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[H.A.S.C. No. 111–81]

PROSECUTING LAW OF WAR VIOLATIONS: REFORMING THE MILITARY COMMISSIONS ACT OF 2006

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

HEARING HELD
JULY 16, 2009

U.S. GOVERNMENT PRINTING OFFICE

58–225 WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PROSECUTING LAW OF WAR VIOLATIONS: REFORMING THE MILITARY COMMISSIONS ACT OF 2006

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Thursday, July 16, 2009.

The committee met, pursuant to call, at 2:04 p.m., in room 2118, Rayburn House Office Building, Hon. Ike Skelton (chairman of the committee) presiding.

OPENING STATEMENT OF HON. IKE SKELTON, A REPRESENTATIVE FROM MISSOURI, CHAIRMAN, COMMITTEE ON ARMED SERVICES

The CHAIRMAN. The committee will come to order.

Since the 109th Congress deliberated and passed the Military Commissions Act of 2006, I have argued that the most important task before us has been to design a system that would withstand legal scrutiny and would be found to be constitutional. I doubted at the time and still believe that the current system could survive a Supreme Court review. By my estimation, there are at least seven potential defects in this act.

First, the Supreme Court has already held in *Boumediene* that the Military Commissions Act constitutionally stripped Federal courts of jurisdiction over habeas corpus.

Relatedly, the act may violate the exceptions clause under Article III of the Constitution by impermissibly restricting the Supreme Court's review.

Third, it is questionable whether the Supreme Court would uphold a system that purports to make the President the final arbiter of the Geneva Convention.

Fourth, the provisions regarding the coerced testimony may be challenged under our Constitution.

Fifth, the act contains very lenient hearsay rules which rub up against the right of the accused to confront witnesses.

Sixth, the act may be challenged under equal protection and other Constitutional grounds for how it discriminates against the detainees for being aliens.

Lastly, Article I of the Constitution prohibits ex post facto laws; that is, what this act may have created.

At the President's instruction, the Administration is conducting an inter-agency review of detainee policy. This inter-agency task force should be recommending reforms to the military commissions law. Already, the Administration has commented on the suggested amendments to the Military Commissions Act that our colleagues in the Senate Armed Services Committee include in their National Defense Authorization bill; and I invite each of our witnesses to

provide their assessment of whether the Senate bill has gone far enough to correct the potential constitutional infirmities or not.

The bottom line is that we must prosecute those who are terrorists with the full force of the law, but we must also make sure that the convictions stick. Certainty of convictions must go hand in hand with tough prosecutions. And being a former prosecutor in my home county, the worst thing that one anticipates or could anticipate is a Supreme Court freeing someone that a jury in your home county convicted. Permitting hardened terrorists to escape jail time because we didn't do our jobs here in Congress to fix this act would be a travesty of justice.

Now, I turn to my good friend and colleague, the gentleman from California, Mr. McKeon.

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

Mr. MCKEON. Thank you, Mr. Chairman. Thank you for holding a hearing on such an important topic: prosecuting terrorists for law of war violations through the Military Commissions Act of 2006, or MCA.

Let me also begin by welcoming to the committee our witnesses, the Judge Advocate Generals for each of the services. Gentlemen, good afternoon. And thank you for being here.

Before we jump into the heart of today's hearing, the Military Commissions Act, I just want to note that we have another hearing next week with senior Department of Defense and Department of Justice officials on the Administration's overall detainee policy. At that hearing, I look forward to discussing the President's plan for a preventive detention system and the findings of the Detainee Task Force on a detainee policy which, pursuant to the executive orders, is due to complete its work next week.

In my view, the 2006 MCA was a fair piece of legislation and a product of careful negotiations between the House, Senate, and the previous Administration. In that light, I welcome President Obama's decision to use military commissions as a tool for prosecuting those who violate the laws of war.

In his speech at the National Archives on May 21, the President recognized correctly that we are at war with al Qaeda and its affiliates, and that commissions are an appropriate forum for prosecuting those who violate the laws of war.

The President rightly noted that military commissions have a long history of protecting sensitive intelligence sources and methods, while allowing for the introduction of evidence unique to battlefield contingencies.

It is worth recalling that the 2006 MCA passed the House and Senate by a comfortable vote with bipartisan support. Yet the 2006 MCA, like any other law, is not perfect and could use improvement, especially now that we have the benefit of seeing the system in practice.

I hope that during today's hearing, each of you will share your independent view on the legislation proposed by the Senate Armed Services Committee (SASC) to amend the 2006 MCA. I understand the committee language is the product of a bipartisan effort and

enjoys the support of Senators McCain and Graham, but I would like to hear if you have any suggestions or concerns with respect to the proposal and whether you feel there are any steps that Congress should take to ensure we have an effective military commissions system.

Finally, I would also like to ask you to hear your thoughts on the Administration's proposed changes to the SASC language.

After looking at both the Senate and White House proposals, I have a number of questions and concerns I hope you will be able to address today. My first concern is forum choice. If we are going to utilize the military commissions, we need to ensure that any changes to the framework make the commissions more efficient and bring swift justice to terrorists.

While the commissions have only convicted three individuals, at least 19 other detainees have charges currently pending and at least another 40 could be charged as well.

Let me be clear on one point. I think we should use the military commissions to try all detainees who have violated the laws of war.

I also have grave concerns about the President's preference to use Article III courts to try some of the detainees currently being held in Guantanamo Bay. In my view, trials of terrorists need to stay within the paradigm of armed conflict. The required procedures and rules of evidence in Federal courts are not fit for trials in the armed conflict paradigm. Most importantly, prosecuting some detainees in Federal courts and others in commissions, in the absence of clear criteria guiding this decision, will lead to the perception that commissions are an inferior system or a kangaroo court. This is an unacceptable outcome and dishonors the uniformed personnel working on military commissions.

A related concern that I hope you will discuss is where we intend to hold these commissions. I would like to know how, if at all, the MCA and rules for military commissions may need to change if the Administration decides to hold commissions within the continental United States.

I look forward to your testimony, and hope that the discussion we have today will help us work with the Senate to improve the 2006 MCA so that the Administration will use the MCA framework to bring terrorists to justice. I yield back.

The CHAIRMAN. I thank the gentleman.

Before us today our witnesses are, from my left to right, Lieutenant General Scott Black, Judge Advocate General, United States Army; Vice Admiral Bruce MacDonald, Judge Advocate General of the United States Navy; Lieutenant General Jack—is it Reeves or Rive?—Rives, Lieutenant General Jack Rives, United States Air Force Judge Advocate General; and Brigadier General James Walker, United States Marine Corps, Judge Advocate to the Commandant of the Marine Corps.

We thank you gentlemen for being with us today. We will go down the line.

General Black, you are on.

STATEMENT OF LT. GEN. SCOTT C. BLACK, USA, THE JUDGE ADVOCATE GENERAL, U.S. ARMY

General BLACK. Thank you, Mr. Chairman, Ranking Member McKeon, members of the committee. I would like to thank you for the opportunity to appear here today for the committee's consideration of these important issues. I join in endorsing and encouraging continued congressional and Administration efforts to reform military commissions for the trial of unprivileged belligerents accused of violations of the law of war during our country's ongoing conflict against those who planned and conducted the attacks against us on September 11, 2001, as well as those detained during the conduct of associated military and intelligence operations.

I am confident that this reform effort will result in a system that meets the standards for military commissions described by the Supreme Court in *Hamdan v. Rumsfeld.* I am similarly confident that such reforms of military commissions will satisfy any outstanding concerns relative to our demand for a system characterized by our proper devotion to standards of due process recognized under the law of war, our commitment to ensuring fair treatment of the accused, and reliable results in any commission proceeding.

I offer the following comments in relation to a few specific proposals found in the Senate version of the act.

First, I understand that the Administration favors adoption of a voluntariness standard on the admissibility of statements into evidence. I acknowledge and respect the prerogative of the Administration to resolve policy on all such matters, but maintain my recommendation against adoption of a voluntariness standard and in favor of a reliability standard where voluntariness is a relevant factor in resolving whether statements warrant admission at a commission trial.

Second, I support the Administration's proposal to adopt the most recent developments in federal practice under the Classified Information Procedures Act for application to trial by military commissions in this context.

Third, I disagree with the Senate's proposal to establish the Court of Appeals for the Armed Forces as an intermediate court of appeals for those convicted by military commissions. I favor instead the Administration proposal to modify the responsibility and authority of the Court of Military Commission Review by infusing that court with the same responsibility and authority of our service courts of criminal appeals under Article 66 of the Uniformed Code of Military Justice.

I believe you have a copy of the balance of my full statement for inclusion in the record, Mr. Chairman.

As an aside, I would like to offer my thanks to this committee for their hard work and tremendous support for soldiers and their families. I can assure you that we are deeply grateful for both. And with that, sir, I look forward to your questions.

[The prepared statement of General Black can be found in the Appendix on page 39.]

The CHAIRMAN. Admiral, please.

STATEMENT OF VICE ADM. BRUCE E. MACDONALD, USN, THE JUDGE ADVOCATE GENERAL, U.S. NAVY

Admiral MACDONALD. Thank you, Mr. Chairman. Chairman Skelton, Ranking Member McKeon, and members of the committee, thank you very much for providing me the opportunity to present my views on military commissions.

In 2006, Congress enacted the Military Commissions Act. This act established the jurisdiction of commissions, set baseline standards for their operation, and prescribed substantive offenses. The act also authorized the Secretary of Defense to promulgate procedural and evidentiary rules to be used in military commissions and to establish the elements of the substantive offenses. Those rules were completed in early 2007, and additional rules were recently promulgated by the Secretary of Defense on May 15 of this year and became effective on July 13th of this year.

The current framework, in my opinion, provides an appropriate balance that ensures important rights and protections for an accused while also providing the government with an effective means of prosecuting an accused before a military commission. Nevertheless, there is room for improvement in a number of areas. Some examples include the rules relating to classified evidence, the admissibility of hearsay evidence and statements of the accused, information that must be disclosed to the accused, and the type of review to be applied during the appellate process.

I recently testified before the Senate Armed Services Committee on its proposal that would, in my view, fix many of these issues, but I recommended that additional changes be considered. Regardless of the method used to revise the Military Commissions Act, the first step toward the needed changes is establishing an open dialogue to share views on these issues.

In September 2006, when we last testified before this committee, it was the view of the Judge Advocates General that whatever process was eventually established should be tested against two standards: First, it must be consistent with our Nation's notions of justice and fairness. Second, we must be willing to have our own service members tried under the same standards and procedures that we apply. Those standards should continue to inform our discussion today as we consider changes to the Military Commissions Act. For that reason, I commend your efforts and thank you very much for the opportunity to appear before you this afternoon, and I look forward to answering your questions.

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

Mr. ORTIZ [presiding]. General Rives.

STATEMENT OF LT. GEN. JACK L. RIVES, USAF, THE JUDGE ADVOCATE GENERAL, U.S. AIR FORCE

General RIVES. Mr. Chairman, Ranking Member McKeon, members of the Armed Services Committee, good afternoon, and thank you for this opportunity to testify today on the subject of military commissions. I would like to emphasize that the views expressed in my testimony are my own and do not represent the views of the Department of Defense or the Administration.

Military commissions have a long history in this country as a mechanism to address possible violations in the law of war. Military commissions were used extensively during and after World War II, and they were again called upon in the aftermath of the September 11, 2001 attacks. After action by the Executive and review by the Supreme Court, the Congress acted in 2006 to pass the Military Commissions Act, providing the President statutory authority to establish military commissions to try traditional offenses as codified in the Military Commissions Act.

The effort to make military commissions more fair and credible enhances national security by providing effective alternatives to try international terrorists who violate the law of war. Periodic review of the military commissions legislation and procedures is vital to an effective and fair commission process.

As required by the Military Commissions Act, the Secretary of Defense notified the Congress in May of this year of proposed changes to the Manual for Military Commissions affecting procedures used by the military commissions. Those amendments will improve the military commissions process.

As a result of those changes, statements obtained using interrogation methods that constitute cruel, inhuman, and degrading treatment cannot be admitted as evidence at trial. The burden of proof on admissibility of hearsay will shift to the party that offers it. The burden will no longer be on the party that objects to hearsay to disprove its reliability.

The accused will have greater latitude in selecting defense counsel. In situations where the accused elects not to testify but offers his own prior hearsay statements, the military judge will no longer be required to instruct the members to consider the accused's decision not to be cross-examined on the hearsay statements and that the statements are not sworn. Any such instruction will now be left to the discretion of the military judge.

Military judges may establish the jurisdiction of their own courts. Under prior practice, jurisdiction for a military commission to hear a case was established by a prior combatant status review tribunal.

Further review, of course, is ongoing within the Administration. Changes to the Military Commissions Act of 2006 have also been advanced by the Senate Armed Services Committee. Some of the recommendations include making the changes that I have just mentioned statutory. Additional changes are also appropriate. I highlight two for your consideration.

First, reforms in the rules for handling classified information would have significant impact. Procedures that follow the Classified Information Procedures Act (CIPA) would, with appropriate modification, balance the government's need to protect classified information with the defendant's interests. The substantial body of that case law that has developed over the years would provide valuable guidance to lawyers and the commissions.

Next, expanding the scope of appellate review to include review of factual matters, as the service courts of criminal appeals enjoy under Article 66 of the Uniform Code of Military Justice, is desirable. Also retention of the current Court of Military Commissions Review, which is comprised in whole or in part of those with the experience as military appellate judges who are comfortable re-

viewing cases for both factual and legal sufficiency, is logical and efficient.

I encourage you to closely consider these revisions, and I stand ready to assist, as appropriate, in your efforts. You have a copy of my full statement for inclusion in the record. Again, I thank you for the opportunity to testify, and I look forward to answering your questions.

[The prepared statement of General Rives can be found in the Appendix on page 51.]

Mr. ORTIZ. General Walker.

STATEMENT OF BRIG. GEN. JAMES C. WALKER, USMC, STAFF JUDGE ADVOCATE TO THE COMMANDANT, U.S. MARINE CORPS

General WALKER. Thank you, Chairman Skelton, Ranking Member McKeon, and honorable members of the Armed Services Committee. Good afternoon. I appreciate the opportunity, as the other witnesses, to come before you today and testify regarding the military commissions.

The military commissions over the past few years have demonstrated the difficult balance between individual due process, fundamental fairness, and our national security interests.

I support the majority of the amendments to the Military Commissions Act proposed by Senate Bill 1390, because they will help maintain that difficult balance. I concur with the comments of the other witnesses as to specific provisions and, in the interest of time, will not repeat those comments.

The procedures and rules that we adopt for the military commissions are important to our Nation and also to all current and future members of the Armed Forces. As a Nation, we have forces deployed around the world advancing the rule of law. We must demonstrate our commitment to fairness and those guarantees indispensable for civilized nations. We must also remain cognizant of the fact that how we administer the military commissions can, and likely will, impact how U.S. forces will be treated by other nations in future conflicts at a time unknown.

I thank you for your opportunity to express my views on these difficult issues, and I look forward to answering your questions.

[The prepared statement of General Walker can be found in the Appendix on page 57.]

Mr. ORTIZ. Thank you very much. Not being a lawyer, and reading through some of the information, I just have a few questions. I am going to allow and give time to my colleagues to ask questions, but my question that I want to ask from all of you is: Why is providing material support for terrorism a crime subject to prosecution in military commissions, since it has not traditionally been an offense under the law of war? And maybe you could explain to me a little bit, enlighten me on why.

Admiral MACDONALD. Sir, I can—I will start off. We actually can find material support for terrorism in the law of war. And, in fact, we have one military commissions case, the Hamdan case, where Judge Allred in that case actually found—and in his opinion upholding material support, found that particular crime in the law of

war and traced it back to the Civil War. So we do have it extant in our own law of war jurisprudence.

General RIVES. Congressman, I agree that material support for terrorism or terrorist organizations remains an appropriate charge for military commissions. The law of war is prohibitive law. If it does not prohibit, then it permits. And there is history behind having such an offense as material support as a chargeable offense for a military commission.

I also note that in the Military Commissions Act of 2006, Congress provided that the crimes in section 950(v) codify offenses that have been traditionally triable by military commissions.

As Admiral MacDonald has mentioned, material support has been specifically charged; there have been objections to it, but judges have ruled. And I believe the proper course of action is to let judges consider the arguments in specific cases at the trial and, as appropriate, appellate levels to determine the continuing viability of material support as an offense.

General BLACK. Mr. Ortiz, I agree with the comments of my colleagues already, and I would add just a couple of points. One, of course, the language is already in the SASC bill. But, two, I would rather litigate it in trial than just forego the opportunity by excluding the offense in the current legislative package. So I would argue in favor of including it.

General WALKER. Sir, I agree with the other witnesses. I think, first of all, there is support in international law that the law of war does support the charge of material support to terrorism. And we have at least one experience with the courts at Guantanamo where a judge has so held that. I think this is one of those issues that we will never be able to say for absolute certainty, is it encompassed in the law of war? Because, of course, those specific words aren't there. This is the exact issue that is the subject of litigation that we should litigate, and there is an adequate basis under law to proceed with that charge.

Mr. ORTIZ. Thank you. I have another question. Should detainees who allegedly committed law of war violations when they were minors, should they be prosecuted under the Military Commissions Act of 2006 or a successive legal framework? If not, how would you suggest that they be adjudicated? I am talking about minors, you know, under the——

General BLACK. Sir, I'll start. The factor of age is just that, a factor that should be considered by the trier of fact in the military commissions. Well, first, by the convening authority as they determine whether to refer charges to trial; and then, second, as a factor to be considered by the trier of fact if a case is brought forward. So, yes.

Admiral MACDONALD. Sir, there—again, there is history in the law of war that military commissions are an appropriate forum to try minors. And I would agree with General Black. Certainly the convening authority in the case can take a look at the specific facts and circumstances, including the age of the minor, when making that decision whether or not to refer charges to a military commission in a particular case; also, the trier of fact, when they are determining whether or not they have jurisdiction over a minor. This

will go to that definition of unprivileged enemy belligerent that we have talked about in our opening statements.

That trier of fact can listen to arguments on both sides and determine whether or not a minor actually fits into that jurisdictional definition.

General RIVES. And, Congressman, I also agree that the issue of whether to hold minors responsible as an adult in a criminal matter involves a multifaceted approach.

First, consideration by the convening authority of whether to even charge when considering all the facts and circumstances. Then the military judge has a role to play based on the legal standards. And finally, the trier of fact has decisions to make that can be affected by the age of the individual accused.

The law of war does not speak to the issue of minors as combatants, except that states can create special safety protections for civilians under the age of 15. And that is under the Geneva Convention IV. And also, states are required to take precautions when persons under the age of 18 are recruited into an armed force. So those are considerations, but there is no clear determination. It would depend on the facts of the given case.

General WALKER. Sir, I believe the most positive point under the Military Commissions Act is that there are numerous opportunities and safeguards within the existing provisions to consider the act of the defendant as one of the factors to whether he would bear criminal responsibility for his act, much as we do in criminal courts within the United States. So I do not feel there is a need to automatically bar prosecutions under the Military Commissions Act based on the age.

Mr. ORTIZ. Thank you so much. Let me yield to my good friend from California, Mr. McKeon.

Mr. MCKEON. Thank you, Mr. Chairman.

The Administration has expressed a preference for trying detainees in Article III courts. Do you share the same preference?

Admiral MACDONALD. Sir, I don't share a preference. I believe that whatever we come up with in terms of modifications to the current Military Commissions Act, and as I said in my opening statement, we have to make sure and we have to leave here at the end of the day believing that this is a fair and just system that can stand on its own, and that we ought to be willing to subject any detainee, any terrorist, to the military commission process.

Now, I understand that the Administration may have, and we may have, some reasons for looking towards Article III courts that may cause us in a particular case to defer to an Article III prosecution. But I think, at the end of the day, we need to build a system that can stand on it own.

General RIVES. I agree, Congressman. In my view, the military commissions process is historically tested. It can be a very fair process. The military commissions that evolved through the Military Commissions Act of 2006 is such a fair process. It currently is being reviewed to make it even more so; to make for transparency, to ensure the rights of an accused, to ensure that it meets, easily, international standards.

So my preference would be, get the military commissions right, do the prosecutions under the military commissions process. Of

course, I have no problem if a policy call is made in a given case to prosecute someone in an Article III court. That does come down to a policy call. But the important factor is for people to understand that military commissions are fair, they meet international standards, and they are not in any way something just to fall back on because we want to assure a certain result. The military commissions process is fair, and the only guarantee is we are going to provide a fair process.

The history through World War II was the almost 2,500 people who were prosecuted in the European and Pacific theaters during and immediately after World War II had a conviction rate of 85 percent. The cases we have already had, we have seen that people are not necessarily being convicted of all charged offenses, and the punishment that the members decide is appropriate has not been as severe as some people thought would happen.

So the military commissions process is very fair, and it should be given a chance to work out. I do support the efforts of the Administration and Congress to make it even more fair than it has been.

General BLACK. Sir, I agree with the comments of my colleagues. I would only add that the process here has to be perceived as fair and just, and there should not be a preference for any one system over the other. Article III courts are just another tool in the kit bag that is available to our country for resolving these issues and these crimes.

General WALKER. I believe we are fortunate to have two forums in which we can charge these offenses, both which meet the international mandates, meet the law of war, and meet those fundamental principles of justice. It is a policy call which forum is chosen. I think we can make both work to achieve our Nation's goals.

Mr. MCKEON. I am not trying to get you to talk against the Administration. That would be—You know—I understand the situation. My concern is that if you decide to send some to Article III courts and some to military courts, what—is there a judgment made prematurely that indicates that one is less guilty than another or goes to one court over—you know, how do you determine which court would handle? That is one of the concerns I have on that.

Are you concerned that this process will buttress the view that military commissions are a second-class system? I think you probably addressed that, and I don't want to put you in a bad light with the Administration. But we don't want to come up with a system where one is considered a kangaroo court and one is of a higher, better nature, more fair. That is, I think, the thing that we are grappling with.

General RIVES. Congressman, I agree. An Article III court clearly gives the full panoply of constitutional and other rights to individual accuseds. The military commissions are designed for a specific purpose. A part of it is based on the very function of a military commission, which is based not on United States constitutional standards for civilian criminal defendants, but the battlefield. Soldiers on the battlefield are not law enforcement specialists. They are not acquiring evidence in strict conformance with constitutional standards and judicial rulings that provide protections.

So the point is the military commissions need to be clearly fair and well within international standards. I am satisfied that they are, and that the additional protections that will be provided will make them even more so. They should not be viewed as second-class justice.

On the other hand, as we have said and you have said, it comes down to a policy call. Should the Administration decide in a given case to use Article III courts, that is totally appropriate, but they would need to explain why that is the preferred venue in a given case.

Admiral MACDONALD. Congressman, in the President's National Archive speech he used the phrase "whenever feasible" in talking about the distinction between going to an Article III court and a military tribunal, a military commission. And we know that the Administration is working through a set of criteria—evaluation criteria to do that, to try to determine.

So I think to answer your question, the proof will be—you know—when we understand the criteria that will be applied to make that determination, and then take a look at what cases are being referred to Article III and what cases are being referred to military commissions.

Mr. MCKEON. And, finally, do you think it makes a difference whether the commissions are held at Gitmo or in the continental U.S.?

General BLACK. No, sir, I don't. I believe that geography doesn't matter. These are law-of-war-based criminal prosecutions, and geography does not affect the way we should draft the rules to accomplish the process.

Admiral MACDONALD. Congressman, I think this comes down to what do you believe these commissions are? And there are some that believe that these are law enforcement actions; that terrorists ought to be tried under a law enforcement model. That leads you into U.S. criminal law and the Constitution.

There are others that believe, as I think we all do, that we are at war and that the law of war applies, and that you look to the law of war to find the substantive law that should be applied. And looking at the Military Commissions Act with the SASC amendments, we believe that obviously with some—I think we have all talked about some improvements, but we believe it meets that law of war standard, and it meets it at Guantanamo and it would meet it here in the United States.

General RIVES. And Congressman, as I understood your question it is: Does it matter substantively and procedurally whether we try cases by military commissions within the United States?

My answer is I don't believe it should matter. We already have a ruling from the Supreme Court in the *Boumediene* case saying that the constitutional right for habeas corpus does apply to the noncitizens who are in Guantanamo Bay.

There could be other judges who may determine that because we are in the United States, there are some additional rights that may accrue to someone being prosecuted even by a military commission. My view is that that should not matter and it would not matter. But we can't be sure how an individual judge or, ultimately, a case on appeal may be decided.

Admiral MACDONALD. I think, sir, we can also look at another case, another Supreme Court case, and it is the *Hamdi* case. Hamdi was a U.S. citizen brought from Afghanistan and brought into the Navy brig down in Charleston. So we had a U.S. citizen in the United States. And Justice O'Connor, in finding that Hamdi was entitled to a habeas proceeding, and talking about the kind of proceeding, what kind of proceeding that would be, she actually looked to the law of war. And she looked to Article five of the Third Geneva Convention. Those are Article five tribunals that we in the military are very used to conducting.

These are the status determinations on the battlefield when you get someone, take them off the battlefield, you convene an Article five tribunal to determine their status. Are they a lawful combatant, an unlawful combatant? Are they a privileged civilian?

And she specifically pointed towards the law-of-war model and said that might be a suitable way to determine status.

So if she was—if the Supreme Court was willing to do that for a U.S. citizen in the United States and apply this law-of-war detention review process, then we believe that they are likely to do the same thing. Nothing is a certainty, but they are likely to do the same thing when they evaluate the commissions process and the due process accorded to commissions here in the United States.

General WALKER. Mr. Chairman, I believe there are—the precedents that we have for the extension of constitutional rights to detainees have been limited. In the cases where the courts have had the opportunity, as Admiral MacDonald mentioned, they have chosen a limited application of the traditional constitutional protection. And I believe that is a correct application of the law, because we should go by the law of war.

However, I have to say that if the commissions were geographically sited in the United States, I think it would increase the possibility that a particular jurisdiction or a Federal court could choose to broaden that scope of constitutional protections.

Mr. MCKEON. Thank you. Thank you, Mr. Chairman.

Mr. ORTIZ. Let's see if we can get some clarification on something. Now, while each of you support prosecution in military commissions, you do not oppose prosecution of detainees in Federal civilian courts. Am I assuming correct?

General BLACK. That is correct, sir.

Admiral MACDONALD. Yes, sir.

Mr. ORTIZ. All of you?

General WALKER. Aye, sir.

General RIVES. I agree.

Mr. ORTIZ. Thank you. Mr. Taylor.

Mr. TAYLOR. Mr. Chairman, I am going to yield to Mr. Murphy.

Mr. MURPHY OF PENNSYLVANIA. Thank you, Mr. Chairman. And thank you, Mr. Taylor.

Gentlemen, thank you for your service to our country.

I would like to put you on the spot. I know my colleague on the other side of the aisle, Representative Rooney, you know—he served as a young captain, a judge advocate in that First Calvary Division, and I was a young captain in the 82nd Airborne Division. Who would be a better judge advocate? Who would you rather have on your team?

But I won't put you on the spot because we all know that the Airborne leads the way. So I will get right to my question.

Gentlemen, I think it is important that we are having this hearing today to try to figure out the details of how we can constitutionally and fairly put these suspected terrorists on trial in a way that is consistent with our values while still keeping our service members and our families here in America safe. As a former judge advocate and a constitutional law professor at West Point, to many of us this is very personal.

The Administration has yet to formally comment on the exact definition of an enemy combatant, and clearly the Bush Administration, in my opinion, stretched the boundaries of what exactly constitutes an enemy combatant.

Back in 2004, a Deputy Associate Attorney General argued in Federal district court that an old lady in Switzerland, who wrote a check to a charity that, without her knowledge, passed those funds on to an al Qaeda organization, could be held as an enemy combatant. When asked to explain this, the representative for the Bush Administration said that, under the 2001 Authorization for the Use of Military Force, the government could hold the woman indefinitely, and that someone's intention is clearly not a factor that would disable detention.

The Military Commissions Act states that, "To be declared an unlawful enemy combatant, an individual must have purposely and materially supported hostilities against the United States." But the 2001 Authorization for Use of Military Force makes no such distinction, merely leaving the decision up to the President as to whether someone engaged in or supported hostilities against the United States.

So my question to the panel: In your opinion, in your view, does mens rea—obviously the mental intent—should it play a key role in determining who the government should and should not classify as an enemy combatant? Gentlemen, I appreciate your answers.

General BLACK. Mr. Murphy, thank you. And thank you and Mr. Rooney for your service in my corps. I won't take sides with the respective divisions that you both served in. They are both wonderful organizations and produce great officers and soldiers.

Now, with respect to your question, the objective here ought to be as narrowly and carefully tailored a definition as we can possibly come up with. And, yes, mens rea should be part of the package.

Purposefully and materially supporting hostilities is a definition we can work with. It does provide the sufficient—the element of mens rea, and I would support that. We look forward to working with the Administration and continuing to work with the Administration to refine the definition to get to exactly the end state that we need in this regard.

Mr. MURPHY OF PENNSYLVANIA. Thank you.

Admiral MACDONALD. Congressman, I agree completely with that. Mens rea should be an element of any of the crimes, the material support crime, the conspiracy, aiding and abetting. And also in terms of detention, it should be an element as well before we detain.

General RIVES. Mr. Murphy, as you were speaking, I was thinking I was glad you are not my law professor.

Mr. MURPHY OF PENNSYLVANIA. I did lecture at the Air Force Academy in Colorado Springs, but only for a few weeks.

General RIVES. Well, you are welcome to come back anytime, and I won't be in your class.

But I agree that we need to be careful with how we define these terms. Lawyers know you have got a lot of discretion in how you charge, but I believe we should only charge those who we believe really committed a criminal offense, one that is punishable for military commissions purposes under the laws of war.

Mens rea really is a critical element in ultimately getting a conviction. We shouldn't charge someone if we don't believe we are likely to get a conviction, if we don't believe the evidence is there. And if we don't believe we have good evidence of mens rea, we should not be charging an individual.

We should not charge the little old lady in Switzerland who innocuously thought she was donating money to an organization that helps orphans. But if the same little old lady knew that the purpose of her money was ultimately to help someone accomplish a terrorist goal, we can properly charge her, we can properly prosecute her. And whether she is convicted or not depends on how the proof is given in the trial.

Mr. MURPHY OF PENNSYLVANIA. And I agree with that assessment, absolutely. If she knows that is where the money is going, we absolutely should prosecute her to the fullest extent of law. General?

General WALKER. I believe that we should consider intent or mens rea as we look at these crimes under the law of war, just as those elements have been traditional elements of the crimes under the law of war throughout history. We see—I see no reason we would differentiate now.

Mr. MURPHY OF PENNSYLVANIA. Thanks, General. And I see my time is up. I appreciate the time. Thank you, Mr. Chairman.

Mr. ORTIZ. Mr. Bartlett.

Mr. BARTLETT. Thank you very much.

Gentlemen, are there world courts where these prisoners might be tried?

General WALKER. There could be—international tribunals would be a possible forum that could try these offenses. A good example of a similar tribunal would be the ITFY, the International Tribunal for Former Yugoslavia. That would have been a forum; I suppose still could be a forum. I am not aware of any standing body that could handle these cases.

General BLACK. Nor am I, sir. I am not aware of any existing forum that has the jurisdiction to handle these cases.

Mr. BARTLETT. General Rives, you mentioned that we wanted the military commissions to be considered fair and creditable. I gather that you said that because they are not always considered fair and creditable.

When you made that statement, I was reminded of the counsel that my mother gave me and your mother probably gave you: that you shouldn't borrow trouble. We have enough trouble without borrowing trouble.

When I mention military commission or military tribunal—and I have tried this a lot of times—when I mention that to one of my constituents, their reaction is always my reaction: a banana republic, a trial at midnight, execution at dawn.

I voted against this act because I didn't think we needed to borrow that trouble. If these people need to be tried, there are international courts that can try them. And I don't know why we are doing this. We have enough trouble to deal with without borrowing this additional problem.

General RIVES. Well, interestingly, Mr. Bartlett, the trials at Nuremburg after World War II are often held up as the gold standard, when in fact if people dug into exactly what happened at Nuremburg, there was no specified standard of proof; the accused's presence was not even required; an accused did not have the right against self-incrimination. Evidence obtained from any source was admissible. The judgments were final. There was no right of appeal.

At Nuremburg, many of the accused were prosecuted, and then the death penalty was executed within a matter of hours in some cases, no more than a few weeks in just about every case. So Nuremburg is not the gold standard.

My point earlier about having fair military commissions is we also need to be concerned with how we explain the processes. And I agree with you that many people, when they hear military commissions, have bad thoughts. But when I have talked to people about the sort of rights that we have with the Military Commissions Act, and in the military commissions we have had—the fair trials that really have been conducted under the guidance of well-trained, qualified, conscientious military judges—when they hear about all the rights that people have at the military commissions, they are sometimes very surprised that those are military commissions and it is a fair process.

So we need to do a better job of being fully open, not trying to hide things except those things that are a matter of national security, and having transparent decision-making processes to the point, to the maximum extent, having full and open trials. And then the military commissions process can be seen as a fair process that it really is.

Mr. BARTLETT. In this arena of psychology and politics, perception is reality. And although it—I am sure that it is true that if we have a military commission trial, that it would not be conducted differently in Gitmo than it would be on the continental United States. But I will tell you, gentlemen, the perception would be very different about where it is conducted. If we are going to conduct those trials, we need to conduct them on the continental United States because the perception will be very different than if we conduct them in Gitmo.

Thank you very much for your service. I want to tell you how proud I was of all of your uniformed lawyers. I am not always proud of lawyers. But I want to tell you how proud I was of your uniformed lawyers. Every one of them came and sat at that table you are sitting at and told us that civilized nations do not torture.

Thank you very much for the quality of the people that work in your divisions. Thank you, and I yield back, Mr. Chairman.

Mr. ORTIZ. Dr. Snyder.

Dr. SNYDER. Thank you, Mr. Chairman. Thank you also for your service. I will add to Roscoe's comment. You are also darned good-looking, too, and we appreciate you—appreciate all you have done.

I want to—I am going to pick up and just follow up on what Roscoe asked about with regard to perception, because you all I think generally have the belief that no matter where you do these commissions the way you all would like to have them done, it is a fair process whether it is in Guantanamo or here.

Picking up on what you said, General Walker, I think I guess anyone who is a lawyer recognizes that judges come from a broad spectrum of backgrounds. Again, you know, sometimes you just get off-the-wall opinions that, I believe in your words, could increase the likelihood of finding constitutional rights here.

There is a flip side of that though, too, isn't there, that gives the perception that Roscoe brought up: which is we do not want to be perceived as a nation that we are going to keep these people on a Caribbean island in order to deny them rights. I mean, that is the flip side of this.

I would—I prefer the first view which is, no, we are going to treat them fairly. If a hurricane closes Guantanamo and they are swept to Miami for a weekend, we are giong to—they are going to have the same rights because we are treating them fairly everywhere. So I think that is the flip side of that.

I want to ask this specific question. I will just show my Marine Corps background, I guess, and ask you, General Walker. Today in Guantanamo, if an inmate were to attack another inmate and kill them, what body of law would control the murder trial?

General WALKER. I am actually not certain of the answer to that.

Dr. SNYDER. Well, let's just leave it at that for today. Because—I mean—the issue is, would it be American criminal law or would it be—or if they, you know, stole money from you when you went down there to see them, what body of law would control? I would be—Let's take it as a question for the record.

[The information referred to can be found in the Appendix beginning on page 65.]

Dr. SNYDER. I wanted to ask—a couple of you in your statements, you talk about one of the changes you would like to see is more of a duty for the prosecution to disclose exculpatory evidence. How did that get overlooked?

I mean, how can a prosecutor sit there knowing they have got in their file a statement from—you know, I will just make some—you know—two eye witnesses said that a—you know—a perpetrator was three miles away at the time. How could a prosecutor not turn that over? How did that get overlooked? Was that an oversight by the Congress?

Admiral MACDONALD. Actually, sir, the prosecutors assigned to the Office of Military Commission are turning them over. That is the good news, is that despite the rule that was put in place in 2006 and 2007, the prosecutors have been doing that. This is simply codifying the practice that the prosecutors have been doing in the commission since 2006 when the Military Commissions Act was first enacted. So that is the good news.

I think what this rule change does is it extends it now to an affirmative duty on the prosecutors to disclose mitigation evidence for sentencing purposes and also to disclose evidence that could be used to impeach a witness.

Dr. SNYDER. So you have had, what, three trials so far in the military commissions, and you all feel comfortable that that disclosure has been going on? Okay.

The Ranking Member made some comment about you confronting the Administration or something. We have had a change in Administration, so I don't think there is going to be any payback here. But I did notice you all—I think three of you went out of your way to say this is your personal legal opinion. Is that just what lawyers do? Or is there some reason that you are—it is a complicated enough activity—you haven't done a group think on these comments. Is there anything magic about the fact that—we are not used to people putting that in their opening statements, that this is your personal legal opinion.

General Walker is that—what is going on?

General WALKER. I think to a degree, that is what lawyers do. You always have to try a caveat. However, our specific invitation to the committee was to express our personal opinions on the modifications to the Military Commissions Act under the Senate bill.

Dr. SNYDER. And it is very helpful because this is a complicated area of law, and we appreciate your service and appreciate—Yes, Admiral?

Admiral MACDONALD. And, sir, you may remember that in 2006 we were specifically invited up to testify before the House Armed Services Committee (HASC) and to give our personal opinion because we—much of our testimony was contradictory to the Administration positions. And so we take our duties seriously that, when you ask us to give our personal opinions, we will come up and we will tell you.

Dr. SNYDER. Thank you for your service. Thank you Mr. Chairman.

Mr. MCKEON. Will the gentleman yield? And they gave contradictory opinions and they are still here. That is a good thing. Thank you.

The CHAIRMAN [presiding]. Mr. Forbes, please.

Mr. FORBES. Thank you, Mr. Chairman. And, gentlemen, thank you for being here. And I apologize, I only have five minutes. So if I am short, it is not because I want to be rude; it is just because I want to get the questions in for you.

One of the things that we always realize is if we are going to keep somebody from seeing the forest, the best way to do it is to drive them deep into the trees.

When the American people hear all this debate, they hear some specificity but they don't see the big picture. I want to take you back to the big picture just a moment. And one of the parts of the big picture is we are not talking about purse snatchers here,—you know—we are not talking about bad check writers. We are talking about people, really, that could pose a threat to U.S. citizens.

The Attorney General of the United States, Mr. Holder, testified before the Judiciary Committee and he said this: He said that in his office they receive a great deal of evidence or information about

these detainees, these alleged terrorists. Some of this information is classified, obviously some is not. Some is hearsay, some is not.

However, the Attorney General said this: If his office concluded that in the totality of that information it led to the conclusion that the detainee had a probability of harming a U.S. citizen, that the Attorney General would detain that individual even if he did not have enough admissible evidence in court to charge him and convict him of a crime.

I am asking you, Admiral MacDonald, because you have used the standard of justice and fairness, is the Attorney General's standard, the testimony he made, does that meet a standard of justice and fairness?

Admiral MACDONALD. Yes, sir. And——

Mr. FORBES. Alright. If that is the case—and you can talk in just a minute, but let me get this in. If that is the case, and we talked about perception here, if somebody were to spin that standard of justice and fairness and suggest it wasn't just and it wasn't fair, and the perception was that it wasn't just and fair, should the Attorney General change his position because the perception somehow or the other was out there that it wasn't?

Admiral MACDONALD. No. I don't believe he should.

Mr. FORBES. If that is the case, then, one of the things that we forget sometimes here is that we are looking at a balance between prosecutors and defendants. We don't also talk about the difficulties prosecutors have when you are picking up and trying to get evidence in Afghanistan and other places. You don't always have the right to use search warrants to get the evidence that you want over there like you would here for a domestic trial, do you?

Secondly, you don't have the ability to have grand juries to subpoena evidence in. You can't subpoena business records and other things when you are in foreign countries. So you have a difficulty in that balance of power already.

The question I am going to ask you is this: Is there anyone who would disagree on our panel today that, if we held the commissions within the United States, that it would be more likely than not that it would shift the balance of power more towards the defendants than the prosecutors?

Nobody answers that. I am—Yes, sir?

General RIVES. I would disagree that it would shift the balance just because we shifted the location of the military commissions. If they are military commissions——

Mr. FORBES. You don't think they would have more rights because they were in the United States than if they were held elsewhere?

General RIVES. I don't believe they have any more rights under the military commissions, wherever they are prosecuted.

Mr. FORBES. Wherever they are prosecuted. Does anyone disagree with that? Was it your testimony that they could probably have more rights if they were geographically in the United States?

General RIVES. I testified there would be an argument they would have more rights.

General WALKER. I agree with General Rives that, as a legal proposition, they would not automatically be extended more rights. However, it is my opinion that there is a greater likelihood that a

particular court or jurisdiction could choose to extend greater rights.

Mr. FORBES. Let me ask you this. If we use Article III courts versus commissions, would it be more likely that they would have more rights for the defendants than for the prosecutors?

General WALKER. Yes.

Mr. FORBES. That would shift it. You have testified that you did not oppose the Article III courts of the commissions. But does anyone there favor a preference for Article III courts?

I take it the answer is no.

If we adopt the Administration's recommendation regarding detainee statements, the voluntariness standards, would that be a shift in power to the defendant or to the prosecutor?

Admiral MACDONALD. To the defendant.

Mr. FORBES. Does anyone disagree with Admiral MacDonald's testimony? Everybody is shaking their head no.

If we do not try those offering material support for terrorism in military commissions, but rather do so in a criminal court, wouldn't that make it more difficult for us to get convictions for those individuals as well? Anybody?

General RIVES. If we did it in an Article III court, in Federal court? Any prosecution in an Article III court could be more difficult, because we are talking about evidence that was obtained on the battlefield and not by law enforcement authorities.

Mr. FORBES. And the last question I have, if I have time to get it in. The Administration has proposed to drop material support for terrorism from the list of offenses triable by military commissions. Do you agree with the Administration's position?

Admiral MACDONALD. No.

General BLACK. No, sir.

General RIVES. No.

General WALKER. No.

Mr. FORBES. No one agrees with that. Mr. Chairman, with that, I yield back the balance of my time.

The CHAIRMAN. I thank the gentleman from Virginia.

Before I call on the gentleman from Georgia, let me ask this simple question of each of you. Looking at the law as it exists today, if you were to make one change or one correction, what would you do? Starting with you, General.

General BLACK. I would go after the voluntariness issue, sir, with respect to the admission of statements. I believe that we ought to adopt a reliability standard with voluntariness as a factor to be considered in the totality of the circumstances by the trier of fact, the judge.

The CHAIRMAN. Admiral.

Admiral MACDONALD. Sir, I would bring in the Classified Information Procedures Act into the SASC bill as the standard by which classified evidence is determined, whether or not it is going to be introduced in a military commission.

The CHAIRMAN. General.

General RIVES. I agree with Admiral MacDonald that the most important reform we need to make is to clarify the rules and strengthen the rules for handling classified information. And it

ought to be similar to the rules for the Classified Information Procedures Act.

The CHAIRMAN. General.

General WALKER. Mr. Chairman, the land forces stand together. I concur with General Black that we need to first modify the standard for admission of the hearsay evidence from voluntariness to reliability, plus consideration of the exigencies of the military battlefield.

The CHAIRMAN. Thank you. Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

And, gentlemen, I want you to know that I appreciate your service and I consider that all of you are men of justice. And we could disagree sometimes as to what that means, but I certainly respect your intent to be respectful of our Constitution and the great traditions of a civilized society.

And what I would like to know is: What is the statute of limitations on a crime committed on the battlefield for which an individual could be prosecuted?

General RIVES. There is not one under the law of war.

Mr. JOHNSON. So a detainee could be held indefinitely, even for life, for 20, 30 years, without being charged and without being tried?

Admiral MACDONALD. Congressman, we need to distinguish, though, between the power to detain under the law of war and the power to prosecute. Those are two separate and distinct powers that nations have when they go to war.

Mr. JOHNSON. I understand, and I am just simply trying to find out the practical impact of our military commissions setup as is proposed in the Senate.

Also, why is it that the reliability standard should be used as opposed to a voluntariness standard for admissions against interest, if you will?

Admiral MACDONALD. Congressman, it has to go with the different circumstances under which statements are taken. So, for example, our position is that in the heat of battle when a soldier breaks down a door and, at the point of a rifle, extracts a statement from a detainee, that that is an inherently coercive environment. And if you have a voluntariness standard, the likelihood, that if that is applied, that a judge would find that that statement was involuntary is great.

Mr. JOHNSON. I don't think that even in civilian courts that a statement made at the time of a person's arrest, that was spontaneous and voluntary, would be excluded as evidence. And so I think the same standard would probably be the same in a military tribunal.

But the bottom line is, you know—I don't think I have gotten an answer to the question yet. What is wrong with applying a voluntariness standard as opposed to a reliability standard? And with respect to reliability, how can you determine the quality of hearsay evidence that is admissible against—in accordance with the Senate version here?

General RIVES. Congressman, on the substantial question, I believe reliability is the better test.

Mr. JOHNSON. Why?

General RIVES. Because it effectively balances fair treatment of the accused with the exigencies of the battlefield. The reliability of a statement will depend on the totality of the circumstances. Voluntariness is one of those standards.

But I would emphasize that the pressure of the battlefield could make any statement involuntary. If you consider, for example, that ten soldiers in full battle gear, armed with M–16s, confront a person and ask about the location of a hidden improvised explosive device, his statement proves to be reliable. But is it voluntary? That is the issue.

General BLACK. Sir, if I might add something. This past Saturday morning I happened to have the opportunity to sit down with a young judge advocate who was advising a Special Operations team in Afghanistan. I talked to him in Bagram this past Saturday morning and I asked him that very question: Voluntariness or reliability? Which way should we go on this? Because we are talking about it now. And his quotes—and I will give it to you straight up:

"Our mission on the site of capture is information exploitation. Exploitation and prosecution do not mix. Imposing a voluntariness standard would disrupt our mission. Tactical site exploitation interrogations are perhaps our most important results in terms of continuing success in this fight."

So his position was reliability, but with voluntariness as a factor to be considered. And you can almost consider it as a sliding scale, sir. The greater the government intrusion, if you follow the analogy of the Fifth and 14th Amendment analysis.

Mr. JOHNSON. Okay. Thank you. And could someone answer the question about the level or the quality of the hearsay that could be admissible or that would be admissible against an accused?

General RIVES. It will be fact-specific and determined by the military judge. I very much appreciate the fact that the rules have evolved for military commissions where the military judges, who are very experienced and are picked for their independence, judgment, discretion, and experience, are able to make this sort of decision.

It is hard to give—it is impossible to give a blanket rule that would fit in every occasion, but I can say that based on the facts of the case, I trust the judgment of our trial judges in these sort of cases.

Mr. JOHNSON. Thank you all.

The CHAIRMAN. I thank the gentleman.

Before I call on Mr. Coffman, let me ask this question of the Admiral. How would you define "proximate to the battlefield"?

Admiral MACDONALD. Actually, sir, that is—this is exactly the discussion that we are having with the Administration after the SASC hearing last week. The Administration favors a voluntariness standard with a battlefield exception. I think we go at it the other way: A reliability standard, taking voluntariness as one of a number of factors that you would weigh and balance, a judge would weigh and balance, in determining whether or not the statement was ultimately reliable.

We are pretty close. Over the last week we have been working on, as General Black said, kind of this sliding scale. And I think at this point we would assess it this way: The closer you are to the

battlefield, the more that voluntariness would recede and you would look at the kind of indicia of reliability of the statement itself. At some point, though, as you take the detainee off the battlefield and as you put them into a confinement facility, then the nature of the interrogation changes.

So you go from this tactical interrogation that General Black talked about on the battlefield in Afghanistan, you move away from the intelligence interrogations that go on, and at some point you are starting to look at exploitation, getting statements for prosecution. At that point, I think we all agree that voluntariness should be the standard at that point.

So all of these detainees at Guantanamo right now, all their statements ought to be evaluated under a voluntariness standard, because they have been removed from the exigencies of the battlefield. But we are pretty close and working with the Administration on that test.

The CHAIRMAN. I thank the gentleman. I did not see Mr. Rooney, Mr. Coffman. So we will call on Mr. Rooney first for five minutes.

Mr. ROONEY. Thank you, Mr. Chairman.

Thank you all for your service and your leadership. And as far as what former Captain Murphy had to say earlier, all I have to say is first team to that.

I wanted to go into two sort of separate areas. I have a question, but I want to start with a follow-up to something that I think Congressman Forbes was raising, but also that Admiral McDonald and General Black—I am a little confused with something that was said before.

When you were talking about, Admiral, the commissions could be properly held in the United States, I was getting the gist from you that it insulated from outside distractions. In fact, we had a United States citizen that was brought to the United States and successfully prosecuted in a commissions setting, a case involving an actual U.S. citizen. So, therefore, when we bring noncitizens from Guantanamo to the United States, we should be able to do it as well.

However, then General Black, I think, made the statement that depending on the forum, extra-constitutional protections beyond habeas corpus, from the court's ruling—you know, Fifth Amendment due process rights and the like—may attach, depending on which court they get or which district they get or whatever the circumstance may be.

So I don't know if I am seeing a sort of—can we be—and the reason I ask this is because, again, like Congressman Forbes said, from a 30,000-foot view, my constituents in the 16th District of Florida are going to be very concerned about us bringing detainees from Guantanamo to the United States. So I have to look them in the eye and say the judge advocates are sure that we are going to be able to do this in a way that is not going to give them the same rights as American citizens, that they are not basically de facto constitutionally protected American citizens. Because in their eyes, or in at least some of them, you know, they are terrorists, so to speak.

So can you try to for me—are they going to get extra-constitutional rights, or are we going to be able to insulate them in a commission?

Admiral MACDONALD. Sir, in my opinion, they are going to get due process, but they are going to get due process as informed by the law of war. And, so that we need to look to the law of war over time, and we also look to international tribunals, like General Walker talked about—the International Criminal Tribunal for Rwanda and for Yugoslavia—to look for that body of law, those rights, that we would bring into the commissions process.

We have done that analysis. We have looked at the military commissions rules. We have looked at the amendment that the Senate—or the bill that the Senate has proposed. And we believe that it satisfies the due process concerns as informed by the law of war.

Now, I believe there is some disagreement, and I think the Administration may have a different opinion, but our opinion is the law of war is the body of law you look to to inform what process is due to a detainee, whether in Guantanamo or in the United States.

Mr. ROONEY. And I am confident that you are correct. My concern is that you are also correct, if I think—if I get the gist of what you are saying, that from there we don't know what is going to happen, because it is very rare to say we are bringing a noncitizen into this country and we are giving them all the constitutional rights in court. We are going through uncharted territories.

Am I confident that you guys are going to get it right? Yes. But after that, where are we going to go? That is what I am a little afraid of. Go ahead.

I just want to really quick, because my time is, unfortunately, limited. One of the things you talked about, voluntariness. I completely understand your statements with regard to voluntariness and the classified information, but what I want to get into is classified information.

One of the things that I am concerned about is when we have detainees, we get evidence from them. A lot of times the evidence may have been gotten from a source or somebody who is a clandestine agent, so to speak, or the like.

And I am a little concerned about when we have this evidence that is classified or protected. What protections or procedures do you feel are best under the act, or changing the act to move forward with regard to making sure that if we have sources in foreign lands that are helping us, that we are not putting them in jeopardy? And also whether or not this information you all talked about, the Classified Information Procedures Act—could you just go into that briefly? Go ahead.

Admiral MACDONALD. It does—the CIPA has—first of all, Congressman, CIPA has been around for a while, a long time. There is about 20 years' worth of case law that go with CIPA. It has been used in Federal court very successfully. That is one of the reasons why we want to—we are recommending to bring it into the Military Commissions Act.

When the Military Commissions Act was passed in 2006, we testified about Military Rule of Evidence 505, which is the military analog to CIPA. It hasn't worked well over the last two to three

years. The reason? There is not a robust body of case law that goes with MRE 505; there is with CIPA. And it has procedures to address your concern, which is the protection of sources and methods for gathering statements.

But at the end of the day, the judge is going to have to rule on whether or not a detainee is entitled to get the sources and methods. And then, as we testified in 2006, it is ultimately going to be up to the government, to the United States, to say that they want to proceed with a commission and introduce and disclose sources and methods or forego it. That is how CIPA would operate in that context.

The CHAIRMAN. I thank the gentleman. The time has expired.

Mr. Ellsworth.

Mr. ELLSWORTH. Thank you, Mr. Chairman. Thank you, gentlemen.

I am sitting here thinking, after 25 years in local law enforcement, I was wishing I could claim battlefield circumstances in some of our interrogations; unfortunately, we couldn't get away with that.

But, I have a real quick question, and then I am going to defer to Mr. Kratovil. And, Mr. Forbes, thank you; I like the rapid-fire questions. We get a lot more answered in a short amount of time.

Are there cases and circumstances—I know you prefer the military commission. But are there cases you can think of, where Article III is preferred or would be appropriate at any time in these proceedings, that you would say this ought to be an Article III in the circumstance that we are talking about? Does that make sense?

General BLACK. I can't think of a particular hypothetical right now, but I don't want to foreclose the opportunity either. Article III courts are another tool that we can use.

Mr. ELLSWORTH. And with that, that is the only question I had. I will give Mr. Kratovil the rest of my time.

Mr. KRATOVIL. Thank you. Gentlemen, forgive me; I am a former State prosecutor and am not as familiar, obviously, with the military forms of justice that we are talking about. But I do have a few questions for you.

My first question is: Is it the position of all of you that individuals that are detained at Guantanamo Bay right now could be detained indefinitely without a finding under any of these possible sources—commission, Article III, or a civilian court? Could they remain indefinitely without having any finding?

Admiral MACDONALD. Yes, sir.

General BLACK. Yes, sir.

Mr. KRATOVIL. Okay.

General WALKER. With, I think, the exception, sir, that the "indefinitely" means, under international law and the law of war, for the duration of the conflict. So it is not truly indefinitely.

Mr. KRATOVIL. Okay. At what point do we establish some standard of proof to continue detention based on the decision to take them before one of these—either the commission or the Article III?

Admiral MACDONALD. Yes, sir. If a detainee was taken to a military commission, and let's assume that at that commission the detainee was acquitted. If the United States continued to believe that that detainee posed a serious threat to the security of the United

States, the detainee could be put back into detention. And that is the difference that I was pointing out earlier, the difference between the power to detain and the power to prosecute. But there would be a process following that, and it would be habeas.

Mr. KRATOVIL. Okay. What—ultimately, what is the purpose of bringing these individuals before either the commission, Article III, or a Federal civilian court? Ultimately, what is the purpose?

General WALKER. Punishment for specific crimes as opposed to detention as a national security threat.

Mr. KRATOVIL. Okay. Is it punishment? We are jumping to punishment? Or is there some need to determine whether or not, in fact, they have committed what they are bringing— brought before those bodies?

General RIVES. It is both. We should prosecute to determine whether we can prove guilt beyond a reasonable doubt; and if so, we apply an appropriate punishment. And the separate question that we have discussed is whether the person should continue to be detained. Ultimately, that is a policy call. We do have to establish fair procedures to periodically review the propriety of continued detention.

Mr. KRATOVIL. Alright. So it is fair enough to say that the purpose of them is to, in a sense, determine the truth as to the allegations.

What is the danger in allowing either involuntary or—well, involuntary statements or unreliable statements?

General RIVES. Number one, you would—you are more likely to get an unjust result. And most importantly, we are concerned about reciprocity; how would we want our soldiers, sailors, airmen, and marines to be prosecuted if held by a foreign authority? The Military Commissions Act provides for a fair process that I would be comfortable with our people being prosecuted under.

Mr. KRATOVIL. Okay. By the way, the discussion that you are having, I was about to ask about the distinction you were making in reliability versus voluntariness. And based on the discussion that you had with the Chairman, to me that sounds like a very reasonable compromise where you are saying that voluntariness should be used in a situation after detention, where you don't clearly have the issue of, really, battlefield; whereas using the reliability when you are talking about other factors that obviously are not similar to a criminal-type of interrogation. So to me that sounds like a very reasonable compromise and I salute you for it.

And let me say this. We are obviously having all of these discussions, because it does not get any more complicated than trying to determine how best to deal with individuals that we suspect are involved, but aren't necessarily at a point of having proof that we would have in our—in typically under normal prosecution. It is a very difficult balance, and I salute you for trying to find it.

The CHAIRMAN. At last, Mr. Coffman.

Mr. COFFMAN. Thank you, Mr. Chairman.

Thank you all for your service. I was not in the JAG Corps; I expect lower test scores and a tremendous threshold for pain. I was an infantry officer in the United States Marine Corps.

Let me express a concern that I think there is some fantasy that we are not a Nation at war. We are a Nation at war, and we are

fighting irregular forces bound by an ideology who often use terrorism as a tactic. And I guess it has been redefined as a man-caused disaster, and we are not involved in the global war on terror, but I believe it is called "overseas contingency operations."

But, there seems to be—we ought to look at the—you know—we're—there is now a view that this is a criminal justice issue. And it would seem that combatants who are plucked off the battlefield, that there are—one is, did they in fact violate the law of random warfare? Are they war criminals? And the other one is the fact that they are combatants, and they ought to be detained until this war is over.

And we have released those that have been detained—plucked off the battlefield, detained, that have returned to the battlefield to kill Americans. This is a failed system, and I want you all to comment on this.

General WALKER. Congressman, I believe there are two issues that come into play there.

The first, again as we have mentioned, is the detention process as opposed to the military commissions process where individuals would be potentially prosecuted and held accountable for their actions. That is the balance of trying to achieve balance of accountability for the law of war and violations of the law of war, and, at the same time, maintain those standards of justice.

The individuals—there is, to my knowledge, some evidence of individuals who have been released from Guantanamo and returned to the battlefield. But our testimony today, what we were focusing on, or attempt to focus more, was the military commissions when we are actually bringing the individuals to their responsibility; which is at, of course, a later point in time.

General RIVES. Congressman, I would say we are holding the detainees because they are belligerents and because they are active participants in the current conflict against the United States and our coalition partners. We need to continue to hold them until we are convinced they are no longer a threat to us.

Admiral MACDONALD. And Congressman, as you said, the law enforcement model does not work in this instance. That is why, in terms of prosecutions and in terms of detention, we look to the law of war, because it gives us the power to do both.

General BLACK. We can't be one-sided on this, sir. We have to apply the rule of law evenly and fairly across the board. And I certainly understand your perspective and your viewpoint.

And as a soldier and as the father of a soldier who is currently serving in Iraq, I share your concerns in many respects. But again the even-handed application of the rule of law has to be at the forefront of our national policy in my view. And I believe that we execute our responsibilities pretty darn good.

Is the system perfect? No, sir. And as you have noted, there have been detainees who have returned to the battlefield. But I think, by and large, it is a system that is managed by men and women of good character and good heart, who are trying to do the very best they can to do what is right every single time, and to keep our Nation's best interests and the rule of law at the forefront.

Mr. COFFMAN. Thank you for your testimony, gentlemen. And again I would stress that terrorism, and that our enemies are fight-

ing us, and this is—we are engaged in a war. And I don't think that that is the view of this Administration, but it is certainly my view.

I yield back the balance of my time.

The CHAIRMAN. I thank the gentleman.

Mr. Kratovil, you were next on the list. Do you wish to use your time?

Mr. KRATOVIL. No.

The CHAIRMAN. The gentleman yields back.

In that event, it appears, Mr. Larsen.

Mr. LARSEN. Thank you, Mr. Chairman. Just a few questions to clarify some things for me.

I remember being here in 2006 and getting the MCA put together. And I think we made a lot of errors in putting the MCA together, which got us to today and barely got us through the last three years of implementing the MCA.

But, I am not an attorney, but of course over the last couple of years I have been able to try to at least get up to speed on some of the concepts that we have struggled with to create a system that can apply for detainees.

And I have a very general question to start—and a yes or no might be appropriate, I will let you all decide. But in your view, have we prosecuted and convicted detainees to the point that Americans have got the justice that we deserve?

There is all this talk about, you know, should, you know, all these rights that we might give to terrorists. I don't—I am not concerned about that. I am more concerned about the justice for the victims of 9/11, justice for Americans in this process. Have we prosecuted and convicted detainees to the point where we can say that we got the justice we deserve?

General BLACK. My view, sir, no. We have been mired. This has been a time-consuming and extraordinarily lengthy process. The best thing we can do for the American people and for the detainees is to move the process forward, get these rules put into effect and get the process moving.

Admiral MACDONALD. Congressman, in—when I talked about the Classified Information Procedures Act, many of these cases, if not all of them, involve classified evidence. The trial teams will tell you that they have been mired down because they don't have a set of procedures that are rational, that make sense, and that can move the process along.

And that is why I think General Rives and I kind of focused on CIPA as an important aspect of improving the Military Commissions Act because it will do just that; it will speed the prosecutions that are going to take place under this act.

General RIVES. Congressman, my answer to your question is no. And the brief reason why not is the process for the current military commissions was set in motion by executive order on November 13, 2001. We have only had three complete prosecutions under it.

If Americans were getting justice, we would have had a process that had a greater sense of urgency, emphasis on fairness, and procedures that are respected in the international community. But we should have had more prosecutions before now.

General WALKER. I concur that justice delayed is rarely justice served. And I think the speed of prosecutions will help everything. That is what we hope some of these changes to the Military Commissions Act will enable us to do.

I can say that there has been greater progress of late than in the first couple of years under the Military Commissions Act, and I am hopeful we can continue that momentum.

Mr. LARSEN. Another generalized question here. On June 12 of last year, in a 5–4 decision, the Supreme Court rejected the view—well, they held that detainees being held at Guantanamo have a habeas corpus privilege under the suspension clause of the Constitution. And the Court also held that section 7 of the MCA is an unconstitutional suspension of right, because its procedures to review the status of detainees are not an adequate and effective substitute for habeas corpus.

There have been comments here by a lot of good folks on the committee and in Congress that the remaining detainees being held at Guantanamo are in fact dangerous. Given that 5–4 decision last year and these statements, can we say that each and every one of the detainees that is there is dangerous, does belong there, is rightfully there, and ought to be prosecuted? Do we actually know that?

General BLACK. Sir, we can say that each of the detainees that is currently at Guantanamo, they have all been the subject of a combatant status review tribunal that looked at the circumstances of their capture and all the facts and circumstances surrounding their background and has made a determination that they should be retained in custody.

So without specific cases and specific knowledge, I can't go any further than that.

Admiral MACDONALD. And, Congressman, that is exactly what the President set up with these task forces on January 22. One of them was to do just that, is to look at all of the detainees at Guantanamo and sort them—those that would be continued in detention because they continue to pose a threat to our national security, and those that have committed crimes such that they need to go before a commission.

Mr. LARSEN. Fair enough. Thank you.

The CHAIRMAN. I thank the gentleman.

The gentleman from Texas, Mr. Conaway.

Mr. CONAWAY. Thank you, Mr. Chairman, I appreciate that. Gentlemen, thank you for being with us today.

Admiral MacDonald, you have talked a couple of times—at least asserted—that the handling of classified information under the existing structure is flawed. Could you articulate for us something other than just that assertion, and also give us some examples of where prosecutors have not been able to introduce evidence that they would have been able to introduce under your scheme?

Admiral MACDONALD. Congressman, in talking to a number of the prosecutors, under the current scheme in the MCA, they are having to submit written declarations to the court, the military judges, and they are not able to take part in ex parte hearings that a Federal prosecutor can get under CIPA.

This has really, in their opinion, bogged down the process because the judge is asking them to put it in writing. The judge then has to review these written submissions, respond back. There is additional work that needs to be done. There is a lot of back-and-forth that has been going on.

Mr. CONAWAY. Okay. So it really is a timing issue as opposed to us not being able to make the decision you talked about earlier, that we either disclose sources and methods or we walk away from prosecution. That hasn't happened under this current scheme, it is just a matter of how much time it is taking to get from point A to point B; is that the gist?

Admiral MACDONALD. Yes, sir. They are saying it is a more efficient system under CIPA.

Mr. CONAWAY. But still protects the classified information completely.

Admiral MACDONALD. Yes, sir, it does.

Mr. CONAWAY. Just an editorial comment. Well, first off, is there a bright line on the definition of—and General Rives, you said cruel, inhuman and degrading treatment. Is there a spectacularly bright line for that definition?

General RIVES. No, there is not.

Mr. CONAWAY. Okay. So every court is going to have to decide for themselves.

General RIVES. Yes.

Mr. CONAWAY. Okay. Who sets the international standards you have been holding us accountable to? Each one of you have mentioned international standards for whatever. Who set those standards? Did we have a role in helping set those standards?

Admiral MACDONALD. Well, Congressman, I would say on the international criminal tribunals that we talked about, the United States has supported those tribunals and the rules that are in effect in those tribunals.

Mr. CONAWAY. So that is collectively? Every time you have mentioned international standards, that is the standard which you refer to?

Admiral MACDONALD. And then there are other standards that have come up through the law of war over the years.

Mr. CONAWAY. And did we as Americans participate in those developments?

Admiral MACDONALD. Yes, sir.

Mr. CONAWAY. Okay. Are there instances—are there other instances where we disagreed with those international standards because they don't believe—we don't believe they protect our interests properly, and made a conscious choice to do something different than those standards? Just think about that. If you get by with an answer, that is fine.

I am going to yield the rest of my time to my colleague from Virginia, Randy Forbes. But we ought to do what is right, what respects law, what is respectful for law and order and all those kinds of things, just because that is the right way to do it.

I am unpersuaded, each time each one of you said it, that we only do that or that one of the reasons to do that is because we want to expect our soldiers, and sailors, and marines and airmen to be treated that way from other countries. I can't imagine an-

other country is going to raise their standards because of that. We ought to do it just because it is the right thing to do.

With that, Mr. Chairman, I yield back to—I yield the rest of my time to Mr. Forbes.

Mr. FORBES. General Black, you mentioned in response to Congressman Coffman that we need to apply the law and we need to do that evenly. But I just want to point out, that is what we are doing right now. We are writing the law. And whatever we write is what we are going to be applying. That is why Congressman Coffman asked that question, because we need to write it correctly.

Also, the task force. Admiral MacDonald mentioned that the Justice Department has been looking at these tribunals. There was a memorandum on May 4 where, as you know, the Assistant Attorney General said that there was a serious risk that Federal courts would adopt a constitutional due process approach when evaluating military commission tribunals if they were brought to the United States. And the *Zabadas* case—as all of you, I know, can quote backwards and forwards—says it is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographical borders, but once an alien enters the country the legal circumstances change.

I would ask if there is not a single one of you that, if you were defending one of these detainees, wouldn't use this as a precedent, if they were here, to say full constitutional protections applied once they entered U.S. soil.

And also if you were prosecuting a case outside of U.S. soil, if you wouldn't use this as precedent to simply say, no, there is a difference because look at this case. And my good friend, Mr. Larsen, raised the *Boumediene* case, but that only applied to habeas corpus. It didn't apply to all of the others.

If any of you disagree with what I have said, please respond to that. I only have got a few seconds.

I take that as an agreement, and I yield back my time, Mr. Chairman.

The CHAIRMAN. That is one way to get an answer.

Dr. SNYDER. Mr. Chairman, I would like to hear them amplify on—I mean, that is a complicated, fairly hurried question there. I would suspect that they——

Mr. FORBES. Mr. Chairman, I didn't want to cut them off, but I only had——

The CHAIRMAN. Dr. Snyder, we don't have time for that. Thank you.

Would you like to comment further?

Mr. FORBES. No, Mr. Chairman.

The CHAIRMAN. Mr. Murphy, you are next on my list. Have you not claimed your time? Go ahead.

Mr. MURPHY OF PENNSYLVANIA. Thank you, Mr. Chairman. Mr. Forbes, I would just like to say there is no one on this side of the aisle that I am aware of, or in this Administration, that is making the argument that detainees captured on the battlefield, whether it is in Iraq or Afghanistan, should get the same constitutional rights as Americans.

Now, if you were going to get tried in a commission, a military commission under the MCA, and the MCA that is going to be revised by this Congress of the United States and signed into law, hopefully, by the President as soon as possible, then you get some rights under international law, which we did sign in past Administrations. But if you are an American, you get a whole heck of a lot more constitutional rights.

But I would just say that one of those constitutional rights that we are given on that as an argument is that we are giving them the right to counsel.

Mr. FORBES. Would the gentleman yield?

Mr. MURPHY OF PENNSYLVANIA. I would yield to you.

Mr. FORBES. And I would tell my good friend that I am not suggesting that you would argue that. What I am saying is that the current Attorney General's Office has warned the commissions, if you have the commissions here—the task force that is looking at a commission—if you bring the commissions here, there is a serious risk that, regardless of what any of us want, those full constitutional protections could be applied.

And if you look at the *Zabadas* case, it certainly makes a big distinction when you bring them to U.S. soil versus keeping them outside. And my only purpose was to say we may have good intentions not to do it, but once we bring them here, they may be out of our hands. And I yield back.

Mr. MURPHY OF PENNSYLVANIA. And I will take back my time.

I think that the legal interpretation as I read it, in reading the same case and the same opinion by the Attorney General of the United States, is saying that they are granted—if you do bring them under the soil of our country, that they would get habeas corpus, which is not the same as having the whole spectrum of constitutional rights. And so, you know, we could agree to probably disagree on that point.

And I would also like to mention, you know, Mr. Conaway, that these are previous Administrations that we signed under the Geneva and Hague Conventions and really stood on what the values of the United States of America is. And we have disagreed with our colleagues across the oceans over in Europe. We did not sign an International Criminal Court because it basically said you won't defer to our courts or our courts martial. And that if we are going to have a court martial, we want to try our soldiers for committing crimes even, if they are overseas, and we don't want to defer to the ICC, the International Criminal Court.

So there are times when we disagree with our allies across the river, and that is a healthy debate. But they respect our opinion because they actually respect what we get done in military justice via the UCMJ. So I just want to make sure that we are making these distinctions.

And I would also like to say to my colleague, Mr. Coffman—and, sir, I do absolutely respect your service. I would just say that there is no one on this side of the aisle that is trying to get our soldiers in the battlefield, these American heroes that are keeping our families safe in Iraq and Afghanistan, that are trying to make them cops, that are trying to say that they get Miranda rights, or they get an attorney on the battlefield or we have to—no one is saying

that. But we are saying that they should get a fair shake in a sense that we just can't capture hundreds of people, wherever they are, and just say we are going to lock you up in Guantanamo and throw away the key.

Mr. CONAWAY. Will the gentleman yield for a comment?

Mr. MURPHY OF PENNSYLVANIA. Absolutely, Mr. Conaway.

Mr. CONAWAY. The Global Initiative is in fact attempting to Mirandize folks across.

Mr. MURPHY OF PENNSYLVANIA. Mr. Conaway, we argue—we both serve on the Intelligence Committee, we have had this argument. I would say that that has been radically blown out of——

Mr. CONAWAY. I am just commenting. You said they weren't doing that, and this Administration is doing that.

Mr. MURPHY OF PENNSYLVANIA. Well, I would say that. And Mr. Conaway, that we have made it clear that that is not the intent. And that is not my intent, and that will not happen as long as I am breathing on this Earth, that will not happen. With the best of my ability; I am not the President of the United States. So I can't say. And I will yeild back.

Mr. CONAWAY. Are you a dictator? I am not sure you have the authority to make that statement.

Mr. MURPHY OF PENNSYLVANIA. Well now—all I am saying is that we need to put this in proper perspective. You know we are losing—we are doing our best to earn hearts and minds and capture and kill al Qaeda wherever they are roaming on this Earth, and we need to continue to do so. But that does not mean, and no one is suggesting here that that means we are going to start reading them Miranda rights and that means that we are going to give them an attorney when we capture them when we are fighting in Kabul—when we are fighting—.

You can snicker and you can laugh, but that is not what we are asking for. What we are asking for is proper justice under what we have asked other countries to do in the Geneva and Hague Conventions. And these servants, these men who wear the cloth of our country, are trying to do the best that they can and advise us.

And so I do want to salute all of you. I know this is not easy. I know, frankly, when I was in Baghdad and we lost soldiers, I wanted to go out and ring some people by their neck and kill them myself with my own hands. And, frankly, I still want to do that. But at the end of the day—and we have men and women that still do that.

But we need to make sure that when we bring them to a court, whether it is a criminal court, a military commission or—and again, we are asking and arguing that it should be a military commission for these folks, not an Article III, meaning the same courts that we use in America. A commission, a military commission court. That there are some standards that we still must abide by, that we agree to, and we must have fidelity to those commitments.

And I yield back the balance of my time.

The CHAIRMAN. I thank the gentleman for his comments.

It appears that Ms. Fallin is the last one on the list. Please proceed.

Ms. FALLIN. Thank you, Mr. Chairman. This discussion is very interesting and very passionate, too.

When questioned by the Senate Repub—Senators at the Senate Armed Services Committee at a July 7 hearing, Administration officials said they believe detainees had some constitutional rights in addition to the habeas corpus, but could not articulate which ones or why they deserve constitutional protections. And since we are already talking about this, I was just curious if you could expand upon that particular comment back from the Senate hearings on July 7.

Admiral MACDONALD. Well, ma'am, I was at the hearing, and I would disagree with that. Again, I think it depends on what model you are using to analyze what rights are due. We would look to the law of war. And we believe that under the law of war, the process that is due is contained in the Military Commissions Act as improved by the SASC language in there. I think the Administration disagrees with that or they believe that the law is unsettled on that and that there is, as was pointed out, there is risk associated with bringing them here.

General BLACK. I might add, ma'am, that the 2006 Military Commissions Act and the Senate bill that you are currently considering both contain rights and privileges that are almost identical—indeed, are identical—to privileges and rights that are contained in our Constitution: the right to counsel, the right to confrontation, et cetera.

Ms. FALLIN. So you believe the protections are there.

General BLACK. There are some. There were built in.

Ms. FALLIN. Are some.

General BLACK. That is correct.

Ms. FALLIN. Do they need to be refined?

Admiral MACDONALD. Well, as we have testified, and as you can see in our written statements, we do recommend in a couple of areas that the Senate bill be improved. But at the end of the day, with those improvements we believe that it complies with the law of war.

General RIVES. And I don't believe there are any additional protections needed to make the commissions process comply with the United States Constitution. I believe it does comply with the Constitution and with international law already. We are talking about some enhancements that will help the fairness of the process.

Ms. FALLIN. Mr. Chairman, I have one other question, if I can.

Generals Black and Walker, back in 2006, you testified in front of this committee—that we were putting the MCA together for the first time—and you testified that you felt the standards for hearsay evidence were consistent with what is accepted in the international legal community for war crime trials, citing specifically the International Criminal Tribunal of Yugoslavia (ICTY).

Have you changed your opinion? And if so, why?

General BLACK. I have not, ma'am. The rules that we are putting together—that we put together in the 2006 Military Commissions Act and the rules that appear in the current bill meet or exceed the standards that are applied in the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda. So I have not changed my views in that regard.

General WALKER. I also, ma'am, have not changed my views. I think we meet the standards that were established—in ICTY, and

other law of war where we have—if there has been a change, we have noted some disagreement with some of the proposed changes to those rules in the 2006 Military Commissions Act.

Ms. FALLIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Ms. Fallin.

It appears no one else wishes to interrogate.

I wish to thank the panel for their expertise and for their service.

Reference was made a moment ago about the international rule of law, and I suppose basically that is a reference to the Geneva Convention and the determinations as it applies. That is why we are here. We are at war. If we were not at war today, we would not have this hearing.

And it is important that those of us that look at this understand—and I know that we do. And any comments to the contrary just don't hold water. We are at war. That is why we are taking the time to do it right.

And as I said before—and I know I look at it like a country prosecutor that I was—when one is convicted by any jurisdiction, including but not limited to the tribunals, you want it to stick, you want it done right. You don't want it to be reversed on a procedural error or a substantive error.

And that is why we are here, to help prosecute in our own way the effort via the young men and young women who wear the uniform and who are protecting us so valiantly.

Gentlemen, thank you for your testimony. I thank the committee. The committee is adjourned.

[Whereupon, at 4:00 p.m., the committee was adjourned.]

A P P E N D I X

JULY 16, 2009

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 16, 2009

STATEMENT BY

LIEUTENANT GENERAL SCOTT C. BLACK
THE JUDGE ADVOCATE GENERAL OF THE UNITED STATES ARMY

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

PROSECUTING LAW OF WAR VIOLATIONS:
REFORMING THE MILITARY COMMISSIONS ACT OF 2006

FIRST SESSION, 111TH CONGRESS

JULY 16, 2009

NOT FOR PUBLICATION
UNTIL RELEASED
BY THE COMMITTEE
ON ARMED SERVICES

Introduction

Thank you, Mr. Chairman, Ranking Member McKeon and members of the committee. I'd like to thank you for the opportunity to appear here today and for the committee's consideration of these important issues.

I join in endorsing and encouraging continued Congressional and Administration efforts to reform military commissions for the trial of unprivileged belligerents accused of violations of the law of war during our country's ongoing conflict against those who planned and conducted the attacks against us on September 11, 2001 as well as those detained during the conduct of associated military and intelligence operations.

Our responsibility and interest in the enforcement of the law of war requires the viability and availability of military commissions for the legitimate prosecution of alleged war crimes. I am confident that this reform effort will result in a system that meets the standards for military commissions described by the Supreme Court in Hamdan v. Rumsfeld. I am similarly confident that such reformed military commissions will satisfy any outstanding concerns relative to our demand for a system characterized by our proper devotion to standards of due process recognized under the law of war, our commitment to ensuring fair treatment of the accused, and reliable results in any commission proceeding.

I offer the following comments in relation to a few specific proposals found in the Senate version of the NDAA:

First, I understand that the Administration favors adoption of a voluntariness standard on the admissibility of statements into evidence. I acknowledge and respect the prerogative of the Administration to resolve policy on all such matters but maintain my

recommendation against adoption of a voluntariness standard and in favor of a reliability standard where voluntariness is a relevant factor in resolving whether statements warrant admission at commission trial.

A domestic criminal law voluntariness standard of admissibility imposes an unrealistic burden upon our Soldiers in the field conducting lawful operations and will likely result in the exclusion of relevant and reliable statements collected during the course of military operations. Battlefield conditions neither warrant nor permit the scrupulous pursuit of Constitutional standards applicable to law enforcement activities. Any requirement that the United States establish the voluntariness of statements during the course of operations that are necessarily and legitimately coercive and intimidating by nature will likely frustrate what would otherwise be legitimate and necessary prosecutions at military commissions. I will continue to work with the Administration and Congress to fashion a standard for admissibility of evidence that is reliable and takes voluntariness into account, along with the exigencies of military operations, as a part of a "totality of the circumstances" analysis.

Second, I support the Administration's proposal to adopt the most recent developments in Federal practice under the Classified Information Procedures Act for application to trial by military commission in this context. The Senate proposal generally accords with rules applied by CIPA and Military Rule of Evidence 505 but fails to address impediments to the fair, efficient, and effective adjudication of classified information issues that frequently arise in such trials. Incorporation of the more sophisticated methods employed by those most experienced with the issue, borne of hard

experience in a number of cases, will ensure the best protection of classified information while conforming to the demands of a fair trial at military commissions.

Third, I disagree with the Senate's proposal to establish the Court of Appeals for the Armed Forces as an intermediate court of appeals for those convicted by military commission. I favor, instead, the Administration proposal to modify the responsibility and authority of the Court of Military Commission Review by infusing that court with the same responsibility and authority of our service Courts of Criminal Appeals under Article 66 of the Uniform Code of Military Justice (UCMJ).

The nature of this armed conflict does not require departure from the uniformity principle addressed by the Supreme Court in Hamdan, as applied to appellate review, but, rather, warrants adoption of an appellate system that more closely resembles that mandated by the UCMJ. The only departure from that system warranted by the history of military commissions and present circumstances is designation of a Federal Court of Appeals and the Supreme Court for ultimate civilian appellate review.

I caution against encumbering the Court of Appeals of the Armed Forces (CAAF) with a separate set of responsibilities in relation to review of military commissions in addition to those it has in relation to review of courts-martial, namely the need to review convictions for factual as well as legal sufficiency. CAAF's role and responsibility under the UCMJ is well-defined. It should not be confused with additional and significantly different duties when such are unnecessary for the proper review of commissions. It is better to rely on an intermediate court comprised of military judges already familiar with such review to serve as an additional check upon unreliable results at commission before resort to a traditional legal review in higher appellate courts.

And with that, I look forward to your questions, sir.

United States Army

Lieutenant General SCOTT C. BLACK

The Judge Advocate General
United States Army
2200 Army Pentagon 2B514
Washington, DC 20310-2200
Since: October 2005

SOURCE OF COMMISSIONED SERVICE ROTC

EDUCATIONAL DEGREES
California Polytechnic State University – BA – Political Science
California Western School of Law – JD – General Law
National Defense University – MS – National Resource Strategy

MILITARY SCHOOLS ATTENDED
Armor Officer Basic Course
Judge Advocate General Officer Basic and Graduate Courses
United States Army Command and General Staff College
Industrial College of the Armed Forces

FOREIGN LANGUAGE(S) None recorded

PROMOTIONS	DATE OF APPOINTMENT
2LT	5 Jun 74
1LT	5 Jun 76
CPT	8 Aug 78
MAJ	1 Jun 86
LTC	1 Aug 92
COL	1 May 97
BG	1 Jan 02
MG	1 Oct 05
LTG	8 Dec 08

FROM	TO	ASSIGNMENT
Oct 74	Feb 75	Training Officer, A Company, 4th Battalion, 3d Basic Combat Training Brigade, Fort Ord, California
Feb 75	Mar 76	Executive Officer and Training Officer, C Company, 2d Battalion, 3d Basic Combat Training Brigade, Fort Ord, California
Mar 76	May 77	Assistant S-1, 2d Brigade, 7th Infantry Division, Fort Ord, California
Aug 77	Jul 80	Student, California Western School of Law, San Diego California
Aug 80	Oct 80	Student, Judge Advocate General Officer Basic Course, Charlottesville, Virginia
Oct 80	Oct 81	Chief, Legal Assistance Branch, United States Army Air Defense Artillery Center, Fort Bliss, Texas
Oct 81	Oct 83	Trial Counsel, later Chief, Criminal Law Branch, United States Army Air Defense Artillery Center, Fort Bliss, Texas
Nov 83	Jul 84	Contracts Attorney, Civil and Administrative Law Branch, United States Army Air Defense Artillery Center, Fort Bliss, Texas

LTG Black, Scott C.

Aug 84	May 85	Student, Judge Advocate Officer Graduate Course, Charlottesville, Virginia
Jun 85	Jan 89	General Law Attorney, Office of The Judge Advocate General of the Army, Washington, DC
Feb 89	Jul 89	Assistant Counsel to the President, White House, Washington, DC
Jul 89	Jun 90	Student, United States Army Command and General Staff College, Fort Leavenworth, Kansas
Jun 90	Mar 93	Deputy Staff Judge Advocate, 7th Infantry Division (Light), Fort Ord, California
Mar 93	Jun 94	Chief, Military and Civil Law Division, Office of the Staff Judge Advocate, United States Army Europe and Seventh Army, Germany
Jun 94	Jul 96	Staff Judge Advocate, 3d Infantry Division, later redesignated 1st Infantry Division, United States Army Europe and Seventh Army, Germany
Jul 96	Jul 98	Legislative Counsel, later Chief, Investigations and Legislative Division, Office of Legislative Liaison, Office of the Secretary of the Army, Washington, DC
Aug 98	Jun 99	Student, Industrial College of the Armed Forces, Fort Lesley J. McNair, Washington, DC
Jun 99	May 00	Chief, Personnel, Plans and Training Office, Office of The Judge Advocate General, Washington, DC
Jun 00	Jul 01	Staff Judge Advocate, V Corps, United States Army Europe and Seventh Army, Germany
Aug 01	Jul 03	Special Assistant to the Assistant Judge Advocate General for Military Law and Operations, later Assistant Judge Advocate General for Military Law and Operations, United States Army, Rosslyn, Virginia
Jul 03	Aug 05	Commander/Commandant, United States Army Judge Advocate General's Legal Center and School, Charlottesville, Virginia
Oct 05	Present	The Judge Advocate General, United States Army , Washington, DC

SUMMARY OF JOINT ASSIGNMENTS: Joint duty tour requirement waived due to general officer promotion selection as a Professional Branch officer.

US DECORATIONS AND BADGES
Legion of Merit (with Oak Leaf Cluster)
Meritorious Service Medal (with 4 Oak Leaf Clusters)
Army Commendation Medal (with Oak Leaf Cluster)
Army Achievement Medal (with Oak Leaf Cluster)
Parachutist Badge
Ranger Tab
Army Staff Identification Badge

NOT FOR PUBLICATION UNTIL
RELEASED BY THE HOUSE
ARMED SERVICES COMMITTEE

STATEMENT OF

VICE ADMIRAL BRUCE MacDONALD, JAGC, USN

JUDGE ADVOCATE GENERAL OF THE NAVY

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

16 JULY 2009

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

Chairman Skelton, Ranking Member McKeon and Members of the Committee, thank you very much for providing me with the opportunity to testify regarding my personal legal opinion on the subject of military commissions. My testimony today is neither the opinion of the Department of Defense or the Administration.

In 2006, Congress enacted a comprehensive framework for military commissions. The Military Commissions Act (MCA) established the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence, and prescribed substantive offenses. It used the Uniform Code of Military Justice as a model for the commissions' process. The Act also provided the Secretary of Defense with the authority to promulgate rules to be used in military commissions. The MCA and the rules currently in effect provide an accused with critical legal protections, which include:

- The right against self incrimination, the right to compulsory process and a reasonable opportunity to obtain witnesses and evidence, including exculpatory evidence.
- The right to be present during all sessions of trial when evidence is to be offered, and the right to confront witnesses.
- The right to self representation and the right to be represented by detailed military counsel, the right to be represented by military counsel of the accused's own selection if they are currently assigned to the Office of Military Commissions and reasonably available, and the right to civilian counsel at the accused's expense.

- The right to appellate review.
- Presumption of innocence, protection against double jeopardy, and the right to require the government to prove its case beyond a reasonable doubt.
- Protection from admission of statements obtained by torture or through the use of cruel, inhuman or degrading treatment, no matter when the statement was obtained.
- The right to equal treatment of all parties when hearsay evidence is offered, and a requirement that the proponent of the evidence establish its reliability.
- Recognition and reliance upon an independent trial judiciary that has been the hallmark of military trials under the UCMJ.

Despite these protections, some shortcomings remain. These include:

- Classified materials are handled under guidelines that have no civilian or court-martial counterpart. The lack of precedent has created confusion over the authority to hold *ex parte* hearings, and has led to inefficient litigation regarding discovery and protective orders.
- The admissibility of hearsay evidence is too broad.
- There is no requirement for the prosecution to disclose evidence that might mitigate a sentence or impeach the credibility of a government witness.
- Appellate review is not sufficiently robust.

On July 7th, I was called to testify on the military commissions provisions of Senate Bill 1390. The military commissions provisions under consideration by the Senate correct many of these shortcomings. There are, however, two areas in which our practitioners would benefit from some additional clarity.

- Section 949d under the Senate proposal provides for the use of rules of evidence in trials by general courts-martial in the handling of classified evidence. This is consistent with our overall desire to use those procedures found within the UCMJ and the Manual for Courts-Martial whenever possible. However, experience has shown that practitioners struggle with a very complex and unclear rule within the Military Rules of Evidence. The military rules do not have a robust source of informative or persuasive case law. Frankly, prosecutions using Military Rule of Evidence 505 are rare. In developing the rules for the handling of classified material during a military commission, it would be more prudent to rely upon the Classified Information Procedures Act (CIPA) used in Article III courts as a starting point. The use of CIPA as a touchstone for drafting provisions for use in the litigation of classified evidence in military commissions, complete with the definitional guidance that has developed over more than 20 years of jurisprudence in federal district courts, would provide practitioners with additional clarity in the area of classified evidence.

- Section 948r under the Senate proposal provides a test for determining the admissibility of allegedly coerced statements. I recommend that the provision include greater particularity. I recommend a list of considerations that the military judge should use in evaluating the reliability of those statements. Those considerations should include the degree to which the statement is corroborated, the indicia of reliability in the statement itself, and whether and to what degree the will of the person making the statement was overborne. The rule should also distinguish between intelligence and law enforcement interrogations. When conducted for the purpose of intelligence in the proximity of the battlefield, the rule should clearly provide for admissibility where the actions of the person taking the statement were in accordance with the law of war. But when interrogations are conducted for the purpose of possible prosecution or not in the proximity to the battlefield, voluntariness is an appropriate standard for admissibility.

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

United States Navy
Biography

Vice Admiral Bruce MacDonald
Judge Advocate Generals Corps, United States Navy Judge Advocate General

Vice Admiral Bruce MacDonald was born in 1956 in Cincinnati, Ohio. He graduated from the College of the Holy Cross in 1978 with a Bachelor of Arts degree in English, and entered the Navy in May of that year.

MacDonald was commissioned an ensign in the unrestricted line through the Naval Reserve Officer Training Corps. Following the normal surface warfare pipeline, he reported to the USS *Hepburn* (FF 1055) in October 1979, where he served as the main propulsion assistant and navigator. After a two-year tour at Fleet Combat Training Center, Pacific, where he served as intermediate combat systems team training and advanced multi-threat team training course director, he was selected for the Law Education Program in 1984. He received his degree of Juris Doctor from California Western School of Law in 1987.

In 1987, MacDonald reported to Naval Legal Service Office, San Diego, where he served as senior defense counsel, trial counsel, and medical care recovery act claims officer. In 1990, he reported aboard USS *Independence* (CV 62) as the command judge advocate. After receiving a Master of Laws degree from Harvard Law School in Cambridge, Mass., in 1992, he was transferred to Seoul, Korea, where he served as chief, Operational Law Division, on the staffs of United Nations Command, Combined Forces Command and United States Forces, Korea. He also served as staff judge advocate on the staff of United States Naval Forces, Korea.

In August 1994, MacDonald reported aboard Naval Legal Service Office Northwest as its executive officer. In November 1996, he became the officer in charge of Trial Service Office West Detachment, Bremerton, Wash. In July 1997, he reported to Commander 7th Fleet in Yokosuka, Japan, as the fleet judge advocate. MacDonald assumed command of Naval Legal Service Office, Northwest, in August 1999, serving as commanding officer until June 2002. He was assigned to the Pentagon as the special counsel to the Chief of Naval Operations from June 2002 through October 2004. In November 2004, MacDonald became the deputy judge advocate general and commander, Naval Legal Service Command. In July 2006, MacDonald assumed his current position as judge advocate general of the Navy.

MacDonald is admitted to practice before the courts of the State of California and the United States District Court for the Southern District of California. His military decorations include the Navy Distinguished Service Medal, the Legion of Merit with two Gold Stars, the Defense Meritorious Service Medal, the Navy Meritorious Service Medal with Gold Star, the Navy Commendation Medal with Gold Star and the Navy Achievement Medal with Gold Star. He and his wife have one daughter.

Updated: 6 March 2009

DEPARTMENT OF THE AIR FORCE

PRESENTATION TO THE
COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

SUBJECT: MILITARY COMMISSIONS

STATEMENT OF: LIEUTENANT GENERAL JACK L. RIVES
THE JUDGE ADVOCATE GENERAL
UNITED STATES AIR FORCE

JULY 16, 2009

NOT FOR PUBLICATION UNTIL RELEASED
BY THE COMMITTEE ON ARMED SERVICES
UNITED STATES HOUSE OF REPRESENTATIVES

Chairman Skelton, Ranking Member McKeon, members of the Armed Services Committee, good afternoon and thank you for this opportunity to testify today on the subject of military commissions. Before I begin, I would like to emphasize that the views expressed in my testimony are my own and do not represent the views of the Department of Defense or the Administration.

Military commissions have a long history in this country as a mechanism to address possible violations of the law of war. Military commissions were used extensively during and after World War II, and they were again called upon in the aftermath of the September 11, 2001 attacks. After action by the Executive and review by the Supreme Court, the Congress acted in 2006 to pass the Military Commissions Act (MCA), providing the President statutory authority to establish military commissions to try traditional offenses as codified in the MCA. The effort to make military commissions more fair and credible enhances national security by providing effective alternatives to try international terrorists who violate the law of war.

Periodic review of the military commissions legislation and procedures is vital to an effective and fair commission process. As you are aware, the Department of Defense has been participating in a review of military commissions as directed by the President. We have been involved in that undertaking. The review led to the development of procedural changes that did not require revisions to the statute.

As required by the MCA, the Secretary of Defense notified the Congress in May of proposed changes to the Manual for Military Commissions affecting the

procedures used by military commissions. Those amendments will improve the military commissions process. As a result of the changes:

- Statements obtained using interrogation methods that constitute cruel, inhuman and degrading treatment cannot be admitted as evidence at a trial.
- The burden of proof on admissibility of hearsay will shift to the party that offers it. The burden will no longer be on the party that objects to hearsay to disprove its reliability.
- The accused will have greater latitude in selecting defense counsel.
- In situations where the accused does not testify but offers his own prior hearsay statements, the military judge will no longer be required to instruct the members to consider the accused's decision not to be cross-examined on the hearsay statements and that the statements are not sworn. Any such instruction would now be left to the discretion of the military judge.
- Military judges may establish the jurisdiction of their own courts. Under prior practice, jurisdiction for a military commission to hear a case was established by a prior Combatant Status Review Tribunal.

Further review is ongoing within the Administration. Changes to the Military Commissions Act of 2006 have also been advanced by the Senate Armed Services Committee. Some of the recommendations include making the changes listed above statutory. Additional changes are also appropriate; I highlight two for your consideration.

Reforms in the rules for handling classified information would have significant impact. Procedures that follow the Classified Information Procedures

Act (CIPA) would, with appropriate modification, balance the Government's need to protect classified information with the defendant's interests. The substantial body of CIPA case law that has developed over the years would provide valuable guidance to lawyers and the commissions.

Expanding the scope of appellate review to include review of factual matters, as the Service Courts of Criminal Appeals enjoy under Article 66 of the UCMJ, is desirable. Retention of the current Court of Military Commissions Review, comprised in whole or part of military appellate judges experienced in reviewing cases for both factual and legal sufficiency, is logical and efficient.

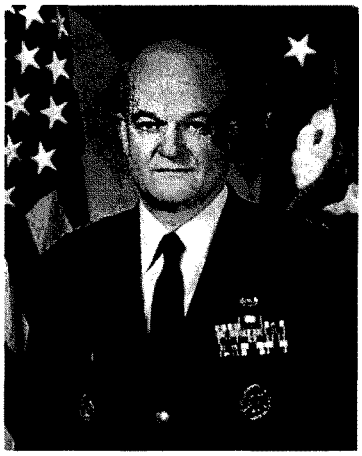
I encourage you to closely consider these revisions and stand ready to assist as appropriate in your efforts.

Again, thank you for the opportunity to testify and I look forward to answering your questions.

BIOGRAPHY

UNITED STATES AIR FORCE

LIEUTENANT GENERAL JACK L. RIVES



Lt. Gen. Jack L. Rives is The Judge Advocate General (TJAG), Headquarters U.S. Air Force, Washington, D.C. In that capacity, General Rives serves as the Legal Adviser to the Secretary of the Air Force and all officers and agencies of the Department of the Air Force. He directs all judge advocates in the performance of their duties and is responsible for the professional oversight of more than 2,200 judge advocates, 350 civilian attorneys, 1,400 enlisted paralegals and 500 civilians in the Total Force Judge Advocate General's Corps worldwide. General Rives oversees military justice, operational and international law, and civil law functions at every level of command.

General Rives received his commission through the Air Force ROTC program in 1974. He completed his legal education at the University of Georgia School of Law in Athens before entering active duty in 1977. The general has served as a wing staff judge advocate; Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff; Commandant of the Air Force Judge Advocate General School; the first Chief of the Air Force Executive Issues Team; and as the Staff Judge Advocate at Headquarters Air Combat Command. Prior to assuming his current position, General Rives served as Deputy Judge Advocate General. In July 2008, he became the first TJAG to serve in the grade of lieutenant general.

EDUCATION

1974 Bachelor of Arts degree in political science, University of Georgia, Athens
1976 Juris Doctor degree, University of Georgia School of Law, Athens
1982 Squadron Officer School, by correspondence
1983 Air Command and Staff College, by correspondence
1985 National Security Management, by correspondence
1990 Air War College, by seminar
1993 Distinguished graduate, National War College, Fort Lesley J. McNair, Washington, D.C.

ASSIGNMENTS

1. January 1977 - June 1977, Assistant Staff Judge Advocate, Griffiss AFB, N.Y.
2. July 1977 - August 1978, Area Defense Counsel, Griffiss AFB, N.Y.
3. September 1978 - September 1979, Deputy Staff Judge Advocate, Kunsan Air Base, South Korea
4. October 1979 - June 1981, Assistant Staff Judge Advocate, Hellenikon AB, Greece
5. June 1981 - June 1983, Circuit Defense Counsel, Pacific Circuit, Clark AB, Philippines

6. July 1983 - June 1984, Judge Advocate Air Staff Training Officer, the Pentagon, Washington, D.C.
7. July 1984 - July 1986, Staff Judge Advocate, Plattsburgh AFB, N.Y.
8. July 1986 - April 1990, Chief, Officer Branch, Judge Advocate Professional Development Division, Office of the Judge Advocate General, the Pentagon, Washington, D.C.
9. May 1990 - August 1992, Appellate Judge, U.S. Air Force Court of Military Review, Bolling AFB, D.C.
10. August 1992 - June 1993, student, National War College, Fort Lesley J. McNair, Washington, D.C.
11. June 1993 - August 1995, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, the Pentagon, Washington, D.C.
12. August 1995 - March 1998, Commandant, Air Force Judge Advocate General School, Maxwell AFB, Ala.
13. March 1998 - February 2000, Chief, Air Force Executive Issues Team, Office of the Secretary of the Air Force, Washington, D.C.
14. February 2000 - February 2002, Staff Judge Advocate, Headquarters Air Combat Command, Langley AFB, Va.
15. February 2002 - February 2006, Deputy Judge Advocate General, Headquarters U.S. Air Force, Washington, D.C.
16. February 2006 - present, The Judge Advocate General, Headquarters U.S. Air Force, Washington, D.C.

SUMMARY OF JOINT ASSIGNMENTS
1. June 1993 - August 1995, Deputy Legal Counsel to the Chairman of the Joint Chiefs of Staff, the Pentagon, Washington, D.C., as a lieutenant colonel and colonel

MAJOR AWARDS AND DECORATIONS
Distinguished Service Medal
Defense Superior Service Medal
Legion of Merit with oak leaf cluster
Meritorious Service Medal with silver and bronze oak leaf clusters
Air Force Commendation Medal

EFFECTIVE DATES OF PROMOTION
Second Lieutenant June 12, 1974
Captain Jan. 25, 1977
Major Dec. 1, 1983
Lieutenant Colonel Aug. 1, 1989
Colonel May 1, 1994
Brigadier General April 1, 2000
Major General April 1, 2002
Lieutenant General July 23, 2008

(Current as of July 2009)

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

STATEMENT OF

BRIGADIER GENERAL JAMES C. WALKER, USMC

STAFF JUDGE ADVOCATE TO THE COMMANDANT OF THE MARINE CORPS

BEFORE THE

HOUSE ARMED SERVICES COMMITTEE

16 JULY 2009

NOT FOR PUBLICATION UNTIL
RELEASED BY THE
HOUSE ARMED SERVICES COMMITTEE

The views expressed in this statement are those of the witness and do not represent the views of the Department of Defense or the Administration.

Chairman Skelton, Ranking Member McKeon and Distinguished Members of the Armed Services Committee, good morning. I appreciate this opportunity to come before you and testify today regarding the military commission process. The military commission process, while not new in American military history, has evolved significantly over time, as society has evolved. Just as American notions of what is fair and just have changed in our Criminal Justice practice, so have American notions changed of what is fair and just in the conduct of military commissions in the prosecution of alleged unlawful enemy combatants, or as the current legislation would describe them, unprivileged enemy belligerents. When I came before this committee in September of 2006, we discussed the way forward in light of the Supreme Court's Opinion in *Hamdan v. Rumsfeld*. At that time, I stated that I supported the military commission process. My views have not changed. Then, I stated, that we needed to "strike the balance between individual due process and our national security interests, while maintaining our nation's flexibility in dealing with terrorists and unlawful enemy combatants." The process to achieve this end has proven challenging. I believe a number of the provisions in Senate Bill 1390 under consideration make great steps towards this end. Admirably, Senate Bill 1390 continues to recognize those "fundamental guarantees" the Supreme Court determined as "indispensable by civilized peoples," such as, the presumption of innocence, the right against self-incrimination, and the right to presence during one's trial.

As we have began to work through the commissions process, problem areas have been identified in the current Military Commissions Act.

Senate Bill 1390 of the proposed National Defense Authorization Act addresses many of these problems. Overall, I concur with most of the changes proposed, and believe those changes establish the correct framework to ensure those responsible for violations of the laws of war are brought to justice and receive a fair and impartial trial.

Specific Senate Bill 1390 provisions, to name a few, which I support, are as follows:

- I support the provision in the proposed legislation that allows an accused to select a military defense counsel, among counsel determined reasonably available. This provision balances fairly the need for an accused to select a counsel that he personally feels comfortable representing him, with the needs of military efficiency to ensure that any counsel selected be reasonably available to represent such an accused.

- I support the requirement that prosecutors disclose any exculpatory evidence to the defense that negates guilt, reduces the degree of guilt, tends to impeach the credibility of a government witness, or may mitigate the sentence imposed. This is a matter of fundamental fairness and basic justice. Commissions should be a search for the truth, and the requirement that the prosecution disclose that information within its knowledge that exculpates the accused is a necessary step in satisfying this goal.

- I support the requirement that the proponent of hearsay evidence establish its reliability and necessity before such evidence is admitted. I believe we must also always recognize the realities of the battlefield in any measure of reliability of evidence.

As a result, I believe overall the quality and content of Senate Bill 1390 is admirable in its attempts to remedy problem areas in the conduct of military commissions. We can only achieve justice by

maintaining those fundamental guarantees indispensible for civilized people. These guarantees are also the principles that have served our nation for well over 200 years. Thank you for the opportunity to express my views on the commission process and I look forward to answering your questions.

Brigadier General
James C. Walker
Staff Judge Advocate to the Commandant

BGen Walker was born on 1 July 1954 in Laurens, South Carolina. After graduation from Clemson University with honors in May 1976, he was commissioned through the PLC program. BGen Walker then enrolled in law school at the University of South Carolina, and received a Juris Doctorate degree with honors in May 1979.

BGen Walker reported for training at The Basic School, Quantico, Virginia in August 1979. After graduation in February 1980 he was ordered to MCAS, Beaufort, S.C. In June 1980 he attended the Lawyer's Course at Naval Justice School where he graduated first in his class. At Beaufort, BGen Walker served as a defense counsel, trial counsel, and legal assistance officer. He was promoted to Captain in February 1981.

In July 1982 BGen Walker was transferred to the Military Law Branch, Judge Advocate Division, HQMC. During this tour he chaired a national committee of the American Bar Association and graduated with honors from Georgetown University School of Law with a Master of Laws in Taxation.

In April 1985 BGen Walker was transferred to Marine Barracks, 8th and I, where he served three years as Adjutant for the oldest post in the Corps. After promotion to Major in 1988, he attended the U.S. Army Judge Advocate Advanced Course in Charlottesville, Virginia and earned a Master of Laws degree in military law.

In June 1989 BGen Walker was transferred to Okinawa, Japan. There he served as Officer in Charge of Legal Services Support Team, Camp Hansen. After one year on Okinawa he reported to MCAS, El Toro, California. From July 1990 until July 1992 he served as the Military Justice Officer, Deputy SJA, and finally as SJA for the 3rd Marine Aircraft Wing.

In July 1992 BGen Walker assumed command of Headquarters and Headquarters Squadron, MCAS, El Toro. He commanded the squadron until June 1994 when he was reassigned to Camp Pendleton where he served as Officer in Charge of the Legal Services Support Section. In June 1995 he was selected for top level school. After graduation as a distinguished graduate from the Naval War College in June 1996, BGen Walker reported to HQ USEUCOM where he served as the Operational Law Advisor until June 1998.

BGen Walker returned to Camp Pendleton to serve as SJA for I MEF from June 1998

until June 2000. In July 2000 he assumed command of Security Battalion, Marine Corps Base, Camp Pendleton and concurrently served as the Assistant Chief of Staff, Installation Security and Safety until June 2002. In July 2002 BGen Walker assumed duties at HQMC as Deputy SJA to the Commandant and Deputy Director of the Judge Advocate Division. BGen Walker next served as the Military Secretary/Executive Assistant to the Commandant from June 2003 until August 2006. He became Staff Judge Advocate to the Commandant and Director, Judge Advocate Division in August 2006.

BGen Walker's personal decorations include the Legion of Merit with two gold stars, Defense Meritorious Service Medal, Meritorious Service Medal with three gold stars, Navy Commendation Medal with gold star, and Navy Achievement Medal. He resides in Springfield, Virginia with his wife and son.

WITNESS RESPONSES TO QUESTIONS ASKED DURING THE HEARING

JULY 16, 2009

RESPONSE TO QUESTION SUBMITTED BY DR. SNYDER

General WALKER. Federal criminal law could apply to both of these scenarios.

(a) According to 18 USC § 7(3) (2009), the term special maritime and territorial jurisdiction of the United States, as used in Title 18, include "[a]ny lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof . . ."

(b) Article III of the Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, February 23, 1903 (TS 418, 6 Bevans 1120), states that "during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas . . ."

(c) These two provisions, read together, allow for the application of federal criminal law to crimes committed on GTMO. This proposition is supported by Federal case law. (*See, e.g., Gherebi v. Bush*, 352 F.3d 1278, 1289 (9th Cir. 2003) (persons committing crimes on GTMO are subject to trial in US courts); *United States v. Lee*, 906 F.2d 117, 117 (4th Cir. 1990) (Jamaican national charged under Federal law for crime committed on GTMO)).

(d) Accordingly, various sections in Chapter 51 (homicide) of Title 18 of the United States Code could apply to the murder scenario. E.g. 18 U.S.C § 1111(b) (making punishable murder in the first and second degrees "[w]ithin the special maritime and territorial jurisdiction of the United States"). The theft scenario could be prosecuted under 18 USC 661.

3. Related Scenarios. The questions raised by the HASC logically lead to permutations of the proposed scenarios, which should be addressed. For instance, if the detainee killed a U.S. service member at GTMO, federal criminal law could be used to prosecute the detainee, but there may be other statutes that provide jurisdiction.

(a) First, we address the Uniform Code of Military Justice (UCMJ). The UCMJ might apply to detainees through Article 2(a)(12) [10 U.S.C. § 802 (a)(12)] which, "[s]ubject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law," makes subject to the UCMJ "persons within an area leased by or otherwise reserves or acquired for the use of the United States which is under the control of the Secretary concerned and which is outside the United States and outside the Commonwealth of Puerto Rico, Guam, and the Virgin Islands."

(b) The Military Commissions Act (MCA) could possibly be used to prosecute detainees at GTMO for a murder, but not for a theft. The MCA addresses thefts on the battlefield in the sense of pillage, which does not seem to be a theft offense of the nature proposed.

(c) The MCA extends jurisdiction over "murder of a protected person" (10 U.S.C. § 950v(b)(1)), and "murder in violation of the law of war" (10 U.S.C. § 950v(b)(15)). A "protected person" is specifically defined in the MCA (10 U.S.C. § 950v(a)(2)), and could include another detainee because they are entitled to the protections of common article 3 of the Geneva Conventions.

4. Conclusion. If a detainee killed a fellow detainee, he could be charged pursuant to our federal criminal code (Title 18). If a detainee commits a theft, federal criminal law could apply depending upon the nature of the theft. The UCMJ and MCA might offer other avenues to prosecute. [See page 16.]

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JULY 16, 2009

QUESTIONS SUBMITTED BY MR. SKELTON

Mr. SKELTON. In your oral testimony, you referred to law-of-war precedent for prosecuting individuals who were minors when the law-of-war violations are alleged to have occurred. Please provide citations to this precedent and your assessment of its application to the applicable cases of detainees currently in Guantanamo Bay, Cuba.

Admiral MACDONALD. In the aftermath of the Second World War, both French and British military tribunals prosecuted and convicted minors for war crimes. (See Trial of Alois and Anna Bommer, United Nations War Crimes Commission, Law Reports of Trials of War Criminals (Vol. 9) 66 (1947)—three daughters convicted of war crimes committed when two of the girls were between 16 and 18, and one daughter was between 13 and 16), *see also* the Belsen Trial (United Nations War Crimes Commission, Law Reports of Trials of War Criminals (Vol. 2) (1947)—war crimes convictions of individuals who served in myriad capacities at Bergen-Belsen Concentration Camp under the age of 21).

In my view those cases are not directly relevant to the possible war crimes prosecutions of detainees at Guantanamo or to the possible war crimes prosecutions of persons detained in the future course of the ongoing armed conflict against al Qaeda and associated forces. Rather, I believe the practice of modern war crimes tribunals is more appropriate.

The International Criminal Court (ICC) allows for war crimes prosecutions under National systems of justice, of persons who were between the ages of 16 and 18 at the time of their alleged misconduct, but prohibits war crimes prosecutions in National systems of justice for persons who were aged 15 or below at the time of the alleged misconduct. The ICC itself does not have jurisdiction over persons under the age of 18.

The International Criminal Tribunals for Rwanda and the former Yugoslavia, do not have specific rules prohibiting or limiting war crimes prosecutions based on age. Rather, the age of an individual accused would be a factor to be considered in determining competence or capacity to stand trial and *mens rea* for any particular offense. To date, those tribunals have not included prosecutions of minors or persons who were under age 18 at the time of their alleged misconduct.

The Special Court for Sierra Leone, set up jointly by the Government of Sierra Leone and the United Nations, and which has to deal with a large number of "child soldiers" alleged to have committed war crimes, has jurisdiction over persons who were 15 years old (or older) at the time of their alleged misconduct. The Special Court has a well developed and separate justice process for juvenile offenders that incorporates safeguards to minimize the stigma that may attach to such persons as well as limits on punishments that may be imposed. Those safeguards generally track internationally recognized standards for the adjudication and rehabilitation of juvenile offenders.

Mr. SKELTON. In your written testimony, you seem to advocate for a two-track approach for determining the admissibility of allegedly coerced statements. If a statement was elicited for the purpose of intelligence in the proximity of the battlefield, the statement should be admitted if the interrogator was acting in accordance with the laws of war. If the statement was elicited for the purpose of a possible prosecution or was secured in a location that is not close to the battlefield, then you seem to argue for applying a totality of the circumstances analysis to determine the voluntariness of the statement and thus its admissibility. Is that correct? If so, are the considerations for the totality of the circumstances test which the Administration has proposed in response to the Senate language acceptable in your estimation? How would you define "proximate to the battlefield"? Would interrogations that occurred in a Theater Internment Facility fall within your second track—that is locations that are not proximate to the battlefield? How about at an internment facilities below the TIFs?

Admiral MACDONALD. I have consistently advocated a standard for determining the admissibility of statements of an accused that recognizes the distinction between a voluntariness standard that is appropriate in settings where the interrogation appears to be akin to a law enforcement interrogation, and a reliability standard that

is appropriate in settings where a Soldier or Marine is conducting an interrogation at the point of capture for purposes of security, safety and mission accomplishment. Suppression rules have generally developed in order to deter conduct which we as a society find unacceptable on the part of law enforcement personnel. On the field of battle, conducting an interrogation at the point of capture in a manner that conforms with the law of war is exactly what we expect of our servicemembers.

My goal has been to ensure that battlefield interrogations are treated differently from non-battlefield interrogations. But I have not been seeking a "carve-out" from voluntariness that exceeds the need for safety of our troops and mission accomplishment. I do, however, believe that an explicit statutory distinction should be made between statements that would be tested for voluntariness, and statements taken at the point of capture or in closely related combat engagements surrounding the point of capture. The latter would be tested for reliability, so long as admission of the statement would be in the interests of justice.

Where the line is drawn between statements that fall within one test and statements that fall within another is a question that is best left to the military judges who will have to apply the statute, and the question will ultimately depend on the facts surrounding a given case. Point of capture may be a place in a room, a room, a building, or a city block or more, depending on the circumstances.

I offer two draft proposals for your consideration. The first proposal is the one I recommend you use.

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

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

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

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

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

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

(d) OTHER USES PERMITTED.—Notwithstanding the above, where the statement was not obtained by use of torture or by cruel, inhuman, or degrading treatment, this section does not prohibit use of the statement to impeach by contradiction the in-court testimony of the accused or the use of such statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

I also support the following language, which has the support of the Administration, and the Army and Air Force Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff:

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

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

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

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

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

"(2) at least one of the following:

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

"(B) That the statement was voluntarily given.

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

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

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

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

Mr. SKELTON. In your oral testimony, you referred to law-of-war precedent for prosecuting individuals who were minors when the law-of-war violations are alleged to have occurred. Please provide citations to this precedent and your assessment of its application to the applicable cases of detainees currently in Guantanamo Bay, Cuba.

General RIVES. My testimony included the statement that, "The law of war does ***not*** speak to the issue of minors as combatants . . ." (emphasis added). Where the law of war speaks to the issue of age is in the Geneva Convention on the Protections of the Civilian Populations. Article 14 calls on States to create special safety protections for civilians, including children under the age of 15. In the 2002 Protocol to the Convention on the Rights of the Child, international law requires States to take special precautions when persons under the age of 18 are recruited into the States' armed forces.

There have been circumstances where national courts (in France and Great Britain) prosecuted minors in the years following World War II, but they involve circumstances not analogous or applicable to the cases of the detainees at Guantanamo.

More recent rules established by the United Nations tribunals for the Former Yugoslavia and Rwanda do not prohibit or limit prosecution of individuals based on age. Instead the age of the individual is a factor to consider in determining whether they have the capacity to stand trial. Tribunals established for Sierra Leone, as well as the International Criminal Court, establish age standards: minimum age of 15 or older for the Special Court for Sierra Leone; no trial permitted for persons 15 years old or younger when the offense allegedly occurred.

I believe the criteria established by the tribunals for the Former Yugoslavia and Rwanda are the right ones to adopt for the MCA. We should permit the convening authority and the commission judges to take into account an individual's age, but the facts of a given case should determine whether, and to what extent, a minor should be prosecuted for war crimes.

Mr. SKELTON. In your written testimonies, you argue against eliminating the current appellate court to military commissions, the Court of Military Commissions Review, as the SASC has proposed. Please elaborate as to why you believe that the

CMCR is better suited than the Court of Appeals for the Armed Forces to review these cases?

General RIVES. I fully support the appellate structure established by the Military Commissions Act of 2006. The current structure, with review by the Court of Military Commissions Review with further appeal to the U.S. Court of Appeals for the District of Columbia and the U.S. Supreme Court, provides comprehensive review by appellate military judges experienced in military law and operations, with additional review by the Federal appellate court with jurisdiction over related detainee litigation.

I also fully support broadening the scope of CMCR review to include factual sufficiency. This enhancement will align the scope of review with that employed by the Service Courts of Criminal Appeals and provide the additional assurance of thorough review of the underlying facts that supported the conviction.

I concur with the Administration on this point and recommend against the SASC proposal to expand CAAF jurisdiction. Retaining the CMCR, composed in whole or part of appellate military judges experienced in reviewing cases for both factual and legal sufficiency, as well as military operations, is logical and efficient.

Mr. SKELTON. In your written testimonies, you argue against eliminating the current appellate court to military commissions, the Court of Military Commissions Review, as the SASC has proposed. Please elaborate as to why you believe that the CMCR is better suited than the Court of Appeals for the Armed Forces to review these cases?

General BLACK. CAAF's role and responsibility under the UCMJ, to conduct a legal review of courts-martial, is well-defined. I do not believe it should be encumbered with a separate set of responsibilities or the requirement to conduct a factual as well as a legal review. The CMCR, on the other hand, can consist, in whole or in part, of appellate military judges schooled in the application of a factual sufficiency review and experienced in military law and operations. Therefore, the CMCR is best suited to conduct this first level appellate review of Military Commissions proceedings. I concur with the Administration on this point and recommend against the SASC proposal to expand CAAF jurisdiction under the circumstances.