S. HRG. 111–563

PROSECUTING TERRORISTS; CIVILIAN AND MILITARY TRIALS FOR GTMO AND BEYOND

HEARING

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

JULY 28, 2009

Serial No. J–111–40

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

57–711 PDF WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

VerDate Nov 24 2008 08:21 Aug 13, 2010 Jkt 057711 PO 00000 Frm 00001 Fmt 5011 Sfmt 5011 S:\GPO\HEARINGS\57711.TXT SJUD1 PsN: CMORC

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PROSECUTING TERRORISTS; CIVILIAN AND MILITARY TRIALS FOR GTMO AND BEYOND

TUESDAY, JULY 28, 2009

U.S. SENATE,
SUBCOMMITTEE ON TERRORISM AND HOMELAND SECURITY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:41 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Benjamin L. Cardin, Chairman of the Subcommittee, presiding.

Present: Senators Cardin, Feingold, Durbin, Whitehouse, Kaufman, Sessions, Hatch, and Kyl.

OPENING STATEMENT OF HON. BENJAMIN L. CARDIN, A U.S. SENATOR FROM THE STATE OF MARYLAND

Chairman CARDIN. The Subcommittee will come to order. I want to apologize for being a few minutes late. Our caucus lunches ran a little bit late, and then we had a vote on the Senate Foreign Relations Committee that I had to attend on some nominee. So I apologize to our witnesses for starting a few minutes late.

Shortly after taking office, President Obama ordered the closure of the Guantanamo Bay detention facility within a year. I commended President Obama at the time for ordering the closure of the detention center. President Obama is sending a clear message to the world that we are reestablishing the rule of law in the United States, and that we as a Nation will abide by our own international obligations.

As the Chairman of the United States Helsinki Commission, no other concern has been raised with the United States delegation by our colleagues in Europe as often—and as in earnest—as the situation in Guantanamo Bay. As a Member of the House of Representatives in 2006, I voted against the Military Commissions Act. At the time, I stated that I believed it was not sound legislation, and I thought it was susceptible to challenge in the courts. The legislation set up the flawed system of tribunals in Guantanamo Bay that ultimately was rejected by the Supreme Court.

Let me make this very clear. I want the U.S. Government to bring terrorist suspects to justice quickly and effectively. We must remain vigilant against the terrorist attacks on our Nation on September 11, 2001. But the system we use must meet fundamental and basic rule-of-law standards. Americans have a right to expect this under the Constitution, and our Federal courts will demand it when reviewing a conviction. We would, of course, expect other nations to use a system that provides no less protection for Americans

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that are accused of committing crimes abroad and are called before foreign courts.

This May, President Obama classified the remaining Guantanamo detainees into five categories. Today's hearing will focus on the first two categories: first, detainees who have violated American criminal laws and can be tried in Federal courts, our Article III courts; and, second, detainees who violate the laws of war and can be tried through military commissions.

I understand that the Detention Policy Task Force, under the guidance of the Departments of Justice and Defense, has extended its work for an additional 6 months in order to issue a comprehensive final report and recommendations.

Last week, the task force issued a preliminary report, along with a protocol for the determination of Guantanamo cases referred for prosecution. This protocol lays out factors that the Departments of Justice and Defense will consider in deciding whether to try a case in an Article III court or in a reformed military commission. The protocol states that "there is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with the traditions principles of Federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there."

I might point out that the Senate did enact an amendment to the Department of Defense authorization bill which may not be totally consistent with the position which the administration has taken.

We do have two distinguished panels of witnesses to today to help us in our deliberations, and I look forward to their testimony.

At this point, I would recognize the Republican leader on this Committee, Senator Kyl.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman, and I, too, thank all of the witnesses for being here and presenting testimony today.

We are going to hear testimony of several witnesses on the extent to which military commissions should be used in the prosecution of terrorists presently detained at Guantanamo. Before they testify, however, I think it is important to recall that military commissions have a long history in this country precisely because it is widely recognized that procedures governing civilian criminal trials lack the flexibility that is frequently needed to deal appropriately with the unique circumstances presented in war. These include issues regarding the admissibility of hearsay evidence obtained on the battlefield and the protection of classified information. Military commissions can provide a workable solution to these issues while still providing the accused with a fair trial.

Opponents of military commissions like to point out that we have successfully convicted terrorists in civilian courts, such as Omar Abdul Rahman, the so-called Blind Sheikh. But rather than approve the adequacy of civilian courts for terrorist prosecutions, these cases actually highlight the national security risks inherent in prosecuting terrorists as if they were common criminals.

In the case of Mr. Rahman, for example, intelligence information was compromised when the Government was forced to turn over to the defense a list of unindicted co-conspirators, as required in civilian prosecutions. According to the 9/11 Commission's final report, the release of that list had the unintended consequence of alerting some al Qaeda members to the U.S. Government's interest in them. Similarly, Judge Mukasey, who presided over several terrorist prosecutions, has described how our national security interests were compromised in the prosecution of Ramzi Yousef when, and I am quoting now, "an apparently innocuous bit of testimony in a public courtroom about delivery of a cell phone battery was enough to tip off terrorists still at large that one of their communication links had been compromised."

But he goes on to say, "This communication link had provided enormously valuable intelligence, but as a result of the public testimony, the link was immediately shut down and further intelligence information lost."

Cognizant of these serious national security concerns, Congress has in a bipartisan fashion repeatedly ratified its support for military commissions. Indeed, just last week, as the Chairman noted, the Senate passed an amendment to the National Defense Authorization Act that once again stated that military commissions were the preferred forum of the trial of terrorists.

In light of the significant national security risks associated with civilian prosecution of terrorists and the oft-repeated support of military commissions by Congress, I am deeply troubled that the Obama Justice Department's July 20 protocol for Guantanamo case adopts a presumption that terrorism cases will be prosecuted in civilian courts. In my view, the Justice Department's July 20 policy puts Americans at risk unnecessarily. Military commissions have been used for over two centuries to bring justice to war criminals, and they have done so in a way that is fair to the accused.

More troubling than what we heard from the Justice Department on July 20, however, is what we did not hear. President Obama has issued an arbitrary deadline for closing Guantanamo by January 22, 2010, less than 6-months from now. But, thus far, we know precious little about how he intends to do it. I would hope perhaps at this hearing, which the Chairman initially entitled "Closing Guantanamo: The Path Forward Under the Rule of Law," might provide an opportunity for the administration to lay out its plan. Apparently, however, administration officials are not ready to talk about the plan, if one exists.

I would add that the Justice Department has been unwilling to fulfill even the simplest requests for information. For example, I sent a letter to Attorney General Holder on May 29, 2009, asking for details regarding the terrorists who are currently imprisoned in the United States. I reiterated my request during the Attorney General's oversight hearing before this Committee on June 17th, but still have not received a response from the Justice Department.

It is clear to even the most casual observer that the administration will either need to push back its arbitrary deadline for closing Guantanamo or bring those presently detained at Guantanamo to the United States. Bringing the detainees to the United States could, of course, substantially curtail the range of options available

to detain and prosecute suspected terrorists. It could also mean that detainees who are not convicted will be ordered released into our country. This is understandably of concern to all Americans, especially since the Pentagon believes that more than 70 previously released Guantanamo detainees have resurfaced on the battlefield. We, therefore, need to know whether the administration intends to bring Guantanamo detainees into the United States before we can have an informed debate on prosecution alternatives.

Finally, I would note that any plan to bring detainees into the United States would likely require congressional action. It is, therefore, critical that the administration devise a plan and share it with the Congress as soon as possible while there are still sufficient legislative days to fully consider and debate the available options by the President's self-imposed deadline.

Chairman CARDIN. Thank you, Senator Kyl.

Senator Durbin has requested an opportunity to give an opening statement as Chairman of the Human Rights Subcommittee. Without objection, Senator Durbin is recognized.

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman.

I think what you have just heard articulated by my colleague Senator Kyl is a point of view that has been expressed many times on the floor of the Senate, and it can be summarized very simply: When it comes to terrorists, American courts cannot try them and American jails cannot hold them.

I could not disagree more. Any discussion of prosecuting suspected terrorists held at Guantanamo should begin with an examination of the facts. For 7 long years, the Bush administration failed to convict any of the terrorists who planned the 9/11 terrorist attack, and for 7 long years, only three individuals—three—were convicted by military commissions at Guantanamo Bay.

In contrast, look at the record of our criminal justice system in holding terrorists accountable. Richard Zabel and James Benjamin, two former Federal prosecutors with extensive experience, published a detailed study on prosecuting terrorists in America's courts, our Federal courts. Here is what they concluded: From 9/11 until the end of 2007, 145 terrorists have been convicted and sentenced for their crimes. And according to the Justice Department, in just the last 5 months, since January 1, 2009, more than 30 terrorists have been successfully prosecuted or sentenced in Federal courts.

To argue that American courts cannot prosecute terrorists? Look at the facts. We not only have done it in the past; we are doing it now. And this argument that we are somehow at risk when we try these terrorists of disclosing sensitive classified information, this goes back to a case that was prosecuted involving the 1993 World Trade Center, where the prosecutors failed to use CIPA, the Classified Information Procedures Act. According to these same individuals I mentioned earlier, the Government did not invoke CIPA to prevent the disclosure of a list of unindicted co-conspirators.

But the Government has learned from this case, and in later terrorism prosecutions, like the trial of the 1998 embassy bombers,

the Government did use CIPA to protect sensitive information. The law is there. It can be used. Terrorists can still be prosecuted.

Now, last month, the Obama administration transferred Ahmed Ghailani to the United States to be prosecuted for his involvement in the 1998 bombings of our embassies in Kenya and Tanzania which killed 224 people, including 12 Americans. Indeed, here is what the President said about Ghailani: "Preventing this detainee from coming to our shores would prevent his trial and conviction for killing 12 Americans. And after over a decade," the President said, "it is time to finally see that justice is served. That is what we intend to do."

Some Members of Congress have a different perspective. Recently, a Member of the House Republican leadership, Mr. Cantor, criticized the decision to bring Ghailani to trial. He said, and I quote, "We have no judicial precedents for the conviction of someone like this."

The truth is there are many precedents. Let me name a few: Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing; Omar Abdul Rahman, the so-called Blind Sheikh; Richard Reid, the Shoe Bomber; and Zacarias Moussaoui. In fact, there is a precedent for prosecuting in U.S. courts the terrorists who were involved in bombing those embassies. This is the very same attack for which Ghailani is now being prosecuted.

In 2001, four men were sentenced to life without parole at the Federal courthouse in Lower Manhattan, the very same court where Ghailani is being tried. The argument that we cannot prosecute him in that court, the argument that it is somehow unsafe to the people of New York City for him to be incarcerated while he is being tried really just defies history.

Susan Hirsch, an American citizen, lost her husband in Kenya at the embassy bombing. She testified at the sentencing hearing for the four terrorists who were convicted. She supports the Obama administration's decision to prosecute Ghailani. She said, and I quote, "I am relieved we are finally moving forward. It is really, really important to me that anyone we have in custody accused of acts related to the death of my husband and others be held accountable for what they have done."

Mrs. Hirsch supports closing Guantanamo. Some of the people who are speaking do not. They have made that very clear. She believes it is safe to try Ahmed Ghailani in the United States. She said, "I trust the New York Police Department."

Listen to what she said about the critics of the administration. "They are just raising fear and alarm. There is a lot more to be afraid of when we have Guantanamo open." I agree with her. I have faith in the New York Police Department. I have faith in our law enforcement agencies. I have faith in our court system. They have proven time and again they can rise to this challenge.

Some of my colleagues on the other side argue that we should continue to not prosecute Guantanamo detainees in our courts because no prison in America can safely hold them. Remember that flap? Remember that dust-up as to whether or not terrorists could be successfully incarcerated, securely held in the United States?

Senator Lindsey Graham, our colleague on the Judiciary Committee, also a military lawyer, said, and I quote, "The idea we can-

not find a place to securely house 250-plus detainees within the United States is not rational."

The record is clear. Today our Federal prisons hold 355 convicted terrorists. No prisoner has ever escaped from a Federal supermaximum security facility. Clearly, our corrections officers know how to hold terrorists.

I recently visited the Marion Federal prison, which used to be our supermax, in southern Illinois, and I can tell you what the guards told me: "You can bring any terrorist here that you want. We are holding terrorists today. We can hold them safely and securely." And the mayor of Marion, Illinois, said, "I hope you will allow us to expand this prison. We can do our job for America, as we have done for so many years."

So let us get to the bottom line. If we do not bring suspected terrorists to this country to be prosecuted and detained, it is almost impossible to close Guantanamo, and that is really what this argument is all about. Who wants to close Guantanamo? Not just the President of the United States, but General Colin Powell, the former Chairman of the Joint Chiefs of Staff and Secretary of State under President Bush, has called for closing Guantanamo, as has Republican Senators John McCain and Lindsey Graham; former Republican Secretaries of State James Baker, Henry Kissinger, and Condoleezza Rice; Defense Secretary Robert Gates; Admiral Mike Mullen, and General David Petraeus—all have called for us to close Guantanamo. They understand that as long as it is open, it is a recruiting tool for terrorists around the world.

It is time for us to turn the page and acknowledge history. We have successfully prosecuted and incarcerated terrorists in the United States much more successfully than we have been able to do with any military commission at Guantanamo.

I yield.

Chairman CARDIN. Let me introduce our first panel of administration witnesses from the Department of Justice and Department of Defense. I will introduce them first, and then I will ask you to rise to take the oath.

Our first witness is David Kris, who was sworn in as an Assistant Attorney General for National Security on March 25, 2009. He has worked in both the public and private sectors. He served in the Department of Justice from 1992 to 2003. As an Associate Deputy Attorney General from July 2000 to May 2003, Mr. Kris' work focused on national security issues, including supervising the Government's use of FISA, representing the Department on the National Security Council, and assisting the Attorney General conducting oversight of the intelligence community.

Our second witness is Jeh Charles Johnson, who was appointed the General Counsel of the Department of Defense on February 10, 2009, following nomination and confirmation by the U.S. Senate. In this capacity, he serves as the chief legal officer of the Department and the legal adviser to the Secretary of Defense. Mr. Johnson's legal career has been a mixture of private practice and distinguished public service. Mr. Johnson began his career in public service as an Assistant United States Attorney in the Southern Division of New York, where he prosecuted public corruption cases between 1989 and 1991.

Gentlemen, if you would please stand? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. KRIS. I do.

Mr. JOHNSON. I do.

Chairman CARDIN. Thank you. Please have a seat.

Mr. Kris, we would like to hear from you.

STATEMENT OF DAVID KRIS, ASSISTANT ATTORNEY GENERAL, NATIONAL SECURITY DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. KRIS. Thank you. Mr. Chairman, Senator Kyl, and members of the Committee, thank you for inviting me to testify.

Federal prosecution in Article III courts can be an effective method of protecting national security, consistent with fundamental due process and the rule of law. In the 1990s, I prosecuted a group of violent anti-government extremists. Like their more modern counterparts, they engaged in what would now be called "law-fare," and the trials were very challenging. But prosecution succeeded not only because it incarcerated these defendants, but also because it deprived them of any legitimacy for their anti-government beliefs.

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

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

Now, as the Committee knows, a task force established by the President is actively reviewing each of the detainees now held at Guantanamo Bay. And although I cannot refer to precise numbers, a significant number of cases have been referred for possible prosecution. Those cases will be reviewed and worked up by joint teams of officials from DOJ and DOD using a protocol issued jointly by DOJ and DOD that we have released publicly and to which Senator Cardin referred in his opening remarks.

Under the protocol, there is a presumption, where feasible, that referred cases will be prosecuted in Federal court, but that presumption can be overcome if other compelling factors make it more appropriate to prosecute in a commission.

There are three main groups of factors identified in the protocol that resemble the factors that govern forum selection by DOJ prosecutors every day, whether the choice is between Federal and State court, U.S. courts and foreign courts, or civilian courts and traditional military courts martial.

Perhaps the most important point about the protocol is that it avoids too many abstract, bright-line rules. It recognizes the existence of two prosecution fora—both effective, both legitimate—and provides that the choice between them needs to be made by professionals looking closely at the facts of each case, using flexible criteria established by policymakers. That flexibility, we submit, is

the most effective way to defeat the adversary consistent with our core values.

I would be pleased to answer your questions. Thank you.

[The prepared statement of Mr. Kris appears as a submission for the record.]

Chairman CARDIN. Thank you very much.

Mr. Johnson.

STATEMENT OF JEH C. JOHNSON, GENERAL COUNSEL, DEPARTMENT OF DEFENSE, ARLINGTON, VIRGINIA

Mr. JOHNSON. Thank you. You have my prepared written statement. I would like to make, consistent with that statement, a few observations.

I want to thank the Senate for taking the initiative at reform of military commissions, various provisions to amend the Military Commissions Act of 2006. As I said in my prepared remarks, we in the administration think that the Senate has identified the issues for reform, and we have worked with the Senate Armed Services Committee to further amend the law.

Since the bill was reported out of Committee on June 25th, the Department of Justice and we in the Department of Defense were happy that the language was amended to more closely reflect the Classified Information Procedures Act so that classified information in military commissions prosecutions is treated in a manner similar to the way in which it is treated in Federal civilian courts.

As was noted, we in the Department of Defense and the Department of Justice have negotiated and agreed to a protocol for determining where cases should be prosecuted. As Mr. Kris noted, the operative language is that there is a presumption that, where feasible, cases should be prosecuted in an Article III court. And then there are three sets of factors for the consideration of that issue.

The one thing that I can say in my experience as a public servant and as a former prosecutor, my prediction—and I say this with some confidence—is that as we go through these cases and we make these assessments, in all likelihood we are going to end up doing this on a case-by-case basis looking at the evidence, making the assessments case by case. With the protocol in place, I am sure that is going to be done carefully.

The review is under way of each detainee that the President mandated in his Executive order. The Detention Policy Task Force is busy at work, and I just want to add to what was said before by noting that a bipartisan cross-section of distinguished Americans has called for the closure of the Guantanamo Bay detention facility and has done so for a period of years, not just as a matter of symbolism but as a matter of promoting our national security.

We know that al Qaeda needs and uses bumper sticker messages for recruitment tools, and Guantanamo Bay for years has been one of them. There are public accounts of bin Laden himself citing Guantanamo Bay as a recruitment tool.

This administration has imposed a deadline for closing Guantanamo Bay. We all know that bureaucracies work best with a deadline. In his second full day in office, this President imposed a deadline on us for closing Guantanamo Bay. We remain committed to

meeting that deadline, and we are confident that we will get the job done.

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

[The prepared statement of Mr. Johnson appears as a submission for the record.]

Chairman CARDIN. Well, thank you.

First, let me say what I said in my introduction. I commend the President for his announcements on the closing, the intended closing of Guantanamo Bay. I have been representing our Nation in many international meetings, and Guantanamo Bay has been a very sore spot, and legitimately so, by our friends around the world as to the manner in which Guantanamo Bay has been handled.

And I share Senator Durbin's confidence that our Article III courts can handle the prosecution of those that we intend to hold criminally responsible for their actions.

I want to first start, if I might. Mr. Kris, you did not give us any numbers because you said that you are starting the process. But can you just give us what you anticipate to be perhaps the percentages that we prosecute, that we want to take to criminal responsibility either in Article III courts or in military commissions? How many of that percentage-wise would you anticipate would be tried in our Article III courts and how many would you anticipate would be handled by military commissions?

Mr. KRIS. That is a difficult question to answer for the reasons that Mr. Johnson and I both articulated, which is that under the protocol and under the approach that we intend to take here, we are going to evaluate these cases one at a time in a very fact-intensive way under the criteria that are set out in the protocol. So it is very difficult as a result of that approach to make statistical predictions about how they are going to shake out.

I think the basic idea behind this protocol is that we need to look at these cases from close to—one at a time, and make the best judgment. So I am really not in a position to give you a percentage number or prediction.

Chairman CARDIN. If I understand correctly, the decision to prosecute in an Article III court would be made by the Attorney General after consultation with the Secretary of Defense?

Mr. KRIS. That is correct.

Chairman CARDIN. If a decision is made not to prosecute in an Article III court, would that also be made by the Attorney General after consultation with the Secretary of Defense? Is that also going to be made at that level?

Mr. KRIS. I think that is right, yes.

Chairman CARDIN. And when do you anticipate the process of evaluating that, that is, evaluating whether they should be recommended for trial in Article III courts or in commissions to be completed, that review?

Mr. KRIS. Well, that, too, is difficult to be precise about. I can give you some sense of how the process, I think, will work that may be responsive to your question without going on at too much length.

Currently, the task force is more than halfway through its review of the 240 detainees, and they expect to finish that review by Octo-

ber 1st. Some of those then will be referred over for possible prosecution. Already a significant number have been. And then we will work those as quickly as possible. Some of the cases have already been investigated to some degree because they were or are pending in military commissions, others less so.

So, again, I do not want to give you a precise date, but there is going to be very aggressive working up of these cases by these joint DOJ and DOD teams. We want to move forward quickly. We want swift and sure justice, and we want to get it right.

Chairman CARDIN. Let me go over capacity in Article III courts just for one moment. We have heard that the preparations for trying a terrorist case coming out of Guantanamo Bay could be very time-consuming for the court. It could be very intense as far as budget support from the different participants in our criminal justice system. Is there any concern about the capacity in our Article III courts to handle the workload that may be presented? And is that a factor at all in making a judgment as to whether to try an individual in an Article III court, the cost factor associated with a trial in the Article III courts?

Mr. KRIS. We are certainly mindful of both security concerns and cost concerns, and we would not want to choke the Federal courts with some sudden onslaught. But I think we believe that this can be handled. The courts are resilient. The Marshals Service is very capable. And I think we believe we can work this out successfully. It is going to have to be, again, worked out on a case-by-case basis, but we have every confidence in our institutions and our capacity to do this and do it well.

Chairman CARDIN. Mr. Johnson, let me just ask you about the concern that the American Bar Association has expressed in regard to military commissions. They raised questions on hearsay evidence, on coercive evidence, on the effect of use of counsel. And even though there have been some modifications suggested, they still raise concern as to whether a military commission can, in fact, comply with the standards that the Bar Association believes is appropriate.

Any comment about that? Can you satisfy their concerns?

Mr. JOHNSON. I can answer that in two ways. I think that the Senate bill does a pretty good job of dealing with hearsay evidence dealing with authenticity issues in a way that takes account of military operations, intelligence collections operations.

In terms of resources, the ability to prosecute and defend these cases, one of my special concerns is to ensure, for example, that our defense counsel are adequately trained and experienced in handling, potentially, capital cases. There are ABA standards for representation of a defendant in a capital case. And I have met with Colonel Masciola, our chief defense counsel at Guantanamo Bay, to ask him what he needs to provide his JAGs with adequate training and resources to deal with very, very significant defenses of these cases. And I am open and willing and ready and able to help him in that task.

Chairman CARDIN. Thank you.

Senator Kyl.

Senator KYL. Thank you.

Just taking the questions of the Chairman and the testimony both of you gave, would either of you quibble with the generalization that while there are different potential concerns with both trials in Article III courts and military commissions, both can be made to work to try these particular kinds of cases? Is that a generalized correct statement?

Mr. JOHNSON. Yes, sir, absolutely.

Mr. KRIS. It sounds right to me as well.

Senator KYL. Thank you. That is my view as well, and that is why I do want to relate to a comment my colleague Senator Durbin made. We have had this debate, I think, enough times to know each other's lines, so he knows what I am about to say. He establishes a straw man and knocks it down. But I am not a straw man.

His argument is, and I quote, that my argument is that "American courts cannot try them and American jails cannot hold them." Nobody ever said that. I did not say it. You all do not believe that. I do not believe that.

My criticism is in the change of the presumption, and that is what I want to get to here. It is not a question of can we. You have both established that we can do it in either forum. The question is: Should we? And there are reasons sometimes to go to one forum or the other. You indicated that will be on a case-by-case basis.

My primary question is: Why change the presumption? Is it not true, Mr. Kris, that the presumption that, when feasible, the Article III courts will be presumed to be the appropriate court is a departure from our long tradition of trying these kinds of cases in military commissions for the most part?

Mr. KRIS. Well, in the previous administration, I think there was a very strong preference for the use of military commissions to the exclusion of Article III courts. So I think it represents a change from the recent history.

Senator KYL. How about going back to World War II and bringing it forward?

Mr. KRIS. If you go back, I think, further in time, I think you have a history of both civilian and military prosecution. And I am not sure—perhaps I have not done enough historical research to really draw a solid line that favors military commissions over other prosecution options in all cases.

Senator KYL. We can do that research and determine whether my assumption is correct or not.

Mr. Johnson, in your written statement, you suggest that by changing the unlawful enemy combatant definition to a standard that is tied to the 2001 Authorization for the Use of Military Force, the administration is now detaining individuals pursuant to—and I am quoting—"an authorization granted by Congress."

Is it also your view that the 2001 Authorization for the Use of Military Force provides congressional authority for transferring individuals to the United States and detaining them on U.S. soil? Or would that require further congressional authorization, in your view?

Mr. JOHNSON. Well, as you know, Senator, the Congress in the Department of Defense war supplemental added various reporting requirements in advance of bringing detainees to the United States

or transferring to another country, and it is certainly Congress' prerogative to request that type of thing.

I think that the way I would answer your question is, with regard to the current population, we believe that the Authorization for the Use of Military Force, as informed by the laws of war, provides the adequate legal authority for the detention of the current population. Now, that is obviously being tested in the courts right now. Individually, detainee by detainee, virtually every one of them has brought a habeas proceeding against the Government. And I believe it is the case that that authority exists irrespective of where we hold them.

Senator KYL. So it would extend to detention in the United States.

Mr. JOHNSON. Yes.

Senator KYL. So that it would not be necessary to seek further authorization from the Congress.

Mr. JOHNSON. With regard to the current population, I believe that is the administration view.

Senator KYL. If either of you wish to supplement that answer later, you are welcome to do so.

Let me ask you another question, Mr. Johnson. You said that the Detainee Review Task Force has approved the transfer of substantially more than 50 detainees to other countries. Has the administration found countries willing to take all of these detainees approved for transfer? How many, do you think, other countries have expressed a willingness to take them? And if you know, how many of the 50-plus detainees were already approved prior to the Obama administration taking office on January 20th?

Mr. JOHNSON. Senator, I know that a number had been approved for transfer under the process that existed when the administration came into office. Transfer is a matter for our Detainee Affairs Office in the Department of Defense, as well as the State Department. I am sorry, I do not have the exact numbers for you of countries willing to take detainees.

I would add that in terms of transfer it is not simply just who is willing to take them. We also seek security assurances from the countries that are willing to accept a particular detainee so that they do not simply go back to a country and return to the fight.

Senator KYL. An important point that we fully appreciate. Can you give us any notion—is it most, is it some, is it a few—that we think can be transferred both because the country will take them and the appropriate arrangements can be agreed to? And if either one of you would like to answer, but I assume this is a proper question for you.

Mr. JOHNSON. I hesitate to speculate or make predictions so that I could be proven wrong later. I think that—as I noted in my statement, we are through more than half the current population. The current population is about 229. And I know the number that have been approved for transfer so far is north of 50. It is substantially north of 50.

Let me add this: The population that we began with were people that we thought were readily available for transfer or prosecution. So I would not make any assumptions based on the current pace about what the end results will——

Senator KYL. And I do not mean to put you on the spot here. So if either of you would like to supplement an answer for the record, you are sure welcome to do that. Thank you.

Chairman CARDIN. Senator Feingold.

Senator FEINGOLD. Thanks, Mr. Chairman. I am glad that you are holding this hearing. On an issue of this importance, and with these types of constitutional implications, it is critical that the Judiciary Committee stay involved. And I was glad to see a presumption in favor of using our Federal courts in the administration's protocol for handling Guantanamo cases that are referred for trial.

I want to state for the record that I disagree fundamentally with an amendment that became part of the Department of Defense authorization legislation last week that stated that military commissions should be the preferred forum for prosecutions of detainees. In my view, that has it exactly wrong. At a minimum, the presumption should be that our existing civilian and military legal systems are the proper venues for trying these cases, as is laid out in the administration's protocol.

But that does not answer the next question, which is: When, if ever, should military commissions be used? I am glad the administration supports changes to improve the procedures that will be used in military commission trials and that many of those changes are moving forward as part of defense authorization. But I remain concerned that the military commission process is so discredited that it may not be possible to fix it. And I have yet to hear a convincing argument that other options for bringing detainees to justice—the civilian Federal criminal justice system and the military courts martial system—are insufficient or unworkable.

So let me start by simply asking you both why the Government should retain military commissions as an option at all. Mr. Kris.

Mr. KRIS. Well, I guess sort of a four-part answer to that, Senator Feingold. It is a good question.

The first is the point that was made earlier that military commissions do have a long tradition in our country, going back really in some form to the Revolutionary War.

The second is that they prohibit, because they are tied to the law of war, a slightly different set of offenses, law-of-war offenses on the one hand and traditional Federal crimes on the other.

The third is that there are some differences. Obviously, we do not yet have a final bill on the military commissions side, but if the administration's positions are adopted, there will be differences with respect to Miranda warnings, although a voluntariness test would still be required, with respect to the hearsay rules, and there may be different statute-of-limitations requirements and rules that apply as well.

And I guess finally, with respect to the application of some of these procedural differences and law-of-war offenses, you would have military judges who have some familiarity with law-of-war and military necessity and operations in charge of the trials.

So those are some of the sort of operational differences that we think may be relevant.

Senator FEINGOLD. I can understand some of those more than others. The mere fact that they have been done before does not overwhelm me. And I am concerned about any suggestion that mili-

tary commissions would be better because it is easier to get a conviction. You did not say that, but a couple of the things you mentioned may perhaps suggest that. All I would caution is that to have any legitimacy at all, this decision should not be outcome-driven. And I am not suggesting that is what you were saying, but it is a possible interpretation, if you would like to respond.

Mr. KRIS. No, I think your point is a good one. The factors that are set forth in the protocol really boil down to the strength of the interest in the forum, so, for example, the identity of the victims, the location of the offense, that sort of thing. Efficiency, if you have joint trials, multiple defendants in the same locations. And then a third category of other factors to include an ability to sort of display or convey the full misconduct of the accused or the defendant, and that, again, might vary according to the type of offense that is within the subject matter jurisdiction of the forum.

I agree with you that these need to be principled decisions. We want them to be fact-intensive, case-by-case, but we do not want to have a system that is or appears to be unfair or wholly results-oriented. So I agree with that?

Senator FEINGOLD. Mr. Johnson.

Mr. JOHNSON. Senator, the President has reiterated that we are at war with al Qaeda. Military commissions, as was pointed out, are older than George Washington. And we believe that some offenses that constitute law-of-war offenses should be prosecuted in the war/military context, in military commissions. By the nature of the alleged conduct, offenses, conduct can violate both Title 18 as well as the laws of war, and there are some offenses—for example, offenses directed at the U.S. military or offenses committed on what we would call "the conventional battlefield"—that belong in the law-of-war context for prosecution. Our JAGs believe that. Our commanders believe that. I believe that, and the administration believes that.

So what I would urge is that we reform military commissions, we adopt a credible process so that we have alternatives available to promote national security.

Senator FEINGOLD. I'd like to ask you about one other aspect of this. We all know that prior versions of military commissions have been roundly criticized, both at home and abroad, and I, again, appreciate the efforts to make the procedures more fair. But I remain concerned about how they will be perceived and how that will affect our broader counterterrorism efforts.

Let me read you a letter sent to the President in May by three retired military officers. They said, "Attempts to resume military commission trials would perpetuate the harmful symbolism of Guantanamo, undermining our current terrorism efforts and squandering an opportunity to demonstrate the strength of the American system of justice."

How do you respond to that?

Mr. KRIS. Well, I think it is very important that we have clear that the military commissions systems, as we are proposing to reform it, would not be some kind of second-class justice system. And I think it is incumbent upon us as the administration, and perhaps the Government as a whole, to get that message out. And I think a hearing like this one is an important part of that process.

We want to have a system of commissions that is and appears to be fair, and I think we are moving in that direction, and I hope that people will listen to what is going on and take a look at the rules that we are proposing and take comfort in them.

Senator FEINGOLD. There has been a lot of talk lately about the application of Miranda rights in the battlefield context. As I understand the Government's longstanding position under President Obama and President Bush alike, Miranda warnings are never permitted to interfere with American military or intelligence-gathering operations.

Is that correct? And can you explain why this is really a red herring?

Mr. KRIS. It is correct. There is no new policy with respect to the administration of Miranda warnings. It continues to be done and decided on a case-by-case basis. In actual practice, I believe the number is less than 1 percent of interviews are preceded by Miranda warnings. They are not used by soldiers on the battlefield, and they are not allowed to interfere with force protection and other critical aspects.

Again, it is this case-by-case, fact-intensive judgment because sometimes the use of Miranda warnings can help keep open a prosecution option, and that makes us more safe, not less.

Senator FEINGOLD. Thank you.

Thank you, Mr. Chairman.

Chairman CARDIN. Senator Hatch.

Senator HATCH. Thank you, Mr. Chairman.

I appreciate both of you and your testimony here today. Gentlemen, last week, a major deadline was missed by the Detainee Policy Task Force, and the failure to meet that deadline gives me some pause. I see it as an indicator that closing Guantanamo in less than 180 days may very well be unrealistic. The DPTF's publishing of "an interim report" does nothing to dispel my concern, let alone the concerns of my constituents who write me daily to express their uneasiness over bringing detainees to the United States.

Now, the 6-month extension for publishing the report will now push back the report's due date to January 21, 2010, the day before the President will order the closure of Guantanamo. Now, this schedule for the issuance of reports and the deadline for closure of Guantanamo was set by the President, not by Congress.

I certainly have a lot of respect for the job that you gentlemen have been tasked with, and as a member of both the Senate Judiciary Committee and the Senate Select Committee on Intelligence, I realize the complexities involved in this review process. But when a significant report outlining detainee policy going forward misses its deadline and cannot and will be published and presented to the Congress and the American public until the day before the administration shutters Guantanamo, you can see how it reflects poorly on the way this process has evolved.

Now, I believe that this is a major reason why support for the closure of Guantanamo is waning in not only Congress but in public opinion as well.

So, today, can both of you give me your honest assessment of where we are in the review process? And are you confident that the final report will take another 6 months to complete?

Mr. KRIS. Senator, I think I will take a crack at that. First, I think to begin with, it is important to distinguish between the Detainee Policy Task Force, which will be the author of the report to which you refer, which is really looking at the whole range of detainee policy issues going forward; and, on the other hand, the task force assigned to review each of the detainees at Guantanamo Bay.

So the delay in coming up with a comprehensive detainee policy I do not think necessarily undermines the ability of the separate Guantanamo task force to do its review. And as I say, they are more than halfway through the 240 detainees now, and they do expect to be done with their initial review of all detainees by October 1st.

Senator HATCH. How many cases have you reviewed, and how many are left to review, do you know? If you could give me those numbers.

Mr. KRIS. I do not have the exact number, but we are more than halfway through the 240 who were there on January 22nd, so approximately 120. And the expectation is to finish the remaining 120 for review by October.

Senator HATCH. What are the projected breakdowns of prosecutions by Article III courts and military commissions?

Mr. KRIS. As I said earlier, that is a number that is impossible to provide at this point because we have not done all of the prosecution work-up. I can say that, as Mr. Johnson has said, substantially more than 50 have been approved for transfer and a significant number have been approved for possible prosecution. Beyond that, I really cannot go.

Senator HATCH. Mr. Kris, in your prepared testimony, you stated that, when feasible, the Justice Department will prosecute detainees in a Federal criminal court for violations of war, and there are specific requirements to ensure the authenticity of evidence for use in Federal criminal prosecutions. One of these requirements, as you know, is chain of custody. There are many scenarios where the chain of evidence may not be documented. For example, a combatant captured in Afghanistan may have documents, pocket litter, or other materials in his possession that link him to a war crime or a criminal violation. If the ultimate goal is prosecution in Federal criminal court, then chain of custody must be preserved. At least, that is my understanding.

What is your proposal to address the preservation of chain of custody so that the Government can introduce its evidence into Article III courts?

Mr. KRIS. It is an excellent question, Senator. Obviously, chain of custody is a concern, and it is a concern for authenticating evidence in any forum.

To answer your question directly, I guess what I would say is the protocol in the second of the three groups of factors recognizes that choice of forum may be influenced by legal or evidentiary problems that might attend the prosecution in the other jurisdiction. And as I was saying to Senator Feingold, there are, I think, going to be some differences in the rules that govern between Article III courts

and military commissions as we are proposing them. One of them, for example, would have to do with the admissibility of hearsay evidence, which raises a similar concern. If you have got a soldier on the battlefield and he is, you know, the live witness, you may not be able to pull him off the line, and so there may need to be some relaxation of those rules.

But considerations of the sort you are identifying are part of the protocol and would not be dispositive, but they would be a factor in the thinking.

Senator HATCH. Okay. I am sure, Mr. Kris, that a great deal of the evidence that will be introduced in Federal criminal prosecutions of detainees was obtained for intelligence purposes. In some cases, the Government may not be willing or able to produce the source of the evidence. Furthermore, the evidence may be the fruit of information obtained from foreign intelligence or foreign investigations. The disclosure of these foreign relationships could severely jeopardize intelligence-sharing opportunities in the future. As such, the source of the evidence is either unable or unwilling to testify at trial.

If trying these cases in Federal criminal courts is the ultimate goal, what solutions does the DOJ propose to address hearsay evidence exclusions? Have you arrived at conclusions on that?

Mr. KRIS. Well, with respect to hearsay—excuse me. We have a position that is actually quite close to the Senate Armed Services Committee bill, which basically requires the direct evidence, unless it would be impractical or it would have an adverse effect on military operations and is not in the interest of justice. So that is a different standard, say, than applies in Federal court.

With respect to classified information, especially with the Graham-McCain amendment, which Mr. Johnson mentioned in his testimony, which is quite similar to CIPA, the Classified Information Procedures Act, in a way you are pointing out a challenge that exists for all prosecutions in either forum, and it is a challenge. You can have situations where you risk compromising sources and methods. There are ways around that, and CIPA is the main vehicle for dealing with those kinds of issues. But in a way, I think you point out the larger question here, which is that prosecution itself, whether in a military commission or in an Article III court, is one way but only one way, and not always the best way to protect national security. We are focused on protection of national security, and we have tried to use all of the lawful tools in the President's toolbox to achieve that protection, including but not limited to prosecution.

Senator HATCH. Mr. Chairman, my time is up.

Chairman CARDIN. Thank you very much.

Senator Durbin.

Senator DURBIN. Thank you very much. And Senator Kyl is right. We have this ongoing debate that continues, and I would just say that as far as the presumption is concerned, I think the figures speak for themselves. The fact that over the 7 years we had three who were tried before military commissions and 145 in Article III courts is an indication to me that there was a presumption that the most successful line of prosecution was in the Article III court.

Let me also say, in commending my colleague from Arizona, that he has been part of the effort of this Committee to enlarge the terrorism laws of the United States since 9/11 that have been the basis for successful prosecutions, so—in Article III courts, I might add, so that we have created some opportunities, legal opportunities here to protect our Nation.

Let me ask, if I can, a question or two here. There is a concern about the image of military commissions. It has been expressed by several people at the highest level. Lieutenant Colonel Darrel Vandeveld testified before the House Committee on the Judiciary recently, and he said, "I proudly went to Guantanamo to serve our country as a prosecutor charged with bringing to justice detainees President George Bush had said were 'the worst of the worst.' But I eventually left Guantanamo," the colonel said, "after concluding that I could not ethically or legally prosecute the assigned case. I became the seventh military prosecutor at Guantanamo to resign because I could not ethically or legally prosecute the defendant within the military commission system at Guantanamo."

Similarly, Rear Admiral John Hudson and Brigadier General James Cullen said, "The commission system lacks domestic and international credibility, and it has shown itself vulnerable to unlawful command influence, manipulation, and political pressure."

Former Secretary of State Colin Powell said, "We have shaken the belief that the world had in America's justice system by keeping a place like Guantanamo open and creating things like military commissions. We don't need it, and it is causing us far more damage than any good we can get for it."

So can we repair the image of military commissions to the point where we can say to the world with credibility that we are now operating under established standards of justice and jurisprudence and that it is clearly a different approach than has been used in the past?

Mr. KRIS. Yes. The President believes we can. The administration believes we can. Obviously the President had concerns about the Military Commissions Act, the prior system, or the existing system of military commissions. The initial action there was to take five important rules changes that he could do without legislation, and those have been made. I can go over them if you want. Mr. Johnson knows them even better. But they were important. They dealt with things like hearsay, choice of counsel, and that sort of thing, and obviously the cruel, inhuman, and degrading treatment standard for the admissibility of confessions.

The next step is the bill that is now pending in Congress reported out by the Senate Armed Services Committee, and we have a great deal of agreement with that bill. There are a few areas where we have some disagreements. But if the administration gets the proposals that it is putting forward, I think the military commission system would be amply fair, and it would be a system that would not be second class. And I think eventually the public perception will catch up with the reality.

Mr. JOHNSON. Senator, if I could, as the Department of Defense lawyer, I think one of the problems that we have had is that the American public, by and large, is just simply unfamiliar with the concept. You cannot turn on TV and watch a military commissions

hour-long show, like "Law and Order" or something of that nature. But I know from personal experience that our JAGs cherish notions of justice, the Constitution, just like Assistant U.S. Attorneys do, and many of our prosecutors at the Office of Military Commissions are reservists who are AUSAs in their other life. Our JAGs are highly qualified lawyers. The JAG sitting behind me who has helped me in this effort is a Rhodes scholar and was on the Harvard Law Review with the President. I think he got better grades.

The JAGs all—let me just cite for you one incident. When we started looking at the rules changes, I got around in a room at the Pentagon with all the JAGs familiar with the process, prosecutors and defense, and said, "Guys, what can we do to reform military commissions?" And the first thing right off the bat was, "Let's get rid of the possibility, codified in law, for admitting statements that were taken as a result of cruel, inhuman, and degrading treatment."

There was almost complete unanimity in the JAG community to do that because that possibility alone did so much to cost military commissions in terms of credibility and perceptions about the fairness of the process. And the rules change, I am happy to say, did away with that, and the Senate bill itself does the same thing. So there is an aspect of, you know, developing here step by step, but I think we can get there.

Senator DURBIN. Let me just say that I do not question the professionalism or integrity of those who were involved in the Judge Advocate Generals' operations. I have worked with many of them, and I respect them very, very much. They were put at a distinct disadvantage when the commissions were initially created by Presidential fiat and not by congressional activity, not by the ordinary course of law. And I think the subsequent Supreme Court decisions in *Hamdan* and *Boumediene* also raised a question as to whether or not they were conceived properly. I hope they can be reconceived in a much fairer fashion.

I join with my colleague from Wisconsin in saying that I would want to be shown in opposition to what passed last week, this so-called preference in our sense of the Senate language for going to commissions. I think that the record, as Senator Whitehouse has said on the floor, speaks for itself in terms of the Department of Justice.

I know I just have a few seconds left here, but I have to tell you that there is one case I am familiar with through a pro bono lawyer in Chicago of an individual arrested at age 19 and detained at Guantanamo. A reward was given to those who turned him over, and after 6 years of incarceration, he was given notice last year that our Government was not going to proceed with any charges against him and he could be released at any time. Of course, he still sits in Guantanamo because there is no place to release him. They are working to find a place for his release.

So the notion that many people have about who is there and why they are being held I think sometimes conflicts with reality. There are dangerous people who need to be tried before courts, or commissions for that matter, and there are some who fall in a category—I would like to close by asking: What do we do with those

who cannot be prosecuted but still pose a threat? What is their disposition? Where do they end up when Guantanamo is closed?

Mr. JOHNSON. As the President said in his National Archives speech on May 21st, there may be at the end of our review process that category of people who, for reasons of national security, safety of the American people, we have to continue to detain. And for that category of people, what the administration believes is that there should be some form of periodic review. Whether that is every 6 months or 12 months, we are sorting that through now.

But because of the nature of the conflict and because there is not going to be a readily identifiable end of the conflict, we believe that if we prevail in a habeas litigation, we should not just throw away the key and keep the person there indefinitely. There ought to be some form of periodic review, and we are developing a system and a process right now for that segment of the population at Guantanamo that we may end up with.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman CARDIN. Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

Well, I think one of the problems we have had from my perspective, having served on the Armed Services Committee and the Judiciary Committee, throughout this entire process is an unfair criticism of the military and what we have been doing. I think this idea that somehow the world is condemning our procedures for handling enemy combatants is not legitimate. I think the criticism is coming from Congress. A lot of it was, frankly, generated during last year's campaign. And so much of that occurred that I guess anybody might think that there is a constant series of abuses going on at Guantanamo. But as I understand the facts, not one single case of waterboarding occurred there. They occurred in intelligence, not the military.

As to the Inspector General's review, I believe they concluded, Mr. Johnson, that one case of torture occurred because of a series of techniques were used against one prisoner, that any one technique alone was not torture, but all together amounted to torture. So a review has been—so that is the extent of the military's misbehavior, apparently, as found there. And it is just so sad to me that we now are in a position where we have got a perfectly safe, well-run place at Guantanamo, and somehow our own Members of Congress have created a perception that all wild abuses have been occurring systematically there. I do not believe that is true. I do not believe that is fair.

With regard to trying these cases in the United States, when you try one, you find out how hard it is. In 2006, the death penalty trial of Zacarias Moussaoui was tried in Alexandria. Afterwards, the mayor said, "We would be absolutely opposed to relocating Guantanamo prisoners to Alexandria. We will do everything in our power to lobby the President, the Governor, the Congress, and everyone else to stop it. We had this experience. It was unpleasant."

City officials noted that there were military people with heavily armed agents, rooftop snipers, bomb-sniffing dogs, blocked streets, identification checks, and fleets of television trucks around. So it is not such an easy thing to try one of these big cases in a civilian court in a civilian city. It is just not.

Sixty of these individuals have already returned to the battlefield that have been released. Senator Durbin says the 19-year-old—maybe they were not able to try him, but presumably he was detained as an unlawful combatant, and that means he is historically and lawfully detained until the war is over.

I do not think these military commissions have been so discredited. I have seen nothing is more righteous than a JAG officer motivated on an issue. They will stand up to anybody. I have seen them shred a colonel, one of my friends, one time, and I held a JAG slot for 2 years, although I was not trained at Charlottesville, in an Army Reserve unit. And I have great confidence in the fidelity of these officers, and they have even, I am sure, objected to some of these procedures, as he said, because they have extremely high standards about how these matters should be handled.

Could I ask you some brief, simple questions? I hope you will not talk too long, because I am just trying to get a perspective. Maybe the Department of Justice would be first. If there is a terrorist attack, a terrorist captured in Afghanistan with bombs, provable to be planned to be used against an American base, is that the kind of case that we are talking about being tried in Federal court?

Mr. KRIS. The answer is it might be, but I think it is probably more likely that that case would result in detention in a theater detention facility.

Senator SESSIONS. And what statute is violated? How is there jurisdiction in the United States to try such a case in a civilian court?

Mr. KRIS. Well, as was mentioned earlier, I think, thanks to Senator Kyl and others in Congress, there is quite a large number of Federal criminal statutes that apply extraterritorially, including conspiracy to kill Americans and terrorist acts against Americans abroad. So there is, I think, quite a lot of jurisdiction. That is really separate from the question whether as a policy matter or tactical matter it would make sense in any particular case to bring a criminal prosecution, even if you could bring one.

Senator SESSIONS. And the venue? It used to be where you first bring the individual. What if you bring them to Guantanamo? Can they be moved and tried in Illinois?

Mr. KRIS. The venue statute essentially distinguishes between—when you do not have an otherwise basis for venue because of a victim or an attack in the United States. For extraterritorial activities, it really distinguishes between situations in which the indictment is returned before the defendant arrives, where the District of Columbia is a viable venue, or where you do not have that, where the defendant is first brought. I think GTMO does not count because it is not within the jurisdiction of any Article III court right now, not in a district.

Senator SESSIONS. Now, with regard, Mr. Johnson, to the Miranda warnings, well, this can be problematic. I mean, on the battlefield, we are in a state of war. We are dropping bombs on people right now in Afghanistan and Iraq who threaten us, and we have a lawful right to do so. But the key thing we learned from the 9/11 Commission was good intelligence is critical. It is not like the average American burglar or drug dealer. The critical nature of intelligence saves lives on the battlefield.

Don't you think that if we expand and continue to provide more and more Miranda warnings, we are, in fact, going to diminish intelligence because anybody would not talk if they are told that up front? And when you say Miranda warnings, do you tell them they are entitled to a lawyer also?

Mr. JOHNSON. Senator, let me answer your question in two ways, if I can.

First, the current version of the Senate bill expressly excludes from military commissions Article 31 of the UCMJ, which is the Miranda warnings requirements, in terms of admissibility of evidence.

The second point I will make is a letter that I——

Senator SESSIONS. Well, let us slow down. Why is it being given then?

Mr. JOHNSON. Well, Senator, I understand that there is this perception out there that the United States military might be reading detainees or people we capture Miranda warnings, and that is not true. I wrote a letter to the Chairman of the House Armed Services Committee last week on this very issue, and if I could, I would just like to read you the first three sentences of the letter.

Senator SESSIONS. But the FBI is the one that is doing then, our Federal and Department of Justice investigators, not DOD?

Mr. JOHNSON. As Mr. Kris made clear, the FBI in a very, very few cases, in order to not foreclose the avenue of prosecution, has done that. But the United States military is not reading Miranda warnings to people we capture. That is not our——

Senator SESSIONS. Well, isn't there a danger—and I will ask Mr. Kris about it. But isn't there a danger, if the presumption is that those cases would be tried in civilian court, that the evidence or the confessions could be suppressed if they were not given a Miranda warning?

Mr. JOHNSON. Well, Mr. Kris can answer as to Federal prosecutions. Military commissions, that will not be a requirement.

Mr. KRIS. I guess I would say first, to echo what I said earlier, of the thousands of interviews conducted by the FBI in Afghanistan, Miranda warnings have been given in less than 1 percent of the cases, and this is the practice, giving Miranda in a very small number of cases like this, that stands——

Senator SESSIONS. My time is running, but isn't this then—if you are going to try them in civilian courts, aren't we now in a situation where more Miranda warnings must be given if we are going to proceed wisely?

Mr. KRIS. I think you need—to proceed wisely, you need to approach these threats and these problems, these national security problems, one at a time and figure out what is the best way to defeat this problem. And it may vary from case to case. Sometimes you need a hammer, sometimes you need a screwdriver. You use whatever tool is right for the particular situation.

If you give Miranda warnings in a case, it keeps the option of criminal prosecution in an Article III court open. There may be other ways. There are exceptions to Miranda for public safety under the *Quarles* case from the Supreme Court, so it is not as if you always need to give Miranda warnings. But if you do, it can keep the option open. On the other hand, there may be costs to

doing so. That balance has to be struck one case at a time by the professionals who have the ground truth of one particular problem.

Senator SESSIONS. Well, my time is up, but I would just say that is not a very clear answer, I do not think.

Chairman CARDIN. Thank you.

Senator Whitehouse.

Senator WHITEHOUSE. Thank you, Chairman, and thank you for this hearing.

Just to continue on Senator Sessions' point on mirandizing, I think you have said that you look at these matters case by case and you make a very specific fact-intensive determination based on the particular circumstances of each case, correct?

Mr. KRIS. That is essentially right. I think that is the way it should be done, anyway.

Senator WHITEHOUSE. That makes sense, doesn't it?

Mr. KRIS. I think so.

Senator WHITEHOUSE. Are there not indeed cases in which mirandizing a detainee might actually be part of an optimal interrogation strategy for that particular detainee?

Mr. KRIS. Well, it might be, and that would be something that I as a mere lawyer would want to defer to the interrogation experts.

Senator WHITEHOUSE. But certainly since Congress is not interrogation experts, it would be a mistake for us to foreclose your ability to apply Miranda warnings where the case-by-case and fact-intensive determination made by the professionals suggested that it was a good idea?

Mr. KRIS. I think that is the absolutely critical point, Senator, that we have a range of different remedies and tools that we can use, and I think we are at our best, at our most effective and strongest when we have all of the options available to us and we do not have artificial rules sort of adopted a priori that rule out certain techniques and tools in certain categories of cases.

Senator WHITEHOUSE. As I recall, one of the most significant interrogations that has been done in terms of productivity was the interrogation of Abu Jandal, and the 302s from that investigation I believe are still being used in cases to this day, and that was accomplished after Miranda warnings, was it not?

Mr. KRIS. I think that is correct, and I think more generally, depending on the circumstances, a very, very good interrogator can often get tremendously valuable information, you know, depending on what he knows about the detainee and language and cultural issues. So it is a very complicated business. But the goal, again, is to keep all the options on the table.

And I should say one other thing, I guess, that may not be obvious, but to the extent that we do not have a Miranda requirement in a military commission but we do have, let's say, a voluntariness test, I am not suggesting that we would start prophylactically giving Miranda warnings across the board by any means. But if Miranda warnings are given, that does not preclude the admission of the statement and the prosecution in a military commission. Indeed, it may be helpful there as well as in an Article III court.

Senator WHITEHOUSE. And I share Senator Sessions' high opinion of the JAG Corps. Indeed, for those of us who were distressed

and dismayed by what I consider to be shabby and second-rate work that came out of the Office of Legal Counsel in support of the torture program, it was the JAGs from every single one of the military services who stood up and pushed back and said, "This is wrong. We know this material. This is wrong."

Indeed, so did the State Department lawyers. I believe the only organization of Government that did not push back was the CIA, and their lawyers have their own consciences to hold to account for that. But, clearly, the JAG officers, in some cases at considerable peril to their personal careers, did the right thing. So I think that they are a very good measure of whether or not the military commissions are working. And I think the fact that over and over and over again career prosecutors resigned rather than pursue prosecutions under the military commissions as they previously existed is a sign that something really was wrong with those military commissions, that it has not just been invented by Members of Congress. And, certainly, Colin Powell has never been a Member of Congress, and he is a person who I think America has confidence in on national security matters. And he said that we have shaken the belief the world had in America's justice system by keeping a place like Guantanamo open and creating things like the military commission. And he obviously meant as it was then run, and I wish you well in trying to repair it. His view is we do not need it and it is causing us far more damage than any good we get for it. And I think it would be important as you go forward to make sure you stay out of the chatter strips in terms of doing this right, because our credibility has already been burned once in this effort.

Could I ask you how many terrorists have to date been convicted before military commissions since 9/11?

Mr. JOHNSON. Three.

Senator WHITEHOUSE. Three.

Mr. JOHNSON. In 7 years.

Senator WHITEHOUSE. In 7 years.

Mr. JOHNSON. That is not a great track record.

Senator WHITEHOUSE. That is not a great track record.

Mr. JOHNSON. We are determined to have a more efficient system.

Senator WHITEHOUSE. And the information that I had when I spoke on the Senate floor with respect to the preference is that the number of people associated with terrorism who have been convicted and are now serving lengthy Federal prison sentences numbers around 350 or so. Is that correct?

Mr. KRIS. That sounds certainly—that is at least close to the number, if it is not the exact number. I think there are more than 200 persons in the custody of the Bureau of Prisons with a terrorism nexus of one sort or another.

Senator WHITEHOUSE. My information was that there are 355 inmates in Federal prison now who have been successfully charged, prosecuted, convicted, and are serving lengthy sentences as a result of their history or connection with international or domestic terrorism. The domestic terrorism number may be the 200, and the others are international terrorism.

The last thing that I will mention to you, I know attorneys in my home State who have represented people in Guantanamo. These

are attorneys in a corporate law firm. They have no particular axe to grind. In fact, if anything, they probably err on the side of a conservative view of the world and a kind of orderly, established view of the world. The way in which they have been treated as advocates for people at Guantanamo has them livid: denials of access, repeated inconveniences, unnecessary hassle and bother, as they try to go about what for them is pro bono activity.

I would urge you to take a look at the way in which the counsel for folks at Guantanamo are treated. These are good Americans who are trying to do the right thing. They aspire to the highest standards and principles of their legal profession. And for some reason or other, they come away feeling very disturbed by the way they have been treated by their own Government.

Mr. JOHNSON. Senator, since I come from a corporate law firm, they call me directly.

Senator WHITEHOUSE. You understand.

Mr. JOHNSON. And they are not shy about that, so it is something I am very sensitive to.

Senator WHITEHOUSE. Thank you, Chairman.

Chairman CARDIN. Senator Hatch has a follow-up question.

Senator HATCH. Yes, I have been concerned about this Miranda matter, and while I know both of you gentlemen stated that Miranda warnings should not be provided to detainees captured on the battlefield, that does not address the fact that there will be some Miranda problems, especially if Article III courts, you know, are to be the preferred venue for prosecution.

Now, I staunchly oppose any notion that troops in the middle of the battlefield be required to administer warnings to capture combatants. But can both of you or either of you give me your definition of the nature and scope of what is a battlefield in the context of the current conflict? Let me stop there, and then I have one other question I would like to ask.

Mr. JOHNSON. Senator, I can offer to the Committee for the record a letter that I wrote to the Chairman of the House Armed Services Committee last week on this issue. What I can say to you is that the U.S. military is not providing Miranda warnings to people that they capture. That is not their job, and I would have a lot of three- and four-star general clients all over me if I even remotely began to suggest that our troops do that. And the only circumstance under which that happens is where the law enforcement prosecution option is one that is being considered and we have exhausted military intelligence collection options with respect to that particular individual.

As to your question about what constitutes the battlefield, obviously given the nature of this conflict, there is no easy answer to that question, and anybody who tried to give you an easy answer to that question I suspect would be overlooking a lot of complexity.

I can tell you that the mission of the military is not evidence collection. It is to capture and engage the enemy.

Senator HATCH. Okay. Any—did you want to say something?

Mr. KRIS. Well, I would just say more generally, Senator, it is important to distinguish between rules of admissibility in prosecution for, whether it be a commission or an Article III court, and primary conduct on the ground. When it comes to the primary con-

duct, the paramount concern always has to be safety and force protection and intelligence collection. It may be that some statements in some situations may not be admissible, but you would not want to compromise the safety of our troops on the line in order to preserve that for down the road.

Senator HATCH. Well, I agree with that, but any first-year law student will tell you that Miranda is triggered when a suspect is in custody and is asked questions that will elicit a response that may develop inculpatory statements or evidence.

Now, given that some of these detainees have been in custody since 2002, what is being used to evaluate the veracity of previous statements they have made since being in custody? And how does the Government plan to overcome the admissibility issue of these statements in the Article III courts?

Mr. KRIS. Well, again, we may or may not be able to overcome those admissibility concerns in any particular case, and if we cannot, that may be a factor that bears on forum choice. I cannot say that in every case every statement will be admissible under whatever standard ends up applying either in an Article III court or in a military commission.

Senator HATCH. Would you be forced to let them go free then?

Mr. KRIS. No. I think you have to consider other evidence that is available against them. Cases do not depend entirely on the statements of these people. You know, there can be other evidence, and prosecutors are used to working around those kinds of concerns when evidence is suppressed in any kind of environment. So you just have to work through each case one at a time and figure out what you can do.

Senator HATCH. Well, thank you.

Thank you, Mr. Chairman, for letting me ask those questions.

Chairman CARDIN. Absolutely.

Let me just get the numbers straight and a couple dates. You are indicating that you will complete the review of the detainees at Guantanamo Bay this fall.

Mr. KRIS. That is the expectation, yes.

Mr. JOHNSON. Yes.

Chairman CARDIN. And that to date, somewhere significantly higher than 50 out of the 240 you anticipate transferring to other countries or relocating.

Mr. KRIS. Substantially more than 50 have been approved for transfer. That is right.

Chairman CARDIN. Already approved. That is right. I am sorry. And that there is a significant number that you are already pursuing Article III prosecution, criminal prosecution.

Mr. KRIS. Well, they have been referred for evaluation by DOJ and DOD prosecutors jointly under that protocol.

Chairman CARDIN. So it could Article III or it could be military commissions.

Mr. KRIS. Or I guess in some cases we might conclude ultimately it cannot be prosecuted and it would get thrown back, but essentially yes.

Chairman CARDIN. Has there been any determinations yet of those that will be recommended for indefinite detention?

Mr. KRIS. No. There is no detainee who has been put in that fifth category.

Chairman CARDIN. Will the decision to put someone in the fifth category also be made by the Attorney General in consultation with the Secretary of Defense?

Mr. KRIS. That is not an issue that is covered by this protocol. I think that is probably a broader Cabinet-level, principal-level, or Presidential decision that would not necessarily be just confined to the two of those, those two particular——

Chairman CARDIN. So that decision has yet to be made other than the President's statements that there would be due process review of individuals placed in this category.

Mr. KRIS. Yes. I mean, it is conditional, if we end up with people in that category.

Chairman CARDIN. If we end up. As I understand it, you recommended that the military commission bill, Senate bill, be amended to include a sunset provision. Could you explain why you believe there should be a sunset provision in this?

Mr. KRIS. Well, the main reason, I guess, is that traditionally military commissions were used in the context of a particular conflict. This particular conflict may be unlike most others, if not all others, that we have dealt with, with respect to how long it may endure. And so if you tie a commission to the duration of the conflict but you now have a relatively open-ended conflict, it made sense to us that after some number of years, Congress come back and take a fresh look and see whether we have learned something, whether things need to be changed. That is really, I think, the main thinking behind that.

Chairman CARDIN. I generally support sunset provisions, but it seems to me that we do want to get a process for military commissions in place with some degree of confidence and predictability.

Mr. KRIS. That is a fair point.

Chairman CARDIN. If there is no longer a need in regards to this particular conflict to continue military commissions, your recommendation would be to allow the sunset to take place?

Mr. KRIS. I do not necessarily want to go that far. All I am really saying on behalf of the administration here—this is not just me—is that a sunset is a mechanism that would compel and allow Congress to look again at commissions, see maybe they should be continued, maybe they should not be; maybe they should be reformed in some way. I think we are going to learn things going forward here, and after a certain number of years, it may be appropriate for Congress to take a second look. But I would not want to prejudge any particular outcome at that point. It would really depend on what we find.

Chairman CARDIN. Well, as you go forward, we would like you to keep the Judiciary Committee informed as to the numbers that are likely to be referred for prosecution, both Article III and military commissions, and what procedures are being used in the event that you will be determining people need indefinite detention. Obviously, I know you are going to have to submit a plan to Congress as to where those individuals will be maintained if there is no Guantanamo Bay.

Senator Kyl.

Senator KYL. Thank you.

I meant to ask you, and I understand Senator Hatch may have asked you, the question about whether given the fact that we are going to have now a presumption for Article III jurisdiction or trials, it would not necessarily increase the situations in which Miranda warnings are given. Now, if I misstate this tell me, but my understanding was that the answer was, well, the case-by-case analysis in any event does not occur until after whatever questioning by the military intelligence or other related departments or agencies might be.

If that is true, wouldn't this—if that is true, even though you can have an Article III trial with testimony admissible despite no Miranda warning, it makes it much more difficult, I believe, and, therefore doesn't that diminish the number of cases in which the presumption could result in an Article III court trial? That question got kind of convoluted, but I think if you want to restate your understanding of it, that is fine.

Mr. KRIS. I think I understand you. It is certainly the case, I think, as Mr. Johnson said, that we need to take care of immediate intelligence and force protection first.

Senator KYL. Right.

Mr. KRIS. Nobody wants to sacrifice the safety of our troops.

Senator KYL. Right.

Mr. KRIS. The second is I think we need to be strategic about this, but, you know, if we find that we have information that is very valuable and inculpatory, but it was not preceded by Miranda warnings, then obviously that will be a factor.

Actually what outcome will follow from that in any particular case would depend—and I guess this is the theme I keep returning to over and over again—on all of the facts of the case——

Senator KYL. Right, but let me just ask you——

Mr. KRIS [continuing]. But it will—yes?

Senator KYL. One of the key facts will be whether a Miranda warning was given, because that will have a lot to do with whether evidence is admissible. Is that not correct? I will address my questions to either one of you.

Mr. KRIS. Go ahead. I thought you were talking to him.

Senator KYL. Well, I am sorry. I kind of was. But whichever one of you wants to answer is fine with me. The question is—well, let us do it in order.

Is it true that in order to get an Article III prosecution, it is a whole lot better to have a Miranda warning if you are going to rely on statements given by the defendant?

Mr. KRIS. Yes, it will be better—of course, there are exceptions, like the public safety exception is important, too. But I take your basic point, yes.

Senator KYL. Yes, Okay. Now, is the presumption for an Article III trial, therefore, going to override what I heard you to say was the preeminent concern, which is that whatever battlefield intelligence questioning needs to occur will occur first, without regard to how the case is ultimately going to be disposed of?

Mr. KRIS. If I understand you, I think the answer is clearly not. We would want to gather intelligence and protect our troops as the paramount concern and then see what we can do after that.

Senator KYL. Right. So if there is an order of hierarchy here, the first value would be seek whatever information you need to in the beginning to protect the troops and gather important intelligence. Second now is a change in the hierarchy of values. After that, the next presumption is that the case should be an Article III case if possible.

Mr. KRIS. Again, I think I understand where you are going. My only quarrel with this is it starts to become a little too rigid for what I think is the varied and complex ground truth that we encounter out there.

The way I would put it is we are interested in protecting national security using whatever tool is best for the situation, and that will vary quite a lot. There are some principles I can state, and the one we talked about earlier about force protection and immediate intelligence gathering. But I think it is very dangerous to start adopting these abstract principles too much in advance because the reality is more messy than that.

Senator KYL. I understand that, but what we are getting at here is it is going to be really hard to get an Article III prosecution if you do not give Miranda warnings. And if the presumption is that the cases are going to be Article III cases, not military commissions, then by definition you are going to have to have given Miranda warnings in most of them. And if that is the case, then that directly conflicts with the first priority, which is getting good military intelligence, because once you give a Miranda warning, you are probably not going to get a whole lot, at least in most cases.

So doesn't this change in presumption potentially work its way up the chain and conflict with the first priority, which is to get military intelligence?

Mr. JOHNSON. Senator, let me try to answer that by reading to you a portion of the protocol that has been worked out between DOJ and DOD.

"There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court in keeping with traditional principles of Federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there."

And then we go on through three sets of factors to evaluate with each case. I will just read one of the three sets: "Strength of Interest. The factors to be considered here are the nature of the offenses to be charged, or any pending charges, the nature and the gravity of the conduct underlying the offenses, the identity of victims of the offense, the location in which the offense occurred, the location and context in which the individual was apprehended, and the manner in which the case was investigated and evidence gathered, including the investigating entities."

And the other two sets of factors sort of go on in a similar vein.

Senator KYL. So isn't it likely, though, that if there is not a change in procedure in the original intelligence gathering, whether the questioning is by the military or the intelligence services, CIA or whoever it might be, if they are not routinely giving Miranda warnings—and I gather they would not be—then even though there may be a presumption to try to get prosecutable cases into Article III courts, the reality is that without Miranda warnings having

been given in most cases, the presumption is probably going to be overridden on that factor alone in many, in perhaps the majority of cases?

Mr. JOHNSON. I would hesitate to try to predict how the cases are going to shake out in response to your question. I do know that this protocol was worked out with sufficient flexibility to take account of that and other issues so that we have both avenues of prosecution available for dealing with international terrorists.

Senator KYL. Yes. And, by the way, I think everybody is in favor of having both avenues available, and I am not arguing with the priorities here and so on. But I am having a little trouble understanding how you could get to the situation where you have a lot of military commissions as opposed to—excuse me, a lot of Article III trials as opposed to military commissions if, in fact, there is not a fairly early Miranda warning given in this situation?

Mr. KRIS. I guess two things. One, if you have a situation in which the guy does not talk, you do not mirandize him but he just does not talk at all, but you have got plenty of other evidence, you have got him on video or you have got eyewitnesses or whatever, there may be a situation where the statements do not obviously make any difference.

The other is while we do want to be strategic about this and we try to sort of anticipate the endgame of the process at the earliest possible stage—that is only sensible—I think the concern you are getting at, and I think it is a fair one, is you do not want the tail to end up wagging the dog.

And I do think that is a legitimate concern, but I think we have enough flexibility under this protocol to take that into account and guard against it.

Senator KYL. If I could just suggest, in the interest of time here—we have another panel we want to get to—anything else you would like to add to the record that further clarifies this, if you think it is necessary, we would be happy to receive it, because I think it is an interesting question that is raised, and we could perhaps answer some questions that our colleagues might have about this if there is anything else that you want to supplement the record with. And I thank you both for your testimony.

Chairman CARDIN. I thank Senator Kyl for that comment. I concur. Again, I request that you keep us informed, and if there is other information you believe we should have to be part of our record, please let us know. I expect this will not be the last hearing that we will be having on this subject. This is an evolving issue and one which is certainly challenging to the Department of Justice and the Department of Defense, and we thank both of you for your service and for your testimony here.

Mr. KRIS. Thank you.

Mr. JOHNSON. Thank you.

Chairman CARDIN. We will now turn to our second panel. Let me introduce the second panel as they come forward.

First, we have David Laufman. Mr. Laufman is a former Assistant U.S. Attorney and chief of staff to the Deputy Attorney General, now serves as partner with Kelley Drye's white-collar crime and litigation practice group. Mr. Laufman served as an Assistant U.S. Attorney for the Eastern District of Virginia where he special-

ized in prosecuting terrorism, espionage, and other national security cases. In 2005, he served as the lead trial counsel in the Government's successful prosecution of Ahmad Omar Abu Ali known as the "Virginia jihad" case. This case involved an American citizen who was convicted of providing material support and resources to al Qaeda, conspiring to assassinate the President of the United States, conspiring to hijack and destroy aircraft, and other charges, and he was just recently, I think yesterday, sentenced to life imprisonment.

Our second witness is Deborah Pearlstein. She joined the Woodrow Wilson School for Public and International Affairs at Princeton University in 2007 as an assistant research scholar in the law and public affairs program. From 2003 to 2006, Ms. Pearlstein served as the founding director of law and security programs at Human Rights First, where she led the organization's efforts in research, litigation, and advocacy surrounding U.S. detention and interrogation operations. Among other projects, she led the organization's first monitoring mission to Guantanamo Bay, prepared a series of amicus curiae briefs to the United States Supreme Court, and has co-authored multiple reports on the human rights impact of U.S. national security policy. She was appointed in 2009 to the American Bar Association Advisory Committee on Law and National Security.

And our third witness is Michael Edney. Mr. Edney is counsel to the Washington, D.C., office of Gibson Dunn & Crutcher. From 2007 to 2009, Mr. Edney was a White House legal adviser to President Bush's National Security Council. In that capacity, he assisted in coordinating the administration's response to national security legal issues and controversies. His principal focus was national security-related litigation and congressional oversight. Mr. Edney previously worked in the Justice Department Office of Legal Counsel.

We welcome all three of you to the Committee, and we appreciate very much your willingness to testify. It is the tradition of our Committee, if you would please rise, I will administer the oath. Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. LAUFMAN. I do.

Ms. PEARLSTEIN. I do.

Mr. EDNEY. I do.

Chairman CARDIN. Thank you very much. Please have a seat.

Mr. Laufman, we will start with you.

STATEMENT DAVID H. LAUFMAN, PARTNER, KELLEY DRYE & WARREN LLP, WASHINGTON, D.C.

Mr. LAUFMAN. Thank you, Mr. Chairman, thank you, Senator Kyl. Thank you for inviting me to testify here today.

Yesterday morning, in an Alexandria, Virginia, courtroom only a few miles from here, the final act played out in a terrorism case that embodies many of the issues now before this Subcommittee. In the case of *United States* v. *Ahmed Omar Abu Ali*, U.S. District Court Judge Gerald Bruce Lee increased the defendant's sentence from 30 years to life in prison for providing material support to al

Qaeda, conspiracy to hijack and destroy civilian aircraft, conspiracy to assassinate the President, and other crimes. Abu Ali will now be transported back to the administrative supermax in Florence, Colorado, where he is serving his sentence under highly restrictive conditions of confinement.

Mr. Chairman, prosecutors and former prosecutors love to talk about their big case, but the Abu Ali case is a prime example of both the unique challenges of bringing terrorism cases in the criminal justice system and how those challenges can be overcome. And in this debate about alternatives for prosecuting terrorists, that case is highly instructive.

From a homeland security standpoint, Abu Ali was our worst nightmare. Born and raised in the United States, fluent in Arabic, highly intelligent, he joined an al Qaeda cell in Saudi Arabia and plotted to commit terrorist acts inside the United States upon his return. Because of the obstacles to criminal prosecution, Abu Ali was almost designated as an enemy combatant. The Government's key evidence consisted of confessions obtained by foreign security officers in a country with a problematic human rights record, which the defendant claimed were the result of torture. And the physical evidence tying Abu Ali to the al Qaeda cell had been seized by Saudi security officers and was located in Saudi Arabia.

To prove the Government's case and to rebut Abu Ali's claims of torture, which were fabricated, it was essential to obtain the testimony of Saudi security officers, and the Saudi Government had never in its history permitted its officers to testify in a criminal proceeding outside Saudi Arabia—or even inside Saudi Arabia.

The intelligence community possessed information vital to both the Government's case in chief and the repudiation of Abu Ali's torture claims, but initially was unwilling to allow the use of that information in a criminal proceeding.

These challenges were all overcome through unprecedented foreign cooperation, resourceful prosecutors and agents, a court willing to apply well-settled jurisprudence to novel facts, and an intelligence agency willing to meet prosecutors halfway. And what the Abu Ali case and numerous other cases affirm is the proven ability of Federal courts to resolve the most challenging procedural and evidentiary issues presented by terrorism cases without compromising sensitive intelligence sources and methods or the fundamental due process rights of defendants.

That record of judicial achievement is well documented in the 2009 update to the Human Rights First study, "In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts," which was released last week, and in the initial volume published in 2008. And I would ask that the 2009 update be included in the record.

Chairman CARDIN. Without objection.

Mr. LAUFMAN. Mr. Chairman, the proven effectiveness of criminal prosecutions of terrorism cases is reason alone to ensure that the Government's ability to bring these cases in the courts is not hindered. But there are additional benefits. Bringing terrorism cases in Article III courts under well-established constitutional standards and rules of procedure and evidence confer greater legitimacy on these prosecutions, both here and abroad, by revealing

the underlying facts of our adversaries' plots. Criminal proceedings also play an important role in educating the American people and the world about the nature of the threat that we face. In my judgment, the Obama administration, therefore, should be commended for establishing a presumption "where feasible" that Guantanamo detainees will be prosecuted in Article III courts.

At the same time, I would respectfully submit to the Subcommittee that congressional restrictions on the administration's ability to transfer Guantanamo detainees to the United States for criminal prosecution are ill advised, contrary to the national interest, and should be eliminated. These restrictions appear to be based on the myth that terrorists cannot be safely incarcerated in the United States. In fact, both before and after 9/11, a rogues' gallery of dangerous terrorists successfully have been detained in this country, as detailed in my written testimony, in localities across the United States. None of these facilities was ever attacked while a defendant was incarcerated there on terrorism-related charges, and no such detainee has ever escaped. The most dangerous of these terrorists are now safely serving their sentences at the impregnable supermax facility operated by the Federal Bureau of Prisons in Florence, Colorado.

Congress has ignored this history of experience. It has also ignored the Department of Justice's regulatory authority to tighten security for individuals who either are being detained pending trial on terrorism-related charges or have been convicted of such an offense. Under Federal regulations, the Attorney General has broad discretion to impose special administrative measures that severely restrict a detainee's ability to engage in conduct while incarcerated that could present a national security risk, including restrictions on contact with other inmates, even group prayer with other Muslim inmates, and with the outside world.

As the Obama administration and Congress grapple with resolving the detention of prisoners at the U.S. Naval Station in Guantanamo Bay, it is essential to create a legal architecture that gives the executive branch flexibility in determining whether and where to bring terrorism prosecutions. One option that must be preserved, among other options, with respect to both Guantanamo detainees and future cases is the criminal prosecution of detainees in Federal courts.

In its preliminary report issued on July 22nd, the Detention Policy Task Force recognized the importance of preserving both criminal prosecution and military commission as options for the Government in determining where to prosecute individuals accused of engaging in terrorism. The task force identified three broad sets of factors that the Government will employ in determining the appropriate forum for a terrorism prosecution.

The factors identified in the task force's preliminary report reflect a recognition that while criminal prosecutions may be generally desirable, certain terrorism cases either should not or cannot be brought in Article III courts. In my judgment, these cases include cases where the defendant is accused of committing crimes against humanity or war crimes or evidence was gathered in the battlefield by U.S. or foreign military or security services or the Government's key inculpatory evidence is based on sensitive intel-

ligence sources and methods that either should not be disclosed to the defense or cannot be revealed in a public trial, or where statements critical to the Government's case were obtained through coercive means.

In such cases, Mr. Chairman, where the Government has made a finding that the evidence against an accused is both probative and reliable and that release, repatriation, or adjudication in an appropriate third country is not an option, the Government must have recourse to an alternative legal forum such as a military commission, subject to oversight and under rules that balance a defendant's right to a fair proceeding with the Government's legitimate right to protect national security interests. President Obama, therefore, was wise in my judgment to retain the system of military commissions pending various procedural reforms.

In conclusion, I commend you for holding today's hearing, and I urge the Subcommittee to follow a course that enables the administration to bring detainee and other terrorism in criminal courts, without restriction, while preserving its ability to bring prosecutions in military commissions where appropriate.

Thank you.

[The prepared statement of Mr. Laufman appears as a submission for the record.]

Chairman CARDIN. Thank you, Mr. Laufman.

Ms. Pearlstein.

STATEMENT OF DEBORAH N. PEARLSTEIN, ASSOCIATE RESEARCH SCHOLAR, WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS, PRINCETON, NEW JERSEY

Ms. PEARLSTEIN. Thank you, Chairman Cardin, Senator Kyl, members of the Subcommittee. Thanks for the opportunity to testify on this important subject.

The preliminary report of the Administration Detention Policy Task Force, issued last week, announces the administration's intention to use reformed military commission proceedings to try some fraction of the detainees currently held at Guantanamo Bay. As I recently testified before the House Judiciary Committee, while I continue to doubt that the use of a new military commission system is a necessary course of policy, I also believe that it is possible to conduct commission proceedings for certain crimes in a way that comports with U.S. and international law. Ensuring that any future proceedings meet those standards is now a critical responsibility of Congress.

In this brief statement, I would like to highlight just a few of the recommendations I have made that I believe are essential to help ensure that any commission process going forward complies with applicable U.S. and international law. These recommendations involve both the legislative framework governing the commissions and the protocol recently put forward by the Detention Policy Task Force for determining whether to proceed with criminal prosecution in a military commission or in Article III court.

The administration is right to recognize that guidance is needed in these exceptional circumstances to constrain the exercise of prosecutorial discretion. At the same time, the protocol put forward

needs to be clarified in key respects to ensure that discretion is exercised in a way that is consistent with the rule of law.

In recent testimony before the House, I offered a series of specific recommendations for how the Military Commissions Act of 2006 should be amended if commission proceedings are to comply with relevant law, and I ask that that testimony be incorporated into the record here, if that is possible.

Chairman CARDIN. Without objection.

Ms. PEARLSTEIN. Thank you.

In addition, I think it is critical that any new legislation regarding military commissions include a sunset provision or other structural mechanism to ensure that the commissions are strictly limited in purpose and duration. Such structural limitations are essential not only to bolster the commissions' already tarnished legitimacy, but also to ensure their constitutionality.

As the Supreme Court has consistently recognized, our constitutional structure reflects a strong preference that determinations of guilt and innocence be carried out by independent courts created under Article III. In keeping with this constitutional presumption, the extent to which the Supreme Court has approved the use of Article I military courts has been strictly limited by the Supreme Court.

As the Hamdan Court recognized, military commissions had historically been courts of necessity, not efficiency, recognized only in a limited set of circumstances, the only one of which that is relevant here is when commissions are, in the words of the Supreme Court, "incident to the conduct of war." In this respect, where a new commission system functions other than incident to the conduct of a particular recognized war, whether because the offenses charges are not war crimes under international law or because the commission itself appears to extend its mandate beyond events occurring within the period of war as recognized by international law, it may be more vulnerable to challenges exceeding Congress' authority under Article I. Absent clearer formal recognition of the commission statute that "military commissions" cannot exercise jurisdiction over every crime committed at any time, Congress may not only exceed its constitutional authority, it will have created, in my judgment, a standing national security court by another name.

Finally, let me say a word about the administration's proposed protocol for selecting where Guantanamo cases should be prosecuted. Any such protocols should reflect two central principles, and it is unclear to me from the text of the protocol whether it does.

First, military commission trials may only be considered at all in those cases in which prosecutors have probable cause to believe that a specifically defined war crime has been committed, and that evidence admissible in the commission forum will likely suffice to sustain a conviction. In the absence of either one of those two findings, none of the other considerations identified in the protocol—the gravity of the alleged conduct, the relative efficiency of the forum, foreign policy concerns, and so forth—are relevant to the prosecutorial decision in choosing a forum. Independent, professional prosecutors must have arrived at clear and affirmative answers to these threshold questions—that is, probable cause of a

war crime, and evidence sufficient for prosecution—before the protocol is even invoked.

Second, the administration's stated presumption in the protocol in favor of prosecution in Article III courts must include guidance that makes it clear for prosecutorial decisionmakers why and to what extent such a presumption exists and how it should be implemented. In my view, such a presumption is consistent with, and perhaps compelled by, the structure of our Constitution, which recognizes Article III courts as the default setting for criminal trials of non-servicemembers. It is also essential as a policy matter to limit the strategic damage continued use of military commissions seem likely to cause.

The President has wisely recognized that Guantanamo has had the effect of expanding the base of al Qaeda recruits. Just as with the Guantanamo detention system in general, the taint of unfairness extends to the commission process in particular. Whatever tactical gain may be achieved in trial by commission in the first instance will bring with it a strategic cost of conducting trials under a system many will likely to continue to see as lacking legitimacy.

As the President himself appears to believe, the United States has already suffered significant strategic losses in the global struggle against terrorism. It is in our national security interest to minimize those losses going forward.

The single biggest threat to the legitimacy of the military commissions is the danger that the commissions will function, in perception or reality, as a second-class form of justice for cases involving evidence insufficient to prevail in prosecution in a traditional Article III setting. Adhering closely to constitutional standards of evidence and fiercely protecting prosecutorial independence, these are indispensable safeguards if commissions are to move forward without the taint of illegitimacy that has so infected commission trials to date.

Thank you, and I look forward for your questions.

[The prepared statement of Ms. Pearlstein appears as a submission for the record.]

Chairman CARDIN. Thank you very much.

Mr. Edney.

STATEMENT OF MICHAEL J. EDNEY, GIBSON DUNN & CRUTCHER LLP, WASHINGTON, D.C.

Mr. EDNEY. Thank you, Chairman Cardin, Ranking Member Kyl, for the opportunity to come and address this important issue today. You have my written statement. I just wanted to highlight a few key points before we get started with the questions.

After the President's May 21st speech to the Nation, it is becoming clear that there is an emerging consensus now between two administrations that some form of military commissions is necessary for the prosecution of members of al Qaeda, specifically ones at the Guantanamo Bay facility. At the same time, in fewer than 6 months, the President's deadline for closing Guantanamo will arrive. We have not heard from the President's task force on how that will be handled, but what we do know is that there are more than 220 detainees at Guantanamo today, just about 15 fewer than there were when this administration started; and it is almost inevi-

table that al Qaeda detainees, maybe hundreds of them, will end up in the United States. Some will be here held as enemy combatants. Some will be tried in Federal courts. Some will be tried by military commissions. And that is the topic at hand today, an issue that Congress will have a significant role in.

I want to address briefly the considerations, the legal considerations that would help in choosing between Federal criminal trials and military commissions.

First, that choice needs to address classified information. Classified information is at the forefront of any trial involving al Qaeda operatives. Our Nation's military and intelligence services have conducted significant surveillance, especially against the highest-level individuals in the al Qaeda organization, and these are the people that we are talking about down at Guantanamo right now, and they have done it to protect the American people. So classified information, any way you look at it, is going to be either used in the Government's case or be relevant to what the defense wants to say.

The fundamental principle here behind the military commission rules on this is to avoid forcing the Government into a very difficult choice between revealing classified information to members of an enemy force during a time of armed conflict, a continuing war, on the one hand, and holding them responsible and accountable for violations of the law of war, including the 9/11 attacks on this country, on the other hand. So the Military Commissions Act allows for an impartial check by the judge on the reliability of underlying intelligence sources and methods without revealing every intelligence activity behind the evidence. At the same time the defendant receives every piece of evidence that the jury sees and he is entitled to all exculpatory evidence, classified or not, unless there is an adequate substitute for him to prepare his defense.

These are special procedures for a continuing war. The rules in criminal trials identified by the Classified Information Procedures Act are not that. They are not tailored to a continuing armed conflict. That law was passed for very different circumstances, and if you go back and look at the legislative history of that act, you will see it. It was to try U.S. Government officials for espionage. These people were walking repositories of classified information, and we wanted an orderly system for the Government to have notice when they intended to bring some of this classified information out at trial.

If we are going to go down the path of trying dozens of Guantanamo detainees in Federal court, we need to take a critical look at these rules that are now in Federal court under the Classified Information Procedures Act. It is no answer to say that Federal courts are ready because of a law passed 29 years ago for a very different purpose.

Second, there has been significant discussion today—and it was the primary focus of the testimony earlier—about how we sort Guantanamo detainees between Federal criminal trials and military commissions, and I think this is a crucially important topic.

The administration says that there will be a presumption of Federal court trials unless the evidence is too weak or the classified information is too important, in which case a move back to the

military commission system may be considered on a case-by-case basis. This approach, I believe, may be a threat to the integrity of both the military commission system and the Federal criminal justice system, and this is something that Senator Feingold pointed out earlier. It sends a message that the rigorous procedures in Federal courts for criminal trials matter until they matter; or, in other words, they will be followed until they make a difference in a particular case, at which point we will move to another system of justice.

For military commissions, the message would be that those proceedings are a type of secondary justice not to be respected, and I think we can have no doubt when it comes to defending the military commission system in the appellate process that that message will be taken by the judges that review it.

A better approach would be to designate a class of cases for one system or another, the quality of evidence in any particular case aside. Try all members of al Qaeda who are aliens who have violated the laws of war in military commissions. Justify that choice on history, tradition, and the necessities of armed conflict. Or try all of those individuals in Federal courts. But the least preferable option is to sort them on the strength of the evidence to come up with a compromise solution, a sliding scale that applies to particular cases as we move through the process.

Third, Congress needs to consider the legal consequences of where military commission trials are held, and this is something that is an impending issue for this body, because unless the President changes his deadline, these new military commission trials will be held in the United States, not in Guantanamo. And when the Military Commissions Act was passed, while that was a possibility, it was not at the forefront of the consciousness of this body.

One legal consequence of holding those trials in the United States is the scope of the constitutional rights that will apply. The more constitutional provisions applicable, the fewer options that are available to Congress in developing rules for these trials.

In the United States, territorial arguments against the application of certain constitutional provisions would be wiped away once these military commissions come here, and that will have all sorts of consequences. Everybody on the panel today talked about the need for special rules for hearsay, and I think there is a broad consensus on that. But I think those would be the first to fall if the trials were held here in the United States and full constitutional guarantees applied to those proceedings. If the Confrontation Clause applies, the Supreme Court's recent decision in *Crawford* v. *Washington* would suggest that a safety valve for hearsay that depends on reliability assessments by a trial judge would be invalid.

Another consequence would be taking away Congress' exclusive discretion as to whether Guantanamo detainees are released inside the United States. The power to allow entry into this country rests exclusively with this body under the Constitution's Naturalization Clause and Article I, Section 8, Clause 4 of the Constitution. And the Court would be extremely unlikely to order entry after a military commission acquittal outside of this country. But once Guantanamo detainees are here, that is no longer a power that Congress will have. It will be up to other branches.

Thank you again for the opportunity to testify. I look forward to the panel's questions.

[The prepared statement of Mr. Edney appears as a submission for the record.]

Chairman CARDIN. Well, thank you to all three for your testimony and your addition to the record.

I want to start with the first point where there is a difference, I guess, between Mr. Edney and Mr. Laufman and Ms. Pearlstein, and that is, if we bring these detainees into the United States—and I think it is difficult to argue that this is not a problem that the United States can avoid being part of the solution. We are not going to be able to get other countries to handle all the people at Guantanamo Bay. We are going to have to assume responsibility for bringing these individuals to justice. And if we use our Article III courts, they are going to be here in the United States.

I think it is clear that we can safely detain and incarcerate these individuals here in the United States. I do not really think that is an issue. As has been pointed out by my colleagues, there are hundreds of convicted terrorists currently in our prison system.

The issue, Mr. Edney, that you raise is that if they are found to be not guilty or there is insufficient evidence and they are here, whether it is a military commission or a trial, an Article III court, what do you do if they are not convicted or one day they complete their sentence, whatever that sentence might be, and they are released? Do we give up our ability to require that they leave our country? I do not think we do. I think the immigration laws are such that there is no responsibility for them to be allowed to remain in the United States, particularly when they have violated any of the standards that we would allow someone to come into our country. So I think we can ask them or require that they leave our country.

So I think we are not giving that up. I think Congress has spoken to that, and, of course, we are waiting to hear the administration's plan, and we expect that that will be addressed somewhere in their plan as to what ultimately would happen to individuals who are either found exonerated by the court system or have exhausted their sentence here in the United States, what would be the administration's position as to where they ultimately would be released. I do not have the answer to this, but I just think this problem is solvable.

But I want to—and if you want to comment on that, if any of you want to comment on that, that is fine. Mr. Edney.

Mr. EDNEY. Yes, I am happy to comment on that. I think that is an important point that you raise, Senator, about the ability to remove them from the country after an acquittal. They are aliens, after all, and you can develop procedures that would reduce their standing to stay in this country.

I think it is important to keep in mind that one of the challenges of reducing the Guantanamo population has been finding countries willing to take these people because of the assessment of those third countries of the dangerousness of those individuals, and, perhaps more importantly, finding places for some of these individuals where they will not be mistreated. Once they are in the United States, we actually have a legal obligation under the torture stat-

ute and under the Convention Against Torture not to return an individual to a place where he or she will be mistreated, and that has been a big challenge at Guantanamo.

Chairman CARDIN. That is part of commitment. I acknowledge that. But let me just take issue with one point. I have talked to representatives from other countries concerning this issue, and one of the points they raise to me frequently is that, fine, we are willing to do our part, but is the United States willing to take on a responsibility within its justice system? And I am talking about nations in which there is no question that they would respect international human rights in regards to the manner in which they would handle these transfers.

So I think it is an issue that the United States has to be prepared to deal with, because we are, we are transferring some now for trial. I think that is going to happen. But I think you raise a legitimate concern, and it may well be that we need to change the law to deal with what happens in the eventuality that these individuals ultimately are released from our criminal justice system, strengthen the laws in regards to deportation.

Mr. EDNEY. Well, why not change it before they arrive, too? That is——

Chairman CARDIN. We might——

Mr. EDNEY. Because once they are here, rights will attach, and it will be difficult to take them back.

Chairman CARDIN. We might have to.

Ms. PEARLSTEIN. I guess I would just differ slightly. I agree absolutely with your premise. This particular problem is a solvable problem. In fact, to the extent I differ, I think it may already be solved, and that is, let me just highlight, I think, two distinctions.

First of all, the U.S. obligations not to send anybody back to a country where they are likely to face torture and persecution and so forth is an obligation under we have under our statutes, regulations, treaties and so forth. It attaches already in Guantanamo Bay, and whether they stay in Guantanamo or come back here, we are under that obligation. And I think the evidence of that is reflected in the fact that the last administration, just like this administration, thought they cannot send the Guantanamo Bay detainees back to places like China or wherever to face persecution. So those obligations exist whether they are in Guantanamo or whether we bring them to the United States. That does not make a difference.

With respect to what to do if a detainee is brought to the United States for trial, is acquitted, or convicted and then serves his sentence, under immigration laws as I understand them as they exist, that person is certainly deportable, and not only are they deportable, we can continue to detain them while deportation proceedings are pending. So there is, in my view, simply no risk that a Federal court would then immediately order the release from the supermax facility in Colorado.

Chairman CARDIN. I think that is the concern of people in our country. There is concern that the terrorists that are currently at Guantanamo Bay could be released in the United States, and I think that risk is not there if we follow the procedures we are talking about.

Yes, Mr. Laufman.

Mr. LAUFMAN. Just to make clear, the alien removal statute is that authority that Ms. Pearlstein is speaking of, which empowers the Attorney General to do anything at his discretion to detain foreign nationals who present a national security risk. There is no specific time limit by law on how long the Government can detain people for national security reasons. There was a Supreme Court case in Zadvydas a few months before 9/11, where the Court even made a bow toward the necessity to detain foreign nationals longer under the alien removal statute where there were national security grounds to do so.

Mr. EDNEY. Well, I just want to say about that, if you go back to the Zadvydas case that held that question open, I do not think we know how the Supreme Court is going to rule on that, and the Zadvydas decision places a heavy thumb on releasing people who cannot be deported within 6 months. So that is a risk that we are running, constitutional litigation.

Chairman CARDIN. I would just make this observation. I think there is no opposition at all in Congress to making the laws as clear as can be that terrorists are not going to be released in the United States. I think that is—if we need to strengthen the law, we will strengthen the law. I think we could pass that without too much difficulty. So I think that issue can be handled.

I understand some of the other points that have been raised. I agree with Ms. Pearlstein; I think it is already clear. But if we have to make it stronger, we will make it stronger that, assuming we go through trials, assuming that there are detainees that become incarcerated in the United States, either awaiting trial or during trial or after conviction, ultimately if there comes a time when they are eligible to be released, they are not going to be released in the United States. One way or the other they are not going to end up in our country. They are not citizens of America. They have no rights in that regard.

Let me turn to Senator Kyl.

Senator KYL. Let me just ask and, if you can, a yes or no answer, and then if you need to expand, then do it. On this last point, do you agree with Senator Cardin's statement just now that if the United States brings someone from Guantanamo to an Article III court and, for whatever reason, they are at some point released, deemed no longer imprisonable—the case is dismissed, their sentence has been served, whatever the situation—at that point there is no constitutional issue, having been brought to the United States and being in the United States, that the United States could hold them indefinitely in the event that we could not find a place to send them, that there is no constitutional issue, no constitutional right for that detainee to be released after a period of time? Do you agree with that?

Mr. LAUFMAN. I am not sure I understand the Senator's question.

Senator KYL. Would there be a constitutional claim by someone brought into the United States, having served his sentence, for example, with the existing immigration laws that allow us to hold an individual who is deportable?

Mr. LAUFMAN. If it is a foreign national, I do not believe——

Senator KYL. A foreign national.

Mr. LAUFMAN. If it is a foreign national, I do not believe the individual would have a creditable claim that he cannot be detained under the alien removal statute. The boundaries of how long that detention can take place may well be litigated because Zadvydas left open that question.

Senator KYL. Right. Do you agree with that, Ms. Pearlstein?

Ms. PEARLSTEIN. I agree that it is an open question after Zadvydas that, you know, without any legal authority to continue to detain somebody, they just need to be deported, and we have no place to send them, could we continue to detain them beyond 6 months, a year, 3 years, and so forth. The Supreme Court has never had occasion to rule on that particular question. When it left the question open in Zadvydas, it said it may be that terrorism and security cases are an exception, and this was a case that came down before 9/11.

Senator KYL. Mr. Edney, your view.

Mr. EDNEY. I think that there is a substantial risk, Senator, that they would have a constitutional claim for release in the United States. And if it is a constitutional claim, we can pass all the legislation in the world, and we cannot really do anything about it.

Senator KYL. All right. Thank you.

Mr. Edney, can you edify us at all on the statements that have been made earlier that there have only been three convictions in military commissions out of Guantanamo? What are the reasons for that?

Mr. EDNEY. Well, I go over this somewhat in my written statement, but there is a long history behind this. When the military commissions really got started in earnest after captures, they got started in about the 2003–04 period, and they were immediately caught up in constitutional challenges and stayed for almost 3 years, well over 2 years, resulting in the Supreme Court's decision in *Hamdan* v. *Rumsfeld* in 2006.

Then it took time for the Congress to respond, to pass the Military Commissions Act, develop rules under the Military Commissions Act, which were not completed until January 2007 through yeoman work by both the executive branch and the Congress.

After that, charges started to happen, and by January 2009, nearly 24 people had been charged by military commissions under the MCA. Even in that period, there were at least 7 or 8 months that was held up in yet another jurisdictional challenge that got resolved by the Court of Military Commission Review in September 2007. So because of all of the higher-court litigation, the military commissions really have not had a chance to get working until the very end, until they were suspended on the day after President Obama was inaugurated.

Senator KYL. Are you familiar with how many of the Guantanamo people—that is to say, alleged enemy combatants detained at Guantanamo—have been tried in Article III courts in the United States? Or successfully convicted, I think was the claim.

Mr. EDNEY. Could you run that by me again, Senator?

Senator KYL. How many of the detainees at Guantanamo have been successfully convicted under Article III courts?

Mr. EDNEY. Well, none, and I think that—you know, I listened to Senator Durbin's commentary on this. You know, there have

been a lot of people that have been convicted in Article III courts of terrorism offenses. The people at Guantanamo are a little bit differently situated. I mean, we have down at Guantanamo now al Qaeda leadership, and one feature about al Qaeda leadership, without telling anything that should come as a surprise to anybody, is that they are heavily surveilled, and that makes things awfully complicated when it comes to trying them. I mean, they are really in kind of a class by themselves. And on top of that, many of those prior cases come during the time of continuing armed conflict where you want to continue those measures to protect the country and be on the offensive against the terrorist organization.

Senator KYL. Mr. Laufman, I had a question. In your testimony, you approvingly quoted the President's statement that the existence of Guantanamo likely created more terrorists around the world than it ever eliminated. I was intrigued by the allegation when the President made it on May 29th, so I sent a letter to the National Security Adviser, General Jones, and I asked him to provide factual support for the statement. I have not received any response from the administration, and since you referred to it, I wonder if you could provide some factual support for the statement or quantify in some way how many or who you are referring to.

Mr. LAUFMAN. I am not sure that was in my statement, but I will say to the Senator that it has been my observation from talking to people in the intelligence community—and I even had the opportunity when I was in Saudi Arabia about 18 months ago to meet some detainees released from Guantanamo, then in a Saudi jihadist halfway house program, if you will—to speak to them about what had led to their radicalization, what had helped to form them as extremists. And some of them talked about Abu Ghraib. Some of them talked about Guantanamo Bay. And it is hard to form any hard and fast conclusions from that that have any statistical, empirical value. But I think it is fair to say that Guantanamo became a jihadist propaganda tool to recruit people to the cause, and to that extent, it has become a national security liability for the United States.

Senator KYL. I misspoke. Actually, that was in Ms. Pearlstein's statement, and so I apologize for asking the question. My time just expired, but I think I could ask Ms. Pearlstein, can you provide some enlightenment on the basis for the statement?

Ms. PEARLSTEIN. Sure. The basis of the President's statement. You know, obviously I do not have any personal knowledge of what the President in particular was basing his statement on. The reason I believe the statement is several-fold, and I would caution that it is difficult to quantify—you know, we do not have any way of having any knowledge of what the worldwide population is of al Qaeda members currently, but the evidence I found the most persuasive in this respect was at least three-fold.

First is testimony in the last few years by people like Alberto Mora, who was the former General Counsel of the Navy under President Bush, and senior leadership of our military who said on the battlefield—in Iraq this was at the time, in particular—the two single things they thought were putting their troops most in danger were Guantanamo and Abu Ghraib. That is one piece of evi-

dence, and the testimony, the sort of individual testimony of those folks who are sort of on the front line I found quite compelling.

Senator KYL. In other words, the assumption is that people who would not have otherwise been recruited believed that the American system of justice at Guantanamo was insufficiently rigorous and, therefore, decided to object by becoming terrorists?

Ms. PEARLSTEIN. I do not think they—I think the short answer is——

Senator KYL. That is a bit of a stretch, isn't it?

Ms. PEARLSTEIN. No. I think if you look at——

Senator KYL. What standard of justice does somebody in Saudi Arabia test the American standard against to reach the conclusion that we are not fair?

Ms. PEARLSTEIN. I think that is a bit of a misstatement—or a bit of a mischaracterization, I would say. I think the argument they were making—and if you look on jihadist websites, recruiting websites, the pictures on those websites are pictures of Abu Ghraib and pictures of Guantanamo Bay. I do not think they are making—I do not think they are necessarily making a highly specific argument about what the procedural rules of the military commissions are. They are making a symbolic——

Senator KYL. But if I—and I apologize for interrupting——

Ms. PEARLSTEIN [continuing]. Argument and they are succeeding.

Senator KYL. But, really, what that would suggest is that anything that they object to about our Western way of life we should compromise because it might be a reason for them to recruit each other.

Ms. PEARLSTEIN. Absolutely not. I absolutely disagree with that statement.

Senator KYL. I am glad you disagree with that.

Ms. PEARLSTEIN. I would argue that they are in so many respects completely wrong. The problem is we do not get a choice in the United States about what our enemies decide to do. What we can do, to the extent possible—and I think in this case, the case of the treatment of detainees and the trial process we use, it is incredibly possible to minimize the risk that what we are doing is going to make us more enemies than we already have.

Chairman CARDIN. Let me just raise one or two points very quickly.

First, in regards to use of Article III courts with terrorists in the United States, there was no effort made by the previous administration to prosecute detainees at Guantanamo Bay under Article III courts. So the numbers that were raised earlier dealt with terrorists who were apprehended outside of Guantanamo Bay, some Americans, some non-Americans, who have been prosecuted successfully under Article III trials.

I want to just ask a question. If you have a person at Guantanamo Bay today who is not eligible for a military commission under the war crimes issue, so it could be tried either in Article III or it could be tried in a military commission, and you have the evidence to proceed either way you want to, what do you think should be the preference? Should we try that person in a commission, or should we try that person in an Article III court? If we have a true option one way or the other to, we believe, successfully prosecute

that person for criminal actions, what is your preference? And why?

Mr. LAUFMAN. My preference as a general rule of thumb is to bring those cases in Article III courts except in cases where, for policy reasons, I believe they belong in a military commission, cases involving crimes——

Chairman CARDIN. The reason why?

Mr. LAUFMAN. Crimes against humanity, war crimes.

Chairman CARDIN. I excluded that.

Mr. LAUFMAN. My preference for the Article III forum is that I believe it holds us to the highest standards. It confers the greatest legitimacy on the outcome of those cases. It is an enormous educational tool by virtue of the constitutional right to public trials for the illumination of the underlying evidence regarding the conduct at issue. It produces a result that I think stands the test of time. Our courts are familiar with applying the rules of evidence, procedural rules to novel sets of facts. We have an enormous empirical body of history to rely upon over the last 10 years, and going back before 9/11 in the cases starting in the Southern District of New York and coming through my old district. We do not have to reinvent the wheel each time.

Chairman CARDIN. Ms. Pearlstein.

Ms. PEARLSTEIN. As a policy matter, which is how I understand your question, I think the preference should be for Article III courts for the reasons I was getting at just a moment ago in my statement. With the prosecution in an Article III court, you get all of the tactical benefit of a successful, almost always successful prosecution without any of the strategic downside of using a forum that is still perceived—and hopefully the new commissions will be better, but generally the military commission forum is still perceived as a second-class system of justice.

There is a tremendous amount of work that has to be done to overcome that perception and reality. I think we are on the right track now. But in the meantime, there is no more powerful tool for securing the long-term detention of terrorist suspects than prosecution in Article III courts.

Chairman CARDIN. Mr. Edney.

Mr. EDNEY. Well, it is hard for me to say that I have a policy preference because I am really just used to giving legal advice on this question. I think my legal advice on it would be the following: If the premise is right that has been recognized by two administrations now that you need some military commission system for some members of al Qaeda to hold them to account for their crimes against the law of war, I think it is important that you think very seriously about putting all alien members of al Qaeda who have violated the laws of war into that military commission system, because what you cannot have—I do feel this relatively strongly. You cannot have a situation where you go to the military commission system when a Federal court trial in a particular case gets too hard. And I think there is lots of history, lots of tradition, lots of very strong arguments for using military commissions for a class of individuals, members of al Qaeda during a continuing time of armed conflict, to hold them accountable for their violations of the laws of war. I do not think it is possible to argue that the Sep-

tember 11th attacks, for example, were not a violation of the laws of war, and that was part of the armed conflict against the United States.

Chairman CARDIN. Thank you.

Senator Kyl.

Senator KYL. Let me just pursue it, because I think this is an intriguing argument. If the claim—and all three of you have made this point one way or another, that you do not want to be accused of a double standard, in effect, of what Mr. Edney talked about, that the Article III cases are great until they become too hard, until their very protections would preclude a prosecution, then you turn to the second-class justice, clearly we want to avoid that kind of construct here. And so Mr. Edney's suggestion is that you try, rather than doing a case-by-case analysis, which necessarily will hang essentially on that question, that you ought to decide in advance that some are appropriate for one and some are appropriate for the other.

Now, contrast that with the fact that, of course, one of the justifications for military commissions is that you do not have to deal with some of the protections that are guaranteed in the Article III courts—the use of classified information that would become deleterious to our national security and so on.

Let me just ask you, Mr. Laufman. Does Mr. Edney have a point here, that to some extent you are almost conceding that military commissions are a second-class kind of justice if you start out with the presumption that you should start with Article III presentations?

Mr. LAUFMAN. Well, I start out with that presumption only with respect to those cases that I feel as a policy matter do not belong in military commissions. There are some categories of cases that I do believe belong in military commissions, and I might even go so far as to agree with Mr. Edney that the Moussaoui case could have probably been brought in a military commission.

Senator KYL. If I could just interrupt, so you would both agree that there are some cases that you ought to just put off in a corner and say these are military commission cases irrespective of the case-by-case analysis, but then get to the case-by-case analysis for a large number of remaining cases?

Mr. LAUFMAN. It is my own view that there are some cases for policy reasons that properly belong in a military commission.

Senator KYL. Right. But then as soon as you start doing the case-by-case analysis—and most of that will hang on how easy or how tough it is to get the prosecution, won't it?—then don't you get into this dilemma that Mr. Edney discussed?

Mr. LAUFMAN. There will be tough judgments, there is no question about it, that have to be made. Those kinds of judgments are made all the time, whether even to bring criminal prosecutions, you know.

Senator KYL. So let me just ask you this: Suppose that you are responding to an intellectual argument rather than the sort of recruiting argument that Ms. Pearlstein was talking about earlier, somebody who is criticizing our system and says, well, your system is bad because, you know, you say Article III except when it gets too tough, then you just revert to the military commissions. And

you would defend a case-by-case analysis of which one to go to by saying what?

Mr. LAUFMAN. It is going to depend on the specific facts of each case. I think as Mr. Kris was saying, these are very fact-intensive cases. You know, what is the admissible evidence in this case? You know, can the Government meet its obligations under the principles of Federal prosecution? You know, can it sustain a conviction? Can it protect——

Senator KYL. But all of those—excuse me again for interrupting, but all of those get to how easy it is to get the prosecution.

Mr. LAUFMAN. Well, if you begin with a presumption in favor of Article III prosecutions, I think it is propelling you down that road.

Senator KYL. I agree, and I think that was part of Mr. Edney's concern or question.

Mr. LAUFMAN. But I am not troubled as a policy matter if we all begin from the position of doing everything necessary and appropriate to protect national security. If we have to in some cases send some cases to military commissions to ensure that bad actors receive justice in an appropriate forum about which there can be no controversy as to its legitimacy, I do not have a problem with that.

Senator KYL. So your response is just the practical one, yes, it may be that one could argue we are relegating this situation to a second-class situation, but you respond by saying, first of all, it is not second-class, we have a lot of good procedures built in, especially with the legislation that is being proposed; and, second, just as a matter of national security, there are some things which do deserve to be protected above all?

Mr. LAUFMAN. That is right, and I do not know that it is necessarily fair to refer to the military commissions as a second-class——

Senator KYL. I agree.

Mr. LAUFMAN [continuing]. System of justice. It is a different system of justice which has a rich history, which has been discussed, you know, at length here today.

Senator KYL. Mr. Edney.

Mr. EDNEY. Maybe I could just put a finer point on this. If given the choice between the Senate's resolution that was passed the other day to say that this entire class of individuals, alien, unprivileged, enemy belligerents I think they now call them, should be tried by military commission, on the one hand, and on the other hand, the proposed presumption that could be deviated from on a case-by-case evidentiary basis, I think we have to go with the Senate's resolution. And this is really not just because of bolstering the military commission system, but protecting the integrity of the criminal justice system. It cheapens the Federal criminal justice system where these protections are, you know, cast aside on a case-by-case basis. This is something the Supreme Court thought a lot about in considering the constitutionality of civil proceedings, you know, in a series of Supreme Court cases.

Where States propose we should be able to detain somebody civilly if they are dangerous, the Supreme Court said, no, you cannot use this as a safety valve of the criminal justice system, not really because of the civil commitment proceedings but because it hurts the criminal justice system. That is what the—and I think that is

what this Committee needs to keep in mind as it evaluates the proposals of sorting these individuals into various buckets. The process is ongoing right now.

Senator KYL. It is an interesting question.

Just let me ask all of you this last question. We talked to the first panel about whether if you start from the presumption that you should go to Article III courts, of necessity you are going to increase the requirement for giving Miranda warnings much earlier in the processing of these detainees. Now, the answer from the first panel seemed to be that, no, because you have to start with the assumption that the interrogation is going to be initially for the purpose of national security, and only after that has been accomplished do you then confront the question of now what do we do with this person who could be tried in Article III courts. That is the presumption. So that perhaps the Miranda warning still would not be given so early in the process that it could interfere with the acquisition of intelligence information. I think that is a summary of what the first panel said. I would be interested in your evaluation of that.

Mr. LAUFMAN. I will start. These are considerations that have been in play for years now in cases where individuals are arrested and detained, sometimes by U.S. military forces, sometimes by other countries, and where the imperative is to gather as much actionable intelligence as possible without grafting into the process in ways that could have a chilling effect on the elicitation of information, criminal justice based policies like Miranda.

Take the case of Abu Ali that I have talked about. He had been held by the Saudis for many months. The FBI was not given access to him for many months. Then in September 2003, a special team of FBI agents went in just for the purpose of conducting an intelligence interview. Well, we knew as prosecutors later there was nothing we could use from that interview, but when I went over there to talk to Saudi officials and we hoped to have a crack at Abu Ali, I knew I had to have a Miranda warning with me. It did not affect what had gone on before. It would not have affected the efforts to elicit additional intelligence information from him afterward. But the minute I came in as a prosecutor or agents came in with the idea of collecting information for use in a criminal prosecution, then we had to have Miranda in mind.

Ms. PEARLSTEIN. If I could just add to that just a bit, I think there are two critical points on the Miranda front. The first is that, as Spike Bowman has told me—and he used to be FBI counterterrorism director, senior person in the FBI—if somebody does not want to talk to you, they are not going to talk to you whether you mirandize them or not. So if you happen to pick up a high-value detainee or any detainee who does not want to talk to you on the battlefield, you cannot lawfully coerce them into talking to you, but the existence of Miranda or not does not make a difference.

Secondly, in his experience, the vast majority of detainees who you do mirandize in the criminal justice system, or any other context, end up talking to you anyway if you have an effective interrogation or interview set of techniques.

So I think the fear of Miranda as somehow the end of the acquisition of information is sort of substantially overstated.

The second thing I would say—and this is just to emphasize this point—the courts have already held in the course of terrorism prosecutions that have been successfully brought since 9/11 and before that it is possible to, you know, if somebody is held by a foreign intelligence service, by our own intelligence service where they are initially detained, for example, even up to a period of some weeks, and interviewed for intelligence purposes, that information is not necessarily voluntarily given. But once you after that period of weeks give the Miranda warnings, the information you subsequently obtain can still be deemed, depending on the circumstances, voluntary enough to then be admissible in criminal court.

So I actually think this is another example of an eminently solvable problem.

Senator KYL. Mr. Edney.

Mr. EDNEY. Senator, I would make three quick points about this.

First, I think if the presumption is in favor of Federal criminal trials and I were providing legal advice to the Department of Defense, I absolutely would advise for any statement that you actually wanted to use in court, you would want to mirandize it. And, you know, there is an interesting thing in Mr. Kris' testimony on this, too. He wants to introduce a voluntariness standard into the military commissions process, and if were providing legal advice regarding that, I would advise mirandized statements even for people that we would send to a military commission, because it is the same inquiry. I mean, Miranda came out of the voluntariness standard. The Court decided that it was too difficult to manage and wanted a prophylactic rule. I think that is probably where we would be headed, you know, in the military commissions process if there was a voluntariness standard. Certainly, we would look to the knowledge of the detainee as to his right to an attorney and stop talking and various things like that.

A second point that I would make—and I think this is an important one—if you are moving to a system where you do not want to have the detention of enemy combatants to the end of hostilities—which is kind of the old system, right?—but instead you want to use Federal criminal trials and military commission trials for the vast majority of these cases for incapacitation purposes, making sure that an initial statement from a detainee is done under conditions of voluntariness becomes crucially important for the military, and they are going to be pulled in two different directions: first, to gather intelligence from these individuals to save their lives; and, second, to look down the road where we do not have to release these folks in a year or two because a statement was not properly taken on the battlefield. That is a very dangerous conundrum to put our Nation's armed forces into.

So these considerations need to be kept in mind both in the choice between Federal criminal trials and military commission proceedings, but also in the rule that Mr. Kris is urging upon this Committee, and the Armed Services Committee more specifically, with regard to military commission trials.

Senator KYL. Thank you very much.

Thank you, Mr. Chairman.

Chairman CARDIN. Well, I want to thank all three of you for your testimony. I think it has been very helpful. These are not easy issues, and they are going to continue to be of interest to the Judiciary Committee as well as the Armed Services Committee and every Member of the U.S. Senate. We are not going to solve the issue today, and, of course, we are still awaiting the administration's detailed reports on the closing of Guantanamo Bay, which we do not have. But I think today's hearing prepares us to be better prepared as we go forward to developing the policies necessary to protect the security of our country.

Chairman Leahy was unable to attend today's hearing. He has other conflicts, but he asked that his statement be made part of the record. Without objection, it will be.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman CARDIN. The Committee record will remain open for 7 days for additional questions by members of the Committee, which I would urge the witnesses, if such questions are propounded, to please respond promptly.

And, with that, the Subcommittee will stand adjourned. Thank you all very much.

[Whereupon, at 5:16 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions follows:]

[Additional material is being retained in the Committee Files, see Contents.]

QUESTIONS AND ANSWERS

Responses of Michael J. Edney
Questions for the Record

Untied States Senate Committee on the Judiciary
Subcommittee on Terrorism and Homeland Security
"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"

Questions from Senator Kyl

1. You mentioned in your written statement that Congress has exclusive authority to determine who may enter this country. Has Congress authorized the Executive Branch to bring Guantanamo detainees to the United States?

The Supreme Court repeatedly has held that the Congress has exclusive authority to determine who may enter the United States.[1] For this proposition, the Court has relied on the explicit grant of authority to the Congress in the Constitution's Naturalization Clause.[2] Accordingly, the Executive and Judicial Branches generally require the statutory authorization of the Congress before effecting the physical entry of an alien into the United States.

Only an aggressive interpretation of current statutory immigration law in favor of the Executive Branch would authorize the contemplated transfer of Guantanamo detainees to the

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[1] *Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Fok Yung v. United States*, 185 U.S. 296, 302 (1902); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

[2] U.S. CONST. Art. I, § 8, cl. 4.

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United States.[3] This is especially so for individuals the Executive Branch continues to believe are members of al Qaeda-affiliated terrorist organizations and do not intend to try in federal court. Importantly, these immigration law questions are entirely independent of recent measures restricting the use of certain appropriations funds for transfers into the United States.[4] The safer course would be for the Executive Branch to obtain explicit authorization from the Congress for any transfer of detainees into the United States prior to the closure of Guantanamo.

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, governs the entry of aliens into the United States. The INA broadly prohibits admission into the United States of aliens who have engaged in terrorist activity, or who the Attorney General or the Secretary of Homeland Security knows or has a reasonable grounds to believe has engaged in terrorist activity.[5] "Engaged in terrorist activity" is defined to reach conduct well beyond completing or attempting a terrorist act. It explicitly prohibits admitting members of terrorist organizations, those who endorse or espouse terrorist activity, and those who have received military-type training on behalf of a terrorist organization.[6] The INA provides the Secretary of State with the

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[3] *But see* Remarks by the President on National Security, National Archives, Washington, DC (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ ("We must recognize that these detention policies cannot be unbounded. They can't simply be based on what I or the Executive Branch decides alone. That's why my Administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law.").

[4] *See, e.g.*, H.R. 2892 § 553.

[5] *See* 8 U.S.C. § 1182(a)(3)(B).

[6] *Id.* at § 1182(a)(3)(B)(iv)-(ix).

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authority to waive some terrorism-related restrictions, but expressly denies waiver authority for the above categories.[7]

The INA authorizes the Executive Branch to allow otherwise inadmissible aliens into the United States under certain specified circumstances. The Attorney General may "parole into the United *temporarily* . . . for urgent humanitarian reasons or significant public benefit any alien *applying for admission* to the United States."[8] This authority is a poor fit for transferring all categories of Guantanamo detainees to the United States. Parole authority reaches only aliens "applying for admission," consistent with providing the Attorney General authority to make limited and temporary exceptions for those voluntarily seeking entry to the United States. Guantanamo detainees are not applying for admission to the United States in any traditional sense: They are held involuntarily and would be transferred to the United States against their will.[9] In addition, many detainees transferred from Guantanamo would not be present in the United States "temporarily."

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[7] *See* 8 U.S.C. § 1182(d)(B)(1). To be sure, the Executive Branch determines who meets the statutory criteria for having "engaged in terrorist" activity. But determining that a Guantanamo detainee does not meet the statutory criteria for having "engaged in terrorist activity" would be inconsistent with any theory of holding the person once in the United States, either for prosecution in federal court for terrorist acts, or for prosecution by military commission for violation of the laws of war, or as a member of al Qaeda under the laws of war.

[8] 8 U.S.C. § 1182(d)(5); (emphasis added); *see also* Letter from Attorney General Eric Holder to Senator Jeff Sessions (June 16, 2009) (citing parole authority under 8 U.S.C. § 1182(d)(5) for transfer of detainees from Guantanamo into the United States).

[9] The D.C. Circuit noted this feature of the immigration laws in overturning a lower court ruling ordering entry into the United States. *See Kiyemba v. Obama*, 555 F.3d 1022, 1031 (D.C. Cir. 2008), *cert. granted* __ S. Ct. __ (Oct. 21, 2009) ("explaining that a Guantanamo detainee "(a) has never entered or attempted to enter the country, and (b) *has never applied*

[Footnote continued on next page]

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Some transfers could be argued to be similar to extradition. The Attorney General's Board of Immigration Appeals has referred to the extradition of an alien criminal defendant as an exercise of parole authority, and extradition is also involuntary. The BIA neither addressed the subject at length nor analyzed section 1182(d)(5) as amended by the Illegal Immigration & Immigrant Responsibility Act of 1996.[10] Nor did the BIA consider the interaction of parole authority and the specific prohibition on terrorist entry. The practice of extradition for criminal prosecution in federal court may be better rooted in the express statutory authority for extradition or as a long-standing custom not explicitly barred by statute, rather than as parole.[11] Even if

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[Footnote continued from previous page]
for admission under the immigration laws.") (emphasis added). *Cf. Wang Zong Xiao v. Reno*, 837 F. Supp. 1506, 1563 (C.D. Cal. 1993) (suggesting that "applicant for admission" refers to merely presenting one's self at the border and does not entail an inquiry into voluntariness); INS General Counsel Op. No. 98-10, *Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens* (Aug. 21, 1998) (stating that an "applicant for admission" need not present himself at the border before being eligible for parole).

[10] *See, e.g.*, *In re Badalamenti*; 19 I. & N. Dec. 623 (BIA 1988). The BIA cited a submission by the Public Health Service appended to a House Committee Report on the predecessor of section 1182(d)(5). The Public Health Service submission stated that the Attorney General should have "broader discretionary authority" to parole inadmissible aliens into the United States "in cases where it is strictly in the public interest to have the inadmissible alien in the United States, such as, for instance, as a witness or for the purpose of prosecution." H. Rep. 82-1365, *reprinted at* 1952 U.S.C.C.A.N. 1653, 1706. The Public Health Service never analyzed the case of an individual brought to the United States—by extradition or otherwise—against his will or whether such a person could be regarded as "applying for admission." And the BIA panel—without linking its analysis to the Attorney General's original statutory parole authority—held that an alien extradited into the United States "against his will" could not be considered an "applicant for admission." *Badalamenti*, 19 I & N Dec. at 626.

[11] *See* 18 U.S.C. § 3184. Immigration law now expressly deems aliens who are "brought to the United States after having been interdicted in international or United States waters" as "applicants for admission" and thus arguably subject to the Attorney General's parole authority. *See* 8 U.S.C. § 1225(a)(1). It is possible that some Guantanamo detainees may qualify for parole authority under this provision. Many Guantanamo detainees, however, were apprehended in Afghanistan and Pakistan.

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there is a customary parole authority for the limited purpose of criminal prosecution outside the specific context of extradition, this category would not reach the entirety of the Guantanamo population, some of whom the Administration plans to try by military commission or hold under the laws of war.

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2. (a) What is the legal risk that al Qaeda operatives, acquitted by military commissions in the United States, will be released in the United States?

(b) What if no third country can be forced to accept the detainee, is release more likely?

Under the current state of Supreme Court precedent, it is possible that a Guantanamo detainee—once transferred to the United States and acquitted here by military commission or federal criminal court—would be ordered released by a federal court. That risk arises from federal immigration law and Supreme Court decisions holding that aliens inside the United States have constitutional rights against indefinite detention pending removal.

The circumstances that may give rise to court-ordered release are not far-fetched. Once in the United States, the Executive Branch likely would seek to deport a Guantanamo detainee after acquittal by military commission or criminal trial. Many of the Guantanamo detainees, however, cannot be transferred to another country because no government is willing to take them. For others, citizenship cannot be established to the satisfaction of any foreign government. Foreign governments reject still others because they are assessed to be dangerous. Court-ordered release into the United States is less likely so long as the detainees are held at Guantanamo, because of the Congress's plenary power over questions of entry.[12]

In *Zadvydas v. Davis*,[13] the Supreme Court suggested that aliens may have a constitutional right to release if they cannot be removed within six months of a deportation

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[12] *See* Written Testimony of Michael J. Edney (July 28, 2009) at 20-21. The Supreme Court may decide this question during the October 2009 Term. *See also Kiyemba v. Obama*, 555 F.3d 1022, 1031 (D.C. Cir. 2008) (holding that courts lack authority to order Guantanamo detainees released into the United States), *cert. granted* __ S. Ct. __ (Oct. 21, 2009)

[13] 533 U.S. 678 (2001).

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order.[14] According to the Court, the key distinction is setting foot on U.S. soil, which Guantanamo detainees have not yet done: "[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[15]

The Court held open the question of whether its ruling would apply to aliens who are believed to be terrorists.[16] We do not know how the Court would decide this question. Context would be important. A court may view a military commission acquittal as placing a Guantanamo detainee outside the terrorism context. After all, a military panel—or a federal court jury—already will have disagreed with the Government's characterization of the detainee's past. The atmosphere of an acquittal may obscure the many reasons a Guantanamo detainee might be acquitted, including the hard choice the Government might have made on revealing classified information during trial.

Relying on *Zadvydas*, a court may hold that a Guantanamo detainee—transferred to the United States and acquitted on U.S. soil—has a constitutional right to be released in the United States within six months if no foreign country can be found to take him. If kept at Guantanamo,

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[14] The Court did not directly reach the constitutional question. Rather, the Court construed the statute authorizing detention pending removal not to permit indefinite detention in order to avoid a serious constitutional question. *See Zadvydas*, 533 U.S. at 690; *see also N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 508-09 (1979) (explaining that courts may construe ambiguous statutory terms to avoid resolving a serious constitutional question).

[15] *Id.* at 693.

[16] *Id.* at 696 ("Neither do we consider 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.")

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detainees would not have such a right under the *Zadvydas* line of cases and the territorial distinction those cases draw.[17]

It is worth noting two matters. First, after *Zadvydas*, Congress enacted the USA PATRIOT Act that authorized the detention of certain deportable aliens believed to have engaged in terrorism for renewable periods of six months, "if the release of the alien will threaten the national security of the United States, or the safety of the community."[18] This statutory change reduces risk. Nevertheless, this statute would not directly control a constitutional right imposed following the reasoning in *Zadvydas*, and there is a risk that a court would disagree with the assessment of national security risk by the Attorney General.[19]

Second, Congress may reduce the chances of court-ordered release by statutorily designating Guantanamo detainees as paroled into the United States, thus as excludable aliens, and then authorizing their indefinite detention if they cannot be deported. As explained in response to Question 1, current law may not provide authority to parole all Guantanamo detainees into the United States. If deemed excludable, the continued detention of Guantanamo detainees would present a different constitutional question.[20] The Court also has explicitly left

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[17] *See Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

[18] 8 U.S.C. § 1226a(a).

[19] *See Zadvydas*, 533 U.S. at 692 ("the Constitution may well preclude granting 'an administrative body the unreviewable authority to make determinations implicating fundamental rights'").

[20] *See Zadvydas*, 533 U.S. at 692-94.

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open whether the Constitution permits the indefinite detention of excludable aliens.[21] The Court previously had decided in *Shaughnessy v. United States ex rel Mezei* that excludable aliens lack constitutional rights and may be detained indefinitely pending removal.[22] That the Court has not recently affirmed *Shaughnessy*, and indeed undermined *Shaughnessy* by extending certain constitutional rights to aliens wholly outside the United States,[23] creates uncertainty as to whether such a statutory fix would work.

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[21] *See Clark v. Martinez*, 543 U.S. 371 (2005) (interpreting that same statute at issue in *Zadvydas* not to provide authority to detain excludable aliens indefinitely).

[22] 345 U.S. 206 (1953).

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

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3. (a) If al Qaeda detainees are moved to the United States, will they have new rights to challenge their conditions of confinement in federal court?

(b) What legal rules will govern that litigation?

Once inside the United States, Guantanamo detainees may have new claims to several constitutional protections.[24] Persons enjoying U.S. constitutional rights, under certain circumstances, may sue federal officials for money damages for violating those rights.[25] *Bivens* has been the basis for modern prison litigation in the United States, a system that involves close judicial management over the conditions of confinement.

If imprisoned in the United States, Guantanamo detainees can be expected to seek judicial review of decisions regarding isolation from other prisoners, the quality and quantity of food, and the amount of daily exercise. Also of particular note would be religious practices. Unless modified by Congress, the Religious Freedom Restoration Act ("RFRA") would apply to Guantanamo detainees held inside the United States.[26] RFRA has been the basis of several

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[24] Written Testimony of Michael J. Edney (July 28, 2009) at 17-19; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

[25] *Bivens v. Six Unnamed Federal Agents*, 403 U.S. 365, 382-83 (1971).

[26] 42 U.S.C. § 2000bb-1 and § 2000bb-2 ("A person whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.").

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lawsuits seeking rights to common prayer, as well as against the grooming of hair for security purposes.[27]

The specter of constitutional litigation can have as great an effect on prison conditions as successful lawsuits. With regard to one convicted al Qaeda terrorist, the possibility of litigation may have had some effect. Richard Reed—an al Qaeda operative convicted of a plot to destroy American Airlines flight 63 from Paris to Miami in 2001—was released from Special Administrative Measures ("SAMs") at the Supermax facility in Florence, Colorado in June 2009. Reed had filed suit claiming that the measures, which included isolation from other convicted terrorists and close monitoring of outgoing mail, violated his rights under the First Amendment's Free Exercise Clause to gather in prayer.[28] That lawsuit did not go to verdict, but the litigation undoubtedly had an effect on prison personnel in terminating the SAMs.

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[27] *See, e.g.*, *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58 (D.D.C. 2006); *Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005).

[28] *See, e.g.*, Debra Burlingame, *Revenge of the Shoe Bomber: Terrorist Sues to Resume His Jihad from Prison*, WALL ST. J. (July 29, 2009).

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4. The Administration has proposed a "voluntariness" standard for determining whether a defendant's statement may be admitted into evidence. Do you think such a standard will effectively require the reading of Miranda warnings to make any statement admissible?

The Congress should take great care before adopting the Administration's proposal to amend the Military Commissions Act of 2006 regarding the admission of statements against the accused.[29] Proposed legislation would amend the MCA to bar the admission of any statement by the accused obtained through cruel, inhuman, or degrading treatment, as defined by the Detainee Treatment Act of 2005, no matter when the statement occurred.[30] The Administration wants Congress to take an additional significant step, making inadmissible any statement deemed "involuntary."[31] There is a substantial risk that statutorily mandating a "voluntariness" standard would effectively require the reading of *Miranda* warnings on the battlefield.

Before the Supreme Court decided *Miranda*, courts asked whether the a defendant's statement was "voluntary" to determine whether it could be admitted into evidence. The voluntariness test looked to the "totality of the circumstances" to "determine whether a defendant's will was overborne."[32] By the time of *Escobedo v. Illinois*,[33] the voluntariness

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[29] Transcript of July 28, 2009, Senate Judiciary Committee, Subcommittee on Terrorism and Homeland Security Sub-committee Hearing, at 125 ("Hearing Transcript")

[30] Under current law, statements obtained by such cruel, inhuman, or degrading treatment after the enactment of the DTA are inadmissible. Pending legislation would apply that standard retroactively.

[31] Statement of David Kris, Assistant Attorney General for the National Security Division (July 28, 2009); Transcript 53-56.

[32] *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)

[33] 378 U.S. 478 (1974).

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inquiry was developing the ingredients of modern *Miranda* warnings. Did the defendant know that he was not required by law to talk? Did he know that he could have the assistance of counsel? Did he believe that his silence could be used against him in a criminal trial? [34]

The *Miranda* Court viewed these inquiries as labor intensive.[35] The Supreme Court decided to resolve this perceived dilemma by requiring for admissibility the reading of a series of warnings, prior to taking a statement in custody.[36] The warnings were "prophylactic:" If given, courts could substantially curtail the inquiry into voluntariness.[37] According to the Court, the need for the specified warnings increased with the severity of the conditions: "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice."[38]

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[34] *Escobedo*, 378 U.S. at 483, 85, 91; *Miranda v. Arizona*, 384 U.S. 436, 464-66, 465 (1966). ("Our holding [in *Escobedo*] stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation.")

[35] *Miranda*, 384 U.S. at 468-69 ("Assessments of the knowledge the defendant possessed based on information as to his age, education, intelligence, or prior content of authorities, can never be more than speculation.")

[36] In its most recent description of the relationship between the voluntariness standard and *Miranda* warnings, the Court explained that the "totality of the circumstances test [searching for voluntariness] is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

[37] As the Court recently explained, "the requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But . . . cases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare." *Dickerson*, 530 U.S. at 444; *see also Berkemer v. McCarty*, 468 U.S. 420, 453 (1984).

[38] *Miranda*, 384 U.S. at 458.

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There is a risk that *Miranda*-type warnings would be a natural outgrowth of imposing a voluntariness standard on military commissions. Without *Miranda*-type warnings, prosecutors would enter into a military commission uncertain of whether a judge would find a defendant sufficiently knowledgeable to have made a "voluntary" statement. One need only to retrace the *Miranda* Court's steps from voluntariness review. Indeed, the *Miranda* Court required warnings prior to custodial interrogations because lack of voluntariness—"compulsion"—was "inherent in custodial surroundings."[39] If *Miranda*'s treatment of the "voluntariness" test were taken seriously, the "unfamiliar surroundings" of a police station in the United States would be nothing compared to the harsh realities of capture on the battlefield, where immediately prior to custody the captors often had sought to use lethal force against the detained. Alien detainees captured on foreign battlegrounds also may not be familiar with U.S. rules.[40] The same search for voluntariness—looking at all the circumstances—may be even more likely to require *Miranda*-style warnings in the wartime context.

There can be little doubt that our military and intelligence personnel in the field would feel pressure to ensure that any statement obtained would be admissible in either military commission or federal criminal proceedings. The President and the witnesses at the hearing of this Committee have stated that the policy of this Administration is either to try enemy combatants by federal criminal trial, as a first preference, or by military commissions or to release them. What the Administration has characterized as the "fifth category" of enemy

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[39] *Id.*

[40] *See Escobedo*, 378 U.S. at 486 (looking to the defendant's educational background and knowledge of criminal law, to determine whether a statement in the absence of an attorney or a warning that he could have one was voluntary).

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combatant, those who cannot be tried but absolutely must be held for national security reasons, is to remain as small as possible. The dilemma for troops and intelligence officers on the field of battle is this: If they do not obtain "voluntary" statements from the defendant indicating guilt, there will be a substantial risk that such enemy combatants will be released back into the conflict. Troops in the field will have to navigate the understandable need to obtain fresh intelligence from the captured—that can be used in winning the battle and saving American lives—and ensuring that the enemy combatant is incapacitated for at least the duration of hostilities. Due to the policies recently discussed by the Executive Branch and the legal standards urged on the Congress, the battlefields of Afghanistan may well become laboratories in the long-standing debate over whether *Miranda* warnings facilitate or deter the communication of truthful information. Some might argue that a continuing armed conflict is no place to resolve this empirical question.

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5. Do you agree with the Administration that material support for terrorism is not an offense against the law of war?

The Military Commissions Act defines material support for terrorism as an offense triable by military commission.[41] Congress's resolution of the question whether material support for terrorism is a violation of the law of war is arguably definitive, given the affirmative textual grant of authority in the Constitution "to define and punish Offences against the Law of Nations."[42]

There is external evidence supporting Congress's conclusion that "material support for terrorism" is a violation of the law of war. Several recent international agreements have condemned support of terrorism; the U.N. Security Council has called for those "supporting terrorism" to be "brought to justice" (implying that they have committed an internationally cognizable crime). The international tribunals for the former Yugoslavia and Rwanda consider aiding and abetting acts which the MCA defines as terrorism to be a war crime.[43] Further, as far back as the 1890's, Congress recognized that supplying and sheltering those who commit violence against civilian populations is a violation of the laws of war.[44]

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[41] 10 U.S.C. § 950v(25).

[42] U.S. CONST. ART. I, § 8, cl. 10.

[43] *Khulumani v. Barclay*, 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring) (collecting sources); *see also id.* at 270-71 n.6 (comparing the material support for terrorism offense under the MCA to aiding and abetting liability); 10 U.S.C. § 950v(24) (defining terrorism as violence against protected persons to achieve political ends).

[44] H.R. Doc. No 65, 55th Cong. 3d Sess., 234 (1894) ("numerous rebels . . . that furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together . . . for the purpose of assisting the enemy to rob, to maraud, and to

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6. Why do you think the Obama Administration has only been able to transfer a handful of detainees from Guantanamo since Inauguration Day?

The challenges of reducing the population at Guantanamo faced by the prior Administration likely have not abated. First, the prospect of mistreatment in a detainee's home country is a barrier to releasing the Guantanamo population. As a matter of policy, the United States does not transfer alien enemy combatants from Guantanamo to a country where it is more likely than not they will be tortured. The United States had not been able to reach that level of comfort for several of the home countries of Guantanamo detainees. Second, it is difficult to find a third country, for those who may be mistreated or whose citizenship is difficult to establish, willing to take Guantanamo detainees. Many foreign countries assess Guantanamo detainees to be security risks.

Third, it is often difficult to obtain adequate assurances that certain detainees will be monitored in their home countries. As suspected members of al Qaeda, the United States will not transfer a detainee to a nation where they will pose a substantial risk of returning to terrorist activity. The press has reported that Yemen is one such country; there are more than 90 Yemenis held at Guantanamo. The importance of this issue cannot be understated. The unwillingness of foreign countries to undertake even the simplest measures to mitigate the risks of Guantanamo's detainees—from travel bans to periodic check-ins—leaves the United States with a stark choice. The United States must detain the individual, or bear the full risk of his future dangerousness at large. Fourth, there is some population of particularly dangerous al Qaeda terrorists at

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lay waste to the country. All such persons are by the laws of war in every civilized country . . . .").

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Guantanamo where the American people are safe only if they are in secure U.S. custody. These are not new challenges, and thoughtfully addressing them will take time.

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Questions from Senator Sessions

1. In the appendix to its July 20, 2009, memorandum, the Detention Policy Task Force stated that "[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution." The administration can then overrule the presumption and proceed via military commission if there are "compelling factors" that "make it more appropriate to prosecute a case in a reformed military commission." In your testimony, you criticized this ad hoc type of decision-making, instead favoring a clear set of rules setting forth the appropriate venue for prosecution based upon the type of case and detainee rather than the likely outcome of the case. In your view, what would such rules look like and which categories of cases and detainees do you believe should be handled by military commissions? Please explain the legal and/or policy rationale for your answer.

I continue to believe that the Administration should not choose between military commissions and federal criminal trials on the basis of the strength of evidence and the need to protect intelligence sources and methods in any particular case. Should the Administration retain military commissions, a strong historical and normative case can be made for trying by military commission all (1) alien, (2) members of al Qaeda, (3) who have violated the laws of war by military commission, and (4) who were captured outside the United States.[45]

Taking the category of al Qaeda members who have potentially violated the laws of war, perhaps the most difficult question is between aliens who have been captured outside the United States, on the one hand, and U.S. citizens captured abroad or in the United States and aliens captured inside the United States, on the other hand. The distinction is grounded in a long line of Supreme Court decisions, extending certain constitutional rights to U.S. citizens throughout the world and aliens within the United States are entitled to constitutional rights.[46] The Executive Branch reasonably could conclude that such individuals, even though members of al Qaeda,

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[45] Statement of Michael J. Edney at 13-15; Hearing Transcript at 116, 120-21.

[46] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

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should be tried through the federal criminal process. Federal criminal procedures are tailored to meet such constitutional standards.

Such categorical distinctions—trying all members of a force who have violated the laws of war through the same system—are consistent with the laws of war. The Third Geneva Convention obligates state parties to try "prisoners of war" in the same manner reserved for its own forces.[47] The Convention defines prisoner of war by the characteristics of the force of which a combatant is a member.[48]

These categorical distinctions also avoid a danger in sorting Guantanamo detainees between military commissions and federal criminal trials on the basis of evidentiary concerns and other problems of proof. The Administration has proposed a presumption in favor of federal criminal trials, which is rebuttable by factors such as the evidence available and the need to protect classified sources and methods.[49] This method of sorting defendants potentially threatens integrity of both systems. It implies that the military commission system is a form of secondary justice. And it compromises the procedural protections of the federal criminal justice system. For enemy combatants, the rights and procedures in the federal criminal justice system could be enjoyed until they make a difference is a particular case. A better approach would be to defend military commissions or federal criminal trials—for an entire category of individuals.

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[47] Third Geneva Convention Art. 82-88

[48] *Id.* at Art. 4.

[49] Preliminary Report of the Detention Policy Task Force (July 21, 2009) at App. A.

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2. The Detention Policy Task Force lists factors to consider in deciding whether to seek Article III prosecution or a military commission trial. In the second set of factors listed, the Task Force lists "protection of intelligence sources and methods" and "legal or evidentiary problems that might attend prosecution in the other jurisdiction" and "resource concerns." Wouldn't a military commission prosecution generally protect all of these interests better than a civilian criminal trial?

The military commission system was designed specifically to address the challenges posed by holding trials regarding the actions of an enemy force, undertaken outside this country during a time of continuing armed conflict. Federal criminal procedures were not crafted for this purpose. They are rules of general applicability, directed at handling the run of cases most of which will concern conduct largely completed, occurring within this country, and based on evidence geographically proximate to domestic law enforcement.

With regard to the protection of sources and methods, federal criminal trials follow the rules set forth in the Classified Information Procedures Act ("CIPA"). As explained below, CIPA was designed to allow prosecutors, in an orderly fashion, to make the classic prosecutorial choice, between exposing sources and methods to the public and prosecuting the matter.[50] CIPA requires notice before the defendant reveals classified information. If the classified information is relevant to the charges, nothing in CIPA bars its disclosure. Similarly, CIPA does not on its own provide special methods for allowing the government to use certain evidence without revealing all the classified sources and methods used to obtain it.

By contrast, the political branches made a considered decision on how sources and methods should be protected in the MCA. A carefully considered and unified rule on this issue is undoubtedly preferable to the opinions of various courts searching for a substantive standard to protect classified information not specified in CIPA.

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[50] *See also* Statement of Michael J. Edney at 7-11.

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Similarly, "legal and evidentiary problems" associated with prosecuting suspected al Qaeda operatives are likely to be better addressed by a system tailored to those problems, rather than one designed for the run of domestic cases. One specific challenge in prosecuting members of a foreign terrorist organization is the chain of custody for evidence obtained abroad. The evidence is transported from other countries and often recovered by U.S. personnel whose primary mission (unlike U.S. law enforcement personnel) is to carry out military operations, not build criminal cases. Military commission rules provide specific hearsay and authentication rules to account for this dilemma.[51]

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[51] *Compare* 10 U.S.C. § 949a(b)(2)(E) *with* Fed. R. Evid. 801-07; *see also* Statement of Michael J. Edney at 11-13.

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3. **How do you respond to those who claim that the Classified Information Procedures Act (CIPA) provides adequate protections to allow for terrorism prosecutions in Article III courts?**

CIPA was designed for trials against those suspected of espionage—often U.S. government employees—and to protect the classified information already possessed by the defendant from further public disclosure.[52] CIPA requires the defendant to give notice of the intent to introduce classified information into evidence.[53] CIPA is a strictly procedural rule: It provides a stepwise process for the court to evaluate classified information proposed to be used at trial. The Government may request *ex parte*, *in camera* proceedings to address the relevance of classified information and to consider alternatives to admitting into evidence (and thereby disclosing) classified information.[54]

Importantly, CIPA itself does not contain a substantive privilege for classified information.[55] Courts have struggled to determine the appropriate standard for determining whether classified information should be provided to the defense in discovery or whether a defendant should be permitted to reveal classified information at trial. Some courts have followed the standard governing all criminal discovery, requiring disclosure of classified information is it is relevant to the defense.[56] Others have imposed a slightly higher standard,

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[52] *See* Statement of Michael J. Edney at 7-11.

[53] 50 U.S.C. App. 3 § 5.

[54] *Id.* at § 6.

[55] *See United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

[56] *United States v. Rosen*, 557 F.3d 192, 199-200 (4th Cir. 2009) (appearing to require the discovery of classified evidence under only the relevance standard of F. R. Crim. P. 16); H.R.

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requiring the disclosure of the classified information only if it is relevant and helpful to the defense.[57] Courts also have attempted to borrow requirements from the state secrets privilege.[58] Primarily designed for civil proceedings not initiated at the option of the Government, the state secrets privilege itself is an imperfect fit for criminal matters.[59] Fewer appellate courts have had the occasion to establish standards for allowing the substitution of summaries or admissions of discrete material facts for the admission of classified information. CIPA provides procedures for considering such substitutes, but does not specify under what circumstances such substitutes should be permitted.[60]

In this sense, CIPA is directed at orderly governmental decisionmaking. CIPA protects classified information to some degree by preventing surprise . By requiring notice before the introduction of classified information and pretrial rulings on the relevance of pretrial information to the defense, CIPA provides the Government the time necessary to obtain the assessment of high-level Government officials on the effect of the classified information's disclosure. In this

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Rep. No. 96-831, pt. 1, at 27 (1980) (noting that CIPA "is not intended to affect the discovery rights of the defendant").

[57] *Yunis*, 867 F.2d at 621 (CIPA "creates no new rights or limits on the discovery of a specific area of classified information"). Lacking guidance from the Congress, the court in *Yunis* borrowed a more protective standard from *Roviaro v. United States*, 353 U.S. 53 (1957), providing a privilege to protect the identity of confidential informants. *Id.* at 61 ("Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense, or is essential to a fair determination of the cause, the privilege must give way.")

[58] *See Aref*, 533 F.3d at 79-80.

[59] H.R. Rep. No. 96-831, pt. 1 at n. 12 ("The common law state secrets privilege is not applicable in the criminal arena.").

[60] 50 U.S.C. App. 3 § 3.

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way, CIPA allows a fully informed Government determination whether the benefits of prosecuting and incapacitating particular defendant outweigh the damage to national security of the disclosing the classified information at issue.[61] CIPA adds interlocutory appeal rights, so that the Government may obtain the second opinion of the appellate courts in the event the trial court deems classified information discoverable or relevant in the prosecution. 50 U.S.C. App. § 7.

By contrast, the Military Commissions Act establishes substantive standards governing whether classified information is provided to the defendant in discovery, protected from disclosure at trial, and allowed to be substituted.[62] In addition, the MCA particularly protects classified information for intelligence sources and methods. To admit evidence at trial, the Government need not reveal in all cases classified intelligence sources and methods underlying the evidence. Instead, the trial judge *ex parte* and *in camera* may determine whether the provenance of the evidence is reliable.[63] At the same time, Congress established certain

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[61] 50 U.S.C. App. 3 § 6(e) (providing procedures for the dismissal of the prosecution rather than allowing disclosure of the information).

[62] *See* 10 U.S.C. § 949d(f)(1) (establishing an explicit privilege for classified information); § 949d(f)(2) (requiring the military judge to authorize substitutes or summaries of classified information); § 949j(d)(1) (providing a standard for adjudicating requests for substitutions or summaries: When the classified information is "exculpatory," the defendant shall be provided of an "adequate substitute.")

[63] *See* 10 U.S.C. § 949d(f)(2)(B) ("The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security,

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protections for defendants. There will be no secret trials: No evidence may be presented to the commission's members that is not also provided to the defendant.[64] With regard to discovery, the defendant receives all exculpatory evidence, classified or not, unless an adequate substitute is available.[65]

Whether or not the MCA strikes the perfect balance between protecting classified information and ensuring that defendants may present an adequate defense, it bears an institutional advantage. The Constitution vests primary responsibility for national security matters in the political branches—the Congress and the President.[66] The Supreme Court has recognized the explicit textual grant of authority to the other two branches and is hesitant to decide legal questions with national security consequences.[67] The political branches are

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an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.")

[64] 10 U.S.C. § 949d(b).

[65] 10 U.S.C. 949j(d)(2). In this regard, the MCA is more protective of classified information than the common law standard to protect classified information hypothesized by some courts in federal criminal cases. The "relevant and helpful to the defense" standard requires more classified information to be turned over to the defense than the MCA's "exculpatory" standard. *See Aref*, 553, F3d at 80 ("To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government's obligation under *Brady v. Maryland* to disclose 'exculpatory' information").

[66] *See, e.g.*, U.S. CONST. Art. I, § 8, cl. 11-16; Art. II, § 2.

[67] As the Supreme Court explained in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs." *Id.* at 530. *See also id.* (explaining that the Executive Branch has primary constitutional authority to protect classified information and that "protective judgments should be made by those with necessary expertise in protecting classified information"); *Haig v. Agee*, 453, U.S. 280, 292 (1981) (foreign policy and national security "are so exclusively entrusted to the political

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regularly briefed on national security threats and are better situated to determine the degree to which national security information must be protected during a time of continuing armed conflict.[68]

Relying on CIPA to protect national security information in al Qaeda trials leaves a difficult decision to the branch least suited to decide national security matters. Better would be for the Congress and the President to set substantive standards through legislation and leave to the Judicial Branch a discrete question it has answered since *Marbury v. Madison*—whether the statutory standard falls within the discretion provided those branches by the Constitution.

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branches of government as to be largely immune from judicial inquiry or interference"); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

[68] *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (Jackson, J.) (explaining that national security judgments depend on the regular flow of classified briefings and courts lack the "aptitude, facilities [and] responsibility" to review such information and make such judgments"); *Cf. Boumediene v. Bush*, 128 S.Ct. 2229, 2276-77 (2008) ("Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.")

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4. The Department of Justice had a number of problems with CIPA during the trial of Zacarias Moussaoui. Does Congress need to amend CIPA to help the Department better protect classified evidence in terrorism trials and, if so, what reforms should Congress consider?

As explained in the last answer, CIPA provides no standard for the protection of classified information. The question arises whether CIPA should be amended to provide such a substantive standard. A standard for all cases involving classified information—from espionage to terrorism—may be difficult to establish.

Terrorism defendants present unique challenges. In the best of circumstances, a terrorist's plot is detected prior to completion, and his incapacitation is essential to protecting American lives. If detention of al Qaeda members captured abroad without criminal trial is not used in any significant numbers,[69] a stark choice would be presented: Between revealing the classified sources and methods underlying otherwise admissible evidence during a continuing armed conflict and taking a dangerous terrorist off the streets. This context might require a different balance than espionage or other cases concerning classified information. A global standard for all classified information-related prosecutions may not be warranted; a special standard for terrorism cases may be.

The *Mossaoui* case raises questions about the *procedures* established by CIPA. CIPA establishes special procedures to ensure a second review of issues involving classified information prior to disclosure. Specifically, CIPA authorized expedited interlocutory appeals of

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[69] *See* Remarks by the President on National Security, National Archives, Washington, DC (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ ("Now there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. . . . We're going to exhaust every avenue we have to prosecute those at Guantanamo who pose a danger to this country.");

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trial court orders "authorizing the disclosure of classified information" in a criminal case.[70] The United States Courts of Appeals for the Fourth Circuit held that an order giving the defendant, suspected to be the "20th hijacker" in the September 11th attacks, classified information was not an order of "disclosure" subject to interlocutory appeal. The Court explained that the interlocutory appeal provisions "is concerned with the disclosure of classified information by the defendant to be public at a trial or pretrial proceeding, not the pretrial disclosure of classified information to the defendant or his attorneys."[71]

This interpretation of CIPA should be corrected. The government should not be forced to reveal classified information until it is certain that the applicable standard so requires. Verification by the court of appeals—a second set of eyes—is an obvious safeguard given the sensitivity of this information. Absent such review, passing classified information to a suspected member of al Qaeda may have been unnecessary.

I understand that Senators Kyl and Cornyn have proposed legislation to overturn the Fourth Circuit's interpretation.[72] This statutory change is well-advised.

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[70] 50 U.S.C. App. 3 § 7(a).

[71] *United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003), *rehearing en banc denied*, 336 F.3d 279 (4th Cir. 2003).)

[72] HENO9943 to S.1692.

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Senate Judiciary Committee
Subcommittee on Terrorism and Homeland Security
Hearing on "Prosecuting Terrorists:
Civilian and Military Trials for GTMO and Beyond"
July 28, 2009

Questions Submitted by U.S. Senator Russell D. Feingold
to Department of Defense General Counsel Jeh Charles Johnson

1. In a memo to the Attorney General and Secretary of Defense dated June 9, 2009, the DOD Office of Chief Defense Counsel raised concerns about the adequacy of resources provided to defense counsel in the military commissions employed thus far. What specific steps has the administration taken to address those concerns, and what additional measures are forthcoming?

2. On July 20, the Department of Defense and the Department of Justice issued a protocol governing how decisions will be made to prosecute particular Guantanamo detainees in federal court or in a military commission. This protocol directs federal prosecutors to consider a broad range of factors, including "the nature of the offenses to be charged" and "evidentiary problems."

    a. Please provide an example of a fact pattern that would likely produce a recommendation for trial by military commission instead of in federal court.

    b. "Evidentiary problems" is one of the factors listed in the protocol. How does the Administration plan to ensure that the application of these forum selection factors is perceived as neutral and legitimate, rather than simply calculated to ensure conviction?

3. In your written and oral testimony, you asserted executive branch authority to detain those currently held in Guantanamo deriving from the Authorization for Use of Military Force (AUMF) passed by Congress in September 2001, as informed by the laws of war. You indicated this would be based on a March 13, 2009, Justice Department court filing, which states: "The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners,

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including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." That filing further states that congressional authority under the AUMF is not limited to "just al-Qaida or the Taliban," and is "not limited to persons captured on the battlefields of Afghanistan."

a. Is this the administration's position?
b. If so, what are the limits of the detention authority of the executive branch, in terms of both place of capture and nature of involvement with terrorist organizations?

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QUESTIONS FOR THE RECORD FOR JEH JOHNSON
SENATOR JEFF SESSIONS

1. According to published reports, high-level al Qaeda detainees held at Guantanamo Bay, such as Khalid Sheikh Mohammad, want to be able to plead guilty and be executed. It is my understanding that the Military Commissions Act currently does not allow for such guilty pleas. Does the administration support amending the Military Commissions Act to allow high-level al Qaeda detainees to plead guilty and be executed?

2. At the subcommittee hearing on July 28, 2009, you testified that at least 50 detainees would be transferred to facilities in the continental United States. Of these detainees, how many of them would be transferred for the purpose of detention only; i.e., will be sent to the United States for indefinite detention without trial?

3. At the subcommittee hearing, you indicated that there would be "periodic review" of the cases of detainees transferred to the United States who could not be prosecuted in an Article III court or before a military commission. Noncitizen detainees transferred to the United States would likely receive greater constitutional protections than those detained outside the United States, making federal court intervention into these cases more likely. In light of this, would you support legislation granting express statutory authority for the detention of persons who are members of Al Qaeda or have engaged in hostilities or purposefully supported Al Qaeda? Would you support legislation to require any alien detainee released from military custody into the United States to be taken into custody by immigration authorities pending removal?

4. Detainees transferred to the United States will almost certainly seek relief from removal under U.S. immigration laws. For example, they may apply for asylum, claiming that they have a well-founded fear of persecution if transferred to a third country. If granted asylum, these same detainees could thereafter apply for adjustment of status to that of a legal permanent resident. Would you support legislation barring Guantanamo Bay detainees transferred to the United States from eligibility for asylum or other relief from removal?

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Senate Judiciary Committee
Subcommittee on Terrorism and Homeland Security
Hearing on "Prosecuting Terrorists:
Civilian and Military Trials for GTMO and Beyond"
July 28, 2009

Questions Submitted by U.S. Senator Russell D. Feingold
to Assistant Attorney General David Kris

1. I understand that the administration worked with the Senate Armed Services Committee on changes to the Military Commissions Act with regard to the handling of classified information at trial. As a result, the Defense authorization bill (S. 1390) that passed the Senate on July 23 includes language that relies heavily on the Classified Information Procedures Act (CIPA), a law that governs the use of classified information in federal civilian courts. Please provide an explanation of how the language in the Defense authorization bill differs from CIPA, and the implications of each such difference.

2. In a memo to the Attorney General and Secretary of Defense dated June 9, 2009, the DOD Office of Chief Defense Counsel raised concerns about the adequacy of resources provided to defense counsel in the military commissions employed thus far. What specific steps has the administration taken to address those concerns, and what additional measures are forthcoming?

3. On July 20, the Department of Defense and the Department of Justice issued a protocol governing how decisions will be made to prosecute particular Guantanamo detainees in federal court or in a military commission. This protocol directs federal prosecutors to consider a broad range of factors, including "the nature of the offenses to be charged" and "evidentiary problems."

    a. Please explain what kinds of fact patterns would likely produce a recommendation for trial by military commission instead of in federal court.

    b. "Evidentiary problems" is one of the factors listed in the protocol. How does the Administration plan to ensure that the application of these forum selection factors is perceived as neutral and legitimate, rather than simply calculated to ensure conviction?

4. In his written and oral testimony, Mr. Johnson asserted executive branch authority to detain those currently held in Guantanamo deriving from the Authorization for Use of Military Force (AUMF) passed by Congress in September 2001, as informed by the

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laws of war. He indicated this would be based on a March 13, 2009, Justice Department court filing, which states: "The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces." That filing further states that congressional authority under the AUMF is not limited to "just al-Qaida or the Taliban," and is "not limited to persons captured on the battlefields of Afghanistan."

a. Is this the administration's position?
b. If so, what are the limits of the detention authority of the executive branch, in terms of both place of capture and nature of involvement with terrorist organizations?

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QUESTIONS FOR THE RECORD FOR DAVID KRIS
SENATOR JEFF SESSIONS

1. The appendix to the Detainee Policy Task Force's memorandum states that the presumption in favor of prosecution in Article III courts can be overcome only by demonstrating "other compelling factors" making a military commission prosecution more appropriate. The use of the word "compelling" suggests that the presumption in favor of Article III court prosecution is very strong. As you know, the compelling state interest test is a test used by the federal courts in due process and equal protection claims under the U.S. Constitution, and is also part of the strict scrutiny analysis that a federal court will employ when either a suspect class or a fundamental right is involved.

A. How was the concept of "compelling factors" settled upon as the standard for rebutting the presumption in favor of prosecution in Article III courts?

B. Is the Task Force's standard for overcoming the presumption in favor of prosecution in an Article III court intended to mirror the highest level of scrutiny under the Constitution?

2. The Task Force also proscribed that the choice between federal court prosecution and military commission prosecution "must be fact-intensive and case-by-case determination, based on a broad set of factors, in keeping with the standards traditionally used by federal prosecutors." The second set of factors in the Task Force memorandum's appendix lists "protection of intelligence sources and methods" and "legal or evidentiary problems that might attend prosecution in the other jurisdiction" and "resource concerns." Don't all of these factors universally favor military commission trials, which are more protective of classified information, allow for greater flexibility for hearsay evidence, and have dedicated teams already prepared to try the cases?

3. Assume for the sake of argument that after this fact-intensive determination, it is determined that prosecution in an Article III court is inappropriate, and the remaining options are transfer for prosecution in a foreign court, or a U.S. military commission trial. Under the Task Force's guidance, is there is any presumption in favor of prosecution in a foreign court over a U.S. military commission trial?

4. The Department of Justice had a number of problems with the Classified Information Procedures Act during the trial of Zacarias Moussaoui. Does Congress need to amend the Classified Information Procedures Act to help the Department better protect classified evidence in terrorism trials and, if so, how?

5. On June 12, 2009, FBI Director Robert Mueller wrote to Congressman Frank Wolf to answer his questions about reports the FBI was giving Miranda warnings to battlefield detainees. Director Mueller wrote that there was no blanket policy, but advised that Miranda warnings were being provided on a case-by-case basis. In his letter, he wrote that "[f]or detainees held in military custody overseas, approval by the Department of Justice is required before Miranda warnings may be given." What are the criteria for determining whether Miranda warnings should be given to detainees held in military custody overseas? Are you involved in making these determinations?

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6. In light of the presumption in favor of prosecution in an Article III court, will it now be necessary for FBI agents to Mirandize detainees in most instances to ensure that the evidence will be admissible in federal court and, as in your own words, "keep all options on the table"? If not, how does the Department make the determination at the interrogation stage that the presumption of Article III prosecution will not apply?

7. In support of the proposition that the Task Force's recommendations will not impact military and intelligence operations, you stated that Miranda warnings have been given to detainees in less than 1% of cases. Isn't this statistic largely meaningless, as it is the product of a backward-looking evaluation of cases initiated prior to the Task Force's announcement of a presumption in favor of prosecution in Article III courts?

8. Going forward, does the Department anticipate that Miranda warnings will be given to detainees in less than 1% of cases? Please explain and include the percentage of detainees given Miranda warnings since the administration announced its presumption in favor of prosecution in Article III courts.

9. Does the administration believe it can lawfully detain an unprivileged enemy belligerent who has been transferred into the United States for prosecution in Article III courts even after the basis for criminal detention has ended (e.g., post-acquittal or conclusion of sentence)? If so, what is the basis for this belief and is there clear case law post-Zadvydas supporting this legal position?

10. One of the reasons some detainees have reportedly been held at the U.S. Naval Base at Guantanamo Bay, Cuba – even after they were cleared for transfer – is that Article 3 of the U.N. Convention Against Torture (CAT) prevents the detainees' transfer to their home countries. If detainees held at Guantanamo Bay are transferred to criminal or immigration custody in the United States, would the CAT still apply and potentially restrict their transfer even after the criminal or immigration law bases for their detention ended?

11. In Kiyemba v. Obama, the District of Columbia Circuit held that it was beyond the authority of a federal court to order an alien detainee held outside of the United States brought into the United States for release in a *habeas corpus* proceeding.

A. Doesn't the rationale of the Kiyemba decision no longer apply once the alien detainee is brought into the United States for detention?

B. Doesn't the risk that a court will exercise *habeas corpus* jurisdiction and order an alien detainee's release into the United States increase once the detainee is brought onto United States' soil? If your answer is other than "yes," please explain the basis of your answer.

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For David Kris from Senator Kyl:

1. On page 2 of your written testimony, you stated that "there is a serious likelihood that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional." **What is your legal support for this assertion?**

2. **Could you explain the legal basis for your concern that material support for terrorism is not a violation of the law of war?**

3. You stated that the number of people detained in this armed conflict without trial—either in federal court or by military commission—should be minimized.

   (a) Does your view apply beyond Guantanamo?

   (b) Does it apply to persons held at Bagram Air Base in Afghanistan?

4. I note that the prosecutions of five men responsible for the 9/11 attacks have been stalled since shortly after President Obama took office. **Given your testimony that the Administration intends to use military commissions, when is the earliest possible date those trials could resume?**

5. **(a) When will the President recommend legislation to the Congress necessary for implementing his Executive Order?**

   (b) Should this Committee be concerned that legislation will not timely be recommended given that the deadline for the recommendation of the Detainee Policy Group has been extended until January 2010?

6. **Do you think the 9/11 attacks were violations of the laws of war?**

7. **(a) Given the Administration's position that the group of enemy combatants held without trial should be minimized, will not the message to our troops be to obtain a "voluntary" statement, preferably with Miranda warnings, or see their captives back on the battlefield within months?**

   (b) How will the presumption of federal criminal trials be squared with protecting our forces on the battlefield?

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SENATOR KYL

Questions for the Record

For David Kris and Jeh Johnson:

1. Executive Order 13492 states that the Guantanamo Bay detention facility will be closed by January 22, 2010. That day is fewer than six months away. Nevertheless, the Administration has not announced its plans as to how Guantanamo Bay will be closed, where any detainees remaining in U.S. custody will be held, and what legal apparatus will be used to hold them. These are questions crucial to the security of the Nation. I believe options contemplated by the Administration will require legislative action, and less than 75 legislative days remain until the President's arbitrary deadline.

   The Congress needs information to address this important issue. In the absence of a timely report from the President's Detainee Policy Task Force, answers to the questions herein are crucial. Accordingly, I would request that the Administration accelerate its customary timetable for responding to questions for the record. I will continue to raise this issue in coming weeks.

   (a) Does the Administration believe it currently has legal authority to transfer Guantanamo detainees to the United States?

   (b) How would you answer this question if restrictions on spending contained in the war supplemental were allowed to expire?

   (c) How would you square your answer with the Immigration and Nationality Act?

2. **Has the Administration loosened the threat standard for keeping an al Qaeda operative detained?**

3. According to a recent article in the Wall Street Journal: "In January, the American Civil Liberties Union (ACLU) of Colorado issued a statement saying that conditions at supermax are 'simply another form of torture' worse than Gitmo which 'make a mockery of 'innocent until proven guilty.' Last month, the ACLU filed a civil lawsuit mirroring Reid's religious rights claim on behalf of two terrorism inmates held at the Communications Management Unit inside a medium security prison in Terre Haute, Ind."[1]

[1] Debra Burlingame, *Revenge of the 'Shoe Bomber'*, Wall St. J., July 30, 2009, at A17.

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President Obama and the Administration frequently cite supermax facilities—and their enhanced security procedures—as the reason why U.S. citizens will be safe from al Qaeda detainees held on U.S. soil.[2]

(a) What is the Administration's position on whether security procedures at supermax prisons should be relaxed for convicted terrorists who claim that such procedures violate their civil rights?

(b) Would this position change if the individual was being detained either indefinitely or prior to prosecution in an Article III court or military commission?

(c) Does the Administration plan to vigorously defend against lawsuits challenging the conditions of a detainee's or convicted terrorist's confinement?

[2] The White House, Remarks by the President on National Security, May 21, 2009, *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

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David H. Laufman

Responses to Questions for the Record Concerning the July 28, 2009, Hearing by the Subcommittee on Terrorism and Homeland Security Entitled "Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"

Question from Senator Kyl

1. On page 11 of your written testimony, you said: "More often than not in terrorism cases, courts have either ordered pre-trial detention or authorized release subject to restrictive conditions." I was shocked by the fact that there is a substantial risk that a judge presiding in a civilian trial may release a suspected pending trial. Why is this not a compelling reason to favor military prosecutions over civilian trials?

   There is always *some* risk that a federal magistrate judge will deny a government motion for pretrial detention in a terrorism case and order the release of the defendant subject to conditions. But it would be inaccurate to describe that risk as "substantial." In the overwhelming majority of cases -- both before and since September 11 -- defendants criminally charged with terrorism-related offenses have been detained pending trial. The risk of a terrorism defendant's release pending trial also has diminished since Congress established a rebuttable presumption against pretrial release in terrorism cases. Further, if a magistrate judge denied a government motion for pretrial detention, the government could pursue an immediate appeal to a United States District Judge while the defendant remained incarcerated.

Questions from Senator Sessions

1. At the subcommittee hearing on July 28, 2009, you indicated that the Classified Information Procedures Act (CIPA) provides an adequate statutory mechanism for protecting sensitive information from disclosure. Didn't prosecutors have many problems with CIPA in the Zacarias Moussaoui case? Do you support reforming CIPA to address those problems before additional detainees are transferred to Article III courts for prosecution?

   CIPA can present challenges for prosecutors, particularly when a district court orders a wide-ranging search of intelligence community records for potentially exculpatory information. The CIPA proceedings in the Moussaoui case were extensive and complex. But the government found CIPA to be an effective mechanism for protecting against the improper disclosure of classified information. Based on my own experience litigating CIPA issues and the historical record to date of cases involving CIPA litigation, I have no present basis to believe that CIPA needs to amended.

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2. You are a member of the criminal defense bar. Don't some members of the criminal defense bar believe that certain aspects of CIPA – for example, using redacted summaries of witness testimony – violate the Confrontation Clause, in light of recent Supreme Court cases? Do you believe that any aspects of CIPA arguably violate the Confrontation Clause?

It is fair to say that some members of the defense bar do not regard CIPA as a sufficient mechanism for protecting their clients' constitutional rights at trial. Several courts have addressed legal challenges to CIPA proceedings; to my knowledge, the statute consistently has been found to be constitutional.

3. In the appendix to its July 20, 2009, memorandum, the Detention Policy Task Force stated that "[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution." The administration can then overrule the presumption and proceed via military commission if there are "compelling factors" that "make it more appropriate to prosecute a case in a reformed military commission." In response to questioning, you indicated that some types of cases should be tried before military commissions. Specifically, you stated that the Zacarias Moussaoui case possibly should have been tried before a military commission. In your view, which types or categories of cases should be handled by military commissions?

What I stated in my response to a question from Senator Kyl was that "the Moussaoui case *could* have probably been brought in a military commission." (Tr. at 118 (emphasis added)) Although I generally favor bringing terrorism cases in Article III courts where practicable, in my judgment, crimes against humanity and war crimes, as a policy matter, more properly are adjudicated in a military commission under rules comparable to those employed in established international tribunals.

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Responses of
Deborah N. Pearlstein
to Written Questions by Senator Jon Kyl
Subcommittee on Terrorism and Homeland Security
Committee on the Judiciary
United States Senate
July 28, 2009

Prosecuting Terrorists:
Civilian and Military Trials for GTMO and Beyond

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Deborah N. Pearlstein
Responses to Written Questions of Senator Jon Kyl
Subcommittee on Terrorism and Homeland Security
Committee on the Judiciary
United States Senate
July 28, 2009

Prosecuting Terrorists:
Civilian and Military Trials for GTMO and Beyond

Response to Question 1: In addition to the oral responses I provided to your question at the hearing, the following are some among the many reports and statements I have found instructive in understanding the impact of Guantanamo on terrorist recruiting.

A veteran Air Force counterintelligence agent who served as a senior interrogator for the United States in Iraq has written as follows: "I learned in Iraq that the No. 1 reason foreign fighters flocked there to fight were the abuses carried out at Abu Ghraib and Guantanamo. Our policy of torture was directly and swiftly recruiting fighters for al-Qaeda in Iraq. The large majority of suicide bombings in Iraq are still carried out by these foreigners. They are also involved in most of the attacks on U.S. and coalition forces in Iraq. It's no exaggeration to say that at least half of our losses and casualties in that country have come at the hands of foreigners who joined the fray because of our program of detainee abuse."[1]

On June 17, 2008, former Navy General Counsel Alberto Mora testified to the U.S. Senate Committee on Armed Services as follows: "[T]here are serving U.S. flag-rank officers who maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantanamo."[2]

In 2008, McClatchy news service published a detailed series of reports on the Guantanamo Bay detention program that it based on interviews with U.S. officials, foreign intelligence services, and former detainees. The reports concluded, among other things, that "instead of confining terrorists, Guantánamo often produced more of them by rounding up common criminals, conscripts, low-level foot soldiers and men with no allegiance to radical Islam — thus inspiring a deep hatred of the United States in them — and then housing them in cells next to radical Islamists."[3]

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[1] Matthew Alexander, *I'm Still Tortured by What I Saw in Iraq*, WASH. POST, Nov. 30, 2008, at B1.
[2] Testimony of Alberto J. Mora, "Hearing on the Treatment of Detainees in U.S. Custody," U.S. Senate Committee on Armed Services, June 17, 2008, available at http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf.
[3] Tom Lassiter, *How Guantánamo Became a Terror Training Ground*, MIAMI HERALD, June 17, 2008, available at http://www.miamiherald.com/newsletters/five_min/story/572714.html.

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Response to Question 2: The proper disposition for a detainee acquitted in military commission proceedings in the United States will depend entirely on the facts and law applicable in the particular case. If the acquitted detainee is deportable under U.S. immigration law, as appears likely to be the case for all current Guantanamo detainees plausibly described as "terrorists," then detention followed by deportation may be the appropriate outcome.[4] If the acquitted detainee is innocent of any wrongdoing, and not otherwise subject to detention or deportation under U.S. immigration laws or the law of war, then release is likely the appropriate course. If no country can be immediately identified as willing to receive an alien subject to deportation, U.S. law currently provides as follows:

> "[T]he Attorney General may, notwithstanding any other provision of law, retain the alien in custody. The Attorney General, in coordination with the Secretary of State, shall make periodic efforts to reach agreement with other countries to accept such an alien and at least every 6 months shall provide to the attorney representing the alien at the removal hearing a written report on the Attorney General's efforts. Any alien in custody pursuant to this subparagraph shall be released from custody solely at the discretion of the Attorney General and subject to such conditions as the Attorney General shall deem appropriate."[5]

Congress of course has the authority to amend that provision as it sees fit.

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[4] Current law provides for the deportation of an extraordinarily broad set of individuals who may be suspected of terrorist activity. *See, e.g.*, 8 U.S.C. § 1227(a)(4)(B) (rendering deportable any alien who "has engaged in a terrorist activity," is a representative or member of a terrorist organization, or as to whom U.S. officials have "reasonable ground to believe is engaged in or is likely to engage in after entry any terrorist activity"); 8 U.S.C. § 1227(a)(4)(C) (rendering deportable any alien "whose presence or activities in the United States the Secretary of State has reasonable ground to believe would have potentially serious adverse foreign policy consequences for the United States").

[5] 8 U.S.C. § 1537(b)(2)(C).

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SUBMISSIONS FOR THE RECORD

Statement of

The Honorable Benjamin L. Cardin

United States Senator
Maryland
July 28, 2009

OPENING STATEMENT OF

SENATOR BENJAMIN L. CARDIN

CHAIRMAN, TERRORISM AND HOMELAND SECURITY SUBCOMMITTEE

OF THE SENATE JUDICIARY COMMITTEE

HEARING: "PROSECUTING TERRORISTS:
CIVILIAN AND MILITARY TRIALS FOR GTMO AND BEYOND"

TUESDAY, JULY 28, 2009

The subcommittee will come to order.

Shortly after taking office, President Obama ordered the closure of the Guantanamo Bay detention facility within one year. I commended President Obama at the time for ordering the closure of the detention center. President Obama is sending a clear message to the world that we are reestablishing the rule of law in the United States, and that we, as a nation, will abide by our international obligations.

As the Chairman of the U.S. Helsinki Commission, no other concern has been raised with the United States delegation by our colleagues in Europe as often – and in earnest – as the situation in Guantanamo. As a member of the House of Representatives in 2006, I voted against the Military Commissions Act. At the time, I stated that I believed it was not sound legislation, and I thought it was susceptible to challenge in the courts. The legislation set up the flawed system of tribunals in Guantanamo Bay that was ultimately rejected by the Supreme Court.

Let me be clear. I want the U.S. Government to bring terrorist suspects to justice quickly and effectively. We must remain vigilant after the terrorist attacks on our nation of September 11, 2001. But the system we use must meet fundamental and basic rule of law standards. Americans have a right to expect this under the Constitution, and our federal courts will demand it when reviewing a conviction. We would of course expect other nations to use a system that provides no less protection for Americans that are accused of committing crimes abroad and are called before foreign courts.

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This May, President Obama classified the remaining Guantanamo detainees into five categories. Today's hearing will focus on the first two categories: first, detainees who have violated American criminal laws and can be tried in federal courts; and second, detainees who violate the laws of war and can be tried through military commissions.

I understand that the Detention Policy Task Force, under the guidance of the Departments of Justice and Defense, has extended its work for an additional six months in order to issue a comprehensive final report and recommendations.

Last week, the Task Force issued a preliminary report, along with a protocol for the determination of Guantanamo cases referred for prosecution. This protocol lays out factors that the Departments of Justice and Defense will consider in deciding whether to try a case in an Article III court or in a reformed military commission. The protocol states that "there is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with the traditions principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there."

We have two distinguished panels of witnesses to testify at today's hearing from both the government and private sector. I look forward to hearing their testimony today.

I will now recognize Senator Kyl, the Ranking Member of our Subcommittee, for any remarks that he would care to make at this time.

Statement of
Michael J. Edney
Gibson, Dunn & Crutcher LLP

Prepared Testimony Before
The Senate Committee on the Judiciary

Subcommittee on Terrorism and Homeland Security

"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"

July 28, 2009

Chairman Cardin, Ranking Member Kyl, and distinguished members of the Committee, thank you for giving me the opportunity to testify on this important subject.[1] Both Presidents to address the question of prosecuting members of al Qaeda and the Taliban since the September 11th attacks have recognized the need for a military-based trial system, outside federal criminal

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[1] The views expressed herein are my own and do not reflect those of Gibson, Dunn & Crutcher LLP. The following biography is provided for the convenience of the Committee:

Michael J. Edney is of counsel in the Washington, DC office of Gibson, Dunn & Crutcher LLP, where he was also a lawyer between 2002 and 2005. His practice specializes in criminal and regulatory defense, complex civil litigation, and appellate and constitutional law. From 2007 to 2009, Mr. Edney served as a legal advisor and Deputy General Counsel to the National Security Council ("NSC") at the White House, where he provided legal advice to the NSC and its various committees, as well as senior White House policymakers, on national security related legal issues. Mr. Edney also chaired committees of lawyers from throughout the Executive Branch to address national security questions. From 2005 to 2007, Mr. Edney served in the United States Department of Justice, as a member of its Office of Legal Counsel. Relevant to the issues before this Committee, Mr. Edney participated in providing advice on the legal response to the Supreme Court's 2006 decision in *Hamdan v. Rumsfeld* and on the drafting of the Military Commissions Act of 2006 and the ensuing Manual for Military Commissions. Mr. Edney also participated in arguments on behalf of the United States before military commissions and before the Court of Military Commission Review. Mr. Edney has been a law clerk to Judge Danny J. Boggs of the United States Court of Appeals for the Sixth Circuit. He graduated with high honors from The University of Chicago Law School, where he was Articles Editor of *The University of Chicago Law Review* and was enrolled in the Order of the Coif. He received his B.A., *magna cum laude*, from the University of Notre Dame.

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trials before Article III courts.[2] In 2006, the Congress passed the Military Commissions Act ("MCA"),[3] providing unambiguous authorization for military commissions trials for members of al Qaeda or the Taliban who violate the laws of war. The Senate passed the legislation by a margin of 65 to 34.[4]

The question arises to what extent the military commissions authorized by the Congress, either under the MCA or any later legislation that may be enacted, should be employed to address potential violations of the laws of war committed by certain persons currently held at the Guantanamo Bay facility. The Congress will have a role in resolving that difficult question. To assist the Committee in considering this important issue, I intend (1) to provide an overview of the history of using military commissions in the current armed conflict; (2) to discuss some of the legal challenges in prosecuting members of al Qaeda that military commissions, or an alternative to Article III criminal trials, were designed to address; and (3) to outline some of the legal consequences policymakers should consider in determining where trials for persons currently held at Guantanamo should be held.

I. Background on the Application of Military Commissions to Al Qaeda and the Taliban

On September 11, 2001, nineteen armed al Qaeda agents took control of four civilian aircraft and used them as weapons to attempt attacks on several targets in the United States. Those attempts were successful on both towers of the World Trade Center in New York City and on the Pentagon in Arlington, Virginia. A fourth captured plane crashed in Shanksville,

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[2] Remarks on the War on Terror, 42 WEEKLY COMP. PRES. DOC. 1569 (Sept. 6, 2006); Statement on Military Commissions, DAILY COMP. PRES. DOC. May 15, 2009 ("Military commissions have a long tradition in the United States. They are appropriate for trying enemies who violate the laws of war, provided that they are properly structured and administered.").
[3] Pub. L. No. 109-336 (codified in scattered sections of 10 and 18 U.S.C.) (2006),
[4] United States Senate, *U.S. Senate Roll Call Votes 109th Congress – 2nd Session*, Sept. 28, 2006.

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Pennsylvania, killing all on board. As a result of those attacks, nearly 3000 innocent civilians and members of our Armed Forces perished. The Executive Branch was quickly faced with the question of how to hold accountable members of al Qaeda or the Taliban responsible for those attacks, as well as prior acts of terrorism against the United States, including al Qaeda's bombing of the U.S.S. Cole and our embassies in Kenya and Tanzania.

President Bush signed a military order on November 13, 2001, designating a panel of military officers to preside over trials for members of al Qaeda or the Taliban who violated the laws of war.[5] President Bush was not first to authorize the use of military commissions: Instead, military commissions had been used throughout our Nation's history to prosecute violations of the laws of war. In 1780, during the Revolutionary War, General George Washington authorized a military commission to try British Major John Andre as a spy.[6] Commissions were used in the Mexican-American War, the Civil War, and World War II. Military commissions were convened to try the assassins of President Abraham Lincoln and their accomplices.[7] Importantly, Congress had long recognized the proper historical role for military commissions in the Uniform Code of Military Justice by providing that the creation of general courts martial "do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."[8]

The Secretary of Defense issued rules to govern the proceedings established by the President's military order, and soon six individuals held at Guantanamo Bay and designated as

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[5] Military Order of November 13, 2001, 3 C.F.R. 918 (2001).
[6] *See Ex parte Quirin*, 317 U.S. at 31, n.9; *Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780*, (Francis Bailey ed. 1780).
[7] *See Military Commissions*, 11 Op. Att'y Gen. (1865); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868).
[8] 10 U.S.C. § 821 (2006).

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enemy combatants were charged.[9] These proceedings were immediately entangled in judicial challenge, which took more than two years to resolve.[10] In *Hamdan v. Rumsfeld*, the Supreme Court held that military commissions established by the President were contrary to statute.[11] This was not because they were military tribunals, or because they were established by presidential mandate, but because certain rules for the military commissions did not meet a statutory requirement that general court martial procedures generally be tracked or the requirements of Common Article 3 of the Geneva Conventions. The Court determined that Common Article 3 was applicable to the armed conflict between the United States and al Qaeda, and that the Uniform Code of Military Justice required that tribunals comply with Common Article 3, in armed conflicts to which it was applicable.[12]

On September 6, 2006, the President announced that fourteen high-level suspected al Qaeda operatives were being transferred to military custody at Guantanamo Bay, Cuba, and would be evaluated for trial by military commission. These men included the alleged mastermind of the September 11th attacks, Khalid Sheikh Mohammed, as well as al Qaeda leaders responsible for the attacks on the U.S.S. Cole and our embassies in Kenya and Tanzania. The President asked Congress to address the *Hamdan* decision and quickly to pass legislation authorizing military commission trials for these and other individuals held at Guantanamo Bay.[13] The Congress responded, and the MCA was enacted on October 17, 2006. It provided extensive statutory prescriptions for how military commission proceedings must be conducted and included a number of important changes from the system established pursuant to the President's

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[9] *Hamdan*, 548 U.S. at 569.
[10] *See generally*, *id.* at 569-573.
[11] 548 U.S. 557 (2006)
[12] *Id.* at 624-25.
[13] Remarks on the War on Terror, *supra* note 2, at 1573-74.

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November 13, 2001, order. The trials would be presided over by a military judge, qualified to handle general courts martial.[14] Trial counsel and defense attorneys would be assigned by the Judge Advocates General.[15] Any conviction could be appealed to a new Court of Military Commission Review, also staffed by impartial military judges, the United States Court of Appeals for the D.C. Circuit, and ultimately the Supreme Court of the United States.[16]

The Secretary of Defense submitted to Congress rules for implementing the MCA on January 18, 2007. Three Guantanamo detainees were charged in coming months, and those prosecutions were stayed by an early jurisdictional challenge, which was rejected by the Court of Military Commission Review on September 24, 2007.[17] Military commissions were allowed to proceed thereafter, and new charges were issued. Ultimately, military prosecutors swore charges against 24 Guantanamo detainees. Notably, on May 9, 2008, the Convening Authority referred charges that Khalid Sheikh Mohammed, Walid bin' Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa al Hawsawi conspired to plan and to execute the September 11th attacks. Prior to January 2009, that case had substantially progressed through pretrial proceedings.

On January 22, 2009, President Obama issued Executive Order 13492, mandating that military commission proceedings be suspended pending determinations on whether to prosecute military commission defendants in federal courts and otherwise to dispose of the charges through modified military commission procedures, dismissal, or release.[18] A second order, issued the same day, established a multi-agency task force, chaired by the Attorney General and the Secretary of Defense, to make recommendations to the President on whether and in what form

[14] Pub. L. No. 109-366, § 948j.
[15] *Id.* § 948k.
[16] *Id.* §§ 950f, 950g.
[17] *United States v. Khadr*, CMCR 07-0001 (Sept. 24, 2007).
[18] Exec. Order No. 13492 § 7, 74 Fed. Reg. 4897 (Jan. 22, 2009).

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military commission prosecutions should go forward.[19] The task force recommendations were due on July 22, 2009, but the Attorney General and the Secretary of Defense granted an extension of 180 days.[20] Military judges presiding over commission proceedings have granted the Executive Branch's requests for continuances to implement the President's order. Military commission prosecutions are stalled.[21]

II. Considerations for the Decision Between Federal Criminal Trials and Military Commissions

There appears to be emerging consensus among policymakers—the Congress and the President—that some alternative mode of prosecution separate from Article III criminal trials should be available for members of al Qaeda and the Taliban.[22] In addition, both Presidents to confront this issue agree that it arises in the context of a continuing war.[23] Even with these fundamental determinations, the Congress and the President now face two intertwined questions: (1) What criteria will guide the choice between federal criminal trials and military commissions for individual detainees?; and (2) What rules should govern those military commission proceedings?

In devising military commission procedures, the Executive Branch and, on the second occasion, the Congress have identified adjustments to federal criminal procedures necessary to

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[19] Exec. Order No. 13493, 74 Fed. Reg. 4901 (Jan. 22, 2009).
[20] *See* Preliminary Report; *see also* Exec. Order No. 13493 § 1(g) (authorizing extensions at the discretion of the co-chairs)
[21] *See, e.g.*, Order Granting Second Motion for 120-day Continuance, *United States v. Khalid Sheikh Mohammed* (May 14, 2009) (granting a second continuance of the 9/11 prosecution until September 17, 2009).
[22] Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. May 21, 2009; S. Amd. No. 1657 to S. 1390 CONG. REC. (Jul. 21, 2009) S7795 (amendment sponsored by Senator Lieberman and passed on a voice vote stating that "It is the sense of Congress that the preferred forum for trial of alien unprivileged enemy belligerents subject to this chapter for violations of the law of war and other offenses made punishable by this chapter is trial by military commission.").
[23] Remarks at the National Archives and Records Administration ("Now let me be clear: We are indeed at war with al Qaeda and its affiliates.").

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address the special circumstances of prosecuting members of an enemy force during a time of continuing armed conflict. As policymakers address these key open questions, it is worth revisiting the justifications for two key categories of such adjustments: Procedures addressing classified information and special relaxations of hearsay and authentication rules for evidence collected on the battlefield or otherwise abroad. Any argument suggesting that federal criminal trials are the appropriate mechanism for trying members of al Qaeda held at Guantanamo Bay will have to address these concerns. In addition, policymakers should consider the consequences on the legitimacy federal criminal trials and military commissions of allocating defendants on a case-by-case basis between each system.

A. Procedures for Handling Classified Information

Classified information is at the forefront of any trial against al Qaeda operatives. Al Qaeda is the subject of substantial U.S. intelligence activities: Whether or not the Government intends to present classified information at trial, it is a near certainty that the Government possesses classified information relating to the defendant. Military commissions were motivated, in part, due to difficulties of addressing classified information in terrorism trials before Article III courts. The 9/11 Commission recognized these difficulties in assessing the historical capabilities of the law enforcement system to prevent the September 11th attacks. During the trial of Omar Abdel Rahman, also known as the "Blind Sheikh," for his role in the 1993 World Trade Center bombing, the Government was required to disclose a list of unindicted co-conspirators to the defense. Within days, that list had been faxed to close associates of

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Osama bin Laden, providing a roadmap as to which al Qaeda operatives the United States were tracking.[24]

Problems also arose in the trial of Ramzi Yousef, the mastermind of the 1993 World Trade Center bombing. During live testimony in trial, it was revealed that certain evidence against Yousef was gathered through tracking the delivery of cell phone batteries between al Qaeda associates. That one piece of information, according to former Attorney General Michael Mukasey, alerted al Qaeda operatives that their cell phone communication network had been compromised. The operatives immediately discontinued its use, and a vitally important stream of intelligence was lost.[25]

A fundamental premise of the military commission rules was that holding al Qaeda terrorists to account was not entirely about determining who was responsible for a historical event.[26] Instead, each al Qaeda trial would have *prospective* consequences because of the continuing armed conflict against al Qaeda and the organization's unrelenting plans for future attacks against the United States. Classified information adduced at trial or disclosed before trial would not be as secure. Special military commission procedures for classified information were meant to avoid forcing the Government into a decision between revealing classified information to members of an enemy force during a continuing armed conflict and holding them accountable for violations of the laws of war.

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[24] NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 472 n. 8 (2004).

[25] Michael B. Mukasey, *Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions*, WALL. ST. J. (Aug. 22, 2009). *See also* Remarks at the National Archives and Records Administration, *supra* note 19, at 5 (explaining that the Yousef case is a success story for federal criminal trials in the terrorism context).

[26] *Taylor v. Kentucky*, 436 U.S. 478 , 489 n.17 (1878) ("The only purpose of a criminal trial is to determine whether the prosecution established the guilt of the accused as required by law, and the trial judge should not allow the proceedings to be used for any other purpose.").

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To this end, the MCA establishes a strong national security privilege to protect classified information as a general matter.[27] The MCA streamlines the procedures for asserting protections of classified information, providing that any person, not just the head of a department, may raise the national security privilege.[28] Importantly, the MCA provides special protections for intelligence sources and methods. The MCA allows the Government to introduce otherwise admissible evidence that was obtained through classified intelligence sources and methods, without disclosing those sources and methods to the accused or the members of the military commission. The military judge conducts an impartial evaluation of the sources and methods to determine whether the ultimate evidence is reliable.[29] To address the defendant's ability to test that evidence, the MCA requires that defendants be given an unclassified summary of such sources and methods that produced the evidence to the extent practicable and consistent with national security.[30] The rules are designed to provide an impartial check that the sources and methods are reliable, while not forcing the Government to lay bare intelligence activities by which it continues to gather information against an enemy force each time it seeks to prosecute a member of that force.

At the same time, the MCA safeguards the defendant's right to present a vigorous defense. All evidence provided to the members of the military commission—the ultimate triers of fact—is provided to the defendant. And any exculpatory evidence—classified or not—must be disclosed to the defense, unless the Government demonstrates that there are adequate

[27] *See* 10 U.S.C. § 949d(f)(1) ("Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the proceeding applies to all stages of the proceedings of military commissions under this Chapter.").
[28] *See* 10 U.S.C. § 949d(f)(2)(C).
[29] *See* 10 U.S.C. § 949d(f)(2)(B).
[30] *Id.*

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substitutes for the classified information through redactions, summaries, or admissions of fact by the Government.[31]

This is not to say that federal criminal trials lack any procedures for dealing with classified information. These procedures, however, were adopted for very different circumstances. The Classified Information Procedures Act ("CIPA") was enacted in 1980 to combat the threat of graymail in espionage prosecutions.[32] To that end, CIPA established elaborate, information-forcing procedures that require defendants to give notice before disclosing any classified information in open court.[33] As this Committee made clear when considering CIPA, the principal purpose of these procedures was to make manageable cases against U.S. government employees who possess classified information independently of anything that occurs in the criminal prosecution.[34] By requiring notice, the Government is given the choice whether to tolerate the disclosure of relevant classified information by the defendant or to dismiss the case.[35] CIPA does not provide special protections for intelligence sources and methods, however. While CIPA requires courts to consider adequate substitutes for classified

[31] *See* 10 U.S.C. § 949j(d).
[32] *See* 18 U.S.C. app. 3 (2006).
[33] *See id.* §§ 2, 5-9.
[34] *See* S. Rep. 96-456, *Classified Information Procedures Act* (June 18, 1980), 1980 U.S.C.C.A.N. 4294, 4295. The Judiciary Committee's report of the bill explained the extensive study of "cases in which intelligence information had been passed to foreign powers through espionage or through leaks in the media." The key finding of the Committee's study was that "prosecution of a defendant for disclosing national security information often requires the disclosure in the course of trial of the very information that the law seeks to protect." The report never mentions special issues regarding classified information in the terrorism context or in a wartime setting.
[35] *United States v. Smith* 780 F.2d 1102, 1105 (4th Cir. 1985) (*en banc*) ("Prior to CIPA, the government had no method of evaluating . . . disclosure claims before trial actually began. Oftentimes it would abandon prosecution rather than risk possible disclosure of classified information.").

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information,[36] CIPA ultimately does not change the standard for disclosure and has been construed to require that the defendant be provided access to classified information that is relevant and helpful to the defense.[37] Moreover, CIPA contains no mechanism for a trial judge to make an independent but *ex parte* assessment of the reliability of intelligence sources and methods underlying otherwise admissible evidence. If the Government intends to present intelligence work product as evidence under CIPA, it must be prepared to allow a deep review and potential disclosure of underlying sources and methods.

While CIPA may accidentally provide a method for handling classified information in the context of terrorism or wartime prosecutions, it was not a matter of close consideration by the Congress. The MCA has, and any amendments thereto will have, the distinct advantage of policymakers consciously adopting special procedures to handle classified information in the context of a continuing armed conflict. The overriding purpose of maintaining the confidentiality of classified information is to conceal it from an enemy foreign power during a time of war.[38] Protections for classified information when prosecuting the agents of such foreign powers should be more robust than in a typical criminal trial.

B. Special Allowances for Evidence Collected Abroad or on the Battlefield.

The unifying feature of prosecuting members of al Qaeda or the Taliban held at Guantanamo is that all are not U.S. persons and all were captured outside the United States. In some of the prosecutions, the alleged criminal acts had effects inside the United States. The prosecution of the 9/11 conspiracy stands as an example. Nevertheless, much of the conduct

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[36] *See* 18 U.S.C. app. 3 § 4.
[37] *See, e.g.*, *United States v. Aref*, 533 F.3d 72, 78-79 (2d Cir. 2008); *United States v. Smith* 780 F.2d 1102, 1107-10 (4th Cir. 1985) (*en banc*); *United States v. Rosen*, 557 F.3d 192 (4th Cir. 2009).
[38] Exec. Order 12958 (discussing standards for classifying information).

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occurred outside the United States, and the evidence of the conduct is found in foreign lands or through intelligence surveillance. In other cases, both violations of the laws of war and all of the events occur entirely outside the United States. This is the case in the prosecution of Omar Khadr, who is charged with throwing a grenade at and killing Army Sergeant Christopher Speer. In these cases, much of the evidence comes from witnesses located in foreign lands interviewed during combat and physical materials gathered from the battlefield. The military and intelligence personnel responsible for gathering evidence often did not do so with criminal prosecution in mind, as domestic law enforcement investigating a crime inside the United States would. Instead, evidence was collected often during active combat with the object of predicting the next attack rather than establishing a chain of custody that could stand up to federal court scrutiny. Persons responsible for the evidence, or establishing its authenticity, are often active-duty military or deployed intelligence personnel, whose presence for trial may disrupt national security operations. Foreign nationals who have witnessed events abroad may have since become unavailable due to the instability of the region.

To adjust for such conditions, markedly different than those faced in the domestic law enforcement context, the MCA relaxed rules generally applicable in federal criminal proceedings barring hearsay evidence and establishing strict standards for the authentication of evidence. With regard to hearsay evidence, the MCA established a standard based on the reliability of the evidence and the opportunity to rebut it, rather than adopting the complex web of rules that defines inadmissible hearsay evidence in federal trials.[39] The MCA's rule was designed to allow judges to evaluate all the circumstances underlying the evidence and to make pragmatic judgments. May an out-of-court statement be sufficiently tested by the defense, even if the

[39] *Compare* 10 U.S.C. § 949a(b)(2)(E) *with* Fed. R. Evid. 801-07.

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declarant is not cross-examined before the commission's members? Does an out-of-court statement bear other indicia of reliability?

There has been a debate about who should bear the burden to show the reliability of hearsay evidence, and whether additional procedural protections should be built into the military commission rules regarding hearsay.[40] Nevertheless, both the amendments to the MCA in the pending National Defense Authorization Act for Fiscal Year 2010 and the Administration's regulatory adjustments to the rules for military commissions recognize that the restrictions on hearsay evidence must contain an exception for information that can be demonstrated to be reliable. When considering whether federal criminal trials are up to the task of trying al Qaeda operatives for violations of the laws of war, how prosecutions can be reasonably conducted under the hearsay rules must be addressed.

C. Protecting the Integrity of Both the Federal Criminal System and Military Commissions

There has been substantial debate about whether a presumption in favor of trying alien enemy combatants in Article III courts rather than military commissions is appropriate. Such a presumption is the current position of the Executive Branch, based on its preliminary policy review of the appropriate role of military commissions and Article III courts in handling charges against Guantanamo detainees.[41] The presumption would be rebutted when sources and methods

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[40] *See* S. 1390 § 1031 proposed 10 U.S.C. § 949a(3)(D); Preliminary Report of the Detention Policy Task Force (July 20, 2009) at 3 ("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.").

[41] *See* Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. May 21, 2009 ("First, whenever feasible, we will try those who have violated American criminal laws in federal courts—courts provided by the United States Constitution."); Preliminary Report of the Detention Policy Task Force (July 20, 2009) at App. A ("There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution.").

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require protection or evidentiary issues counsel in favor of trial by military commission.[42] Others disagree with this approach. The Senate passed by voice vote on July 23 a sense of the Congress resolution that all "alien unprivileged belligerents"—a group defined as members of al Qaeda and the Taliban who have engaged in hostilities against the United States—should be tried by military commission.[43]

There are consequences in not choosing one system or another—federal criminal trials or military commissions—for the prosecution of offenses that would violate the laws of war committed by alien Guantanamo detainees. The proposed presumption that most al Qaeda members who have violated the laws of war should be tried in federal court, except when the evidence makes such trials difficult, poses a threat to the integrity of both the federal criminal system and the military commission system. Using military commissions as a safety valve when federal criminal prosecutions become difficult would strip the procedural safeguards in the federal criminal process of some meaning. Those procedural protections, such a practice would suggest, are justified only to the point of prosecutorial convenience. Similarly, military commission outcomes would be viewed as a second best alternative, of lesser legitimacy. The existence of the proposed rebuttable presumption would cast a pall over military commission proceedings as a collection of cases with weaker evidence. Atmosphere counts in litigation. Sorting defendants between federal criminal trials based on evidentiary considerations would weaken the Government's defense of military commission rules before the appellate court.

Determining that an entire class of cases would be tried in one system or the other, by contrast, would enhance the legitimacy of both systems. A rule that alien members of an enemy

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[42] *Id.*

[43] S.1650, proposed 10 U.S.C. § 948e, 155 CONG. REC. S8003-8005 (daily ed. July 23, 2009) ("It is the sense of Congress that the preferred forum for the trial of alien unprivileged enemy belligerents . . . is trial by military commission").

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force captured abroad, who have committed violations of the laws of war, should be tried by military commission could be supported by reference to history and tradition. The rules governing such trials could be defended as an appropriate balance of procedural protections and sensitivity to national security in an ongoing armed conflict. Differential treatment for U.S. citizens or aliens members of an enemy force captured on U.S. soil could be justified by the distinct constitutional rules applicable to those groups.[44] Similar benefits—in terms of systemic legitimacy—would be realized if entire classes of offenses or defendants were handled through the federal criminal system. Sorting individual cases, however, based on evidentiary challenges may be the least preferable option.

III. The Location of Military Commission Trials

The decision whether to hold military commission trials in the territorial United States or at Guantanamo Bay, Cuba, will have substantial legal consequences. On January 22, 2009, the President issued Executive Order 13492, requiring that the Guantanamo Bay detention facility be closed "as soon as is practicable, and no later than one year" from the order. Fewer than six months remain in the allotted time for carrying out that order. Nevertheless, 229 persons associated with the armed conflict remain detained at the Guantanamo Bay facility.

The difficulties in reducing the population at Guantanamo are understandable. The last Administration made reducing the population at Guantanamo a high priority, but encountered significant challenges. For some, the United States could not obtain sufficient guarantees from the detainee's home country that he would be held or monitored in manner consistent with a realistic assessment of the detainee's threat. For others, there was an intolerable risk that their home countries would mistreat them upon return. The policy of the United States is not to return

[44] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (discussing the constitutional status of U.S. citizens abroad and aliens present in U.S. territory).

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any person from Guantanamo Bay, Cuba, to a country where it is more likely than not he will be tortured. For still others, assembling the evidence necessary to make informed prosecution decisions takes time.

The slow pace of transferring Guantanamo Bay detainees to foreign countries over the last six months has led to an inescapable conclusion: A large portion of the detainees currently at Guantanamo will need to be transferred to the United States, unless the timetable set forth in Executive Order 13492 is extended. The President recognized in his May 21, 2009, address that a certain portion of the detainees at Guantanamo Bay "cannot be prosecuted yet [ ] pose a clear danger to the American people."[45] For that class, the President suggests detention without criminal charge—before military commission or Article III courts—presumably under the authority to hold combatants until the end of hostilities. This category of detention—if it is to occur on United States soil—will pose a new set of challenges, and the Executive Branch will need to adhere to legal standards whose applicability at Guantanamo was at least uncertain.

The planned closure of the Guantanamo Bay facility will also affect the policy options open to the Executive Branch and the Congress with regard to military commission trials. If the decision were made today to resume military commission proceedings, many would not be complete until after January 22, 2010. That decision, of course, will not be made today. The Attorney General and the Secretary of Defense extended the deadline for the Detention Policy Task Force report on these matters until January 22, 2010.[46] Moreover, if amendments to the MCA are enacted into law, a substantial overhaul of the rules for military commissions will be

[45] Remarks at the National Archives and Records Administration, DAILY COMP. PRES. DOC. May 21, 2009

[46] Department of Justice Press Release, *Detention Policy Task Force Issues Preliminary Report* (July 20, 2009).

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required.[47] Accordingly, absent a revisiting of Executive Order 13492, any future military commission trials likely will be held on U.S. soil, a feature that will have legal consequences.

New Constitutional Restraints on Military Commission Rules. First, locating military commission trials within the territorial United States will affect the constitutional provisions applicable to such trials. In *Boumediene v. Bush*,[48] the Supreme Court held that the Suspension Clause of the Constitution applies at Guantanamo Bay, Cuba. The Court's analysis included a detailed survey of the geographic scope of the writ of habeas corpus in 1789, as Supreme Court precedent required.[49] The Court determined that Guantanamo, though outside the territorial United States, was sufficiently similar to areas where the writ has historically extended and shared qualities of *de facto* sovereignty so that the Suspension Clause applied. The applicability of the Suspension Clause narrowed the form of legislation by and circumstances under which Congress could foreclose access to habeas corpus at Guantanamo. The Court explicitly did not reach the question whether other constitutional rights apply at Guantanamo.

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[47] One provision alone in pending legislation will require a detailed review of the Manual for Military Commissions. Under current law, the Secretary of Defense has wide discretion in establishing rules for military commissions to depart from the rules applicable for general courts martial, and the Secretary of Defense in many instances had done so. *See* 10 U.S.C. § 949d(a) ("Such procedures shall, *so far as the Secretary considers practicable or consistent with military or intelligence activities*, apply the principles of law and rules of evidence in trial by general courts-martial." (Emphasis added)). Pending legislation would require adherence to the rules for general court martial, absent explicit statutory mandate to the contrary. *See* S. 1390 § 1031, proposed 10 U.S.C. § 949a ("Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter."). Whatever the merits of the provision, a substantial review of military commission rules will be necessary.
[48] 128 S. Ct. 2229 (2008).
[49] *Id.* at 2244-51; *see also INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

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The Court historically has limited the extraterritorial reach of other constitutional provisions.[50] If the question of what other constitutional provisions apply at Guantanamo arises, the Supreme Court may very well not apply the full range of constitutional rights enjoyed in the territorial United States. Instead, a potential outer perimeter of constitutional rights at Guantanamo is the analysis applied in the *Insular Cases*, where the Court held that certain fundamental constitutional protections applied in unincorporated territories of the United States.[51] If applied to Guantanamo, the *Insular Cases* analysis would provide the courts with "functional" flexibility to determine whether protections in military commissions violated certain "fundamental" guarantees.

If military commission trials were held in the United States, the *Insular Cases* would provide no such judicial discretion in applying constitutional guarantees. There would be substantial questions about whether even the least controversial military commission procedures could withstand scrutiny under constitutional provisions applicable in United States territory. For example, the Confrontation Clause of the Sixth Amendment requires that "in criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Supreme Court recently has determined that the Confrontation Clause bars the admission of testimonial hearsay if the defendant has not had a chance to cross-examine the

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[50] *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (holding that the Fourth Amendment does not apply to a search and seizure by United States agents of property owned by a nonresident alien located in a foreign country); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) ("Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens")

[51] *See Dorr v. United States*, 195 U.S. 138, 143 (1904); *Downes v. Bidwell* 182 U.S. 244, 293 (1901) (White, J., concurring) ("[T]he determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations with the United States"). The Court in *Boumediene* hinted at using this rubric for determining the scope of constitutional rights at Guantanamo Bay. *See Boumediene*, 128 S. Ct. at 2254.

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witness.[52] The Court specifically rejected a test that would allow trial judges to admit such out-of-court testimonial statements if deemed "reliable." As explained above, such a safety valve based on reliability is a common feature of special rules for hearsay in military commissions, whether in the MCA or the proposed amendments for reforming the military commission rules. Under a June 25 Supreme Court decision extending the constitutional bar on hearsay to expert reports, additional questions would be raised about the admissibility of intelligence reports under the Confrontation Clause.[53]

Arguments would still be available that a military commission does not qualify as a "criminal prosecution" for purposes of the Sixth Amendment.[54] It is unclear whether such arguments would be successful, especially in the appellate courts holding that Confrontation Clause applies to military proceedings, specifically general courts martial.[55] At a minimum, however, the discretion of political branches in crafting rules for military commissions would be narrowed if the trials were held in the territorial United States. Specifically, the political branches would be deprived of some arguments protecting their judgments on well recognized needs for wartime trial. No longer would the political branches be able to assert that constitutional provisions lack extraterritorial reach or are not among the fundamental constitutional rights applicable to certain associated territories outside the United States.

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[52] *See Crawford v. Washington*, 541 U.S. 36 (2004).
[53] *See Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).
[54] The Supreme Court held in *Ex parte Quirin* that neither the Sixth Amendment jury trial right, nor the mandate in Article III of the Constitution that "the trial of all Crimes, except in cases of Impeachment, shall be by Jury" applies to military commission proceedings. 317 U.S. 1, 39-46 (1942). The Court did not address the applicability of the Confrontation Clause.
[55] *See United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960); *see also U.S. v. Rankin*, 64 M.J. 348 (C.A.A.F. 2007) (specifically applying the rule in *Crawford* to general courts martial). Notably, S. 1390 would direct all appeals from military commission convictions to the United States Court of Appeals for the Armed Forces.

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Post-Conviction / Acquittal Dispositions. Holding military commission trials inside the United States would also affect the options available to the Congress and the President for addressing disposition of detainees after a military commission trial. The political branches must be prepared to address the risk that a military commission may disagree that a charged defendant is guilty of a violation of the law of war or may assess a sentence insufficient to incapacitate the defendant in a manner consistent with the threat he poses. For military commission trials held at Guantanamo, the remedy for courts may be an order of release, triggering an obligation on the part of the Executive Branch to find a willing foreign country into which to transfer the defendant. This process can be difficult.

One remedy that is likely unavailable to a military commission or a federal court reviewing the habeas petition of a person held at Guantanamo Bay is ordering his release into the United States. In this regard, the United States Court of Appeals for the D.C. Circuit recently held that a federal court cannot order the Government to bring Guantanamo detainees into the United States, outside the framework of federal immigration laws.[56] This ruling was not a departure from Supreme Court precedent or constitutional text. The Constitution explicitly grants Congress the authority to establish "an uniform Rule of Naturalization."[57] The Supreme Court consistently has interpreted the Naturalization Clause to give Congress exclusive control as to who is permitted entry to the territorial United States.[58] To order the release of a Guantanamo detainee into the United States without statutory authorization, the Supreme Court

[56] *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).
[57] U.S. Const. Art. I, § 8, cl. 4.
[58] "For more than a century, the Supreme Court has recognized the power to exclude aliens as 'inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers -- a power to be exercised exclusively by the political branches of government.'" *Kiyemba*, 555 F.3d at 1025 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)).

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would be required to overturn or carefully to distinguish more than a century of prior decisions.[59] As the Court has put it, there is "not merely 'a page of history, . . . but a whole volume' reaffirming the exclusive power of the political branches in this field."[60]

Moving military commission trials to the United States would therefore narrow the discretion of the Congress, and whatever authority Congress delegates to the President, as to *where* as opposed to *whether* a military commission defendant should be released. Whatever the merits of holding military commission trials in the United States, the Congress should be aware that doing so likely will impose a judicial check on its decisions as to where detainees currently at Guantanamo are released after an acquittal or the completion of sentence.

* * *

Thank you again for the opportunity to discuss this important issue with the Committee. I am prepared to answer the Committee's questions.

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[59] *See Demore v. Kim*, 538 U.S. 510, 521-22; *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst*, 408 U.S. at 765-66; *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Young Yo v. United States*, 185 U.S. 296, 302 (1902); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

[60] *Galvan*, 347 U.S. at 531 (quoting *N.Y. Trust Co. v. Eisner*, 256 345, 349 (1921)).

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Testimony of Jeh Charles Johnson
General Counsel, Department of Defense
Hearing Before the Senate Judiciary Committee, Subcommittee on Terrorism and Homeland Security
"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"
Presented On
July 28, 2009

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

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

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

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

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review process is on track. We remain committed to closing the Guantanamo Bay detention facility within the one-year time frame ordered by the President. A bi-partisan cross section of present and former senior officials of our government, and senior military leaders, have called for the closure of the detention facility at Guantanamo Bay to enhance our national security, and this Administration is determined to do it.

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

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

Over the last few weeks, the Administration has also worked with the Congress on legislative reform of the Military Commissions Act of 2006, by commenting on Section 1031 of the 2010 National Defense Authorization Act, which was reported out of the Senate Armed Services Committee on June 25, 2009. Section 1031 was adopted, as amended, by the Senate on July 23, 2009. My Defense Department colleagues and I have had an opportunity to review the reforms to the military commissions included in the draft of the National Defense Authorization Act adopted by the Senate,

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and it is our basic view that the Act identifies virtually all of the elements we believe are important to further improve the military commissions process. We are confident that through close cooperation between the Administration and the Congress, including the esteemed Members of this Committee, reformed military commissions can emerge from this effort as a fully legitimate forum, one that allows for the safety and security of participants, for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in an Article III federal court, and for the just resolution of cases alleging violations of the law of war.

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

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

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

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laws of war. Thus the Administration has been relying solely on authority provided by Congress as informed by the laws of war in justifying to federal courts in habeas corpus litigation the continued detention of Guantanamo detainees.

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

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

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Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON TERRORISM AND HOMELAND SECURITY
UNITED STATES SENATE

ENTITLED

"PROSECUTING TERRORISTS: CIVILIAN AND MILITARY TRIALS FOR GTMO AND BEYOND"

PRESENTED

JULY 28 2009

Statement of
David Kris
Assistant Attorney General
Before the
Committee on the Judiciary
Subcommittee on Terrorism and Homeland Security
United States Senate
For a Hearing Entitled
"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"
Presented
July 28, 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will be happy to answer any questions you have.

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Statement of David H. Laufman
Partner, Kelley Drye & Warren LLP

Hearing Before the Senate Committee on the Judiciary,
Subcommittee on Terrorism and Homeland Security

"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"

July 28, 2009

I. Introduction

Mr. Chairman and distinguished members of the Subcommittee, thank you for the opportunity to testify on the subject of terrorism prosecutions. This hearing is particularly timely in light of the preliminary report issued on July 20, 2009, by the Detention Policy Task Force.

I am currently a partner at the law firm of Kelley Drye & Warren, where I concentrate on representing individuals and corporations who are the subject of government investigations. The vast majority of my career, however, has been in public service, and a substantial portion of my time in government was in the national security arena, beginning with my tenure as a military and political analyst at the Central Intelligence Agency in the early 1980s.

The views I express today are based predominantly on my service with the Department of Justice preceding my return to private law practice in 2007. From May 2001 through February 2003, I served as Chief of Staff to the Deputy Attorney General, a position in which I assisted in coordinating the Justice Department's responses to the terrorist attacks of September 11. From March 2003 until August 2007, I then served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the Eastern District of Virginia, where I prosecuted several terrorism cases, including *United States v. Abu Ali*, the "Virginia Jihad" case *(United States v. Khan)*, *United States v. Chandia*, and *United States v. Biheiri*. Through my work on these cases, I obtained first-hand experience with the range of legal issues presented by bringing prosecutions of

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terrorism cases in Article III courts, including detention; charging options; allegations of coercive interrogations; the challenge of meeting evidentiary requirements with respect to evidence obtained overseas; working with foreign intelligence and law enforcement agencies; and the use and protection of classified information.

II. A Flexible Architecture for Prosecution

As the Obama Administration and Congress grapple with resolving the detention of prisoners at the U.S. Naval Station in Guantánamo Bay, Cuba, it is essential to create a durable and dynamic legal architecture that affords the government flexibility for determining whether and where to bring terrorism prosecutions. One option that must be preserved -- with respect to both Guantánamo detainees and future cases -- is the criminal prosecution of detainees in federal courts. As more fully discussed below, not every terrorism case will be suitable for adjudication in an Article III court. Based on my own experience in prosecuting terrorism cases, however, and the growing historical record, the courts have demonstrated their ability to adjudicate these cases and resolve the complex constitutional and procedural issues that they often present. Moreover, the empirical record demonstrates that the government has been mostly successful in using the criminal justice system to detain and convict individuals who present a threat to U.S. national security, without compromising intelligence sources or methods or the fundamental due process rights of defendants.[1]

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[1] *See generally* Zabel & Benjamin, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments* (July 2009); Zabel & Benjamin, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (May 2008).

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The Obama Administration therefore should be commended for establishing a presumption "where feasible," that cases of Guantanámo detainees will be prosecuted in Article III courts.[2] At the same time, Congressional restrictions on the Administration's ability to transfer Guantanámo detainees to the United States for criminal prosecution are unwise, contrary to the national interest, and should be eliminated.

In its preliminary report, the Detention Policy Task Force ("Task Force") recognized the importance of preserving both criminal prosecution and military commissions as options for prosecuting individuals accused of engaging in terrorism. The Task Force identified three "broad sets of factors" that the government will employ in determining the appropriate forum for a terrorism prosecution, denominated as "Strength of Interest," "Efficiency," and "Other Prosecution Considerations."

- With respect to "Strength of Interest," the government will consider "the nature of the offenses to be charged or any pending charges; the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities."
- With respect to "Efficiency," the government will consider the "protection of intelligence sources and methods; the venue in which the case would be tried; issues related to multiple-defendant trials; foreign policy concerns; legal or evidentiary problems that might attend prosecution in the other jurisdiction; and efficiency and resource concerns."

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2 Memorandum from the Detention Policy Task Force for the Attorney General and Secretary of Defense, June 20, 2009 (Tab A).

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- With respect to "Other Prosecution Considerations," the government will consider "the extent to which the forum, and the offenses that could be charged in that forum, permit a full presentation of the wrongful conduct allegedly committed by the accused, and the available sentence upon conviction of those offenses."

Although the meaning of the factors listed in the Task Force's preliminary report is not clear in each instance, and their prospective application is uncertain, they collectively represent a reasonable initial approach to resolving choice-of-forum issues in terrorism cases. The factors reflect an understanding that while criminal prosecutions are generally desirable, certain terrorism cases either should not, or cannot, be brought in Article III courts. In my judgment, these include cases where the defendant is accused of committing crimes against humanity or war crimes; where evidence was gathered on the battlefield by U.S. or foreign military forces; where the government's key inculpatory evidence is based on sensitive intelligence sources and methods that either should not be disclosed to the defense, or cannot be revealed in a public trial; or where statements critical to the government's case were obtained through coercive means.

In such cases, where the government, through a robust interagency process, has made a finding that the evidence against an accused is both probative and reliable -- and that release, repatriation, or adjudication in an appropriate third country is not an option -- the government must have recourse to an alternative legal forum such as a military commission, subject to oversight and rules that balance a defendant's right to a fair proceeding with the government's legitimate right to protect national security interests. President Obama therefore was prudent to retain the system of military commissions, pending various procedural reforms.

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III. The Importance and Success of Article III Prosecutions

Our success in preventing acts of terrorism, and in holding accountable those who commit or plan such attacks, is enhanced by building and sustaining a domestic and international consensus about the legitimacy of our approach. Prosecutions in the criminal justice system under well established Constitutional standards and rules of procedure and evidence confer greater credibility on the government's handling of these cases. Domestically, that credibility helps to foster political consensus about the legitimacy of the government's approach to counterterrorism; overseas, it helps to promote critical cooperation by foreign intelligence and law enforcement authorities.

In addition, by their public exposition of evidence through the crucible of the adversarial system, criminal prosecutions play an important role in educating the American people -- and the world -- about the true nature of the continued threat we face. In the case of Ali al-Marri case, for example, the defendant's guilty plea in April 2009 to conspiracy to provide material support to al-Qaeda resulted in the revelations that he had been recruited by Khalid Sheikh Mohammed ("KSM"), then the operations chief of al-Qaeda, to assist with al-Qaeda operations in the United States; that he had been directed to come to the United States no later than September 10, 2001, to operate as a sleeper agent; and that he had received sophisticated codes for communicating with KSM and other al-Qaeda operatives. Similarly, the guilty plea of American-born al-Qaeda recruit Bryant Neal Vinas, unsealed in July 2009, revealed that al-Qaeda was interested in details about the Long Island Railroad system, and that as recently as 2008, Vinas and other recruits were receiving training in weapons, plastic explosives, and techniques for making explosives-rigged jackets for suicide bombers.

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Four arguments have been principally advanced by those who disfavor bringing terrorism cases in Article III courts: (1) that sensitive intelligence cannot be protected; (2) that existing rules of evidence and criminal procedure are inadequate; (3) that terrorism prosecutions place an undue burden on the court system; and (4) that terrorists cannot be safely incarcerated in civilian detention facilities in the United States. None of these arguments withstand scrutiny.

Protecting Intelligence Information. It is true that the criminal prosecution of terrorists opens the door to defense efforts to obtain sensitive classified information to develop potentially exculpatory information. It is also true that information shared confidentially with the United States by foreign intelligence and law enforcement authorities can be at risk of disclosure under discovery rules. What critics of Article III prosecutions often fail to acknowledge, however, is that the Classified Information Procedures Act ("CIPA") provides a statutory mechanism for protecting sensitive intelligence information from disclosure.

CIPA provides the government with numerous procedural advantages. Prior to trial, the government has the opportunity, for example, to make an *ex parte*, *in camera* submission to the court in which it brings information to the court's attention for a ruling on whether the information is discoverable, explains the source and sensitivity of the information, and makes arguments as to relevance and the damage to national security that would result if the information were disclosed to the defense. In the case of Ahmed Omar Abu Ali case, for example, which I prosecuted, the court agreed with the government that certain categories of classified documents sought by the defense were irrelevant and precluded their use at trial by the defense.

If the court determines that the information is discoverable, CIPA authorizes the government to propose a substitute for the specific classified information -- which the court

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may accept, reject, or modify -- that masks the information's most sensitive elements while substantially enabling the defendant to prepare his defense. Where classified material is deemed discoverable, its pretrial disclosure may be restricted to cleared defense counsel, and the government has an opportunity in a sealed hearing to contest the defense's interest in using specific classified information at trial. The government may not win every skirmish, but courts usually fashion compromise disclosure orders that protect the government's core security interests.

Nor are trials a forum for the reckless disclosure of classified information. With the government's close attention and exhortation, courts police their pretrial orders regarding the handling of classified information and the questioning of witnesses -- and defense counsel abide by them. Despite claims to the contrary, there are no proven examples of disclosures at trial resulting in the compromise of sensitive intelligence sources and methods.

Arguments that U.S. discovery rules and due process requirements cause foreign governments to refrain from sharing intelligence with U.S. authorities also are overstated. Since September 11, intelligence-sharing and cooperation between U.S. and foreign intelligence authorities has increased dramatically. Perhaps in no case was information-sharing and cooperation better demonstrated than in the Abu Ali prosecution, where the defendant - who originally was arrested and detained in Saudi Arabia -- claimed that his detailed confessions were the result of torture by Saudi authorities. For the first time in Saudi history, the Saudi Government permitted Saudi security officers to testify in an American criminal proceeding and face rigorous cross-examination by U.S. defense attorneys, thereby enabling prosecutors both to obtain direct testimony about the defendant's admissions and to rebut his claims of mistreatment by Saudi authorities.

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Courts have also shown a willingness to accommodate the security concerns of foreign governments cooperating in U.S. terrorism prosecutions. In the Abu Ali case, U.S. District Judge Gerald Bruce Lee issued an order protecting the identities of Saudi security officers who testified and shielding their images from public view when videos of their testimony were played at trial. Similar orders have been issued in other terrorism cases.

Rules of Evidence and Procedure. Existing rules also have proven adequate to resolve difficult evidentiary and procedural issues in terrorism cases. Rather than adopting new rules or relaxing the application of existing ones, the courts have simply applied traditional standards of analysis to the specific factors in a given case. In the Abu Ali case, for example, the Saudi Government declined to permit its security officers to come to the United States to testify at a pretrial hearing. On the government's motion, the court agreed to permit the Saudi officers to testify in Saudi Arabia under circumstances where they would be subject to in-person cross-examination by the defendant's lead trial attorney, the defendant (then in Alexandria, Virginia) and the witness could observe each other on video screens, the defendant was accompanied by one of his trial attorneys in the courtroom in Alexandria, and the defendant could communicate with his counsel in Saudi Arabia during breaks in the testimony. After hearing testimony from the Saudi officers and considering related evidence, the court applied traditional standards of analysis to determine that Abu Ali's confessions were voluntary and admissible. So, too, the court applied customary standards in finding that the government had authenticated and established a chain of custody for physical evidence seized at al-Qaeda safehouses in Saudi Arabia by Saudi security officers.

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Administrative Burdens. Trying terrorism cases in federal courts does impose additional logistic and security demands on courthouse personnel and the U.S. Marshals Service. But given what is at stake, they are not unreasonable demands. Other than the Southern District of New York, no judicial district has handled a more demanding series of terrorism cases than my former district, the Eastern District of Virginia, and I am unaware of any presiding judge there who questioned the importance or appropriateness of trying those cases in federal court. Rather, they looked upon these cases as an opportunity to shoulder their coordinate responsibility for meeting a national challenge, and to demonstrate the strength and adaptability of the American criminal justice system.

Homeland Security Considerations. The issue of whether Article III prosecutions present a risk to homeland security involves an examination of the government's authority to detain terrorists – either before or after they are charged with a crime -- and its authority to impose conditions of confinement after conviction that minimize security risks.

Under existing law, the government has three criminal options for detaining individuals suspected of terrorist activity: (1) pretrial detention under the Bail Reform Act; (2) detention of foreign nationals under an alien removal statute; and (3) detention pursuant to a material witness warrant. These authorities illustrate both the adaptability and limits of the criminal justice system, and the importance of retaining the option of military detention where prosecution in the criminal justice system is not viable or appropriate and the laws of war permit such detention.

The rules regarding the detention of a person who has been charged with a federal crime are favorable to the government in terrorism cases. Under the Bail Reform Act, a court can order a defendant detained pending trial if, after a hearing, the court finds probable cause that "no condition or combination of conditions will reasonably assure the appearance of the [defendant]

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as required and the safety of any other person and the community."[3] In support of a request for detention, the government can submit hearsay and other information that would be inadmissible at trial because the Federal Rules of Evidence do not apply at a detention hearing.[4] Accordingly, the government can present summary testimony by an agent rather than presenting testimony by a witness with first-hand knowledge.

A court must take into account several factors in determining whether to detain a defendant pending trial, including (1) the nature and circumstances of the alleged offense, including whether the offense is a federal crime of terrorism; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of danger to any person or to the community if the defendant were released.[5] A finding that the defendant presents a danger to a person or the community must be supported by "clear and convincing evidence,"[6] but there is a rebuttable presumption in favor of detention if there is probable cause that the defendant committed a "federal crime of terrorism" such as material support to terrorists;[7] material support to a designated terrorist organization;[8] financing terrorism;[9] the receipt of military-type training from a designated terrorist organization;[10] and acts of terrorism transcending national boundaries.[11]

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[3] 18 U.S.C. § 3142(e).
[4] *Id.* § 3142(f)(2).
[5] *Id.* §3142(g).
[6] *Id.* § 3142(f)(2).
[7] *Id.* § 2339A.
[8] *Id.* § 2339B.
[9] *Id.* § 2339C.
[10] *Id.* § 2339D.
[11] *Id.* § 2332B.

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More often than not in terrorism cases, courts have either ordered pre-trial detention or authorized release subject to restrictive conditions. The government successfully has obtained pretrial detention in numerous terrorism cases, including the case of September 11 co-conspirator Zacarias Moussaoui; the recent Fort Dix, New Jersey case; the case of Ahmed Omar Abu Ali, an American citizen and Falls Church, Virginia, resident who joined an al-Qaeda cell in Saudi Arabia; and the East Africa embassy bombings case (where defendant Wadih al-Hage was initially detained for 15 months on a perjury charge, then for more than two years following a superseding indictment). The courts are not rubber stamps for the government, however: the magistrate judge in the "Virginia Jihad" case denied the government's motion for pretrial detention for a few of the defendants despite the government's seizure of AK-47-style weapons at their residences, and in a recent case in Ohio, the court granted the defendant's motion for pretrial release even though the defendant was accused of having expressed interest in manufacturing improvised explosive devices from household substances, had been recorded discussing his training in weapons and tactics, had expressed concerns about maintaining security and secrecy, and had watched pro-*jihad* videos and expressed a desire to target the U.S. military.[12]

While the standards are favorable to the government regarding detention pending trial of an individual who *already* has been charged with a terrorism-related offense, existing legal authority to detain persons *prior* to charge is limited. Under the Constitution and the Federal Rules of Criminal Procedure, arrest warrants may be issued only upon a showing of probable cause by the government that the individual committed an offense,[13] and an individual who has been arrested must be presented to a Federal magistrate "without unnecessary delay" (typically

[12] *United States v. Mazloum*, 2007 WL 2778731, *1 (N.D. Ohio 2007) (unpublished decision).
[13] Fed. R. Crim. P. 4(a).

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within 48 hours) and advised of the charges against him. Otherwise, the government's current authority for detention in terrorism-related cases outside of the military detention model is limited to the material witness statute,[14] and, in the case of foreign nationals, immigration detention.

Terrorism investigations are often driven by threat analysis, and threat assessments often are based on intelligence information such as communications intercepted under the Foreign Intelligence Surveillance Act and information provided by foreign law enforcement and intelligence authorities. Sometimes the government has the luxury of building a case over a period of months to develop evidence that would be admissible in a criminal prosecution. But sometimes it does not because of the nature of the threat, the credibility of information regarding a potential attack, and the perceived imminence of an attack. And in those cases, the government needs options for detaining individuals before it is ready to bring criminal charges in order to protect the public safety.

Under the material witness statute, a court may authorize an arrest warrant if the government files a sworn affidavit establishing probable cause that the testimony of a person is "material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena." There is "no express time limit" in the statute for the length of detention,[15] but the Federal Rules of Criminal Procedure provide for close judicial oversight of detention under the statute. Specifically, in each judicial district the government must report biweekly to the court, list every material witness held in custody for more than 10 days pending

[14] 18 U.S.C. § 3144.

[15] *United States v. Awadallah*, 349 F.3d 42, 62 (2nd Cir. 2003).

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indictment, arraignment, or trial, and "state why the witness should not be released with or without a deposition being taken...."[16]

After September 11, the government aggressively used the material witness statute to detain individuals in connection with terrorism investigations, several of whom were subsequently charged with crimes. José Padilla, for example, initially was arrested on a material witness warrant when he arrived in Chicago on a flight from Pakistan, in order to enforce a subpoena to secure his testimony before a grand jury. He was held for one month on the warrant before he was designated an enemy combatant and transferred to military custody. Nor has the statute's use been limited to foreign terrorism cases: prior to September 11, Terry Nichols was arrested and detained on a material witness warrant three days after the bombings of the Federal building in Oklahoma City.

Although some individuals have been detained for several weeks and months on a material witness warrant, the statute was not intended to serve as a substitute for pretrial detention when the government is not yet ready to charge. In the case of *United States v. Awadallah*, the defendant's name and telephone number had been found on a piece of paper in a car abandoned at Dulles Airport by September 11 hijacker Nawaf al-Hazmi.[17] (The number subsequently was traced to an address in San Diego where al-Hazmi and fellow hijacker Khalid al-Mihdhar had lived.) Reversing the district court, the U.S. Court of Appeals for the Second Circuit found that the defendant's detention for several weeks on the material witness warrant was not "unreasonably prolonged,"[18] but it cautioned that "it would be improper for the

[16] Fed. R. Crim. P. 46(h)(2).

[17] *United States v. Awadallah*, 349 F.3d at 45.

[18] *Id.* at 62.

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government to use [the material witness statute to detain] persons suspected of criminal activity for which probable cause has not yet been established."[19]

The government has additional tools to detain foreign nationals in terrorism cases. Upon a warrant issued by the Attorney General, "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[20] The Attorney General has broad discretion in exercising this authority, and detention is mandatory where the alien is reasonably believed to have engaged in terrorist activity or "any other activity that endangers the national security of the United States.[21] In the immediate wake of the September 11 attacks, the Department of Justice utilized the removal statute to arrest and detain numerous foreign nationals suspected of engaging in terrorist activity.

Utilizing the alien removal statute can buy the government substantial additional time to determine whether to pursue criminal charges against an alien defendant. In *Zadvydas v. Davis*, a case decided a few months before the September 11 attacks, the Supreme Court construed the law to limit the period of detention to the time reasonably necessary to secure the alien's removal – with six months presumed to be a reasonable limit.[22] But the Court noted that the case did not involve "terrorism or other special circumstances where special arrangements 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."[23]

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[19] *Id.* at 59.
[20] 8 U.S.C. § 1226(a).
[21] *Id.* §§ 1226(c)(1), 1226a(a)(3).
[22] *Zadvydas v. Davis*, 533 U.S. 678, 691-97 (2001).
[23] *Id.* at 696.

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IV. Congressional Restrictions on Transferring Guantanámo Detainees to United States

Congress unwisely has restricted President Obama's flexibility to pursue the criminal option in the Guantanámo cases. In legislation that will be in effect through the end of September 2009, no funds may be used to transfer Guantanámo detainees to the United States for criminal prosecution unless the President submits a detailed classified report to Congress on the detainee forty-five days in advance. Now similar legislation is pending that would extend the funding prohibition indefinitely unless the President submits a required report to Congress on each detainee proposed for transfer, including a risk assessment and a plan for risk mitigation. Even then, no funds may be used for a detainee transfer to the United States until four months after the President's report to Congress.

These legislative restrictions appear to be based on the myth that terrorists cannot be safely detained on U.S. soil. Both before and after the attacks of September 11, 2001, a rogues' gallery of dangerous terrorists successfully have been detained for long periods in the United States in localities across the country. For example, Egyptian radical Sheikh Omar Abdel Rahman was held for approximately four years at the Federal Medical Center in Rochester, Minnesota following his conviction in 1995 for plotting to bomb the Lincoln Tunnel and other New York City landmarks. Ahmed Ressam, an Algerian who had trained at an al-Qaeda camp in Afghanistan, was long incarcerated at a federal detention center near Seattle after his arrest for planning to bomb Los Angeles International Airport on New York's eve in 1999. Ramzi Yousef, who masterminded the 1993 bombing of the World Trade Center, was detained for approximately three years at the Metropolitan Detention Center in New York.

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After September 11, al-Qaeda operative Richard Reid was held at a county correctional facility in Plymouth, Massachusetts, after his arrest for attempting to blow up a passenger airliner in mid-air. The municipal detention center in Alexandria, Virginia – located only a few miles from the White House and U.S. Capitol -- has housed both Zacarias Moussaoui, who trained to fly commercial aircraft in connection with the September 11 plot, and Ahmed Omar Abu Ali, an American citizen who joined an al-Qaeda cell in Saudi Arabia and conspired to commit various terrorist attacks in the United States, including the assassination of President George W. Bush.

None of these facilities was ever attacked while a defendant was incarcerated there on terrorism-related charges, and no such detainee has ever escaped. Moreover, most of these terrorists are now safely serving their sentences at the impregnable "Supermax" facility operated by the federal Bureau of Prisons in Florence, Colorado.

Congress irresponsibly has ignored this history of experience. It has also ignored the Department of Justice's regulatory authority to tighten security for individuals who either are being detained pending trial on terrorism-related charges, or have been convicted of such an offense. Under federal regulations, the Attorney General has broad discretion to impose "Special Administrative Measures" (SAMs) that severely restrict a detainee's ability to engage in conduct while incarcerated that could present a national security risk.

The restrictions the government can impose under its SAMs authority include solitary confinement; severe limitations on telephone communications, correspondence, and visits by family and friends; and a prohibition on contact with the news media. The government even can prohibit participation in group prayer with other Muslim inmates. In a case where "reasonable suspicion" exists to believe that a particular inmate may use communications with attorneys to facilitate acts of terrorism, the government also can monitor and review communications that

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otherwise would be confidential under the attorney-client privilege. Inmates make seek judicial review of SAMs restrictions if they have first exhausted administrative appeals within the Bureau of Prisons, but the courts generally have been deferential to the government's security concerns.

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Statement Of Senator Patrick Leahy (D-Vt.),
Chairman, Committee On The Judiciary,
Hearing On "Prosecuting Terrorism, Civilian and Military Trials
For GTMO and Beyond"
Subcommittee On Terrorism And Homeland Security
July 28, 2009

In a May 21, 2009, speech on national security issues, President Obama spoke of the challenges faced by his administration in prosecuting individuals held at Guantanamo Bay. For those who can be prosecuted, the administration has stated a preference for trying them in Article III Federal courts. I support that decision. Article III courts have legitimacy around the world, and have proven to be able to handle this task.

Last week, the Senate passed S.1390, the National Defense Authorization Act for Fiscal Year 2010, which authorized military commissions as another venue for trying some of these individuals. These commissions are a marked improvement on the military commissions previously authorized by Congress. Those commissions were found to be constitutionally defective by the U.S. Supreme Court in 2008. Nonetheless, I remain concerned about the wisdom of using this alternate system.

First and foremost, I have not been convinced by supporters of military commissions that the Article III courts are not capable of trying terrorism cases. Second, the military commissions utilized by the executive branch since the 9/11 attacks have failed to convict most of the detainees they were created to try. A study by two former Federal prosecutors issued last week by Human Rights First found that 91 percent of terrorism cases resolved in Federal court since 9/11 resulted in convictions. There are currently over 200 inmates in Federal prisons who have been convicted on terrorism-related charges. Meanwhile, after seven long years, only three of the hundreds of detainees who have cycled in and out of Guantanamo have been convicted. Our Federal courts have done much better. The knowledge and expertise of our law enforcement agencies and courts is one of our greatest assets in this fight. Forcing these institutions to take a backseat is dangerous to our national security.

Those who disagree would like us to believe that seasoned men and women in law enforcement are not up to the task. To dispel this myth, we have only to look at the example of former FBI Agent Ali Soufan who obtained intelligence, without using torture, on some of the most infamous terrorists in the world, from the USS Cole bombers to the plotters of 9/11.

As the debate about current and future detainees continues, we must not let rhetoric replace reality. Depriving those in the field of tools that ensure that our Government can convict and detain terrorists hurts our national security. This challenge is too important to leave entirely to a system that so far has resulted only in failure, and too important to disregard tools that have proven to work.

There are a number of detainees for whom prosecution will be difficult because their cases are tainted by the coercive interrogations techniques that were employed by the Bush-Cheney administration. Evidence obtained through coercion is inadmissible in a court of law. President

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Obama has said that some of those who cannot be tried, whether because of coercion or because of a lack of evidence, may still pose a threat to the United States. The President inherited this problem, and we now face the complex question of how to handle cases in which the Government believes the individual must be further detained. To address such cases, the President described a system of "prolonged detention," with periodic judicial review.

I held a hearing last year on this issue in which I expressed my concerns about any system of detention without sufficient judicial safeguards. The administration has not yet offered details about how a system of prolonged detention would operate. I want to understand the scope of the judicial review contemplated under this proposal before determining for myself whether it meets our standards of fair treatment under law. I want to ensure that a system established by this administration is grounded in constitutional protections so that it cannot be exploited by future administrations.

I appreciate the President's commitment to work with the Congress to ensure that we act consistently with our values and with our Constitution. As Justice Kennedy said in a Supreme Court decision restoring the great writ of habeas corpus, the Constitution is not something an administration is able "to switch on and off at will." I believe strongly that we can ensure our safety and security, and bring terrorists to justice, in ways that are consistent with our laws and values. I am committed to working with the President to ensure we accomplish that goal.

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Statement of
Deborah N. Pearlstein

Prepared Testimony to the
Subcommittee on Terrorism and Homeland Security
Committee on the Judiciary
United States Senate
July 28, 2009

Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond

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Deborah N. Pearlstein
Prepared Testimony to the
Subcommittee on Terrorism and Homeland Security
Committee on the Judiciary
United States Senate
July 28, 2009

Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond

Introduction

Chairman Leahy, Subcommittee Chairman Cardin, Ranking Member Kyl, members of the Subcommittee, thank you for giving me the opportunity to testify on this important subject. The Preliminary Report of the Obama Administration Detention Policy Task Force, issued July 20, 2009, announces the Administration's intention to use reformed military commission proceedings to try some fraction of the detainees currently held at the U.S. Naval Base at Guantanamo Bay.[1] As I recently testified before the House Judiciary Committee, while I continue to doubt that the use of a new military commission system going forward is a wise or necessary course of policy, I also believe that it is possible to conduct military commission proceedings for certain crimes in a way that comports with U.S. and international law.[2] Ensuring that any future proceedings meet those standards is now a critical responsibility of Congress.

The testimony that follows begins by briefly recalling the importance of the President's decision to close the detention facility at Guantanamo Bay. These comments

[1] Memorandum from Brad Wiegmann, Col. Mark Martins, Detention Policy Task Force, to the Attorney General and Secretary of Defense of the United States (Jul. 20, 2009), available at http://www.scotusblog.com/wp/wp-content/uploads/2009/07/law-of-war-prosecution-prelim-report-7-20-09.pdf [hereinafter DPTF Preliminary Report].
[2] My previous testimony on this matter, written and oral, was provided on July 8, 2009, to the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, in connection with its hearing "Legal Issues Surrounding the Military Commissions System." It is available at http://judiciary.house.gov/hearings/hear_090708.html.

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are in response to recent statements challenging the wisdom of this decision – statements that fly in the face of the broad, bipartisan recommendation of leading military and civilian national security experts to the contrary, and ignore the compelling reasons why it is so important that Guantanamo be closed. A second section highlights a few key recommendations essential to help ensure that any military commission process going forward complies with applicable U.S. and international law. The final section discusses the proposed protocol put forward by the Detention Policy Task Force for determining whether criminal prosecution of Guantanamo detainees should proceed in an Article III court or in military commission. Although the protocol is right to note that prosecutors have traditionally enjoyed some discretion in choosing among lawful fora for criminal prosecution, much remains to be clarified in these exceptional circumstances to ensure that discretion is exercised consistent with the rule of law in the United States.

Closing Guantanamo

There should be no question that President Obama made the right decision in announcing the closure of detention facilities at Guantanamo Bay. Indeed, it is for powerful reasons that closure had been urged not only by President Obama and Senator McCain, but by the head of U.S. Central Command, General David Petraeus, and many other leading military and civilian authorities in U.S. national security.[3] As the President

[3] *See, e.g.*, Radio Free Europe/Radio Liberty, "Transcript: RFE/RL Interviews U.S. Central Command Chief, General David Petraeus," May 24, 2009, available at http://www.rferl.org/content/transcript_RFERL_Interviews_US_Central_Command_Chief_General_David_Petraeus/1738626.html; Jonathan Winer, "Bipartisan Experts Tell Congress to Let Guantanamo Detainees Come to United States," Counterterrorism Blog, July 13, 2009, available at http://counterterrorismblog.org/2009/07/bipartisan_experts_tell_congre.php (signatories include M.E. (Spike) Bowman, former Senior Counsel for the Federal Bureau of Investigation and Deputy Director of the National Counterintelligence Center; Robert Hutchings, former Chairman of the U.S. National Intelligence Council; Dr. David Kay, former head of the Iraq Survey Group; Brig. Gen. Mark T. Kimmit,

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emphasized in his recent speech at the National Archives: "Instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained."[4] The consensus is overwhelming that Guantanamo has hurt U.S. national security more than it has helped. It would be irresponsible as a matter of national security to allow the problem to continue to fester.

While the policy goal is thus clear, it must be recognized that the task of closing Guantanamo has been made significantly more difficult as a result of the past seven years of treatment of the detainees now held at Guantanamo Bay – treatment that was in many respects unlawful. The past Administration neglected to adhere to U.S. obligations under Article 5 of the Third Geneva Convention to afford detainees a status hearing after capture,[5] and the first orderly inquiries into detainees' identities in many cases were thousands of miles and many years removed from reliable information about the original circumstances of detention.[6] Some detainees were subject to torture and cruelty,[7] and their statements – information that might otherwise have constituted evidence in a

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Assistant Secretary of State for Political Military Affairs; Rear Adm. James E. McPherson, TJAG of the Navy 2004-06; Paul Pillar, former Deputy Chief Director of Central Intelligence's Counterterrorist Center; William S. Sessions, former FBI Director; Philip Zelikow, fomer executive director of the 9/11 Commission); *Guantanamo's Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40, *available at* http://www.theatlantic.com/doc/200710/guantanamo-poll (surveying a bipartisan array of leaders in U.S. foreign affairs and national security).

[4] The White House, Remarks by the President on National Security, May 21, 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter National Archives Speech].

[5] *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[6] *See, e.g.*, LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 52-56 (2003), *available at* http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf (summarizing status of Guantanamo detainees).

[7] *See, e.g.*, Neil A. Lewis & David Johnston, *New F.B.I. Files Describe Abuse of Iraq Inmates*, N.Y. TIMES, Dec. 21, 2004, at A1 (recounting July 2004 F.B.I. agent report describing Guantanamo detainees chained to the floor for 18-24 hours or more without food or water, left to soil themselves, and others subjected to temperatures freezing or "well over 100 degrees").

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criminal prosecution – are now tainted by the coercion to which they were subject. Many detainees have simply been held for years without ever being advised that they have any rights or hope of release, all but eliminating the possibility of obtaining from them any statement about their past conduct voluntary enough to be admissible in a criminal case.[8]

As a result of these actions and omissions, prosecution options that might ordinarily be available under existing U.S. and international law for the handling of terrorist suspects may now be foreclosed. This is not to suggest it is not possible to close Guantanamo Bay. On the contrary, the facility can and must be closed. It is, however, to caution that in resolving the particular policy disaster that is Guantanamo, we ought not also assume we are setting the standard for all U.S. terrorism trial practice going forward. The Administration and Congress should continue working to keep separate two different problems that must be faced in turn: (1) how best to resolve the cases of the Guantanamo detainees, whose options are uniquely limited by past mistakes, and (2) what kind of system is best used for terrorism trials going forward. In enabling the Guantanamo facility's closure, which must be the immediate goal, only the first question must be answered. The recommendations that follow are based on this understanding.

Military Commission Recommendations

In recent testimony before the House Judiciary Committee, I offered a series of specific recommendations for how the Military Commissions Act of 2006 should be amended if commission proceedings going forward are to comply with U.S. and

[8] *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 483 (1972) (recognizing it as axiomatic that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession") (internal quotations omitted).

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international law.[9] Among other points, I urged that Congress clarify that *involuntary* statements – whether obtained through torture, cruel treatment, or any other method – not be admissible in commission proceedings.[10] I also advocated that military commission judgments be subject to full review on appeal in Article III courts, with broad jurisdiction to review questions of both fact and law. These and other recommendations for amending the MCA are explained in greater detail in that testimony, and I ask that the previous testimony be incorporated by reference here. In addition to those recommendations, there is one centrally important point I wish to emphasize here.

Any new legislation regarding military commissions must include a sunset provision or other structural mechanism to ensure that the commissions are strictly limited in purpose and duration. Such structural limitations are essential not only to bolster the commissions' already tarnished legitimacy, but also to ensure their constitutionality. As the Supreme Court has consistently recognized, our constitutional structure reflects a strong preference that determinations of guilt and innocence be carried out by independent courts created under Article III.[11] In keeping with this constitutional presumption, the extent to which the Supreme Court has approved the use of Article I military courts has been strictly limited. Congress' Article I power "[t]o make Rules for the Government and Regulation of the land and naval Force" authorizes the extension of court martial jurisdiction over persons actually in the armed services, but not over those

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[9] *See* Deborah Pearlstein, Testimony to the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights, and Civil Liberties, "Legal Issues Surrounding the Military Commissions System," Jul. 8, 2009, available at http://judiciary.house.gov/hearings/hear_090708.html (written and oral statements) [hereinafter Pearlstein House Testimony].

[10] *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 483 (1972) (recognizing it as axiomatic that "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession") (internal quotations omitted).+

[11] *See, e.g.*, Toth v. Quarles, 350 U.S. 11, 15-16 (1955) ("The provisions of Article III were designed to give judges maximum freedom from possible coercion or influence by the executive or legislative branches of the Government.").

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who have been honorably discharged from service.[12] Likewise, Congress' power to punish "Offenses against the Law of Nations" has been recognized, albeit in a historically discredited opinion, to authorize the trial by military commission of individuals who commit offenses against the law of war, but only insofar as Congress' military commissions legislation of the time was read to be consistent with the common law and international law of war that applied.[13] The Court's most recent views on the legality of military commissions, expressed in *Hamdan v. Rumsfeld* in 2006, should leave little doubt that any military commission structure, even with congressional authorization, may be subject to constitutional limits.[14]

What are those limits? While it is not clear how the current Court will approach a new Article I tribunal expressly authorized by Congress, the *Hamdan* Court emphasized that military commissions had been recognized historically at common law in just three circumstances: (1) as a substitute for Article III courts in situations of martial law, (2) as part of a temporary governing structure over territory occupied by U.S. military forces, and (3) as "incident to the conduct of war."[15] Only the third circumstance is relevant

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[12] Toth v. Quarles, 350 U.S. 11 (1955); *see also* Reid v. Covert, 354 U.S. 1 (1957).

[13] *See* Ex Parte Quirin, 317 U.S. 1, 29, 45 (1942) ("We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury....[P]etitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the Commission without a jury."). The *Hamdan* Court described *Quirin* as "high-water mark of military power to try enemy combatants for war crimes." Hamdan v. Rumsfeld, 548 U.S. 557, 597. Even Justice Scalia has described *Quirin* as "not this Court's finest hour." Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

[14] *See* Hamdan v. Rumsfeld, 548 U.S., 557, 593 (emphasizing that *Quirin* had held only that Congress had "preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions").

[15] Hamdan v. Rumsfeld, 548 U.S. 557, 596 (2006) (quoting *Quirin*, 317 U.S., at 28-29); *see also Hamdan*, 548 U.S., at 597-98 ("The classic treatise penned by Colonel William Winthrop ... describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. ... [T]he offense charged 'must have been committed within the period of the war.' No jurisdiction exists to try offenses 'committed either before or after the war.' ... [A] military commission not established pursuant to martial law or an occupation may try only '[i]ndividuals of the enemy's army who have been guilty of

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here. In this setting, where a new commission system is seen as functioning other than incident to the conduct of a particular recognized war – whether because the offenses charged are not war crimes recognized under international law, or because the commission itself appears to extend its mandate beyond events occurring "within the period of the war" as recognized by international law – it may be more vulnerable to challenge as exceeding Congress' authority under Article I.[16]

In this respect, the current draft bill on military commissions circulating in the Senate may be read to omit key limitations in defining the jurisdiction of military commissions.[17] While the provision setting forth who may be subject to military commissions properly recognizes that commission defendants must have "engaged in hostilities" against the United States, it does not in this section make clear that such "hostilities" must occur within the context of an armed conflict recognized under international law.[18] Similarly, while the jurisdictional provision of the military commissions set forth in the draft bill properly (and necessarily) targets offenses against the "law of war,"[19] it does not make clear that the offenses must be committed "within

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illegitimate warfare or other offences in violation of the laws of war' and members of one's own army 'who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.' Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: 'Violations of the laws and usages of war cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'") (internal citations omitted).

[16] *See, e.g.*, *Hamdan*, 548 U.S., at 596 (opinion of Stevens, J.); *Hamdan*, 548 U.S., at 603 (opinion of Stevens, J.) ("At a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war.").

[17] My comments in this regard are based on legislation introduced earlier this month in the Senate, S. 1390, and in particular Subtitle D thereof, available at http://www.thomas.gov/cgi-bin/query/z?c111:S.1390.

[18] S. 1390, amending Chapter 47A of title 10, United States Code, at Section 948c. International law recognizes both international and non-international (internal or transnational) forms of armed conflict. *Hamdan*, 548 U.S., at 629-631. Section 950p(c) of the draft legislation may be intended to recognize this limitation in part (recognizing that offenses under the act are triable only if "committed in the context of and associated with armed conflict"). But this provision does not limit the durational authority of the commission structure as a whole. It is also less than clear what is intended by the phrase "*in the context of and associated with* armed conflict."

[19] S. 1390, amending Chapter 47A of title 10, United States Code, at Section 948d.

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the period of the war" as defined by international law. As the *Hamdan* Court noted: "No jurisdiction exists to try offenses 'committed either before or after the war.'"[20]

Whether such jurisdictional limitations are reflected in new legislation by describing the particular conflict at issue (clarifying when it began and at least acknowledging that it will have an identifiable end), or whether they are reflected in a time limit provision per se, Congress would be wise to include them. Absent clearer formal recognition that "military commissions" cannot exercise jurisdiction over every crime committed at any time, Congress may not only exceed its constitutional authority, it will have created a standing national security court by another name.

Forum Selection Protocol

In addition to the interim report, the Administration Detention Policy Task Force last week also issued a separate proposed protocol setting forth how the Administration intends to decide whether a case should be prosecuted in an Article III court or a military commission.[21] The Task Force Protocol is right to recognize that federal prosecutors in the United States have traditionally been entitled to discretion in choosing among available prosecutorial fora. The Protocol also importantly makes clear that it is not intended to restrict the "exercise of independent discretion" by prosecutors involved in Guantanamo cases, and that federal court and commission prosecutors alike should be guided to the extent applicable by the traditional principles of federal prosecution set forth in the U.S. Attorneys' Manual. The single biggest threat to the legitimacy of the

[20] *Hamdan*, 548 U.S., at 597-98 (opinion of Stevens, J.) (internal citations omitted).
[21] *See* DPTF Preliminary Report, *supra*, note 1 ("Determination of Guantanamo Cases Referred for Prosecution"), available at http://www.scotusblog.com/wp/wp-content/uploads/2009/07/tab-a-prosecution-protocol-7-20-09.pdf [hereinafter Prosecution Protocol].

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military commissions going forward is the danger that the commissions will function, in perception or reality, as a second-class form of justice for cases involving evidence insufficient to prevail in prosecution in a traditional Article III setting. Adhering as closely as possible to traditional forum selection principles that apply, and fiercely protecting prosecutorial independence so that prosecutors may, free from political influence, exercise their professional judgment about how best to proceed – these are indispensible safeguards if commissions are to move forward without the taint of illegitimacy that have so infected commission trials to date.[22]

At the same time, the proposed Protocol raises a number of questions about the circumstances under which it is to be followed, and the relative weight the factors it identifies are to be accorded. In part, such questions might be addressed by the inclusion of guidance clarifying the limited extent to which the selection problem may arise. That is, military commission trials may only be considered *at all* in those cases in which prosecutors have probable cause to believe that a specifically defined *war crime* has been committed, and that evidence admissible in the commission forum will likely suffice to sustain a conviction.[23] In the absence of either one of those findings, none of the other considerations identified in the Protocol – the gravity of the alleged conduct, the relative efficiency of the fora, foreign policy concerns, etc. – are relevant to the prosecutorial decision. (It may be that the Administration understands and shares this view, but it is far from clear in the text of the Protocol itself.) Accordingly, independent, professional prosecutors must have arrived at clear and affirmative answers to these threshold

[22] *See* Pearlstein House Testimony, *supra*, note 9, at pp. 3-8, 13-16.
[23] *See* U.S. ATTORNEYS' MANUAL, Sections 9-27.200 and 9-27.220, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/ (setting forth the relevant standards and their basis in federal law).

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questions (i.e. probable cause of a war crime, and evidence sufficient for prosecution) before the Protocol is even invoked.

A second critical set of questions arises after it has been determined that commissions are lawfully available. The Protocol appropriately embraces a preference for proceeding in Article III courts, but leaves troublingly vague how and to what extent this preference is to be reflected.[24] The Protocol's failing in this respect is not a function of its recognition that many factors may be taken into account in making a selection decision; the choice of which among more than one lawfully available forum is appropriately informed by a range of concerns, and the exercise of some discretion is inevitable. The failing is in neglecting to make clear for prosecutorial decision-makers why and to what extent the "presumption" in favor of Article III courts exists. In my view, there are at least two critically important reasons. The first is that such a "preference" is most consistent with (perhaps compelled by) the structure of our Constitution. As the Supreme Court has emphasized:

> "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service .... Determining the scope of the constitutional power of Congress to authorize trial by [military court over non-servicemembers] presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'"[25]

A strong reading of this caveat might lead to a selection criterion that *required* Article III trial unless there is no offense for which a defendant may be charged under ordinary federal criminal law.

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[24] *See* Prosecution Protocol, *supra*, note 21 ("There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there.").

[25] Toth v. Quarles, 350 U.S. 11, 22-23 (1955) (internal citation omitted).

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A second reason goes to the very real problem of ensuring that commission trials are legitimate, and perceived as such by Americans and others in the international community. The President's wise recognition that Guantanamo has had the effect of expanding the base of al Qaeda recruits has practical consequences in this regard.[26] Just as with the Guantanamo detention system in general, the taint of unfairness understandably extends to the military commission process in particular. As the commissions proceed through the inevitable set of challenges they will face in the courts, the Administration and Congress must recognize that whatever tactical gain may be achieved in trial-by-commission in the first instance will bring with it a strategic cost of conducting trials under a system many will likely continue to see as lacking in legitimacy. As the President himself appears to believe, the United States has already suffered significant strategic losses in the global struggle against terrorism. It is in the security interest of the United States to minimize those losses going forward.

Conclusion

It is still possible to create a lawful set of rules for the operation of military commission trials. But it remains a significant challenge for all three branches to see it done. I am grateful for the Committee's efforts, and for the opportunity to share my views on these issues of such vital national importance.

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[26] National Archives Speech, *supra*, note 4.

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