violations to Military Commissions and (2) allowing a number of Military Commissions to complete their process without interruption so that the public has an opportunity to observe the military justice system at work. All facets of the Office of Military Commissions—the Prosecution, Defense, Judiciary, and Administrators—are staffed with talented, experienced professionals fiercely dedicated to producing full and fair trials. They deserve the opportunity to complete their mission.

Mr. MARCUS. No. Our military commission procedures, if improved as the Committee proposes, are not "second-class justice"; indeed, they would provide defendants with more procedural rights and protections than are available in the regular criminal justice systems of most other countries. If we candidly articulate the reasons why some cases are brought in Federal courts and others in military commissions, we should be able to rebut any allegations of this kind.

DETAINEE TRIALS IN THE UNITED STATES

28. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what are the advantages and disadvantages of holding trials in the United States?

Mr. JOHNSON. Holding trials in the United States makes it possible to employ Federal courts, in addition to military commissions, to try those detainees who have committed Federal crimes. Federal courts have, on many occasions, proven to be an effective tool in our efforts to combat international terrorism, and the President has made clear that both Federal courts and military commissions should be available for this purpose.

With regard to military commissions, it is not clear that moving them to the United States would have a significant impact on how they function as a legal matter, as basic due process protections may apply irrespective of the location of the commissions. Our goal is to create a military commissions system that is fair, effective, and legal, and that will survive appellate review, regardless of where the trials take place.

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Admiral MACDONALD. My personal, professional opinion is that there would be no substantive legal differences between Military Commissions conducted inside the United States or in their current venue.

Admiral HUTSON. I can't think of any disadvantages, other than perhaps access to witnesses. The primary advantages are that this is where the courts are and Americans are victims of the crimes.

General ALTENBURG. There are few, if any, advantages. Any site chosen to house prisoners pending Military Commission proceedings is likely to be in an isolated location more difficult to access than the relatively simple 3 hour flight from DC to

Guantanamo. Disadvantages include increased likelihood that local Federal courts would interject themselves into the detention process and provide a venue for potentially frivolous litigation as the Military Commissions cases move forward, a greatly increased security risk, especially when detainees are being transported to and from the detention location; the cost would be considerable to recreate the detention and trial facilities which already exist at Guantanamo.

Mr. MARCUS. The advantages of holding military commission trials in the United States, rather than at GTMO, are substantial: First, we would no longer have to detain enemy combatants at GTMO, thus avoiding the international stigma that has arisen from the earlier problems there and that cannot be totally dissipated. Second, the logistics of trying cases in GTMO are daunting, particularly the problems of travel to GTMO and providing effective counsel to defendants. We will have a much easier time convincing the world of the fairness of our trials if they are held in the United States.

29. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, would bringing the detainees into the United States for trial give them additional constitutional rights, such as the 5th Amendment due process concerns that recent media reports indicate were raised by the Office of Legal Counsel in May?

Mr. JOHNSON. See our answer to question 17. We believe that, whether military commissions are convened in the United States or at Guantanamo, there is a significant risk, in light of the circumstances of the Guantanamo detainees, that courts will apply a baseline of due process protection in commission proceedings. This does not mean that courts will provide commission defendants with the same array of constitutional rights that defendants receive in Article III criminal trials. We do believe, however, that 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), regardless of whether commission proceedings are held at Guantanamo Bay or in the United States. It is not clear that moving commission trials to the United States would have a significant impact on how they function as a legal matter, as basic due process protections may apply irrespective of their location.

Mr. KRIS. See our answer to question 17. We believe that, whether military commissions are convened in the United States or at Guantanamo, there is a significant risk, in light of the circumstances of the Guantanamo detainees, that courts will apply a baseline of due process protection in commission proceedings. This does not mean that courts will provide commission defendants with the same array of constitutional rights that defendants receive in Article III criminal trials. We do believe, however, that 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), regardless of whether commission proceedings are held at Guantanamo Bay or in the United States. It is not clear that moving commission trials to the United States would have a significant impact on how they function as a legal matter, as basic due process protections may apply irrespective of their location.

Admiral MACDONALD. I am not aware of legal precedent, on point, for the proposition that the due process clause of the fifth amendment would apply to a prosecution of an alien unprivileged enemy belligerent before a Military Commission, whether convened within the United States or abroad.

Admiral HUTSON. I believe the key to constitutional rights follows the courts and the nationality of the accused, not the location of the piece of ground upon which the court is situated. If we hold the courts out of CONUS just to avoid providing certain protections, the court is doomed to failure anyway.

General ALTENBURG. Perhaps. Obviously no one knows this for sure, because no one can project with certainty the continued development of the line of cases that includes but predates Quirin but also includes Boumediene, which purports not to overturn Quirin or Eisentrager, but substantially weakens both of those precedents. Bringing the detainees to the United States presents new opportunities for innovative defense counsel and guarantees protracted litigation.

Mr. MARCUS. I have not seen the OLC opinion. But my own view is that, while the issue of the constitutional due process rights of detainees in trials conducted at GTMO has not been ruled on by the courts, at the end of the day there are not likely to be significant differences between the constitutional rights that would apply at GTMO as opposed to the United States.

30. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what happens to detainees who are found not guilty at trial?

Mr. JOHNSON. As a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the authority to detain under the law of war. However, relying on law of war authority to detain an individual in the current conflict after he has been acquitted in Federal court or in a military commission raises serious policy questions that we are continuing to consider. We note that, in the last administration, two of the individuals who were tried by military commission and received short sentences were returned to their home countries post-conviction and later released. We believe that this option would be appropriate for detainees who are acquitted at trial, where consistent with national security and the interests of justice.

Mr. KRIS. As a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the authority to detain under the law of war. However, relying on law of war authority to detain an individual in the current conflict after he has been acquitted in Federal court or in a military commission raises serious policy questions that we are continuing to consider. We note that, in the last administration, two of the individuals who were tried by military commission and received short sentences were returned to their home countries post-conviction and later released. We believe that this option would be appropriate for detainees who are acquitted at trial, where consistent with national security and the interests of justice.

Admiral MACDONALD. Each case would have to be dealt with based on its own facts and circumstances. As a practical matter, a detainee acquitted before a Military Commission would continue to be held in detention under the laws of war and the Authorization to Use Military Force, until released by order of the executive or his duly authorized subordinate. The Executive's order could be issued independently or in execution of a decision from a Federal court pursuant to a writ of habeas corpus. But the overarching point is that an acquittal does not, ipso facto, result in release if hostilities are still ongoing.

Admiral HUTSON. They are legally not guilty of the crime(s) for which they were prosecuted. Whether they continue to be incarcerated would depend on other findings. "Not guilty" does not necessarily mean "innocent" although it may.

General ALTENBURG. They might be transferred to the home country or another nation. They could be considered for inclusion in the group of detainees too dangerous to release. They remain eligible under the law of war to be detained as enemy combatants until the end of hostilities. If tried in Article III courts, they might then fall into the category of persons who revert to indefinite INS detention because they cannot be released to any other country; this would be similar to individuals who arrived in the USA during the Mariel Boat Lift.

Mr. MARCUS. Theoretically, detainee combatants who are found not guilty at trial could continue to be detained until the end of the armed conflict. This would clearly be undesirable in most cases. But they would not in any event be entitled to release in the United States. As far as I know, none of the GTMO detainees are lawful residents of the United States, and they could therefore be detained as unlawful immigrants and deported.

31. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, does a not guilty verdict at a trial conducted in the United States increase the chances that a detainee would be ordered released into the United States?

Mr. JOHNSON. See the answer to question 2. As the President has stated, this administration will not choose to release any detainee into the United States who will endanger the American people. As noted in the answer to question 30, in the event a detainee is acquitted, it may be appropriate to transfer the detainee to his home country or a third country, where consistent with national security and applicable laws.

Mr. KRIS. See the answer to question 2. As the President has stated, this administration will not choose to release any detainee into the United States who will endanger the American people. As noted in the answer to question 30, in the event a detainee is acquitted, it may be appropriate to transfer the detainee to his home country or a third country, where consistent with national security and applicable laws.

Admiral MACDONALD. In my opinion it would not. The detainees at Guantanamo already have full access to habeas review in Federal courts under the Boumediene decision, and I am unaware of legal precedent for the proposition that they would be more likely to be ordered released pursuant to a habeas review if they were ac-

quitted at a Military Commission held in the United States as opposed to the existing venue.

Admiral HUTSON. I don't believe so. The person, if released, should still be repatriated.

General ALTENBURG. Yes.

Mr. MARCUS. No. See answer to question 30.

POST-TRIAL DETENTION

32. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, where should detainees who are convicted be incarcerated?

Mr. JOHNSON. We are currently examining a number of different options for housing detainees. We can assure you that we will not move any detainees into the United States unless and until we are convinced that they will be held safely and securely in a facility or facilities that satisfy all of our security concerns and meet our legal obligations regarding treatment of the detainees.

Mr. KRIS. We are currently examining a number of different options for housing detainees. We can assure you that we will not move any detainees into the United States unless and until we are convinced that they will be held safely and securely in a facility or facilities that satisfy all of our security concerns and meet our legal obligations regarding treatment of the detainees.

Admiral MACDONALD. I believe this question is being considered by the detention policy task force established by the President, and it would not be appropriate for me to offer my personal opinion at this juncture.

Admiral HUTSON. Either in the United States or in a U.S. run prison in their country of origin.

General ALTENBURG. Wherever they can be efficiently housed and secured without any chance of escape. Many facilities, including Guantanamo, provide such security. In fact, other than its reputation in some quarters, Guantanamo today is a model prison facility, as observed by the Attorney General after his visit to Guantanamo in January.

Mr. MARCUS. Those convicted by military commissions should be incarcerated in a high-security military prison in the United States or a high-security Federal prison. Those convicted in Federal courts should be detained in a high-security Federal prison.

DETENTION REVIEW PROCESS

33. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, what sort of system of review should apply to those detainees who we cannot try, but who are too dangerous to release?

Mr. JOHNSON. See the answers to questions 2 and 22. As the President stated in his May 21 speech at the National Archives, for any detainees that may fall into this category, we will have "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified." We are currently in the process of determining the precise details of the periodic reviews.

Mr. KRIS. See the answers to questions 2 and 22. As the President stated in his May 21 speech at the National Archives, for any detainees that may fall into this category, we will have "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified." We are currently in the process of determining the precise details of the periodic reviews.

Admiral MACDONALD. Like the previous question, I believe this subject is being considered by the detention policy task force and I would not want to offer a personal opinion.

However, as I answered in an earlier question, I believe the President has authority to detain unprivileged belligerents for the duration of hostilities. I also accept, as a general matter, that in a common Article III armed conflict, as the duration of hostilities and length of detention extend over years, the humane treatment obligations require greater levels of review, and additional accommodations must be made in the conditions of detention. In this regard, I support the findings and recommendation made in the Walsh report.

Admiral HUTSON. I am not convinced that such persons exist, although I realize that may be true. If they do, it should be a periodic, independent review.

General ALTENBURG. A review tribunal similar to the CSRTs, with the decision ultimately made by the Secretary of Defense in consultation with the Attorney General.

Mr. MARCUS. The current CSRT review system is inadequate. Given the length of detention, we need a more independent system of regular reviews, focusing on continuing dangerousness, and with a presumption in favor of release after a specified period of time (say 10 or 15 years) has elapsed. I would favor annual review hearings conducted by a Federal court or some new independent body, with a right to military and civilian counsel for the detainee.

34. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, should military judges and lawyers be provided to the detainee for a parole board on a periodic basis?

Mr. JOHNSON. See the answer to question 33. For any detainees that fall into this category the President has committed to "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified." We are currently in the process of determining the precise details of the periodic reviews.

Mr. KRIS. See the answer to question 33. For any detainees that fall into this category the President has committed to "a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified." We are currently in the process of determining the precise detaiIs of the periodic reviews.

Admiral MACDONALD. This question also goes to a matter that is now under review by the detainee policy task force. I can't comment on the concept of parole boards, but as I noted in the last question, I do believe that as the length of detention extends over a period of years, our obligations to ensure humane treatment under common Article III include making additional accommodations in the conditions of detention and in the review process.

Admiral HUTSON. Parole boards for convicted detainees should be conducted like any other Federal parole board.

General ALTENBURG. For periodic review of indefinite detention, attorneys should be provided, but never judges. For those convicted by the Military Commissions, parole should not be available to shorten an imposed sentence. This is consistent with Federal practice which has abolished parole. Seeking Presidential clemency could be a possible course of action.

Mr. MARCUS. Yes.

35. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, who should get this special long-term detention review process? Those detainees at Guantanamo? Those at Bagram captured off the battlefield? All detainees held long-term?

Mr. JOHNSON. See the answers to questions 2, 22, and 33. As the President has stated, any Guantanamo detainees who continue to be detained, where authorized by Congress and consistent with the law of war, will be afforded periodic reviews, so that any prolonged detention can be carefully evaluated and justified. New review procedures are also being put in place at the Bagram Theater Internment Facility, under which detainees held there will be provided biannual review of their detention.

Mr. KRIS. See the answers to questions 2, 22, and 33. As the President has stated, any Guantanamo detainees who continue to be detained, where authorized by Congress and consistent with the law of war, will be afforded periodic reviews, so that any prolonged detention can be carefully evaluated and justified. New review procedures are also being put in place at the Bagram Theater Internment Facility, under which detainees held there will be provided biannual review of their detention.

Admiral MACDONALD. This question is also under review by the administration. As I answered earlier, under the laws of war, unprivileged enemy belligerents may be detained for the duration of hostilities. I also believe that the obligation under the laws of war to treat detainees humanely includes a requirement to make additional accommodations in the conditions of detention and in the review process, as detention extends over a period of many years. In this regard I support the findings and recommendations in the Walsh report.

Admiral HUTSON. All detainees held long term. Again, location should not be determinative.

General ALTENBURG. All detainees held long term. No system which allows the government to avoid detention review by simply moving the prisoner to a different location should be accepted as legitimate.

Mr. MARCUS. I would favor this beefed-up review process for all GTMO detainees who continue to be detained and for all non-battlefield detainees at Bagram.

36. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, should detainees who were captured

off the battlefield, but held at Bagram or other battlefield internment facilities, ever be granted the right to an Article III court review of their detention?

Mr. JOHNSON. As we have argued in *Maqaleh* v. *Gates*, we do not believe that habeas rights extend to detainees captured outside of Afghanistan and transferred to Bagram for detention. Judicial review of detention on the battlefield in a theater of active military operations overseas raises significant operational concerns that are not present with respect to review of detention at Guantanamo Bay.

Mr. KRIS. As we have argued in *Maqaleh* v. *Gates,* we do not believe that habeas rights extend to detainees captured outside of Afghanistan and transferred to Bagram for detention. Judicial review of detention on the battlefield in a theater of active military operations overseas raises significant operational concerns that are not present with respect to review of detention at Guantanamo Bay.

Admiral MACDONALD. This question is now being litigated in Federal court in the *Malaqeh* v. *Gates* case, and I cannot comment.

Admiral HUTSON. Yes, unless we can devise a better system that the sham CSRTs have proven to be.

General ALTENBURG. This result is likely unless Congress acts to provide for administrative review of long-term detentions in all overseas facilities.

Mr. MARCUS. At least one District Judge, John Bates, has held that habeas review in Article III courts is available to such detainees. While the D.C. Circuit and the Supreme Court have not addressed this question, I agree with Judge Bates's opinion.

HABEAS CORPUS REVIEW

37. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, should a National Security Court be created to hear habeas corpus petitions or appeals of long-term detention?

Mr. JOHNSON. Almost all of the Guantanamo detainees now have pending habeas cases in Federal court. We believe that this review is rigorous, independent, and effective as a means of establishing the lawfulness of the detentions, and that it should continue without any effort to evade or displace such review. We have not identified a need for a new National Security Court.

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Admiral MACDONALD. I do not think such a court is necessary, and I note that all of the Guantanamo detainees already have habeas cases in Federal court, thus their long-term detention is already receiving judicial review.

Admiral HUTSON. No, I am not in favor of creating new courts. Existing courts are more than adequate and certainly better than a newly created court. All these are simply schemes to avoid "real" courts which have a proven record over the years of fairness with many, many successful prosecutions.

General ALTENBURG. There is merit in the concept of designating a particular court to hear FISA requests and try terrorism cases; it can build specific facilities and provide trained judges for these types of cases. The creation of such a legal system will take many years and likely create substantial litigation, as illustrated by the time and litigation generated in the creation of the military commission legal system.

Mr. MARCUS. No. While there are some good arguments for a National Security Court, there are strong arguments against it, and the District Court for the District of Columbia is in effect becoming a specialized (and effective) national security court through its handling of the habeas cases.

38. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, should Congress create uniform rules and procedures for conducting habeas corpus review for detainees?

Mr. JOHNSON. Habeas corpus review of Guantanamo detentions is rigorous, independent, and effective as a means of establishing the lawfulness of the detentions. The cases are proceeding before judges in the District Court of the District of Columbia under a case management order, and many issues are being coordinated by the judges. We think this review should be allowed to continue, without any effort to evade or displace such review. We expect that any legislation adopted by Congress to regulate habeas corpus review of Guantanamo detentions for existing cases

would result in delays in resolving these cases and litigation over the proper interpretation, and perhaps the constitutionality, of any rules and procedures adopted.

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Admiral MACDONALD. It would be beneficial to have clear, uniform standards of review and procedure, and application of the laws of war as the substantive body of law controlling habeas decisions. The post-Boumediene decisions within the U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the D.C. Circuit have been encouraging on this point, and thus it may be unnecessary for Congress to intervene.

Admiral HUTSON. No.

General ALTENBURG. Yes.

Mr. MARCUS. The District Court for the District of Columbia is doing a good job of developing effective and fair procedures. While there are some differences among the judges of that Court, they are not significant and they will be minimized over time as appeals are taken to the D.C. Circuit. Congress should watch these developments closely to see if legislation establishing uniform procedures is necessary or desirable.

39. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, if Congress did enact such rules and procedures, what would happen to the existing assignment of habeas cases and the case management orders currently governing those hearings?

Mr. JOHNSON. The effect on existing cases of any legislation adopted by Congress to regulate habeas corpus review of Guantanamo detentions would depend on what rules and procedures were enacted. At a minimum, we expect such legislation would result in delays in resolving these cases and litigation over the proper interpretation of, and perhaps the constitutionality, of any rules and procedures adopted.

Mr. KRIS. The effect on existing cases of any legislation adopted by Congress to regulate habeas corpus review of Guantanamo detentions would depend on what rules and procedures were enacted. At a minimum, we expect such legislation would result in delays in resolving these cases and litigation over the proper interpretation of, and perhaps the constitutionality, of any rules and procedures adopted.

Admiral MACDONALD. Because the effect of legislation to regulate habeas corpus review would depend on the exact rules and procedures enacted, it is impossible to predict what would happen to existing cases. Legislative changes could result in delays as courts are asked to review and interpret any new rules and procedures.

Admiral HUTSON. I don't know.

General ALTENBURG. Congress should address this issue directly in enacting rules and procedures.

Mr. MARCUS. If Congress legislated in this area, the courts would be bound except to the extent that they determined that the legislated rules and procedures were unconstitutional.

40. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, how does habeas corpus fit with a system of long-term detention review?

Mr. JOHNSON. Habeas corpus review is playing an important role in ensuring that Guantanamo detention decisions are lawful. As the President has stated, prolonged detention of these individuals should not be the decision of any one person. Habeas review for Guantanamo detainees helps establish the lawfulness of our detention decisions and ensure that we can justify to an independent branch of government our decisions about who can be detained. The administration believes that habeas review of the Guantanamo detentions should continue, without any effort to evade or displace that review.

Mr. KRIS. Habeas corpus review is playing an important role in ensuring that Guantanamo detention decisions are lawful. As the President has stated, prolonged detention of these individuals should not be the decision of any one person. Habeas review for Guantanamo detainees helps establish the lawfulness of our detention decisions and ensure that we can justify to an independent branch of government our decisions about who can be detained. The administration believes that habeas re-

view of the Guantanamo detentions should continue, without any effort to evade or displace that review.

Admiral MACDONALD. Habeas reviews of Guantanamo detainees following the Boumediene decision have applied the laws of war as the substantive body of law controlling the lawfulness of detention. I believe the courts are correct in so applying the laws of war. While this has worked well, so far, in the Guantanamo cases, I do not believe habeas should apply to detentions in areas of active hostilities.

Admiral HUTSON. Probably so.

General ALTENBURG. Long-term detention of those individuals who are not tried by Article III courts or military commissions should require regular periodic reviews of the basis for their continued detention. Obviously, prisoners will challenge such review through the habeas process; this underscores the importance of providing periodic reviews which will stand up to such scrutiny by the district courts.

Mr. MARCUS. Habeas corpus would still be an important avenue for the courts to determine whether initial and continued detention was lawful. Improved procedures for making those determinations by the military should, over time, reduce the habeas burden on the Government and the courts.

41. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, is habeas a separate process or should successive habeas petitions by detainees serve as independent court review of long-term detention?

Mr. JOHNSON. See the answer to question 40. Habeas corpus review is playing an important role in ensuring that Guantanamo detention decisions are lawful. Even after a habeas court has upheld the lawfulness of detention, the detainee will be afforded periodic administrative reviews, so that any prolonged detention will be carefully evaluated and justified.

Mr. KRIS. See the answer to question 40. Habeas corpus review is playing an important role in ensuring that Guantanamo detention decisions are lawful. Even after a habeas court has upheld the lawfulness of detention, the detainee will be afforded periodic administrative reviews, so that any prolonged detention will be carefully evaluated and justified.

Admiral MACDONALD. In my view, habeas should be a separate process, focused on whether the Executive's detention of a particular detainee-petitioner complies with the laws of war.

Admiral HUTSON. I'm sorry, but I'm not sure I understand the question adequately to intelligently answer.

General ALTENBURG. Habeas is a separate civil proceeding with a specific statutory role in our criminal justice system. It should remain separate from the development of a systemic review of long-term detention.

Mr. MARCUS. If Congress establishes an adequate process for direct review of long-term detention decisions, or provides for those decisions to be made by a Federal court, there should be no need for separate habeas proceedings.

RETURN TO THE FIGHT

42. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, how can we best ensure that those detainees who are released to another country don't return to the fight?

Mr. JOHNSON. The United States Government employs a number of methods to help prevent former detainees from returning to the fight. When we transfer a detainee from Guantanamo we seek any necessary security assurances from the receiving country to mitigate possible threats posed by the transferred detainee. Part of our assessment in transferring a detainee to another country is whether a country will issue such security assurances and whether that country has the capability of fulfilling those assurances. In addition, the United States has transferred detainees to countries that have used rehabilitation programs to help mitigate the risk of returning to the fight. The United States also continues to work with our allies and partners to share intelligence, conduct cooperative security operations, and collect biometrics to prevent re-entry into the United States.

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countries that have used rehabilitation programs to help mitigate the risk of returning to the fight. The United States also continues to work with our allies and partners to share intelligence, conduct cooperative security operations, and collect biometrics to prevent re-entry into the United States.

Admiral MACDONALD. Each case must be assessed individually and risk mitigation plans tailored accordingly. As a general matter, the executive branch seeks to receive security assurances from the receiving State and, in appropriate cases, assurances that rehabilitation programs will be employed.

Admiral HUTSON. We can never guarantee that but we can best ensure it by providing fair trials and rehabilitation during incarceration. Warehousing people and trying them in sham trials will ensure they do return to the fight, or even engage in it for the first time.

General ALTENBURG. Release only to nations we trust to monitor them.

Mr. MARCUS. This is a question best addressed to the administration witnesses. The best guarantee is effective agreements with foreign countries for rehabilitation and monitoring of former detainees.

CLOSING GUANTANAMO

43. Senator MCCAIN. Mr. Johnson, Mr. Kris, Admiral MacDonald, Admiral Hutson, General Altenburg, and Mr. Marcus, if all the detainees cannot be tried or repatriated to another country by January 2010, what should we do about closing Guantanamo?

Mr. JOHNSON. As the President has stated, rather than keeping us safe, the prison at Guantanamo Bay has weakened our national security by serving as a rallying cry for our enemies and reducing the willingness of our allies to work with us in fighting an enemy that operates in multiple countries. A bipartisan group of current and former senior U.S. Government officials and military leaders has called for the closure of the detention facility at Guantanamo Bay to enhance our national security, and this administration is determined to accomplish this within the 1 year timeframe directed by the President. We are actively working to prosecute as many detainees as possible before our Federal courts or in reformed military commissions, as well as to transfer to other countries those detainees who can safely be transferred. If there are some who can neither be prosecuted nor safely transferred, the President has made clear that "[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." Any such detention of the detainees currently at Guantanamo would be based on authorization from Congress, i.e., the 2001 AUMF. See our answers to Questions 2, 22, and 33.

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Admiral MACDONALD. The President issued an Executive order on 22 January 2009 directing the closure of detention facilities at Guantanamo no later than 1 year after the date of that order. As a uniformed officer, it would not be appropriate for me to speculate about alternatives that are inconsistent with the President's order.

Admiral HUTSON. Close it and imprison the detainees elsewhere.

General ALTENBURG. The totality of the previous administration's practices and policies regarding detainees has produced unwarranted demonization of the facilities at Guantanamo. The confinement and court complexes recently constructed there are state of the art; all Americans should be proud of those facilities and the dedicated men and women who operate them. Guantanamo provides the current administration with a safe, secure, modern facility which should be re-considered as an option for detaining belligerents and conducting military commissions.

Mr. MARCUS. We should still close GTMO and transfer the remaining detainees to military prisons in the United States.

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

POST-TRIAL

44. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, assuming military commissions are held at Guantanamo, where will detainees who are convicted serve out their sentence—in the United States or somewhere else?

Mr. JOHNSON. This determination will likely be made on a case-by-case basis. Of the three individuals who have been convicted by military commissions to date, two were returned to their home countries, and one remains in United States custody at Guantanamo.

Mr. KRIS. This determination will likely be made on a case-by-case basis. Of the three individuals who have been convicted by military commissions to date, two were returned to their home countries, and one remains in U.S. custody at Guantanamo.

Admiral MACDONALD. This is a matter currently under review by the administration and it is not a matter under my cognizance.

45. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, Federal Bureau of Investigation Director Robert Mueller said there is the very real possibility that the Guantanamo detainees will recruit more terrorists from among the Federal inmate population and continue al Qaeda operations from the inside. What is the impact of placing detainees in the U.S. prison system—pre-trial and post-trial?

Mr. JOHNSON. We are currently examining a number of different options for housing Guantanamo detainees, including the possibility of housing them in facilities separate and apart from the Federal inmate population. There are sound legal and policy reasons to house any detainees held under law of war authority separately from criminal prisoners. In the event that any Guantanamo detainees are held in proximity to Federal inmates, special administrative measures (SAMs) are available where necessary and appropriate to restrict their communications, isolate them from other prisoners, and prevent violence to any person. See 28 CFR 501.3.

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Admiral MACDONALD. I respectfully defer to the administration on this question, as it is not a matter under my cognizance.

46. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, has an assessment been done to determine the risk of escape as well as potentially creating targets in the United States for terrorist attacks?

Mr. JOHNSON. We will not move any detainees into the United States unless and until we are convinced that the detainees will be held safely and securely in a facility that satisfies all of our security concerns. We note that 33 international terrorists are currently housed in the Bureau of Prisons' administrative maximum (ADX) facility, sometimes referred to as "supermax." Nobody has ever escaped from the ADX.

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Admiral MACDONALD. I respectfully defer to the administration on this question, as a risk assessment of this sort is not under my cognizance.

47. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, will Guantanamo detainees be segregated from the regular prison population?

Mr. JOHNSON. We are currently examining a number of different options for housing Guantanamo detainees, including the possibility of housing them in facilities separate and apart from the Federal inmate population. There are sound legal and

policy reasons to house any detainees held under law of war authority separately from criminal prisoners.

Mr. KRIS. We are currently examining a number of different options for housing Guantanamo detainees, including the possibility of housing them in facilities separate and apart from the Federal inmate population. There are sound legal and policy reasons to house any detainees held under law of war authority separately from criminal prisoners.

Admiral MACDONALD. I defer to the administration on this question as it is not a matter under my cognizance.

48. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, currently, the United States has only one Supermax facility and it is located in Florence, Colorado. According to a Bureau of Prisons official, "only one bed was not filled at Supermax" as of May 21. What facilities exist in the United States today that can hold these detainees?

Mr. JOHNSON. As the administration works toward closing the detention facility at Guantanamo Bay, Cuba, we are carefully considering the various options as to where detainees could be housed. These deliberations are ongoing, and therefore it would be inappropriate to comment or speculate as to the outcome of that determination or to discuss specific facilities. We can assure you, however, that we will not move any detainees into the United States unless and until we are convinced that the detainees will be held safely and securely in a facility that satisfies all of our security concerns and meets our legal obligations regarding treatment of the detainees.

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Admiral MACDONALD. It is my understanding that the subject matter of this question is under review by the administration and it is not a matter within my cognizance. Therefore, I respectfully defer to the administration.

49. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, today the Guantanamo detainees are held under well-established laws of war permitting belligerents to confine captured enemies until hostilities are over. What if a detainee is found not guilty—where will he be released?

Mr. JOHNSON. As a matter of legal authority, the question of guilt or innocence in a criminal prosecution is separate from the authority to detain under the law of war. However, relying on law of war authority to detain an individual in the current conflict after he has been acquitted in Federal court or in a military commission raises serious policy questions that we are continuing to consider. We note that, in the last administration, two of the individuals who were tried by military commission and received short sentences were returned to their home countries post-conviction and later released. We believe that this option would be appropriate for detainees who are acquitted at trial, where consistent with national security and the interests of justice.

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Admiral MACDONALD. As I answered in response to Senator McCain (see question # 30), each case would have to be dealt with based on its own facts and circumstances. As a practical matter, a detainee acquitted before a Military Commission would continue to be held in detention under the laws of war and the Authorization to Use Military Force, until released by order of the executive or his duly authorized subordinate. The Executive's order could be issued independently or in execution of a decision from a Federal court pursuant to a writ of habeas corpus.

But the overarching point is that an acquittal does not, ipso facto, result in release if hostilities are still ongoing.

50. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, what does the administration plan to do when a Federal judge orders the release of a detainee but who the administration knows is too dangerous to release or transfer?

Mr. JOHNSON. As the President has stated, the United States is a nation of laws and we must abide by court rulings. At the same time, the administration will not voluntarily release into the United States any detainees who would endanger the American people. If a detainee is ordered released by a habeas court, we will work to develop transfer or resettlement options that satisfy our security concerns, consistent with the rulings of the court. Moreover, as noted above, for detainees in the United States, authority to detain individuals under the immigration laws pending their removal, particularly where they pose a threat to national security, is an additional mechanism that may be used if necessary to ensure that detainees will not endanger our citizens.

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Admiral MACDONALD. If a Federal judge orders the release of a detainee, the government would comply with the order to the fullest of its ability or seek to appeal to a higher court.

51. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, what do you do with a detainee you cannot try or release due to national security concerns?

Mr. JOHNSON. As the President stated in his National Archives address, although we are going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country, 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." For the detainees at Guantanamo, the President has stated that "[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." Any such detention will be based on authorization from Congress, i.e., the 2001 AUMF. As the Supreme Court held in *Hamdi* v. *Rumsfeld*, and as the administration has explained in filings in recent habeas cases, the detention authority Congress has conferred under the AUMF should be informed by the laws of war, which have long permitted detention of enemy forces to ensure that they not return to the fight.

Mr. KRIS. As the President stated in his National Archives address, although we are going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country, 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." For the detainees at Guantanamo, the President has stated that "[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." Any such detention will be based on authorization from Congress, i.e., the 2001 AUMF. As the Supreme Court held in *Hamdi* v. *Rumsfeld*, and as the administration has explained in filings in recent habeas cases, the detention authority Congress has conferred under the AUMF should be informed by the laws of war, which have long permitted detention of enemy forces to ensure that they not return to the fight.

Admiral MACDONALD. The laws of war and the AUMF do not require that unprivileged enemy belligerents be referred to trial or released. They may be detained for the duration of hostilities.

52. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, what is the risk of releasing Guantanamo detainees given the recidivism rate is 1 in 7?

Mr. JOHNSON. There are always risks in releasing detainees, whether from Guantanamo, or in Iraq or Afghanistan, or from our Federal prisons. Recidivism is always

a possibility. The prior administration released and transferred abroad well over 500 detainees from Guantanamo Bay, and some have returned to the fight. But the United States does everything it can to mitigate these risks, including seeking any necessary security assurances from the receiving country, arranging for detainees to enter rehabilitation programs, and collecting biometrics to prevent re-entry into the United States. In reviewing a detainee for transfer, release, prosecution, or detention, our primary concerns are always our national security interests, the safety of the America people, and the rule of law.

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Admiral MACDONALD. The risk of releasing Guantanamo detainees is that some may return to the battle. That risk is taken into account in the review process of individual cases. As a general matter, if a detainee is to be released to another country, the executive branch seeks to receive security assurances from the receiving State and, in appropriate cases, assurances that rehabilitation programs will be employed.

53. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, when does the administration plan to ask permission from Congress to authorize long-term detention of detainees?

Mr. JOHNSON. Congress has already provided authorization through the AUMF to detain persons who the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, persons who harbored those responsible for those attacks, and persons who were part of, or substantially supported, Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners. Habeas courts are actively reviewing the government's detention decisions with respect to Guantanamo detainees. The administration is not currently seeking additional authorization.

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Admiral MACDONALD. I respectfully defer to the administration on any question concerning the administration's intentions regarding possible introduction of legislation relating to detainees.

TRIAL LOCATION

54. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, the Expeditionary Legal Complex (ELC) provides a secure location to secure and try detainees charged by the U.S. Government, full access to sensitive and classified information, full access to defense lawyers and prosecution, and full media access by the press. Moving detainees to prisons in the United States as well as trying them in the United States will require a significant investment and re-structuring of our existing detention facilities. In 2002, an entire wing of a jail in Alexandria, Virginia, was cleared out for the September 11 "20th Hijacker," Zacarias Moussaoui, to be housed for his trial—just for one detainee. Where will military commissions be held—at Guantanamo or in the United States?

Mr. JOHNSON. We are currently considering all possible options. That said, the President has committed to closing Guantanamo by the end of January 2010. As the President has stated, rather than keep us safe, the prison at Guantanamo Bay has weakened our national security by serving as a rallying cry for our enemies and reducing the willingness of our allies to work with us in fighting an enemy that operates in multiple countries. A bipartisan group of current and former senior U.S. government officials and 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 accomplish this within the 1-year timeframe directed by the President.

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Admiral MACDONALD. I have not been involved in any discussions regarding the location, or potential location, for military commissions. That determination will be made by the administration.

55. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, assuming military commissions are held at Guantanamo, what additional constitutional rights will a detainee gain if they are tried in the United States versus Guantanamo?

Mr. JOHNSON. See our answer to question 17. We believe that, whether military commissions are convened in the United States or at Guantanamo, there is a significant risk, in light of the circumstances of the Guantanamo detainees, that courts will apply a baseline of due process protection in commission proceedings. This does not mean that courts will provide commission defendants with the same array of constitutional rights that defendants receive in Article III criminal trials. We do believe, however, that 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), regardless of whether commission proceedings are held at Guantanamo Bay or in the United States. It is not clear that moving commission trials to the United States would have a significant impact on how they function as a legal matter, as basic due process protections may apply irrespective of their location.

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Admiral MACDONALD. The Supreme Court held in *Boumediene*, that detainees held at Guantanamo have a right to habeas review under the Suspension Clause of the Constitution. The Court did not extend other Constitutional protections to those detainees, and subsequent decisions by lower courts have held that the holding in *Boumediene* was limited to the Suspension Clause. I am not aware of any precedent, on point, that would extend other Constitutional rights to alien unprivileged enemy belligerents detained under the laws of war, whether held within the United States or outside the United States.

56. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, are there differences in the rights awarded to detainees tried in a military commission versus civilian court? Could location or geography affect the right afforded to detainees (somewhere in the United States versus Guantanamo)?

Mr. JOHNSON. Properly reformed military commissions are uniquely situated to take into account the realities of the battlefield and the particular challenges of gathering evidence during military operations overseas, while also providing due process to the accused. For example, some of our customary rules of criminal procedure, such as Miranda-like warnings, are not required in the military commissions legislation that passed the Senate.

With regard to location, it is not clear that moving the trials to the United States would have a significant impact on how they function as a legal matter, as basic due process protections may apply irrespective of their location. Our goal is to create a military commissions system that is fair, effective, and legal, and will survive appellate review, regardless of where the trials take place.

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Admiral MACDONALD. As I noted in my answer to question 55, I believe that the rights afforded to detainees within the draft military commissions legislation under consideration by this committee will be sufficient to protect whatever rights a detainee has regardless of the physical location of the commission. Those rights are not identical to the rights that are found in civilian courts.

Both commissions and civilian courts offer a right of confrontation, a right of counsel, the right to be present during the introduction of evidence, a right to remain silent, protection against statements obtained by torture or cruel, inhuman or degrading treatment, a right of due process, a right to an impartial judge, and appellate review. Both include a presumption of innocence, proof beyond a reasonable doubt, protection against double jeopardy, and the right to 12 members in a capital case.

However, the right of confrontation in criminal courts forbids the introduction of testimonial hearsay. Commissions permit hearsay if reliable. Domestic courts use a voluntariness standard for admissibility of statements of a defendant, while commissions rules would permit a military judge to consider voluntariness as an aspect of determining both reliability and admissibility in the interests of justice. Due process rights before commissions is informed by the law of war, permitting substitutes for domestic norms, such as trial by members rather than trial by jury, and trial based upon sworn charges rather than indictment. The right to a Miranda warning is well founded in domestic law, but is not required for admission of statements in a military commission because it is inconsistent with the duties of a Soldier or Marine conducting a battlefield interrogation. Similarly, search and seizure laws applicable under the Fourth Amendment generally do not apply to searches and seizures outside of the United States.

PROTECTION OF CLASSIFIED INFORMATION

57. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, some classified information that could be essential to the conviction of these detainees is still extremely sensitive and could compromise ongoing activities as well as American lives. How do we handle protection of classified information during trials?

Mr. JOHNSON. Ensuring that classified information is adequately safeguarded in order to protect our national security is a paramount concern for the administration. The system provided by CIPA for criminal cases prosecuted in Federal Court has generally worked well in protecting classified information, while also ensuring a fair, credible, and effective trial. We have worked closely with the committee staff to develop the Levin-Graham-McCain amendment that was adopted by the Senate on July 23, and provides for a modified version of CIPA that reflects lessons learned from past terrorism prosecutions. We are grateful for the work of the committee staff in developing procedures that will adequately protect classified information and advance the President's objective of reforming the commissions and ensuring that they are a fair, legitimate, and effective forum for the prosecution of law of war offenses.

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from past terrorism prosecutions. We are grateful for the work of the committee staff in developing procedures that will adequately protect classified information and advance the President's objective of reforming the commissions and ensuring that they are a fair, legitimate, and effective forum for the prosecution of law of war offenses.

Admiral MACDONALD. The provisions addressing classified evidence permitted a military judge to determine the reliability of underlying evidence, and redact classified sources and methods from material provided to the defense. The standards for discovery and use in military commisions are similar to those found in courts-martial, but given the lack of a robust body of case law interpreting those rules, the rules addressing classified information fail to provide clear guidance to military judges and practitioners regarding both the standards for discovery and the procedures to be used in obtaining ex parte review of petitions from the government. The rules governing classified information have no clear analogue in either courts-martial or Article III courts, depriving commissions of the benefit of the jurisprudence that exists under established norms in either courts-martial or district courts. Without such clear guidance, counsel have been unable to obtain ex parte hearings to expedite the resolution of classified information issues, and have had to seek multiple protective orders to ensure all information, regardless of source, is properly protected.

I recommend that the classified information rules be altered, relying on CIPA as a touchstone for starting the draft, incorporating the lessons learned from commissions to date, and those provisions of MRE 505 that permit closure of the proceedings when warranted. Counsel and military judges will then have the benefit of more than 20 years of jurisprudence from CIPA application to guide the use of the rules.

LONG-TERM IMPLICATIONS

58. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, what are the long-term implications on future conflicts of trying these detainees in a civil court versus military commissions?

Mr. JOHNSON. As we testified before the committee, the administration is committed to using all elements of national power and authority—including the systems of justice in both Federal courts and military commissions—to defeat our enemy and to advance the interests of justice. Federal courts have been used successfully many times before to try and convict suspected terrorists, including individuals affiliated with al Qaeda. We have developed a protocol to determine whether cases will be tried in a military commission or a Federal court, and will make these determinations on a case by case basis. The protocol is attached (see Annex A). We do not believe that these determinations will foreclose any options for the future.

Mr. KRIS. As we testified before the committee, the administration is committed to using all elements of national power and authority—including the systems of justice in both Federal courts and military commissions—to defeat our enemy and to advance the interests of justice. Federal courts have been used successfully many times before to try and convict suspected terrorists, including individuals affiliated with al Qaeda. We have developed a protocol to determine whether cases will be tried in a military commission or a Federal court, and will make these determinations on a case-by-case basis. The protocol is attached (see Annex A). We do not believe that these determinations will foreclose any options for the future.

Admiral MACDONALD. Each case deserves an individual determination as to whether or where a trial might be conducted. There may be individual instances where a determination may be warranted to criminally prosecute a case in an Article III court, depending on factors such as the citizenship of the accused, the location of the offense, the status of the victims, or the particularities of the crime. Ultimately, it is a policy determination as to whether the administration chooses to pursue a case in one forum or another. No matter whether or how that determination is made, however, I think it is important that the system for military commissions we establish is fair, and that we are confident enough in the fairness and legality of their rules and procedures that we would accept trial of our own servicemembers before similar tribunals for allegations of war crimes brought by another country.

MIRANDA RIGHTS

59. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, currently, new intelligence is continually being collected from detainees at Guantanamo and is being used to fight terrorists in Iraq, Afghanistan, and around the globe. Accord-

ing to former Central Intelligence Agency Director George Tenet, upon Khalid Sheikh Mohammad's capture on March 1, 2003, he said: "I'll talk to you guys after I get to New York and see my lawyer." Why is the administration reading Miranda Rights to some detainees captured or held in Iraq and Afghanistan? How many are being read Miranda Rights? How many have invoked their rights?

Mr. JOHNSON. First, it should be made clear that Miranda warnings are never given by our soldiers on the battlefield or in any other circumstance where they would have an adverse impact on military or intelligence operations. 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.

Under policies that have been in place for years (including under the previous administration), Miranda warnings are only given in a very small number of cases after an individual has been removed from the battlefield, and only when consistent with military and intelligence needs. This administration is committed to using all instruments of national power to defeat terrorist extremists. This includes, 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. The warnings are never given if doing so will hinder our counterterrorism efforts.

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Admiral MACDONALD. It has been the longstanding practice of the U.S. Government to use Miranda warnings in a very small number of cases in which it is important to our national security to ensure that statements made by terrorist suspects can be used in a criminal prosecution. However, the warnings are given in locations removed from the battlefield, and only after the military's intelligence-gathering and force protection needs have been met. The decision as to whether or not to give a warning is made by experienced career professionals in consultation with military and intelligence officials. The warnings are never given if the professionals conclude that doing so will hinder our counterterrorism efforts.

I do not know the number of cases in which a detainee has invoked his right to silence.

60. Senator INHOFE. Mr. Johnson, Mr. Kris, and Admiral MacDonald, what is the impact of requiring the reading of Miranda Rights to terrorists captured on the battlefield and advising them they have the right to remain silent?

Mr. JOHNSON. See the answer to question 59.

Mr. KRIS. See the answer to question 59.

Admiral MACDONALD. The impact of requiring Miranda warnings on the battlefield would be significant. Soldiers seek actionable intelligence in order to achieve the mission, and any requirement that impinges on obtaining such information would endanger both the mission and the lives of servicemembers who require that information to subdue the enemy in battle. Soldiers must be free to exercise their full authority under the law of war to obtain actionable intelligence, or risk compromise of the mission and safety of our troops.

However, where the provision of Miranda rights will not risk compromise of the mission or safety of our troops, providing Miranda warnings may enable the government to keep all options on the table, thus helping to ensure that those who commit terrorist acts against our citizens can be brought to justice, whether in Federal courts or military commissions.

QUESTIONS SUBMITTED BY SENATOR JEFF SESSIONS

CAPITAL CHARGES

61. Senator SESSIONS. Mr. Kris, the MCA has been construed by some military judges to prevent prosecutors from pursuing capital charges against a defendant if he pleads guilty. This is not the case in the civilian system, right? In other words, in State and Federal courts, a defendant who pleads guilty can still be charged with a capital offense?

Mr. KRIS. In the Federal civilian system, as well as in the vast majority of the States which currently have capital punishment, the death penalty can be imposed after a guilty plea. The question of whether the MCA and commissions rules permit the death penalty to be imposed after a guilty plea in military commissions is currently the subject of litigation that is pending before the commissions. We have argued in litigation that the existing law allows for the imposition of the death penalty after a guilty plea to capital charges. No courts have ruled on the question to date.

62. Senator SESSIONS. Mr. Kris, the courts' interpretation of the MCA makes it harder to pursue a capital case, in the case of a defendant who pleads guilty, than it would be if the same unlawful belligerent were prosecuted in State or Federal court—or if a U.S. citizen were prosecuted for murder in State or Federal court. Is that correct?

Mr. KRIS. Whether the death penalty can be imposed after a guilty plea under the MCA is the subject of pending litigation and no courts have ruled on this question to date. In the Federal system, and in the vast majority of the States which currently have capital punishment, the death penalty can be imposed after a guilty plea.

63. Senator SESSIONS. Mr. Kris, if Khalid Sheikh Muhammad, for example, began to have doubts about the heavenly reward that has been promised to him by Osama bin Laden in the event of his death, could he simply plead guilty, and thereby ensure that no capital charges can be brought against him?

Mr. KRIS. Whether a defendant chooses to plead guilty or go to trial has no bearing on which charges can be brought; the question is solely about the punishment, that is, whether the death penalty can be imposed based on a conviction resulting from a guilty plea rather than a finding of guilt after a trial. This question is the subject of pending litigation before the military commissions, as discussed above.

64. Senator SESSIONS. Mr. Kris, do you believe that Congress should correct this anomaly?

Mr. KRIS. We have argued in litigation that the existing statute and rules allow for the imposition of the death penalty after a guilty plea to capital charges. The administration has not taken a position on whether this matter requires any further congressional action.

CLASSIFIED INFORMATION

65. Senator SESSIONS. Mr. Kris, the committee-reported NDAA requires that, before the government may seek protection for classified information, it first must certify that the information in question has been declassified "to the maximum extent possible." Does the administration support this change—and if not, why do you believe that it is unsound?

Mr. KRIS. A provision in the bill passed by the Senate Armed Services Committee allowed the use of traditional CIPA protections for classified evidence—such as substitutions—only after an agency head or original classifying authority has certified that the evidence has been declassified to the maximum extent possible. The administration expressed concern that this provision has no analogue in CIPA or the UCMJ, and created a potentially burdensome process of declassifying information for which disclosure might not be ordered after an ex parte review by a military judge or district court.

On July 23, the Senate adopted an amendment to revise the section of the bill governing the handling of classified information in military commission trials. Among other things, this amendment removed this requirement.

66. Senator SESSIONS. Mr. Kris, I understand that there is an ambiguity in the MCA as to whether it allows presentations in support of a motion to protect classified evidence to be presented ex parte. Some judges apparently think that only the

written motion may be filed ex parte, but that an oral presentation in support of the motion cannot be made to the court ex parte. In the Federal courts' practice under the CIPA, can presentations as well as written motions seeking protection for classified evidence be made ex parte?

Mr. KRIS. In Federal court practice, trial judges generally permit the government to present oral, as well as written ex parte explanations concerning the national security interests in classified information that is potentially subject to discovery. In military commissions practice, however, judges have demonstrated reluctance to permit such ex parte oral presentations. We believe the Levin-McCain-Graham amendment to section 1031 of the NDAA makes clear that oral ex parte presentations are permitted.

67. Senator SESSIONS. Mr. Kris, what practical problems arise when MCA judges do not allow such presentation to be made ex parte?

Mr. KRIS. Proposing substitutions and summaries of classified information is a cumbersome process, given the technical difficulties associated with developing alternatives to full disclosure that provide information material to the defense without disclosing sensitive classified information. Ex parte sessions provide an opportunity for trial counsel to immediately respond to questions from the military judge by explaining the alternatives or proposing amendments to the alternatives without the delay involved in relying solely on written submissions.

68. Senator SESSIONS. Mr. Kris, the MCA allows the United States to seek protective orders for information that the United States has supplied to the defense through discovery. The text of the MCA, however, does not authorize such protective orders for classified or other sensitive information that the defendants obtains through other means. Has this proven to be a problem in MCA prosecutions, and if so, can you describe the circumstances in which it has been a problem?

Mr. KRIS. Yes, this has proven to be a problem in MCA prosecutions. Unfortunately, classified information may be found in open or public sources due to previous unauthorized disclosures. However, these unauthorized disclosures do not change the classification level of the information and do not minimize the damage to national security that disclosure is reasonably expected to cause. When leaked classified information is cited or used by counsel who have security clearances or otherwise have had access to classified information by virtue of their role as counsel, the public perceives that the leaked classified information has been acknowledged, thus increasing the harm to national security. The government is put in the untenable position of risking further disclosures by confirming or denying the classified information. We believe the Levin-McCain-Graham amendment to section 1031 of the NDAA addresses this problem by authorizing protective orders in this context.

69. Senator SESSIONS. Mr. Kris, I understand that the administration has informally suggested that the standard for discovery in MCA litigation should be clarified, so that discovery is available for information that is relevant and necessary to a legally cognizable and relevant defense or to sentencing issues. Can you describe the policy reasons for this proposal?

Mr. KRIS. We think it is important to codify and adapt current law and practice on this issue under the CIPA for the military commission context, in order to better protect classified information that is the subject of a discovery request by the defense. We believe the Levin-McCain-Graham amendment to section 1031 of the NDAA addresses this issue appropriately. Under the amendment, defense counsel will not have access to classified evidence unless it materially assists the defense in rebutting an element of the offense, in asserting an affirmative defense, or in obtaining a favorable sentence, and an unclassified substitution or summary is inadequate. This codifies current law. See, e.g., *United States* v. *Yunis,* 867 F.2d 617, 624–25 (DC Cir. 1989).

QUESTIONS SUBMITTED BY SENATOR SUSAN COLLINS

HABEAS CORPUS CHALLENGES

70. Senator COLLINS. Mr. Johnson, Mr. Kris, and Admiral MacDonald, the Supreme Court's decisions have left unresolved the question whether Guantanamo detainees may challenge the conditions of their detention, such as whether they can be held in solitary confinement, when they can be transferred, or whether they can have contact with their relatives. Does the administration support allowing habeas challenges to these and other aspects of detention?

Mr. JOHNSON. The administration believes that current law does not authorize Guantanamo detainees to challenge the conditions of their detention before an Article III court. In fact, we have to date prevailed in this argument in every habeas case in which it has arisen.

Mr. KRIS. The administration believes that current law does not authorize Guantanamo detainees to challenge the conditions of their detention before an Article III court. In fact, we have to date prevailed in this argument in every habeas case in which it has arisen.

Admiral MACDONALD. I am unaware of any judicial precedent, on point, for a Federal court to review the conditions of detention for alien unprivileged enemy belligerents. As I answered in an earlier question, I also believe that the laws of war, themselves, obligate the United States to make additional accommodations in the conditions of detention for unprivileged enemy belligerents as the length of detention extends over many years.

71. Senator COLLINS. Mr. Johnson, Mr. Kris, and Admiral MacDonald, the typical remedy for habeas claims is the release of the individual being unlawfully detained. But given that many of the detainees cannot be released to their home countries or another country willing to take them, what does the administration believe to be a practical remedy in the event that a detainee successfully challenges his detention?

Mr. JOHNSON. If a detainee is ordered released by a habeas court, and cannot be returned to his home country, we will work to develop alternative transfer or resettlement options that are lawful and that satisfy our security concerns. Moreover, as noted above, for detainees in the United States, authority to detain individuals under the immigration laws pending their removal, particularly where they pose a threat to national security, is an additional mechanism that may be used if necessary to ensure that detainees will not endanger our citizens.

Mr. KRIS. If a detainee is ordered released by a habeas court, and cannot be returned to his home country, we will work to develop alternative transfer or resettlement options that are lawful and that satisfy our security concerns. Moreover, as noted above, for detainees in the United States, authority to detain individuals under the immigration laws pending their removal, particularly where they pose a threat to national security, is an additional mechanism that may be used if necessary to ensure that detainees will not endanger our citizens.

Admiral MACDONALD. This question falls outside my area of expertise and is a matter now under review by the administration's Detention Policy Task Force.

[Annexes A through D follow:]

ANNEX A

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).

ANNEX B

United State of America v. Ahmed Mohammed Ahmed Haza Al Darbi	)	D-007 **RULING** Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction Over *Ex Post Facto* Charges 8 August 2008

1. The accused is charged with committing offenses beginning in 1996 and ending on 4 June 2002 in violation of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006)(MCA) enacted into law on 17 October 2006. Defense challenges the jurisdiction of the commission to try the accused based on alleged violations of the *Ex Post Facto* provisions of US and international law.

2. After considering the submissions by both parties and for the reasons discussed below, the defense motion is denied.

3. Congress possesses express enumerated authority under Article I, Section 8, Clause 10, of the Constitution to enact the MCA of 2006. The plenary power given to Congress "to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations" establishes the *prima facie* validity of the statute in question.

4. The MCA grants the commission to try "any offense made punishable by this chapter or the law of war when committed by an alien unlawful combatant before, on, or after September 11, 2001.

5. The Supreme Court has recognized that Congress could define offenses against the Law of Nations:

> It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns....Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course. *Ex Parte Quirin*, 317 U.S. 1, 12, 63 S.Ct. 2 (1942).

6. The Commission has considered the cases and authorities cited by the defense and prosecution and finds:

1) There was a reasonable basis for Congress, in 2006, to determine that the offenses of conspiracy to commit violations of the law of war and providing material support to terrorism were part of the common law of war, before, on, and after 11 September 2001; and,

2) There was a reasonable basis for Congress, in 2006, to determine that the offenses of conspiracy to commit violations of the law of war and providing material support to terrorism were punishable by military commissions, before, on, and after 11 September 2001.

7. The defense asserts that the specific statutory provisions in question, 10 U.S.C. § 950v(b)(25) and10 U.S.C. § 950v(b)(28), did not exist at the time of the offenses charged. Since the offenses charged allegedly occurred beginning in 1996 and ending on 4 June 2002 and the statute in question was enacted in 2006 that assertion is beyond dispute.

8. The Commission does not believe the accused has a right to the protections of the Constitutional prohibition of the enactment of *ex post facto* law. In *Boumediene v. Bush*, 533 U.S. ____ (2008), the Supreme Court determined that the Constitution's Writ of Habeas Corpus protected Boumediene and another petitioner held in Guantanamo Bay. The holding was limited to that writ ("The only law we identify as unconstitutional is MCA Sec 7, 28 U.S.C.A. Sec 2241(e)(Supp 2007)").

9. Assuming for the purposes of this paragraph of this motion that Mr. al Darbi is entitled to specific, partial or limited protections of the Constitution, the commission will evaluate the provision in light of *ex post facto* standards:

a. On its face, the provision applies to Mr. Al Darbi. The jurisdictional provisions of the MCA (Section 948d) set forth that any person who may be tried by a military commission may be tried for any offense listed in the MCA – whether committed before, on, or after 11 September 2001.

b. The Supreme Court has recognized Congress' authority in this area (See, eg., *Ex Parte Quirin*, 317 U.S. 1, 63 S.Ct. 2 (1942). It has stated that "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex Parte Quirin, Id.*, at 10.

c. The Supreme Court recognized that Congress has and has had the choice of allowing military commissions to determine for themselves what are violations of the law of war or of setting out specifically certain violations of the law of war. "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts...." *Ex Parte Quirin, Id.*, at 12.

d. In enacting the MCA, Congress asserted that "The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. . . . Because the provisions of the subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter." MCA § 950p(a),(b). Thus, Congress was clearly aware of the Constitutional limitation of its power, and indicated its sense that it had complied with that limitation. In light of Congress's enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a "new crimes that did not exist before its enactment", the Commission is inclined to defer to Congress's determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.

e. The Commission concludes that prosecution of Mr. Al Darbi for the offenses of conspiracy and to commit violations of the law of war and providing material support to terrorism, as defined by the provision in question, does not violate *ex post facto* standards – whether under the Constitution or international law.

10. The Commission has reviewed Charges I and II and their respective specifications. The specifications allege violations of the statute as modified by the Ruling of the Commission on the Defense Motion to Dismiss "Criminal Enterprise" Specification of Charge I (D-006). The offenses alleged in each specification are violations of the law of war.

JAMES L. POHL
COL, JA, US Army
Military Judge

ANNEX C

UNITED STATES OF AMERICA v. SALIM AHMED HAMDAN	**D012** **RULING ON MOTION** TO DISMISS (EX POST FACTO) And **D050** DEFENSE REQUEST TO ADDRESS SUPPLEMENTAL AUTHORITY ON D012 14 July 2008

The Defense has moved this Commission to dismiss referred charges for lack of subject matter jurisdiction. Specifically they claim the charges of Conspiracy and Providing Material Support for Terrorism violate the prohibition against Ex Post Facto application of the law, found both in the Constitution, in Common Article 3 of the Geneva Conventions, and in the law of nations. The Government opposes the motion, arguing variously that the Constitution does not protect aliens held outside the United States, and that even if it does, there is ample precedent in the Law of Armed Conflict for the trial of these offenses by military commission as violations of the Law of Armed Conflict.

BURDEN OF PERSUASION

The Defense characterizes its motion as one challenging the Commission's jurisdiction, and argues that the burden should be on the Government to prove jurisdiction, in accordance with R.M.C. 905(c)(2)(B). The Government denies that this is a jurisdictional issue, and argues that the burden remains on the Defense, as moving party, in accordance with RMC 905(c)(2)(A). Because a military commission has narrowly constrained jurisdiction as to offenses, the Commission assigns the burden to the Government to demonstrate that the offenses with which the accused is charged were violations of the law at the time Mr. Hamdan engaged in the actions with which he is charged.

DOES THE CONSTITUTION OF THE UNITED STATES PROTECT MR. HAMDAN?

The Commission has previously determined that an alien unlawful enemy combatant held outside the sovereign borders of the United States, who has no voluntary connection to the United States other than his confinement, cannot claim the protections of the Constitution *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990); *Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir. 2007); *Cuban Am. Bar Ass'n v. Christopher*, 43 F.3d 1412, 1428 (11th Cir. 1995) cert. den. 516 U.S. 913 (1995); *DKT Mem'l Fund Ltd. v. Agency for Int'l Dev.*, 887 F.2d 275, 284 (D.C. Cir. 1989). In light of the Supreme Court's recent ruling, the Defense requests reconsideration and agues that the Constitution does

protect detainees held in Guantanamo, and specifically Mr. Hamdan. *Boumediene v. Bush,* 533 U.S. _____ (2008), [hereinafter *Boumediene*].

In addition, the Defense points out that the Ex Post Facto clause of the Constitution is not a substantive protection to be claimed by individual claimants, but a substantive limitation on the power of Congress. "There is a clear distinction between . . . prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several states. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall be passed,' . . . it goes to the competency of Congress to pass a bill *of that description." Downes v. Bidwell,* 182 U.S. 244, 276-77 (1901). Thus, the Defense argues, whether the ex post facto protections of the Constitution protect aliens in Guantanamo Bay, the Constitution prohibits Congress from enacting *ex post facto* legislation. This Commission concludes that Congress is not authorized to pass *ex post facto* legislation, and thus will review the MCA prohibitions against conspiracy and material support for terrorism to determine whether they are such offenses.

To prevail on this motion, the Government must show that conspiracy and material support for terrorism were traditional violations of the law of armed conflict when he engaged in the conduct with which he is charged.

CONSPIRACY

The parties have argued this issue with commendable skill and passion. The Defense points to the plurality's holding that conspiracy is not a "clear and unequivocal" violation of the common law of war (citing *Hamdan v. Rumsfeld,* 126 S.Ct. 2749, 2780 & n. 34); that there has been no "universal agreement and practice" establishing conspiracy as a violation of the law of war (citing *Ex Parte Quirin,* 317 U.S. 1, 30); the rejection of conspiracy as a war crime by the Nuremberg Tribunal on the ground that "[t]he Anglo-American concept of conspiracy was not a part of European legal systems and arguably not an element of the internationally recognized laws of war" (citing T. Taylor, Anatomy of the Nuremberg Trials: A Personal Memoir 36 (1992); an Amicus Curiae Brief of Specialists in Conspiracy and International Law before the Supreme Court; and the conclusion of a UN Special Rapporteur who concluded that conspiracy is not an offense under the laws of war (citing U.N. Doc. A//HRC/6/17/Add.3 (Nov. 22, 2007).

The Government responds that the Supreme Court's opinion in *Hamdan* should be read in light of the absence (at that time) of Congressional action to define violations of the law of war under its Constitutional authority to "define and punish" offenses against the laws of nations, and cite Justice Kennedy's observation that "Congress, not the Court, is the branch in the better position to undertake the sensitive task" of determining whether conspiracy is a war crime. *Hamdan v. Rumsfeld,* 126 S. Ct. 2749, 2809 (Kennedy, J, concurring). The Government notes that conspiracy convictions of Nazi saboteurs were upheld in *Ex Parte Quirin,* 317 U.S. 1 (1942) and *Colepaugh v. Looney,* 235 F. 2d 429, 431, 433 (10th Cir 1956), cert denied 352 U.S. 1014 (1957). In the Pacific theater, "orders establishing the jurisdiction of military commissions in various theaters of operation provided that conspiracy to violate the laws of war was a cognizable offense" *Hamdan* at 2834 (Thomas, J. dissenting). The World War II military tribunals of several European nations recognized conspiracy to violate the laws of war as an

offense triable before military commissions, and military commissions in the Netherlands and France tried conspiracy to violate the laws of war, as did the International Military Tribunal at Nuremburg with respect to four specific types of conspiracies. *Hamdan* at 2836, n. 14. (Thomas, J. dissenting). The conspirators who assassinated Abraham Lincoln were tried and punished by a military commission for conspiracy, and an 1865 Opinion of the Attorney General declares that "to unite with banditti, jayhawkers, guerillas or any other unauthorized marauders is a high offense against the laws of war; the offence is complete when the band is organized or joined." 11 Op. Atty. Gen. at 312.

MATERIAL SUPPORT FOR TERRORISM

Once again, the question here is whether "Material Support for Terrorism," criminalized by 18 U.S.C. §950v(25), is sufficiently well established as a violation of the law of war that exposing Mr. Hamdan to punishment for that offense is not an ex post facto application of the law.

For this offense, the Defense points again to the UN Special Rapporteur, who concluded in 2007 that terrorism, providing material support for terrorism, wrongfully aiding the enemy, spying and conspiracy "go beyond offences under the law of war." *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism,* 12, U.N. Doc.A/HRC/6/17/Add.3 (Nov 22, 2007). American military tribunals have never tried this offense, and it is not listed as a war crime in the U.S. War Crimes Act, 18 U.S.C. § 2441, or the U.S. Army's *Law of War Handbook* (2005). A Congressional Research Service report prepared for Members of Congress recently concluded that "defining as a war crime 'material support for terrorism' does not appear to be supported by historical precedent."[1] Nor is the offense mentioned in any of the treaties or statutes that define law of war offenses: the Hague Conventions, the Rome Statute of the International Criminal Court, nor the International Criminal Tribunals for the Former Yugoslavia, Rwanda or Sierra Leone.

In reply, the Government argues that violations of Common Article 3 (such as "violence to life and person" of those "taking no active part in hostilities") are widely considered to be war crimes and have been criminalized by the U.S. War Crimes Act, 18 U.S.C. §2441; Providing Material Support for Terrorism and Providing Material Support for an International Terrorism Organization have been violations of federal law, with provisions made for the prosecution of extraterritorial offenses, since 1993. (18 USC §2339A and 2339B) U.N. Security Council Resolutions 1189 and 1373 condemn terrorism and require member states to criminalize it; and the United States is a party to twelve international treaties that prohibit kidnappings, hijackings, bombings, the killing of innocent civilians and other acts of "terrorism." In essence, the Government argues in part that because terrorism is condemned by International law, and material support for terrorism a violation of U.S. federal law, material support for terrorism has traditionally been a crime under the law of armed conflict, or at least that Hamdan must have known his conduct was not "innocent when done."

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[1] Jennifer K. Elsea, *The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparisons with Previous DOD Rules and the Uniform Code of Military Justice,* 12 (CRS, updated Sep. 27, 2007), available at http://www.fas.org/sgp/crs/natsec/RL33688.pdf.

The Government offers evidence of U.S. practice during the American Civil War. An 1894 Congressional document asserted that during the war, there were "numerous rebels . . . that . . . furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together in several of the interior counties for the purpose of assisting the enemy to rob, to maraud and to lay waste to the country. All such persons are by the laws of war in every civilized country liable to capital punishment." H.R. Doc. No. 65, 55th Cong. 3d Sess., 234 (1894). Likewise, Colonel Winthrop wrote that during the Civil War numerous persons were "liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission" based upon their support for unlawful combatants. Winthrop, *Military Law and Precedents*, 784.

In addition, the language of General Orders establishing the jurisdiction for military commission during the Civil War suggests the existence of an offense similar to "providing material support for terrorism" existed during that conflict: "There are numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several areas of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste of the country. *All such persons are by the laws of war in every civilized country liable to capital punishment* (emphasis added)). Numerous trials were held under this authority." *Hamdan v. Rumsfeld, supra,* at 817 n. 9 (Thomas, J. dissenting)(quoting from H.R. Doc. No. 65, 55th Cong., 3d Sess. 164 (1894). Thereafter Justice Thomas cites several General Court-Martial Orders in which convictions were upheld for "being a guerrilla." The meaning of this term is made clear by Colonel Winthrop, who explains, under his description of "Irregular Forces in War," the meaning of the term "Guerillas." The term encompasses "irregular armed bodies or persons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders. . . . ." *Winthrop,* at 783. After a discussion of these forces, which a modern reader might understand to be a description of "unlawful combatants," Winthrop continues in this vein:

> But a species of armed enemies whose employment in a military capacity was not and could not be justified were the so called "guerillas" of our late civil war. [Note 55 inserts here "Called 'guerilla-marauders' in the act of July 2, 1864, c. 215 and the 105th Article of War. They were also styled, in different localities, "bushwhackers," "jayhawkers," "regulators," etc. Prof. Leiber (Inst § 82, 84) refers to them as "highway robbers or pirates" and "armed prowlers."] These were persons acting independently, and generally in bands, within districts of the enemy's country or on its borders, who engaged in the killing, disabling and robbing of peaceable citizens or soldiers, in plunder and pillage, and even in the ransacking of towns, from motives mostly of personal profit or revenge." Winthrop, at 783-784 and note 55.

Only in light of the further clarification provided in this footnote does the difference between the two types of Civil War "guerillas" appear. Traditional guerillas were irregular forces who supported the Confederate armed forces, and for whom the protections of prisoner of war status was sometimes claimed. Winthrop at 783. The "guerillas" of the civil war era, i.e. those described in the numerous General Court Martial Orders Justice Thomas refers to in *Hamdan*, at 817 n. 9, were more akin to (and were actually referred to as) "spies," "bridge-burners,"

"pirates," "highway robbers" and "guerilla-marauders." They were subject to trial by military commission, along with those who "join, belong to, act, or co-operate" with them. *Ibid.* They acted entirely without the law "plundered the property of peaceable citizens," and usually for motives of personal profit or revenge. In modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism. At least in American Civil War practice, they were subject to trial by military commission for their activities.

The Government concedes that although the offense of "providing material support for terrorism" does not appear in any international treaty or list of enumerated offenses, the *conduct* now criminalized by the MCA provision has long been recognized as a violation of the law of war. 18 USC §950v(b)(24) defines the offense of Terrorism such that any person "who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life...." shall be punished. Intentionally killing or inflicting great bodily harm upon a protected person is clearly a violation of the law of war. Taking all of this history into account, the Government argues that Congress merely *defined* as "Material Support for Terrorism" conduct that was already proscribed and subject to trial by military commission.

The evidence for both Conspiracy and Material Support for Terrorism is mixed. Absent Congressional action under the define and punish clause to identify offenses as violations of the Law of War, the Supreme Court has looked for "clear and unequivocal" evidence that an offense violates the common law of war, *Hamdan,* at 2780 and n, 34, or that there is "universal agreement and practice" for the proposition. *Ex Parte Quirin,* 317 U.S. 1, 30 (1942). But where Congress has acted under its Constitutional authority to define and punish offenses against the law of nations, a greater level of deference to that determination is appropriate. Quoting from an opinion by the U.S. District Court for the Southern District of New York, the Government argues:

> [E]ven assuming that the acts described in 18 U.S.C. §§ 2332 & 2332a are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceed Congress's authority under [Article I, Section 8] Clause 10. Clause 10 does not merely give Congress the authority to punish offenses against the law of nations; it also gives Congress the power to "define" such offenses. Hence, provided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations. *See United States v. Smith*, 18 U.S. (5 Wheat.) 153, 159 (1820)(Story, J.)("Offenses . . . against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations. . . . [T]herefore . . . , there is a peculiar fitness in giving the power to define as well as to punish.") Note, Patrick L. Donnelly, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Ominbus Diplomatic Security and Antiterrorism Act of 1986,* 72 Cornell L. Rev. 599, 611 (1987) (Congress may define and punish offenses in the international law, notwithstanding a lack of consensus as to the nature of the crime in the United States or in the world community.)

United States v. Bin Laden, 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000), *criticized on other grounds by United States v. Gatlin*, 216 F. 3d 207, 212 n.6 (2d Cir 2000); see also Anthony J. Colangelo, *Constitutional Limits on Extra territorial Jurisdiction; Terrorism and the Intersection of National and International Law,* 48 Harv. Int'l L. J. 121, 142 (2007)) ("we might assume , , , that Congress, representing the United States' sovereign lawmaking body within the international system, has at least some leeway to aid in the development of the category of international offenses by pushing the envelope beyond where it already is").

CONCLUSION AND DECISION

In enacting the MCA, Congress asserted that "The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. . . . Because the provisions of the subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter." MCA § 950p(a),(b). Thus, Congress was clearly aware of the Constitutional limitation of its power, and indicated its sense that it had complied with that limitation. In light of Congress's enumerated power to define and punish offenses against the law of nations, and its express declaration that in doing so, it has not enacted a "new crimes that did not exist before its enactment", the Commission is inclined to defer to Congress's determination that this is not a new offense. There is adequate historical basis for this determination with respect to each of these offenses.

The Government has shown, by a preponderance of the evidence, that Congress had an adequate basis upon which to conclude that conspiracy and material support for terrorism have traditionally been considered violations of the law of war.

The Motion to Dismiss for Lack of Subject Matter Jurisdiction Over Ex Post Facto Charges is DENIED as to both offenses.

Keith J. Allred
Captain, JAGC, USN
Military Judge

ANNEX D

UNITED STATES OF AMERICA	}	**D-011 Ruling on Defense Motion to Dismiss Charge IV for Lack of Subject Matter Jurisdiction**
		21 April 2008
v	}	
OMAR AHMED KHADR a/k/a "Akhbar Farhad" a/k/a "Akhbar Farnad" a/k/a "Ahmed Muhammed Khahi"	}	

1. The commission has considered the defense motion, the government response, and the defense reply. Both parties presented oral argument on the matter.

2. Charge IV and its Specifications read as follows:

CHARGE IV: VIOLATION 10 U.S.C. §950v(b)(25), PROVIDING MATERIAL SUPPORT FOR TERRORISM

Specification 1 : In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in or around Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to al Qaeda, an international terrorist organization founded by Usama bin Laden, in or about 1989, and known by the accused to be an organization that engages in terrorism, said al Qaeda having engaged in hostilities against the United States, including attacks against the American Embassies in Kenya and Tanzania in August 1998, the attack against the USS COLE in October 2000, the attacks on the United States on September 11, 2001, and further attacks, continuing to date against the United States; said conduct taking place in the context of and associated with armed conflict.

The accused provided material support or resources to al Qaeda including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

3. In or about July 2002, Khadr attended one month of land mine training.

4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where; based on previous surveillance, U.S. troops were expected to be traveling.

5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

Specification 2: In that Omar Ahmed Khadr, a person subject to trial by military commission as an alien unlawful enemy combatant, did, in Afghanistan, from at least June 2002 through on or about July 27, 2002, intentionally provide material support or resources to wit: personnel, himself, to be used in preparation for, or carrying out an act of terrorism, that the accused knew or intended that the material support or resources were to be used for those purposes, and that the conduct of the accused took place in the context of and was associated with an armed conflict.

The accused provided material support or resources in support of acts of terrorism including, but not limited to, the following:

1. In or about June 2002, Khadr received approximately one month of one-on-one, private al Qaeda basic training from an al Qaeda member named "Abu Haddi," consisting of training in the use of rocket propelled grenades, rifles, pistols, hand grenades, and explosives.

2. In or about June 2002, Khadr conducted surveillance and reconnaissance against the U.S. military in support of efforts to target U.S. forces in Afghanistan.

3. In or about July 2002, Khadr attended one month of land mine training.

4. In or about July 2002, Khadr joined a group of Al Qaeda operatives and converted land mines to improvised explosive devices and planted said improvised explosive devices in the ground where; based on previous surveillance, U.S. troops were expected to be traveling.

5. On or about July 27, 2002, Khadr engaged U.S. military and coalition personnel with small arms fire, killing two Afghan Militia Force members.

6. Khadr threw and/or fired grenades at nearby coalition forces resulting in numerous injuries.

7. When U.S. forces entered the compound upon completion of the firefight, Khadr threw a grenade, killing Sergeant First Class Christopher Speer.

3. Paragraph 6(25), Part IV, Manual for Military Commissions, which contains both the text of § 950v(b)(25) and the Secretary's implementation of the statute, reads as follows:

(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.

a. *Text.* "Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct."

b. *Elements.* The elements of this offense can be met either by meeting (i) all of the elements in A, or (ii) all of the elements in B, or (iii) all of the elements in both A and B:

A. (1) The accused provided material support or resources to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24));
(2) The accused knew or intended that the material support or resources were to be used for those purposes; and
(3) The conduct took place in the context of and was associated with an armed conflict.

Or

B. (1) The accused provided material support or resources to an international terrorist organization engaged in hostilities against the United States;
(2) The accused intended to provide such material support or resources to such an international terrorist organization;
(3) The accused knew that such organization has engaged or engages in terrorism; and
(4) The conduct took place in the context of and was associated with an armed conflict.

c. *Definition.* "Material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons,

lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

d. *Maximum Punishment.* Confinement for life.

4. Paragraph 6(24), Part IV, Manual for Military Commissions, which contains both the text of § 950v(b)(24) and the Secretary's implementation of the statute, reads as follows:

(24) TERRORISM.

a. *Text.* "Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct."

b. *Elements.*

(1) The accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced a wanton disregard for human life;
(2) The accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct; and
(3) The killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict.

c. *Comment.*

(1) This offense includes the concept of causing death or bodily harm, even if indirectly.
(2) The requirement that the conduct be wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.

d. *Maximum Punishment.* Death, if the death of any person occurs as a result of the terrorist act. Otherwise, confinement for life.

5. Congress possesses express enumerated authority under Article I, Section 8, Clause 10 of the Constitution to enact the Military Commissions Act of 2006. The plenary power given to Congress "to define and punish Piracies and Felonies committed on the high

seas, and Offences against the Law of Nations" establishes the *prima facie* validity of the statute in question.

6. The Supreme Court has recognized that Congress could define offenses against the Law of Nations:

> It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns....Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course. *Ex Parte Quirin,* 317 U.S. 1, 12, 63 S.Ct. 2 (1942).

7. The commission has considered the cases and authorities cited by the defense and prosecution and finds:

1) There was a reasonable basis for Congress, in 2006, to determine that the offense of providing material support for terrorism was part of the common law of war, before, on, and after 11 September 2001; and,

2) There was a reasonable basis for Congress, in 2006, to determine that the offense of providing material support for terrorism was punishable by military commissions, before, on, and after 11 September 2001.

8. The defense asserts that the specific statutory provision in question, 10 U.S.C. Sec. 950v(b)25), did not exist at the time of the offenses charged. Since the offenses charged allegedly occurred in 2002 and the statute in question was enacted in 2006, that assertion is beyond dispute. Assuming for the purposes of this paragraph of this motion that Mr. Khadr is entitled to specific, partial or limited protections of the Constitution, the commission will evaluate the provision in light of *ex post facto* standards:

a. On its face, the provision applies to Mr. Khadr. The jurisdictional provisions of the MCA (§ 948d) set forth that any person who may be tried by a military commission may be tried for any offense listed in the MCA – whether committed before, on, or after 11 September 2001.

b. The Supreme Court has recognized Congress' authority in this area (See, eg., *Ex Parte Quirin,* 317 U.S. 1, 63 S.Ct. 2 (1942). It has stated that "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex Parte Quirin, Id.,* at 10.

c. The Congressional decision to enact the providing material support for terrorism provision was not a decision to create a new crime and Congress did not create a new crime. The Supreme Court recognized that Congress has and has had the choice of allowing military commissions to determine for themselves what are violations of the law of war or of setting out specifically certain violations of the law of war. "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts...." *Ex Parte Quirin, Id.,* at 12.

d. The commission concludes that prosecution of Mr. Khadr for the offense of providing material support for terrorism, as defined by the provision in question, does not violate *ex post facto* standards – whether under the Constitution or international law.

9. The commission has reviewed Charge IV and its Specifications. Each Specification alleges a violation of the statute.

10. The defense motion to dismiss Charge IV and its Specifications is denied.

Peter E. Brownback III
COL, JA, USA
Military Judge

[Whereupon, at 12:10 p.m., the committee adjourned.]

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