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TEN YEARS AFTER THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: CURRENT STATUS OF LEGAL AUTHORITIES, DETENTION, AND PROSECUTION IN THE WAR ON TERROR

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HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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TEN YEARS AFTER THE 2001 AUTHORIZATION FOR USE OF MILITARY FORCE: CURRENT STATUS OF LEGAL AUTHORITIES, DETENTION, AND PROSECUTION IN THE WAR ON TERROR

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Tuesday, July 26, 2011.

The committee met, pursuant to call, at 10:05 a.m. in room 2118, Rayburn House Office Building, Hon. Howard P. "Buck" McKeon (chairman of the committee) presiding.

OPENING STATEMENT OF HON. HOWARD P. "BUCK" MCKEON, A REPRESENTATIVE FROM CALIFORNIA, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. The committee will come to order. Good morning.

Much has changed over the past 10 years since the attacks of 9/11 and the 2001 passage of the Authorization for Use of Military Force. Changes have been made to the Federal agencies, laws, and the lives of thousands of our men and women who have taken the fight to the enemy. We have borne the heavy burden of losing some of those brave men and women. These Americans, whether military or civilian, have paid the ultimate price as part of an effort to prevent terrorists from reaching our shores. Terrorists still pose a grave threat to the United States, but they have changed as well.

We now face a diversified threat emanating from multiple locations. While we believe that Al Qaeda's capacity to launch widespread attacks has been diminished by the unrelenting work of our military and intelligence professionals, there are new and different faces of the same enemy in places like Yemen and Somalia. Our Government's counterterrorism leaders say that Al Qaeda in the Arabian Peninsula is now the greatest threat to the United States. We must acknowledge this reality and move forward.

When I became chairman, I told our members that the committee must operate on a wartime footing. This is because, as Members of Congress, we are charged by our constituents, and Article I, Section 8 of the Constitution to "provide for the common defense," "define and punish ... offenses against the law of nations," "declare war," "raise and support armies," "provide and maintain a navy," "make rules for the government and regulation of the land and naval forces," and "to make rules concerning captures on land and water."

It is time to reaffirm Congress' role in identifying the scope of the current conflict, and just as importantly, it is time to reaffirm Congress' support for those we have asked to defend us against the threats we face.

These are the reasons why I believe the House strongly supported inclusion of the affirmation of the 2001 Authorization for Use of Military Force in the National Defense Authorization Act for Fiscal Year 2012.

Unfortunately, the Administration has suggested that Congress is trying to limit options for handling terrorism suspects. Yet it is the Administration's foreclosure of some of the most fundamental aspects of this war effort that have forced Congress' hand. For example, we recently heard Vice Admiral William McRaven confirm in his testimony before the Senate that bringing detainees to Guantanamo is "off the table."

A law of war detention system for future captures focused on intelligence collection and keeping terrorists out of the United States is essential to our success.

We cannot possibly prefer terrorists to be held aboard Navy ships, and we cannot possibly be comfortable with the policy whereby bringing terrorists to Guantanamo is "off the table," but bringing them to the United States is not. In certain cases, prosecution may also be appropriate for law of war detainees.

When it comes to deciding the forum for such prosecution, the Administration has shown time and again that not only is prosecution in Federal court their overwhelming preference for current detainees, it is the only option they will seriously consider for future captures.

The Administration has spent countless hours touting the Federal criminal justice system. I agree that we have an excellent court system. I simply disagree that military commissions, like detention at Guantanamo, should be off the table for future captures. In fact, the strong preference should be for prosecution by military commission.

The Administration and their supporters also frequently cite the number of terrorism cases that have been successfully prosecuted in Federal court. However, this is not a very helpful point of comparison given that we do not know how many terrorists have instead been released and never prosecuted because of a lack of permissible evidence. Further, the courtrooms at GTMO [Guantanamo] have sat empty for 2½ years at the direction of the Administration. The commission system cannot prosecute cases that it does not have.

The problem is further heightened when the Administration delegitimizes the commission system with their words and actions. Attorney General Holder's reluctant announcement to prosecute the alleged 9/11 co-conspirators in a military commission, during which he blamed Congress, comes to mind. Why would an observer take seriously a forum that the Administration itself seems to suggest is a lesser system of justice?

I disagree with this notion. The military commission system is fair and just, and it should be resourced with the best personnel our Government has to offer. Instead of undermining the system, Attorney General Holder and the Department of Justice should lend their full support and resources to the Department of Defense, and the military commissions should be given a real chance to succeed. Perhaps then it will be fair to compare and contrast it with other systems.

This is not a time for division. The war we are fighting is against our enemies, Al Qaeda and their associates. It is time for us to affirm that our enemies and the legal authorities we have provided to fight them have evolved. So too must our policies, particularly those dealing with the law of war detention and prosecution.

And I will yield to our ranking member, Mr. Smith, for his opening statement.

[The prepared statement of Mr. McKeon can be found in the Appendix on page 45.]

STATEMENT OF HON. ADAM SMITH, A REPRESENTATIVE FROM WASHINGTON, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. SMITH. Thank you, Mr. Chairman. I appreciate that we are having these hearings. I think these are critical issues, and they are critical issues that have not yet been resolved. And clearly, the conflict between the way Congress wants to resolve them and the way the President wants to resolve them has led to problems, has led to limitations, frankly, on how we can act, beginning with the situation at Guantanamo Bay.

Part of the reason that the President is reluctant to bring any future inmates to Guantanamo Bay is because of laws that Congress has enacted that severely restrict what can be done with inmates once they are taken there. The larger debate about whether or not we should keep Guantanamo Bay open I think is still appropriate to have. I for one think we should close it. I understand there are those who are on the other side of that. But even if you feel Guantanamo Bay should remain open, this current situation is not advantageous to that position, a situation where if an inmate goes to Guantanamo, he cannot be transferred to the United States for trial, he cannot even be sent back to a home country because of the severe restrictions that have been placed on the President by the previous Congress, and would continue to be placed on the President by some of the bills that have been introduced and passed thus far.

I think we need to clarify the situation one way or the other, to have a clear policy. And I think the President and Congress actually agree on one basic principle, and that is all three options should be on the table. You should have the option of indefinite detention, you should have the option of military commissions, and you should have the option of Article III courts.

How do we keep all of those three options on the table in a realistic way? I think by and large there is agreement on that point. There is just a difference about when each option should be put in place, and that conflict, as I said, has now led to a very, very difficult situation where all the options are not realistically on the table.

But, yes, Article III courts have worked, and unfortunately the bill that we passed out of here and out of the full House would have severely restricted the ability to prosecute people in Article III courts. I will perfectly admit that some cases are not appropriate for that. But we are taking the opposite approach in this committee and this Congress and saying it is never appropriate and will not be allowed. That needlessly ties the President's hands.

And as I think our witnesses will get into in greater detail and with more knowledge, there are certain advantages to being able to use Article III courts, and if you take those off the table you create problems for our variability to prosecute the war on terror.

So, yes, we need a clear picture on what our detention policy should be. We need a clear picture on what our interrogation policy should be. But I feel the cornerstone of that should be to keep all the options on the table and not needlessly restrict the executive branch in their ability to prosecute that war.

We are not there yet. I appreciate the chairman's continuing to bring this issue up. We have worked very closely together on trying to work out those details, and I am optimistic that we will get there, but it is appropriate that we have this hearing, appropriate that we have this discussion, so that hopefully we can get to a place where the executive branch's and the legislative branch's differences don't restrict our ability to have all the options on the table and to fully prosecute this war.

I will completely agree with the chairman's statements about how important this war is, about the fact that Al Qaeda and their affiliates still threaten us, and we need to be in a position to counter them. I just differ a little bit on what the policy should be and the best way to encounter them.

The last thing I want to do, we have remarks by John Brennan which I would like to submit for the record, without objection.

[The information referred to can be found in the Appendix on page 111.]

The CHAIRMAN. Without objection, so ordered.

Mr. SMITH. Thank you, Mr. Chairman. I yield back.

[The prepared statement of Mr. Smith can be found in the Appendix on page 47.]

The CHAIRMAN. Thank you.

I welcome our great panel of witnesses that are here to speak on these very important issues today. We are honored to have with us today the Former Attorney General and Former Chief Judge of the U.S. District Court for the Southern District of New York, the Honorable Michael B. Mukasey.

We also have Former Principal Deputy General Counsel and Acting General Counsel for the Department of Defense, Mr. Daniel Dell'Orto.

We also have Former Deputy Assistant Attorney General for the Department of Justice's Office of Legal Counsel, Steven Engel.

And we have professor Robert Chesney from the University of Texas Law School. Professor Chesney previously served as an adviser to the Administration's Detention Policy Task Force and is a Co-Founder of the Lawfareblog.

A very distinguished panel who are very well versed in our subject here today, and we are happy to have you with us. Thank you for being here.

We will hear first from Judge Mukasey.

STATEMENT OF HON. MICHAEL B. MUKASEY, FORMER ATTORNEY GENERAL OF THE UNITED STATES

Mr. MUKASEY. Chairman McKeon, Ranking Member Smith, members of the committee, I want to thank you for the opportunity

to appear at this hearing, and particularly in the company of the people who are sitting here who are well informed and well able to testify on this subject, which is one that is literally of vital interest to this country—how we can go about defending ourselves against the threat of Islamist terror, which is the greatest existential threat to this country since the Civil War.

The authorities available to us to meet the terrorist threat are now controlled by what turns out to be a patchwork of statutes, policy improvisations and court rulings; the principal statute, the Authorization for the Use of Military Force is, as the chairman pointed out, 10 years old and was passed in the immediate aftermath of the attacks of September 11, 2001.

Although two administrations have relied on it for authority to detain terrorists, the statute does not even mention the word "detention," let alone set standards for who to detain, under what circumstances, and where.

We need a statute that helps organize and rationalize the process, like the one that you have passed, affirming that we are, in fact, in a global war with shadowy adversaries who do not follow the rule of law. Our troops need clear authority to capture and hold dangerous people and to obtain from them, when possible, valuable intelligence about others of their kind who may be out there.

I think three recent events dramatize the need for the statute that you have passed. One is the testimony that was alluded to by the chairman of Vice Admiral William McRaven, who made it clear in testimony to a Senate committee that there is in place no coherent policy with respect to terrorists encountered abroad, that we are faced with a choice between killing them, holding them on board ships for a limited time to obtain intelligence if possible, and then either sending them to another country that will take them, bringing them to the United States for trial in a civilian court, or freeing them.

We have also seen the recent disclosure that a man named Warsame was apprehended in April, held aboard one of our vessels for 2 months so that intelligence could be obtained from him, and then given Miranda warnings and brought to the United States to stand trial in a civilian court.

And, finally, a letter from 20 United States Senators was all that prevented the Administration from releasing to the Iraqis a dangerous Hezbollah commander who we have in our custody in Iraq, even though we have no guarantee that he would have been tried or held with appropriate restrictions by an Iraqi administration that is functioning increasingly as a satellite of Iran the closer we come to pulling our troops out of Iraq.

The choice among unpalatable alternatives, as described by Admiral McRaven, is what we face because our commanders do not have recourse to laws that empower them to capture and hold people whose principal goal in life is to destroy our civilization.

A defendant charged with serious terrorist acts is brought to this country to stand trial in a civilian court, even though we have on the books a Military Commissions Act that suggests that he could be tried before a military commission, and even though we have a state-of-the-art facility at Guantanamo that can be used to detain and try accused terrorists without any of the risks of bringing them

to this country, and without the perverse reward to terrorist behavior that is inherent in treating accused terrorists better than soldiers who obey the laws of war.

We have a defendant like Warsame, brought to the United States to stand trial in a civilian court, even though his accused acts make him arguably eligible for trial before a military commission—that doesn't seem to have been considered—and even though we have available that state-of-the-art facility at Guantanamo, and even though we face hurdles in the civilian court that make the outcome far from certain as the result of his having been detained for 2 months aboard a naval vessel and interrogated before being advised of his legal rights, hurdles that would not be serious if he were being tried before a military commission.

And finally, we have a hardened terrorist whom the Administration proposes to release to Iraqi authorities at a time when we cannot rely on them to keep him confined and win. If we cannot continue to hold him in Iraq, we have available the facility at Guantanamo that we refuse to use.

I am grateful to this committee for considering this legislation and for passing it to replace and to bolster the system that we have with a reliable standard for assuring that dangerous people can be detained in secure and humane conditions.

And I thank you also for your attention.

The CHAIRMAN. Thank you, Judge.

[The prepared statement of Mr. Mukasey can be found in the Appendix on page 49.]

The CHAIRMAN. Mr. Dell'Orto.

STATEMENT OF DANIEL DELL'ORTO, FORMER DEPUTY GENERAL COUNSEL AND ACTING GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Mr. DELL'ORTO. Thank you, Mr. Chairman, Ranking Member Smith, and members of the committee for your invitation to appear before the committee today. It is an honor to once again appear before this committee, this time in my individual capacity.

I commend the chairman and the committee for addressing the issues that are the subject of this hearing. I also am honored to appear with Honorable Judge Mukasey and with Steve Engel, with whom I had the privilege of working during my time in Government, and both of whom I hold in the highest regard.

As some of you may recall, as a civilian attorney I served as the Principal Deputy General Counsel of the Department of Defense from June 2000 through March 2009, not long after I completed a 27½-year career as an Active Duty Army officer. I was in the Pentagon on 9/11, and thereafter participated in the formulation of the legal positions that the Department adopted in the aftermath of 9/11, including those relating to the interpretation of the Authorization of the Use of Military Force, the legal basis for the conduct of operations against Al Qaeda, the basis for detention of captured enemy combatants, the decision to establish the detention facility at Guantanamo, and the implementation of President Bush's military order of November 13, 2001, which created military commissions.

The Authorization for the Use of Military Force of September 18, 2001, has served the Nation well. Nevertheless, at the 10-year mark, it is appropriate to consider whether there should be a reaffirmation of that authorization and appropriate amendment.

From the beginning of our fight against Al Qaeda, well before 9/11, it has been apparent that we are at war against a nontraditional enemy. The nontraditional nature of our foe has required resourcefulness by every entity of our national security structure from the rifleman on the ground in Afghanistan all the way up the chain of command to the President in his role as Commander in Chief.

As the enemy has changed its tactics and the locations of the planning for and conduct of its attacks, the rifleman and his commanders at all levels have had to be nimble and adaptable in the face of the many challenges that this nontraditional foe has thrown at us.

To the extent that the aAuthorization for the Use of Military Force falls short of providing the President and his subordinate commanders with the full range of authority he and they need to bring the fight to this changeable foe, then it should be adjusted to do so.

As one who has advised and aided senior civilian and uniform leaders at the Department of Defense as they wrestled with the decisions related to the detention of enemy combatants, the establishment of the detention facility at Guantanamo and the structure of military commissions, I remain firmly supportive of those initial decisions and remain convinced that those decisions were correct at the time they were made.

There is absolutely every reason to continue to move important detainees to Guantanamo for detention and intelligence gathering. And I remain firmly convinced that the military commissions should be the preferred forum for the adjudication of the war crimes committed by those who have been waging war unlawfully against our Nation and its citizens.

I am prepared to respond to your questions. Thank you.

[The prepared statement of Mr. Dell'Orto can be found in the Appendix on page 60.]

The CHAIRMAN. Mr. Engel.

STATEMENT OF STEVEN ENGEL, FORMER DEPUTY ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL

Mr. ENGEL. Thank you, Chairman McKeon, Ranking Member Smith and members of the committee.

I appreciate the opportunity to appear here today to discuss the legal framework for the war on terror now nearly 10 years after the attacks of September 11.

And I am particularly honored to appear beside Judge Mukasey and Mr. Dell'Orto, two extraordinary public servants with whom I had the privilege of working during my time at the Department of Justice.

On September 11, Al Qaeda took the United States by surprise, and the legal framework for this conflict has taken the better part of a decade to catch up. The traditional laws of war are premised

upon principles of reciprocity and the distinction between combatants and civilians. That framework provides clear answers to who may be detained, how they must be treated, and where they should be prosecuted.

None of these answers is self-evident when it comes to the nontraditional enemies against whom we fight in the war on terror.

The committee, in enacting the National Defense Authorization Act for 2012, has taken an important step forward in addressing these questions. Section 1034, in particular, would update the statutory authorization for this conflict by codifying the definition of who we are fighting, that the executive branch, over two administrations now, has relied upon in this conflict.

The Act would affirm that the United States is engaged in a continuing armed conflict with Al Qaeda, the Taliban, and associated forces, and that in this conflict the President may detain those who are a part of or who are substantially supporting the enemy.

None of this should be controversial. The Obama Administration currently relies on these very same words in fighting this war, and these words have been vindicated by the D.C. Circuit. Yet some have claimed that congressional authorization could constitute a new declaration of war that would dramatically expand the conflict.

I confess that I do not understand this. Congress already has authorized the President to wage war against Al Qaeda and its supporters wherever they may be found. One week after the September 11 attacks, Congress granted the President the current statutory authority under the Authorization for the Use of Military Force, the AUMF. By its terms, this statute was not limited to Al Qaeda, and it was not limited to Afghanistan. Rather, Congress authorized the President to take the fight to the enemy, no matter where they were, or where they spring up over time.

Over the past decade, U.S. forces have done just that, fighting Al Qaeda in Afghanistan, in Pakistan, and its affiliates in places such as Iraq, Yemen, and Somalia. In the course of that conflict, the United States has captured Al Qaeda members in those countries, and many others, and has detained them under the laws of war. Section 1034's definition of the enemy thus does nothing more, but also no less, than give the President's interpretation the force of law.

The statute is needed because the AUMF was appropriately focused on the September 11 attacks, yet over the past decade, the threat from Al Qaeda and like-minded organizations has developed in new and different ways. It is no doubt reasonable for the President to classify Al Shabab, the Pakistani Taliban or Al Qaeda's homegrown franchises in Iraq or Yemen as part of the same enemy with whom we are at war under the AUMF. But as the United States continues its military operations outside of Al Qaeda's original hideouts in Afghanistan and its litigation challenges emerge to such decisions, as they inevitably will, it becomes increasingly important for Congress to weigh in. In the absence of a clear statement from Congress, the courts may well have the last word in determining whom we may detain, and, by extension, whom the military may target.

I appreciate the committee bringing attention to these issues. And I appreciate the committee putting this issue in the forefront

of the National Defense Authorization Act. That statute will strengthen the Administration's hands in the courts and will strengthen our military's ability to take those measures necessary to protect our national security.

Thank you, Chairman McKeon and Ranking Member Smith, for the invitation to appear here. And I look forward to our discussion this morning.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Engel can be found in the Appendix on page 66.]

The CHAIRMAN. Professor Chesney.

STATEMENT OF ROBERT CHESNEY, FORMER ADVISOR TO THE DETAINEE POLICY TASK FORCE

Mr. CHESNEY. Chairman McKeon, Ranking Member Smith, and members of the committee and staff, thank you for the opportunity to testify today.

My aim is to convince you that the optimal policy is one in which the President has, and is willing to use, the maximum range of lawfully available tools when it comes to capturing, getting intelligence from, and ensuring the long-term incapacitation of terrorists.

Toward that end, I want to make three points:

Point one. Civilian criminal prosecution in some instances is the most effective tool for ensuring the long-term detention of a terrorism suspect. Congress should not take this tool out of the President's hands. This can be true for several reasons, one of which is illustrated by the Warsame case. Simply put, the civilian trial option will not require the Government to prove the details of the relationship among Al Qaeda, Al Shabab and Al Qaeda in the Arabian Peninsula. This is something the Government no doubt can do in a closed-door setting, in a classified briefing, but may well prefer not to do outside of a SCIF [Secure Compartmentalized Information Facility] in the interests of protecting sources and methods, and in order not to reveal the current state of our penetration of these networks.

A military commission trial, in contrast, might require such a showing in order to establish personal jurisdiction over Warsame. In such a showing, we would also likely be required eventually, were we simply to hold Warsame in long-term law of war detention at Guantanamo or elsewhere, as it is more likely than not that a person captured in his circumstances would eventually establish the right to *habeas* review.

Of course, there are other factors relevant to the decision as to which system makes the most sense for long-term detention in a particular case. And I discuss these other factors in considerable detail in my written testimony. For now it suffices to say that one size doesn't fit all, and it doesn't make sense to make an across-the-board predetermination to the contrary.

Now, that is true for all of the lawfully available options, which brings me to my second point. Other options that are lawful in certain circumstances include both trial by military commission and, separately, the use of military detention consistent with the law of war. In some instances in fact, one or other of those options will

be the most effective tool available to incapacitate a dangerous person for the long term. When that is the case, and even if Guantanamo is the only practically available location for using them, the Administration should be willing to use these options and not just for legacy cases. That is to say, the President shouldn't take these tools out of his own hands going forward.

Now you will notice so far I have only been talking about the options for long-term detention. I have not been talking yet about collecting intelligence, and that brings us to my final point. The question of how best to detain over the long term and the question of how best to acquire intelligence from a captured person are two different matters, and the answer to one does not dictate the answer to the other.

For example, selecting civilian criminal prosecution, the best tools for long-term detention in a particular case, by no means obliges the Government to Mirandize the person upon capture, to cease questioning if the person asks for a lawyer, to employ only law enforcement personnel as questioners, or otherwise to treat a terrorism suspect as if it is a run-of-the-mill criminal or questioning is merely designed to obtain evidence admissible in court. Far from it.

As Warsame illustrates, in terrorism cases one can and frequently should prioritize intelligence collection on the front end, even though this wouldn't be ideal from the standpoint of a possible prosecution on the back end. But it doesn't follow that you just can't prosecute on the back end or that you somehow shouldn't prosecute on the back end.

What does follow, I think, is that all of these decisions require nuanced professional case-specific judgments with participation from the military, the Intelligence Community, and the Justice Department, and of course they also require access to the full slate of legally available tools and the will to use them.

In conclusion, let me emphasize that my written statement goes into far more detail on all of this, and it also addresses a range of other issues raised by the Warsame case, including matters such as detention on naval vessels and the law relevant to ICRC [International Committee of the Red Cross] notification and access.

I look forward to your questions and I thank you very much for your sustained and serious attention to this important issue.

The CHAIRMAN. Thank you very much.

[The prepared statement of Mr. Chesney can be found in the Appendix on page 86.]

The CHAIRMAN. Our committee vice chair needs to leave to go to another hearing so I am going to turn my time over to him at this time. Mr. Thornberry.

Mr. THORNBERRY. Thank you, Mr. Chairman, and I appreciate each of you all being here today. There is a number of issues and ramifications at stake in what we are talking about, but I want to focus on the first and most basic issue, and that is whether Congress should affirm and update the Authorization for the Use of military Force that was passed in September 2001.

And as Mr. Engel referenced in his testimony, there has been some criticism of the section in the House-passed bill, section 1034. Some people say well, the courts—you are just adopting the court

interpretation of the AUMF, so you really don't need to do it, it doesn't change anything, just let the courts continue to adapt and interpret the September 2001 authorization.

A second criticism, which is kind of coming from the opposite way, is that, oh, this is a vast new expansion of power with no limits of time or geography.

So I would appreciate each of you giving us your opinion on whether Congress should affirm and update the authorization for the use of military force and whether you think either of those criticisms have merit; do you think that it is okay for courts to interpret when the United States can use military force; and are you concerned about some vast expansion?

And Professor Chesney, if I may, since somebody from the University of Texas Law School, welcome, I would ask you to go first.

Mr. CHESNEY. Thank you, sir, that is a great question. And I have two main points I want to make in response to it.

First, one of the issues that lurks in the background that we have not probably paid enough attention to is the fact that the existence of ongoing relatively conventional conflict in Afghanistan has made it relatively easy for everyone to agree that there is at least some combat going on somewhere that entitles us to detain somebody. It is entirely foreseeable that in the next year or two, for better or worse, that may not still be the case. And when that situation develops, when—that is, our situation in Afghanistan, similar to our current situation in Iraq, we are drawing down, we are leaving, we are no longer engaged in sustained combat operations, there will be an argument that will emerge that there is no longer authority under the original AUMF to detain anywhere.

I think it would be a very smart move on the part of Congress to clarify that for purposes of our domestic law, we do not condition our detention authority with respect to Al Qaeda on the existence of combat operations in Afghanistan. And this is something that Congress could head off by making clear there is detention authority, and it is not linked in that way.

A second issue is the question of whether it is even possible by statute to tamp down the debate over what is the scope of the authorization. Everybody agrees Al Qaeda counts, the Taliban counts. But when push comes to shove and people start getting down in the weeds, they often don't really agree about what they think the boundaries of Al Qaeda actually are and whether it encompasses various affiliated groups.

The question of the moment, as the chairman indicated in the opening remarks, AQAP, Al Qaeda in the Arabian Peninsula, may be the greatest threat we face. There is debate about the extent to which it is encompassed by the existing AUMF. The Administration takes the position, I believe, that AQAP is effectively part of Al Qaeda. And that may be the right interpretation. There is going to be debate about that. It is not clear if and when there is an AQAP detention that the courts necessarily will agree with that. It might be wise to eliminate that sort of uncertainty. But then you have even more difficult groups like Al Shabab where the ties, whatever they are, are relatively looser by a considerable amount as they are as between Al Qaeda and AQAP.

In that circumstance, a difficult question that I am not sure can be eliminated by statute will remain as to which groups are sufficiently associated with the AUMF-named groups to count.

The current House-passed version of the NDAA confirms the Administration's position that associated forces, co-belligerants, are encompassed but it doesn't actually define that term. And I am not exactly sure how best to define that term. That may be some indeterminacy that is just built into this framework.

Mr. THORNBERRY. Mr. Engel.

Mr. ENGEL. Sure. Thank you.

As I mentioned in my opening remarks, I think it is very important that Congress take this on. Essentially, the AUMF isn't only about who we detain; it has been elaborated and interpreted by the courts in the context of the Guantanamo *habeas* litigation, but it also affects who we target. So it basically is a definition of who we are fighting in this war. And I think it is very important and appropriate in our constitutional structure that the political branches, and particularly Congress, take a lead role in making these determinations.

When we talk about what are the courts saying, what are the courts doing, the courts are trying to figure out what Congress meant when it passed the AUMF almost 10 years ago now. And I think it is very important and appropriate for Congress to weigh in and to clarify basically by making clear it agrees with the views of the executive branch, because this goes really to the heart of who we are fighting and our national security.

Mr. THORNBERRY. Thank you. Mr. Dell'Orto.

Mr. DELL'ORTO. I would echo what Mr. Engel and Professor Chesney have said. I think one the keys here is that we need to be looking forward rather than rear-ward, and to the extent that we have demonstrations of how Al Qaeda and its branches and sequels are unfolding, we need to be prepared to address that.

And I think that anything that would limit the scope of our activities to certainly Afghanistan, would put us in a position where we will not be ready for the emergence of the next branch or sequel. And in point of fact, it would acknowledge what we are doing today. We have these operations taking place in many parts of the world. And I think we need to maintain the authority to do so.

I also agree that the courts should not be the place where there this is determined. I think the courts rightfully—they have been drawn into this somewhat reluctantly, I think—are doing their best to interpret what Congress has established by way of the law, and the more clarity we can establish through legislation I think the better off everyone will be.

The CHAIRMAN. Judge.

Mr. MUKASEY. I agree with the comments of the prior speakers. I would add only two things. First of all, this question of what it is that allows us to continue to detain has not been passed on by the courts as yet, and I think that Professor Chesney makes an important point in saying that we ought to head that off right now, because having that argument advanced could result in freeing an enormous number of people who should never see the light of day.

Secondly, the notion of defining a list of organizations that are against us, and then checking whether somebody is or isn't on the

list, and making targeting decisions on that basis and capture decisions on that basis, simply doesn't work. Al Qaeda and those associated with them don't care who is on the list, and this is not a motorcycle gang who wear jackets that are emblazoned with a particular label, and as soon as we kill off everybody who is wearing a jacket, we win. They didn't care on 9/11 whether we had anybody on a list or not, and they are not going to care now.

You need to look no further, I should say, than the Times Square bomber, Faisal Shahzad, when he was captured. It turned out he was associated with the Pakistani Taliban that wasn't on the list, and there was actually a debate about whether we had authority to hold him. That shouldn't happen.

Anwar al-Awlaki was self-radicalized in the United States, is now in a leadership position in AQAP, again somebody who may not neatly fit a category, but somebody who is undeniably at war with this country. And we should be equally free to oppose the people who are at war with us.

Mr. THORNBERRY. Thank you.

The CHAIRMAN. Thank you. Ms. Bordallo.

Ms. BORDALLO. Thank you, Mr. Chairman.

And, Mr. Chesney, my first question is for you. You observed that a military commission trial, one, may not have proper jurisdiction or available charges to try someone like Warsame; and, two, may pose additional risk of revealing sensitive intelligence information because of all the additional evidence needed for military commissions' prosecutors to establish jurisdiction over suspects like Warsame. Can you elaborate on these points?

Mr. CHESNEY. Yes, ma'am. The point I was trying to get at is one that is not necessarily going to arise in many, or even most cases, that would be part of the civilian trial versus military commissions debate. But it does seem to be one that is raised here, and there has been intimations in media accounts that this was part of the internal analysis.

In a military commission proceeding, there is a statutory personal jurisdiction requirement that is a bit complicated, and I won't get down into the details of it. Suffice to say, that there does need to be certain showings made to ensure that this is a person within the scope of the armed conflict that is at issue here, someone engaged in hostilties, or an Al Qaeda member and so on and so forth.

The factual predicates that are built into that showing are not identically repeated in a civilian setting where you are simply charging the person with having provided material support to one of these groups or having—I believe the charges in this case include bearing arms while doing so, and then instructing others in how to make explosives and receiving military-style training.

In short, it is possible that in order to establish jurisdiction in a commission proceeding, the Government would need to reveal more than it would in a civilian court regarding the existence of a relationship between some or all Al Shabab members, possibly just some; Al Qaeda in the Arabian Peninsula, which seems to be the liaison relationship that Warsame was involved in; and the relationship of both of those two with Al Qaeda proper. That doesn't necessarily need to be done, and in fact probably does not need to be done in a civilian trial.

Now that, as I mentioned in my testimony, is not the only consideration that matters here, but it is a substantial one, and one can readily imagine that the Intelligence Community might have preferred, all things being equal, not to be put in a position where it has to decide whether to come forward with the evidence that fleshes out the relationship amongst these groups.

Ms. BORDALLO. Thank you.

Mr. Mukasey, my next question is for you. You are critical of holding terrorism trials in Article III, because you claim that such trials would reveal sensitive national security information. However, what we know is that the Government has carefully crafted tools under the Classified Information Procedure Act, or CIPA, that allows sensitive national security information to be protected. As a result, one study after another of international terrorism cases have shown that in the hundreds of terrorism trials that have taken place in Article III courts, sensitive national security information has never been revealed when the Government uses the tools made available to it under CIPA. In fact CIPA works so well that the military commissions have modeled their classified information protection rules on CIPA.

Given these facts, why do you continue to believe that classified information would be better protected in military commissions which have little experience handling sensitive information, than in Article III courts which have almost three decades of experience handling sensitive national security information?

Mr. MUKASEY. I believe it, based on my own experience, and based on the trials of which I am aware.

The case, the terrorism case that I tried, United States versus Abdel Rahman, et al., started out with the Government having to provide, as it does in all conspiracy cases, a list of unindicted coconspirators. That necessarily included all the people that the Government was aware were associated with the defendants in that case. It included a then-obscure man named Osama bin Laden. We found out later on that within 10 days of the service of that list, it was in the hands of Osama bin Laden in Khartoum, where he was then residing, and he was then able to determine not only that we knew about him, but who else within his organization we knew about, and to take appropriate action. And from every account he did.

There are other instances of testimony coming out in criminal prosecutions that is later used as virtually a smorgasbord by terrorists. In addition, the need to keep agents from testifying to classified information is something that the Government feels, but obviously defense lawyers do not feel it, and shouldn't feel it. That is not their job. And so they will push to the limit, with the result that Government agents will appear to be and have appeared to be evasive or restrictive in their testimony and in their responses in a way that colors criminal prosecutions that would not happen in a military commission.

And as far as having to reveal means and methods in the military commission, I have to say that I am, frankly, mystified by Professor Chesney's testimony on that point. If you think that a military commission presents difficulties in the Warsame case as com-

pared to what is going to happen in a civilian court, I can give you two words of advice, "stay tuned."

Ms. BORDALLO. Thank you. Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you. Mr. Bartlett.

Mr. BARTLETT. Thank you. Nearly 19 years ago, before I came to the Congress, I must confess that when I heard the term "military tribunal" or "military commission," it conjured up images of a banana republic, a trial at midnight, and execution at dawn. If I had been asked to give an example of a kangaroo court, I probably would have said a military tribunal.

Now, 19 years later, nearly 19 years later, having been on this committee, I have a very different view of our military commissions.

But where we house our prisoners and where we try them is in a large sense a political decision. Not every citizen of the world has had the opportunity I have had to sit for nearly 19 years on this committee. So how does the average citizen of the world perceive military tribunals? In politics, of course, perception is reality.

So what is the perception of the average citizen of the world about military tribunals?

Mr. CHESNEY. May I?

One of the most interesting things about the military commissions perception issue, which I completely agree is a terribly significant one, is that we are not doing the best we could to let the rest of the world know how legitimate and just the system, as you have just described it, is.

Part of the problem is that it is very difficult for outside observers to know what is actually happening in the proceedings as they go on. The small number of reporters and interest groups that send personnel down there to monitor what is happening provide some outside access to what is happening, but not nearly as much access as could be to our interest.

It would be very advisable for the Department of Defense to make it far more transparent what is happening there, including great expansion of the amount of closed-circuit coverage and availability, including here in the Washington area, for more than just a small number of reporters and journalists to monitor these proceedings. There will be a good story to tell, I believe, but we are not putting most people in a position to actually hear it. It is all getting filtered through a small number of observers who are, in many cases, very critical of the system.

Mr. BARTLETT. Emphasizing the importance of perception, General Petraeus in a not private, but not really public, conversation indicated the enormous problems that Guantanamo Bay created for him in his area of responsibility in the military.

Let me read something from what we passed in the Congress nearly 10 years ago now. "The President also has the authority to detain persons who were part of," I have no idea how the President would know they were a part of something without a trial and a jury and a verdict, "or substantially supported Taliban or Al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners."

If I just take those first few words, absent the emergency that we were in at that time, wouldn't you have thought that this was pretty patently unconstitutional to say that the President could, without any court action, without any trial, determine that a person were part of a substantially supported Taliban or Al Qaeda forces and therefore detain them indefinitely, without any counsel, without any opportunity to defend themselves?

Mr. DELL'ORTO. Congressman Bartlett, let me at least take a stab at that. Again, if you premise the authority on laws of armed conflict and the law of war, then clearly, the President has the authority, as do the subordinate commanders, to make those determinations on the battlefield. And that is exactly what was done from day one. The detention authority stems from the authorities pursuant to the recognized international law of armed conflict and——

Mr. BARTLETT. But, sir, isn't the battlefield here essentially anywhere and everywhere?

Mr. DELL'ORTO. Well, I think in certain respects it is, Congressman, because the enemy has shown an ability to project its force from virtually anywhere to here, as contrasted to previous conflicts where there was essentially somewhat of a geographic limitation on the enemy's positioning and the locations from which he projected his force. Certainly we got used to the notion of a geographical limit on some of that, on the conflict.

Here, we have an enemy who moves about and may launch his attack from Afghanistan, may launch it from Pakistan, may launch it from Somalia, Yemen—and we have seen that. We have seen that with the *Cole* bombing and other instances where this enemy pops up and fights at a place of his choosing.

And so I think that the authority to detain very reasonably can be applied to a variety of areas that are not necessarily well defined by a nation's geographic boundaries.

Mr. BARTLETT. Thank you.

Mr. MUKASEY. If I could just add one point to the answer that has been given so far. First of all, the choice of the battlefield was not ours. That choice was made by the people who launched attacks against us. And we can, if we wish, limit the battlefield for our own purposes, but it is not going to limit it for theirs.

Secondly as Mr. Dell'Orto pointed out, assault takes place in the context of the laws of war. The laws of war recognize that people who wear uniforms, follow a recognized chain of command, carry their arms openly, and don't target civilians, are entitled to a certain level of treatment when they are captured, and they receive that level of treatment. But these people don't do any of these things. And the old rule was that if such a person was captured, they could be treated as the books said, summarily; which generally meant stand up against this wall and we will be with you in a moment. Now we have come substantially beyond that. But we are by no means obligated to bend ourselves into pretzels to treat people in that situation the same way that we treat ordinary criminal defendants. Not at all.

The CHAIRMAN. Did I hear you had an occasion, some special thing happen to you last week?

Ms. SANCHEZ. That is correct, Mr. Chairman.

The CHAIRMAN. Did that change your name or anything?

Ms. SANCHEZ. No, I am keeping the same name, the same name I have had since I was born. So thank you. Thank you very much, Mr. Chairman.

The CHAIRMAN. Congratulations.

Ms. SANCHEZ. I wanted to give Professor Chesney a chance to direct some comments to the whole issue of the Article III versus military commission question that was put forward. Would you like to do that?

Mr. CHESNEY. I would like to address one point, because I think it may be that Attorney General Mukasey may have misunderstood my point earlier about the particular issue raised in the Warsame case. I wasn't suggesting that civilian criminal trials have better capacities to protect sources and methods than military commissions do. It is at least equal, and perhaps the military commissions are slightly better at this because they have had a chance to codify things about CIPA that are generally done in practice now by the civilian courts, but aren't in CIPA itself.

But, rather, my point was that the actual substance of what needed to be proved would be different in that particular case. That is, Warsame, under the indictment that has been brought in the Southern District of New York, what the Government needs to prove in that instance doesn't require in any way to try to prove anything about the relationships amongst these various Al Qaeda and Al Qaeda franchise entities, whereas in the military commission process, regardless of what charges were brought by virtue of the personal jurisdiction provisions, will require such proof.

That is one way in which you could have a serious difference between the two systems. I don't think that is a frequently recurring situation, but I think it arose in this instance and would arise in any Al Shabab, AQAP, or other non-core Al Qaeda, non-core Taliban-type case.

Other issues that are worth keeping an eye on that this committee should be aware of include the difference in the substantive charges available in the following respect. There is ongoing litigation as to the legitimacy of charging material support and conspiracy in military commission proceedings. In particular, it is a quite open question, if not a doubtful question, as to whether the D.C. Circuit or the Supreme Court at the end the day ultimately will allow the commissions to charge material support and conspiracy for pre-2006 conduct.

The current state of play is that an intermediate military court, the Court of Military Commissions review, has upheld the constitutionality or the legality of charging material support, but this is just the beginning of years of litigation that are still in our future. The D.C. Circuit will have the next crack at it, and beyond that if the Supreme Court grants cert, it will decide the question.

There is some reason to believe, and I think a lot of people who have looked at this closely think it is at best a 50/50 call how the Supreme Court ultimately will come down on this. If they come down negatively on this as to a lot of the earlier cases, not going-forward cases, but the existing legacy cases, this will take away a pretty important tool in the tool set for prosecuting in a commis-

sion setting. This doesn't affect all the cases; it affects some of them.

Ms. SANCHEZ. Okay. Well, first of all, I think that even though we have had some people since directly after 2011, after we declared—or the President declared the Global War on Terror, and we have people still detained, I have a hard time believing that most of those people that we have left are actually even going to come forward into some sort of a process, if you will.

But I have been one of the few Democrats, I think, on this committee that has advocated for keeping Guantanamo Bay open and for military commissions. I am one of the few people, I think I was the first one to drop a bill, maybe about 2 or 3 years before the Hamdan case ever came down, and required this committee to at that point act. But I wouldn't preclude the fact that I think that we should keep both systems open and available to doing this.

My question, and the reason I think commissions is a great place to try a lot of it is because of several issues, including fog of war, evidentiary chain requirements, Miranda rights, if you will, a whole host of things that are introduced once one takes a look at the Federal system, and I think don't work well within some of the issues that go on with respect to the types of people and where we pick them up and how we pick them up.

And I guess the two questions that I really have that I am hoping you all can sort of enlighten me on is what difference has that made with the Court's ruling that GTMO is now a special place and inures with it some special rights to the people that we have had held there, as opposed to before.

And the second issue is, what do you think—understanding that I think most of these things would be best held in the military system, where do you think are some of those situations that would be better placed within our Federal system?

Does anybody want to take a crack at those two questions?

Mr. ENGEL. With respect to your first question, in terms of the impact of Boumediene and the Supreme Court's holding that the constitutional right of *habeas corpus* applies to Guantanamo Bay, that is some issue that now almost 3 years after Boumediene the courts are really still working it out. The Supreme Court held that it had jurisdiction, you know, that the Federal courts had jurisdiction, but it did not elucidate and consciously reserved the question of what other rights would apply to Guantanamo Bay. And that is something that the Federal district courts have, in developing *habeas* procedures, have been sort of all over the map, and they have gradually been corralled by a number of D.C. circuit decisions which has provided some content at least to the substantive standard for *habeas*.

Now, none of that answers fully what would apply in a military commission process and the like. Those are questions that the military commission courts have been working out, and they have taken something of a case-by-case basis where they look at whether the procedural rights at issue are fundamental. And they have generally held that the processes that this Congress has provided in the Military Commissions Act in 2006 and 2009 are sufficient, you know, with some glosses here and there. But these are issues that are still working their ways out in the court.

What is clear, of course, is that if individuals were in the United States, they would have a full panoply of rights. And while that may permit commissions to go forward in the United States, it would raise, you know, much more severe——

Ms. SANCHEZ. Obviously. And that is one of the reasons why I think it is best to keep them in the military commissions if we can.

Do you think it would be—that there would be a place for this Congress to delineate, not wait for the courts to sort of apply what those rights might be?

Mr. ENGEL. Well, I think that this Congress really has done so with the Military Commissions Act in 2006, 2009. Mr. Bartlett mentioned earlier about his image of military commissions and military courts. I think this Congress has provided the most developed procedures, the greatest amount of due process I think that we have ever seen in any kind of military commission system.

And so, you know, I would submit that Congress has weighed in and has provided appropriate protections under any constitutional standard. But, certainly, if there is tinkering to be done, those are questions for this body to consider.

Ms. SANCHEZ. Thank you, Mr. Chairman. I realize that my time is done, and I hope that I can submit that other question to the record for the gentleman before us to try to answer. Thank you.

The CHAIRMAN. Thank you.

Mr. Wittman.

Mr. WITTMAN. Thank you, Mr. Chairman.

I would like to thank the panelists for joining us today.

Judge Mukasey, it seems like the Administration's policy for evaluating detainees for transfer seems to have a little inconsistency there. And I want to ask a comparison, to look at the policy that is used for the transport-release of someone like Mr. Warsame in the case where he was detained on a ship versus other evaluations such as for GTMO.

And if you could give me your opinion on where you believe the differences are there. And is there a reason for the difference from a legal standpoint? And in electing to release a detainee from the ship, should the potential for reengagement be considered or the possibility of reengagement be mitigated in consideration of both of those, I would say, divergences in policy with relation to detainees?

Mr. MUKASEY. Well, let me answer your last question first. The possibility of reengagement always has to be considered. The whole purpose of capture in a conventional war—and it would be only underlined in an engagement like we are in with these folks—is to immobilize somebody who is dangerous and prevent them from returning to the fight. A catch-and-release program is the last thing in the world that you want.

So far as Warsame is concerned, the sense I have is that that was something of a—obviously, I don't have a window into the decisionmaking process in the current Administration. But the sense I have is that that was somewhat of an innovation and of an improvisation, in some measure in response to the legislation that barred the transfer of detainees from Guantanamo to the United States. They didn't put him in Guantanamo. They held him on a ship, debriefed him for some period of time, and then brought in a clean

team to give him Miranda warnings and then bring him to the United States.

I should add that, as it happens, paradoxically, holding somebody on a ship is itself arguably a violation of one section of the Geneva Accords. Now, whether that is a section that applies to people like this at all, I would argue that it doesn't, but it just shows you how problematic that whole process is. And we can't continue to make these decisions *ad hoc*. We need to have a systematic way of assuring, principally, our safety; secondly, our intelligence-gathering capacity. And everything else, in my view, follows from that.

Mr. WITTMAN. Thank you.

I want to follow up on your comment about our intelligence-gathering capacity. With what has taken place with Mr. Warsame, are we limiting our military and intelligence operatives' options with detention of known terrorists by pursuing this particular policy? And with leadership in SOCOM [Southern Command] and the CIA [Central Intelligence Agency], are they going to be forced to let detainees go if they aren't able to get that information, especially with this particular tenet that they are pursuing with detainee policy?

Mr. MUKASEY. Well, I think the question of letting detainees go and of gathering intelligence are, in a sense, separate.

Regrettably, in my view, the CIA program was abandoned entirely, and, instead, what we have told the rest of the world is that the Army Field Manual now sets the limit for any interrogation by any U.S. Government employee. The Army Field Manual has been used as a training manual by terrorists for years. And I think what we need is a classified interrogation program to be run by people who are trained in the running of it, so that people we capture don't know precisely what they have to expect. And we can get a whole lot of intelligence a lot easier that way.

There are people who were captured by the CIA who didn't go into their program at all, who, upon capture, said, "I know who you guys are, I don't want any part of that, and I am perfectly willing to cooperate," and did. But if you limit yourself in that fashion, then you are really tying your own hands.

Mr. WITTMAN. Let me ask one final question. Does a coherent detention policy include subordinate policies on detainee transfer and release? And, if so, how would you believe transfer-and-release policies minimize the possibility of reengagement?

Mr. MUKASEY. I think if you have a place to take people, evaluate them in a calm setting, that that is optimal. You are going to find at some point whether—I mean, you may very well find that somebody who was dangerous when he was apprehended has become, for objective reasons having nothing to do with his particular mindset, less dangerous because his friends are gone and is somebody you can release, or you may find another country willing to take him. But you certainly can't do that with the wind blowing in your face under a deadline that says, we are going to find this out in 2 months or else we are going to let him go.

Mr. WITTMAN. Very good. Thanks, Judge Mukasey.

Mr. Chairman, I yield back.

Mr. BARTLETT. [Presiding.] Thank you.

Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I think one of the things that we should acknowledge, looking at this, is, no matter which way you go, there are uncertainties. And I think one of the things that both sides have done is, well, gosh, if we did your plan, then we wouldn't know what was going to happen in this instance. I mean, we are in uncharted territory. I mean, just talking about this, as Mr. Engel said, you know, it is not clear what rights exist at Guantanamo. They are being constantly interpreted by the courts, and that could pop up and create a problem.

You know, military commissions are a relatively new thing. I think we have only prosecuted—help me out here—we have only prosecuted, like, one or two folks under military commissions at this point, and those were both guilty pleas, I believe. We haven't gone through a full trial with a military commission.

Mr. ENGEL. We have gone a little bit above that. I think there may be four or five and couple of trials——

Mr. SMITH. Okay.

Mr. ENGEL [continuing]. But your point is well-taken.

Mr. SMITH. It is still being interpreted. So no matter which way we go here, because of the, you know, unique nature that I think all witnesses testified to of the fact that this is an enemy that the law, frankly, didn't contemplate, and certainly the law of war, so we have to improvise and go forward, so I think we need to keep that in mind as we look at the options.

You know, keeping all the options on the table, I think one of the biggest restrictions right now that we haven't talked that much about—and, Mr. Mukasey, if you could comment on this—the restrictions that have been placed on people once they are in Guantanamo. And this is because Congress opposed the closing of Guantanamo and was looking for ways to make sure that the President couldn't do that. And that is perfectly appropriate, from a legislative standpoint.

But in placing severe restrictions on when anyone from Guantanamo can be transferred back to a home country and placing an absolute bar on those inmates ever being transferred to the U.S. for trial, if an inmate is transferred to Guantanamo at this point, the President's hands are tied. And that is a big factor in their reluctance to send someone to Guantanamo.

Now, the Administration has said—and Admiral McRaven does not necessarily speak for the entire Administration—has said that they have not taken it off the table, and, in certain circumstances, in high-profile cases, it is something that they would consider doing. But the reason for their reluctance is because of the fact that literally you had the situation where, to throw the cliché out there, Guantanamo is now the Hotel California: Check in; you can't check out.

And this, by the way—keep in mind, I would hope that during the course of this process, if we are effectively doing our job of erring on the side of caution, I would hope that at some point we will pick somebody up who it turns out is not, in fact, a threat, that we were wrong. This happens. I would hope it would happen or you are not being thorough enough.

But in the current situation, if you do that, you pick someone up and you send them to Guantanamo, even if you find out, you know

what, it is the wrong guy, got the wrong guy, not the guy we thought it was, there is nothing that we can do but keep him there, under the current law. So shouldn't we, at a minimum, if we are going to keep options on the table—military commission, whatever—stop that severe restriction on what can happen?

And I will throw one other point out before I quit. It has also been interpreted possibly that even if you go there, you know, you do a military commission trial, let's say they sentence him to 10 years. You know, the argument is that even after the 10 years, when the sentence is up on Guantanamo, you are still restricted in being able to transfer that person out. So you have to go to indefinite detention anyway, even after they served their sentence, because the law that we have passed has said, you can't transfer this person.

Isn't that a problem, and shouldn't we sort of look at some way to put some flexibility in there?

Mr. MUKASEY. Well, certainly, if that is the effect of the law, then there ought to be flexibility. I mean, you are not going to get me to say that I am in favor of that kind of rigidity. I think tying our hands is the last thing we want to do in this struggle.

But we have to understand that the law restricting their transfer to the United States was passed in response to a plan to bring Khalid Sheikh Mohammed and a whole bunch of other people to a courtroom in lower Manhattan and the hubbub and turmoil that that, and I think deservedly, created.

But I agree with you that when you legislate in response to events like that, to action-driving events, that it doesn't always create the most rational policy in the world and that flexibility is very much called for.

And as far as the issue of indefinite detention, we faced that with the trial of Osama bin Laden's chauffeur, who, in essence, got time served. And there were people who favored continuing to detain him after his sentence was served because he continued to be a threat. But it was felt that we couldn't do that, and he was nonetheless released.

So, again, we need a coherent policy, we need a flexible policy. And when you have extreme actions that then become the subject of legislation, that creates the worst possible atmosphere in which to make these decisions.

Mr. SMITH. And I agree with that. And, certainly, I think, you know, the decision on Khalid Sheikh Mohammed and the way the Administration did not come out quickly and clearly and put a policy—I mean, we had them going through a military commission process that was stopped. That certainly did not help this process whatsoever.

I want to ask one question on the civilian Article III court side. And we have cited this statistic repeatedly, the number of terrorists we have tried, you know, and going back to 1993 bombing, Ramzi Yousef, you know, captured oversees, brought back here, tried, put in jail. That seemed to work. He has been in prison for quite a while here in the U.S., went through the court system.

I mean, I would submit that Al Qaeda and affiliated groups are targeting us anywhere and everywhere they possibly can, whether we are holding people here or not.

Why isn't that an example of why you need to have the option on the table for civilian trials for people like that?

Mr. MUKASEY. Two things.

First of all, I was in the courthouse where that case was tried and where other cases were tried. That case has to be tried by jurors who have to be kept anonymous. I had an anonymous jury in the terrorism case that I tried with the "Blind Sheik." We took great pains to keep those people's identity from becoming known. The day they delivered their verdict, two of them found reporters sitting at their doorsteps and were absolutely terrified. And there is no reason to believe that that kind of confidentiality can be maintained.

These people don't come—the jurors, that is—don't come from Mars. They all have friends, they all have working associates, they all have people who know that they were called for jury duty, and they could, themselves, come to the courtroom.

Mr. SMITH. We do do that in mob trials. I mean, that is a huge risk, granted, but it is something that we have done. And, I mean, there are many, many other types of people where you are in jeopardy, and we have set up a system to protect them.

Mr. MUKASEY. You can't guarantee it. If the interest level is high enough, that is going to be breached. It was breached in my case, and I will tell you that the steps taken were far in excess of what is taken in mob cases. They were taken by marshals in the morning and in the afternoon, picked up at pick-up points and dropped off at drop-off points, to make sure that people didn't discover who they were. But everybody has one good friend, and they all have relatives and working associates and so on, some of whom knew they were on that jury. So that is one issue.

The second issue is, it is a colossal expense. We had to bring marshals in from districts all over the United States to protect the courthouse because the U.S. Marshal Service in the Southern District of New York and the Eastern District of New York weren't sufficient to provide that kind of protection. It was enormously costly, it was enormously disruptive.

The cost of protecting two judges—I was one of them. I had a security detail for 11 years.

Mr. SMITH. And I think that——

Mr. MUKASEY. And that is not—the point is not that it was difficult. Of course it was difficult.

Mr. SMITH. It is expensive.

Mr. MUKASEY. It was very expensive.

Mr. SMITH. And I think, you know, one of the things we can agree on, as I said, about the Khalid Sheikh Mohammed case, at a certain level of high profile, you know, you do create that problem. But we capture terrorists on all kinds of levels, down to a guy like Warsame. They are not all going to be on the Ramzi Yousef/Khalid Sheikh Mohammed level. So, surely, there are some examples where this can work.

Mr. MUKASEY. Of course there are.

Mr. SMITH. And that is all we are saying——

Mr. MUKASEY. Of course there are.

Mr. SMITH [continuing]. Is to keep all those options on the table.

Mr. MUKASEY. I mean, we had a trial of the millennium bomber up in Washington, the fellow who was trying to, you know, bring explosives across the border, successfully tried in a district court.

All I am saying is that we need to do this in military commissions, as well. And to compare numbers I think is very misleading. In essence, as was pointed out before, the military commission system has been bypassed. I mean, this is akin to telling somebody, you know, "I just poured glue in your watch, and it doesn't work, so you might as well throw it away." We need to let the system work.

And there is a state-of-the-art courtroom down there. I have visited it.

Mr. SMITH. As have I.

Mr. MUKASEY. And it is well able to handle these trials, if only we let them go forward.

Mr. SMITH. And let me just say to be perfectly clear, I mean, my position and I believe the Administration's position is, all three of these options need be on the table. The Administration and no Democrat that I am aware of on this committee is arguing that we should not have military commissions. We should. Or even, for that matter, indefinite detention. We have to have indefinite detention.

The concern is, the restrictions that have been placed legislatively have taken the Article III courts off the table and tied the Administration in knots, and I think we need to resolve that. And one of the key issues that we have to resolve as we are trying to figure out how to get through this is, it can't be the case that if you go to Guantanamo it is absolutely impossible to leave. We have to figure out some way to solve that.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. [Presiding.] Thank you.

Mr. West.

Mr. WEST. Thank you, Mr. Chairman and Mr. Ranking Member.

Thank you for the panel for being here.

And lots of academic discussion here, and what I want to do is maybe try to bring it to the commonsense level of a combat soldier.

You know, when you deploy me outside the United States of America and you give me ammunition and you give me imminent danger pay, that means I am going into a combat zone. And in a combat zone, you have two types of individuals. The individual that is in a uniform, shooting at you and planning against you, that is an enemy combatant. The individual that is not wearing a uniform, that is not a member of any type of state, is an illegal enemy combatant. I think that the problem here we have to come to grips on, if we are in a war, to start to understand that there are illegal enemy combatants.

Now, the problem I see with this is, you know, back during World War II we captured Nazi saboteurs off the coast of, I believe, New York and New Jersey, military tribunal, and they were summarily executed. And I am not saying we go to that length, but we already have that system that was in place.

So when I look at what just recently happened with the gentleman who was accused of planning the African embassy bombings and, all of the sudden, because of a technicality in civilian courts, he is not convicted for the murders of those individuals, my ques-

tion to you is, if we continue on in this Warsame case or if we look at the Somali pirates that we now have in Norfolk, Virginia, who killed the four Americans on their U.S.-flag yacht, or, as well, with the underwear bomber, if we do not start seeing them as illegal enemy combatants, if we start to see them as common criminals and offering them constitutional rights and bringing them into civilian courts, what would be the ramifications long-term? And has this Africa embassy bombing already set a precedent by which things can be different as we go forth in this Warsame case?

Mr. CHESNEY. These are really great questions, sir.

Let me first address the point about——

Mr. WEST. Well, thank you. I stayed up last night to write them.

Mr. CHESNEY. I stayed up last night thinking about what I might say in response.

You mentioned the Ghailani prosecution. This is the East African bombing defendant who was transferred out of Guantanamo into the Southern District of New York, where the judge I used to clerk for, Lewis Kaplan, your former colleague, presided.

And as everyone, I think, knows and recalls, there was evidence that was suppressed. And the key evidence that was suppressed was the testimony of a witness who was discovered—his identity was discovered from the interrogation of Ghailani himself. The Government didn't dispute that the interrogation that produced his name was coercive. And it raised one of these, what we call, you know, the fruit-of-the-poisonous-tree situations: Should the testimony of the other guy be suppressed because you learned about him in the wrong way?

It is often suggested that this particular problem, the exclusion of this guy's testimony, wouldn't have happened if only we had tried the same case in a military commission. But I don't think we can make that assumption. In fact, I think that it is more likely than not—of course, you never know. When you change decision-makers, you can get individual differences. But the applicable rules may well have been quite the same.

One of the things about the current iteration of the military commissions, with the Military Commissions Act of 2009's voluntariness requirements, is that the rules about voluntary testimony and what is going to be admissible, in terms of interrogation statements, have become very close to being identical to what goes on in Federal criminal courts, civilian criminal courts. It is often assumed that is not the case, but I actually think they are quite similar.

There is an exception in the Military Commissions Act for statements that might not have been voluntary but that were obtained at the point of capture by a unit, such as one that you would have been a part of, that captures someone and immediately conducts field interrogation to get tactical and operational intelligence. That can come in, potentially, under the Military Commissions Act, even if not voluntary.

But once you are away from the moment of capture, once you have gone back into the detention system, and certainly once you have gone to Guantanamo and you are talking about interrogation, it all has to be voluntary under the statute, even if you are in a military commission.

Mr. ENGEL. And maybe if I may just add one additional point, we have been talking about this a lot as a practical question, about what procedures apply in the commissions, what procedures apply in the Article III courts. I do think the procedures in the commissions are more flexible. I think that the error, or the application of Article III standards that happened in the Ghailani case would be less likely to happen in the commission process. But I am not sure that that is the point.

I think the point is what you spoke about when you talked about sending people into battle and who we are fighting and picking up there. These are not common criminals. These are military enemies. We are detaining them by our military. And consistent with really every one of our past wartime experiences, we are both entitled and it is appropriate to treat them through a military commission process. And that process may be more fair and more robust than we have ever seen before, but it is still a military process. And we try them before the commissions because they are the enemies of the country and they are not common criminals, not simply because we think in a particular case there are a couple of procedures that would make the prosecution more efficient.

The CHAIRMAN. Thank you.

Mr. WEST. Thank you. I yield back.

The CHAIRMAN. Ms. Hanabusa.

Ms. HANABUSA. Thank you, Mr. Chair.

Mr. Engel, there is a statement in your testimony that I think kind of gets to the essence of all of this. You said, "The traditional laws of war are premised upon a conventional international armed conflict or, in some cases, civil wars. The established legal framework provides clear answers to who may be detained, how they must be treated, and where they should be prosecuted. None of these questions is self-evident when it comes to the war on terror."

So can you tell me why it is so clear in the other situation and why it is so muddy in the situation of the war on terror?

Mr. ENGEL. Sure. Well, I mean, largely, when you are talking about the conventional laws of war, you are talking about the Geneva Conventions, you know, by and large, and the common law that has been worked out around that. And the Geneva Conventions really do provide specific answers as to how we treat prisoners of war, you know, those legitimate combatants who meet these standards. And it talks about where they can be kept. It talks about where they may be prosecuted, if they are to be prosecuted for war crimes and the like.

And none of these questions really exist or apply when we are talking about individuals who are not prisoners of war and individuals who are not covered by international armed conflict. We have seen some clarity, particularly with the Supreme Court's Hamdan decision and the way in which it interpreted Common Article III, that has provided some baseline treatment standards and the like. But many of these other issues are issues that have been worked out by the executive branch with Congress, with the courts. And the answers, even now, almost 10 years later, you know, are not perfectly clear.

Ms. HANABUSA. So if this war on terror, or however variant that we may continue to call it—we are going to continue in this murky area?

Mr. ENGEL. Well, look, I think we have more clarity now about these standards, a lot more clarity now, than we had, you know, on 9/11. I think the United States has taken the lead, I think Congress has taken the lead in elucidating, you know, the governing law.

Because when we talk about international law, when we talk about the laws of war, apart from things like the Geneva Conventions, these answers don't exist in the sky. The written bodies of—there is no criminal code for the law of war as such, but it is worked out from time to time. And I think we do have some answers, but, as we have seen from this discussion and we have seen from the reaction to section 1034, there are still questions that are being worked out here.

Ms. HANABUSA. But it is a unilateral act versus something that you would see that nations would get together and sort of agree to some kind of basic premise. And that is what I see as the problem.

I would like to speak Mr.—is it "Mukasey"? Is that correct?

Mr. MUKASEY. Yes, it is. Thank you.

Ms. HANABUSA. Okay. And this is regarding the—I know I am going to not pronounce it correctly—is it the Boumediene——

Mr. MUKASEY. Boumediene.

Ms. HANABUSA [continuing]. Boumediene decision. And I think you were Attorney General when that came out in 2008.

One of the things that I found in the decision that struck me and wanted to discuss with you is the fact that, toward the end, the Supreme Court says that because conflicts have been limited in duration, we have had the ability to have the outer boundaries of war powers undefined, basically the Presidential right. And I think the discussion was of separation of the powers.

What I am curious about in reading part of the testimony that we have had is, given that situation and given the thing that the Boumediene decision seemed to have also looked at the geographic area, of what is the status of Guantanamo, for example, and they talked about the insular cases—I am from Hawaii, so of course the insular cases development is very critical to me.

So what I would like to know is, at what point are we going to see this clarity? Because at some point we, as Congress, cannot legislate to the point where the Constitution and the Supreme Court comes back and says, "Well, you can kind of do it for now, but at some point, we are going to address this issue." And I would like to know how you thought about that.

Mr. MUKASEY. Well, I think that you have to legislate in the here and now, and you have to legislate with what we have.

So far as past conflicts being of limited duration, I should point out that that is only in retrospect. The Germans didn't march into Poland in 1939 scattering little pieces of paper saying, "Don't worry, this is all going to be over by 1945 and the Fuhrer is going to blow his brains out." That is something that we achieved, and it was limited in duration only in retrospect.

This conflict, I am hoping, will have an end. How are we going to know? We will know. And it is not something for us to worry

about while it is ongoing. What we have to worry about while it is ongoing is how we behave and how we treat our adversaries. And the fact that this committee is holding hearings like this and passing the kind of law that it has passed on to the House and that passed the House is wonderful testimony that we are a nation that does that and that worries about those things.

But I don't think we can sit here and worry about the duration of the conflict and paralyze ourselves from acting. We act with the facts as we know them. If the facts change, you can always change a statute. But inaction is going to get us in a place that we don't want to be.

Ms. HANABUSA. Thank you.

Thank you, Mr. Chair. My time has expired.

The CHAIRMAN. Thank you.

Mr. Runyan.

Mr. RUNYAN. Thank you, Mr. Chairman.

Judge Mukasey, in the chairman's opening statement, he referenced the Administration's overwhelming preference for prosecuting terrorists in Federal court. What are the downsides to having the two-track system whereas cases that are seen feasible are tried in a Federal court and the weaker ones are tried in the commission?

Mr. MUKASEY. I think that sends the wrong message for so many reasons it is hard to know where to begin.

First, it suggests that military commissions are some sort of lesser form of justice. They are not. They are, in point of fact, a robust, able system.

Secondly, we shouldn't be making principled decisions based on the feasibility of a case or the infeasibility of a case. We should be making those decisions based on an intelligence assessment of where they belong, a principled assessment of where they belong.

And, finally, even if you try to make an assessment in advance of what the feasibility of a case is, I think the Ghailani case is a perfect example of the fact that you don't always guess right.

So, for all of those reasons, I think we have to do this on some basis other than projected feasibility.

Mr. RUNYAN. Thank you.

And this is really for all of you, if you want to take a quick stab at it. You know, this past month, President Obama issued an Executive order establishing a process to periodically review continued detention of each detainee at GTMO. And are any of you concerned about such a process being an adversarial system on top of all the *habeas* litigation?

Mr. DELL'ORTO. Congressman Runyan, let me take a stab at that.

First, let me also add one point to what Judge Mukasey indicated with respect to military commissions. I think one thing that we have to failed to account for with respect to a distinction between military commissions and the civilian courts is, ultimately—and I think this goes to Congressman West's point—ultimately, the people who are in the best position to judge the guilt or innocence of individuals who are accused of committing war crimes are the soldiers. They have been on the battlefield; they understand what all of this is about. And I think there lies a very significant aspect of

military commissions that you don't necessarily have in a civilian court.

Going to your question regarding the review of detention at Guantanamo, having lived through the Combatant Status Review Tribunal process, Administrative Review Board process, we are acknowledging somehow that things are different here than they have traditionally been on the battlefield. And we did so with both the CSRTs [Combatant Status Review Tribunal] and the ARBs [Administrative Review Board]. We provided what I believed was a system that had a certain process as part of it that worked.

To now take this and turn it into an adversarial proceeding, where you have counsel for a detainee and no judge there to adjudicate what is being done in that proceeding, I think invites a very, very difficult situation for those commanders who are charged with responsibilities for detention. You are incorporating into a noncriminal court-type situation and administrative determination a whole set of legal aspects that I think are wholly uncalled for in that environment.

Mr. RUNYAN. Anyone else?

Mr. CHESNEY. I would like to follow up on that a little bit. I first would emphasize how important periodic review of some kind, whether it is by Executive order or by the statutory mechanism in the Defense Authorization Act, how important it is, precisely because of the open-ended timeline concern that Representative Hanabusa raised a moment ago. This is how you respond to the indefiniteness of war against something like Al Qaeda.

I have some sympathy with Mr. Dell'Orto's point about the risk of turning this into sort of a second round of *habeas, as well.*

I do want to respond and disagree, to some extent, with the point he made, however, about the relative expertise of military officers versus civilian jurors as fact-finders. And it is a limited disagreement.

I am sure that is actually quite correct as to, for example, the Omar Khadr situation, where you have a firefight and there is an alleged war crime involved with the firefight involving soldiers, and it is the sort of thing soldiers certainly know better than civilian jurors. But one of the things that is funny about the current circumstance is, a lot of times what we are going to charge in commissions as material support or the sort of things, whatever it was that this Warsame fellow was up to, if it was tried in a commission, these will be things that don't look like what soldiers train and do in combat situations, that are more like what the intelligence community deals with. And we shouldn't assume that military officers have special expertise.

That said, I will note that military officers are quite possibly going to be less likely to be overimpressed by allegations that someone is linked to Al Qaeda and so on and so forth. And I think you see that in the Hamdan military commission case, where they acquitted on some counts, convicted on a lesser count, and then gave a time-served sentence.

Mr. RUNYAN. Thank you.

Chairman, I yield back.

The CHAIRMAN. Thank you.

Mr. Langevin.

Mr. LANGEVIN. Thank you, Mr. Chairman.

I want to thank the panel for this discussion today. Your presence is obviously very enlightening. And this is clearly an extremely contentious issue that I think that we need to address as a nation if we have any hope of moving forward, with our history involved in Guantanamo Bay and ultimately, of course, the AUMF that was issued after 9/11.

I would like to ask the panel specifically their thoughts about the potential effects of closing off completely the ability to try any terrorist in Article III courts. And, second, would it be possible to have Article III courts at Guantanamo?

Mr. MUKASEY. Well, the short answer to your second question is "no."

As far as closing off Article III courts, I don't think any of us, even the most skeptical—and I probably fit into that category; maybe Mr. Engel is slightly more skeptical of Article III courts—I don't think any of us says that you close off Article III courts.

I think what we are talking about here really is where you set the default. And there are those of us who believe that the default should be set at military commissions for reasons that we have explained and other folks who think it should be set at Article III courts.

But I don't think anybody favors closing off Article III courts. They are very a important tool, and, as a former card-carrying Federal judge, I have great confidence in them.

Mr. ENGEL. And, actually, if I may add, sometimes there is confusion when we talk about terrorism prosecutions and Article III courts and military commissions, that sometimes we are mixing apples and oranges.

I mean, there is no question that the Article III courts have prosecuted—you know, have overseen the prosecution of a wide variety of terrorism cases since 9/11 and before, that were folks who were picked up by the FBI [Federal Bureau of Investigation], using traditional law enforcement mechanisms in this country. And I don't think there is any disagreement, by and large, that the vast majority, if not nearly all, of those cases are appropriate and should go forward in Article III courts, at least as the default rule.

By contrast, when we talk about folks who were picked up in wartime circumstances, either by military services or by our intelligence services, often picked up by foreign governments who then turn them over to the United States in connection with this ongoing armed conflict, I think it is there—and these are basically the folks at GTMO and folks who are to be picked up in the future—where the military commission system would seem to be most appropriate to those circumstances and, you know, something as the default rule under those circumstances.

Mr. CHESNEY. I think it is very interesting that we are actually seeing a lot of consensus on—I think all of us came into this largely agreeing about the need to have all three of these tools, the legitimacy of all these tools, and a fair amount of consensus emerging about the need for some degree of flexibility. And I would associate myself with Judge Mukasey's remarks about the question really being, where is the default set?

I do want to underline that, in the circumstance, as Mr. Engel described it, of the overseas capture, which is really what this is about, much more so than within the United States, there is a fact pattern that can and has arisen from time to time that, if nothing else, shows you that you do have to have some flexibility to be able to prosecute in a civilian court. And that is when it is a foreign government that has custody of an individual and they won't give him to us unless we are going to pursue a civilian criminal prosecution. That is, they won't transfer him into our custody were we to pursue a military commission alternative.

There was a fellow who was, I believe, in the Netherlands. His name has escaped me, but I believe it was Delaema, if I am recalling correctly, and he was in Dutch custody. He was involved in the insurgency in Iraq. They would not possibly have given him to us if we were going to put him before a military commission. And I believe there was actually a diplomatic agreement that we would not actually put him in a military commission or military detention. If we wanted him, it was Article III or nothing.

Examples like that hopefully will be rare, but when they arise, we need to make sure that the President has the ability to say, yeah, we will take him, even though it is not a preferred option.

Mr. LANGEVIN. Thank you.

Mr. Chesney, let me ask a different topic, in response to a question or a comment from Judge Mukasey, what are your thoughts about shipboard detention?

Mr. CHESNEY. So, shipboard detention, as soon as you raise it, I think all of us think of the British hulks lying in the East River in the American Revolution, the horrors that the American soldiers captured there went through. And others may think of the Japanese so-called "hell ships" of World War II. There is a terrible history associated with them because, generally speaking, they are deeply unhealthy places to hold people, historically speaking, and often they are dangerous as well. Many an American POW [prisoner of war] was accidentally killed by friendly fire when we fired on ships in World War II that turned out to have prisoners aboard them. So there is the justifiable negative reputation there.

It is carried forward in the Third Geneva Convention, which says prisoners of war have to be held on land, full stop. That provision is not applicable. That is a provision applicable only to international armed conflicts, which is not what we are talking about here. It is not clear that in noninternational armed conflict the same strict rule applies, but we can look to the Army's longstanding regulations about shipboard detention. Army Regulation 190–8 has long provided that you have to strictly limit it, but it can be done for temporary operational exigency reasons, particularly if you have captured someone at sea.

I agree with Judge Mukasey that, at the end of the day, it was lawful to hold Warsame for the 2-month period that we did hold him. You couldn't show that that violated international law. But there is no question, also, that we do not want to be in the business of long-term Guantanamo at sea.

Mr. LANGEVIN. Very good.

Thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you.

Mr. Reyes.

Mr. REYES. Thank you, Mr. Chairman.

And thank you, gentlemen, for being here. I did read your testimony, but I apologize for not being here earlier due to another conflict.

But I was interested, based on what I read and what I have heard, what you think are the long-term implications of what has been the whole Guantanamo experience or the process, both to us and to our allies. And then, in there, if you could consider the kinds of asymmetric threats that we face today, what can we expect long-term from this issue.

Mr. DELL'ORTO. Well, let me begin, Congressman Reyes.

Going back to the earliest days of the determination to house detainees at Guantanamo, there was a fairly extensive look at potential options for where to house folks. And as Secretary Rumsfeld I think once described it, it was the least worst of a number of bad options.

There weren't very many options open to us, particularly if we were not going to keep them in Afghanistan because of the nature of the footprint we wanted to limit in the theater there, the practical reasons for trying to maintain a very secure facility, and, you know, concerns about having folks in the United States who, you know, who unlike traditional soldiers who fight in accordance with the laws of war, would do anything were they to break out and be a true threat to the populace.

Guantanamo became the one place where we believed we had the ability to, first, ensure that they were secure there, and, two, put us in a position to take maximum opportunity to develop as much intelligence as we could.

Having said that, I think the reasons—and as I said in my earlier testimony—I think the reasons for opening Guantanamo then hold true today: where we have a dynamic situation, a changeable foe, an uncertain operational picture in terms of geography. Guantanamo, to my way of thinking, still presents us with a very well-developed and mature now facility, with all of the construction that has taken place there, procedures that have been established for detaining the sorts of folks we are picking up on the battlefield, and continuing to interrogate them as the need warrants.

Mr. MUKASEY. I would add that Guantanamo, in my view, is a state-of-the-art facility. I visited when I was a district judge. Forget maximum security—medium security facilities in this country, Federal prisons; Guantanamo compares favorably with the conditions in those prisons insofar as how it treats people.

If we were to close it, we would be doing away not only with all of that, it is a place that is remote, secure, and humane. We would be doing away with all of that. We would also be doing away with all of the experience, the collective experience that we have in holding people there, understanding how to deal with them and how to control them. That would be an enormous sacrifice, forget the financial sacrifice of having built that kind of facility, including an expensive courtroom facility in which we can try military commission cases.

Long-term, what I hope, in response to your question, is that we here and the world at large comes to its senses about what Guanta-

namo is and what it isn't, and that if we have to keep it open, that we can keep it open and do it in a straightforward, unashamed way. Because there is nothing to be ashamed of down there.

Mr. CHESNEY. Greetings from Texas, Congressman.

You asked about asymmetric threats and the future course of things. In looking very far ahead, I want to sound a pessimistic note and suggest that we may look back on this time, amazingly enough, as the easy phase in terms of the legal and policy debates. We may, 10 years down the road, be dealing with a situation in which we long for the days in which we could at least say that there was something called "Al Qaeda" that had some sort of organizational trappings and that it wasn't so completely diffused that you can't even come to grips with exactly who the enemy is.

One of the leading theoreticians of Al Qaeda is a man named al-Suri. And al-Suri's core idea is a familiar one for those who study nonstate violence. It is the idea of leaderless resistance. He has been urging for years and years that Al Qaeda's leadership do everything it can to transform the movement from organization to ideology and inspiration, where everyone might decide to self-radicalize and engage in violence against us. And if and when we really get to that point in an even greater degree than we have today, we are going to have one heck of a time trying to figure out how to bring all these tools to bear on it.

Mr. ENGEL. I will just say, on a more positive note, we have understandably been focusing on issues in which there is disagreement, but when I look at the long term and I think about, you know, where we have come over the last 10 years, I am actually heartened by the degree to which there is some bipartisan agreement on a number of issues, you know, with respect to this armed conflict.

You know, we have seen—there is common agreement that we are at war with this enemy, Al Qaeda and its affiliates. There is common agreement that we may detain these folks under the laws of war and for the long term. And even with respect to things like military commissions, which seemed to divide the country, you know, just a few years ago, we have seen President Obama support military commissions, at least in principle, and actually push through, you know, or support an act that Congress passed to update and amend the Military Commissions Act of 2009.

And so, through now two successive administrations, there is actually a substantial degree of consensus on a lot of big issues with respect to the legal framework of the war on terror. And, unsurprisingly, there are still issues of policy and law that divide folks, but, you know, I actually see things moving in a positive direction on a lot of fronts.

The CHAIRMAN. Thank you.

Mr. Garamendi.

Mr. GARAMENDI. Thank you, Mr. Chairman.

I, too, apologize for not being here earlier. I was in the Resources Committee defending the work you did on the wilderness study in Mono County. Good piece of work.

But the issue at hand today is exceedingly important. As you recall, we had a rather controversial moment with the National Defense Authorization Act. I want to compliment you on having this

hearing, bringing us together to deal with some of the extraordinarily important and very complex issues surrounding it.

The one question I have goes to Guantanamo, and that is, could it be a Federal court as well as a military court at Guantanamo?

Mr. MUKASEY. It can't. The Constitution prescribes that cases be tried where the crimes are committed. And you can't—forgetting the fact that there is no Federal district, Congress could always define the outlines of a Federal district. And there is no authorization for holding court there; you can solve that, too. And forgetting where you would get a jury from and where you would hold them and all of that. I believe the Constitution absolutely bars trying somebody someplace other than where the crime was committed.

The CHAIRMAN. Thank you.

Ms. Sanchez, you had another question?

Ms. SANCHEZ. I just wanted to put something in for the record, because I know that Mr. Dell'Orto had—and I agree with a lot of what you are saying with respect to how important—or how well our military men and women can judge the combatants. And, to a large extent, I do agree with that.

But you mentioned, in saying that, Mr. West's comments about how it had served us in the past. And the one case that he brought up, in particular, were the six German saboteurs. And I just wanted to add for the record, that was probably not a very good case to bring up, considering, you know, putting them before a firing squad when, in fact, they had turned themselves in. Most of them didn't even know what they were coming over to do, et cetera. It is just a very bad case in point, so I wanted to put that into the record.

But I do agree with your comments about how, most of the time, our military can be some of the best judges with respect to that.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I have a couple of questions.

What are some of the possible ramifications for bringing foreign terrorist detainees to the United States in terms of constitutional rights and immigration-related issues that could be triggered?

Mr. MUKASEY. Well, I think we are all aware that, once somebody comes to this country, there attaches to them a whole panoply of rights that they don't have so long as they are outside it. And that is true even post-Boumediene.

So far as immigration issues, once somebody is in this country, there are then limits on how long we can hold them in an effort to deport them. If it were necessary to deport any of the people that we brought here for trial, whether because of the expiration of their sentence or because of their acquittal, the current state of the law is that we have essentially 6 months to find a place for them to be sent, and then we may very well have to let them go.

Now, whether that would hold in a difficult case or not, I don't know. But I don't want to have to bet the farm on the outcome of that kind of exercise. I think once they get here, they are in the jurisdiction of any Federal court where they are held. And there is a whole array of lawyers who have said that they are perfectly well-prepared to file as many cases as they can, whether they are frivolous or well-founded, in an attempt to challenge conditions of

confinement, the fact of confinement, the whole range of issues that can be challenged in a Federal court. And we are going to find our Federal courts in the business of doing virtually nothing but defending those cases, if those folks are brought here.

Mr. CHESNEY. On the question of constitutional rights, the interesting question is, What, ultimately, will turn out to be the case for the detainees who stay at Guantanamo when they are being prosecuted in commissions when they invoke the Sixth Amendment Confrontation Clause and Fifth Amendment due process, particularly relating to coercion and voluntariness?

It remains to be seen and is an open question whether or not the constitutional, trial-related rights that are at issue for sure if you bring them into the United States, whether they might be at issue, as well, and perhaps even to the same effect in a commission proceeding. There is years of litigation awaiting us before we know for sure what the D.C. Circuit or the Supreme Court ultimately will have to say on that.

We can't assume, though, that the current state of play is or will be that they get a certain set of rights in the United States but they just won't get that at Guantanamo. They may well get the same constitutional rights in the end. We don't know, we don't have a crystal ball, but you can't rule it out.

On the immigration issue, the key issue, it is, I think, the most significant problem and issue that needs to be dealt with when one considers bringing someone from outside the United States into the U.S. The Supreme Court in 2001 in Zadvydas had said, in a non-national-security case, that if you had some person who is removable, but for whatever reason, he is a stateless person or he is at risk of torture, whatever it is, you just practically can't remove them, then, as Judge Mukasey said, after 6 months, or roughly speaking, you potentially constitutionally got to let him go into the United States.

However, in the same decision, Justice Breyer, for the majority, wrote specifically that the majority was not talking about a terrorism—and they used that word—terrorism or national security scenario. They didn't say that the answer would be opposite in that scenario, but they went out of their way to say that they weren't setting that rule.

And in a later case called Clark v. Martinez, an opinion by Justice Scalia again underlined that that was not necessarily the rule for terrorism and security cases. And Justice Scalia, for the majority, specifically referred to the Alien Terrorist Removal Court, the special immigration proceeding that we haven't yet had occasion to use but we well might in one of these cases, suggesting fairly strongly that the answer might be different in that context.

The CHAIRMAN. Anybody else on that one?

Mr. ENGEL. Well, I think I would just add, I mean, when we are talking about bringing people into the United States, and when particularly we are talking about people from difficult or failed states like when we are talking about Yemen or Somalia or the like, we need to assume that they are not leaving here at the end of the day, and either they will be kept in detention, if we believe we can detain them, or, ultimately, someday they will be released if our legal authority for detention lapses.

And, you know, those are serious issues that need to be considered in addition to the burdens of nonstop litigation that Judge Mukasey alluded to, you know, that will come. So it is a weighty decision and one that shouldn't be made solely with a focus on a particular criminal prosecution, you know, which could have a short term with uncertain results.

The CHAIRMAN. Okay.

There has been some discussion about whether Ahmed Warsame could qualify for prosecution before a military commission. Do you believe that the Military Commissions Act would need to be amended in order to establish jurisdiction over individuals who are part of an associated force, such as Al Qaeda in the Arabian Peninsula?

Mr. ENGEL. I don't personally believe so. I think it is certainly a question that would be litigated, and it is not a trivial question. But the Military Commissions Act, as it is currently written, permits prosecution of individuals who have engaged in hostilities against the United States or who has purposefully and materially supported hostilities against the United States or its coalition partners.

Again, I mean, I think, to the extent that this committee were to look at this issue and were seeking to expand, you know, to include associated forces alike, I think that could be helpful. But I do think the Government could argue and likely win the case like Al Shabab, you know, or Warsame under the Military Commissions Act.

Mr. CHESNEY. I think with Al Qaeda in the Arabian Peninsula, I think the Government would win this. It may have to come forward with evidence it would prefer not to use in court to do it, but it could do it.

I think Al Shabab, from an outside perspective, not knowing the classified information that is relevant to the question, I nonetheless have the perception that it is substantially more difficult question, complicated by the fact that in Al Shabab you have some actual Al Qaeda figures who are effectively dual-hatted. Some Al Shabab members, they are clearly going to come within the scope of the commissions act and detention authority under the AUMF, whereas other, especially more of the indigenous personnel in Al Shabab, that is not necessarily the case.

And then, again, of course, it will all change over the course of a year's time. It is an evolving threat. In the past year, we have seen Al Shabab's leadership declare formal allegiance to Al Qaeda. And in a year or 2, we may find that Al Shabab is relatively uncontroversially described as part and parcel of Al Qaeda itself, or we may find it remains an indigenous unit that is entirely separate.

The CHAIRMAN. It is one of the reasons why we are addressing this in our current bill, because things do change. And then probably it would be open to be addressed in a future one.

One final question for Judge Mukasey. I would like to ask if you would hone in on how the detainee *habeas* cases are also impacting the evolution of targeting authorities pursuant to the AUMF. Can Congress' affirmation of the AUMF help prevent policymaking by

the courts in this area? Wouldn't the affirmation section 1034 provide more solid ground for the lawyers in the executive branch?

Mr. MUKASEY. The answer to that is an emphatic "yes." It turns out that targeting decisions are being made by reference to the developing body of *habeas* cases that determine who is and who isn't targetable—or that were not meant to determine that. They determine who can and can't be held, which is a very different question.

And the judges, who do not have the fact-gathering ability or, frankly, the competence, let alone are not politically responsible, are making those decisions in *habeas* cases. And that body of law is then being used, in the absence of any other authority, as a basis for lawyers in the Defense Department making targeting decisions.

The cases were never meant for that. My hope is that it would mortify the judges who are deciding those cases to know that their decisions have those implications. But the fact is that they do. And once you create a body of law, it is very difficult to control how it is going to be used by other people, which is an excellent reason for Congress stepping in and creating flexibility here and making certain that we don't have targeting decisions being made on the basis of *ad hoc* decisions in *habeas* cases.

Mr. REYES. Can I ask one follow-up to that question?

The CHAIRMAN. Sure.

Mr. REYES. Judge, is it possible for someone to make a case—because I have heard this in some of the people that are questioning the legality of setting up a place like Guantanamo—is it possible for somebody to make a case that at least some of these people being held there are in a state of legal limbo or legal suspended animation because they can't be moved one way or the other?

And if it is, what would be the entity that would be able to make—that they could make that case to? Is it the World Court? Or where would they be able to take it?

Mr. MUKASEY. Guantanamo is controlled by the United States, and in fact the fact of control was the basis for the Supreme Court saying that people detained there could have *habeas* rights, or something like *habeas* rights. I don't think they are in any kind of limbo. They are certainly not in any kind of limbo so long as we have courts in this country who will rule on what we do in places that we control. I don't think that is something that we really need to concern ourselves with.

We certainly don't want to cede jurisdiction over that decision to a world body that is essentially a political court that makes decisions on something on the basis of something other than United States law. That it seems to me is something that is a decision that can and should be controlled by the political branches of Government, this branch, the legislative branch of course, and the executive, and that judges should be following those decisions, not making them.

The CHAIRMAN. Ranking Member Smith.

Mr. SMITH. I think you said two things. I want to follow up a little bit on the question of targeting based on the detainability of the target. I wasn't sure I heard quite correctly what you said there, Mr. Mukasey. You are saying that there are decisions to target people based on the fact that they are not detainable so we have to take them out. Was that——

Mr. MUKASEY. No. It is my understanding that in determining whether somebody can be targeted or not—and Mr. Dell'Orto I think can probably can speak to this more authoritatively because he knows about the decisionmaking process within the Pentagon—but that lawyers in the Pentagon are involved in those decisions, and so they look for a body of law, and the body of that law that they look for is the body of law that is contained in *habeas* cases. *Habeas* cases aren't for that purpose at all; they are for the purpose of determining detainability. And so you wind up having a body of law created in one setting being used in a setting which was never intended to be used, with results that can't possibly be good.

Mr. SMITH. Well, certainly it is a very complicated situation. I know the DOD is going to in terms of who they can target, whether for detention, killing, or capturing, those lists move around, there is a whole lot of history there. But I think I understand your point.

Just a quick question. Mr. Mukasey had answered about Article III courts at Guantanamo that he did not think that was a constitutional option. I just wanted to see what the other three, how they felt about that as a possible option.

Mr. DELL'ORTO. I would certainly defer to the judge's view on that. I have not looked at the question specifically, so I don't have an answer beyond my agreement with Judge Mukasey.

Mr. MUKASEY. Just to be specific about the provision, Article III, Section 3, says: The trial of all crimes except in cases of impeachment shall be by jury and such trial shall be held in the State where the said crime shall have been committed, but when not committed within any State the trial shall be at such place or places as the Congress by law may have directed.

If you have a crime that is not committed in any State, I suppose you could have a court. But then the question would be where do you get the jury, where do you hold them? You have to create—or add Guantanamo onto one of the existing districts. It is a mare's nest.

Mr. CHESNEY. Congress created a district of—I am not sure exactly the title, but in West Berlin, in the American sector. I think it even tried one case. It may even have been in the 1970s, I believe. Do you know the details, Steve?

There is an obscure historical episode. This sort of thing can be done. It is difficult. But as Judge Mukasey said, the scenario in which the offense is entirely extraterritorial, by definition, doesn't present the "you have got to try it somewhere other than Guantanamo" scenario, you can put it where Congress wants to put it.

There is the expense and the logistical questions associated with that. In theory, I suppose you could piggy-back on the facilities that are at Guantanamo, and you could create the District Court for Guantanamo there, and you could draw on the substantial population that lives there as the jurors. I am not sure this is the right solution, but I think actually it probably could be done.

Mr. ENGEL. I think the principal question would be the difficulties in finding the judge and the jury and the like. I think probably as a statutory matter, some Congress could create either a territorial court and may well be able to create an Article III court. I don't know if the West Berlin court was in fact an Article III court, or probably a territorial court or the like.

But it would not be easy, and I don't know whether it would be advisable. But Congress has broad authority to create Federal courts, and so if it were to target the issue it may be theoretically possible. But I have not studied it, I confess.

Mr. CHESNEY. I would just add really quickly, if it were an Article III court, we would be talking about the mother of all confirmation hearings, I suppose.

Mr. SMITH. Thank you. I appreciate the detail. I have no further questions.

The CHAIRMAN. Thank you, each of you, for being here today. I think you have been an outstanding panel of witnesses, and we really appreciate your expertise and your willingness to help us out on this issue.

With that, this committee stands adjourned.

[Whereupon, at 12:06 p.m., the committee was adjourned.]

A P P E N D I X

JULY 26, 2011

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 26, 2011

Statement of Hon. Howard P. "Buck" McKeon

Chairman, House Committee on Armed Services

Hearing on

Ten Years After the 2001 Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror

July 26, 2011

Good morning. Much has changed over the past 10 years, since the attacks of 9/11 and the 2001 passage of the Authorization for Use of Military Force. Changes have been made to Federal agencies, laws, and the lives of thousands of our men and women who have taken the fight to the enemy. We've borne the heavy burden of losing some of those brave men and women. These Americans, whether military or civilian, have paid the ultimate price as part of an effort to prevent terrorists from reaching our shores.

Terrorists still pose a grave threat to the United States. But they have changed as well. We now face a diversified threat emanating from multiple locations. While we believe that Al Qaeda's capacity to launch widespread attacks has been diminished by the unrelenting work of our military and intelligence professionals, there are new and different faces of the same enemy in places like Yemen and Somalia. Our Government's counterterrorism leaders say that Al Qaeda in the Arabian Peninsula is now the greatest threat to the United States. We must acknowledge this reality and move forward.

When I became Chairman, I told our members that the committee must operate on a wartime footing. This is because as members of Congress, we are charged by our constituents and Article I Section 8 of the Constitution to "provide for the common defense," "define and punish . . . offenses against the law of nations," "declare war," "raise and support armies," "provide and maintain a navy," "make rules for the government and regulation of the land and naval forces," and to "make rules concerning captures on land and water."

It is time to reaffirm Congress' role in identifying the scope of the current conflict. And just as importantly, it is time to reaffirm Congress' support for those we have asked to defend us against the threats we face. These are the reasons why I believe the House strongly supported inclusion of the affirmation of the 2001 Authorization for Use of Military Force in the National Defense Authorization Act for the Fiscal Year 2012.

Unfortunately, the Administration has suggested that Congress is trying to limit options for handling terrorism suspects. Yet, it is the Administration's foreclosure of some of the most fundamental aspects of this war effort that have forced Congress' hand. For example, we recently heard Vice Admiral William McRaven confirm in testimony before the Senate that bringing detainees to Guantanamo is "off the table." A law of war detention system for future captures—focused on intelligence collection and keeping terrorists out of the United States—is essential to our success.

We cannot possibly prefer terrorists to be held aboard Navy ships. And we cannot possibly be comfortable with a policy whereby bringing terrorists to Guantanamo is "off the table," but bringing them to the United States is not.

In certain cases, prosecution may also be appropriate for law of war detainees. When it comes to deciding the forum for such prosecution, the Administration has shown time and again that not only is prosecution in Federal court their overwhelming preference for current detainees, it is the only option they will seriously consider for future captures.

The Administration has spent countless hours touting the Federal criminal justice system. I agree that we have an excellent court system. I simply disagree that military commissions, like detention at Guantanamo, should be off the table for future captures. In fact, the strong preference should be for prosecution by military commission.

The Administration and their supporters also frequently cite the number of terrorism cases that have been successfully prosecuted in Federal court. However, this is not a very helpful point of comparison given that we do not know how many terrorists have instead been released and never prosecuted because of a lack of admissible evidence. Further, the courtrooms at GTMO have sat empty for 2½ years at the direction of the Administration. The commissions system cannot prosecute cases that it does not have.

This problem is further heightened when the Administration delegitimizes the commissions system with their words and actions. Attorney General Holder's reluctant announcement to prosecute the alleged 9/11 co-conspirators in a military commission, during which he "blamed" Congress, comes to mind. Why would an observer take seriously a forum that the Administration itself seems to suggest is a lesser system of justice?

I disagree with this notion. The military commission system is fair and just. And it should be resourced with the best personnel our Government has to offer. Instead of undermining the system, Attorney General Holder and the Department of Justice should lend their full support and resources to the Department of Defense. And the military commissions should be given a real chance to succeed. Perhaps then it will be fair to compare and contrast it with other systems.

This is not a time for division. The war we are fighting is against our enemies—Al Qaeda and their associates.

It is time for us to affirm that our enemies, and the legal authorities we have provided to fight them, have evolved. So too must our policies, particularly those dealing with law of war detention and prosecution.

Statement of Hon. Adam Smith

Ranking Member, House Committee on Armed Services

Hearing on

Ten Years After the 2001 Authorization for Use of

Military Force: Current Status of Legal Authorities,

Detention, and Prosecution in the War on Terror

July 26, 2011

I thank the Chairman for holding this hearing.

I continue to believe we must have a clear and coherent strategy to properly detain and interrogate terrorists who attack and threaten us. Congress needs to act to provide a consistent policy that upholds the Constitution and our values while at the same time ensuring our national security.

This policy needs to do four things: 1) effectively prosecute the enemy in a way that is consistent with the rule of law; 2) effectively obtain intelligence, both short-term and long-term; 3) effectively detain those who are fighting against us, both short-term and long-term, and 4) resolve what we are going to do with the remaining detainees at Guantanamo.

In my mind, this means our policy needs to use all effective tools to protect us against this terrorist threat. As the President's advisor on these issues, John Brennan, has stated, "confronting this complex and constantly evolving threat does not lend itself to simple, straightforward solutions. No single tool alone is enough to protect the American people against this threat." I am in favor of military commissions, when appropriate. I am in favor of law of war detention, when appropriate. I am in favor of interrogating the enemy, within the rule of law. And I am in favor of using the one method we know works, prosecuting terrorists in our criminal justice system.

The legislative proposals to address our detention and interrogation policies passed by the House limit the President's options. The recent decision by the Administration to try Ahmed Warsame in Federal court illustrates the limitations of the pending legislation. If enacted, Warsame would not have been able to be transferred to the United States for trial in Federal court, which appears to be the most effective way for handling his specific case.

I continue to believe that having a legal and coherent policy to detain, try and interrogate terrorists who attack us and their supporters is not just a matter of protecting our Constitution and upholding our values, it is also a matter of national security. It is vitally important that we make it clear to our adversaries that the freedoms we hold dear and our way of life that they seek to attack is far superior. But it is also important that we craft an airtight policy to protect against the court-ordered release of dangerous, violent extremists.

Today's hearing will provide us with another opportunity to review the relevant law and policy and to have a candid discussion about how to best move forward. I look forward to hearing from

members of the committee and from today's witnesses, all of whom have been involved in detention policy for many years, about how we can address this significant problem.

Testimony of Michael B. Mukasey Before House Armed Services Committee

July 26, 2011

Thank you Chairman McKeon, ranking member Smith and members of the Committee for inviting me to testify at this hearing, dealing with how this country can best address the most consequential threat to face it in modern times – the threat of Islamist terrorism.

Although attacks signaling that Islamists considered themselves at war with this country began as early as 1990, when a right-wing Israeli politician named Meir Kahane was assassinated in New York by El-Sayyid Nosair, and continued through the first World Trade Center bombing in 1993, a later plot to blow up landmarks in New York inspired by the so-called blind sheikh, Omar Abdel Rahman, the declaration of war by Osama bin Laden in behalf of al Qaeda in 1996, the 1998 bombing of U.S embassies in Kenya and Tanzania, and the bombing of the USS Cole in Aden in 2000, it was not until after the attacks of September 11, 2001 that Congress responded by passing the Authorization for the Use of Military Force (AUMF), mandating the use of force outside the criminal justice system. Just as the threat had evolved before 9/11, with early involvement by groups such as Gama 'at al Islamia, Egyptian Islamic Jihad, and others, so too it has evolved after 9/11, with al Qaeda branching out into what appear to be franchised groups such as Al Qaeda in the Arabian Peninsula (AQAP), Al Qaeda in the Islamic Maghreb (AQIM), and the even more loosely affiliated but nonetheless lethal al

Shabab, operating in the failed state of Somalia, as well as Taliban organizations in Afghanistan and Pakistan.

Although the AUMF authorizes the use of "all necessary and appropriate force against those nations, organizations, or persons [whom the President] determines planned, authorized, committed, or aided the terrorist attacks . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons," the fact is that we have fought and captured enemy fighters not only in Afghanistan and Iraq, but also in Somalia, Yemen and Pakistan, and continue to detain hundreds. The AUMF, however, does not explicitly authorize detention, let alone prescribe standards for who should be detained, on what basis, where and for how long. Yet both the Bush and Obama administrations have had to rely on that statute not only to wage a ground war in Afghanistan, but also to use lethal force in the form of drones against al Qaeda leaders in Pakistan, Yemen and Somalia, and to capture suspected al Qaeda and Taliban in Pakistan, Yemen and Somalia and to detain them.

The statute has come to apply to a struggle that has evolved against different people in different places presenting problems different from those that confronted us in the immediate wake of 9/11. It should be amended to make clear to all involved, from troops to lawyers to judges – and to our enemies -- that detention of suspected terrorists is authorized, and to set forth standards for detaining and/or killing terrorists, even those who are affiliated with groups other than those directly responsible for the 9/11 attacks.

Moreover, part of any consideration of detention will have to involve as well considering where categories of detainees are to be held, and where charges should be brought against any who should be tried criminally.

I. Detention

The need to face these issues was cast in bold relief by three recent events. One was the testimony before the Senate Armed Services Committee at the end of June from Vice Admiral William McRaven, who supervises special operations for the entire military. He testified that at present there is no clear policy as to how to deal with captured detainees, and that options range from holding them aboard naval vessels, to sending them to third countries that will accept them, to bringing them to the United States for trial in civilian courts, to releasing them for want of any other option; he said he understands that detention and trial at Guantanamo Bay is "off the table." Soon afterward, it was disclosed that a Somali man, Ahmed Abdulkadir Warsame, had been captured in April and held and debriefed for over two months aboard a naval vessel, and would be brought to the United States to face terrorism-related charges in U.S. District Court for the Southern District of New York. And in mid-July, it was disclosed that the Administration planned to turn over to the Iraqis a senior Hezbollah commander now in U.S. custody in Iraq, apparently as soon as Friday July 23, when the attention of the nation was focused on the budget dispute and other issues. The commander, Ali Mussa Daqduq, acting at the behest of Iran, had trained Iraqis in Iran to use explosively formed penetrators and other terrorist devices to kill U.S. troops. The Administration relented

only after 20 United States senators, including John McCain, Mitch McConnell, and Joseph Lieberman, blew the whistle in an urgent letter dated July 21, urging that Daqduq be tried before a military commission at Guantanamo Bay and in any event not be released from U.S. custody.

Admiral McRaven's testimony illustrates that there is simply no coherent policy on who U.S. troops are to detain, on what standards, where, and for what purpose. In the process, valuable intelligence opportunities can be squandered and dangerous terrorists returned to the fight. The Warsame case makes it obvious that the Administration remains committed to trying captured terrorists in civilian courts rather than in military commissions, regardless of where they are captured, and also points up problems presented by the termination of the CIA's interrogation program. Warsame was held for two months aboard a ship, but any technique used to question him would have to have been limited by the techniques specified in the Army Field Manual. The Daqduq episode shows that some would prefer to turn over a trainer of terrorists to Iraqi authorities even with no clear commitment or reason to believe that he can or would be prosecuted under Iraqi laws, rather than keep custody of that person and try him before a military commission at Guantanamo Bay or elsewhere. The current statute's limitation to certain specified groups has been overtaken by events, and limits our military response across the board – as to use of force, apprehension, detention and trial.

Quite simply, we need a coherent detention policy. The absence of one means that we are must choose among unsatisfactory alternatives. One is to default to the use of

drones that allow us to strike lethally but not to exploit the intelligence value of detainees, to say nothing of the harsh result inherent in a lethal strike. Another is to seek to detain dangerous people in third countries, where the durability of detention protocols is doubtful, the ability to obtain intelligence from detainees limited, and the humaneness of conditions of confinement uneven at best. Yet another is to simply permit ad hoc detention overseen by judges who have no fact-finding resources and no political accountability. And of course a final one is, as acknowledged by Admiral McRaven, simply to release people we do not wish to release for want of an available alternative.

II. Prosecution

There is in place a Military Commissions Act that prescribes trial before military commissions for those accused of acts of terrorism. There is available as well a detention facility at Guantanamo Bay, Cuba. I have visited that facility in 2008 when I was Attorney General, and can attest that in compares favorably with medium security prisons that are part of the federal system and that I had occasion to visit when I was a district judge. It includes a courtroom unequaled anywhere, including in the mainland United States, for its suitability to try such detainees before military commissions. It includes technology for handling classified information, accommodations for the press to insure open access while maintaining security for data and people, and other features for holding fair and open trials without risk to the security of court personnel or detainees. The refusal to use Guantanamo as a place to hold and, when appropriate to try them before military commissions, appears to arise simply from ignorance.

Based on my own experience as a trial judge and as Attorney General, I have concluded that Article III courts are not ideally suited for trying many or most of these cases. For starters, human beings have spent the last several hundreds of years trying to civilize the laws of war. We have devised rules such that combatants who wear uniforms, carry their arms openly, follow a recognized chain of command, and do not target civilians, may be confined in humane conditions for the duration of hostilities. It seems downright perverse to tell people who violate every one of these rules that they are entitled to even better treatment, to appointed counsel, to a trial in a courtroom that they can use as a platform to spread their views.

Beyond that, such trials can present difficult evidentiary problems, particularly when defendants are apprehended on the battlefield where there is no capability for observing the niceties of a criminal investigation, whether to preserve a chain of custody or to administer Miranda warnings. We recently saw the prosecution of a defendant charged with participation in the 1998 bombing of our embassies in Kenya and Tanzania nearly fail because the judge suppressed the testimony of a witness who was perfectly willing to testify, on the ground that his identity had been learned from coercive interrogation of the defendant. The result was an acquittal on the hundreds of murder charges that were brought, and conviction simply on one count of participating in a conspiracy to destroy government property with resulting fatality.

In addition, high profile prosecutions present challenges to the security of the court and of witnesses, jurors and lawyers that are nearly impossible to overcome. I had

the experience of trying such a case with a panel of jurors identified only by juror number, and yet two of them found reporters waiting at their doors the day the verdict was delivered. They were terrified, and it was only by dint of strong persuasion and removing them from their homes for a time that their anonymity was preserved.

Finally, the cost of maintaining security for such trials, and for those involved in them, is enormous, including the costs borne by communities surrounding the courthouses where such trials are held, which may find commerce and daily existence severely disrupted.

In any event, the default preference given the current legislative scheme should be for trials before military commissions rather than Article III courts, unless and until a special purpose tribunal such as a national security court is created by Congress. Certainly, military commissions should be given a chance to work and should be supported with necessary funding and personnel, including experienced prosecutors assigned from the Justice Department to assist in the presentation of cases.

The Honorable Michael B. Mukasey

Michael B. Mukasey recently served as Attorney General of the United States, the nation's chief law enforcement officer. As Attorney General from November 2007 to January 2009, he oversaw the U.S. Department of Justice and advised on critical issues of domestic and international law. Judge Mukasey joined Debevoise as a partner in the litigation practice in New York in February 2009, focusing his practice primarily on internal investigations, independent board reviews and corporate governance.

From 1988 to 2006, Judge Mukasey served as a district judge in the United States District Court for the Southern District of New York, becoming Chief Judge in 2000. Among the significant cases he presided over are:

- The terrorism trial of Omar Abdel Rahman (the "Blind Sheik") and nine other defendants;
- *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props, LLC*, addressing whether the two-plane attack on the World Trade Center constituted one or two "occurrences" for insurance purposes;
- *Antidote Int'l Films v. Motion Picture Assoc. of Am.*, addressing antitrust issues arising from the MPAA's ban on the distribution of new movies to critics and awards groups;
- *Padilla v. Rumsfeld*, addressing the detention of a citizen suspected of engaging in terrorism against the United States;
- *United States v. Lindauer*, rejecting the government's request to compel a defendant to take psychotropic drugs to render her competent to stand trial; and
- *United States v. Cheng Chui Ping*, where the defendant was charged with immigrant smuggling, money laundering and trafficking in kidnapping proceeds.

From 1972 to 1976, Judge Mukasey served as an Assistant United States Attorney for the Southern District of New York, and as Chief of the Official Corruption Unit from 1975 to 1976. His practice consisted of criminal litigation on behalf of the government, including investigation and prosecution of narcotics, bank robbery, interstate theft, securities fraud, fraud on the government and bribery. From 1976 to 1987 and from 2006 to 2007 he was in private practice.

Judge Mukasey has received numerous honors, including the Federal Bar Council's Learned Hand Medal for Excellence in Federal Jurisprudence. He served as chairman of the Committee on Public Access to Information and Proceedings of the New York Bar Association from 1984 to 1987. He served on the Federal Courts Committee of the Association of the Bar of the City of New York from 1979 to 1982 and its Communications Law Committee from 1983 to 1986. Judge Mukasey was also a part-time lecturer at Columbia School of Law from January 1993 to May 2007, teaching trial advocacy.

He received his LL.B. from Yale Law School in 1967 and his B.A. from Columbia College in 1963.

DISCLOSURE FORM FOR WITNESSES
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Witness name: Michael B. Mukasey

Capacity in which appearing: (check one)

✓ Individual

___ Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: _____

FISCAL YEAR 2011

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2010

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2009

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

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Statement

Daniel J. Dell'Orto

Ten Years After the 2001 Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror

July 26, 2011

Thank you, Mr. Chairman and members of the Committee for your invitation to appear before the Committee today. It is an honor to once again appear before this Committee, this time in my individual capacity. I commend the Chairman and the Committee for addressing the issues that are the subject of this hearing. I also am honored to appear with Judge Mukasey and with Steve Engel, with whom I had the privilege of working during my time in Government and both of whom I hold in the highest regard.

As some of you may recall, as a civilian attorney I served as the Principal Deputy General Counsel of the Department of Defense from June 2000 through March 2009, not long after I completed a twenty-seven and one-half year career as an Active Duty Army Officer. I was in the Pentagon on 9/11 and thereafter participated in the formulation of the legal positions that the Department adopted in the aftermath of 9/11, including those relating to the interpretation of the Authorization for the Use of Military Force, the legal basis for the conduct of operations against Al Qaeda, the basis for detention of captured enemy combatants, the decision to establish the detention facility at Guantanamo, and the implementation of President Bush's Military Order of November 13, 2001 to create the Military Commissions.

The Authorization for the Use of Military Force of September 18, 2011 has served the Nation well. Nevertheless, at the ten-year mark it is appropriate to consider whether it should be amended. From the beginning of our fight against Al Qaeda, well before 9/11, it has been apparent that we are at war against a non-traditional enemy. The non-traditional nature of our foe has required

resourcefulness by every entity of our national security structure, from the rifleman on the ground in Afghanistan all the way up the chain of command to the President in his role as Commander in Chief. As the enemy has changed its tactics and the locations of the planning for and conduct of its attacks, the rifleman and his commanders at all levels have had to be nimble and adaptable in the face of the many challenges that this non-traditional foe has thrown at us. To the extent that the Authorization for the Use of Military Force falls short of providing the President and his subordinate commanders with the full range of authority he and they need to bring the fight to this changeable foe, then it should be modified to do so.

As one who advised and aided senior civilian and uniformed leaders at the Department of Defense as they wrestled with the decisions related to detention of enemy combatants, the establishment of the detention facility at Guantanamo, and the structure of Military Commissions, I remain firmly supportive of those initial decisions and remain convinced that those decisions were correct at the time they were made. There is absolutely every reason to continue to move important detainees to Guantanamo for detention and intelligence gathering. And I remain firmly convinced that Military Commissions should be the preferred forum for the adjudication of the war crimes committed by those who have been waging war unlawfully against our Nation and its citizens.

I am prepared to respond to your questions. Thank you.

Biography

Daniel J. Dell'Orto

Senior Vice President, General Counsel and Secretary
AM General LLC

Daniel J. Dell'Orto was appointed as Senior Vice President, General Counsel, and Secretary of AM General LLC on March 23, 2009. In that capacity, he is the chief legal officer of AM General LLC, which is a world leader in the design, engineering, production, and technical and parts support of military and special purpose vehicles, including the High Mobility, Multi-purpose Wheeled Vehicle (HMMWV®).

Prior to his current position Dan Dell'Orto served as the Principal Deputy General Counsel of the Department of Defense from June 2000 through March 2009. He served as the Acting General Counsel from March 2008-February 2009 and January-May 2001. In those roles he provided oversight, guidance, and direction regarding legal advice on all matters arising within the Department of Defense, including the Office of the Secretary of Defense.

Mr. Dell'Orto served as the Principal Deputy General Counsel of the Department of the Air Force from December 1998 through June 2000. Before that appointment, Mr. Dell'Orto served as an Army officer for more than 27 years. After his commissioning and initial assignments as a field artillery officer, he attended and completed law school under the provisions of the Army's Funded Legal Education Program. Thereafter, at assignments in the United States, Germany, and Korea, he served in a series of positions as a judge advocate, including prosecutor, defense counsel, appellate attorney, trial judge, appellate judge, and chief of the worldwide Army Trial Defense Service, culminating with his assignment as the Military Assistant to the Department of Defense General Counsel. He retired in the grade of colonel.

His civilian education includes a Bachelor of Science Degree in Aerospace Engineering from the University of Notre Dame, a Master of Business Administration Degree from Pepperdine University, a law degree from St. John's University School of Law, and a Master of Laws Degree from Georgetown University Law Center. His military education includes the Army Field Artillery and Judge Advocate Basic Courses, Airborne School, the Judge Advocate Officer Graduate Course, the Army Command and General Staff College, the Armed Forces Staff College and the Army War College.

While on active duty, Mr. Dell'Orto was awarded the Defense Distinguished Service Medal, the Legion of Merit (two awards), the Meritorious Service Medal (four awards), the Joint Service Commendation Medal, the Army Commendation Medal, and the Army Achievement Medal. In 1985, the American Bar Association honored him as the Outstanding Young Military Lawyer of the Army. In his civilian service, Mr. Dell'Orto has received two awards of the Department of Defense Medal for Distinguished Public Service, the Secretary of Defense Medal for Exceptional Public Service, and the Department of the Air Force Decoration for Exceptional Civilian Service.

Mr. Dell'Orto is a member of the Bar of the State of New York and has been admitted to practice before the Supreme Court of the United States, the United States Tax Court, the United States Court of Appeals for the Armed Forces and the United States Army Court of Criminal Appeals.

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Witness name: Daniel J. Dell'Orto

Capacity in which appearing: (check one)

X Individual

___Representative

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STATEMENT OF STEVEN A. ENGEL[1]

FORMER DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
U.S. DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

TEN YEARS AFTER THE 2001 AUMF: CURRENT STATUS OF LEGAL AUTHORITIES, DETENTION, AND PROSECUTION IN THE WAR ON TERROR

JULY 26, 2011

Thank you, Chairman McKeon, Ranking Member Smith, and Members of the Committee. I appreciate the opportunity to appear here today to discuss the legal framework for our detention policy, now nearly ten years after the attacks of September 11. And I am particularly honored to appear beside Judge Mukasey and Mr. Dell'Orto, two extraordinary public servants with whom I had the privilege of working during my time at the Department of Justice.

On September 11th, Al Qaeda proved that it had the military capability to inflict an attack on our homeland as devastating as anything that our Nation had experienced before. While Al Qaeda clearly demonstrated that it represented a military threat to our country, the group is very different from our prior enemies. Al Qaeda is not a nation state, and its forces neither wear uniforms nor control territory in a conventional sense.

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[1] Steven A. Engel is a partner in the Washington, DC office of Dechert LLP. From February 2007 to January 2009, he served as Deputy Assistant Attorney General in the Office of Legal Counsel of the U.S. Department of Justice, and from June 2006 to January 2007, as counsel in that office. Mr. Engel graduated Yale Law School, Cambridge University, and Harvard College *summa cum laude*. He served as a law clerk to Associate Justice Anthony M. Kennedy of the Supreme Court of the United States and to now-Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

Rather, Al Qaeda operates operate outside of, or in the shadows of, the laws of nation states, by exploiting the power vacuums in failed states, making opportunistic alliances where available, and operating covertly from within other nations.

Just as the attacks themselves took the United States by surprise, the legal framework has taken time to catch up. The traditional laws of war are premised upon a conventional international armed conflict or, in some cases, civil wars. The established legal framework provides clear answers to who may be detained, how they must be treated, and where they should be prosecuted. None of these questions is self-evident when it comes to the War on Terror.

The United States has developed answers to those questions only over time. Congress has played a role setting the governing law through such measures as the Detainee Treatment Act of 2005 or the Military Commissions Acts enacted in 2006 or 2009. Those statutes, however, were not intended to provide a comprehensive legal framework, but rather were piecemeal responses to the pressure of court decisions or to narrow political disputes. More commonly, the legal framework for this conflict, including such fundamental questions as who may be targeted by our military and who may be detained, has been set by Executive Branch determinations that, partially and fitfully, have been tested by the courts and refined as necessary.

While this ad hoc legal framework has been developed over time and now ratified by two presidential administrations, it is hardly efficient and it is not yet complete. In part because of congressional silence, nearly ten years after the September 11 attacks, we still do not have perfect clarity over who may be detained and where captured belligerents in this conflict should be prosecuted.

This Committee, in enacting the National Defense Authorization Act of Fiscal Year 2012 ("NDAA"), has taken an important step forward in providing answers to these questions. This morning, I would like to address briefly two provisions of this bill that have generated some discussion: section 1034, which would codify the Executive Branch's understanding of the scope of the armed conflict, including its detention authority, and section 1039, which would prohibit the use of funds to transfer enemy belligerents in military custody, at Guantanamo Bay or elsewhere, to the United States and thereby ensure not only that these individuals would be kept outside of our borders, but that they would be prosecuted by military commissions.

A. Section 1034 of the NDAA: Detention in the War on Terror

Section 1034 would provide an important and, in many ways, long overdue, updating of the statutory authorization for this armed conflict. Section 1034 would affirm that the United States "is engaged in an armed conflict with al-Qaeda, the Taliban and associated forces," Section 1034 (1), would make clear that this armed conflict continues, *id.*, and would confirm that the enemy includes those who "are part of, or are substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners," *id.* 1034(3).

Section 1034 has been the subject of some controversy by those who have claimed that it would be a new "declaration of war" that would expand the scope of the War on Terror beyond Afghanistan. Indeed, opponents have claimed that Section 1034 would "commit the United States to a worldwide war without clear enemies, without any geographical boundaries." Yet our military has been fighting precisely such a conflict for nearly a decade now. And Congress did authorize the United States to fight a "worldwide war," against a shadowy enemy, without any "geographical boundaries."

Section 1034 is necessary, not to expand the conflict, but simply to ratify the understanding of this conflict that the Executive Branch—under the Administrations of both President Obama and President Bush—has developed in fighting this war. The language in Section 1034 is not new, but rather draws upon the definition that the Executive Branch has used to determine both whom we may detain and whom we may target in battlefields around the world. The Executive Branch has developed this definition based on its interpretation of the broad authorization that Congress provided in the wake of the September 11th attacks. While it is important that Congress confirm this interpretation and give it the clear force of law, Section 1034 neither expands the nature of the conflict, nor confers any new authority on the President at all.

One week after the September 11th attacks, Congress authorized the President to engage in an armed conflict against Al Qaeda and its supporters, no matter whether they are inside Afghanistan or elsewhere. On September 18, 2011, Congress enacted the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, which authorized the President to use military force against "those nations, organizations, or persons" who "planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States" by such persons. Pub. L. 107-40, 107th Cong. (2001). Congress did not specifically address the President's detention authority in the AUMF, but the President's authority to wage war necessarily includes the power to detain enemy belligerents captured in the hostilities. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The AUMF, by its terms, was not limited to Al Qaeda or to Afghanistan. Rather, Congress authorized the President to commit our forces to fight the "nations, organizations and persons" involved in the September 11th attacks, and those who "harbored" them, no matter where they were. This was prudent. Al Qaeda was not indigenous to Afghanistan; its presence was opportunistic. While its forces had concentrated there at the time of the September 11th attacks, Al Qaeda was not rooted to that soil, then or now, and it continued to draw on members and affiliates all over the world. In the AUMF, Congress thus did not identify the enemy with precision or locate the conflict in one theater. Rather, Congress authorized the President to take the fight to the enemy, no matter where it was located or where it would spring up over time.

Congress's initial judgment under the AUMF has proven correct. Over the past ten years, the War on Terror has brought United States forces to Afghanistan, but also to Pakistan, Iraq, Yemen, and Somali, among other places. In the course of the conflict, the United States has captured Al Qaeda members in all of those countries and many others around the world. Regardless of where they were captured, the United States has transferred Al Qaeda members and their supporters to military custody and detained them under the laws of war as enemy belligerents, which of course they are.

While the AUMF was a broad and open-ended grant of authority, the Executive Branch has over the course of the conflict been obliged to define the enemy with greater precision. In part, the military has had to do so for by necessary, so as to understand whom we are fighting. In addition, the United States has frequently been compelled to define the enemy with lawyer-like precision because it has had to defend these military

decisions in the federal courts, against the litigation challenges that began soon after the first enemy belligerents were transferred to Guantanamo Bay.

Amidst this litigation context, the Executive Branch, across two Administrations now, has asserted the authority to detain persons who were "part of, or substantially supported, Al-Qaida, the Taliban or associated forces." The Department of Defense originally developed this definition in connection with the administrative review of the Guantanamo Bay population during the Bush Administration. The Obama Administration subsequently adopted the same definition, tweaking it to make clear that the United States would detain only those who "substantially" supported the enemy. (The addition of the adverb did not affect any actual detention decisions, given that the United States had never sought to hold insubstantial supporters of the enemy.)

Despite authorizing the use of military force, Congress has not directly addressed the definition of who may be detained. Congress, however, did borrow from this Executive Branch formula in determining who may be prosecuted by military commission under both the Military Commissions Act of 2006 and the Military Commissions Act of 2009. Both statutes provided for the prosecution of not only those who are part of Al Qaeda and the Taliban, but also "those who purposefully and materially support such forces in hostilities," language very similar to that contained in Section 1034.[2]

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[2] *See* Military Commissions Act of 2006, P.L. 109-366, § 948a(1)(A)(i) (authorizing the trial of an individual who "engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces)"); Military Commissions Act of 2009, P.L. 111-84, § 1802, §§ 948a(7), 948b(a) (authorizing the trial of those who "purposefully and materially supported hostilities against the United States or its coalition partners").

Section 1034's definition of the enemy thus reflects the legal status quo. Both the Bush Administration and the Obama Administration have repeatedly advanced this definition before the federal courts, and the U.S. Court of Appeals for the D.C. Circuit has upheld this definition, and it remains the governing law in the Guantanamo Bay habeas litigation. Section 1034 does nothing more, but also no less, than confirm that Congress agrees with how the President has understood the existing armed conflict and his detention authority under the AUMF.

While Section 1034 may not formally change the law, it remains important nonetheless. In our system of government, Congress has the principal role in defining the scope of our armed conflicts. The Founders granted Congress the power to declare war, and in recent years, Congress has exercised that power not by formal declarations, but by authorizing the use of military force.

Congress's authorization of the War on Terror was broad and open-ended, yet the country would benefit from a new and more precise affirmation of the state of the conflict. The AUMF, focused as it was on the September 11th attacks themselves, did not specifically name Al Qaeda or the Taliban, and over the past decade, the threat from Al Qaeda and like-minded organizations has developed in new and different ways. It may be reasonable for the President to classify Al Shahab, the Pakistani Taliban, or the home-grown Al Qaeda franchises in Iraq or Yemen as part of the same enemy with whom we are at war under the AUMF, but those groups did not themselves plan the September 11th attacks. As the United States continues its military and detention operations outside of Al Qaeda's original hideouts in Afghanistan, and as may well happen, litigation challenges emerge to such decisions, it becomes increasingly important

for Congress to weigh in and confirm this understanding. While the President's interpretation of the AUMF is entitled to substantial deference in the courts, it does not have the force of law. In the absence of a clear statement from Congress, it is possible that the courts could have the last word in determining the scope of the armed conflict, even though they are the branch of government with the least degree of competence to make those decisions.

Even in the face of congressional silence, courts have looked to Congress as a guide. Indeed, the D.C. Circuit did as much in *Al-Bihani v. Obama*, 590 F.3d 866 (2010), the first decision upholding the President's authority to detain those who "substantially supported" Al Qaeda, the Taliban, and associated forces. In evaluating the President's detention authority under the AUMF, the D.C. Circuit looked to Congress's definition of who may be prosecuted by military commissions under the Military Commissions Acts of 2006 and 2009. While noting that those statutes did not address detention, the court recognized that "the government's detention authority logically covers a category of persons no narrower than is covered by its military commission authority" and it includes those who "purposefully and materially support" hostile forces. *Id.* Thus, even when Congress has not directly acted, the courts have sought congressional guidance by looking to analogous statutes to ascertain the appropriate interpretation of the AUMF.

In addition to confirming the President's authority under the AUMF, Section 1034 will provide the equally important function of confirming that the threat from Al Qaeda and associated forces remains. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), the Supreme Court recognized that the President's detention authority continues until the end of hostilities. With the end of Osama Bin Laden and the beginning of a draw down in

Afghanistan, there will no doubt be some who argue that time has eroded the power of the United States to detain captured Al Qaeda members and their affiliates under the law of war.

Yet while the United States have had substantial success in preventing attacks on the homeland since September 11th, the enemy has never stopped trying. With the United States maintaining a strong presence in Afghanistan and projecting force into Pakistan as well, Al Qaeda has adapted and evolved, taking refuge and developing offshoots in other troubled areas, such as Yemen and Somalia. These groups may take inspiration from Al Qaeda, and may adopt its military objectives, without necessarily answering to its command structure. It thus would be premature, and indeed foolhardy, to declare an end to the War on Terror, while the threat remains. Section 1034, by updating and reaffirming the continued threat, ensures that the Executive Branch will continue to have the authority it needs to detain the Al Qaeda members in its custody and those who are captured in the future.

For these reasons, Section 1034 will bring needed clarity by updating the statutory authorization the Executive Branch has relied upon over the last decade. So long as Congress remains silent, and the Supreme Court has not weighed in, the President's interpretation will be subject to challenge. Such uncertainty does not serve the interest of those who are fighting in this armed conflict and such uncertainty does not serve the rule of law.

B. Section 1039 and Prosecution in the War on Terror

While Section 1034 of the NDAA would confirm the Executive Branch's understanding of its detention authority, Section 1039 and similar provisions would place limits on the exercise of executive authority when it comes to the transfer of individuals

in military custody, either away from Guantanamo Bay or into the United States. The impetus for this legislation has not simply been to keep Guantanamo Bay open and to keep captured belligerents outside our borders. Congress also has been responding to the Administration's effort to prosecute such belligerents, who were captured and detained by our military and intelligence personnel, in civilian courts as though they were ordinary criminals.

Under our separation of powers, both Congress and the Executive Branch have important roles to play in making detention and prosecution decisions. In an ideal system of government, perhaps, the political branches would agree and such restrictions would be unnecessary. In the real world, we have seen a gulf develop between Congress and the Executive Branch over these issues, arising from the Obama Administration's halting and somewhat inconsistent embrace of the military commission system. This morning, I would like to touch briefly about the consensus that has emerged underlying the military commission system and then explain why the congressional restrictions under section 1039 are fully consistent with Congress's role in our separation of powers.

In the wake of the September 11th attacks, the Bush Administration announced that it intended to revive the use of military commissions for the prosecution of captured enemy combatants who had committed war crimes against Americans. Although that decision was controversial when announced, over the past decade, Congress has passed two statutes designed to endorse the use of military commissions and to codify a detailed set of procedures for such trials. The Obama Administration in fact pushed the second statute through Congress for the express purpose of improving the system and allowing

the commission trials to go forward. Accordingly, we now have a bipartisan consensus that military commissions are an important tool in the War on Terror.

The debate then has shifted to what kinds of cases should be prosecuted before the commissions, and which cases should be brought in Article III courts. As President Obama has recognized, the United States has long employed military commissions for prosecuting captured enemies for violations of the laws of war. Many of our greatest Presidents—including George Washington, Abraham Lincoln, and Franklin Delano Roosevelt—have recognized in our past conflicts both the lawfulness and the utility of military commissions. Indeed, it is fair to say that commissions represent the traditional means by which this country has tried captured enemies for war crimes.

As with past armed conflicts, the United States has recognized the military justice system to be the appropriate forum for prosecuting captured enemies who commit war crimes against American service members and civilians. The defendants in military commission prosecutions are not ordinary civilian criminals. Their actions arise out of an armed conflict, and they breach the laws of war, not our domestic criminal code.

While it is sometimes the case—and particularly so, when it comes to our war against Al Qaeda terrorists—that the crimes committed by our enemies may also violate our domestic laws, the United States has traditionally not treated its wartime enemies as ordinary domestic criminals. For instance, when the FBI arrested eight German saboteurs in the United States during World War II, President Roosevelt did not present them for trial to the civilian justice system, although he surely could have done so. Rather, he determined that such captures—even though they were effected by law enforcement and took place on American soil—were incident to an armed conflict, and so he directed that

they be prosecuted by military commission. The same circumstances are presented here. During the present armed conflict, we have relied on our military not simply to fight Al Qaeda, but to detain them under the law of armed conflict. So too it is appropriate to regard their offenses, not as ordinary violations of our domestic laws, but as war crimes, and to turn to the military justice system to hold them accountable.

The additional justification for military commissions is a more practical one. In contrast with our civilian courts, military commissions are simply better tailored to handling the challenges of wartime prosecutions. Military commissions have special rules better able to handle the significant amounts of classified information that are implicated by the trials of those apprehended during wartime and by our military and intelligence services. Military commissions can better, and more easily, provide for the safety and security of the participants than can the federal courts located in our communities.

Most significantly, military commissions employ more flexible rules of evidence that allow for the consideration of battlefield evidence that likely would not be admissible under the strict procedural rules of the federal courts. As the Obama Administration's Detention Policy Task Force explained in its July 20, 2009 preliminary report:

> Some of our customary rules of criminal procedure, such as the *Miranda* rule, are aimed at regulating the way police gather evidence for domestic criminal prosecutions and at deterring police misconduct. Our soldiers should not be required to give *Miranda* warnings to enemy forces captured on the battlefield; applying these rules in such a context would be impractical and dangerous. Similarly, strict hearsay rules may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from the battlefield, which may be reliable, probative and lawfully obtained.

By contrast with our federal courts, the military commissions do not require *Miranda*

warnings, and they permit the consideration of hearsay, when reliable and appropriate, under circumstances considerably broader than in Article III courts. Military commission rules thus are adapted to wartime circumstances, and they can permit full and fair trials under circumstances where trials in Article III courts would not be feasible.

The Bush Administration believed that Article III terrorism prosecutions played an important part in our Nation's counter-terrorism efforts, and we counted many successes in winning convictions against terrorists and terrorist supporters apprehended in the United States through the traditional methods of law enforcement. When it came to the prosecution of aliens captured and detained abroad by our military and intelligence forces, however, President Bush determined, consistent with historical precedents, that military commissions were the appropriate forum for trying the "unlawful enemy combatants" or "unprivileged belligerents" who had committed war crimes against our civilians or our military forces.

Although the Obama Administration has agreed that military commissions should be used, the Administration has had a more difficult time articulating whether and when it will make use of the commission system. Indeed, while defending the commissions as the appropriate forum for hearing war crime cases, the Obama Administration then has treated the commissions system solely as a court of last resort—suitable only where Article III prosecutions would not be feasible.

We saw that presumption at work first with the prosecution of Ahmed Ghaliani, an Al Qaeda member involved in one of the group's early acts of war, the bombing of our embassies in Kenya and Tanzania. The Obama Administration transferred Ghaliani from military custody in Guantanamo Bay to New York to stand trial in a federal court on

civilian criminal charges. After the federal judge issued a number of rulings limiting the Government's evidence, the jury acquitted Ghaliani of 279 of the 280 charges. That single conviction in fact was sufficient to secure a life sentence, and so disaster was averted, but the hundreds of acquittals made for a rather close call that hardly builds confidence that civilian trials are the appropriate venues for to future prosecutions of enemy belligerents captured and detained by our military and intelligence services.

The Attorney General made even bigger headlines when he indicted Khalid Sheikh Mohammed and his co-conspirators for the September 11th attacks in that same New York federal court. This time, in the face of a massive political backlash from Congress and the people of New York, the White House suspended the Attorney General's decision and the 9/11 prosecution languished another year, as the Administration languished over whether to move its signature civilian prosecution to the military commission system. Ultimately, it was Congress that broke the logjam through last year's defense authorization act, which blocked the transfer of detainees to the United Sates, taking the civilian prosecution option off the table and leading the Obama Administration finally to embrace military commissions.

Section 1039 of the NDAA essentially continues these restrictions and would prevent the Administration from transferring detainees at Guantanamo into the United States. In addition, it would go further and prevent the Administration from transferring any detainee in the War on Terror to the United States and so would extend to the case of Abdulkadir Warsame, the Al-Shahab member who was detained on a U.S. warship for several months before being transferred to the United States for a civilian prosecution. Section 1039 would close off that option by requiring the U.S. military to hold Warsame

outside the United States, either at Guantanamo Bay or elsewhere.

The Obama Administration has, not surprisingly, raised a separation of powers objection, contending that section 1039 challenges Executive Branch authority "to determine when and where to prosecute detainees, based on the facts and the circumstances of each case and our national security interests." While the President's constitutional authority clearly does include individual detention and prosecution decisions, the Administration's objection overlooks Congress's equally important role to play.

The President is responsible for taking care that the laws are executed, and that extends to making particularized decisions to detain or prosecute based on the law and facts of particular cases. When it comes, however, to the broader policy questions as to whether military detainees, as a class, should be tried in Article III courts or in military commissions, Congress has an equally important, and indeed, preeminent role in making that decision.

The Constitution charges Congress, after all, with the responsibility to create the lower federal courts and to define their jurisdiction. *See* U.S. Const. art. I, § 8, cl. 8 (granting Congress the power "[t]o constitute Tribunals inferior to the supreme Court"). Congress also has the power to create so-called Article I courts, which may hear cases permitted under the Constitution outside the federal courts. Congress has exercised this power in establishing the courts martial under the Uniform Code of Military Justice and the statutory military commissions under the two Military Commissions Acts.

Congress thus clearly has the authority to set the jurisdiction of both the Article III courts and the military commissions, and to determine what cases to be tried in each.

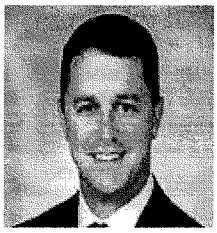
Thus, while Congress should not decide that a particular prosecution be brought in a particular available court, Congress clearly may declare that a class of cases—such as prosecutions against enemy belligerents in military custody—go forward in the military commission system, rather than in Article III courts.

In a perfect world, perhaps, Congress would make such a statement by amending the Military Commissions Act to grant exclusive jurisdiction over such cases to the commission system. While Section 1039 may be a less elegant (or permanent) way of adopting substantive policy, Congress clearly can play an appropriate and constructive role in determining which cases go forward in the military commissions and which go forward in Article III courts. Accordingly, Section 1039 plainly falls within Congress's constitutional authority, and as we have seen with the 9/11 case, its earlier version has played a constructive role in actually moving the commission prosecutions forward.

* * *

In the ten years since the September 11th attacks, the three branches of our Government have engaged in a robust debate to define the appropriate legal framework for detention and prosecution. These issues remain important to our Nation's ability to effectively prosecute this armed conflict, and the detainee provisions of the NDAA represent an important step forward in establishing that legal framework. Thank you Chairman McKeon and Ranking Member Smith for the opportunity to be here today, and I look forward to answering any questions.

14165706.1.LITIGATION



Steven A. Engel

In a career spanning both private and public practice, Steven A. Engel has developed significant expertise litigating high-profile trial and appellate matters and advising clients on the most sensitive and complex legal issues. Mr. Engel also regularly counsels clients in connection with government, congressional, and internal investigations.

A trial and appellate advocate, Mr. Engel has appeared in courts across the country, handling a wide range of civil litigation matters, including in the areas of administrative, antitrust, and securities law. In addition, Mr. Engel, who clerked on the U.S. Court of Appeals for the Ninth Circuit for now-Chief Judge Alex Kozinski and on the U.S. Supreme Court for Associate Justice Anthony M. Kennedy, is an experienced appellate litigator who has handled appeals before the U.S. Supreme Court, seven U.S. Courts of Appeal, and numerous state appellate courts.

Prior to joining Dechert, Mr. Engel served as Deputy Assistant Attorney General for the U.S. Department of Justice's Office of Legal Counsel, where he provided legal advice to senior policymakers on some of the most difficult and critical issues facing the Executive Branch, including matters pertaining to financial issues, national security, constitutional law, congressional oversight, and review of executive orders.

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 112th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Steven Engel

Capacity in which appearing: (check one)

X Individual

___Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: _____

FISCAL YEAR 2011

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2010

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

FISCAL YEAR 2009

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant
None			

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information:

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Federal agencies with which federal contracts are held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information:

Number of grants (including subgrants) with the federal government:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Federal agencies with which federal grants are held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Aggregate dollar value of federal grants held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

"Ten Years After the Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror"

Hearing Before the House Armed Services Committee

July 26, 2011

Prepared Testimony of Robert Chesney*
Charles I. Francis Professor in Law
University of Texas School of Law

Chairman McKeon, Ranking Member Smith, and members of the committee, thank you for the opportunity to testify today. In the pages that follow I use a close review of the Warsame case to illustrate three points:

1. Civilian criminal prosecution in some instances is the most effective tool for ensuring the long-term detention of a terrorism suspect; Congress should not take this tool out of the President's hands.

2. Other options that are lawful in certain circumstances include trial by military commission or the use of military detention consistent with the law of war—a position the administration already routinely defends in various legacy cases. In some contexts going forward, one or the other of these tools may be the most effective and appropriate long-term detention solution. When that is the case, the administration should be willing to use these tools, even if Guantanamo as a practical matter is the only viable location where this can be done. Of course, the administration will be more likely to do so if Congress would remove the existing transfer constraints (which effectively make it impossible to remove persons from Guantanamo without a court order).

3. The question of how best to detain someone over the long-term and the question of how best to acquire intelligence from a captured person are two different matters, and the answer to one does not dictate the answer to the other. Selecting civilian criminal prosecution as the best tool for long-term detention in a particular case, for example, by no means obliges the government to treat a terrorism suspect as a run-of-the-mill criminal whose questioning is designed merely to obtain admissible evidence of guilt. In any event, which framework to employ at a given point in time is a question that should be resolved with nuanced, case-specific judgment informed by the views of professionals from across the relevant agencies and departments—not with a one-size-fits-all solution.

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* For a period in 2009 I served as an advisor to the Detention Policy Task Force, established under Executive Order 13493. I write solely in my personal capacity, of course, and nothing said here should be taken to reflect the views of that Task Force or any other person or department.

Background: The McRaven Testimony and the Warsame Case

In a hearing before the Senate Armed Services Committee on June 28, 2011, Senator Lindsey Graham (R-S.C.) asked Vice Admiral William McRaven, the commander of Joint Special Operations Command, where a detainee would be held if captured outside of Afghanistan in a location such as Yemen or Somalia.[1] Admiral McRaven replied that such a person might be held temporarily on a naval vessel pending a decision to "prosecute them in U.S. court" or to rely on some alternate disposition such as transfer "to a third-party country."[2] Asked what would happen if neither of those alternatives were available, Admiral McRaven stated that "if we can't do either one of those, then we will release that individual."[3] Senator Kelly Ayotte (R-N.H.) followed up by asking whether Guantanamo remained "off the table" for this scenario, and Admiral McRaven agreed that it was.[4] Senator Ayotte then asked if such a person might instead be taken to the U.S. military's detention facility in Afghanistan. Admiral McRaven explained that "we have looked a number of times at whether we would do that in Afghanistan, but owing to the nature of the sovereignty of Afghanistan and the concern about the potential backlash from the Afghan government, we have recommended not to do that."[5] Admiral McRaven agreed with Senator Ayotte that "it would be very helpful" to have a long-term detention facility available for this scenario.[6]

In the aftermath of this testimony, the Obama Administration came under fire from both the left and the right. Some focused on the reference to detention at sea, depicting this as an inappropriate extension of Guantanamo. Conversely, others focused on the failure to embrace detention at Guantanamo itself as an already-extant and judicially-approved long-term detention facility presenting no host-state sovereignty concerns. Then, as if on cue, news broke that the U.S. military in mid-April had captured a Somali man named Ahmed Abdulkadir Warsame in transit between Somalia and Yemen, had held him in military custody and interrogated him for two months on a U.S. Navy vessel, and now was transferring him to civilian custody in order to face prosecution in New York City.[7] It was surely the actual scenario Admiral McRaven had in mind during his testimony.

Criticism came quickly. The *New York Times* editorial board, for example, applauded the decision to prosecute Warsame, but fiercely denounced the two-month period of military detention and interrogation.[8] It asserted that the administration had "created yet another parallel system of unlimited detention and interrogation without rights," calling it "troubling," "extralegal," and "tainted."[9] Others took the opposite view. Chairman McKeon, most notably, denounced the decision to bring Warsame into the United States as unwise,[10] and in a letter to the President last

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[1] The transcript of that hearing is available at http://www.senate.gov/~armed_services/Transcripts/2011/06%20June/11-59%20-%206-28-11.pdf

[2] *Id.* at 36-37.

[3] *Id.* at 37.

[4] *Id.* at 44.

[5] *Id.*

[6] *Id.*

[7] *See, e.g.*, Charlie Savage and Eric Schmitt, "U.S. to Prosecute a Somali Suspect in Civilian Court," *N.Y. Times* (July 5, 2011), available at http://www.nytimes.com/2011/07/06/world/africa/06detain.html?_r=1&ref=charliesavage.

[8] *See* Editorial, "Terrorism and the Law," *N.Y. Times* (July 16, 2011), available at http://www.nytimes.com/2011/07/17/opinion/sunday/17sun1.html?_r=2

[9] *Id.*

[10] *See* Savage & Schmitt, *supra* note 8.

week (co-signed by four other committee chairs) questioned the administration's refusal to use Guantanamo in such cases.[11]

These are but the latest salvos, of course, in a larger and long-running debate over the options that the executive branch ought to have available in terrorism cases—a debate in which this Committee has played an important role. The President, supported by Ranking Minority Member Smith, objects that Congress has unwisely limited his capacity to pursue civilian criminal prosecutions of terrorism suspects captured overseas, as well as his capacity to remove individuals from Guantanamo subject to appropriate safeguards. Other members of Congress, including Chairman McKeon, have responded that "it is the Administration that has foreclosed options" by refusing to make use of Guantanamo for newly-captured individuals.[12]

Who is right? Both are. Civilian criminal prosecution in some circumstances is the best option for the long-term disposition of a terrorism suspect—better than military detention or trial by military commission—and Congress should not bar the executive branch from using it in such cases. Oversight, not unduly-restrictive prohibitions, is the solution for Congressional concerns that such choices might not be made wisely. By the same token, however, military detention may be both lawful and preferable in other circumstances, and where that is the case—and where other locations simply are not available—the administration should not rule out the use of Guantanamo. Likewise, the door should remain open to the use of military commissions in appropriate circumstances. And of course Congress should not itself deter the administration from using Guantanamo by imposing largely unsatisfiable limitations on subsequent transfers or releases of anyone sent to that location. A close review of the Warsame case helps to illustrate these points, while also shedding light on the ongoing debate over modification of the AUMF.

Warsame and the Scope of Military Detention Authority under the AUMF

Set aside for a moment the decision to shift Warsame into the civilian criminal justice system after two months of military detention. Was the use of military detention in his case unlawful, as the *Times* suggests? That turns out to be a difficult question to answer based on the information available to the public.

The AUMF expressly authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons," with the explicit aim of preventing further attacks. President Bush duly determined that al Qaeda was responsible for the 9/11 attacks and that the Taliban was harboring the bulk of al Qaeda's leadership and personnel in Afghanistan. This much is clear. But the substantive scope of the AUMF nonetheless remains incompletely defined at both the organizational and individual levels, and the Warsame situation, at least in light of the information available to the public, appears to fall within that grey zone.

Against which groups does the AUMF authorize detention?

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[11] Letter to President Obama from Representatives McKeon, Rogers, Ros-Lehtinen, Smith, and King, July 19, 2011, available at http://armedservices.house.gov/index.cfm/files/serve?File_id=f30d329b-79bd-4f8b-a2dd-6b512018fa7c.
[12] *Id.* at 1.

As an initial matter, the AUMF is somewhat indeterminate at the *organizational* level, for two reasons. First, it is not obvious how to determine which entities are appropriately viewed as part-and-parcel of al Qaeda itself, such that the AUMF would directly apply to them. Second, it is not obvious how to identify those groups which are independent of al Qaeda and the Afghan Taliban but that nonetheless might fall within the AUMF's scope on the theory that the AUMF implicitly authorizes force against groups which take up arms "alongside" al Qaeda or the Afghan Taliban—i.e., "co-belligerents" or "associated forces."

The first problem—the difficulty of defining the scope of al Qaeda itself—arises because of the indeterminate structure of al Qaeda, including both its networked nature and especially its fuzzy (and varying) relationships with so-called "franchises"—i.e., the several regional groups that have branded themselves with al Qaeda's name and that have to varying degrees established or retained substantive connections with al Qaeda's core leadership.

Al Qaeda in the Arabian Peninsula ("AQAP") provides a case study of the difficulty of answering this question. I have written about this matter in substantial detail elsewhere,[13] and will not repeat those arguments here other than to say that AQAP has substantial roots in the original al Qaeda's past operational presence in Saudi Arabia and Yemen, and maintains substantial ties to the core leadership to this day—yet it also has undergone substantial personnel changes that call into question its organizational continuity over time, and it is far from clear that it operates at the direction and control of al Qaeda's senior leadership. In short, though a plausible argument can be made that AQAP remains part-and-parcel of al Qaeda, and hence directly subject to the AUMF, reasonable counterarguments can be made as well. Without access to the best and most current intelligence on the subject—and without a thicker account of just what it takes in the abstract to show that two entities are one for purposes of the AUMF—it is simply not possible to definitively state an answer.

Is the situation any clearer with respect to al Shabab? Not really, though it probably is fair to say that the argument for treating it as part-and-parcel of al Qaeda is somewhat weaker than the argument for treating AQAP in that way.

Bear in mind that Al Qaeda has two distinct types of presence in Somalia, and they interact in a way that makes it hard to categorize the status of al Shabab. First, al Qaeda over time has frequently had actual members in Somalia, separate and apart from al Shabab's status, for the simple reason that Somalia is a largely ungoverned space that has proven useful as a haven. Second, of course, there is the evolving al Qaeda-al Shabab connection itself. Unlike AQAP, al Shabab does not trace its origins to a historic al Qaeda operational presence in the area, but rather appears to have emerged as one of several indigenous armed groups adhering to an extremist interpretation of Islam compatible with al Qaeda's vision. That said, it has had substantial contact with al Qaeda over time, and the trend appears to be toward greater integration. Historically al Shabab seemed focused on obtaining power locally, and there is reason to believe some of its leaders resisted closer ties to al Qaeda lest the group draw too much attention from Western governments. But al Shabab eventually developed ties to al Qaeda, in part thanks to the direct involvement in al Shabab of actual al Qaeda members in the region. The convergence between the organizations seems to have accelerated of late, moreover, as al Shabab's leadership recently proclaimed its allegiance to al Qaeda and its new leader, Ayman al

[13] *See* Robert Chesney, *Who May Be Killed: Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Yearbook of International Humanitarian Law (forthcoming 2011), available at http://ssrn.com/abstract=1754223.

Zawahiri.[14] Adding to this sense of merger, a steady stream of statements from U.S. officials in recent weeks has emphasized that al Qaeda's senior leadership—including al-Zawahiri—has shown great interest in persuading al Shabab not only to more explicitly embrace a role as an al Qaeda franchise but also to follow the AQAP model in terms of planning operations against Western targets abroad, rather than focusing on Somalia or East African affairs.[15] U.S. officials also indicate, moreover, that al Qaeda leaders have urged AQAP to work with al Shabab in this respect—and Warsame, notably, is said to have been a part of that liaison relationship.[16] The fact that al Shabab has successfully recruited a substantial number of Somali-American young men from the Minneapolis area—and that at last one of these men went on to commit a suicide bombing in Somalia—no doubt has underscored the strategic significance of these trends.[17]

In any event, in light of all this, the case for categorizing al Shabab as part-and-parcel of al Qaeda is weaker than that for AQAP, but not unreasonable either. Again, absent a clear sense of what standards should govern such an inquiry, and what the best, current intelligence shows, it is not possible to render a more definitive opinion.

That said, even if the answer as to both AQAP and al Shabab were to be no, it would not automatically follow that either group is beyond the scope of the AUMF. The next question is whether the AUMF should be read to confer implicit authority to use force against entities that independently takes up arms against the United States in connection with al Qaeda, even if not as *part* of al Qaeda. That is, might some groups be akin to a co-belligerent or associated force of al Qaeda (or the Afghan Taliban, for that matter)?

It is hard to deny that *some* groups qualify under this heading. Consider the Haqqani Network, operating in Afghanistan from havens in Pakistan. It is independent of al Qaeda and the Afghan Taliban, but nonetheless takes a direct and substantial part in combat against United States and coalition forces across the border in Afghanistan.[18] It seems unreasonable to construe the AUMF not to reach that circumstance.[19]

But what about groups not actually engaged in what amounts to active combat operations against U.S. soldiers? That is, should that form of engagement be the litmus test for recognition of something akin to co-belligerency status for purposes of defining the scope of the AUMF? Or can the idea of co-belligerent or associated forces extend to groups that instead conduct or at least attempt periodic terrorist attacks, as in the case of AQAP? How much operational activity of that kind must there be, if any? Once more, we do not have agreed-upon standards for addressing such

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[14] *See* Mark Mazzetti and Eric Schmitt, "U.S. Expands Its Drone War Into Somalia," *N.Y. Times* (July 1, 2011), available at http://www.nytimes.com/2011/07/02/world/africa/02somalia.html?ref=alshabab

[15] *See, e.g., id.*

[16] *See, e.g.* Brian Bennett, "Al Qaeda's Yemen Branch Has Aided Somalia Militants, U.S. Says," *L.A. Times* (July 18, 2011), available at http://articles.latimes.com/2011/jul/18/world/la-fg-bin-laden-somalia-20110718.

[17] *See* Mazzetti & Schmitt, *supra* note 16 (describing concerns of a "senior law enforcement official").

[18] *See* Jason Ukman, "The Haqqani Network: Al-Qaeda's Dangerous Patron," *Wash. Post* (July 18, 2011) (describing the Haqqani Network as "the most dangerous insurgent force fighting U.S. troops in eastern Afghanistan"), available at http://www.washingtonpost.com/blogs/checkpoint-washington/post/al-qaedas-dangerous-haqqani-patron-in-pakistan/2011/07/18/gIQAtWmcLI_blog.html?wprss=checkpoint-washington.

[19] One could certainly argue that the Haqqani Network falls within the AUMF under its "harboring" provision. But what if intelligence indicated that the Haqqani Network had a falling out with al Qaeda and no longer harbored its members in Pakistan's FATA, yet remained as involved as ever in attacks on U.S. forces in Afghanistan? Again, it seems strange to suggest that the AUMF could not be construed to provide domestic legal authorization for responding in kind.

matters in the abstract, nor can we tell from the public record how those standards might actually apply in al Shabab's case.

Against which individuals does the AUMF authorize detention?

Having said all that, let us assume for the sake of argument that al Shabab either is part-and-parcel of al Qaeda or that it amounts to a co-belligerent or associated force within the scope of the AUMF. Next we confront the relative indeterminacy of the AUMF at the *individual* level. That is, we confront the problem of identifying which persons are sufficiently associated with the group, by virtue of their conduct or status, such that the AUMF can be said to authorize their detention.

The AUMF of course does not purport to answer such questions. Not that this is unusual. No prior AUMFs (or declarations of war, for that matter) have done this, and this was not generally thought problematic in the past. In traditional conflicts, after all, there typically was little dispute about whether there existed an underlying armed conflict implicating the law of war, and that body of law in turn provided relatively clear guidance regarding who may be held so long as the conflict involved the regular armed forces of sovereign states. Take those elements away, however, and matters become much less clear. This is precisely why the question of the individual scope of detention authority under the AUMF continues to be litigated today, despite the fact that almost all the Guantanamo habeas cases involve individuals allegedly linked to organizations (al Qaeda or the Taliban) that clearly are within the AUMF's scope.[20]

For the time being, the courts have ironed out a somewhat uniform position, at least at a high level of generality. Specifically, the D.C. Circuit has now repeatedly stated that the AUMF provides detention authority both for members and non-member supporters of al Qaeda, the Taliban, and associated forces.[21] But just what these terms mean in actual practice is another matter.

With respect to membership, the courts have emphasized that the test is functional rather than formal, but just what functions suffice to make one "part of" al Qaeda or the Taliban is not entirely clear. It is fair to say that this standard is satisfied if one actually bears arms or commands others in doing so, but personal involvement in violence or with the instruments of violence is not a necessary condition. The D.C. Circuit has stressed that merely attending an al Qaeda sponsored training camp may be sufficient on its own to prove membership, and that the same might even be true with respect to staying at certain types of guesthouses. All of which provides some degree of clarity, but not necessarily enough if one proceeds from the premise that the concept of membership should distinguish al Qaeda from the larger *jihadi* movement al Qaeda aspires to lead.

And then there is the support track, which permits detention based on the provision of material support to an AUMF-covered group by a non-member. This category, though cited with approval by the D.C. Circuit in *dicta* in several cases, has not yet been the basis for a D.C. Circuit decision, and it remains to be seen if any current GTMO detainee can be held solely on this basis rather than on a showing of membership. Nor has the concept of support been elaborated upon in any significant way. We do not know, most notably, what *mens rea* the courts ultimately may conclude is required

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[20] For a discussion of a full decade's worth of litigation on this point, see Robert Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 Boston College Law Review 769 (2011).]

[21] *See* Benjamin Wittes, Robert Chesney, and Larkin Reynolds, The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking (2011), available at http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx.

for detention on this ground. Must the person intend to further some particular unlawful act, by analogy to the 1994 material support statute in criminal law (18 USC § 2339A)? Or would it be enough that a person naively but knowingly gave support to a group, hoping it would be put to legitimate uses, by analogy to the 1996 material support statute (18 USC § 2339B)? And would it matter *where* the support was rendered—for example, whether the individual was in some sense accompanying an armed force at the time of the support, as opposed to rendering aid in some remote fashion? On this last point, there is reason to believe the administration itself is undecided.[22]

In light of all this, is Warsame within the scope of the AUMF?

In light of the analysis above, it is not possible to say with certainty that Warsame is within the scope of the AUMF, at least not based on the information available to the public.

If we assume for the sake of argument that both AQAP and al Shabab fall within the AUMF's scope at the organizational level, then the case for Warsame's detention likely would be strong. The government apparently is confident that it can prove beyond a reasonable doubt that Warsame received military-style training from one group or the other, and this alone might be sufficient to show him to be a functional member of whichever group provided the training. His other alleged conduct, characterized in the indictment as the provision of material support in various forms (including the provision of explosives training or knowledge to others in those groups), would likely reinforce the membership claim. Whether the provision of support independent of membership would suffice on its own as a detention predicate is, as noted above, less certain; certainly it would help the government's case that, in this instance, the nature of the support involved explosives training rather than something more innocuous.

But do AQAP and al Shabab actually fall within the AUMF's scope? As noted above, the relevant legal standard is decidedly indeterminate, and in any event it is not possible to say without access to the relevant intelligence whether that standard is met by either group. Which leads to a further consideration.

The government of course is free to consult its own intelligence and on that basis to make its own, internal judgment as to whether al Shabab or AQAP fall within the scope of the AUMF. If Warsame were able to contest his detention through a habeas petition, however, then the government would be faced with the question whether to come forward with its intelligence—in a manner to be shared with cleared counsel for Warsame, even if not Warsame himself—in order to prevail in the habeas litigation. It is not difficult to imagine that the intelligence at issue would be exceedingly sensitive, and it is not obvious that the agencies involved would be of one mind regarding whether the risk to sources and methods would be worth incurring in order to win in the habeas proceeding.

If that is the case, then it would matter quite a bit whether Warsame likely would have had the right to pursue habeas relief if detained longer. Certainly he would have that right if brought in military custody to Guantanamo or the United States. And if he were instead simply left on a ship, or even taken to our detention facility in Afghanistan (after an accommodation with the Afghan government)? More likely than not, he would have habeas in those circumstances as well. It is true

[22] *See* Charlie Savage, "Obama Team Is Divided on Anti-Terror Tactics," *N.Y. Times* (Mar. 28, 2010), available at http://www.nytimes.com/2010/03/29/us/politics/29force.html?_r=1.

that the D.C. Circuit Court of Appeals in the *al Maqaleh* litigation has held that the petitioners in that instance had no right to seek habeas relief in connection with their detention in Afghanistan, and that appears to be the entrenched rule going forward for captures occurring in Afghanistan itself.[23] But the court showed concern for the scenario in which a person is captured elsewhere and then brought to Afghanistan at our discretion. Though it concluded that habeas would not lie for such transfers if conducted years ago, before the *Boumediene* ruling, the court went out of its way to leave the door open to a contrary result for future transfers. The issue now is percolating through the lower courts.

Were Warsame still in military detention, in short, he quite likely would contest that detention eventually in a federal court habeas proceeding. This in turn might oblige the government to come forward with evidence establishing that AQAP, al Shabab, or both either were part-and-parcel of al Qaeda, or at least co-belligerents or associated forces of al Qaeda. I am in no position to judge whether this would be a difficult showing to make, nor whether there would be undue costs in terms of the risk of exposing sources and methods that might accompany such a showing. It is certainly possible, however, that government officials might conclude that the detention would be unlikely to be upheld in litigation, and further that an adverse ruling on the organizational scope issue vis-a-vis AQAP or al Shabab would create legal problems for the ongoing uses of force in Yemen and Somalia. From this point of view, it is understandable that the government might wish to pursue other long-term detention options, even if it believed in good faith that it had the right to detain Warsame under the AUMF.

Would § 1034 of the NDAA FY12, as passed by the House, alter this analysis?

Only to a limited extent. Section 1034 would confirm in statute that providing substantial support to any AUMF-covered group would suffice at the individual level to warrant detention, which could be relevant in Warsame's situation (though as noted above this also appears to be the current position of the D.C. Circuit regarding the interpretation of the existing AUMF). Section 1034 also would confirm in statute that detention authority extends to "associated forces," thus ensuring that it would not be necessary to show that AQAP or al Shabab are part-and-parcel of al Qaeda itself.[24] Section 1034 does not define "associated forces," however, and hence this issue would remain as problematic under § 1034 as it does under the current AUMF. That is to say, we would still lack a clear metric as to when an affiliated or related entity becomes an "associated force" of al Qaeda, and the government would still have to ponder whether, if pressed in a habeas setting to demonstrate the relationships among AQAP, al Shabab, and al Qaeda, it would be worth doing so.

If Congress wishes to ensure that detention authority will extend to either AQAP or al Shabab, in short, it would do well to simply say so rather than leave the question to be decided by judges some

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[23] Al Maqaleh v. Gates, 605 F.3d 84 (D.C. Cir. May 21, 2010).

[24] Section 1034(1) of the NDAA FY 12, as passed by the House, confirms that the government has authority to use force against al Qaeda, the Taliban, and associated forces, and § 1034(3) elaborates that "the current armed conflict includes nations, organizations, and persons who—

> (A) are part of, or substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
>
> (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A)…

Section 1034(4) then adds that the AUMF is meant to convey detention authority against "belligerents, including persons described in paragraph (3), until the termination of hostilities."

years down the road at the tail end of a litigation process. Note, however, that this would leave open the question of how to apply the "associated forces" concept to other entities; one would not want to simultaneously foreclose the "associated forces" category, after all, lest there be an arguable gap in the domestic legal authority to use force in response to other groups that may engage in hostilities against the United States alongside those actually named in the AUMF. Fleshing out the associated forces concept is no simple task, unfortunately. At a minimum Congress should consider establishing a statutory reporting mechanism meant to ensure Congressional awareness of the executive branch's ongoing applications of the concept.

Warsame and Interrogation

Warsame was interrogated for two months after his capture, not for purposes of gathering evidence for use against him at trial but in order to gather intelligence for national security purposes. During this initial phase, he was not read *Miranda* warnings. It appears that interrogations were conducted by personnel from a mix of agencies, at least in part under the auspices of the High-value Interrogation Group ("HIG"), which exists for just such occasions.[25] After approximately two months, this phase ended, and a new team of interrogators—this time just FBI criminal investigators—began questioning Warsame for prosecution-oriented purposes. They read Warsame *Miranda* warnings, and he then waived his rights and continued talking. At some point along the way, moreover, the International Committee of the Red Cross ("ICRC") was notified of Warsame's detention, and given access to him. Several questions arise from all this.

Was the initial phase of the interrogation "without rights" as some critics allege?

No. Interrogation of Warsame was subject to Common Article 3 of the Geneva Conventions of 1949, the War Crimes Act, the Torture Act, and the Detainee Treatment Act of 2005. In practical terms, that means a prohibition on both torture and cruel, inhuman, or degrading treatment. The interrogation also was governed by Executive Order 13491, which forbids the use of methods other than those authorized by Army Field Manual 2-22.3 ("Human Intelligence Collector Operations).

If ICRC notification and access occurred late in the two-month period, did this violate the law of war?

The publicly-available information does not make clear when ICRC notification and access occurred. But even if we assume for the sake of argument it only occurred at the end of the initial two-month phase, this would not amount to a violation of the law of war. "There is no specific treaty provision requiring access by the ICRC to detainees in non-international armed conflicts," as the ICRC itself notes in its study of the customary laws of war.[26] Rather, the ICRC in such contexts simply asks for and generally receives such access based on agreements with the detaining power. In this case, Executive Order 13491 § 4(b) provides for ICRC notification and "timely access," but specifies no particular number of days by which these must occur. It is worth noting that even in *international* armed conflict, where the law of war does impose an ICRC access obligation,[27] there is no specific date by which ICRC notification and access must occur. In that setting there is merely

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[25] *See* Ken Dilanian, "Terrorism Suspect Secretly Held for Two Months," *L.A. Times* (July 6, 2011).

[26] Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (Volume I: Rules) (2005) 443.

[27] *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949), art. 126.

the requirement that "[v]isits may not be prohibited except for reasons of imperative military necessity."[28]

Was it legal to hold him on a ship rather than on land?

Yes.

No one would deny that the use of ships to detain has a troubled history or that the practice presents special risks in terms of abusive conditions; infamous examples in which Americans suffered from the practice include the British prison "hulks" of the American Revolution and the Japanese "Hell Ships" of World War II. Indeed, as a result of such experiences, the drafters of the 1949 Geneva Conventions created a rule—Article 22 of the Third Geneva Convention—requiring that prisoners of war be held "only in premises located on land."[29] By its own terms, however, Article 22 applies only in the context of an *international* armed conflict, and even then only in relation to persons who qualify for POW status. Neither of those conditions obtain as to Warsame.

Does the same rule apply in non-international armed conflict? It is not clear that it does. Neither Common Article 3 nor Additional Protocol II refer to the matter. The question, then, is whether the prohibition against ship-based detention has become part of the customary law of war applicable in non-international armed conflict. On one hand, there is no doubt that there is a customary rule requiring that detainees be held in safe locations and under hygienic conditions. The ICRC's recent study of customary humanitarian law says as much, concluding that "[p]ersons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene."[30] But the study does not assert that a customary norm has emerged forbidding *ships* as such.

What about the U.S. military's own position on the use of ships for detention? The matter is addressed in Army Regulation 190-8 ("Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees"), § 2-2(f)(2)(b) of which speaks to detention on naval vessels not just in international armed conflicts but also in other military operations including military operations other than war. In relevant part, it states that naval detention "will be limited," that POWs captured at sea may be held on ships "temporarily...as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility...," that temporary detention at sea also is permissible when transferring between land facilities, and that the Secretary of Defense must give approval if any such temporary naval detention is to take place on an "immobilized vessel."[31]

Whether this captures customary international law as it relates to non-international armed conflict is not clear. But for what it is worth, it shows that the U.S. position—predating 9/11—accepts a reasonable period of *temporary* naval detention in accordance with operational needs, even in settings where Article 22 governs. Of course, not everyone will agree that two months of naval detention constitutes "temporary" detention. Yet absent any clearer guidance regarding the bounds of temporary naval detention—and absent clear evidence that the underlying prohibition actually

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[28] *Id.*
[29] Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949), art. 22.
[30] Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (vol. I), Rule 121.
[31] AR 190-8 § 2-1(f)(2)(B)(1), (2), (3), and (5).

applies as binding law in a *non*-international armed conflict—one cannot say that the detention of Warsame was illegal on this ground.

Does it matter that Warsame was not Mirandized during the initial phase?

The relationship between intelligence interrogation and *Miranda* is poorly understood. When *Miranda* warnings are not given, the primary consequence is that the person's subsequent statement most likely would not be admissible if offered by the prosecution at trial. But that says nothing about the government's ability to use such statements for *other* purposes such as gathering intelligence about the relationship among al Qaeda, AQAP, and al Shabab, developing time-sensitive information that could be used in operational planning, and so forth. Put simply, the government may pay a litigation price in terms of a lost opportunity to gather additional admissible evidence, but it is not hard to imagine circumstances in which that is a price well worth paying (because the intelligence-gathering interest is substantial, because the existing admissible evidence already is sufficient, or both).

In any event, it is not always the case that statements obtained without *Miranda* warnings will prove inadmissible at trial. There has been much talk as to the temporal and subject-matter boundaries of the *Quarles* public-safety exception, pursuant to which at least some amount of safety-oriented questioning is permitted—including for use at trial—despite the lack of *Miranda* warnings. No one can say with certainty how the *Quarles* concept would map on to a fact pattern such as Warsame's, however. The answer ultimately would emerge only after post-capture, pre-*Miranda* statements were offered into evidence, and the appellate process ran its course.

But might this lead to dismissal of a subsequent indictment on grounds of "outrageous government conduct"?

That seems most unlikely. Bear in mind that the government held Jose Padilla (arrested at O'Hare airport in 2002 and soon taken into military custody as an "enemy combatant," on the theory that he was an al Qaeda sleeper agent) in military custody for years before he was transferred into the civilian criminal justice system for prosecution. He brought such a motion, emphasizing allegations of torture and other forms of severe abuse. His motion was rejected. So too in connection with Ahmed Ghailani (held in CIA custody and then at Guantanamo for years, before being transferred to face civilian prosecution in New York in 2010). It is difficult to imagine a successful motion to dismiss on such grounds in Warsame's case, which is considerably less compelling than those two.

What if the earlier phase of interrogation taints the subsequent, post-*Miranda *phase?

There always is litigation risk when prosecutors seek to admit evidence of statements made subsequent to a period of involuntary (or presumptively involuntary) interrogation. This is the "taint" issue. The general idea is that the judge will examine the totality of the circumstances in order to determine whether the taint of involuntariness from the earlier circumstances of interrogation has diminished sufficiently by the time of the subsequent statement, or if instead it renders the subsequent statement involuntary as well.

This is, necessarily, a somewhat subjective inquiry, but there a few things we can say about it. Perhaps the most relevant body of caselaw exploring it has emerged over the past two years in the

Guantanamo habeas litigation. To be sure, the issue there has not been pre- and post-*Miranda* statements, but rather pre- and post-abuse statements. But the underlying test is the same; indeed, the judges in the habeas litigation have relied expressly on the taint principles established in ordinary criminal cases. In any event, the Guantanamo judges "have focused on quantitative factors, such as the amount time between coercion and later, un-coerced interrogation, as well as qualitative factors, such as the identity of the interrogators or the forum in which the statement is made."[32] Taking that as a guide, one cannot be sure quite what will happen if and when prosecutors introduce Warsame's post-*Miranda* statements. The fact that he received an ICRC visitation, followed by the arrival of a new set of interrogators (this time from the FBI), could in the circumstances combine to create a change in atmosphere adequate to vitiate any taint—particularly if the ICRC visited for the first time at this break point. The absence of persuasive allegations of abuse or undue coercion in the pre-*Miranda* phase would likely matter quite a bit as well.

What about speedy trial considerations?

It is unlikely that Warsame could prevail on a motion to dismiss based on speedy trial considerations, because of the relative brevity of his military custody and the emphasis during that period on intelligence collection rather than evidence-gathering.

In *United States v. Ghailani*, the court rejected a motion to dismiss the indictment based on alleged speedy trial violations in circumstances vastly more difficult than the Warsame case. Ghailani had been indicted in 1998, was captured in 2004, held in CIA custody for two years, held in military custody at Guantanamo another three years, and only then brought to trial. The judge emphasized that the government's reasons for delay mattered a great deal, and distinguished between periods of custody during which the primary aim was to gather intelligence and periods in which the person was merely being incapacitated. The judge treated the former scenario as involving "compelling interests of national security" that weighed heavily against speedy trial concerns, and even in the latter case the delay did not matter because the "decisions that caused the delay were not made for the purpose of gaining any advantage over [the defendant] in the prosecution of the indictment."[33]

* * *

The Warsame case embodies an approach to the detention dilemma that all too often is overlooked, perhaps out of a misguided sense that one must commit from the outset either to just holding someone as a military detainee or just prosecuting them as a criminal. The fact of the matter, however, is that frequently both options will be available, and there is nothing wrong with blending them in a sensible way, mixing and matching them in order to maximize the benefits of intelligence-gathering at the front end and reliable long-term detention on the back end. This model won't be available in all circumstances of course; not every terrorism suspect is within the scope of the AUMF, and not everyone within the scope of the AUMF is a viable candidate for criminal prosecution. When the combination is available, however, it can be highly-effective.

Civilian Trials and Military Commissions

[32] Benjamin Wittes, Robert Chesney, and Larkin Reynolds, The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking (2011) 94.
[33] United States v. Ghailani, 751 F. Supp.2d 515, 520 (S.D.N.Y. 2010).

The military commission system is a legitimate and lawful option in many circumstances, and in some circumstances it is the *most* suitable option. But it is not *always* superior to the civilian criminal justice option. Warsame's case illustrates one reason why this is so, though others deserve mention.

Why choose civilian criminal prosecution over trial by military commission for Warsame?

Under the Military Commissions Act of 2009, a commission has personal jurisdiction over any "alien unprivileged enemy belligerent."[34] The MCA defines "unprivileged enemy belligerent," in turn, as a person who does not belong to any of the eight categories listed in Article 4 of the Third Geneva Convention—the categories defining eligibility for POW status in international armed conflict—and who:

> (A) has engaged in hostilities against the United States or its coalition partners;
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
> (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

I cannot see any serious argument that Warsame would fall within any of the Article 4 POW categories, and hence there is no obstacle as to that first part of the test. The more interesting question is whether the government can satisfy the second test. Or more specifically, the interesting question is whether the government would wish to come forward with evidence (which could not be presented *ex parte*) sufficient to show that Warsame was engaged in hostilities specific to the United States (or its coalition partners), that his support to others links back to hostilities against the United States (or its coalition partners), or that he might actually be a member of al Qaeda as such (not an associated force, but al Qaeda proper).

Consider these three alternatives one at a time. It seems likely from the indictment in this case that the government can prove that Warsame was directly involved in planning and training for violent activity to be undertaken by al Shabab, AQAP, or both. But those entities do not solely direct their violence against the United States or its coalition partners. Qualifying under this first option would require evidence of such a focus, evidence which, if it exists, might well be the sort of intelligence that the government would much prefer not to present in any form in a courtroom. And looming in the background, moreover, is the question of what is meant by "hostilities" in this setting. It is one thing to apply the term to firefights with U.S. forces in Afghanistan or direct involvement in plots to blow up U.S. naval vessels or government facilities. But would the term apply to episodic terrorist attacks directed at, say, a civilian airliner? The best answer might well be yes, but the issue is anything but clear—and the recent dispute regarding the meaning of the same word in connection with Libya and the War Powers Resolution, though not controlling here, does not help the matter.

The next alternative involves material support to hostilities. This is probably the best fit for Warsame's circumstance, but note that there still is a need to come to grips with the meaning of hostilities in this setting and to confront possible reluctance to make use of intelligence that would help establish this line of argument.

The third alternative is to show that Warsame is a member of al Qaeda, and no more. This has the virtue of turning entirely on membership status, and hence requiring no showing of hostilities

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[34] Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948c.

directed at the United States or its coalition partners. But it is far from clear this one applies in Warsame's case. The indictment suggests he can be linked to both al Shabab and AQAP. This *may* be enough to link him as well to al Qaeda, but as discussed in detail above, that is hardly a given, depending as it does both on the indeterminacy of the organizational boundaries of these entities and the question of what intelligence the United States is willing to use in court as evidence.

Again, none of this is meant to say that the showing could not be made. The point, rather, is that it is a showing required *only* if one selects the military commission option; none of the charges against Warsame in federal court require proof of his involvement in the matters mentioned above.[35] *If* the relevant government officials, with access to the relevant intelligence, view these obstacles as significant, this is an important point in favor of the civilian alternative.

Would choosing civilian prosecution over a military commission trial in effect give Warsame a set of rights he would not otherwise receive?

This argument arises often in the commissions debate. It depends on the premise that the constitutional rights enjoyed by a defendant in a civilian trial in New York—the Sixth Amendment Confrontation Clause, for example, or Fifth Amendment Due Process considerations such as the prohibition on involuntarily-obtained statements—would not equally apply to a defendant in a military commission proceeding. Yet it is far from obvious that this is correct.

When the Supreme Court decided *Boumediene v. Bush*, it addressed only the capacity of the Guantanamo detainees to object to an ostensible violation of the Suspension Clause, and did not also address their ability to advance other constitutional claims.[36] Even a brief review of the majority's rationale for allowing the invocation of the Suspension Clause, however, should be enough to give pause to anyone who argues that the same result will not follow for various trial-related rights. Justice Kennedy had previously endorsed the view that the extraterritorial effect of constitutional rights should turn on whether such an extension would be "impracticable and anomalous" in the particular circumstances at issue,[37] and he took this opportunity to give that test a prominent role in *Boumediene* as well.[38]

One day, possibly beginning in the context of the slowly-percolating *Hamdan* or *al-Bahlul* military commission appeals, the Supreme Court or the D.C. Circuit will begin the process of sorting out which constitutional rights do apply to military commission proceedings at Guantanamo and, for those that do, whether the rights apply in the usual way or perhaps in a manner tailored to the commission setting.[39] Until then, we may only speculate---but informed speculation suggests that

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[35] Warsame is charged with conspiring to provide and actually providing material support to al Shabab and AQAP, carrying firearms and destructive devices in connection with those offenses, teaching/demonstrating the making of explosives, and conspiring to and actually receiving military-style training from al Shabab and AQAP. *See* United States v. Warsame (S.D.N.Y.) (indictment), available at http://www.lawfareblog.com/wp-content/uploads/2011/07/Warsame-Indictment.pdf.

[36] 553 U.S. 723 (2008).

[37] *See* United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring).

[38] 553 U.S. at 759-60

[39] Appeals from a military commission decision run first to the Court of Military Commission Review, then to the D.C. Circuit Court of Appeals, and then finally to the Supreme Court of the United States (if the Supreme Court grants *certiorari*, that is).

there is a substantial possibility that the court ultimately will extend various trial-related rights to the commission setting, without substantial change.

What are the comparative prospects for conviction and a substantial sentence, as between the civilian and military trial options?

Many will recall that the prosecution of Ahmed Ghailani—a former Guantanamo detainee brought to New York for a civilian trial relating to the 1998 East African embassy bombings—resulted in a conviction on one (weighty) count and acquittals on all the others, including hundreds of murder counts. Does this somehow signify that civilian courts are not to be trusted with terrorism prosecutions, in comparison to military commissions? Not at all.

Consider whether there is any reason to believe the verdict would have been different had the case been tried by a military commission instead. That is quite doubtful. The burden of proof is the same in both settings, and there is no reason to assume that the typical military officer is more likely to convict than the typical civilian juror; indeed, one might expect military officers to be, if anything, *more* discerning in their assessment of the evidence. Recall that a military commission in the case of Salim Hamdan convicted him only on the lesser "material support" charges he faced while acquitting him of more serious charges, and then provided a sentence that practically amounted to time-served (whereas defendants in civilian court convicted on comparable material support cases routinely receive much longer sentences).[40] In light of this, we should probably not assume that simply having a military panel rather than a civilian jury would have made a difference in Ghailani's case.

Is there some other distinction between the systems that might have made a difference in that case? Some have suggested that the government would have been allowed to use more inculpatory evidence against Ghailani had the case been tried by commission. The district court in the actual case, after all, had suppressed testimony from a key witness on the ground that the government only learned of that witness after what was concededly a coercive interrogation of Ghailani. Yet there is no particular reason to believe that the same result would not have obtained had the case been tried by commission. Setting aside whether the Constitution might directly impose the same voluntariness standard in a commission proceeding—a possibility that has certainly not been ruled out, as noted above—the statutory rules governing commissions largely duplicates those rules in any event. The Military Commissions Act of 2009 provides that an accused's own statements may not be admitted into evidence unless they not only are reliable and probative in the totality of the circumstances, but also were "voluntarily given." The only exception to the voluntariness requirement applies only to statements "made incident to lawful conduct during military operations *at the point of capture or during closely-related active combat engagement*" (and even then only so long as the interests of justice favor admission).[41] That exception almost certainly would be matched in a civilian criminal trial by application of the *Quarles* public-safety exception. Nor would the word "voluntary" likely be construed differently in the two systems; the Military Commissions Act defines the considerations that go into the voluntariness determination in a commission proceeding, essentially adopting the civilian criminal law approach.[42]

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[40] Data on conviction rates and sentencing in civilian material support cases is available in Robert Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the "Soft-Sentence" and "Data-Reliability" Critiques*, 11 Lewis & Clark Law Review 851 (2007).

[41] 10 U.S.C. §948r(c) (emphasis added).

[42] 10 U.S.C. §948r(d).

Bear in mind, too, that the charges available in the civilian criminal justice system in some settings are more extensive than those available for trial by commission. Warsame illustrates the point, as he is charged with several counts—bearing arms in connection with a crime of violence, *receiving* military-style training from designated terrorist groups, and providing instruction on making explosives—that have no direct parallel in the commission system.[43]

Further, the prospects for conviction in some instances may depend on having access to information held by other countries—and in some such instances, those countries may be willing to cooperate only if we commit to the civilian prosecution alternative. And the same may be true with respect to obtaining custody of some persons, when they have already been captured by another state.[44] For these reasons alone, it seems unwise to entirely eliminate the civilian prosecution option for persons captured outside the United States.

All that said, there are grounds to favor commissions over civilian trials in some circumstances. But these grounds are not largely about maximizing prosecutorial advantage. They concern, rather, the comparative equities of military and civilian authorities. All other things being equal, for example, commissions are a more appropriate forum in cases involving well-recognized violations of the law of war occurring in combat or occupation settings or where the military is itself the target of the offense.

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Both the military commission system as it currently exists and the civilian criminal justice system are legitimate tools, and each can be highly effective.[45] Whether to use one or the other, once the decision to prosecute is made, is a complex judgments involving competing equities that are very difficult to assess. The situation does not call for a one-size-fits-all approach.

Removing Individuals from the United States

What about the post-sentence (or post-acquittal) endgame, when it becomes time to repatriate a person to his country of origin? Aren't we better off if that person is at Guantanamo at that point, rather than in the United States?

This is, I think, one of the most legitimate and difficult objections that have been lodged against bringing noncitizens captured abroad into the United States to face civilian criminal prosecution. It is not precisely a civilian-versus-military trial point, of course, but rather a question of geography that happens to track the civilian-military trial divide.

The basic concern is that at some point, whether after acquittal or after a convicted defendant has served his sentence, it may prove difficult to remove the individual back to his country of origin.

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[43] Other offenses charged against Warsame—material support and conspiracy—may be charged in both systems, albeit with a caveat: the courts currently are grappling with the question of whether material support and conspiracy can legitimately be prosecuted in the commission setting. This probably would not be a problem as to Warsame given that the arguments against these charges are at their strongest with respect to conduct predating the Military Commissions Acts of 2006 and 2009, whereas Warsame's conduct postdates those statutes.

[44] *See, e.g.*, David Kris, *Law Enforcement as a Counterterrorism Tool*, 5 Journal of National Security Law & Policy 1, 30 (2011).

[45] For more on the efficacy of civilian criminal prosecution, see *id.*

Specifically, the concern is that (i) the person cannot be removed either because his country of citizenship will not receive him or because repatriation poses an undue risk of torture or persecution, (ii) the government cannot find a third country to accept the person, and (iii) a court might eventually order the person released inside the United States rather than face indefinite detention. Why think this might occur? Because something like it did occur in 2001. That summer, the Supreme Court in *Zadvydas v. Davis* held that it would present a Fifth Amendment due process problem were the government to indefinitely detain a person who is subject to removal as a legal matter but cannot actually be removed as a practical matter.[46]

This is indeed a significant consideration for situations such as the Warsame case, where the government captures an alien terrorism suspect overseas and brings the person into the United States for prosecution. But there are two reasons to be cautious before we assume that the *Zadvydas* rule would apply in such cases.

First, and most obviously, the Supreme Court actually said in *Zadvydas*—which was *not* a terrorism or national security-related case—that it was *not* deciding that its ruling would extend to cases involving "terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[47] Second, *Zadvydas* involved a person who had entered the country legally as an initial matter, and thus had established ties to the United States with significant constitutional implications. And while it is true that the Supreme Court in the subsequent *Clark v. Martinez* case extended the *Zadvydas* rule to a person who had *not* entered the country legally in the first place, it did so only as a matter of statutory interpretation—and even then made explicit reference to the fact that immigration law contains an entirely separate track for the removal (and detention pending removal) of terrorism suspects.[48]

How precisely a person like Warsame—i.e., a non-citizen associated with terrorism who is brought into the country involuntarily solely to be prosecuted and to serve any resulting sentence—would fit into the *Zadvydas/Martinez* framework is far from clear. And so I would not brush off the *Zadvydas* concern. But nor would I treat it as a dispositive consideration, let alone one that is more likely than not to materialize.

Conclusion

If there is any one lesson to take away from all this, it is the need for flexibility and nuance in detention policy. In practical terms, this means the following:

- Congress should not entirely foreclose civilian prosecution when it comes to non-citizens captured overseas—even if such persons in theory might be subject to military detention under the AUMF or prosecution by military commission. Nor should the President entirely foreclose the option of military detention, consistent with the AUMF and the law of war, when it comes to new captures—even if the person in issue might also be subject to prosecution under Title 18.

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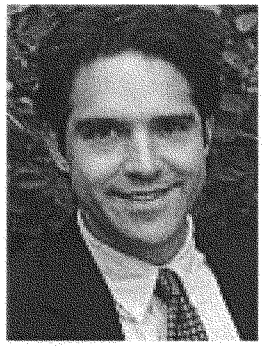
[46] 533 U.S. 678, 695 (2001).
[47] 533 U.S. at 696.
[48] *See* 543 U.S. 371 (2005); *cf.* 8 U.S.C. §§ 1531-37. *See also* 8 C.F.R. §§ 241.13, 241.14(c) and (d), 28 C.F.R. § 200.01.

- Which of these options to pursue—or whether to pursue an alternative such as trial by military commission, rendition to third-country custody, or surveillance—requires complex judgments that necessarily will vary from case to case.

- In many instances, the right move may be a blend of the options. This will be the case, for example, where the imperatives of intelligence-gathering through interrogation counsel in favor of a period of military detention (when otherwise legally available, and subject to appropriate constraints as to the methods involved) yet the best strategy for ensuring long-term detention of a dangerous person turn out to be the civilian criminal justice system.

- It is worth emphasizing, however, that a person need not be held in military custody in order to be interrogated in a manner focused on collecting intelligence for imperative reasons of national security (in contrast to collecting evidence for use in a trial). Such interrogation can take place in any setting, with any personnel, and we should not assume in advance that only certain personnel or certain institutional settings will work best. Rather, the goal should be to empower the executive branch with options that can be brought to bear in a manner that experts deem appropriate to particular fact patterns. Congress of course should conduct oversight in relation to such judgments, but should not predetermine them.



Robert M Chesney

Charles I. Francis Professor in Law

JD Harvard
BS Texas Christian University

Bobby Chesney is the Charles I. Francis Professor in Law at the University of Texas School of Law, a Distinguished Scholar of the Robert S. Strauss Center for International Security and Law, and a Non-Resident Senior Fellow of the Brookings Institution. His scholarship examines legal and policy questions associated with U.S. national security, including but not limited to terrorism-related issues. In 2009, Professor Chesney served in the Justice Department in connection with the Detainee Policy Task Force created by Executive Order 13493, and he also previously served the Intelligence Community as an associate member of the Intelligence Science Board. He currently is a member of the Advisory Committee of the American Bar Association's Standing Committee on Law and National Security, a senior editor for the Journal of National Security Law & Policy, a term member of the Council on Foreign Relations, and a member of the American Law Institute. He is a past chair of Section on National Security Law of the Association of American Law Schools (as well as the AALS Section on New Law Teachers) and a past editor of the National Security Law Report (published by the American Bar Association's Standing Committee on Law and National Security). Professor Chesney has published on an array of topics, including military detention (both from a domestic and an international law perspective), civilian criminal prosecution in terrorism-related cases, and civil litigation involving the state secrets privilege. Pending projects include two books under contract with Oxford University Press (one concerning the evolution of detention law and policy and the other examining the judicial role in national security affairs).

Professor Chesney is a *magna cum laude* graduate of both Texas Christian University (yes, he was at the Rose Bowl on 1/1/11) and Harvard Law School. After law school he clerked for the Honorable Lewis A. Kaplan of the United States District Court for the Southern District of New York and the Honorable Robert D. Sack of the United States Court of Appeals for the Second Circuit. He then practiced with the firm Davis Polk & Wardwell in New York (litigation), before beginning his academic career with Wake Forest University School of Law. There he received a teacher of the year award from the student body in one year, and from the Dean in another. In 2008 he came to the University of Texas School of Law as a visiting professor, and then joined UT on a permanent basis in 2009.

DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 112th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Robert Chesney

Capacity in which appearing: (check one)

_X_Individual

___Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: ***n/a***

FISCAL YEAR 2011

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

FISCAL YEAR 2010

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

FISCAL YEAR 2009

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information: ***n/a***

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Federal agencies with which federal contracts are held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information: ***n/a***

Number of grants (including subgrants) with the federal government:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Federal agencies with which federal grants are held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

Aggregate dollar value of federal grants held:

Current fiscal year (2011):_____;
Fiscal year 2010:_____;
Fiscal year 2009:_____.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 26, 2011

Remarks by John Brennan at Brennan Center Symposium

STATEMENTS & TESTIMONY

– 03/18/11

As Prepared For Delivery Remarks for John O. Brennan
Assistant to the President
For Homeland Security and Counterterrorism

Brennan Center for Justice
NYU School of Law
New York City, NY

Friday, March 18, 2010

Thank you, Michael, for your very kind introduction and for your leadership here at the Brennan Center for Justice. I have to admit, that has a nice ring to it.

Thank you very much for this invitation, which I appreciate on a very personal level. As an Irish Catholic kid from New Jersey, the role models for my generation didn't come any better than Justice William Brennan—an Irish Catholic kid from New Jersey. And you can imagine my pride when I discovered that my family has its roots in the same part of Ireland as Justice Brennan's family, County Roscommon. I've often wondered whether, just maybe, somewhere along the line, our families have shared roots. I may never know for sure, but I consider it an honor today to speak at an institution that has done so much to preserve his legacy.

Michael, as a veteran of the White House staff yourself, you know how hard it can be to escape from the West Wing for discussions like these, which are a chance to step back and take a broader look at the pressing issues of the day. In recent weeks, the pace of world events has been dizzying indeed—from the historic events across the Middle East to the devastating earthquake and tsunami in Japan.

But I very much wanted to join you to discuss a subject that I deal with directly every day and which is vital to our national security—the role of law enforcement in the post-9/11 era. And I want to take this opportunity to put that work in a broader context—the

principles and policies that are guiding the President and his administration as we work to prevent acts of terrorism against the American people.

Nearly ten years after the September 11th terrorist attacks, the United States remains at war with al-Qa'ida and its associated forces. Because of the relentless pressure to which we've subjected it, the senior al-Qa'ida leadership is increasingly hunkered down in its safehaven in Pakistan's tribal regions. Still, it retains the intent and capability to attack the U.S. homeland and our allies abroad.

Despite having its ideology rejected by the overwhelming majority of Muslims and being at its weakest point since 2001, the threat from al-Qa'ida is diversifying. Groups and individuals have sprung up in places like Pakistan, Yemen and North Africa and seek to commit violent acts to further al-Qa'ida's murderous agenda.

We have also seen this problem begin to manifest itself here at home. A very small but increasing number of individuals here in the United States have become captivated by these violent causes, seeking to commit violent acts here at home – their plots disrupted in Washington, D.C., Oregon, and Maryland during the past year alone. Others have traveled abroad to join the ranks of international terrorist groups and work to further their cause.

Though it has changed significantly over the past ten years, the threat from al-Qa'ida and its adherents represents the preeminent counterterrorism challenge we face today, and protecting the American people from this threat remains our highest national security priority.

Some suggest this is largely a military and intelligence challenge with a military and intelligence solution. Our military and our intelligence professionals – and the unique capabilities they offer – are an essential part of our counterterrorism efforts. But, to argue that they are the only solution – or that we should place limitations on other tools and capabilities – is a misunderstanding of the complexity of the problem that we face.

Confronting this complex and constantly evolving threat does not lend itself to simple, straightforward solutions. No single tool alone is enough to protect the American people against this threat. We need to use all these tools, together. That is what the Obama Administration is doing. So, our counterterrorism efforts are guided by several core principles.

First, our highest priority is—and always will be—the safety and security of the American people. The United States Government has no greater responsibility.

Second, we will use every lawfully available tool at our disposal to keep the American people safe– military, intelligence, homeland security, law enforcement, diplomacy, and financial – at all levels of the government, working seamlessly.

Third, even as we are unyielding in pursuit of those who would do us harm, we will remain true to the values and ideals that have always defined us as a nation. Only by adhering to our values are we able to rally individuals, communities, and entire nations to the cause of protecting the world against the threat posed by al-Qa'ida.

Fourth, we will be pragmatic, not ideological—making decisions not on the basis of preconceived notions of which tool is perceived to be "stronger," but based on the evidence of what works—what will actually keep America safe.

Fifth, we must retain the necessary flexibility to address each threat in a way that best serves our national security interests. When confronting the diverse and evolving threat from al-Qa'ida and its adherents, different circumstances will call for different tools.

Guided by these principles, the administration has worked hard over the past two years to establish a counterterrorism framework that is effective and sustainable. This includes the two tools you have gathered to discuss today – law enforcement and intelligence.

The intersection of these two has at times become a subject of intense debate. But to draw the conclusion that the use of law enforcement tools prior to 9/11 somehow hindered our efforts to protect the American people, and that we should therefore abandon the use of law enforcement in this conflict, would be a mistake. In the aftermath of 9/11, the challenges we had to overcome to effectively confront the terrorist threat to this country proved to be much more complicated than ever before. As a result, much of what we have seen over the past 10 years has been an evolution – to find flexible and effective ways to leverage all of our capabilities to confront an evolving threat, including our law enforcement and our intelligence capabilities.

Law enforcement and intelligence are not mutually exclusive. In fact, they can and must reinforce one another. Intelligence is absolutely critical to identifying and disrupting terrorist networks. It empowers law enforcement, informing their operations and

enabling them to identify and disrupt plots before they are carried out. And intelligence often plays a critical role as evidence at criminal trials.

Law enforcement is equally indispensable. Through aggressive investigations, we have been able to identify members of terrorist networks and detect their plots. The tools available to law enforcement allow us to act swiftly to disrupt the plots we uncover, and to incapacitate dangerous individuals through successful prosecution and conviction. Law enforcement also has a well-proven track record of gathering vital intelligence through interrogation. When faced with the fair but heavy hand of American justice, terrorists have offered up valuable intelligence about al-Qa'ida and other terrorist groups.

Our challenge, therefore, has been to carefully integrate intelligence and law enforcement – consistent with our values and the rule of law – to ensure that they complement and reinforce each other.

After 9/11, our law enforcement and intelligence communities had to adapt, gain new tools and authorities, restructure, and change their cultures and operations. We updated and improved our criminal code to better empower law enforcement to disrupt plots before they take innocent lives. We eliminated the so-called "wall" to allow intelligence and law enforcement personnel to work together, a critical step toward better integration of our law enforcement and intelligence tools.

The USA Patriot Act and amendments to the Foreign Intelligence Surveillance Act provided our counterterrorism community with enhanced investigative authorities. We reorganized our intelligence, law enforcement, and CT communities to enable them to function more effectively as a whole. The Federal Bureau of Investigation has been further integrated into the Intelligence Community, and continues its transformation into an intelligence-driven organization.

Each of these steps has transformed law enforcement into a more effective counterterrorism tool, one that can be used preemptively – before an attack is attempted, before a bomb goes off. And because they remain bound by our laws and our Constitution, there will always be checks on the use of these law enforcement tools, to ensure they remain consistent with our laws and our values. As a result, today, we are better positioned to protect the American people.

That does not mean that our work is done. When it comes to the detention, interrogation and prosecution of suspected terrorists, our record is clear. Spanning two consecutive

administrations, we have successfully leveraged our criminal justice system to protect the American people against the threat from al-Qai'da. According to its own figures, the Bush Administration used federal courts to prosecute suspected terrorists – including several apprehended overseas – on hundreds of occasions, including Zacarias Moussaoui, Richard Reid, Ahmed Omar Abu Ali, Ehsanul Sadequee, Oussama Kassir, and many others.

Today, this impressive record of arrest and prosecution of terrorist suspects in federal court is, unfortunately, frequently forgotten, which has prompted a debate over how best to handle, prosecute and punish those accused of trying to attack our country. That debate has, at times, been conflated with another important and consequential debate that we are engaged in with respect to the future of Guantanamo.

And nowhere does the intersection of law enforcement and intelligence – not to mention our Constitution and our values – come together as starkly as it does in Guantanamo. Before 2009, few counterterrorism proposals garnered as much support on both sides of the political aisle – from Colin Powell to President Bush and John McCain – as the proposal to close Guantanamo.

This administration, for the first time, consolidated all information about the detainees held there, and departments and agencies identified the most appropriate disposition for each individual, and recommended that we bring several individuals to justice for their crimes. The administration remains committed to the closure of Guantanamo – to do what is in the national security interest of this country – and we have continued to move forward with key elements of our plan, including restarting military commissions and providing those who will continue to be held a thorough process of periodic review to ensure their detention is necessary and justified.

But support for closing Guantanamo has inexplicably waned, and some in Congress have sought to impose unprecedented restrictions on the President's discretion to transfer and prosecute the individuals held there.

Some have argued that all of these cases should be tried in military commissions, and have sought to bar the Executive Branch from prosecuting any Guantanamo detainees in our Article III courts.

Where we believe a military commission is appropriate, we will move forward. However, where the evidence suggests our federal courts are more likely to produce a result that is consistent with our national security, we will push Congress to repeal these

restrictions so that we can take the steps necessary to bring those individuals to justice. Repeal of these unprecedented encroachments on Executive authority is critical, so that we can make informed decisions about where to bring terrorists to justice, transfer those it is no longer in our interest to detain, and achieve an essential national security objective – the closure of the detention center at Guantanamo Bay.

Even as we deal responsibly with those in our custody, we face the challenge of dealing with those we capture or arrest in the future. When arresting terrorist suspects, we must balance at least four critical national security objectives. First, disrupt the terrorist-related activity of the individual, including ongoing plots to kill innocent people. Second, gather any intelligence the individual may have that could enable us to identify and disrupt additional plots against the United States and our allies. Third, protect the intelligence, including sources and methods, that allowed us to identify or disrupt that individual and his activities. Finally, where the individual poses an enduring threat – as is often the case in terrorism investigations – provide for the sustainable incapacitation of that individual.

There can, at times, be tension between these objectives, so our core principles and values must guide our every step. When confronted with the question of where to bring someone to justice, we cannot base our decisions on preconceived notions about which system is "stronger" or "more effective" in the abstract. The factual and legal complexities of each case, and relative strengths and weaknesses of each system, must guide our decisions to ensure success. Otherwise, dangerous terrorists could be set free – intelligence lost and lives put at risk.

Terrorists arrested inside the United States will, as always, be processed exclusively through our criminal justice system. As they should be. The alternative would be inconsistent with our values and our adherence to the rule of law. Our military does not patrol our streets or enforce our laws in this country. Nor should it. Every single suspected terrorist taken into custody on American soil—before and after the September 11th attacks—has first been taken into custody by law enforcement. Our criminal justice system provides all of the authority and flexibility we need to effectively combat terrorist threats within our borders. In the aftermath of 9/11, two individuals taken into custody by law enforcement were later transferred to military custody. And after extensive litigation and significant cost, both were transferred back to law enforcement custody and prosecuted.

Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are apprehended overseas or here at home, we will process them exclusively through

our criminal justice system. There is bipartisan agreement that U.S. citizens should not be tried by military commission. Since 2001, two U.S. citizens were held in military custody, and after years of controversy and extensive litigation, one was released; the other was prosecuted in federal court. Even as the number of U.S. citizens arrested for in terrorist-related activity has increased, our civilian courts have proven they are up to the job – providing all of the flexibility and authority we need to counter the threat they pose.

The United States cannot expect to detain its way out of this problem. Recreating another Guantanamo runs contrary to our national security interests. So, we must work with our partners to empower them to assist us in our efforts to bring terrorists to justice. In many cases, their home country, the country in which they are apprehended, or the country they seek to attack may have a similar interest – to arrest and prosecute them. Where our partners have the capability to do so, we often work with those countries to assist them in those efforts – by sharing evidence or making witnesses available – to ensure that our collective interests are protected. Where countries lack the capability to lawfully detain and prosecute terrorists, we must work with them to develop the capabilities to mitigate the threat these individuals pose to their people and ours. Our long-term security requires that they build and maintain the capacity to provide for their own security, to root out the al-Qai'da cancer that has manifested itself within their borders and to prevent it from returning.

Where other countries are unwilling or unable to eliminate the threat an individual or network poses, we will continue to act, consistent with our legal obligations, to eliminate the threat. Where we take custody of an individual, we will maintain appropriate policies and mechanisms to preserve our ability to bring that individual to justice – in our civilian courts and our reformed military commissions.

Our legal authority to use military commissions to prosecute terrorism suspects is not limited to Guantanamo, and we will not limit it to Guantanamo as a policy matter. We will reserve the right, where appropriate, to prosecute individuals we capture in the future in reformed military commissions.

Our federal courts are unrivaled when it comes to incapacitating dangerous terrorists. Since 2001, the Department of Justice has convicted hundreds of individuals in terrorism-related cases. In many cases, the individuals have received lengthy prison sentences, and have provided significant and valuable intelligence. Law enforcement, including our federal courts, has been an indispensible part of our strategy to protect the American people, essential to efforts to disrupt, dismantle and defeat al-Qa'ida and its adherents.

Where this option best protects the full range of U.S. security interests and the safety of the American people, we will not hesitate to use it.

This is not a radical idea. As former Attorney General John Ashcroft said, "Our priority should be a priority of preventing further terrorist attacks…" As he explained, "to automatically allocate people from one system to another without understanding what best achieves that priority would … be less than optimal."

Some argue that military commissions are inherently more effective and therefore more appropriate for trying suspected terrorists. Yet our federal courts are time tested, have resulted in far more detentions and convictions, and have produced much longer sentences on average than military commissions. In choosing between our federal courts and military commissions in any given case, this administration will remain focused on producing the right result.

Because of bipartisan efforts to ensure that military commissions provide all of the core protections that are necessary to ensure a fair trial, there are remarkable similarities between commissions and our federal courts. The reformed military commission system includes the attributes Americans believe are necessary to ensure a fair trial: presumption of innocence; proof beyond a reasonable doubt; an impartial decision maker; the right to counsel, including the right to choose your counsel; government-provided representation for those who cannot afford to pay; a right to be present during court proceedings; a right to exculpatory evidence; and a right to present evidence, compel witnesses and compel favorable witness testimony.

In 2009, Congress agreed to replace the original, untested system for protecting classified information in military commission proceedings. They did so by largely codifying the rules that have proven extremely effective in our federal courts – a testament to the strength of our federal courts in protecting intelligence and comfort that our commissions will do the same going forward.

In some cases, there are advantages to military commissions. There is greater flexibility to admit hearsay evidence. Confessions can be introduced in military commissions even if Miranda warnings were not issued, but they have to be reliable and, except in limited circumstances, voluntary.

Though others, such as the former Assistant Attorney General for National Security David Kris, have spoken eloquently about the relative merits of both system, the advantages of our federal courts often go under-appreciated. Our federal courts have a

significantly broader scope – a substantially longer list of offenses can be leveraged to prosecute terrorists regardless of the terrorist organization they belong to. Federal courts provide greater clarity and predictability; decades of experience prosecuting terrorists in this system allow us to predict with a greater degree of certainty the admissibility of evidence or even the likely outcome. Federal courts provide a greater degree of finality – the results of successful prosecutions are more sustainable because the validity of the offenses and the system as a whole are less susceptible to legal challenge. Finally, federal courts facilitate cooperation with our partners in bringing terrorists to justice – some of our most important allies will not hand over terrorists, or the evidence needed to convict them, unless we commit to only using it in our federal courts.

Because of the reforms passed by Congress, we succeeded in bringing the military commission system in line with the rule of law, and with our values. Today, both systems—the federal courts and military commissions—can be used to disrupt terrorists' plots and activities, to gather intelligence, and to incapacitate them through prosecution. But, we must let the facts and circumstances of each case determine which tool we use. That is the only way to ensure we achieve the result that best serves the safety and security of the American people.

As a former career intelligence professional, I understand the value of intelligence. And, when it comes to protecting the American people from al-Qa'ida and its adherents, intelligence is critical to identifying and disrupting their plots, as well as dismantling their network. One of our greatest sources of information about al-Qa'ida, its plans, and its intentions has been the members of its network who have been taken into custody by the United States and our partners overseas. Wherever possible, we must maintain a preference to take custody of terrorists, to preserve the opportunity to elicit information that is vital to the safety and security of the American people. Those who suggest that this administration has shied away from detention ignore the fact that, for a variety of reasons, reliance upon U.S. detention for individuals apprehended outside of Afghanistan and Iraq began declining precipitously years before this administration came into office.

After ten years of relentless pressure, our adversaries have become adept at avoiding areas where they are susceptible to capture – and into places where the ability of the U.S. to capture and detain them is limited.

Arguing that the decline in military detention or detention by the CIA results in a decline in intelligence also ignores the vital intelligence we gain from individuals in the criminal justice system. That is often a very difficult task, but in this case, the facts do not lie. In the past two years alone, our criminal justice system has proven to be an extremely

valuable intelligence collection tool. We have successfully interrogated several terrorism suspects who were taken into law enforcement custody and prosecuted, including Faisal Shahzad, Najibullah Zazi, David Headley, and many others.

Perhaps no single case has generated as much controversy as that of Umar Faruq Abdulmutallab, charged with attempting to blow up that plane over Detroit. I know that many argued that he should have been placed in military custody and that he should not have been given his Miranda warnings. But, the fact is that his arrest ultimately produced valuable information, and there's no reason to believe that placing him in military custody would have produced a better result from an intelligence collection perspective, or would have done so more quickly.

The flexibility and leverage that the criminal justice system provides to gather intelligence – before and after arrest, through proffers and plea agreements, and in some cases even after conviction or sentencing – is undeniable. So we have sought to empower our counterterrorism professionals to leverage the strengths of this system to gather critical intelligence.

And, where appropriate, we have made adjustments – to enhance our ability to collect intelligence through interrogation.

Consistent with our laws and our values, the President unequivocally banned torture and other abusive interrogation techniques, categorically rejecting false assertions that these are the most effective means of interrogation.

The President approved the creation of a High-Value Detainee Interrogation Group, or HIG, to integrate the most critical resources from across the government – experienced interrogators, subject matter experts, intelligence analysts, and linguists – to conduct or assist in the interrogation of those terrorists – both at home and overseas – with the greatest intelligence value. Through the HIG, we bring together the capabilities that are essential to effective interrogation, and have the ability to mobilize them quickly and in a coordinated fashion.

Some suggest getting terrorists to talk is as simple as withholding Miranda warnings. Assertions that Miranda warnings are inconsistent with intelligence collection ignores decades of experience to the contrary. Miranda warnings have not proven to be an impediment in most cases. Though some have refused to provide information in the criminal justice system, the same can be said of many held in military or intelligence custody from Afghanistan to Guantanamo.

But, Miranda warnings have, in several cases, been essential to our ability to keep dangerous individuals off the streets, as post-Miranda admissions have led to successful prosecutions and long-term prison sentences.

Rather than succumb to the false choice between intelligence collection and a sustainable disposition for the individual, we must make informed decisions, based on the evidence and the circumstances of each case, to maximize our intelligence collection and our ability to keep dangerous individuals behind bars.

Where our laws provide additional flexibility, we must empower our counterterrorism professionals to leverage it. The Supreme Court has recognized an exception to Miranda, allowing statements to be admitted if they are prompted by concerns about public safety. Applying that ruling to the more complex and diverse threat of international terrorism can be complicated, but our law enforcement officers deserve clarity. And that is why at the end of 2010, the FBI provided guidance to agents on use of the public safety exception to Miranda, explaining how it should apply to terrorism cases. The FBI has acknowledged that this exception was utilized last year, including during the questioning of Abdulmutallab and Faisal Shahzad. When the immediate threat to public safety was addressed, Miranda warnings were provided, and as the public now knows, intelligence collection did not end; it continued.

The evolution that began following the 9/11 attacks continues. Where possible, we should develop more effective and flexible tools, or strengthen the ones we have, to empower our counterterrorism professionals to succeed, while upholding the values and freedoms that make this country great. Combating terrorism requires a practical, flexible, results-driven approach that is consistent with our laws and our values. It is essential to our effectiveness, as well as our ability to sustain that strategy over time. Our criminal justice system, even though it is just one tool in this fight, embodies each of these things. Where it is available, it is, quite simply, one of the best counterterrorism tools we have to disrupt, dismantle, and defeat al-Qa'ida and its adherents. It has demonstrated unrivaled effectiveness, unquestioned legitimacy, and the flexibility to preserve and protect the full spectrum of our national security objectives.

A rigid approach to the custody, questioning, and prosecution of terrorist suspects, in contrast, would be ineffective, unnecessarily complicating our efforts to counter the complex and diverse threat from al-Qa'ida and its adherents and putting at risk the security of the American people. The Executive Branch, regardless of the administration in power, needs the flexibility to make well-informed decisions about how to handle terrorist suspects – based on the unique circumstances of each case and the advice of

experienced professionals. A one-size-fits-all policy in the area of detention and prosecution would be harmful to our national security.

To achieve and maintain the appropriate balance, Congress and the Executive Branch have to work together. There have been and will continue to be many opportunities to do so in a way that strengthens our ability to defeat al-Qa'ida and its adherents. As we so do, the Obama Administration will be guided by the principles I have laid out here today.

And finally, as we meet here today, a process of political transformation is underway in many parts of the Middle East, an area that I have focused on throughout most of my professional career. But even as I watch history being made in the Middle East, with the political landscape being changed in ways that were difficult to imagine just 2 or 3 months ago, I am mindful of how fortunate we are to live in a society where respect for rule of law and a set of universal rights and freedoms is the norm. And I am truly inspired by the determination and courage of those who pursue one of the most basic of those universal rights— the right to live in a society that respects the rule of law. If we have learned anything about ourselves and about our values in the period since 9/11, it is that respect for the rule of law is not something to be called upon only when it is easy or convenient. Rather, it is the very hallmark of our democracy and our social compact as a nation. I believe that we operate outside that framework and code at our own peril, and I am proud to represent a President, and an Administration and a Nation, that feel the same way.

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JULY 26, 2011

QUESTIONS SUBMITTED BY MR. CONAWAY

Mr. CONAWAY. As we draw down in Afghanistan and Iraq, the case of Ahmed Abdulkadir Warsame is an indication of how the U.S. Government will encounter terrorists in the future. In the case of Warsame, the U.S. military did not apprehend Warsame on the battlefields of Afghanistan or Iraq but instead in the Gulf of Aden on the coast of Africa. By all accounts, Warsame provided valuable intelligence information during his interrogations, but due to his terrorist connections, it was impossible for the U.S. military to simply let him go.

After intelligence-collection interrogations are over, what can the U.S. do with terrorist suspects who were detained outside of Iraq and Afghanistan?

If the U.S. and Guantanamo Bay are deemed unviable options, where can (should) these types of terrorist suspects be held as they await their trial by military commission?

Mr. MUKASEY. These two questions should be answered together and point up the usefulness of enhancing authorities under the AUMF. The AUMF, passed one week after the September 11 attack, authorized the President to use force against "those nations, organizations or persons" who "planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States" by such persons. Although the AUMF did not name either Al Qaeda or the Taliban, and did not specifically authorize detention, the Administrations of both President Bush and President Obama have operated on the assumption that the authority to wage war necessarily includes the power to detain captured enemy belligerents. Those belligerents have been encountered not only in Afghanistan but also in Iraq, Pakistan, Yemen and Somalia. As a practical matter, the return of sovereign control over Iraq to an Iraqi Government means that the only place where we have facilities to detain those belligerents other than in the United States or at Guantanamo Bay would seem to be at Bagram Air Base in Afghanistan, and that option will not continue indefinitely. If, as the question assumes, we rule out transfer to the United States or to Guantanamo, that leaves only the options of transfer to a third country, or release. The former would take out of our hands control over duration of confinement or conditions of confinement. Which is to say, it would put both our fate and the fate of those captured during the conflict in the hands of third parties, with no assurance that our interests would be served or our standards maintained. The alternative of freeing those captured is at least equally unsatisfactory, meaning as it does that detainees will be free to return to the fight against us. I believe the AUMF should be amended to provide the executive with specific authority to detain, but also with specific standards for determining when detainees must be held outside the United States and when it may be permissible to charge them in domestic courts.

Mr. CONAWAY. After intelligence-collection interrogations are over, what can the U.S. do with terrorist suspects who were detained outside of Iraq and Afghanistan?

Mr. DELL'ORTO. Under the Law of Armed Conflict, if an individual who is determined to be an enemy combatant is captured, he may be detained until the end of the conflict. In theory, he may be detained at the location at which he is captured, although he must be removed from the danger of ongoing hostilities. If we choose not to detain him at the location of capture, whether because of the logistical burden associated with maintaining him in a secure facility there or because the country in which he is detained objects to our doing so within its borders, or that country declines to detain him in one of its facilities under conditions acceptable to the U.S., the U.S. can move him to another country willing to detain him or move him to Guantanamo Bay.

Mr. CONAWAY. If the U.S. and Guantanamo Bay are deemed unviable options, where can (should) these types of terrorist suspects be held as they await their trial by military commission?

Mr. DELL'ORTO. If neither the U.S. nor Guantanamo is considered a viable option, the practical alternatives are extremely limited. As indicated above, the U.S. would have to identify a country that would be willing to detain the individual for us under conditions acceptable to the U.S. and that would be willing to transfer the

individual back to the U.S. for purposes of trial before a military commission. In my experience, very few countries would find themselves in a position to assist us in such a manner. First, few, if any, countries believe themselves to be at war with Al Qaeda or other similar terrorist entities and thus, would not be in a position to rely on the Law of Armed Conflict as a basis for detaining such an individual. Second, very few countries have broad enough domestic criminal legal regimes under which such an individual may be detained as a terrorist suspect. Lastly, still fewer countries, having agreed to detain such an individual, would agree to transfer the individual back to the U.S. for trial before a military commission. On those rare occasions in which a country captured and detained a terrorist suspect who could be tried in the U.S., that country would only agree to transfer the individual to the U.S. on the condition that he would not be tried before a military commission, but rather only in a U.S. civilian court.

Mr. CONAWAY. As we draw down in Afghanistan and Iraq, the case of Ahmed Abdulkadir Warsame is an indication of how the U.S. Government will encounter terrorists in the future. In the case of Warsame, the U.S. military did not apprehend Warsame on the battlefields of Afghanistan or Iraq but instead in the Gulf of Aden off the coast of Africa. By all accounts, Warsame provided valuable intelligence information during his interrogations, but due to his terrorist connections, it was impossible for the U.S. military to simply let him go.

After intelligence collection interrogations are over, what can the U.S. do with terrorist suspects who were detained outside of Iraq and Afghanistan?

Mr. CHESNEY. One option, not available in all cases, is to detain terrorism suspects in military custody under color of the law of armed conflict ("LOAC"), without criminal charge. This option by definition is available only where LOAC actually applies. There is, unfortunately, sharp dispute as to where if at all LOAC applies in connection with captures that occur outside of combat zones such as Afghanistan. One extreme in that debate holds that LOAC has no application whatsoever except in the geopolitical boundaries of states in which conventional combat is occurring. The other extreme holds that the LOAC applies wherever in the world one might find a person who has some kind of connection—membership, perhaps even independent support?—to a group that is in some fashion party to an armed conflict. In between, one finds positions such as the view that geography is irrelevant for leaders and other group members whose activities have an impact within the recognized war zone. For better or worse, few of the GTMO *habeas* cases have given courts occasion to weigh in on this issue in a manner that could settle it going forward. But there has been at least one such case: the detainees in the Boumediene litigation were originally captured in Bosnia, well away from any overt hostilities in Afghanistan, and the courts have thus far approved the military detention of one of them despite this geographic disconnect. In his case, the conduct making him eligible for detention had to do with efforts to recruit fighters for the combat zone.

Even if the military detention option is available for non-combat zone captures in some cases, however, that does not mean that it is available for just any terrorism suspect. The more remote the fact pattern is from Al Qaeda, the less likely it is that this option will be available. Nor is it an option for the executive branch to simply assert the authority in any event in dubious cases, at least not for the long term; it is more likely than not that a person in this fact pattern will be entitled to *habeas* review in a Federal court, no matter where they might be held.

In any event, criminal prosecution of course is a significant alternative. Military commissions are an option under this heading if and only if the individual comes within the scope of the personal jurisdiction provision of the Military Commissions Act of 2009. Under that statute, a commission has personal jurisdiction only over an "alien unprivileged enemy belligerent."[1] The MCA defines "unprivileged enemy belligerent," in turn, as a person who does not belong to any of the eight categories listed in Article 4 of the Third Geneva Convention—the categories defining eligibility for POW status in international armed conflict—and who:

(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of Al Qaeda at the time of the alleged offense under this chapter.

One can readily imagine Warsame-type fact patters that simply do not qualify under these standards, as well as situations (possibly like Warsame's own scenario) in which the task of producing evidence in court to satisfy these standards would require the Government to go public with intelligence that it would much prefer to keep secret.

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[1] Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948c.

And then there is the option of a civilian criminal trial. The question here is not one of "personal jurisdiction," but simply whether the person has in fact committed a Federal crime. There are, as it happens, a great many Federal crimes relating to terrorism that are now applicable to noncitizens acting abroad, including both the 1994 and the 1996 material support statutes.

*For a period in 2009 I served as an advisor to the Detention Policy Task Force, established under Executive Order 13493. I write solely in my personal capacity, of course, and nothing said here should be taken to reflect the views of that Task Force or any other person or department.

Mr. CONAWAY. If the U.S. and Guantanamo Bay are deemed unviable options, where can (should) these types of terrorist suspects be held as they away their trial by military commission?

Mr. CHESNEY. If we begin from the premise that neither the United States nor GTMO may be used as the location for detention (of whatever variety), the options are slim.

Option 1 is to attempt to bring the individual to Afghanistan. There are several problems with this. First, it is not as if we have complete discretion to bring persons from abroad into custody in Afghanistan. A combination of diplomatic and other considerations may forbid this in actual practice in some cases. Second, our detention facilities in Afghanistan are no more likely to be permanent than were the facilities we used to run in Iraq; even if you can use this option this year, in short, you probably will not have the option two or three years from now, at which point you must find an alternative after all.

Option 2 is to keep the individual aboard ship. As explained in my original testimony, this is a controversial measure to say the least, and would certainly not be lawful in an international armed conflict. The law is much less determinate on this question with respect to non-international armed conflicts, though I am confident that there would be fierce criticism on both policy and legal grounds were this to be attempted for more than temporary detention purposes.

There are no other obvious options if U.S.-based and GTMO-based detention are excluded, except perhaps temporary custody in the hands of a cooperative third-party state.

QUESTIONS SUBMITTED BY MR. SMITH

Mr. SMITH. Please discuss how *habeas* case law impacts authorities of AUMF, including targeting.

Mr. MUKASEY. Habeas case law, insofar as it deals with prisoners detained in connection with operations against those engaged in terrorist activities against the United States, necessarily has the effect of defining who may and who may not be detained under the authority of the AUMF. However, in doing so, such cases necessarily define the substantive reach of the AUMF itself, and thus not only who may be detained but also who may be the object of military action. Thus a case intended to deal only with whether a particular person may be detained may determine that that person is outside the reach of the AUMF because he has not been shown to receive direction from one of the groups involved in the 9/11 attacks or to provide significant support for such a group. Yet in the absence of other authority, lawyers may look to such a case when they are trying to determine whether it is lawful to target particular people when there is no way to make such a determination before an engagement.

Mr. SMITH. Please discuss the pros and cons with holding Article III proceedings at Guantanamo Bay.

Mr. MUKASEY. In my view, there are many cons and virtually no pros. As to crimes committed within the United States, Article III requires that prosecutions be tried in the district where the crime was committed, in whole or in part. As to crimes committed outside the United States that may nonetheless be prosecuted in an Article III court, there is no legislation designating Guantanamo as a place of holding court in any district in this country. Even if there were, one would then have to transport a jury from a district in this country to Guantanamo, and house them there possibly for months while maintaining their anonymity (lest they or their families be subject to reprisals) and preserving their impartiality. In order to select the jury, one presumably would have to transport a sizeable venire of potential jurors, unless the defendants are not permitted to attend jury selection or to attend only by remote electronic hook-up. It is simply not feasible.

Guantanamo is remote, secure and humane. Those are the things it has going for it. But it is simply not suitable as a place for convening an Article III court absent additional legislation and serious obstacles to the process.

Mr. SMITH. In your opinion, are there any remaining gaps in the legal framework for detainees? If so, please describe these gaps and your recommendations for filling them.

Mr. MUKASEY. I believe the principal gap is that we lack legislation the provides specific authorization to detain people who are intent on waging war against this country, with guidelines for who should be detained, where, and with what safeguards to assure that continued detention is necessary. Instead, we leave such decisions to the military and other executive agencies in the first instance, and to the courts when cases are brought by detainees. This means that we run the risk of inconsistent decisions made by people who do not have the political competence or indeed the actual competence to make them, with the possibility that people who should be detained will instead be released to rejoin the fight against us.

Mr. SMITH. Please provide any additional thoughts or information that you were not able to share with the committee during the hearing as well as any other points you would like to clarify.

Mr. MUKASEY. Perhaps the main thought I was not able to share lies somewhat beyond the jurisdiction of the committee. I believe that faced with a binary choice between military commissions and Article III courts, we should try cases involving activity abroad almost exclusively before military commissions, and give them the resources and support they need to fulfill their mandate. But I think we may question whether military commissions are suited to carry this burden for the long term. We have used military commissions throughout our history, but only episodically rather than over a long period. Running a parallel justice system is not the principal mission of the military, which is there to win wars. I think we should consider creating a national security court to handle these cases with procedures that are flexible and streamlined enough to deal with the conditions of battlefield capture that do not allow for the kind of evidence gathering we require in Article III courts and yet rigorous enough to handle cases in a way that warrants respect for the outcome.

Mr. SMITH. Please discuss the pros and cons with holding Article III proceedings at Guantanamo Bay.

Mr. DELL'ORTO. I must preface my answer by stating that I do not know that such a proceeding could be held at Guantanamo Bay under the law. I defer to Judge Mukasey and the views he expressed at the hearing about whether an Article III court could be empowered to sit at Guantanamo Bay under the Constitution. In responding to the question, I will assume for the sake of the answer that an Article III court with appropriate jurisdiction could sit at Guantanamo Bay. Among the pros would be the avoidance of the controversy, both international and domestic, regarding the military commission as the appropriate forum for terrorism-related criminal trials. Moreover, the full resources of the Department of Justice would be brought to bear in the prosecution of the defendants. As for cons, the Federal Rules of Evidence, which would govern in an Article III proceeding are much more restrictive regarding the admissibility of evidence than those rules of evidence formulated for use in a military commission. The risk that crucial, credible evidence might not be placed before the finder of fact in an Article III proceeding because of exclusionary rules designed to deter police misconduct, but never designed with a view to application on a battlefield, is unacceptable to me and terribly unfair to the victims of the acts that would be subject of the trials. Those sitting in judgment as jurors, unlike in a military commission, would be ordinary citizens unversed in the significant and unique aspects of the conduct of warfare that is at the heart of the crimes for which the defendants would be charged. Should our current conflict end and we find ourselves in a future, more conventional, conflict against a nation state and its armed forces, as was the case in World War II, we would face the argument that the heretofore historically significant and successfully conducted military commission would be an inappropriate forum for the trial of war criminals and thus only an Article III proceeding could be utilized.

Mr. SMITH. In your opinion, are there any remaining gaps in the legal framework for detainees? If so, please describe these gaps and your recommendations for how best to address them.

Mr. DELL'ORTO. I believe that the Law of Armed Conflict provides a strong framework for addressing many of the legal issues related to detainees, both prior to and after their capture. The one gap that does exist under that framework is what becomes of the detainees at the end of the conflict. In recent conflicts, an end of hostilities signaled an end of the authority for detention of those captured on the battlefield. The end of hostilities meant just that and it was understood that each side to the conflict would agree that the conflict had ended and would assert control over its nationals so as to ensure that hostilities were, indeed, concluded. Given the unprecedented nature of the current conflict, it is difficult to envision a "typical" sign

that hostilities have been concluded. There will be no nation and no government to which to turn with the expectation that someone or some authority will direct that those we have detained are to return to their farms, fields and factories with the understanding that their wartime service is now concluded and they will no longer bear arms against a recent enemy. The fact is that we currently detain significant numbers of individuals who have affirmatively signaled that they have no intention of giving up the fight, regardless of what any Al Qaeda "leader" might ever do in the way of affirmatively indicating that Al Qaeda's war against the United States is concluded. Faced with a population over which no nation and no government would have control, the U.S. cannot just turn this population loose, and yet at the pace at which we are now killing off Al Qaeda leadership, there may come a time when we no longer face an organized enemy, a point at which we conclude that hostilities have ended. To the best of my knowledge, there is no existing legal framework under which we would have the authority to continue to detain individuals who would pose a continuing threat. The one solution I propose for addressing this gap is the statutory formation of a national security court, perhaps along the lines of the Foreign Intelligence Surveillance Act Court, which would have jurisdiction over the determination of whether there should be continued detention of such individuals under an objective standard.

Mr. SMITH. Please provide any additional thoughts or information that you were not able to share with the committee during the hearing, as well as any other points you would like to clarify.

Mr. DELL'ORTO. As I stated in my statement to the Committee, I had the privilege of serving as an active duty Army officer for more than twenty-seven years and as a senior civilian attorney in the Department of Defense Office of General Counsel for nine years, including during the period immediately before, on, and after September 11, 2001. To the extent that I provided legal advice on many of the issues under consideration by the Committee, including interpretation of the authority provided by the original Authorization for the Use of Military Force, the development of the military commission framework, the decision to establish the detention facilities at Guantanamo, the review of interrogation techniques, and a host of other critical issues associated with our current conflict, I continue to believe that the decisions made to address those issues were sound and have withstood the test of time and unceasing legal challenge. I continue to believe that Guantanamo is the best location for continued detention of those we have captured, regardless of location of capture, in the war against Al Qaeda and its various affiliates. I continue to believe that a military commission at Guantanamo is the appropriate forum for the trial of those enemy combatants charged with violations of the law of armed conflict. And I continue to believe that we should ensure that commanders, from the President down to the most junior squad leader, have as much authority as possible to carry the fight to the enemy.

Mr. SMITH. Please discuss how *habeas* case law impacts authorities under the AUMF, including targeting.

Mr. CHESNEY. Much of the GMTO *habeas* caselaw concerns either the process of the *habeas* proceedings themselves or the sufficiency of the evidence in particular cases. But there also are opinions that speak directly to the interpretation of the AUMF. Specifically, there are cases that address which groups fall within the scope of the AUMF, and also what conduct or associations suffice to render a particular individual so connected to an AUMF-covered group as to make the AUMF relevant for that person.

The interesting question this raises is whether these holdings have an impact on other activities, unrelated to GTMO, that the U.S. Government undertakes under color of the AUMF. The possibilities include both detention and the use of lethal force, whether in Afghanistan or anywhere else in which an AUMF-related target might become the target of an attempted capture or a lethal strike. In theory, this caselaw should indeed matter for judge advocates and other Government attorneys who may be in the position of advising military or civilian officials on the legal boundaries of detention and targeting authority in such circumstances. If a Federal court has held in any context that the AUMF does or does not reach some particular group, or does or does not encompass some particular individual fact pattern, this could hardly be dismissed as irrelevant when the exact same question arises in the field; the fact that this other circumstances is not likely to come up for *habeas* review does not change this, though of course it impacts the likelihood that an outside authority will step in to impose checks on the Government's course of action. Having said all that, I'm not in a position to say whether this theoretical point is observed in actual practice.

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Mr. SMITH. Please discuss the pros and cons with holding Article III proceedings at Guantanamo Bay.

Mr. CHESNEY. The primary advantages of holding a civilian criminal trial at GTMO are that it would (i) pose less risk that a detainee upon acquittal or release from custody would succeed in litigation challenging that person's removal to their country of origin or some other country, and (ii) spare communities in the United States from whatever expenses, disruptions, and security risks might follow from convening various trials on the mainland. The primary disadvantages are that (i) the choice of the GTMO location would, fairly or not, tarnish the perception of legitimacy that otherwise would attach to the prosecution (though not necessarily a great deal), (ii) difficult question would arise with respect to impaneling a jury (though not necessarily insurmountable ones, as there is a sizeable community living at GTMO and it is not automatically the case that all or even most residents would be disqualified from service), and (iii) this presumably would require creation of a new Federal judgeship and, hence, the "mother of all confirmation hearings" as I put it during my spoken testimony.

Mr. SMITH. In your opinion, are there any remaining gaps in the legal framework for detainees? If so, please describe those gaps and your recommendations for how best to address them.

Mr. CHESNEY. I'm not sure if this qualifies as a gap, but I do think that Congress has created a significant obstacle to the use of military detention in the conflict with Al Qaeda insofar by imposing such sweeping constraints on the ability of the President to transfer detainees away from GTMO when circumstances warrant. Combined with the lack of plausible long-term detention options, this discourages reliance on captures, and instead creates incentives to merely monitor as best as can be done, to plead for action by third countries, or to use lethal force where that is a lawful alternative.

Separately, Congress needs to anticipate the likely withdrawal of American forces from Afghanistan at some point in the next few years. Once U.S. forces are no longer engaged in sustained combat operations that at least somewhat relate to Al Qaeda, some will argue that there is no longer any foundation for treating the law of armed conflict as applicable vis-a-vis Al Qaeda, the Taliban, and associated forces—and hence that GTMO detention no longer has a legal basis. This argument may or may not prevail, but one can be certain that it will be raised through a new round of *habeas* petitions, and it has some chance of succeeding. If Congress actually wishes for the currently-existing scope of detention authority to continue to exist without respect to the status of our Afghanistan deployment, it should not simply wait for these arguments to develop and then hope that judges take one particular view on a sharply-contested question. Instead, it should directly and explicitly legislate the authority it wishes for the President to have—i.e., it should provide the requisite detention authority as a matter of domestic law, making clear the grant of this authority rather than hoping for it to be implied via contested claims regarding background principles of the law of armed conflict.

Mr. SMITH. Please provide any additional thoughts or information that you were not able to share with the committee during the hearing, as well as any other points you would like to clarify.

Mr. CHESNEY. I have no further thoughts to share at this time, except to reemphasize my bottom-line: the goal should be to maximize the array of lawful and legitimate options available to the President to employ in particular cases based on the advice of military, intelligence, and law-enforcement professionals.

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