AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

[H.A.S.C. No. 111–87]

REFORMING THE MILITARY COMMISSIONS ACT OF 2006 AND DETAINEE POLICY

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

HEARING HELD
JULY 24, 2009

U.S. GOVERNMENT PRINTING OFFICE

58–226 WASHINGTON : 2010

For sale by the Superintendent of Documents, U.S. Government Printing Office,
http://bookstore.gpo.gov. For more information, contact the GPO Customer Contact Center,
U.S. Government Printing Office. Phone 202–512–1800, or 866–512–1800 (toll-free). E-mail, gpo@custhelp.com.

HOUSE COMMITTEE ON ARMED SERVICES

ONE HUNDRED ELEVENTH CONGRESS

IKE SKELTON, Missouri, *Chairman*

JOHN SPRATT, South Carolina
SOLOMON P. ORTIZ, Texas
GENE TAYLOR, Mississippi
NEIL ABERCROMBIE, Hawaii
SILVESTRE REYES, Texas
VIC SNYDER, Arkansas
ADAM SMITH, Washington
LORETTA SANCHEZ, California
MIKE MCINTYRE, North Carolina
ROBERT A. BRADY, Pennsylvania
ROBERT ANDREWS, New Jersey
SUSAN A. DAVIS, California
JAMES R. LANGEVIN, Rhode Island
RICK LARSEN, Washington
JIM COOPER, Tennessee
JIM MARSHALL, Georgia
MADELEINE Z. BORDALLO, Guam
BRAD ELLSWORTH, Indiana
PATRICK J. MURPHY, Pennsylvania
HANK JOHNSON, Georgia
CAROL SHEA-PORTER, New Hampshire
JOE COURTNEY, Connecticut
DAVID LOEBSACK, Iowa
JOE SESTAK, Pennsylvania
GABRIELLE GIFFORDS, Arizona
NIKI TSONGAS, Massachusetts
GLENN NYE, Virginia
CHELLIE PINGREE, Maine
LARRY KISSELL, North Carolina
MARTIN HEINRICH, New Mexico
FRANK M. KRATOVIL, JR., Maryland
ERIC J.J. MASSA, New York
BOBBY BRIGHT, Alabama
SCOTT MURPHY, New York
DAN BOREN, Oklahoma

HOWARD P. "BUCK" MCKEON, California
ROSCOE G. BARTLETT, Maryland
MAC THORNBERRY, Texas
WALTER B. JONES, North Carolina
W. TODD AKIN, Missouri
J. RANDY FORBES, Virginia
JEFF MILLER, Florida
JOE WILSON, South Carolina
FRANK A. LOBIONDO, New Jersey
ROB BISHOP, Utah
MICHAEL TURNER, Ohio
JOHN KLINE, Minnesota
MIKE ROGERS, Alabama
TRENT FRANKS, Arizona
BILL SHUSTER, Pennsylvania
CATHY MCMORRIS RODGERS, Washington
K. MICHAEL CONAWAY, Texas
DOUG LAMBORN, Colorado
ROB WITTMAN, Virginia
MARY FALLIN, Oklahoma
DUNCAN HUNTER, California
JOHN C. FLEMING, Louisiana
MIKE COFFMAN, Colorado
THOMAS J. ROONEY, Florida
TODD RUSSELL PLATTS, Pennsylvania

ERIN C. CONATON, *Staff Director*
PAUL OOSTBURG SANZ, *General Counsel*
ROGER ZAKHEIM, *Professional Staff Member*
CATERINA DUTTO, *Staff Assistant*

CONTENTS

CHRONOLOGICAL LIST OF HEARINGS

2009

Page

HEARING:

Friday, July 24, 2009, Reforming the Military Commissions Act of 2006 and Detainee Policy 1

APPENDIX:

Friday, July 24, 2009 49

FRIDAY, JULY 24, 2009

REFORMING THE MILITARY COMMISSIONS ACT OF 2006 AND DETAINEE POLICY

STATEMENTS PRESENTED BY MEMBERS OF CONGRESS

McKeon, Hon. Howard P. "Buck," a Representative from California, Ranking Member, Committee on Armed Services 2

Skelton, Hon. Ike, a Representative from Missouri, Chairman, Committee on Armed Services 1

WITNESSES

Johnson, Hon. Jeh Charles, General Counsel, U.S. Department of Defense 4

Kris, Hon. David, Assistant Attorney General, U.S. Department of Justice 5

APPENDIX

PREPARED STATEMENTS:

Johnson, Hon. Jeh Charles 53

Kris, Hon. David 58

DOCUMENTS SUBMITTED FOR THE RECORD:

July 21, 2009, letters to Mr. Skelton from the Department of Defense and the Department of Justice 67

Department of Defense Military Commissions list submitted by Mr. Forbes 70

WITNESS RESPONSES TO QUESTIONS ASKED DURING THE HEARING:

[There were no Questions submitted during the hearing.]

QUESTIONS SUBMITTED BY MEMBERS POST HEARING:

Mr. McKeon 77

Mr. Skelton 75

REFORMING THE MILITARY COMMISSIONS ACT OF 2006 AND DETAINEE POLICY

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Friday, July 24, 2009.

The committee met, pursuant to call, at 10:05 a.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. Today's hearing will continue the constructive conversation that we began last week with the top military attorneys of the services on reforming the Military Commissions Act of 2006. I look forward to hearing the perspectives of today's distinguished witnesses on what amendments are needed to ensure that we finally end up with a system that can withstand judicial scrutiny and ensure that convictions stick. We certainly welcome our witnesses' thoughts on what legislative changes are most necessary and how the existing law can be improved.

In addition to military commissions reforms, today's hearing addresses other key detainee policy issues such as the closure of the detention facilities at Guantanamo Bay, Cuba, and the law-of-war detention. We initially had hoped that a major report addressing these critical issues would have been released earlier this week, as required by the President's Executive orders from the beginning of the year.

Instead the Inter-Agency Task Force that was established to produce such a report received a six month extension and issued a preliminary report. The preliminary report reiterates the Administration's proposed changes to the military commissions system and begins to describe the process and criteria that the Attorney General will use to determine whether to prosecute a detainee in Federal criminal court or in a military tribunal. It does not, however, make recommendations on the details of Guantanamo's closure or on the process for continuing to detain enemy combatants or belligerents who, for different reasons, cannot be prosecuted in any of our courts.

As the Detainee Task Force and the separate Inter-Agency Review Team that is evaluating all the files of the Guantanamo detainees finalize their work in the coming months, I am confident that they will recommend policies which will keep America safe and conform to American values.

Nevertheless, I want to offer a few words of advice from a former country prosecutor. Although I continue to believe that the closure of the detention facilities in Guantanamo will keep and help restore our country's reputation and moral standing around the globe, I am concerned that time is running out for meeting the President's deadline. With little more than five months to go, the lack of details on how Guantanamo should be closed, or detainees will be transferred, what prosecutions will be taken to protect communities, the costs associated with the closure decision, and the range of related considerations is, frankly, disturbing. A detailed plan should be proposed as soon as possible. To maintain congressional support for the closure decision, this forthcoming plan should safeguard America and be able to be implemented in the little time that is left.

With regard to detainees who cannot be prosecuted but also cannot be allowed to return to the battlefield, the Administration should:

One, clarify the President's authority to detain these individuals, regardless of where they are held, and state whether legislation is needed to augment his authority to detain.

Two, propose a process to replace the Administrative review boards in Guantanamo and similar bodies in Afghanistan with something that is more independent and viewed as legitimate.

And lastly, third, indicate what factors will be considered to determine when an end of hostilities has been achieved and thus continued detention is no longer justified under the Supreme Court's Hamdi decision and the laws of war.

Before I turn to the gentleman from California, let me mention that today's witnesses are the Honorable Jeh Charles Johnson, who is the General Counsel for the Department of Defense [DOD], and the Honorable David Kris, Assistant Attorney General, United States Department of Justice [DOJ].

Now I turn to my good friend, my colleague, the distinguished Ranking Member 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. I thank you for holding this hearing on this important topic, the Administration's detainee policy and its plan for reforming the Military Commissions Act of 2006.

Let me begin by welcoming our witnesses, the Honorable Jeh Johnson, General Counsel for the Department of Defense, and the Honorable David Kris, Assistant Attorney General Department of Justice. Gentlemen, good morning. Thank you for being here.

On October 22, 2009 the President stood before the American people and announced that he would uphold his political promise to close Gitmo within a year and suspend all military commissions pending a review by the Administration. I do not want to make this a political issue. I think if Senator McCain had been elected, he probably would have done the same thing. Let me say that at the outset. Additionally, the President announced the creation of a Detainee Task Force that would review America's current terrorist de-

tention policies and practices and recommended a path forward within six months.

Mr. Chairman, many in Congress were skeptical of this approach. It seemed unwise to have a policy to close Gitmo without a plan. We immediately pointed to the danger of establishing a definite date to close Gitmo without first having identified an alternative location to detain these dangerous terrorists. Additionally, we warned that a policy vacuum from the executive branch would be filled by unelected judges who were not accountable to the American people. Our ultimate concern was that our military personnel serving in Iraq and Afghanistan could be vulnerable because of a lack of specific guidance from the Commander in Chief.

I had the opportunity Monday with three of my colleagues to go to Gitmo, and it was quite an education. And I have a solid view of what I think should be done there now, and probably different from what I would have thought a week ago. But as we were flying back from Gitmo, we received notice that the Administration would not meet the President's self-imposed six month deadline for meeting the President's new detention policy.

This delay is disturbing on many levels and deserves the attention of the American people. On one hand, I commend the President for the delay. On the other hand, it puts the trials, things that we are working on down there, in suspension that I think cause some real problems. So we are kind of between a rock and a hard place on this.

Earlier this year I joined with many in Congress to support legislation which would have required the President to notify a State Governor and legislature 60 days prior to the transfer or release of a Gitmo detainee into their State; number two, obtain the consent of the State Governor and legislature to the transfer board release; and three, certify that the transfer or release of a Gitmo detainee would not adversely affect the national security of the United States or residents of the United States.

Similar language was adopted by this committee in the House NDAA [National Defense Authorization Act]. In other words, Congress has made a bipartisan statement that it cannot fund any policy until it receives a plan.

Given the six month extension for the Detainee Policy Task Force and the President's self-imposed deadline to close Gitmo by January 2010, I am concerned Congress will be handed a predetermined outcome. This would be an unacceptable outcome. Given the vacuum of information surrounding the Administration's detainee policy, today's testimony takes on even greater importance.

Let me briefly lay out my views on the issues I expect our witnesses should cover today.

Mr. Chairman, a comprehensive detention policy must include a strengthened authority to detain and a preventative detention framework; a plan for detaining high-valued detainees captured outside Iraq and Afghanistan where they will not have habeas corpus review; a plan that ensures Federal courts do not release detainees from Gitmo into the United States; and a clear framework that does not favor prosecuting detainees in Federal criminal courts but prosecutes violations of the laws of war in military commissions; a commission system that protects sensitive sources and

methods and is tailored for the exigencies of the battlefield; and, finally, a plan that ensures that detainees we transfer or release from U.S. custody do not return to the battlefield and threaten our forces or citizens.

It is the issue of transfer and release that gives me pause. When I visited Gitmo on Monday, one of our briefers showed us a picture of a former detainee that was released because he was compliant and seemed to no longer pose a threat. The picture showed him holding a child. It turned out we were wrong. He later blew himself up and killed 25 people in Baghdad. We have been wrong, according to DIA [Defense Intelligence Agency], 14 percent of the time.

I fear we are getting it wrong in Iraq and Afghanistan, too. Just this week the New York Times reported that detainees released from American prisons in Iraq could have been the ones that carried out an attack on a restaurant, wounding scores of people. Every time we get it wrong, the consequences are fatal. We need to be honest about the risk of releasing detainees into Iraq, Afghanistan, and especially the United States.

I look forward to your testimony, and I hope that the discussion we have today will give this Congress and the American people a better understanding of the President's detainee policy.

Thank you and I yield back.

The CHAIRMAN. I certainly thank the gentleman.

We now will hear from our witnesses. We look forward to your testimony.

Mr. Johnson, we recognize you first.

STATEMENT OF HON. JEH CHARLES JOHNSON, GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Mr. JOHNSON. Thank you, Mr. Chairman, Congressman McKeon, members of this committee. You have my prepared advanced statement. I apologize for the lateness of getting that to you. In the interest of time I will——

The CHAIRMAN. Let me interrupt. Without objection, the statements of the two witnesses will be entered in toto in the record.

Mr. JOHNSON. In the interest of time I will just read an abbreviated version. On January 22, 2009, as was pointed out, President Obama signed executive orders 13492 and 13493 which establish two interagency task forces, one to review the appropriate disposition of the detainees currently held at Guantanamo Bay, and another to review detention policy generally. These task forces consist of officials from the Departments of Justice, Defense, State, and Homeland Security, and from our U.S. military and intelligence community.

Over the past six months, these task forces have worked diligently to assemble the necessary information for a comprehensive review of our detention policy and the status of detainees held at Guantanamo Bay.

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

Let me begin with some general observations about the progress. All told, about 780 individuals have been detained at Guantanamo.

Approximately 550 of those have been returned to their home countries or resettled in others. At the time this new Administration took office on January 20, 2009, we held approximately 240 detainees at Guantanamo Bay. The Detainee Review Task Force has reviewed and submitted recommendations on more than half of those.

So far, the Detainee Review Task Force has approved the transfer of substantially more than 50 detainees to other countries, consistent with security and treatment considerations, and a number of others have been referred to a DOJ–DOD [Department of Justice–Department of Defense] prosecution team for potential prosecution either in an Article III Federal court or by military commission.

Additional reviews are ongoing and the process, we believe, is on track. We remain committed to closing the Guantanamo Bay detention facility within the one year time frame ordered by the President.

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

The one other thing I would like to add is we talk a lot about closing the Guantanamo Bay detention facility, and as some of you on this committee know who visited there, the military personnel at that facility are truly professional. And so our discussions about closing that facility should in no way reflect upon what I believe is the first-rate dedication and professionalism of that guard force.

Thank you.

The CHAIRMAN. I certainly thank the gentleman.

[The prepared statement of Mr. Johnson can be found in the Appendix on page 53.]

The CHAIRMAN. Mr. Kris.

STATEMENT OF HON. DAVID KRIS, ASSISTANT ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. KRIS. Thank you, Mr. Chairman, Representative McKeon and members of the committee. Thank you for inviting me here. This is my first appearance for this committee. For the Department of Justice, I normally appear before the Judiciary or the Intelligence Committees. So I thought I would just begin by way of introduction to explain the work that I do and how it relates to that of the committee, particularly with respect to military commissions.

I lead the Justice Department's National Security Division [NSD] which is the organizational unit that combines all of DOJ's major national security functions and personnel. And our essential mission is to protect national security using all lawful methods consistent with civil liberties and the rule of law, including but not limited to prosecutions in Article III courts and in military commissions.

In the previous Administration, the National Security Division assembled a team of experienced Federal prosecutors drawn from across the country to assist DOD's Office of Military Commissions [OMC] and litigate cases at Gitmo. That assistance will continue. The man who led that team for NSD, who is a 15-year career DOJ prosecutor, is now my deputy, and a former member of the team

has since been recalled to Active Duty and is the chief prosecutor in OMC.

As the President has explained, when prosecution is feasible and otherwise appropriate, we will try terrorists in Federal court. I prosecuted a group of violent extremists in the 1990s. Like their more modern counterparts, they engaged in what would now be called, I think, lawfare, and the trials were very challenging. But the prosecution succeeded not only because it incarcerated the defendants, some of them for a very long time, but also because it deprived them of any shred of legitimacy in their antigovernment beliefs.

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

To do this effectively, however, the commissions themselves must first be reformed. And the legislation now pending in the Congress is a tremendous step in that direction. You know from my written testimony and that of Mr. Johnson, that the Administration very much appreciates the pending legislation and supports much of it.

Although I can't refer here to precise numbers, as Mr. Johnson said, a significant number of cases have been referred for possible prosecution by joint teams of officials from DOJ and DOD. That review is governed by a protocol that we have released publicly, and I think it would be worth just explaining the three essential principles that are embodied in that protocol.

The first is, as the President stated in his speech at the National Archives, we need to use all elements of our national power to defeat our adversaries, and that is including but not limited to prosecution in both Article III courts and in military commissions.

Second, Article III courts which have unquestioned legitimacy are also effective in protecting national security. And military commissions as we propose to reform them, which have unquestioned effectiveness, are also fair and legitimate.

Now, I suspect there are many people in this room or perhaps elsewhere who might agree only with the first part of that sentence that I just stated, and there will be others who agree only with the second part. But we think both parts are right, and that leads really to the third and final principle.

The choice between the two available prosecutorial for a need to be made by professionals based on a close and careful review of the facts of each case, using criteria established by policymakers, and these are reflected in the protocol. We cannot afford, consistent with the first two principles I have discussed, to adopt abstract rules that artificially constrain and limit our options. That would make us less effective than we otherwise would be in fighting terrorism.

Thank you.

The CHAIRMAN. I thank the gentleman.

[The prepared statement of Mr. Kris can be found in the Appendix on page 58.]

The CHAIRMAN. It seems to me there are two polestars in this whole issue before us. The first is that any conviction, whether it be by a tribunal or a Federal court, meet judicial scrutiny and that

those convictions stick, that they be upheld. The same polestar is the necessity of keeping American citizens safe. Whatever comes to pass, this must—these two polestars must be kept in mind.

I will not take a great deal of time, but I do wish to ask about the one category that seems to be the most troubling. And Mr. Johnson, I will call upon you to give us your best legal opinion.

There are some in custody in Guantanamo today that could not be tried in a Federal court, and, even with relaxed hearsay evidence, could not be tried in a tribunal. But we know full well by other evidence, including their own statements, that they are highly dangerous, and, would, should they be turned loose, attempt to take American lives as well as lives of our allies.

What do you propose to do with that group of inherently dangerous inmates at Guantanamo if you can't try them in either tribunal—but you know full well what they will do if turned loose?

Mr. JOHNSON. Mr. Chairman, thank you for that question. The ability and the authority of our United States military to capture and detain the enemy is as old as the Army itself. It is a basic concept inherent in what the U.S. military does: capture and detain.

And as recently as 2004, the Supreme Court, in the Hamdi decision, reiterated that inherent within the authorization granted by Congress in 2001 to go to war was the ability to detain those who are captured.

Now, this President and this Administration in March revised the definition of our detention authority to more closely align detention authority with the authorization that Congress passed in 2001, the AUMF, the Authorization for Use of Military Force as informed by the laws of war. We believe that that definition, which we are now using in the courts with respect to Guantanamo, is the appropriate and sufficient legal authority to detain people who you have referred to, Mr. Chairman, as those who are threats to the American people, threats to our national security, but for whom we do not choose to prosecute.

The CHAIRMAN. In other words, they could be held as long as the war continues.

Mr. JOHNSON. What the President said in his National Archives speech is that for that category of people, if we have such people at the end of this review process, there should be clear, defined legal standards and there should be a periodic review, so that if we prevail in a habeas case and we don't prosecute them, we are not just throwing away the key. There is a periodic review that ought to be in place to do a form of threat assessment.

The CHAIRMAN. But how long do you keep them? Until they get old and gray and pass away? Or how long can you legally keep them under your test, under your legal test?

Mr. JOHNSON. Under traditional concepts, as you pointed out, you keep them until the end of the war.

The CHAIRMAN. But there is no one in an insurgency or a guerrilla warfare to run up the white flag and sit down and sign a peace treaty. So what then?

Mr. JOHNSON. That is absolutely correct. We are not going to see a peace treaty signed on a battleship, which is why we believe that some form of periodic review—I don't know whether that is every couple of months, every year or so—is appropriate to do a threat

assessment of that particular detainee. And that part of the work of this task force is to develop that form of periodic review.

The CHAIRMAN. As the gentleman from California pointed out, there has been one from Afghanistan that was reengaged in the conflict, and I have in front of me an unclassified documentation of others that have been repatriated and have reengaged in one place or the other.

How do we assure the American people that is not going to happen?

Mr. JOHNSON. What I can assure the American people is that when I and my colleagues at the Department of Defense go through this review process and look at threat assessments, look at the classified and unclassified evidence that we have about each detainee, the thing that weighs most on my mind certainly is, is this a person who is going to return to the fight? And to me that is the most important factor, evaluating that consistent with the law, consistent with the rule of law. So it is a thing that motivates us one way or another, frankly. We are all very cognizant of those statistics.

The CHAIRMAN. Since January the 20th of this year, to your knowledge, have any of those that have been released become involved in reengagement?

Mr. JOHNSON. Sitting here right now, I don't think I could give you that information. Sorry.

The CHAIRMAN. Have some been released since January the 20th of this year?

Mr. JOHNSON. Certainly some have been transferred to other countries. Mr. Binyam Mohamed, for example, was sent back to the U.K. [United Kingdom], I believe.

The CHAIRMAN. Do you understand my concern?

Mr. JOHNSON. I certainly do. It is my concern as well.

The CHAIRMAN. Mr. McKeon.

Mr. MCKEON. Thank you, Mr. Chairman. The Administration has expressed a preference for trying the detainees in Article III courts. Do you share that same preference?

Mr. JOHNSON. Is that for me, Congressman?

Mr. MCKEON. Both of you.

Mr. JOHNSON. Mr. Kris and I have worked out a protocol for determining when a case should be prosecuted in Article III versus military commissions. I think the document is public, and basically what the protocol says is that there is a presumption that, where feasible, referred cases will be prosecuted in an Article III court in keeping with traditional principles of Federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there.

And then the document goes through three sets of factors that are kind of traditional factors prosecutors look at to determine whether a case that is prosecutable should be prosecuted in one forum or another. I suspect that will be a fact-intense, case-by-case review, sir.

Mr. MCKEON. One of the concerns I have in looking at that is it seems like you go through a preliminary judgment then. Do you think that that would prejudice a case?

Mr. JOHNSON. The document itself—I was concerned about that very issue when we negotiated the document, and I would not want some line prosecutor or the media to think that we prejudged a case because we have referred it to one forum or another and that therefore you must indict that case.

So at the end of the document, it refers to the independence of authorities; that however the protocol works, it is still up to the U.S. attorney or the chief prosecutor in the military commission to exercise their own independent judgment in making the determination that a case can and should be prosecuted. You can't, for example, eliminate grand juries that are going to make their own decisions in these cases, nor should we.

Mr. MCKEON. Is there a concern that by bringing them—I guess if you tried them under Article III you would bring them to the United States, try them in a Federal court.

Mr. JOHNSON. I would assume so; yes, sir.

Mr. MCKEON. Is there any concern that they—because that would happen, then they would pick up additional constitutional rights that some may feel they shouldn't have?

Mr. JOHNSON. Well, Mr. Kris could speak to that better. He is in charge of that process. But, you know, we obviously do have the rights that we enjoy in Federal criminal prosecutions, reflected in the Constitution, in the rules of Federal criminal procedure. And I think DOJ has a pretty good track record in cases where we have prosecuted alleged terrorists.

Mr. KRIS. I would just add sort of two points, I guess, Congressman. With respect to the way the protocol is going to work, the first point is that the referrals are made to joint teams, DOD prosecutors and DOJ prosecutors who are going to work together on these cases to try to come up with——

Mr. MCKEON. We—When we met with the—the four of us that went to Guantanamo Monday, we had an opportunity to meet with the lead prosecutor. His preference was that all—all of the trials be done in the military—by the military commission.

Mr. KRIS. Okay. I mean that is really—that is not the Administration's position that we make a bright-line determination, sitting here today, that all of the cases be prosecuted there, but, rather, that they be worked up and evaluated in a case-by-case, fact-intensive way, looking carefully at all of the elements of the case and then make a decision about which is the appropriate forum. But that we do that working together the way Jeh and I have worked together on the protocol.

And the second, I guess, point to make about it is that these kind of forum selection choices are not alien to government officials. They are similar to choices that have to be made all the time, whether it be between a Federal and a State court, between a U.S. court and a foreign court, between a Federal court and a UCMJ [Uniform Code of Military Justice] proceeding——

Mr. MCKEON. This situation is kind of unique, though, with the terrorist situation and the problems we have had leading up to this.

Mr. KRIS. You are absolutely right.

Mr. MCKEON. Are you concerned at all that dividing up into two systems and the preference that going to one or the other might

buttress the view that military commissions are second-class type courts?

Mr. KRIS. It is a very good point. First, I don't mean to minimize the challenges associated with this. It is a unique situation. We are working hard, Jeh and I and people in our shops, to do this—to do this right. It is difficult, challenging, consequential. We think we can do it. We are set up to do it.

I think it is vitally important on the last point you made to understand we are working very, very hard with the Congress now. We are actively discussing amendments to the Military Commissions Act with the Senate counterpart of this committee.

Mr. MCKEON. You are working with the the Congress. Who in the Congress are you working with?

Mr. KRIS. The Senate Armed Services Committee, as you you pointed out, has reported out a Levin—Senator Levin's bill——

Mr. MCKEON. They passed a bill last night—and I have it here—that they say it is the sense of the Congress that the preferred forum for the trial of alien unprivileged enemy belligerents subject to this chapter for violations of the law of war and other offenses made punishable by this chapter is trial by military commission under this chapter.

Mr. KRIS. I am aware of that and I appreciate that that is the sense of that committee and a possible sense of the Congress. What I meant was that—just to respond to the second-class justice point, we are investing and the Congress is investing a huge amount of energy and effort to reform the Military Commissions Act in a variety of ways, as you know, and we think with those reforms the military commission system would not be a second-class justice system. It would be a first-class——

Mr. MCKEON. I don't think it is. What my question was do we think that the perception would be that it is because of this prejudging and moving some to one trial, some to another?

Mr. KRIS. We don't want that, we don't think that, and we don't want to prejudge. We want to work these cases one at a time and make a choice on a case-by-case——

Mr. MCKEON. But there has to—by definition, there will have to be some judgment made if you decide one goes here and one goes there.

Mr. KRIS. That is absolutely right.

Mr. MCKEON. And then—and we really can't control the perception of that process once the media or other people get hold of it. We can't control how the perception will be.

Mr. KRIS. Well, it is certainly true that I don't make any claim to control the media but Mr. Johnson and I are here——

Mr. MCKEON. Probably nobody in this room does.

Mr. KRIS. But we are here to tell you, and I think to tell people who are listening to this, that it is not the case that military commissions as we are proposing to reform them will be second-class.

Mr. JOHNSON. Congressman, if I could just add to something.

Mr. MCKEON. Sure.

Mr. JOHNSON. Captain John Murphy is a career professional. He is the prosecutor, the chief prosecutor you referred to a moment ago. He has spent 17 years as an assistant U.S. attorney. Like many of the military officers I encounter, I would expect him to be

bullish and optimistic and proud of his mission. So it doesn't surprise me that he would tell you that he thinks we should handle all these cases in military commissions and that he thinks he can do so.

Mr. MCKEON. He is not alone in that. We had a hearing last week where we had the JAGs [Judge Advocate Generals] here from each of the services, and I think they also were of the same opinion.

So, Mr. Chairman, I have another question but I think I may have used up my time. If we can come back.

The CHAIRMAN. I am sure we will have a second round.

I am trying to sit in your shoes to make a determination as to which forum in which to try a detainee. My judgment would be your decision would be based upon what type of evidence—in particular, what type of hearsay evidence could or could not be offered in each of the two tribunals. In a Federal court before a jury, there are certain hearsay rules that are quite strict. In a tribunal my understanding is that certain affidavits, certain statements that would violate a court hearsay rule, would be admissible and would cause your recommendation to be in a tribunal as opposed to a Federal court.

Now, you did determine that a detainee by the name of Ghailani should be tried in a Federal court, and he was transferred to the Southern District of New York for prosecution in the Federal system. What factors went into determining that, if you may say so, in our forum today?

Mr. KRIS. Let me say what I can say, which is Ghailani, the man who has been transferred, is a bit of a unique case because he was already under indictment for the East Africa Embassy bombings in the Southern District of New York where others who had been indicted with him had already been tried. So I think it is appropriate to look at that case as a bit of a unique——

The CHAIRMAN. That is a bit different circumstance; is that correct?

Mr. KRIS. Yes, it is a bit of a unique case given the fact that he was already——

The CHAIRMAN. All right. Fine. Thank you.

Mr. Ortiz.

Mr. ORTIZ. Thank you, Mr. Chairman. And I have a question for whoever can answer this question, for both of you.

What percentage, if any, of the current detainee population in Guantanamo are not accused of being associated with al Qaeda or the Taliban, have not fought against the United States or coalition forces in Afghanistan, Iraq? Do we have a number that are still there but have not been accused of aligning themselves with the Taliban or any of the terrorist groups?

Mr. JOHNSON. Congressman Ortiz, I don't think I can give you exact numbers. But what I can say about the current population at Guantanamo is that the overwhelming majority of them were captured in what we would consider the conventional battlefield circumstances in Afghanistan. So I hope that answers your question. I can't give you exact numbers about allegiance and so forth.

Mr. ORTIZ. They were picked up because of their association, not because they were involved with any of these terrorist groups; am I correct?

Mr. JOHNSON. The overwhelming majority were captured in conventional battlefield circumstances, where our military was in Afghanistan pursuant to the authorization of this Congress in 2001 to engage the Taliban and al Qaeda forces.

Mr. ORTIZ. Now, have any of these people that I just mentioned, have they been tried by any of the courts?

Mr. JOHNSON. We have had three convictions thus far in military commissions. Many of us, obviously, believe that we ought to be able to move more efficiently in those cases, but so far there have been three convictions.

Mr. ORTIZ. But you don't know the number? I mean it could be five, it could be 50, it could be 100 who are still detained under those circumstances?

Mr. JOHNSON. Who are not part of al Qaeda or the Taliban?

Mr. ORTIZ. Right.

Mr. JOHNSON. I suspect that the overwhelming majority are aligned with those combatant forces. I don't have exact numbers for you.

Mr. KRIS. Congressman, if I could just add, I am not sure this would be responsive to your question, but almost all of the 240 detainees who were at Gitmo as of January 20 have filed habeas corpus petitions with the United States District Court. And it is through the habeas corpus process that their detainability under the law of war is being tested, subject to judicial review by independent Article III judges.

That determination analytically is distinct from a secondary question—which the word "accused" in your question brings to mind—which is how many have then also been possibly subjected to prosecution for not just being an unprivileged belligerent or an enemy combatant, or whatever the term is, sort of under the law of war, but actually being accused of crimes or war crimes. That is a smaller subset. But the larger population are having their detention tested through habeas corpus.

Mr. ORTIZ. I have just one more question, Mr. Chairman.

Mr. Johnson, you stated before the Senate Armed Services Committee that it was the position of the Administration that if a detainee was acquitted of alleged crimes, the Administration may still have the authority to detain that individual under laws of the war. I mean, if they had been tried and they were found they were not guilty. This is something that I myself cannot understand, and maybe the American people don't understand either. Maybe you can elaborate a little bit on that.

Mr. JOHNSON. It is my view as a lawyer, as a lawyer for the Defense Department, and the view of others that as a matter of legal authority—not as a matter of circumstances or policy or judgment—but as a matter of legal authority, if there is proper law-of-war detention authority for a particular individual, that is true irrespective of what happens in any eventual prosecution.

So in your question, if the individual is acquitted, that would be irrelevant to law-of-war detention authority. Whether or not we ever actually did that as a matter of policy or judgment is to me

an entirely different question, dependent upon the circumstances, what happens in that particular case, and so forth.

I would point out that in one of the three cases, one of the three convictions, the individual received a life sentence. The other two received sentences and they have been transferred.

Mr. ORTIZ. The reason I ask this question is going back to Mr. McKeon's question about that individual who was turned loose, he goes back and he kills 25 people. I am just wondering if all these people who believe that they have done nothing wrong, that they become so angry and so indoctrinated while they are there, that when they are turned loose they go back and they turn against us. This is one of the reasons I am asking you this question.

Mr. Chairman, I know my time is up. I yield back

The CHAIRMAN. I thank the gentleman. We have, it appears, five votes, one 15-minute and four 5-minute votes. We will do our best to squeeze two questioners in before we go. Mr. Bartlett and Mr. Taylor.

Mr. Bartlett.

Mr. BARTLETT. Thank you very much.

I am, by a number of years, the oldest member of this committee. I remember when Franklin Delano Roosevelt defeated Herbert Hoover. I lived through the Great Depression. And you can't know how deeply grateful I am that this really poor Depression-era kid could have the opportunity to work and achieve and one day serve in this Congress. I say that because I want you to understand the context in which I make these statements and ask my questions.

Are there not, or could there not be established world courts in which these prisoners could be tried?

Mr. JOHNSON. I am sorry. Could you repeat that sir?

Mr. BARTLETT. Are there not, or could there not be established world courts in which these prisoners could be tried?

Mr. JOHNSON. I would not rule out the possibility, sir. Others have called for a national security form of court. I can imagine circumstances under which it is plausible and appropriate to prosecute suspected terrorists in an international-type forum. We are trying to deal with the current population right now and the issues we have——

Mr. BARTLETT. I understand. I understand.

Mr. JOHNSON. And we have got a bill that came out of the Senate that we think is a pretty good bill for a lot of reasons. There are areas where we would invite this body to consider amendments. But in theory I can imagine circumstances where that might be appropriate, sir.

Mr. BARTLETT. Thank you.

In many things that we do, there is an inherent tension between national security and our international image, in the perceptions of millions around the world, about who we are and what we do. When I mention military tribunals to my constituents, they have the inherent initial response that I had when I first heard the word and we were going to do this, and that is a "banana republic," a trial at midnight and execution at dawn.

When you were children, I am sure your mother told you what my mother told me, and that is that you shouldn't borrow trouble. I regret that we are where we are today, facing the necessity of de-

ciding how we try these criminals in either one of these two courts. I would have wished that we could have avoided—that obviously is a very dissentious and difficult matter, or we wouldn't be here today. I wish we could have avoided this by deciding at the very beginning that they should have been tried in international courts. No matter what we do, we run the risk of incurring considerable ill will around the world.

Thank you very much for your attention to this, and I hope you can help guide us through this with the least damage. Thank you very much.

The CHAIRMAN. I certainly thank the gentleman.

Mr. Taylor and then we will break for the votes. Mr. Taylor.

Mr. TAYLOR. Mr. Chairman, I am going to yield to one of our resident JAG officers, Mr. Murphy.

Mr. MURPHY OF PENNSYLVANIA. Thank you, Mr. Taylor and thank you, Mr. Chairman. I appreciate it.

Mr. Johnson and Mr. Kris, thank you for your service to our country. We appreciate it. There has been a lot of conversations and discussions in this committee and the Congress about our servicemen and women issuing Miranda warnings to terrorists captured on the battlefield. And, frankly, to hear some Members of Congress tell it, you would think that every one of our service members have been turned into police officers who are forced to worry about reading a terrorist his rights rather than completing his mission and keeping their fellow soldiers safe.

We all agree, we all agree that the job of our Nation's military is to fight and win wars, not law enforcement or evidence collection. And I am glad that you are here today testifying before us, because I am hoping you could set the record straight on this issue once and for all. I know when we have spoken with General Petraeus, he is comfortable with what his soldiers are doing in both Iraq and Afghanistan.

So let me be—I have a couple questions. One, how often are suspected terrorists captured on the battlefield and immediately read the Miranda warnings, and do these warnings ever occur on the actual battlefield itself? So if you could answer that, I would appreciate it.

Mr. JOHNSON. Congressman, thank you for that question. And thank you for your service to our country. The Congress breeds some really terrific JAG officers.

Mr. MURPHY OF PENNSYLVANIA. Thank you, sir.

Mr. JOHNSON. I—In response to that question and concern, I sent a letter to the Chairman, addressing this issue, and I would just read the first two paragraphs of the letter:

"I write to correct a serious misimpression that has arisen in recent weeks that the United States military may be providing Miranda warnings to terrorist suspects in Afghanistan. This is completely inaccurate.

"The record should be clear: The essential mission of our Nation's military in times of armed conflict is to capture or engage the enemy; it is not evidence collection or law enforcement. Members of the U.S. military do not provide Miranda warnings to those they capture."

Now, let me go on to say that in instances where the government chooses to go down the road of prosecution of a suspected terrorist, that too is a member—a mission to enhance national security, to bring to justice suspected terrorists. That is part of ensuring national security. One is not an alternative to the other. Thanks.

Mr. MURPHY OF PENNSYLVANIA. Well, thank you, gentlemen.

And, Mr. Chairman, I know we have votes; so I will yield back the remainder of my time. Thank you.

The CHAIRMAN. I thank you very, very much. For your information, that letter was entered into the record during the recent record on the resolution of inquiry that we took up this past week. And if anyone on the committee wishes a copy of it now, we will make sure the staff gets it to you.

Mr. FORBES. Mr. Chairman I would like to—Mr. Chairman——

The CHAIRMAN. We will—I tell you—to make it easy. We will just make sure everybody on the committee gets a copy of that.

We will now recess until the end of the votes and, gentlemen, we shall return. Thank you.

[Recess.]

The CHAIRMAN. The hearing will resume.

Before each member is the letter dated July 21, addressed to me from the general counsel in the Department of Defense and from the Office of the Attorney General.

[The information referred to can be found in the Appendix on page 67.]

The CHAIRMAN. Mr. Akin.

Mr. AKIN. Thank you, Mr. Chairman.

I am not a lawyer, and some of you have been getting into some fine points here, but perhaps an engineer's perspective may be the way some Americans are looking at this whole situation.

I just want to review, generally, the facts. That is, in January the President made a decision to close Gitmo. I assume that is right. Is that true?

Mr. JOHNSON. Yes, sir.

Mr. AKIN. And we have about 229 people in Gitmo, is that right?

Mr. JOHNSON. That is also true.

Mr. AKIN. And a good number of those are some bad hombres, in the parlance.

Mr. JOHNSON. Thank you, sir.

Mr. AKIN. I understand lawyers want to parse terms, but these guys would kill American citizens if they got out and if they were able to do so, a good number of them.

Mr. JOHNSON. I think we should assume that, yes, sir.

Mr. AKIN. Okay. So then my question becomes, kind of, it seems like getting more toward the bottom line.

First of all, does the Administration plan to release detainees into the U.S.? I am not asking for a very lawyerly—just either "yes" or "no" or "maybe" or "I don't know"—a fairly short answer. Are we going to release these detainees into the U.S.?

Mr. JOHNSON. No.

Mr. AKIN. No. Does the Administration plan to transfer detainees into the U.S.?

Mr. JOHNSON. What we plan to do, consistent with the national security interest and the safety of the American people, is close

Guantanamo, move them to another facility, consistent with all of those interests.

Mr. AKIN. Yeah, but that still didn't really answer the question. Are we going to transfer the detainees to the U.S.?

Mr. JOHNSON. We are considering the possibility of a number of alternative locations. Some may be transferred to other countries. Some will be transferred to Department of Justice custody for eventual prosecution. And some will be transferred to another facility. Where that facility is I could not tell you at this moment.

Mr. AKIN. So it is not absolutely clear, but it is quite possible that some of the detainees could be transferred to the continental United States.

Mr. JOHNSON. It is possible that, consistent with the safety of the American people and our national security interests, we will move them to a location in the United States. That is possible.

Mr. AKIN. Okay. And would they be brought here if we were going to do a trial here?

Mr. JOHNSON. Yes.

Mr. AKIN. Okay. And that would be maybe one of the conditions that would bring them here, if we are going to do a trial, especially if it was going to be a civil-type trial, right?

Mr. JOHNSON. Well, it has already been the case that some detainees have been transferred to the United States for criminal prosecution.

Mr. AKIN. Okay.

Now, another piece of the equation seems to be that we could increase the barrier in terms of making it harder to figure out some other country to send them to if we become more picky about the—some other country's foreign rights kind of prac—I mean human rights kinds of practices. Is that correct?

Mr. JOHNSON. We do not transfer detainees, or anybody else for that matter, to a country that we believe will torture them.

Mr. AKIN. Right. Now, is there any movement among some of the different groups? I guess since the President made the decision we are going to close Guantanamo Bay, six months has elapsed. And so I guess people have been studying this whole deal. I assume that is what you have been doing for the last——

Mr. JOHNSON. We have spent a lot of time studying this, correct, sir.

Mr. AKIN. Right. Okay. And, in the process of that study, is there any recommendation that we raise the bar in terms of where we could send these prisoners if they were going to go to a foreign country, in terms of saying there maybe they don't treat prisoners humanely enough or don't give them enough food or have enough chocolate chip cookies or whatever it happens to be?

Is there anything we are going to do which is going to make it harder for us—or are you going to recommend is there anything we are going to do to make it harder for us to transfer prisoners to a foreign country?

Mr. JOHNSON. Well, another consideration in the equation, sir, is assuring ourselves that the country to which we send a detainee will provide adequate security conditions so that they are not just released into the general population if we think that that detainee is a security threat.

So even in a circumstance where the country says, "Yeah, I would love to have them back," we are not going to do that unless we are satisfied that they are going to provide adequate security conditions for accepting them back. That is part of the equation. It is not just the consideration of, are you going to torture that person?

Mr. AKIN. Right. I guess there is two sides to the equation. You just answered the other half of the question, that there may be people that would not be able to detain them and give them the proper security to make sure that they don't get out.

The other question, though, is, are we going to limit the number of countries we could send them to by increasing the standards in terms—in another sense, in terms of their way that they handle prisoners?

Mr. JOHNSON. I know what the current standard is, sir, and that is what we are applying.

Mr. AKIN. The current—but you are not advocating that we are going to change that current standard.

Mr. JOHNSON. I don't know of any other standard that we would consider utilizing at the moment, sir.

Mr. AKIN. Okay.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank the gentleman.

Dr. Snyder.

Dr. SNYDER. Thank you, Mr. Chairman.

Thank you all for being here. And we very much value your opinion on these issues and so many others.

When you all were discussing somewhat earlier the issue of forums, which forum do you use, military commissions or the Article III courts—just coincidentally, today's paper, the Arkansas Democrat-Gazette, has a story about the case of Abdulhakim Mujahid Muhammad, a name probably you all don't know because he is not one of your detainees. He is the young man from Tennessee that came to Little Rock and shot the two soldiers, Private William Long, who died, and Private Quinton Ezeagwula. They were in uniform, on duty, outside a Federal recruit depot. They were targeted, in his words—he has been making press statements—that because they were part of our war in Afghanistan. He actually has traveled to, I think, Yemen. It is not clear what all his background has been.

But he is going to be arraigned, not in a military commission, not in a Federal court, in Pulaski County Circuit Court, on a capital murder charge, amongst some other felonies. So this—it brings home the complexity of these issues, because we certainly, potentially, have other folks that will fall under the jurisdiction of U.S. authorities other than from Iraq and Afghanistan, including some people in our own country.

I wanted to ask specifically—and I asked this question the other day, and didn't—and people didn't know what the answer was. If a detainee in Guantanamo today were to kill another detainee, what body of law would govern and what would happen to that—I assume that there would be criminal charges brought, one detainee killing—one human being killing another human being. What body of law would be—would determine?

Mr. KRIS. I mean, I think that, especially after the Rasul decision, that Gitmo is within the special territorial and maritime jurisdiction of the United States. So this is something I should check to make sure I can give you an authoritative answer, but I do think there would be Federal jurisdiction in an Article III court over a crime committed there.

Dr. SNYDER. What I think is interesting about your answer—and when we had the JAGs the other day, very nice guys, very professional guys, they did not know. And what confuses me about that, I mean, we have had Guantanamo there for several years now. We hear stories that our guards are at great risk. I assume that they have been hit. I mean, there is an opportunity to bring felony charges and, I would think, convictions, because we've got an evidence trail right there within the confines.

I am curious why we haven't pursued any charges against detainees if they actually have committed what we think were—maybe I am wrong. Maybe it has all been patty-cakes down there, but that is not the impression I have had.

Mr. JOHNSON. Well, in fairness to our T–JAGs—you ask a very good question, so we——

Dr. SNYDER. They said that very same thing.

Mr. JOHNSON. We had the benefit of advance notice of your question. But I agree with Mr. Kris' assessment.

Dr. SNYDER. But the reason I reacted to your answer, you "thought" it would be, which tells me you have not prosecut—that there have been no prosecutions for actions committed by detainees while on Guantanamo during their time.

And my only point is, if you have got somebody you are trying to lock up somewhere or deal with in a definitive way and you don't have evidence for exactly what they did, a harder case to prove whether it was in Afghanistan or Iraq or in the United States or wherever it was, but then they actually do something that you can potentially convict and lock them up for 20 years, I would think that there would have been things that would have occurred that, yes, we can convict this person on this charge.

But—so, I don't know. I wondered if it is because people are afraid to actually bring some kind of charge, that it might say, well, they would fall under this court or these laws. But do you have any idea why that hasn't occurred?

Mr. JOHNSON. As I sit here now, I can't tell you for certain that there haven't been prosecutions. I know that there are a number of disciplinary-like measures that are taken for misbehavior, misconduct, so forth.

Dr. SNYDER. Yeah. I mean—it may be this is a very well-run facility and people are not—don't have the opportunity to do some really bad things. I wanted to—if you have any additional information about that, I would be interested.

My last question I think you have touched on, but the mention in Mr. Akin's question about whether folks would come up here. I assume people come up to the United States, or have or potentially could, for medical reasons, that Guantanamo may not have the kind of—you know, if you have really—need a tertiary center or something.

I am sorry. Time is up, apparently.

The CHAIRMAN. Thank the gentleman.

Mr. Forbes from Virginia.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Johnson, Mr. Kris, first of all, let me thank you for being here, for all of your service. You are good guys. And forgive me for having to talk quick and ask for you to be concise in your questions, but I only have five minutes.

I was with the group that went down to Guantanamo on Monday. We did meet with your chief prosecutor, Mr. Johnson. He is under your jurisdiction, I would take it. Is that correct? Under your department?

Mr. JOHNSON. The Office of General Counsel has supervisory authority over the OMC.

Mr. FORBES. You are familiar with Mr. Murphy and his competence. And I take it, he is the best guy we have to be in that chief prosecutor position or he wouldn't be there?

Mr. JOHNSON. He is an experienced, professional prosecutor, yes, sir.

Mr. FORBES. I want to narrow in on the 9/11 defendants. Because we talk about detainees; sometimes we don't have faces with names. But as to the 9/11 defendants who are detainees there who are undergoing this prosecution, it has been a referral, that is being prosecuted, or was being prosecuted.

The chief prosecutor said his goal was to get justice for the victims of terror and for the citizens of the United States. Is that a fair and just goal?

Mr. JOHNSON. That is a fair and just goal for the United States Government, yes, sir.

Mr. FORBES. Is that the goal of this Administration?

Mr. JOHNSON. Yes, sir.

Mr. FORBES. If that is the case and that is a standard, should that standard be changed simply because someone has a perception that that standard is wrong?

Mr. JOHNSON. I don't believe so.

Mr. FORBES. In that particular case, then, I want to go to the 9/11 attacks and the prosecution that is undergoing there. Are you aware of the number of pleadings and motions that have already been resolved in that one proceeding alone?

Mr. JOHNSON. I know that, in that case and in several other of the pending cases, we have as many as perhaps a hundred pretrial motions that have been resolved, yes, sir.

Mr. FORBES. In that particular case—and, Mr. Chairman, I would ask that this be submitted as part of the record. It is from the Department of Defense, listing 56 motions that have already been resolved in that one proceeding.

The CHAIRMAN. Without objection.

[The information referred to can be found in the Appendix on page 70.]

Mr. FORBES. And, of those 56, Mr. Murphy told us when we were down there on Monday, the Executive order the President signed didn't just talk about a review, as you mentioned earlier, but it actually stayed the proceedings for the military tribunals going on. Is that correct?

Mr. JOHNSON. Yes, sir.

Mr. FORBES. And, on that, the chief prosecutor told us that that is now necessitating that he go in and ask for a continuance on September 11th, which he said is far from certain that he will be granted. Are you familiar with the fact that he is going to have to do that in that proceeding?

Mr. JOHNSON. The continuances have, in fact, been granted in the 9/11 case.

Mr. FORBES. And are you familiar with the fact that he has to ask for one on September 11th because he can't go forward with this trial now, with this tribunal?

Mr. JOHNSON. It is currently stayed.

Mr. FORBES. And he also, then, told us that there is a very good chance that the judge, since he has already asked for continuances, as you mentioned, had—may not grant that continuance. And if the judge doesn't grant that continuance, he has said that he will have to dismiss the charges against the defendants because he can't move forward based on this Executive order.

Are you familiar with that?

Mr. JOHNSON. I agree that continuances are up to the discretion of the trial judge.

Mr. FORBES. Would you also agree that, if he can't get that continuance, that he can't move forward with the commission and he will have to dismiss those charges?

Mr. JOHNSON. Yes.

Mr. FORBES. And if he has to dismiss those charges, why in the world would the Administration put him in a position to risk dismissing the charges against the 9/11 defendants?

Mr. JOHNSON. Well, if—even though the case has been suspended, those particular individuals—and I hesitate commenting on a particular case—but it is the fact that those particular individuals remain detainees at Guantanamo. And irrespective of what happens in the case, they are subject to law of war detention.

Mr. FORBES. Well, then, Mr. Johnson, why in the world are we having these proceedings if we are going to retain them whether we have the proceedings or not depending on—and it doesn't matter what the outcome of the proceedings are?

Mr. JOHNSON. Because on—in certain contexts, people who violate the laws of war or violate Federal criminal laws should be brought to justice. The public, I think, expects that.

Mr. FORBES. Did the—Did the defend—Is it your opinion, your personal opinion that the individuals, the defendants in the 9/11 attacks violated were acts of war, or were they violations of criminal law?

Mr. JOHNSON. I cannot comment on a particular case. I don't think it would be prudent for me to do that, given my position in the Department, sir.

Mr. FORBES. Mr. Kris, can you say whether or not, in your personal opinion, that the acts that took place on 9/11 were violations of war—acts of war or were they violations of criminal law?

Mr. KRIS. I am not going to testify in my personal opinion. But I think it is fair to say that they are both.

Mr. FORBES. Mr. Kris, you are not prepared to give us your personal opinion when you came here? Every other witness—well, I am out of time. I will hopefully come back. But I want to just prep

you all for when I do get some more time. We have been asking all of our witnesses their personal opinions when they come in here. That is what we look to you for.

Mr. Chairman, my time is out.

Mr. KRIS. Congressman, I beg your pardon. I just want to make clear, I am testifying as an Administration witness. I know some of the military officials can testify in their personal capacity and give their personal opinions.

But I will say that I think the 9/11 attacks are both violations of the law of war and of the criminal laws of the United States.

Mr. FORBES. Thank you both.

The CHAIRMAN. Mr. Kris, you understand the difference between a case being dismissed with prejudice or dismissed without prejudice? Do you understand the difference?

Mr. KRIS. I do, yes.

The CHAIRMAN. If it is dismissed without prejudice, it may be refiled. Am I correct?

Mr. KRIS. Yes.

The CHAIRMAN. If it is dismissed with prejudice, that person may not be tried under the same charge. Is that correct?

Mr. KRIS. That would normally be true, yes.

Mr. FORBES. Mr. Chairman.

The CHAIRMAN. Yes.

Mr. FORBES. Would the gentleman yield?

The CHAIRMAN. Yes.

Mr. FORBES. Based on that line of questioning, I would just like to put in the record that the chief prosecutor would agree that there might be a possibility that he can refile this. But the problem would be that—and I think Mr. Larsen and Mr. McKeon would agree—that he said that it could take another 18 months just to get where they are right now because of all these proceedings, because they would have to start from scratch, and also that it could be that the speedy trial laws would actually prohibit him from bringing a case again. All of that is up in the air.

And I just yield back and thank the gentleman.

The CHAIRMAN. Well, I thank the gentleman. But my question is, these particular cases, were they dismissed without prejudice or with prejudice?

Mr. KRIS. I mean, I don't know what the judges will do. I hope they won't dismiss at all.

The CHAIRMAN. No, no. Have they already been dismissed?

Mr. KRIS. No.

Mr. JOHNSON. Under military commissions procedure, when a case is withdrawn, as a few have been in the past, they are withdrawn without prejudice.

The CHAIRMAN. Is that part of the rules and regulations under which the commission operates?

Mr. JOHNSON. Yes, sir.

Mr. KRIS. I might just make, sort of, three quick points that may help on this, maybe not.

But the first is that the protocol considers efficiency, which would embrace, I think, prior litigation in guiding forum choice.

The second is that I think the President has made clear we are not going to go forward with a Military Commissions Act pro-

ceeding until the necessary reforms have been made to the military commissions system in any event.

And, third, that the pending legislation, I think, as it stands today, has a, sort of, conforming amendment approach that allows for the possibility of continuing the cases that are pending even after the amendments have been enacted into law.

The CHAIRMAN. Ms. Sanchez.

Ms. SANCHEZ. Thank you, Mr. Chairman.

I have consistently supported the use of military commissions in appropriate cases. And I was one of the first ones to introduce in 2005 a military commissions bill. Nonetheless, I voted against the MCA [Military Commissions Act] of 2006 because I had some certain concerns with it. And I am glad that, in looking over your review, that your revisions and suggestions, that you have actually gone to some of those concerns. So I want to thank you.

However, I am surprised you didn't include a revision of the definition of "unlawful enemy combatant," which I think currently is "any person who has engaged in hostilities or who has purposefully and materially supported hostilities against the U.S. or its co-belligerents."

I think that the intent of military commissions is to police the battlefield. And I believe that military commissions are intended to enable—I believe that there should be clear boundaries for the use of these special wartime commissions to prevent them from more general use in normal law enforcement cases.

Cases involving noncombatants should be disposed of through Article III courts. I believe this would be accomplished by restricting the jurisdiction of military commissions and the definition of "unlawful enemy combatants" to persons who actually engage in armed hostilities or attempt, conspire, or aid and abet the same. This definition draws the line more strictly around those who participate in acts of violence under the well-defined traditional headings of principals, attempts, and conspiracy.

And, for example, some of the examples I might use is that, under the MCA, the personal jurisdiction of the military commissions are limited to unlawful enemy combatants. I am concerned that defined categories broadly include persons, for example, who are captured off of the battlefield for various noncombatant support or, like, monetary contributions to terrorist organizations, for example.

So my question to you is, have you given thought on whether you would define the—how you would define the personal jurisdiction of military commissions? And, if so, how? And how would you change the definition of "unlawful enemy combatants," if you would?

Mr. JOHNSON. Congresswoman, first thing I would do is refer to the Senate bill, which I think no longer uses the phrase "unlawful enemy combatant" in defining jurisdiction. And I think the phrase used in that bill is "unprivileged enemy belligerent," which is a phrase that many military law experts use and embrace.

In response more broadly to your question, I would refer you to the definition that we are now using with the Department of Justice in our Guantanamo habeas litigation for who we say we have

the authority to detain. That was a definition that was modified in March from the previous Administration's definition.

In that definition, we no longer use the phrase "unlawful enemy combatant." And it is a definition that is more closely tied to the Authorization for the Use of Military Force that the Congress passed in 2001, as informed by the laws of war.

So that is the definition we are using as our detention authority for the people at Guantanamo. And who we prosecute in that group is a subset of that group that we think we have the authority to detain.

Ms. SANCHEZ. But the Congress has not changed the definition.

Mr. JOHNSON. No, no. We, the executive branch——

Ms. SANCHEZ. You are.

Mr. JOHNSON [continuing]. Changed the definition in our submission to the courts for who we say we have the authority to hold.

Mr. MCKEON. Will the gentlelady yield?

Ms. SANCHEZ. I will yield to you, Mr. McKeon.

Mr. MCKEON. In the Senate bill that they passed last night, they used this definition, "unprivileged enemy belligerents." So the Senate is using that.

Ms. SANCHEZ. Yeah, but we aren't. I mean, the current law isn't.

Mr. MCKEON. No, we didn't address it in our bill. It is something we will have to address in conference.

Ms. SANCHEZ. Right.

Mr. KRIS. The Military Commissions Act and the Senate Armed Services bill to which Representative McKeon just referred have this definition. They use different terms to describe it.

But, as Mr. Johnson said, there is the possibility of linking the personal jurisdiction more explicitly to the authorization to use military force from September 2001. That is still, I think, an open question, and we are very interested in working with Congress on that.

One other point that may help address the basic point you were advancing, I think, Congresswoman Sanchez, and that is that, whatever personal jurisdiction issues are—exist, military commissions will be limited in terms of their subject matter jurisdiction to law of war violations. So an ordinary Federal crime would be, I think, outside the scope of what could be tried there, regardless of personal jurisdiction issues.

So I just wanted to add that limiting gating factor that I think is an important part of how you look at this.

Ms. SANCHEZ. Thank you, gentlemen.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

The gentleman from Texas, Mr. Conaway.

Mr. CONAWAY. Thank you, Mr. Chairman. I appreciate it.

Gentlemen, thank you for being here.

Hearing the phrase, "unprivileged enemy belligerent," took me back to my B law days when bank robbers were described as "holders not in due course." Not relevant to what I want to ask.

We are in an ongoing fight. And with respect to new folks, folks who aren't yet at Guantanamo Bay or aren't going to go there, does the Administration plan to use a preventive detention system for terrorist detainees in the future?

Mr. JOHNSON. It is difficult to predict the future. We believe that the Congress authorized law of war detention for these particular detainees at Guantanamo. That is the definition we are now using. And the courts have reaffirmed that principle as recently as 2004.

Mr. CONAWAY. Okay. But if we picked up a guy on the battlefield today that is clearly an al Qaeda or related—an affiliate of al Qaeda, does the Administration believe you have got the authority to preventatively detain that new combatant, or unprivileged enemy belligerent—a guy with a bad attitude, I guess—under the rules? And, if so, where do you plan to keep these guys, or women, depending on who you pick up?

Mr. JOHNSON. If that detainee fits within what Congress adopted in 2001—I think the language was al Qaeda, Taliban—and they are at Gitmo, we certainly believe that we have the authority to detain that person. Part of our review process——

Mr. CONAWAY. Okay, let's focus on the new guys that aren't at Gitmo and, if you have your way of closing it, won't go to Gitmo. Where are you going to keep those folks?

And let's broaden the question a little bit, to if we picked them up in Yemen, some other place in the world besides Afghanistan. What is the Administration's position with respect to those bad guys?

Mr. JOHNSON. We—If they are a member of al Qaeda, they constitute a security threat, we would certainly look to detain them, after we capture them, someplace. Where exactly that is, I would hesitate to try to speculate right here.

Mr. CONAWAY. Okay. Are there plans within the Administration to determine where that place might be?

Mr. JOHNSON. Yes, sir.

Mr. CONAWAY. And who would be—who would we need to bring down here to talk about that?

Mr. JOHNSON. I can try to help you identify that person somewhere within the Department of Defense.

Mr. CONAWAY. Okay. So you are not just—I am always nervous when I am——

Mr. JOHNSON. A lawyer doesn't always have all the answers.

Mr. CONAWAY. Well, lawyers parse their words very easily.

You mentioned earlier about, if we prevail in the habeas cases, that we will keep these guys forever. What if we don't prevail?

Mr. JOHNSON. As the President said in May, if we have the detention authority, there should also be some form of periodic review——

Mr. CONAWAY. But wait a minute.

Mr. JOHNSON [continuing]. So you don't just keep them forever.

Mr. CONAWAY. Okay, well, do you or don't you have the detention authority?

Mr. JOHNSON. We believe we have the detention authority with respect to the current population. There comes a time—and I think the Supreme Court may have alluded to this—that, if circumstances change and the person is just sitting there year after year after year, we may lose that authority, and so some form of periodic review might be appropriate.

Mr. CONAWAY. Because the fight is over, or because this person is infirm?

Mr. JOHNSON. Because the fight is over and/or the person is no longer a threat.

Mr. CONAWAY. Okay. If the fight is over, then we couldn't hold any of them, under that preventive detention measure, right? And how are we going to know when the fight is over?

Mr. JOHNSON. Well—under the traditional law of war principle, you hold them until the cessation of hostilities, until the war is over.

Mr. CONAWAY. Right.

Mr. JOHNSON. And this obviously is a different kind of war. So we think some form of periodic review is appropriate that makes a threat assessment.

Mr. CONAWAY. Sure.

Mr. Kris, are you—what kind of assurances—once you hear the question, you will say none—but what kind of assurances can you give us that some Federal judge in the system somewhere won't decide that, because this fight is, as Mr. Johnson just said, not one we have fought before, and the idea of cessation of hostilities is so nebulous that it no longer applies and that we have to let these guys go? Can we trust that these Article III courts won't come to that conclusion?

Mr. KRIS. Well, at one level, you are right: I obviously cannot control Article III judges. I admitted earlier I can't control the media, and I am happy to make a similar admission here.

But I do have a good deal of faith in our Federal judicial system and the judges who are on it. And, of course, if any one judge makes an error—and that can happen—we have appellate review.

Mr. CONAWAY. The Judiciary Committee, earlier this week, heard some gut-wrenching testimony about a poor soul who was a nerdly, scientist geek who was trying to develop a fuel cell, and he wanted to move from his mother's basement to Alaska. And he knew that these chemicals couldn't—that he was using couldn't be flown to Alaska, so he gives them to a UPS guy, clearly marks "Ground" on the shipping document, not knowing, of course, that UPS flies everything up there. So he flew something up there unintentionally.

We arrest him, put him in jail. While he is in jail, the chemicals that the other—the other chemicals he has had, the EPA decides that he has abandoned those chemicals. The abandonment occurred while he is in jail, in our custody. This pour soul does 17 months on the EPA charge in one of your Article III courts.

And so, your—you know—and that is an unfair accusation to try to characterize the entire system, because the entire system is good. But there are rogue events, anecdotal events, that cause me great concern when we have got a prosecutor on one side and a judge on the other side who couldn't look at the facts there and go, "Goodness gracious, this is nuts."

So can you give me great confidence that this—it is even more important in this arena that we don't let these guys go.

Mr. KRIS. I mean, I think—I am obviously not familiar with that case, as you know.

Mr. CONAWAY. I know.

Mr. KRIS. I mean, I think the lesson of that is, I guess, that, even in a system like Article III, where you have the largest number of

checks and balances and unquestioned systemic legitimacy, mistakes are possible. This is a human endeavor.

Mr. CONAWAY. Yeah.

If we tried KSM, Khalid Sheikh Mohammed, and he is acquitted, worst of all circumstances, he is acquitted, can we still hold him, Mr. Johnson? Or will we still hold him, is a better question.

Mr. JOHNSON. Well, I hesitate to give you a prediction based on particular circumstances.

Mr. CONAWAY. So there is a chance we wouldn't hold this guy?

Mr. JOHNSON. I said earlier in response to another question that it is my view that, if you have detention authority, law of war authority to hold a dangerous person, that is true irrespective of what happens in a prosecution.

Mr. CONAWAY. All right, that is fair. Thank you.

I yield back.

The CHAIRMAN. Mr. Larsen, the gentleman from Washington.

Mr. LARSEN. Thank you, Mr. Chairman.

And, gentlemen, thank you for coming.

I was one of the four Members who were down there on Monday at Guantanamo. I was there in January 2002, as well, and got to, sort of, see the bookends of the physical facilities. And I have to say that the facilities down there are certainly much improved over what we saw in January of 2002.

And to echo Mr. Johnson's comments about the professionalism of the folks down there, I want to echo that. It is really always a sight to behold whenever we get to travel overseas and visit our men and women in the military and see the jobs they do. They are doing a great job under difficult circumstances.

With regards to the Office of Military Commissions prosecutor conversation that we had down there, I think he did make his own forceful case for military commissions. I wouldn't expect anything otherwise. And he provided some conjecture about what might happen because the hearings process has been stayed.

But, I guess, what may be may not be, as well. And, you know, it is tough to say that his prediction would come true or not, in part because we didn't have the opportunity to have the same kinds of discussion with the Office of Military Commissions-Defense [OMCD]. And so I made the point that maybe we ought to have a chance to chat with the OMCD folks, as well, and look forward to how they see the process and what kinds of concerns that they have. Because I think that we need to hear both sides in order to have a better discussion and more informed discussion as we move forward.

With regards to the MCA and the Senate—of course, we didn't have language in the House version, and we will have to sort things out now that the Senate has passed.

But, Mr. Johnson, could you discuss the Administration's position on this debate about voluntary versus reliability standards in the use of evidence and why the Administration is where it is on this issue?

Mr. JOHNSON. The Administration believes that a voluntariness standard is the right way to go. And we believe that for this reason: The current law and the current bill have a totality of circumstances reliability standard. We think that, as these prosecu-

tions progress, more judges will likely impose a voluntariness requirement, and we think, therefore, it is important that they get it right.

And so, what we in the Administration are advocating is a voluntariness standard—and there is language we can give you specifically—tailored to military operations, military intelligence collection circumstances, so that, consistent with the law, the judges get this right.

We are not talking about imposing a voluntariness standard on soldiers at the point of capture. I want to be perfectly clear about that. And one of the things the Senate bill does is specifically exempt from military commissions any Miranda requirements, Article 31 of the UCMJ.

What we are talking about is a voluntariness standard, frankly, that is not far from what Admiral McDonald advocated the other week when he was here. I think the JAGs advocated that voluntariness be a factor in the reliability standard.

Mr. LARSEN. They basically argued reliability with voluntariness as a factor.

Mr. JOHNSON. Correct.

Mr. LARSEN. And it sounds like you are arguing voluntariness with reliability as a factor, in some sense.

Mr. JOHNSON. We are arguing that voluntariness should be the standard. But, really, what we are saying is not that different than what the uniformed lawyers are saying. We are urging a voluntariness standard that takes account of the circumstances of how the military does its job.

Mr. LARSEN. Well, as I understand your argument, it gets at some of the heart of the MCA. What I hear you saying, I guess, is you are trying to perhaps anticipate what a future trial judge or a series of future trial judges may determine about the use of the reliability standard versus the voluntariness standard and, by anticipating they may be moving to the voluntariness standard, put it in the MCA now so we don't have to go back and change it later.

Which has been one of the problems that we have had, I think, in the past with the MCA in getting it wrong and being told by judges to go back and fix what was wrong, which is why we are here today.

Mr. JOHNSON. I want to echo what the chairman said, which is that it is important that we have a process that is sustainable, that brings convictions that can be upheld on appeal.

Mr. LARSEN. And, quickly, the yellow light is on, I will ask a question, material support of terrorism. The Administration—Where does the Administration sit on material support of terrorism as a chargeable offense in the MCA? Are they supportive of it or not? And why?

Mr. JOHNSON. We think Article III prosecutions are for violations of the Federal criminal law and that military commissions are for violation of the laws of war.

We looked at it carefully and concluded that the historical precedent for material support as a law of war offense was questionable. And, therefore, material support should be prosecuted, if it is prosecuted, in Article III Federal courts.

Mr. LARSEN. Thank you.

The CHAIRMAN. Thank the gentleman.

Mr. Coffman from Colorado.

Mr. COFFMAN. Thank you, Mr. Chairman.

There seems to be a shift in this Administration to view what I would call acts of war as criminal justice issues, where the global war on terror is now "overseas contingency operations," and terrorist attacks are now "man-caused disasters."

But we are a Nation at war, and we are fighting against disparate, irregular forces bound by an ideology who often use terrorism as a tactic. All enemy combatants should be detained until this war is over with, regardless of how long it takes for us to win this war.

Only if there are alleged violations of war should these enemy combatants go through—be tried through a judicial process. But even if they are found innocent of that, they are still enemy combatants and should be detained, again, for however long it takes us to win this war.

And I would like to know, is this the Administration's view, that acts of war are criminal justice issues?

Mr. KRIS. Congressman, I think a couple of points on that.

First, the President has made clear, and I want to echo it: We are at war. We need to win that war. We need to defeat our adversaries.

To do that, we need to use all of the tools in our toolbox, all elements of national power consistent with the rule of law. That includes military techniques, intelligence techniques, diplomatic techniques, and anything else that is consistent with the rule of law and that will help us win.

And it includes also military justice, prosecutions in military commissions, and, where it is appropriate and effective, prosecutions before Article III courts.

I want and I think the Administration wants to be able to use whatever tool is the most effective under the circumstances to allow us to win.

Mr. COFFMAN. But you do not believe that enemy combatants should be detained until this war is won.

Mr. KRIS. No, on the contrary, I think the Supreme Court has made clear that, under the authorization to use military force, there is authority to detain. And we are, in fact, detaining many people under that theory now. It is being tested in habeas corpus proceedings, but we are certainly doing it.

At some point, the Supreme Court may——

Mr. COFFMAN. Excuse me, but I think you missed my point. And my point is this, that there are two levels. I was an infantry officer; I wasn't a JAG officer. And I faced—I have been face to face with the enemy. And I will tell you this, that—a couple points. Number one, we are a Nation at war. And so the question is, enemy combatants ought to be detained so long as we are a Nation at war. And the other issue is, when there are violations of war, of the laws of land warfare, then no doubt those people should be tried.

But I think we have this fuzzy-headed view that, when somebody is plucked off the battlefield, that they need to go through some judicial process to determine whether or not they should be detained. And I think that—and you say it is the policy that they can. The

question is, we should have an absolute policy that people that are enemy combatants will be detained until this war is over with.

Mr. JOHNSON. Congressman, the President agrees with you. We are at war. He said that as recently as May 21st.

Given the nature of the conflict, there is not going to be a surrender. There is not going to be a fixed date for a surrender, which is why it is appropriate for those we are detaining under our law of war authority to have some form of periodic review. Because there may be a point in the future where that person is deemed no longer a threat.

Mr. COFFMAN. If—the person—Well, we have released people who we thought were no longer a threat that are back on the battlefield. So our ability to decipher that isn't very good.

You know, again, I think that this view—that there is a view that this is all a criminal justice issue, that acts of terrorism are law enforcement problems. And, as somebody who served in Iraq in 2005, 2006, I want to tell you for the troops on the ground there is a different reality than exists then for this Administration.

Mr. Chairman, I yield back the balance of my time.

The CHAIRMAN. Thank the gentleman.

Before I call on Mr. Courtney, Mr. Kris, when does the war end?

Mr. KRIS. Oh, I am sorry, I, as Mr. Johnson said, that is very difficult to predict. This is a war unlike other past wars. And I think, as he said earlier——

The CHAIRMAN. We know that. But when, in your legal opinion, when does the war end?

Mr. KRIS. I don't know if that is so much a legal judgment as it is a factual and military judgment as to when the war ends. When the adversary is defeated, that would be one ending point. I mean, if you are getting at—and I don't——

The CHAIRMAN. Why don't you do this for me? Answer that for the record. Go back and think about it and send us an answer. When does the war end? Because, at that moment, those detainees, as bad as they are, under the law of war, would be freed.

Mr. KRIS. I agree with you.

The CHAIRMAN. Am I correct?

Mr. KRIS. Yes, I think that——

The CHAIRMAN. So I think it would be helpful to our committee if you would do some research and send us an answer to the question, for the record, when the war ends. Under what circumstances does the war end? And spell it out for us. You are a good lawyer; you can do it.

[The information referred to can be found in the Appendix on page 77.]

The CHAIRMAN. Mr. Courtney.

Mr. COURTNEY. Thank you, Mr. Chairman.

Mr. Chairman, listening to some of the questions, it seems like there has almost been an assumption that this Administration walked into office with a static population at Guantanamo Bay and that we are, sort of, moving from that number of 240 which existed back in January to where we are today. I mean, the fact of the matter is that there were over 700 people that were detained at Guantanamo Bay. Isn't that correct, Mr. Johnson?

Mr. JOHNSON. Yes.

Mr. COURTNEY. And so when President Obama took office and there were only 240 in that facility, my math tells me that about 540 people have been transferred or released, whatever term you want to use, before he even stepped foot into the White House. Isn't that correct?

Mr. JOHNSON. That is correct, yes.

Mr. COURTNEY. So there obviously has been a process that started with the prior Administration of using national security as the measuring stick for evaluating the decision to hold people or to transfer them back to other countries. I mean, that is an obvious conclusion that you have to deduce from just the math. Isn't that right?

Mr. JOHNSON. Correct.

Mr. COURTNEY. So—and when the President clearly stated that, after, sort of, going through this remaining minority of detainees that are at Guantanamo Bay and sorting through who is going to go to military commissions and who is going to go to Article III courts, that—and he was very up front about the fact that there may be this other category who don't necessarily easily fit into those referrals—that the Administration's position is that we have the right to hold them under the law of war. Isn't that correct?

Mr. JOHNSON. Yes. And I think the President has also made clear that the safety of the American people, consistent with the rule of law, is the paramount concern.

Mr. COURTNEY. So, you know, there really is no fuzziness here about what the Administration's position is, in terms of protecting this country and using a non, you know, sort of, criminal police measuring stick, in terms of what the Administration's policy is. I mean, he is basing that detention law—legal opinion on the 2001 authorization which this Congress enacted. Isn't that correct?

Mr. JOHNSON. Yes, sir.

Mr. COURTNEY. So when the Senate did their modification of the commissions in the authorization bill, did they touch that piece of the system? Or is the Administration still just going to ask for us to leave that alone?

Mr. JOHNSON. The Senate amendment to the Military Commissions Act does not purport to address law of war detention; that is correct. And we believe, with respect to the current Guantanamo population, that the Authorization for the Use of Military Force, as it was interpreted by the Supreme Court in the Hamdi decision, provides sufficient authority to detain the current population.

Mr. COURTNEY. So nobody is going anywhere who, again, in the opinion of our military and Administration officials believes still poses a threat, whether they are found guilty either by plea or trial of an offense in the military commission or Article III court because of that policy. Isn't that correct?

Mr. JOHNSON. That is correct. That is our primary obligation to the American people.

Mr. COURTNEY. Okay.

And, lastly, just, you know, Mr. Kris, how many people in the Department of Justice do we incarcerate on a given day, roughly?

Mr. KRIS. I mean, the Bureau of Prisons has a very large population—I think it is a hundred thousand or so—under lock and key right now.

Mr. COURTNEY. And, I mean, just in my State of Connecticut, I mean, there are probably roughly about 20,000 people incarcerated on a given day. Obviously, we have a system that can accommodate 240 people, individuals, in a safe and secure manner. And we prove that every single day, in terms of the hard work that people in the Bureau of Corrections do. Isn't that correct?

Mr. KRIS. I think that is absolutely right.

Mr. COURTNEY. Okay. I yield back.

The CHAIRMAN. Ms. Fallin, the gentlelady from Oklahoma.

Ms. FALLIN. Thank you, Mr. Chairman.

And I appreciate you gentlemen and your testimony today and—about how we treat our enemy combatants, especially on the battlefield. But I have a little bit of a different tack that I would like to ask you about today, because this deals with a situation that is occurring in my home state, in Oklahoma, and it deals with our American soldiers and how they are treated on the battlefield and their rights in the military court system.

And since both of you are with the legal system, I would just like to tell you about a situation, ask your opinion, and then hopefully leave you with some information and ask you specifically if you will look into this situation for me as a Member of Congress.

And let me just start out, I heard Mr. Forbes asking Mr. Johnson about the goals of the Administration in relation to detainees and their rights. And I think you said that the Administration's goal is justice for the victim and—of terror and also for the U.S. citizens. In other words, there should be justice for all when we talk about our military courts.

And I guess my question is, do you believe American soldiers have a constitutional right to a fair trial?

Mr. JOHNSON. I believe that, under the UCMJ, American soldiers, sailors, airmen have a number of rights to a fair trial.

Ms. FALLIN. Thank you. And doesn't an American soldier have the right to defend themselves in a combat zone against, say, if they were to run up an against a member of al Qaeda that is a terrorist and a known terrorist? Do they have the right to defend themselves?

Mr. JOHNSON. Absolutely.

Ms. FALLIN. Okay. And during a military trial, is it permissible for a prosecutor, a government prosecutor, to withhold or fail to provide exculpatory evidence to the defense of an American soldier?

Mr. JOHNSON. Well, first of all, as a former prosecutor myself, I hesitate to comment on what somebody did in a particular trial or a decision made in a particular prosecution. And so, I wouldn't want my comment to be interpreted as that.

Ms. FALLIN. Okay. Well, I am asking——

Mr. JOHNSON. I know that, as a general matter——

Ms. FALLIN. Yeah, in general.

Mr. JOHNSON [continuing]. Prosecutors, the government has an obligation to disclose exculpatory evidence.

Ms. FALLIN. Okay, good. That confirms that.

Okay. So, in your professional opinion, would an American citizen, a soldier, be given a fair trial if evidence is withheld purposely from the defense that is exculpatory?

Mr. JOHNSON. As a general matter—again, I am not commenting on a particular case—as a general matter, prosecutors have an obligation to disclose exculpatory evidence. And, if they don't, there should be consequences.

Ms. FALLIN. Good.

Okay. So that gets me to a point, and that is that we have had a gentleman from my home state—and I am not determining guilt or non-guilt on this situation. But what I do want to make sure is that, when our American soldiers who are away from our country, defending our Nation, and on foreign soil who run across enemy combatants that are in that land, that they have full rights, too, as American citizens, because they are, of course, taking away time from their country and their life and defending our country. And we need to make sure that we protect them just as much as we give rights to detainees or enemy combatants.

And, in a particular case, there has been a gentleman that is First Lieutenant Michael Behenna, who has gone to trial, has had a trial, but there have been very deep concerns from my congressional delegation in Oklahoma and from others who believe that evidence was withheld from the defense of him. And he was accused of shooting an al Qaeda member who had just killed two of his fellow soldiers in his platoon through an explosive device.

And so, there is some question about whether the trial was fair, because not all evidence was presented in court. So we have asked for the convening authority to look at the evidence and to make a ruling. And, just yesterday, they made a ruling that they felt the trial was fair.

So I guess what I am asking is, I want to give you this information and just ask that you would take it back, because my goal is just to make sure that our American soldiers have every single right that they deserve to have a fair trial, just as much as an enemy detainee.

Mr. JOHNSON. Congresswoman, now that you mention the case, I am aware of the case. The Secretary of Defense has received correspondence about the case. Because the case is in the UCMJ process, I am limited in terms of what I can do or what the Secretary can do to try to influence that, nor should we try to do that. But I am happy to look at whatever you ask me to do.

Ms. FALLIN. And all I am asking you is to look at the process, not the outcome.

Thank you.

The CHAIRMAN. I thank the gentlelady.

Ms. Davis.

Mrs. DAVIS. Thank you, Mr. Chairman.

Thank you both for being here.

I wanted to go back to one of our HASC [House Armed Services Committee] hearings in September of 2006, when Admiral McDonald, the Judge Advocate General for the Navy, discussed the issue of reciprocity. And the question was whether the way in which the U.S. treats detainees impacts the way our service members will be treated on the battlefield, something I know you are very familiar with.

And, at that time, he said that, "I would be very concerned about other nations looking in on the U.S. and making a determination

that, if it is good enough for the U.S., it is good enough for us, and perhaps doing a lot of damage and harm internationally." Now, that was a time that we, obviously, were very concerned about what was happening and the impacts.

Could you—do you share his views on that, that it really does make a difference to our troops in the field how we handle this process in the U.S. and overseas?

Mr. JOHNSON. I hear repeatedly from my military lawyer colleagues that reciprocity is important, that we are concerned about how our people would be treated if they were captured. And it is important, therefore, to get it right for that reason.

Mrs. DAVIS. Do you have a comment?

Mr. KRIS. I will say I agree. Jeh and I and Admiral McDonald testified together a few weeks ago in the Senate, and he expressed the same view there, which I found persuasive. And he said, and I think he is right, that the legislation that we are working on satisfies that reciprocity principle. And I think it is an important one.

Mrs. DAVIS. Uh-huh. Are there any changes that the Senate has made or in our discussions that would cause you any concern in those areas? And are some of those issues very differently portrayed in the outside world aside from here? Have you seen that in any way, that they are being portrayed differently than the way you see them?

Mr. JOHNSON. Well, this goes back to—well, let me begin with this. I think that a big change that the Senate bill makes to current law is a ban on the use of statements taken as a result of cruel, inhuman, degrading treatment. The old bill, the current law, permitted that possibility. And I think that that did more to hurt our credibility in the military commissions process than any other one thing.

And so, whatever the House of Representatives decides to do, I would hope that you would agree that we should not permit the possibility of statements taken as a result of cruel, inhuman, degrading treatment. That is certainly not what we would want our military to face. And, as a matter of simple American values, I would submit that we shouldn't permit it in any court system governed by the United States.

Mrs. DAVIS. Any other comments?

Mr. KRIS. I agree with that exactly.

Mrs. DAVIS. Okay, thank you.

As we look to transferring—if we find ourselves in a position of transferring detainees to the United States, there are many of those issues that we are going to be looking at: how we structure the proceedings, procedural rules, due process rights of course, right to be present during adjudication.

In that transfer, is there anything that you feel might be—might affect any of these considerations? I mean, are there some complications that arise as a result of that transfer? And what should we be the most concerned about?

Mr. JOHNSON. I think we are both pretty confident that reform of the Military Commissions Act of 2006, reform of military commissions to make it a robust process that more closely resembles the UCMJ process is good all around, irrespective of where they are conducted.

Mrs. DAVIS. Is there anything in the way, appellate review rights, other considerations, that would—that you think would be at play here that we need to look at further?

Mr. JOHNSON. The—in terms of appellate rights, the Administration embraces the idea in the Senate bill that there ought to be a broader scope of review. I think where we differ with the Senate bill is we believe that the appellate court should be an internal military court, a court of military commission review, plus the D.C. Circuit, United States Court of Appeals for the D.C. Circuit, and then on to the Supreme Court.

Mrs. DAVIS. Thank you.

The CHAIRMAN. Thank the gentlelady.

Mr. Rooney. I have Mr. Rooney and Mr. Kratovil, in that order.

Mr. ROONEY. Thank you, Mr. Chairman.

You know, one of the advantages of going last is that I get to hear everybody else. But it is also a disadvantage, because my questions are going to be all over the place. So if you bear with me, I just want to touch on a few things.

The chairman spoke of when the war is over and releasing detainees and how, Mr. Kris, you would define the end of the war and how difficult that is because it is a war on terror and that type of issue, obviously.

One of the things that I might ask you is, when we are talking about the enemy that we have detained, where is this enemy from? What country do they fight for? What uniform do they wear? What flag do they fight under? The answer to all those questions is obviously——

Mr. KRIS. None.

Mr. ROONEY. Right. So those things are all violations of the law of war, correct? Or the Geneva Conventions, as we understand them?

Mr. KRIS. I mean, they would not be entitled to be privileged belligerents or prisoners of war under the Geneva Conventions. You are absolutely right about that.

Mr. ROONEY. But my question goes more towards the—what eventually you do with them once there is—if we can agree that there is something that would be the end of the war. As the chairman said, that we would just—they would just be released. Is that correct in—when dealing with Khalid Sheikh Mohammed or individuals that we have that have violated the Geneva Conventions?

Mr. KRIS. No, and that is—no. And it is interesting, in the prior discussions we were having, we talked about the distinction between detaining someone under the law of war for the duration of the hostilities. And there is some question about exactly when these hostilities will cease.

But separate from that is an ability to convict someone for violations of the law of war or violations of the criminal code and to hold them for the duration of their sentence, which very well might go quite beyond the end of hostilities. And that will be a fixed sentence imposed by a court as part of a prosecution.

Mr. ROONEY. All right. And I just wanted to throw that out there and add that element to that conversation.

You know, one of the things that concerns me—and I know I don't have much time—but one of the things that concerns me is,

when we are talking about the role of the Commander in Chief and we are talking about the lawfulness under the laws of war, the Geneva Convention, prisoner of war status, Guantanamo Bay, which I also visited, you know, there is a lot left up to interpretation for the Commander in Chief.

You talked about, just a few minutes ago, one of the hot-button issues, obviously, are statements that are elicited from cruel or degrading, you know, punishment or interrogation. Up until the President started defining certain things, I mean, that was arguable. I mean, for some people, it was more obvious than others, but there was room for argument.

My question to you is, as we move forward, the judge advocates that were here—and some of the questions, quite frankly, that you have been asked to answer involve a lot of speculation, and you haven't been able to answer them. The judge advocates haven't been able to answer them.

I think that it is imperative that we do as much as we can to be as clear and detailed as possible, so, moving forward, we are not caught in, sort of, the cloud of war when it comes to how these people are prosecuted. And that is what we are all trying to do here today.

But one of the things that is still kind of out there for me is when we are dealing with future detainees or future prisoners or whatever you want to call them, specifically with regard to habeas, extraconstitutional rights. We talk about detainees in Afghanistan and detainees wherever we are going to go in the future, with regard to terror.

What do you specifically foresee us doing to make sure that we are as locked in as possible when we pick up somebody—and this is kind of an extension of Mr. Conaway's question. If we pick up somebody, a bad guy, on the battlefield of Afghanistan, who is clearly a terrorist or al Qaeda or somebody like that, what rules of criminal procedure are we going to be able to follow for that person with regard to habeas for the future; and are we going to be able to address that with what we are doing here today?

Mr. JOHNSON. Congressman, let me try to answer this question this way, which is part of the question you asked earlier of Mr. Kris. There are no easy, neat, clean answers about when this was going to be over and how you treat people in the future if the so-called war ends, which is one of the reasons why you seek to bring people to justice, so that you can get out of that process a long prison sentence.

In terms of detainees in places like Bagram, we are building a new facility. We are putting in place review procedures, that I think are improved procedures from what we have now, that have been approved at the CENTCOM level by General Petraeus. And so I think we are headed in the right direction there in terms of our ability to hold these people consistent with the rule of law and consistent with what I think ought to be our American standards.

Mr. ROONEY. I had about ten other questions but my time is up, Mr. Chairman. Thank you very much.

The CHAIRMAN. I thank the gentleman.

Mr. Kratovil.

Mr. KRATOVIL. Thank you, Mr. Chairman.

Let me begin by thanking both of you for making efforts to try to resolve what is clearly one of the most complex legal issues that we have perhaps ever faced. And I appreciate your trying to find some reasonable compromise, understanding the differences in the battlefield versus the legal arena.

Once again my chairman, in his country lawyer style, has hit on the issue directly. The way I see the issue is we have detained individuals on a relatively minimal standard under laws of war; and we are justified, according to the Supreme Court, in continuing custody so long as the conflict continues. We are struggling with those individuals because, although we have what I would articulate as perhaps an articulable suspicion in terms of offenses and their involvement, we don't have enough—at least it appears to me—to be sending these individuals to the various forums because if we did, we would have done so already.

So the question becomes, once the conflict is over, what do we do? And the—asking a bit more directly than the chairman did, do you believe, based on the Supreme Court case and the dicta contained within it, that following the removal of troops from Iraq, are we going to be able to justify continued detention of individuals that were detained in the conflict in Iraq after the combat troops leave? And if not, what do we do then?

Mr. JOHNSON. Congressman, Iraq and Afghanistan are obviously different situations. As we wind down our presence in Iraq pursuant to the security agreement, that does not mean that the conflict against al Qaeda and the Taliban is going to be over. We are very much in Afghanistan, dealing with the threat in Afghanistan right now. And, so I would expect that what we are doing will continue there, and part of the mission of the U.S. military is capture and detention.

Mr. KRATOVIL. Alright. Let us go down a few more—let us go down a few years, then. Let us assume that we withdraw from Afghanistan. We have these individuals that we believe are very dangerous people although, again, not sufficient proof, in our view, your view, to bring them before a forum. What do we do then?

And here is what I am getting at. I know we are looking at these cases to determine what forums to send them. My question is, similar to when I was a prosecutor, is what efforts are we making in reviewing them, to acquire additional evidence so that we can forward them to these forums and so that we can hold them beyond the end of the conflict whether in Iraq or Afghanistan?

Mr. JOHNSON. That effort, that collection effort is definitely ongoing.

Mr. KRATOVIL. What does it consist of?

Mr. JOHNSON. Through intelligence and military resources and avenues, we constantly do that if for no other reason than to find out not just how—you know, authority to keep those individuals—but, in my view as the military lawyer here, so that we can gain information about people we haven't yet captured. So we are constantly doing that.

Mr. KRATOVIL. Let me—if I have a little more time, with regard to the voluntariness issue, are you suggesting that in the battlefield if there was a door knocked down and soldiers go in and take a statement at gunpoint, are you suggesting that the voluntariness

standard, even under those circumstances, should be used as opposed to a reliability standard? And if is so, why?

Mr. JOHNSON. What we are suggesting is a voluntariness standard that takes account of that circumstance. So in other words, in a civilian context, cops and robbers, you try to discourage the police from taking statements in those circumstances. But that is the mission of the military. The military should do that. And so what we are asking for and urging is a voluntariness standard that takes account of that circumstance and wouldn't necessarily preclude that statement.

Mr. KRATOVIL. And, my question to you is, do you think it is realistic that our courts are going to find that an individual giving a statement under a voluntariness standard is going to be admissible?

Mr. JOHNSON. You have touched on the very reason why I think we need to get it right, why we need to codify a standard to take account of that circumstance so that judges don't misinterpret a voluntariness standard.

Mr. KRATOVIL. Why not have a different standard of voluntariness when you are talking about someone who is detained in custody in a confined setting, and have a reliability standard that applies when you are dealing with issues on the battlefield?

Mr. JOHNSON. Well, that is very close to what I think we are proposing.

Mr. KRATOVIL. Okay, thank you. I yield back.

The CHAIRMAN. I thank the gentleman.

Mr. Hunter, please.

Mr. HUNTER. Thank you, Mr. Chairman.

Gentlemen, thanks for being here. This is, first, a little bit difficult for me to be sitting here with you because, frankly, the rules of engagement and what the military lawyers do on the ground for guys like me is make life hell, frankly. You make things very difficult.

In fact, I would say that some of the DOD law that exists with rules of engagement and how we treat detainees actually makes us kill more people because we don't want to capture them. I have seen it happen. I have seen guys come in, get detained, couldn't hold onto them for one reason or another, according to our JAGs, so we release them. Then we kill them.

And I don't think you understand to a certain point, especially most JAGs—in fact, a good buddy of mine that I served with in Fallujah was just here. He is in the FBI now, but he was a JAG in Fallujah. We have different types, but they make it very difficult.

In Afghanistan we had a JAG with us 24/7, 24/7 watching the bad guys. And we saw bad guys doing bad things and the JAG would say that we could not do anything for one reason or another, couldn't detain them. And you had a three-star general relying on an O–3 or an O–4 to give them a decision; and the general could override them and strike, but if they did, then it would have been against what that JAG said, and obviously that general's career would have been in jeopardy.

But anyway, we will go on to the questions here. And I am not an attorney, so try to speak plainly to me, if you don't mind. I am at a bit of a disadvantage.

With the nature of these trials, the way that they are going to be, do you think that we are leaning towards holding the detainees in our military brigs as opposed to Federal penitentiaries?

Mr. JOHNSON. I would——

Mr. HUNTER. With the military nature, the way that they are going to be tried, is that going into the—and I am not one either who thinks that this Administration came in and all of a sudden this stuff started. I know in 2007 under the Bush Administration, they were looking at Camp Pendleton and Miramar in my district in San Diego to put detainees, because they thought that would be conducive to trying them in the way that they are held there. So does that lead into that process of thinking?

Mr. JOHNSON. Well, Congressman, let me respectfully disagree with your characterization of the rule of law.

Mr. HUNTER. You really can't disagree, because I have been there three times and I have seen it. I think I have been there more than you have, frankly. So if you want to argue with that, I don't think you are going to be able to.

Mr. JOHNSON. I have—I have two really good JAGs sitting right behind me.

Mr. HUNTER. Good.

Mr. JOHNSON. One of them went to law school with the President. The other has won commendations and so forth for his time in Iraq.

Mr. HUNTER. I am not saying you are not good lawyers. I am sure you are very good lawyers.

Mr. JOHNSON. And my point is that your JAG lawyers are enablers. They empower, they do not prohibit. I am the top lawyer of the Department of Defense. I am here to work with the United States military to help them get the job done consistent with the rule of law. I am not there to stand in the way. And so I would like to respectfully disagree with the characterization.

Now, having said that, I do want to address your other point. I think that where we are headed is a system where you have both systems of justice available for the interest of national security to put away the bad guys in one forum or another. We need to have both court systems available for law-of-war violations, for Federal criminal offenses.

What we have right now is, frankly, a system that could be made better, that in the eyes of at least some falls short, and we have an opportunity to fix it for purposes of promoting national security. And I hope this Congress will take up that opportunity and do that.

Mr. HUNTER. Okay. Let me move on, because I don't know if that answered either of my questions. Let me—I am going to set a time, too.

When you talk about cruel, inhumane, degrading treatment of detainees, do you think we should afford our military the exact same thing? Are we going to change boot camp? Are we going to change SERE [Survival, Evasion, Resistance and Escape] school? Because we humiliate and degrade our marines, and soldiers, and

sailors and airmen all the time. That is what—I mean, it is not fun sometimes being in the military; right?

Mr. JOHNSON. Clearly it is not fun sometimes being in the military.

Mr. HUNTER. We don't get too much sleep. We are sleep-deprived; right? We don't always get food. We don't always get to eat three meals a day. So we are giving detainees better treatment than I got, than those JAGs sitting behind you got.

I mean, if you went to Ranger School—I don't know if either of you went to Ranger School. He is saying yes. I mean, he was humiliated and he was degraded. So are we going to make that same standard for detainees the same standard that we have too?

Mr. JOHNSON. Without a doubt, Congressman, I will not disagree with you. Being in the military is hard, is difficult. You don't always get three meals a day. But this is—please understand, sir, this is not about being nice to the bad guys. It is about American values, who we are as Americans, how we would want our people treated if they are captured.

There was a discussion of reciprocity a moment ago——

Mr. HUNTER. I am out of time. I think the reciprocity argument is absurd. This is al Qaeda. This is evil incarnate. And what America does is win wars, and we don't do it with bad law. We do it by, you know, killing the bad guys.

But thank you very much. I appreciate it. Thank you, Mr. Chairman.

The CHAIRMAN. I thank the gentleman.

It appears we have completed our first round. Before I go over to the second round—I know Mr. McKeon and some others wish to ask some questions—what you are asking of us is to look at the Senate language through your eyes and your recommendations. And as I understand it, you have five such recommendations, and I will try to condense them.

The first is to prohibit the use of involuntary statements. The second is to further regulate the use of hearsay. The third is to modify the appellate process. The fourth is to state that a charge of material support, is not a commission that may be tried in—excuse me—an offense that may be tried in a commission. And the fifth is to establish a sunset on the use of the commissions. Am I correct?

Mr. JOHNSON. Congressman, that sounds right to me. I don't know that there is——

The CHAIRMAN. That is what you are doing; am I correct?

Mr. JOHNSON. I believe so, except that I think—Mr. Kris can correct me. I think that we and the Administration are pretty satisfied with the current Senate language on hearsay. I could be wrong about that, but I think——

Mr. KRIS. I think our language is——

The CHAIRMAN. It would help if you would be very, very clear as to your recommendations to this committee.

Mr. JOHNSON. We would be happy to do that. For the record, we would be happy to do that.

The CHAIRMAN. Spell it out so we can understand it. Will you do that for us within 10 days?

Mr. JOHNSON. Yes, sir.

The CHAIRMAN. We would appreciate it.

[The information referred to was not available at the time of printing.]

The CHAIRMAN. Mr. McKeon.

Mr. MCKEON. Mr. Chairman, if I might defer to other members of the committee that have questions, I would be happy to do that.

The CHAIRMAN. Who—we will just go down the line. Does Mr.—okay.

Mr. Bartlett.

Mr. BARTLETT. Yes. Thank you very much.

You stated, Mr. Johnson, that we will not release prisoners to countries that torture. Does that mean that we have stopped extraordinary renditions?

Mr. JOHNSON. As a general matter, Congressman, I think it is our view that an extradition should occur to bring people to justice, not push them away from justice, as a general matter. That would certainly be my view, and I think that is the view of the Administration.

Mr. BARTLETT. And the extraordinary renditions that we are now approving, they are not going to countries that torture.

Mr. JOHNSON. I hesitate to comment on specific military operations or actions. I just would state that general principle.

Mr. BARTLETT. Would it not be a huge contradiction for the Administration to tell us that they are not going to release prisoners to countries that torture, and then to continue to approve extraordinary renditions to countries that they know darn well do torture?

Mr. JOHNSON. Again, I hesitate to comment on specific operations. I am not sure what you have in mind. But as a general matter, that is my view and I think that is the Administration view also.

Mr. BARTLETT. We have been talking a lot about cessation of hostilities. We have no intention of releasing these prisoners that we have already deemed to be so bad that we couldn't release them even if the court determines that they are innocent.

Why are we talking about cessation of hostilities? Doesn't that just create problems for us in the future when we have withdrawn from Iraq, withdrawn from Afghanistan, and still hold prisoners?

Mr. JOHNSON. Well, the question that the chairman asked of Mr. Kris is a good one: When does this war end? And there is no easy answer to that question. At least I haven't heard one yet from an awful lot of very bright people. And so that is the reason why we think that we have law-of-war detention authority. But I think even the Supreme Court in the Hamdi case said circumstances could change, depending on how far out you go in this conflict, and it is the reason why we think some form of a periodic review of each detainee's situation is appropriate, given the nature of this war, because there may come a point in the future when that person is no longer a threat or they are such that they could be transferred to some other country with appropriate security guarantees.

Mr. BARTLETT. Questions asked by Mr. Forbes and Mr. Conaway elicited answers from you, both of you, I think, that indicated that if the courts found a detainee innocent that we knew was a really bad guy, that we weren't going to release him. That begs a couple of very interesting questions.

One of them is: Haven't we already judged him guilty by determining that he is so bad that no matter what the court does, we are not going to release him? And if that is so, why do we go through a court proceeding, particularly in a military tribunal?

Sir, there are millions of people in the world that when you mention military tribunal, they cringe because of their association with military tribunals. I know ours are different, sir, but this is psychology; and in this area perception is reality, and the reality is that military tribunals have little credibility around the world. I think ours are very good. I have no problem with them. I am not talking about the problem I have with them; I am talking about the problem that the world has with them.

It just makes the point that I made, sir, in my first round of questioning. I am not sure why we are here. I am not sure why we bought this trouble. I try to follow my mother's counsel that you shouldn't borrow trouble. If we yet could move these prisoners to an international court, why don't we do that? We bragged that this was not our war. We bragged this was a coalition. Why are we burdened with this as a single nation when this was a war of a coalition? Why don't we move these prisoners to an international arena and avoid all of the national stigma that we are going to get from these proceedings, no matter what we do and how careful we are?

Mr. JOHNSON. Well, Congressman, I would urge that we not think about a decision to detain a captured belligerent as an adjudication of guilt or innocence. I think the comment that was made earlier was that that is not law enforcement—that is not a law enforcement context.

When the United States military makes a determination that they should detain a belligerent on the battlefield, that is not an adjudication of guilt. That is a decision, for reasons of national security and safety, that that person needs to be retained—detained so that they don't return to the fight. That is very different from an adjudication of guilt or innocence.

I would try to answer your question by saying that military commissions, in my judgment, should not be judged as in any way second-class justice. You say that there is that perception out there. Well, let me try to address that perception. Our JAGs cherish the UCMJ. They cherish notions of justice. There are some excellent JAGs that I work with every day who are committed to that process.

The CHAIRMAN. I thank the gentleman.

It appears Mr. Forbes is next.

Mr. FORBES. Thank you, Mr. Chairman.

And to Mr. Johnson and Mr. Kris, thank you both for being here. I know it is tough. I know it is long. But you keep saying you want us to get it right. We can't do that unless we ask tough questions.

Mr. Kris, you told me earlier that you wanted to talk about the Administration's position. I am going to ask you about that, if I can, on some of these issues. When was the last time that you were at Guantanamo Bay on behalf of the Administration, or in your capacity?

Mr. KRIS. It was sometime within the last few months, I think.

Mr. FORBES. When you were down there, you noticed the security that we had for many of the detainees because often times they are

throwing feces through the door, urine through the door. We have double doors on some of the detainees. We have guards that are well-trained, as everybody talked about the professionalism here, looking on each prisoner every three minutes. They don't move anywhere unless they are with a naval officer. They are also shackled when they are getting interrogations, questioning, or when they are having medical treatments, because they could very easily grab a pin and stab it through a nurse's eye. That is what all the professional people told us when we were down there.

Mr. Courtney raised the suggestion earlier about the general prison population in the United States. Is the Administration even contemplating putting those prisoners with the general prison population in the United States? Is that even a possibility?

Mr. KRIS. I think the answer to your question is no, for a variety of reasons——

Mr. FORBES. And, if the answer is no, then it is meaningless what Mr. Courtney raises about the general population.

Mr. KRIS. Well, I am not—I mean—in fairness——

Mr. FORBES. Let me ask you a follow-up question. You can respond any way you want to, in written statements. But where do we have in the United States that type of security, and what kind of capacity do we have there now to be able to put these prisoners?

Mr. KRIS. Well, I think there is two different questions there. One: Should it be a BOP [Bureau of Prisons] facility; that is, a Federal criminal civilian facility, or a military base or military facility in the United States? So that is one distinction. With respect to just the BOP side of it, I think if I have the numbers right, that we have about more than 200 terrorism-related people already in custody, including 33 at the Supermax facility——

Mr. FORBES. But the Supermax facility, isn't that 95 percent full all the time, according to what the Department of Prisons has told us or the Bureau has——

Mr. KRIS. That number sounds plausible, but I guess the point is we can hold some very, very bad people.

Mr. FORBES. All right. Let me follow up on that. You looked also at the tribunal, the facilities that we built down in Guantanamo Bay to be able to house these military proceedings. You also know it is very important that is the only one SCIF-ed in the United States, because we have security matters that could come up and we have to have a 40-second delay between testimony and between statements and between when it is released to the people watching.

We were told there is not another facility in the United States that has those capabilities, or like that. Do you disagree with the information we were given at Guantanamo Bay?

Mr. KRIS. I think this is something Jeh—Mr. Johnson——

Mr. FORBES. I will let Mr. Johnson answer that if he could.

Mr. JOHNSON. The facility you referred to is first-rate, absolutely. It is an expeditionary facility. It was built that way. It was built with the intention that it someday would be moved.

Mr. FORBES. If—you mean you are talking about moving that facility to somewhere in the United States? Is that even a possibility?

Mr. JOHNSON. If we moved the detainees, we would move the facility.

Mr. FORBES. Then if you did that, and you only have one of these facilities, you wouldn't have—or even entertain the possibility of transferring these individuals across the country, back to the trial proceedings, because they have motions and everything else. You would have to locate those prisoners near in conjunction with that facility; isn't that true?

Mr. JOHNSON. Ideally we would keep the detainees who are being prosecuted in military commissions someplace close to the facility.

Mr. FORBES. So everybody that you would have decided that is going to be prosecuted through a military commission would need to be located near that site; isn't that correct?

Mr. JOHNSON. That would be my optimum solution. Whether it actually happens that way, I am not sure. But that would be an efficient way to do it; yes, sir.

Mr. FORBES. Would the Administration even entertain putting them in other parts of the country and transferring them, with the security risk that might be present there, to the hearings they would have before the military tribunals and the actual proceedings that would take place there?

Mr. JOHNSON. Ideally, as Mr. Kris would tell you, in dealing with—with civilian criminal defendants who are prosecuted, you want to keep them close to a courtroom.

Mr. FORBES. And, Mr. Johnson, my time is almost up. My question is: Would the Administration even entertain not doing that?

Mr. JOHNSON. That would not be—that would not be an efficient scenario.

Mr. FORBES. Thank you.

Mr. Chairman, thank you so much for your patience, and I yield back.

The CHAIRMAN. Thank you very much.

Mr. Conaway.

Mr. CONAWAY. Yes, sir. In the interest of prolonging the misery of our panelists, I do want to talk again, back on the forward-looking issue, and that is the authorization of use of force. We had testimony from one of your colleagues last year that said: In my professional opinion that it would be both constitutional and prudent to confirm the military's authority to detain al Qaeda, Taliban, and associated forces.

It was a Mr. Kadis that testified last—last year. He was a Bush appointee, I suspect.

Mr. Kris, your thoughts on that?

Mr. KRIS. If I understand the—excuse me—if I understand the question correctly, I think the President believes that with respect to the Gitmo population——

Mr. CONAWAY. Again, I am not—I couldn't care—this question has nothing to do with Gitmo. This is a forward-looking question. We have got a Judge Bates who has said that habeas corpus applies to Pakistanis taken in Pakistan and brought to Afghanistan. And so please don't go back to Gitmo.

Mr. KRIS. I beg your pardon.

Mr. CONAWAY. You can go back to Gitmo all you want, but this is a forward-looking question.

Mr. KRIS. I think with respect to forward-looking, I mean to the extent that we need to have long-term law-of-war detention, that

is something I think the President has made clear he wants very much to work with Congress on. And if we need it, I think it might be something that we would consider statutory authority for. That is getting out ahead, because right now we are focused on the near term. I don't want to go back to Guantanamo, but it is——

Mr. CONAWAY. So are you planning to proffer that legislative fix that you believe is necessary? We all want to be able to make sure that the President has got all the authority he or she ultimately needs to deal with this issue. Have you got legislation in mind yet?

Mr. KRIS. No. We really—I don't think we are there yet.

Mr. CONAWAY. All right. Just one last thing, Mr. Chairman.

Other than public opinion, in terms of—and how we can talk about Gitmo. Other than public opinion, is there any—what other reasons do we have for closing that facility? Will these prisoners be safer somewhere else? Will they be better cared for somewhere else? Will it be cheaper somewhere else? Is the treatment better? I mean—is there anything other than just our—it is legitimate, Mr. Bartlett—is there any rational reason, given that we have got trillions of dollars of pending deficits ahead of us, that we would spend new money on replicating Gitmo somewhere else in the United States?

Mr. JOHNSON. The reason to close Guantanamo, sir, is not just some lofty notion of symbolism. Lots of people, a cross-section, bipartisan, from John McCain, George W. Bush, Barack Obama, have said Guantanamo should be closed. Why have they said that? Because Guantanamo is a bumper sticker for al Qaeda.

Mr. CONAWAY. Okay. So you are still talking about public perception. I am saying—is there? Help me——

Mr. JOHNSON. I am talking about national security, sir. I am talking about this enhancing national security by closing this facility.

Mr. CONAWAY. Okay. So if we replicated Gitmo, and it is—as you said, we are going to move it into the United States, doesn't the bad guy still have the exact same issue? So it really is about the perception that we are dealing with and not any of the mechanics.

You said earlier in your testimony that—and I agree with it, having been there myself—that this is a—you couldn't keep these people in a facility any better than what they are going to be kept in. In fact, when we move them into a Federal prison, they will probably have some course of action against us for having lowered their standard of living by moving them into the—into a prison here in the United States, given what they are coming out of in Gitmo. But is there anything besides just perception, written large?

Mr. JOHNSON. There are tangible national security reasons why——

Mr. CONAWAY. That are unrelated to perception.

Mr. JOHNSON [continuing]. The facility needs to be closed, and we are determined to do that.

Mr. CONAWAY. All right. So we will spend new dollars——

Mr. JOHNSON. And, sir, I can tell you that for high-value individuals who we determine we must detain, we will detain them in a facility as secure, if not more secure, for the safety of the American people. That, I think I can give you some pretty good assurance on.

Mr. CONAWAY. Okay. I have got no question. This whole false argument that they might escape from whatever facility we keep them in is a red herring. I don't think anybody in their right mind thinks any of these people will ever escape.

So anyway, thank you, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you. Before I call on Mr. McKeon, does anyone else wish to ask a question?

Mr. Hunter.

Mr. HUNTER. Thank you, Mr. Chairman.

First I would like to, you know, clarify one of my statements so I don't get chased down by a JAG tomorrow myself. We didn't release somebody and then shoot them; we had somebody that we had to release, found them in Fallujah again, and they were fighting us. And we saw them again. They had been killed at that point.

And also I understand that JAGs are enablers. I am talking—but the way that they have to do it, they have to play around the law as well. They have to try to make things work for us on the ground that is law that is made here by DOD, and it makes it difficult for everybody on the ground trying to make things work.

But the JAG Corps itself I think is good. But it is the law here that they have to deal with. So my question is this: And—If we threaten or we verbally abuse during—and help me out here. I am not even leading to any certain line of questioning for any particular answer. If we bust down a door and we threaten somebody, you know, shove a rifle in their face, kick them down, yell at them, threaten them verbally to get an answer out of them and they give that answer, what does that count as in this whole scheme of things?

Mr. JOHNSON. Well, again it depends on the circumstances. What we are advocating is a voluntariness standard that takes account of that battlefield reality.

The other point I would make is that we can't let the tail wag the dog here. We can't let the law enforcement mission, which is an important one for national security, overcome the essential mission of the United States military. And that was part of that letter I read earlier. The military's mission is to capture and engage the enemy. That is what they do, and I don't want them to do it any way different at the point of capture than they do it now, just to make Mr. Kris happy.

Mr. HUNTER. You don't think the MCA is going to change anything on the ground? It will be the same as it is now when it comes to the actual point of engagement?

Mr. JOHNSON. I don't believe that the reforms in the MCA that are in the Senate bill, or that the Administration is proposing, would or should alter how the military does its job at the point of capture; that is correct.

Mr. HUNTER. Okay. Thank you very much.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Rooney.

Mr. ROONEY. Thank you, Mr. Chairman.

As quickly as I can, going off what Mr. Hunter was just saying, when you talked about voluntary versus reliability—and it seemed that Admiral McDonald was sort of saying that, you know, reli-

ability with elements of voluntary was the preference and—but you were going voluntary with elements of reliability. Why is he wrong?

Mr. JOHNSON. Well, first I respect Admiral McDonald a lot and I respect his views on this issue. It is one he and I have discussed extensively. We think that there should be a voluntariness requirement versus it just being a factor, because we think that military commission judges, courts, what have you, are going to try to impose that anyway as we have more and more of these prosecutions.

So as a requirement, we ought to get it right and make sure that it accounts for all of the circumstances that Congressman Hunter is concerned about. So we are advocating a voluntariness standard, but it has got some good language in there that we are happy to put forward for the record within the 10 days that I think is sufficiently flexible to take account of the battlefield. And when you look at it, it is really not that far from what Admiral McDonald is saying.

Mr. ROONEY. Okay. And I am assuming that because we are sort of going down uncharted territory here, because we are fighting a nonconventional-type enemy in a nonconventional war, we are sort of setting new rules for what Mr. Hunter—his scenario has.

Assuming we move forward here—and let's just speculate country X, a true country, North Korea, China, whoever, and we go back to a conventional war, do these rules apply to future conflicts, or do they just apply to the conflict that we are in now with kind of an enemy that is undetermined, be it nationally or under a common flag? Are we setting new rules of engagement, new laws of war for all conflicts moving forward; or if we fight a conventional war, do we go back to the old system?

Mr. JOHNSON. Well, the Military Commissions Act and the Senate bill, on—by their terms, refer to unlawful enemy combatants or unprivileged enemy belligerents. In other words, people who violate the laws of war. The bill does not redefine the laws of war. It does not redefine substantively the laws of war. And as the chairman noted, what we are advocating is a sunset provision to deal with changed circumstances.

Mr. ROONEY. Right.

One last thing and this goes to Mr. Conaway again. You were talking about national security, the stigma of Guantanamo Bay. I asked Mr. Holder on the Judiciary Committee if the stigma—if there is a stigma with Guantanamo Bay, is—does that still hold after a trial; evidence comes out, this guy is a really bad guy, he needs to be put away for the rest of his life, everybody agrees with that, why can't Guantanamo turn from a detention center to an actual prison? And Mr. Holder at that time said, you know, the stigma is still there. He would, I think, agree with you that there may be national security—a bumper sticker for al Qaeda.

What I am saying is, doesn't it take leadership at the highest level from you, from Mr. Holder, from the President, to say to the world and the global community the stigma is wrong? We are holding these people in a first-class facility with people that are doing things the best way possible, giving them the utmost care with regard to their culture and everything else. And not to say that Supermax can't hold them. We know that, you know, they—sure, they are more than capable. But why do we have to react to what

a bumper sticker for al Qaeda might say, rather than take leadership and say this is the reality, this is the new stigma, this is the new reality? Why can't we do that?

Mr. JOHNSON. First of all, I think we tried that. Second, I think that the leadership to be exerted here is to respond to the call of people from both parties, both of the last two Presidents, this one and the last one, and say let us get it done. Okay, everyone wants to close Guantanamo, or at least a lot of people want to close Guantanamo. Let us get it done. Let us make the bureaucracy work and impose a deadline on doing so. That is what I think the leadership should be doing.

Mr. ROONEY. I understand what you are saying. But again, as so many of my colleagues, having been there, having seen the facility, having been told how much money we spent there—and quite frankly are still spending and still building down there, which is insane—but anyway, in this day and age, I think that is, you know, part of the problem a lot of us have, that we can't sort of redefine what the reality is.

Thank you, Mr. Chairman. Thank you.

The CHAIRMAN. I thank the gentleman. Before I call on Mr. McKeon, let me urge our witnesses that should you have additional materials you would like to submit to our committee, feel free to do so. But it would be very helpful if you could do it within 10 days of today, plus the recommendations that I referred to a few moments ago.

Mr. McKeon.

Mr. MCKEON. Thank you very much, Mr. Chairman. And thank you very much for letting us continue. I know this is a very important issue to all of us, and I know the chairman is going to be going to Guantanamo and will get a firsthand view of what is going on down there.

I referred in my opening statement that my opinion changed after having had the opportunity to visit it. All I had seen from Guantanamo was the pictures that we all saw a few years ago that caused, apparently, this problem, that caused this perception that has caused all these problems.

And I would like to associate myself with the questions of Connolly—Mr. Conaway—I gotta get that out of my head. I have only known him for several years and I keep wanting to call him the wrong name—and Mr. Rooney because, frankly, the comments you made, Mr. Johnson, about how things are different down there and what the job that is being done down there now— there was an ad in one of our papers here on Capitol Hill, the Capitol, a couple of days ago, an ad run by one of our prison guards from our Federal prisons asking for more help, more guards. And I met with Federal prison guards a few months ago and they told me that at times one guard is in a yard with 700, 750 prisoners, and he said, They could kill me at any time.

I guarantee if he were in a yard with these prisoners at Guantanamo, it wouldn't have to be 700. He would have been dead. These are guys that have one purpose in life, and I may be generalizing there, but I think that most people that have had the opportunity to interrelate with them would have that same conclusion.

I think you indicated that in your testimony that they are very dangerous individuals. We have down there a thousand guards for these—a little over 200 prisoners, and they are very careful and they still have problems. They would go on hunger strikes. There are a few leaders that they said they have separated, but they still get the word back to the other prisoners: We want you to go on a hunger strike; we want you to commit suicide; we want you to kill a guard; these kinds of things, and they carry out those orders.

As much security as there is there, I don't think we have to worry about terrorist attacks from the outside, which I think we would have to worry about anywhere that we had them in the States, and it just—it seems to me that if we could do what Mr. Rooney suggested, come to a new reality, have the leadership really say, look, you know, in this time of economy, this time of—we are still at war. We have got real financial problems in the country. I think that that facility—the courthouse alone costs $12 million. You said they could move it somewhere, and I think you are probably referring to inside the courtroom, the desks and those kinds of things. The wiring, the ability to do the translating, the things that Mr. Forbes talked about, would—I think would cost us a tremendous amount of money to duplicate anywhere here in the country. I think there would be political opposition on a grand order.

I used to be on a city council. I know what it takes to get a building permit to build a building. There would be people that would be fighting this thing. The delays would be years, not weeks or months, before a facility could be built to handle them, to do this situation.

The prosecutor told us that if he could be allowed to move forward, he could wrap this up in three years. And maybe he is optimistic. Say, four years; I don't know. You have a better feel for that. But to think that we could duplicate what we have there, somewhere here in the country, without the opposition that would come from it, without the—all of the problems that would be associated with this kind of a move, let alone the security problems that are involved, I just wish we could really step back and take a real look at all of these circumstances before we move forward in a judgment—and maybe that is why the President asked for a six months—or the Commission asked for six months more to look at this. I think reality really needs to be brought to bear here.

I thank you again for what you are doing. I think you did a tremendous job of telling your side of the story and carrying out what your mission is.

Mr. Chairman, I thank you for your desire to go down there. You are a tremendous chairman for this committee and I appreciate all that you do. And with that, I yield back.

The CHAIRMAN. Mr. McKeon, thank you so much.

Mr. Johnson and Mr. Kris, we appreciate your testimony today. Please submit to us what else will be helpful, including the official recommendations that we referred to a few moments ago.

[The information referred to was not available at the time of printing.]

The CHAIRMAN. With that, we are adjourned.

[Whereupon, at 1:34 p.m., the committee was adjourned.]

A P P E N D I X

JULY 24, 2009

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

JULY 24, 2009

Testimony of Jeh Charles Johnson
General Counsel, Department of Defense
Hearing Before the House Armed Services Committee
"Reforming the Military Commissions Act of 2006 and Detainee Policy"
Presented On
July 24, 2009

Mr. Chairman and Representative McKeon, thank you for the opportunity to testify here today.

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

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

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

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

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

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

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

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

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

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

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

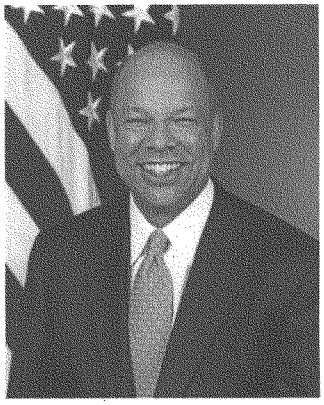
courts in habeas corpus litigation the continued detention of Guantanamo detainees.

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

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

Jeh C. Johnson

General Counsel



Jeh Charles Johnson was appointed General Counsel of the Department of Defense on February 10, 2009, following nomination and confirmation by the U. S. Senate. In this capacity, he serves as the chief legal officer of the Department of Defense and the legal adviser to the Secretary of Defense.

Mr. Johnson's legal career has been a mixture of private practice and distinguished public service. Mr. Johnson began his career in public service as an Assistant United States Attorney in the Southern District of New York, where he prosecuted public corruption cases. From, 1989-1991, as a federal prosecutor, Mr. Johnson tried 12 cases and argued 11 appeals.

Mr. Johnson built upon his early career as an Assistant United States Attorney to become a successful trial lawyer in private practice at the New York City-based law firm of Paul, Weiss, Rifkind, Wharton & Garrison, LLP. While at Paul Weiss, he personally tried some of the highest stakes commercial cases of modern times, for corporate clients such as Armstrong World Industries, Citigroup and Salomon Smith Barney. In 2004, Mr. Johnson was elected a Fellow in the prestigious American College of Trial Lawyers.

In October 1998, President Clinton appointed Mr. Johnson to be General Counsel of the Department of the Air Force following nomination and confirmation by the Senate. He served in that position for 27 months and returned to private law practice at Paul Weiss in January 2001.

While in private practice, Mr. Johnson was active in numerous civil and professional activities. From 2001-2004, he chaired the Judiciary Committee of the New York City Bar Association, which rates and approves all the federal, state and local judges in New York City. Mr. Johnson is also a member of the Council on Foreign Relations, and was a director or trustee of Adelphi University, the Federal Bar Council, the New York Community Trust, the Fund for Modern Courts, the Legal Aid Society, the Lawyers Committee for Civil Rights Under Law, the New York City Bar Fund, Inc., the Vera Institute, the New York Hall of Science and the Film Society of Lincoln Theater. He was also on the Board of Governors of the Franklin & Eleanor Roosevelt Institute.

In January 2007, Mr. Johnson was one of seven nominated by the New York State Commission on Judicial Nominations to be Chief Judge of New York State. The governor reappointed the incumbent, Judith Kaye, though Mr. Johnson was rated well qualified for the position by the New York State Bar Association.

In early 2007, Mr. Johnson was recruited by Senator Barack Obama to become part of the Senator's presidential campaign. For the next 21 months, Mr. Johnson was involved in the campaign as an advisor on national security and foreign policy matters, and as a member of the campaign's national finance committee. During that time, Mr. Johnson also made numerous surrogate TV appearances for the campaign on MSNBC, Fox, NBC and other networks.

Following the election, Mr. Johnson served on President-Elect Obama's transition team, and was then publicly designated by the President-Elect for nomination to the position of General Counsel of the Department of Defense on January 8, 2009, followed by formal nomination on January 20, 2009, and confirmation by the Senate on February 9, 2009.

Mr. Johnson is a member in good standing of the Bars of New York State and the District of Columbia.

Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

"REFORMING THE MILITARY COMMISSIONS ACT OF 2006 AND DETAINEE POLICY"

PRESENTED

JULY 24 2009

Statement of
David Kris
Assistant Attorney General
Before the
Armed Services Committee
United States House of Representatives
For a Hearing Entitled
"Reforming the Military Commissions Act of 2006 and Detainee Policy"
Presented
July 24, 2009

Chairman Skelton, Ranking Member McKeon, and Members of the Armed Services Committee, thank you for the opportunity to discuss ongoing efforts to reform the Military Commissions Act of 2006. As you know, a Task Force established by the President is actively reviewing the detainees held at Guantanamo Bay to determine whether they can be prosecuted or safely transferred to foreign countries.

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

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

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

that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and legitimacy of the commission process without compromising our ability to bring terrorists to justice.

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

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

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

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

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

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

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

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

We also think the bill should include a sunset provision. In the past, military commissions have been associated with a particular conflict of relatively short duration. In the

modern era, however, the conflict could continue for a much longer time. We think after several years of experience with the commissions, Congress may wish to reevaluate them to consider whether they are functioning properly or warrant additional modification.

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

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

I will be happy to answer any questions you have.

David S. Kris, Assistant Attorney General for National Security

David S. Kris was sworn in as Assistant Attorney General for National Security on March 25, 2009.

Mr. Kris has worked in both the public and private sectors. He served in the Department of Justice from 1992 to 2003. Mr. Kris was an attorney in the Criminal Division from September 1992 to July 2000 where he worked primarily in appellate litigation. As Associate Deputy Attorney General from July 2000 to May 2003, Mr. Kris's work focused on national security issues including supervising the Government's use of the Foreign Intelligence Surveillance Act (FISA), representing the Department at the National Security Council, and assisting the Attorney General in conducting oversight of the Intelligence Community. He received numerous awards for his public service including the Attorney General's Award for Exceptional Service in 1999 and 2002.

Prior to his confirmation as Assistant Attorney General, Mr. Kris served in several capacities for Time Warner, Inc., including Deputy General Counsel and Chief Ethics and Compliance Officer. Mr. Kris also taught at Georgetown University Law School and served as a Nonresident Senior Fellow at the Brookings Institution.

Mr. Kris graduated from Haverford College in 1988 and Harvard Law School in 1991. Following law school, he served as a law clerk for Judge Stephen S. Trott on the 9th Circuit Court of Appeals.

Mr. Kris is married and has two children.

DOCUMENTS SUBMITTED FOR THE RECORD

JULY 24, 2009

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

GENERAL COUNSEL

JUL 21 2009

The Honorable Ike Skelton
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

I write to correct a serious misimpression that has arisen in recent weeks, that the United States military may be providing *Miranda* warnings to terrorist suspects in Afghanistan. This is completely inaccurate.

The record should be clear: The essential mission of our nation's military, in times of armed conflict, is to capture or engage the enemy; it is not evidence collection or law enforcement. Members of the U.S. military do not provide *Miranda* warnings to those they capture.

Meanwhile, it has been the longstanding practice of the U.S. government, spanning administrations of both parties, to use all instruments of national power to defeat terrorist extremists. This has included, and will continue to include, the prosecution of some terrorists in Article III courts. In that event, U.S. law enforcement personnel have, in a handful of situations, been permitted to question detainees who are potential prospects for prosecution, accompanied by *Miranda* warnings. Such interviews, accompanied by *Miranda* warnings, are permitted by the Department of Defense only after the military's intelligence-gathering functions have been completed with respect to that detainee. These types of interviews are not given, and should not be given, if the military commanders on the ground conclude that doing so will hinder our military operations or intelligence-gathering efforts.

Though the instances of "Mirandized" interviews of U.S. military detainees are few and far between, we oppose any legislative effort to ban them altogether. Our commanders themselves would say doing so is contrary to national security, because it would limit the option to prosecute terrorists in Article III courts, and jeopardize those cases that we do prosecute. Our government must maintain all lawful options for fighting international terrorism, not limit them.

Sincerely,

Jeh Charles Johnson

Office of the Attorney General
Washington, D.C. 20530

July 21, 2009

The Honorable Ike Skelton
Chairman
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Howard P. "Buck" McKeon
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman and Ranking Member McKeon:

I am writing to correct some serious misinformation about the reading of *Miranda* warnings to terrorist suspects in Afghanistan and to oppose efforts to curtail the appropriate and limited use of this practice as part of a coordinated, multifaceted strategy to defeat terrorism.

It has been suggested that a new policy has been put into effect to read *Miranda* warnings to captured terrorists on the battlefield. This is untrue. It has been the longstanding practice of the U.S. government, including administrations of both parties, to use *Miranda* warnings in a very small number of cases in which it is important to our national security to ensure that statements made by terrorist suspects can be used in a criminal prosecution.

The warnings are given in locations removed from the battlefield, and only after the military's intelligence-gathering and force protection needs have been met. The decision as to whether or not to give a warning is made by experienced career professionals in consultation with military and intelligence officials. The warnings are never given if the professionals conclude that doing so will hinder our counterterrorism efforts.

Over the course of the last two decades, Mirandized statements obtained from non-U.S. citizens detained overseas have played a critical role in winning convictions and lengthy sentences in terrorism cases. For example, in the 1993 World Trade Center bombing case and the plot to bomb U.S. airlines, Ramzi Ahmed Yousef was sentenced to

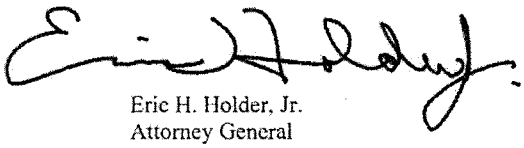
240 years in prison and Abdul Hakim Murad and Wali Khan Amin Shah were sentenced to life in prison. In the 1998 East African embassy bombing case, Mohamed Sadeek Odeh, Mohamed Rashed Daoud Al-'Owhali, Wadih El-Hage and Khalfan Khamis Mohamed were each sentenced to life in prison. And in the 1985 case of the hijacking of Royal Jordanian Flight 402, Fawaz Yunis was sentenced to 30 years imprisonment.

In these and other cases, the use of Mirandized statements has enabled the government to keep all options on the table, thus helping to ensure that those who commit terrorist acts against our citizens can be brought to justice and given lengthy sentences, whether in federal courts or military commissions.

Were Congress to prohibit use of *Miranda* warnings, the government would be deprived of an important weapon against our enemies. Our military, law enforcement, and intelligence professionals must have access to all lawful instruments of national power to protect the country and ensure that terrorists are brought to justice. The judicious use of *Miranda* warnings preserves the full range of options available for dealing with terrorists. If Congress takes that option away, there will be an increased risk that those who have done us harm, who have killed Americans and would do so again, might go free.

This is not about giving rights to terrorists. It is about bringing them to justice. By ensuring that any statements they make are admissible at trial, we help ensure that they will no longer be a threat to American lives and American security.

Sincerely,



Eric H. Holder, Jr.
Attorney General

United States Department of Defense
Military Commissions
On the web: C:\Documents and Settings\hford\Desktop\commissionsCo-conspirators.html http://www.defenselink.mil/news/commissionsCo-conspirators.html

Media contact: +1 (703) 697-5131
Public contact: http://www.defenselink.mil/faq/comment.html or +1 (703) 428-0711

Commission Cases

Sept. 11 Co-Conspirators

- **Khalid Sheikh Mohammed**

  05/09/2008 - Referred Charges

- **Walid Muhammad Salih Mubarek Bin 'Attash**

  05/09/2008 - Referred Charges

- **Ramzi Binalshibh**

  05/092008 - Referred Charges

- **Ali Abdul Aziz Ali**

  05/09/2008 - Referred Charges

- **Mustafa Ahmed Adam al Hawsawi**

  05/09/2008 - Referred Charges

- **Mohammed al Kahtani**

  05/09/2008 - Charges dismissed without prejudice

PLEADINGS:

Protective Order Number 3, Appellate Exhibit 3, A thru D

Motions for Continuance of Initial Session and Arraignment, Appellate Exhibits 17 thru 21

Motions for Special Relief D-010 and D-011

D-001 – Unlawful Influence Motion

D-012 – Motion to Dismiss for Lack of Personal Jurisdiction

D-014 – Motion to Dismiss for Outrageous Government Conduct

D-017 – Motion for Appropriate Relief

D-018 – Motion to Stay Proceedings

D-020 – Motion to Allow Ex Parte

D-023 – Motion to Compel

D-024 – Motion for Religious Consideration

D-025 – Pro Se Filing – Aziz Ali

D-026 – Pro Se Special Request for Relief

D-027 – Pro Se Filing Bin Attash

D-028 – Pro Se Filing – Aziz Ali

D-029 – Pro Se Filing – Mohammed

D-033 – Motion to Compel

D-034 – Motion to Compel

D-035 – Motion to Compel

D-036 – Motion to Compel

D-037 – Motion to Allow Meeting of the Accused

D-038 – Motion for Appropriate Relief

D-032 – Motion to Compel Discovery for UI Motion

D-033 – Ruling on Motion to Compel Production of Arabic Transcripts

D-020 – Ruling on Motion to Allow Ex Parte

D-035 – Ruling on Motion to Compel Resources

D-041 Ruling on Motion on Appropriate Relief

D-017 Ruling on Appointment of Defense Expert Consultant

D-041 Pleadings - Motion for Appropriate Relief – Defense Motion (Inspect Conditions of Confinement)

D-041 Pleadings - Motion for Appropriate Relief - Government Response, Defense Reply and Ruling (Inspect Conditions of Confinement)

D-50 – Joint Defense Motion to Dismiss Charge I for Lack of Subject Matter* Jurisdiction

D-55 – Motion to Dismiss Charge I (Joint Common Enterprise)

D-60 – Motion to Dismiss Charge IX (Failure to State an Offense)

D- 61 – Motion to Dismiss for Lack of Jurisdiction (Absence of Armed Conflict)

D-62 – Motion to Dismiss All Charges for Lack of Jurisdiction (Bill of Attainder)

AE 102-A (Mohammed et al Protective Order # 7 (Protection of Classified Information Throughout all Stages of Proceedings

P-009 Commission Ruling Regarding Government Motion for 120 Day Continuance

D-101 Order Regarding Pro Se Filing: "The Islamic Response to the Government's Nine Accusations"

D-103 Order Regarding Defense Motion for Special Relief: Modification of Protective Orders 3 and 7 to Allow Submission of Classified Information to OSD

D-101 Order Defense Motion for Special Relief: Objection to Public Release of Statement Filed With Military Commission on 1 March 2009 by Pro Se Accused

D-102 Order Defense Motion for Special Relief: Military Commission Must Decline Receipt of Unsolicited Communication Submitted to Military Judge on 13 March 2009 1

D-104 Order Defense Motion for Reconsideration of Military Commission Order D-102, Authorizing Public Release of Military Commission Order D-102

D-105 MJ Order and Pro Se Pleading: Defense Motion to Dismiss Military and Civilian Standby Counsel

D 106 Mohammed et al Defense bin al Shibh Special Request for Relief PO 7 Redacted

D-106 Al Shibh Relief from PO 7

D-107 Relief from PO # 7 Consultant Amador

D-107 Mohammed et al Defense bin al Shibh Special Request for Relief Dr Amador Redacted

D-108 MJ Order and Request for Relief: Prosecution Special Request for Relief—Extension of Time to File a Response to D-108: A Defense Motion to Preserve CIA Black

D-95 Defense Motion to Compel Discovery (19 Jan 2009)

P-010 Ruling and Pleadings on Government Motion for Second 120 day Continuance

D-078 Defense Motion to Compel Discovery (Medical Personnel) and Government Response ***NEW***

D-081 Defense Motion to Compel Discovery (JTF Medical Records, Test Results) and Government Response ***NEW***

D-115 Defense Motion for Appropriate Relief (Order Granting Access for Defense Consultant to Evaluate Mr. bin al Shibh and Communicate His Findings to Defense Coun

D-116 Defense Motion for Appropriate Relief (Seeking the Appointment of Defense Expert Consultant Dr. Ruben C. Gur, M.A. Ph.D.) and Government Response ***NEW***

D-117 Defense Motion to Compel Production of Expert Consultant and Government Response ***NEW***

D-118 Defense Motion Requesting the Military Commission Order a New Inquiry Into the Mental Health of Mr. Mustafa Hawsawi and Government Response ***NEW***

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

JULY 24, 2009

QUESTIONS SUBMITTED BY MR. SKELTON

Mr. SKELTON. In Admiral MacDonald's written testimony, he advocated 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, he seemed to argue that the statement should be admitted if the interrogator was acting in accordance with the laws of war and the statement was deemed to be reliable. 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 he seemed to argue for applying a totality of the circumstances analysis to determine the voluntariness of the statement and thus its admissibility.

Do you agree with this balanced approach? If not, why not?

How would you define "proximate to the battlefield"? Would interrogations that occurred in a Theater Internment Facility fall within the second track—that is locations that are *not* proximate to the battlefield? How about at an internment facilities below the TIFs?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. SKELTON. Since Congress considered the Military Commissions Act, I have warned about the danger of promulgating rules and procedures which are constitutionally deficient and subject to court challenge. The last thing that we want is to convict an individual for terrorism and then have that conviction overturned because of fatal flaws in this Act or the accompanying Manual for Military Commissions.

I believe that the Administration's proposed changes to the Manual and the Senate Armed Services Committee's revisions to the Military Commissions law itself begin to address my concerns.

What further changes, if any, are necessary to fix the remaining deficiencies in the existing Military Commissions Act or the version proposed by the Senate?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. SKELTON. In Admiral MacDonald's written testimony, he advocated 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, he seemed to argue that the statement should be admitted if the interrogator was acting in accordance with the laws of war and the statement was deemed to be reliable. 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 he seemed to argue for applying a totality of the circumstances analysis to determine the voluntariness of the statement and thus its admissibility.

Do you agree with this balanced approach? If not, why not?

How would you define "proximate to the battlefield"? Would interrogations that occurred in a Theater Internment Facility fall within the second track—that is locations that are *not* proximate to the battlefield? How about at an internment facilities below the TIFs?

Mr. KRIS. The Administration believes there is a significant risk courts will find that the Due Process Clause applies to military commission proceedings, and that due process requires that statements of the accused offered in the context of commission proceedings must have been voluntarily given. A standard based on reliability alone would be vulnerable to a constitutional due process challenge in those cases where a military commission construed it to allow the admission of involuntary statements of the accused. The use of such statements might then be subject to reversal on appeal. Accordingly, there arc compelling legal and policy reasons to include an express voluntariness requirement.

That said, we believe that any voluntariness requirement for military commissions cases should account, consistent with the law, for the context in which statements later considered by military commissions can occur. Specifically, the Administration has proposed the following as an alternative to § 948r of the Senate bill, which includes a voluntariness standard for military commissions cases, as well as

a clearer prohibition on the use of any statement obtained by torture or cruel, inhuman, or degrading treatment:

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

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

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

"(c) OTHER STATEMENTS OF THE ACCUSED.—A statement of the accused may be admitted in evidence in a military commission under this chapter only if the military judge finds that the statement was voluntarily given. In determining whether a statement is voluntarily given, the military judge shall consider the totality of the circumstances, including, as appropriate, the details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities; the characteristics of the accused, such as military training, age, and education level; and the lapse of time, change of place, or change of identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.

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

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

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

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

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

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

"(2) at least one of the following:

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

"(B) That the statement was voluntarily given.

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

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

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

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

Mr. SKELTON. What factors will be considered to determine when an end of hostilities has been achieved and, thus, continued detention is no longer justified under the Supreme Court's *Hamdi* decision and the laws of war?

Mr. KRIS. A plurality of the Supreme Court concluded in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2005), that "Congress has clearly and unmistakably authorized detention of those individuals covered in the 2001 Authorization to Use Military Force (AUMF)" and that "[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice' are 'important incident[s] of war.'" *Id.* at 518–19. According to the plurality, the grant of detention authority in the AUMF is best understood to endure "for the duration of the relevant conflict," although this understanding "may unravel" if the circumstances of the conflict are "entirely unlike those of the conflicts that informed the development of the law of war." *Id.* at 520–21.

Based on *Hamdi,* the Administration believes the detention authority provided under the 2001 AUMF, as informed by the law of war, will continue so long as the United States remains involved in active hostilities against al Qaeda, the Taliban, and affiliated forces. In the current circumstances, active hostilities are unlikely to end pursuant to a peace treaty, armistice, capitulation, or a dispositive military operation. In other contexts, the Supreme Court has indicated that "[w]ar does not cease with a cease-fire order," *Ludecke v. Watkins,* 335 U.S. 160, 167 (1948), and that the "power to be exercised by the President [in that case, the power to expel enemy aliens] is a process which begins when war is declared but is not exhausted when the shooting stops." *Id.* "'The state of war' may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act." *Ludecke,* 335 U.S. at 168–69. At a minimum, we believe active hostilities will continue—and detention of enemy forces will be authorized—as long as the United States is involved in active combat operations against such forces. In reaching the determination that active hostilities have ceased, we would likely consider factors that have been recognized in international law as relevant to the existence of an armed conflict, including the frequency and level of intensity of any continuing violence generated by enemy forces; the degree to which they maintain an organizational structure and operate according to a plan; the enemy's capacity to procure, transport and distribute arms; and the enemy's intent to inflict violence.

QUESTIONS SUBMITTED BY MR. MCKEON

Mr. MCKEON. The Department of Justice recently argued in the *Maqaleh* case that the *Boumediene* decision only affected the habeas statute's application to detainees at Guantanamo Bay and nowhere else. Does the Administration still hold this view regarding the detainees in Afghanistan?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. Why did the Administration decide to favor prosecution in federal criminal courts?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. Did the TJAGs advise the Task Force against stating this preference for federal courts?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. According to the current Chief Prosecutor for the Military Commissions, the prosecution of the 9/11 coconspirators could be completed within 24–36 months in a military commission.

Do you share this assessment?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. How long do you think it would take if the case were removed and restarted in federal court?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. Do you think an Article III court can adequately protect sources and methods in the same manner as the military commissions have proven they can?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. In April, Judge Bates on the D.C. district court recognized a right of habeas for particular detainees held at Bagram Air Base in Afghanistan, specifi-

cally those captured outside of Afghanistan. In a recent *Wall Street Journal Article,* legal scholars David Rivkin and Lee Casey asserted that this ruling has already caused the military to decrease its operations in the Afghan-Pakistan border region to avoid claims by detainees that they were captured outside of Afghanistan.

Do you agree with this assertion?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. Are any of the Task Forces recommending that the Administration change the standard to include refusing to transfer if a detainee might experience cruel, inhuman, or degrading treatment in a potential host country?

Mr. JOHNSON. [The information referred to was not available at the time of printing.]

Mr. MCKEON. The Department of Justice recently argued in the *Maqaleh* case that the *Boumediene* decision only affected the habeas statute's application to detainees at Guantanamo Bay and nowhere else. Does the Administration still hold this view regarding the detainees in Afghanistan?

Mr. KRIS. Yes. The Government has appealed the lower court's decision in the *Maqaleh* case, which extended habeas corpus rights to detainees held at the Bagram Air Base in Afghanistan. The position argued by the Government in that litigation remains the Administration's position.

Mr. MCKEON. Why did the Administration decide to favor prosecution in federal criminal courts?

Mr. KRIS. Federal courts are well-established, with clear rules and years of precedent to draw on. Federal courts also have long-standing experience trying complicated cases, including terrorism cases, and a proven and recent track record of prosecuting and convicting terrorists. That said, the Administration is committed to using all elements of national power and authority—including both federal courts and military commissions—to defeat our enemy and to advance the interests of justice. Under the protocol jointly developed by the Departments of Defense and Justice to determine whether individual cases will be tried in a federal court or military commission, there is a "presumption that, where feasible, referred cases will be prosecuted in an Article III court," but that presumption can be overcome where "other compelling factors make it more appropriate to prosecute a case in a reformed military commission."

Mr. MCKEON. Did the TJAGs advise the Task Force against stating this preference for federal courts?

Mr. KRIS. The Administration's policy that, where feasible, suspected terrorists should be prosecuted in Article III courts is reflected in Executive Order 13492, signed by the President on January 22, 2009, his second full day in office. It is also reflected in the speech the President delivered at the National Archives on May 21, 2009. This policy did not originate with the Detention Policy Task Force. In addition, the prosecution protocol adopted by the Department of Justice and the Department of Defense states that "there is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there." The Chief Prosecutor of the Office of Military Commissions (who is a JAG) was consulted in the course of the negotiation of this protocol and provided advice concerning it. The TJAGs' own views about prosecuting suspected terrorists in federal courts or by military commission are reflected in the testimony they gave before the House Armed Services Committee on July 16. Vice Admiral MacDonald, the Navy Judge Advocate General, said, for example, "I understand 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 [military commissions] system that can stand on its own." The Administration is working with Congress to do exactly that.

Mr. MCKEON. According to the current Chief Prosecutor for the Military Commissions, the prosecution of the 9/11 coconspirators could be completed within 24–36 months in a military commission.

Do you share this assessment?

Mr. KRIS. How long the cases will ultimately take will depend on a number of factors. The Chief Prosecutor's estimate sounds reasonable to us.

Mr. MCKEON. How long do you think it would take if the case were removed and restarted in federal court?

Mr. KRIS. If these cases were brought in federal court, the Department of Justice would indict the defendants promptly and would prosecute vigorously. We would

like to obtain justice as quickly as possible. How long the cases will ultimately take will depend on a number of factors.

Mr. MCKEON. Do you think an Article III court can adequately protect sources and methods in the same manner as the military commissions have proven they can?

Mr. KRIS. Yes. Federal courts have a long, successful track record in handling classified evidence and protecting sensitive sources and methods, including in international terrorism cases.

Mr. MCKEON. In April, Judge Bates on the D.C. district court recognized a right of habeas for particular detainees held at Bagram Air Base in Afghanistan, specifically those captured outside of Afghanistan. In a recent *Wall Street Journal Article,* legal scholars David Rivkin and Lee Casey asserted that this ruling has already caused the military to decrease its operations in the Afghan-Pakistan border region to avoid claims by detainees that they were captured outside of Afghanistan.

Do you agree with this assertion?

Mr. KRIS. As you are aware, this issue of habeas rights for individuals held at Bagram is the subject of ongoing litigation in the *Maqaleh v. Gates* case, and we therefore cannot comment on the issues presented in the case. That being said, the essential mission of the U.S. military is to capture or engage the enemy, and the military should not be required to change how it conducts effective military operations to suit the needs of possible habeas proceedings. We in the Administration strongly believe that the detention policy framework the Administration is developing, in consultation with the Congress and consistent with court rulings, should not and will not cause the military to deviate from this mission.

Mr. MCKEON. Are any of the Task Forces recommending that the Administration change the standard to include refusing to transfer if a detainee might experience cruel, inhuman, or degrading treatment in a potential host country?

Mr. KRIS. The Special Task Force on Interrogation and Transfer Policies is considering issues raised by the transfer of detainees from or through United States custody to the custody of another country. Currently, as a matter of law and policy, the United States will not transfer anyone to another country if it is determined that it is more likely than not that the transferee will be tortured in the receiving country. The Task Force is considering whether this standard should be changed as a matter of policy.

○