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LEGAL ISSUES SURROUNDING THE MILITARY COMMISSIONS SYSTEM

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

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HOUSE OF REPRESENTATIVES

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LEGAL ISSUES SURROUNDING THE MILITARY COMMISSIONS SYSTEM

WEDNESDAY, JULY 8, 2009

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Delahunt, Johnson, Sherman, Jackson Lee, Sensenbrenner, Franks, King, Gohmert and Smith (ex officio).

Staff Present: Heather Sawyer, Majority Counsel; Sam Sokol, Majority Counsel; David Lachmann, Majority Subcommittee Chief of Staff; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. I will now recognize myself for a 5-minute opening statement.

Today the Subcommittee examines the military commission system and, more importantly, how we as a Nation can work together productively to clean up the terrible legacy of the Bush administration's detention policies in a manner that provides us with a legitimate legal framework going forward.

One question which arises immediately in view of the apparent Administration position, as stated yesterday by Department of Defense general counsel Jeh Johnson that we can hold indefinitely even people acquitted in the military tribunal, is what is the purpose of the military tribunal in the first place; indeed, what is the purpose of any court hearing if the judge can say you're acquitted and remanded for indefinite detention? What's the purpose of a trial in that case.

Over the past 7 years, approximately 800 individuals have been detained at Guantanamo Bay in Cuba, with some 500 already having being released before President Obama took office in January. In those 7 years only three detainees were convicted of terrorism offenses by military commissions. Approximately 240 individuals remain in Guantanamo. Most of these men have been held for at least 4 years, some have been detained for more than 6 years, all without being charged or tried or convicted of any crime, a blot on American justice by any standard.

In addition to Guantanamo we've also detained individuals in other parts of the world, including Afghanistan. Some of these cases are fairly straightforward; some are not. But for each of these cases, we need to have a means of determining whether the individual is a combatant, lawful or otherwise; whether they are guilty of a crime; and whether they are a threat to the United States. We must decide how to deal with these individuals in a manner that ensures that our Nation is protected from those who would do us harm, and that is consistent with our laws, our treaty obligations and our values.

This is the United States of America, and we have traditions and beliefs worth fighting for and worth preserving. The problem will not go away simply because we have closed Guantanamo. We are still fighting in Afghanistan and Iraq. We are still battling terrorists around the world. We will continue to have to intercept and detain individuals who have attacked us, or who have threatened us, or who we believe, perhaps mistakenly, to do so. We need to be sure that however we handle these cases, we do not conduct kangaroo courts. Remember what it is we are trying to do here. We need to sort out who among these detainees are truly dangerous, who have truly done something for which they must be detained and who has not.

These detainees are accused terrorists. While the previous Administration was fond of reminding people that the detainees were the worst of the worst, the Bush administration, in fact, released a vast majority of them, approximately 500 in all. Presumably they did not believe they were releasing the worst of the worst. The people who we have detained because they were turned over to us by someone with a grudge or by someone who wanted to collect a bounty, and who have, in fact, committed no offense against us, do not belong in detention. We have an obligation to determine who should and should not be in detention, and to afford fair trials to those who we believe have committed crimes, and to release all others. This is especially important if our government plans to seek prison sentences or to execute those convicted.

This debate has been dominated by a great deal of fear-mongering. That is no way to deal with a problem of this magnitude. As much as some people would like to drop these detainees down a hole and forget about them, that is simply not an option legally or morally. It is also not necessary. We are not the first country in history to have to deal with potentially dangerous people. Indeed, this is not the first time this country has had to deal with potentially dangerous people.

I can assure my colleagues who are terrified that some of these detainees might be brought to the U.S. that we can handle it. We have got a few such guests in my district in New York in secure facilities, and we know how to deal with them. People are not panicking in the streets, and no one has been harmed.

We would never tolerate this sort of detention policy from any other nation, especially directed against our citizens, and we should not accept it in ours.

I do not want to underestimate the enormity of the challenge both from a security standpoint and a legal one. Some of these people are extremely dangerous, and some of them have done some

truly terrible things. We need to be sure that we are protected from harm.

It is also true that the Bush administration's rampant lawlessness has erected legal obstacles to pursuing some of the cases that need to be prosecuted. To give a prime example, the use of torture, as military prosecutors have told us, may have made some prosecutions impossible in all but the most farcical of trials. This is an unnecessary obstacle, but a real one. We cannot ignore it; we have to deal honestly with it.

I look forward to the testimony of our witnesses today, and I hope that you will be able to provide some guidance as we seek a legal regime to deal with our problems going forward.

Thank you, and I yield back the balance of my time.

I would now recognize our distinguished Ranking Minority Member, the gentleman from Wisconsin, Mr. Sensenbrenner, for his opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Between 1993 and 2001, this country took the approach of prosecuting terrorism in courtrooms as criminal defendants rather than fighting them on the battlefield as foreign enemies. That approach was a disaster as during those years less than three dozen terrorists were neutralized, and 3,000 innocent Americans and people who were in this country as guests were killed during the 9/11 attacks.

Today it appears the Obama administration is increasingly retreating to this failed approach. The Justice Department has already struck a sweetheart deal with the first enemy combatant to be tried on U.S. soil. That terrorist, Ali al-Marri, is a longtime member of al-Qaeda, who admitted to plotting attacks with cyanide gas at U.S. dams, waterways and tunnels, but he only stands to receive at most a paltry 15 years in jail under the plea agreement reached by the current Administration.

The Attorney General has also announced the prosecution of another known terrorist named Ghailani, who served al-Qaeda as a document forger and explosives trainer at a terrorist camp and a bodyguard for Osama bin Laden until he was captured by the military in 2004. But he will only be prosecuted for his involvement in the separate bombing that occurred in the 1990's. His prosecution literally assumes that 9/11 never happened.

That is apparently just a prelude of things to come. As described in the *Los Angeles Times,* the FBI and Justice Department plan to significantly expand their role in global counterterrorism operations, part of a U.S. policy shift that will replace a CIA-dominated system of clandestine detentions and interrogation with one built around prosecutions. This new approach reportedly entails reading more and more terrorists Miranda rights, including the right to remain silent, that will deny us vital information to thwart future attacks.

For example, the Wall Street Journal recently reported that the Administration's Office of Legal Counsel concluded that detainees tried by military commissions should be given constitutional protections against self-incrimination over the objections of the Defense Department. Although Attorney General Holder denied it in a recent hearing, President Obama's own Solicitor General admitted

that the physical presence of detainees in the U.S., even if they're just detained here for trial, will lead to their being granted greater constitutional rights. That admission came in the form of a brief submitted to the Supreme Court by Solicitor General Elena Kagan, who opposed a court's authority to order foreign terrorists released in this country. In her brief she repeatedly recognized the critical distinction the Supreme Court has drawn between an alien who has effected an entry into the United States and one who has never entered. Indeed, Solicitor General Kagan cautioned the Supreme Court not to blur the previously clear distinction between aliens outside the United States and aliens inside this country or at its borders. This basic distinction, she continued, serves as the framework on which our immigration laws are scrutinized, and repeatedly has been recognized as significant not just under the Constitution, but also as a matter of statutory and treaty law.

All this is happening because the President made an ill-informed decision to close the Guantanamo Bay detention facility within a year. Soon after he made the mistake of signing that order, the President's own Defense Department made an independent assessment of the conditions at Guantanamo Bay and found no such evidence of alleged abuse. His own Attorney General, upon returning from his own trip to Guantanamo, said that the facilities there are good ones.

In stark contrast to the fine facility at Guantanamo Bay is the nature of the detainees it houses. These detainees include al-Qaeda financial specialists, organizational experts, bomb makers and recruiters. As has been reported, camp officials have had to adapt to a detainee population that remains violent. There are up to 10 assaults a week on guards. Some throw urine or feces. When guards deliver food through a cell door, inmates try to pull their arms in and break them.

Over a year ago Judge Royce Lamberth, the chief judge of the U.S. District Court for the District of Columbia, issued an unprecedented statement imploring guidance from Congress on these difficult subjects in the form of legislation that should come sooner rather than later, but the Democratic Majority has not acted. In the meantime, Republicans, myself included, have introduced the Enemy Combatant Detention Review Act, which would prevent Federal courts from ordering the government to release known terrorists into the United States. Republicans have also introduced the Keep Terrorists Out of America Act, which requires the Governor and State legislature to consent to any release or transfer of a detainee into their State. But neither of those bills nor any others on the subject have been brought up for a hearing.

Mr. Chairman, terrorists are exploiting the current legal chaos as we speak, and Congress needs to act now.

I yield back the balance of my time.

Mr. NADLER. I thank the gentleman, and I would recognize for 5 minutes the distinguished Ranking Member of the full Committee Mr. Smith of Texas—excuse me, the Chairman of the full Committee having waived statement at this time.

Mr. SMITH. Thank you, Mr. Chairman.

We are here today because the President made a rash decision after only 1 day in office to close the Guantanamo Bay terrorist detention facility within 1 year.

Just 2 weeks ago this Committee voted not to require the Administration to produce documents about its policy of giving Miranda warnings, including the right to remain silent, to terrorists detained in Afghanistan. The American people still deserve this information. Now President Obama wants to give known terrorists at least some of the constitutional rights of citizens on trial in the U.S. Once terrorists are given additional constitutional rights, such as the right to remain silent, of course they do just that. The result is no interrogations, no information and possibly more attacks.

Just ask 9/11 mastermind Khalid Sheikh Mohammed. When he was captured in 2003, he was not cooperative. According to President Clinton's CIA Director George Tenet, he said, I'll talk to you guys after I get to New York and see my lawyer, but he wasn't read any Miranda rights, and his interrogation went forward whether he wanted it to or not. As a result, Tenet said, the information we obtained from him saved lives and helped defeat al-Qaeda. As Tenet wrote in his memoirs, I believe none of these successes would have happened if we had had to treat this terrorist like a white-collar criminal, read him Miranda rights and get him a lawyer, who surely would have insisted that his client simply shut up, end quote.

A *Wall Street Journal* article pointed out that, quote, military prosecutors have said involuntary statements comprise the lion's share of their evidence against dozens of Guantanamo prisoners who could be tried, end quote.

The Justice Department says there has been no change in overall policy, but several of the individuals responsible for conducting the interrogations of detainees told Congressman Mike Rogers that a change of policy is exactly what has occurred.

These reports that detainees are increasingly being told they have a right to remain silent is disturbing not only for its policy implications, but also because it appears to violate one of President Obama's own policy statements. In a 60 Minutes interview last March, President Obama said, quote, now, do these detainees deserve Miranda rights; do they deserve to be treated like a shoplifter down the block? Of course not, end quote.

Further, as Thomas Joscelyn, one of today's witnesses, has pointed out, since only the most dangerous detainees remain at Guantanamo, there is a clear danger that those released will return to terrorism. According to Reuters News, one out of every seven terrorism suspects formerly held at the U.S. Detention site at Guantanamo Bay are confirmed or suspected of having returned to terrorism. The total of 74 has more than doubled since May 2007, end quote.

The day after the President signed the order closing Guantanamo Bay, I introduced H.R. 630, the Enemy Combatant Detention Review Act. This legislation would prevent Federal courts from ordering the government to release known terrorists into the United States and protect sensitive intelligence on terrorists from being disclosed in court to prevent our foreign enemies from being able to evade detention and conceal future plots. Since then I, along

with other Members, have also introduced H.R. 2294, the Keep Terrorists Out of America Act, which requires the President to notify Congress 60 days before transfer or release of a detainee occurs, and to certify that such a transfer or release will not result in the release of any detainee into the United States or otherwise pose a security risk to the United States.

Mr. Chairman, that concludes my opening statement, and I will yield back.

Mr. NADLER. I thank the gentleman.

Mr. CONYERS. Mr. Chairman.

Mr. NADLER. The gentleman is recognized for what purpose?

Mr. CONYERS. I reluctantly seek to void my yielding of my time.

Mr. NADLER. The gentleman's waiver is waived.

Mr. CONYERS. Okay, and I thank you very much. I would like to yield——

Mr. NADLER. And the gentleman is recognized for 5 minutes.

Mr. CONYERS. I would like to yield briefly to Bill Delahunt, who serves with great distinction on the Foreign Affairs Committee as well as this Committee.

Mr. DELAHUNT. I thank the Chair, and I will be very brief.

I think that the decision to close is the right decision, and I think for multiple reasons. I think when one surveys the opinion of the rest of the world, we can't quantify the loss in terms of collaboration with the United States in terms of dealing with terrorism, in dealing with terrorists. And there's a whole array of consequences that have been caused by the symbol of Guantanamo.

Of course, one could visit Guantanamo today or even a year ago and see a sparkling facility. In my former career I happened to be a prosecutor. I was a State's attorney in greater Boston. I'm very familiar with prisons. They look great when they're all spiffed up.

But that's not really what the issue is. And by the way, I know my friends on the other side are aware of the fact that we have facilities here in this country that I would submit are as secure as anything that Guantanamo can provide. They are called supermaxes. And maybe we ought to take a field trip and see what a supermax is really like. It would be good to maybe kick the tires, as the phrase goes.

But I think the real issue here is do we really believe in due process, do we believe in the search for the truth, or do we want to take political advantage of heinous acts that have been perpetrated upon this country?

You know, due process is a concept that is, in my judgment, fundamental to a viable democracy. And due process, when you strip all the legalese and the legal definitions, is nothing more than a search for the truth. That's what it's about. And I hear the term "known terrorists." Well, who is going to tell us who the known terrorists are?

Mr. CONYERS. Would the gentleman allow me to reclaim——

Mr. DELAHUNT. I yield. I yield to the gentleman for a minute.

Mr. CONYERS. I just——

Mr. DELAHUNT. Because we—go ahead.

Mr. CONYERS. No, no. You got a minute. Go ahead. We're all colleagues, and we're having a very animated discussion in Judiciary, as is customary. I yield another minute.

Mr. DELAHUNT. Well, I thank the Chairman. But "known terrorists?" Who makes the determination as to who "known terrorists" are? In the Subcommittee that I chair on Foreign Affairs, the Subcommittee on Oversight, we had several hearings on the so-called combatant status review tribunals, and it was the military that stood up and said they were a sham. So if that's what constitutes due process, and that's what constitutes a conclusion that we can reach as to an individual that he is a "known terrorist," you know, that just doesn't cut muster if you're a believer in the concept of due process.

No one is saying, well, let them go; no one is saying that, of course not. But we've had a process that I would suggest has failed the American people and has failed us in terms of dealing with terrorism. What happened to those 500 that left? I heard my friend from Texas talk about how 71 have returned to the battlefield. Boy, I see different statistics. They're not from Reuters, they're from, you know, surveys that were done by people who are intimately involved in this particular issue. But let's have a process that we can be sure of that we've made a valiant effort to search for the truth, and I dare say we're getting there.

With that I yield back.

Mr. CONYERS. Well, I thank the gentleman, and I hope he's feeling better now that he's made this dispassionate description of why he thinks we're here today. And I tend to agree with him.

I had not chosen to make opening remarks because I want to hear Adam Schiff, but when the Chairman Emeritus, my good friend Jim Sensenbrenner, said that the war against terrorists in the court was lost and cost 3,000 American lives, I had to take some time to rise to defend the former President of the United States George Bush. I don't think he conducted such a war, and I choose to defend him in that regard. He didn't do any such thing at all.

And then my dear friend, the Ranking Member from Texas Lamar Smith, began his excellent comments, which I always listen to carefully, with the assertion that President Obama made a rash decision to close Guantanamo the first day that he was in office. But candidate Obama campaigned on this same issue for more than a year. And you may be interested to know that so did John McCain, who said he believed we should close Guantanamo. In Los Angeles he argued that the United States cannot go it alone in the world and must respect the views of valued allies. He went on to say our great power does not mean that we can do whatever we want whenever we want. And so on March 27, 2008, both candidates asserted that Guantanamo should be closed. And I thank you for your generous use of the time.

Mr. SMITH. Will the gentleman yield just for 1 minute?

Mr. CONYERS. Which Chairman?

Mr. SMITH. You, sir.

Mr. NADLER. Without objection, the gentleman will be granted 1 additional minute.

Mr. CONYERS. Thank you very much, Mr. Chairman. And I yield to my friend the Ranking Member.

Mr. SMITH. Thank you, Mr. Chairman. And I appreciate your comments, and I thank you for listening to my opening statement, as I do yours.

I just wanted to point out that even the President, after he made the decision, actually and subsequently said that he wished he had studied the issue a little bit more closely. I thought that was a candid and appreciated admission on his part that the issue is far more complex than even he thought, and as we all had discovered as well. I just wanted to make that point.

Mr. CONYERS. I appreciate that very much, because I wish that the President would examine the issue of health care a little bit more carefully. I will be happy to agree with you on that point.

Thank you, Mr. Chairman.

Mr. NADLER. I thank the gentleman.

In the interest of proceeding to our witnesses, and mindful of the Members' busy schedules, I would ask that other Members submit their statements for the record. Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record.

[The prepared statement of Mr. Johnson follows:]

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Constitution Subcommittee Hearing on "Legal Issues Surrounding the Military Commissions System"

Opening Statement of Henry C. "Hank" Johnson, Jr.

Thank you, Mr. Chairman, for holding today's very important hearing on the legal issues surrounding the military commissions system. This hearing is important because, despite his campaign promises to repudiate Bush-era anti-terrorism policies, President Obama is working to revamp the system of military commissions to try terrorism suspects. Today we will hear from experts about the legal issues surrounding the military commissions system and the potential for reform. Certainly, change is in order if the use of military commissions is to continue. The current system is an affront to our nation's ideals of justice. However, I do not believe the reforms that have been proposed will fix this broken system. The problems with the military commissions as used by the Bush Administration are not minor issues that the new Administration or the Congress can easily tweak. The problem is with the system of tribunals itself.

It is impossible to reconcile practices like indefinite imprisonment, abusive interrogation practices, and the use of secret prison camps with fundamental American legal values. The current military commissions system lacks the impartial pretrial investigations and hearings that are guaranteed by the Fifth Amendment. Indefinite pretrial detention and the absence of a speedy trial requirement are inconsistent with the Sixth Amendment and the commission system allows the admission of testimony obtained through coercion. There is no reason why a country with a well-functioning judicial system would need to rely on military commissions aside from the ease with which convictions can be obtained without the "burdens" of due process. The federal courts are perfectly capable of handling these cases.

Even if the tribunals could be reformed to conform to the letter of American law and our international commitments (and I have serious doubts that they can be), the abuses that have occurred under the existing system have ruined any chance that the tribunals and its judgments will be viewed as legitimate domestically or abroad.

We must defend our country against terrorism. But we must not, during the fight, lose sight of who we are and what we stand for. We cannot defend our country by sacrificing the principles on which it was founded. The system of military commissions should be abandoned.

Thank you, Mr. Chairman, I look forward to hearing from today's witnesses and I yield back the balance of my time.

Mr. NADLER. Without objection, the Chair will be authorized to declare a recess of the hearing, which hopefully we'll do only if there are votes on the floor.

As we ask questions of our witnesses, the Chair will recognize Members in the order of their seniority in the Subcommittee, alternating between the Majority and the Minority, provided that the Member is present when his or her turn arrives. Members who are not present when their turn begins will be recognized after the other Members have had the opportunity to ask their questions. The Chair reserves the right to accommodate a Member who is unavoidably late or is only able to be with us for a short time.

I would now like to introduce our first witness. Representative Adam Schiff represents the 29th District of California and is a Member of this Committee. He also serves on the on Appropriations Committee and the Permanent Select Committee on Intelligence. Prior to serving in the House of Representatives, Congressman Schiff completed a 4-year term as State senator to California's 21st State senate district, chairing the senate Judiciary Committee, the senate Select Committee on Juvenile Justice, and the Joint Committee on the Arts. Before serving the California Legislature, Representative Schiff was with the U.S. Attorney's Office in Los Angeles for 6 years, most notably prosecuting the first FBI agent ever to be indicted for espionage. He is a graduate of Stanford University and Harvard Law School.

As you know, your written statement will be made part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less. To help you stay within that time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then red when the 5 minutes are up. And that will also apply to our next panel of witnesses, and I won't have to read that again.

Mr. Schiff.

TESTIMONY OF THE HONORABLE ADAM B. SCHIFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. SCHIFF. Mr. Chairman, I want to thank you for providing me with this opportunity to testify before the Subcommittee on this important issue.

Since al-Qaeda and Taliban detainees first arrived at Guantanamo in 2002, Congress has failed to adopt a framework for detention and prosecution of unlawful combatants that could pass constitutional muster. During the years that immediately followed the establishment of Guantanamo, the then-Majority in Congress was not willing to confront this difficult issue and was comfortable with delegating these hard decisions to the executive branch and eventually to the courts. I want to commend the Chairman of the Subcommittee and the full Committee Chairman for their leadership in convening this hearing today.

Earlier this year the President took the important step of indicating that the detention facility at Guantanamo Bay will be closed within a year. The poorly thought-out prison and the torture that took place there have called into question American adherence to the rule of law and discouraged our allies from cooperating with us.

Apart from Guantanamo, however, a number of difficult questions still remain. Any post-Guantanamo system to detain unlawful combatants must meet our national security needs and also provide

adequate due process to minimize the likelihood of error. Congress must be involved in the formulation of this new system, and changes should not be made solely by Executive Order.

When a suspected terrorist is captured on a foreign battlefield, the accepted laws of war allow us to hold an unlawful or unprivileged combatant for the duration of the war and to prosecute them for crimes. Two determinations have to be made: Whether the person is an unlawful combatant, and whether the person has committed criminal offenses. The question confronting us now is who should make these decisions and how?

The Bush administration established tribunals to determine whether someone at Guantanamo was an unlawful combatant and military commissions to handle any prosecutions. The current Administration has indicated their intention to continue using the military commissions after making a number of changes to the rules. Notwithstanding the changes announced by the Administration, I believe the commission system has proved so flawed and its due process so inadequate and discredited that in the case of the detainees at Guantanamo, it should be completely junked.

Some have called for the creation of a new national security court to try detainees, and others have advocated moving all detainees into the Federal criminal courts. I propose an alternative that I believe better balances the national security needs of the country with our adherence to the rule of law. Earlier this year I introduced H.R. 1315, the Terrorist Detainees Procedures Act of 2009, legislation that would make use of the military courts-martial to prosecute detainees who are unlawful combatants.

Military courts-martial have a long history of dispensing justice without compromising military operations. Cases are tried before military judges using a set of due process protections provided for under the Uniform Code of Military Justice, UCMJ. Almost any wartime offense could be tried in a military court-martial, and their use would allow us to show the world we're giving detainees the same procedural protections we give our own servicemembers who are brought up on court-martial charges. Military courts-martial are also well equipped to provide for the safeguarding of classified information and to deal with unavailable witnesses or involuntary statements in a manner that is fair and provides due process.

The military courts-martial framework does not currently have a mechanism to make initial determinations of whether someone is an unlawful combatant, but this can be easily changed by Congress, and my legislation would make such a change. Specifically it would create a new status review procedure for all detainees currently held at Guantanamo to determine whether each individual was properly designated as an unlawful combatant.

A panel of three military judges would be convened in the military courts-martial to conduct the reviews. This process, which replaces the previous combatant status review tribunals, would follow the same established pretrial investigative procedures used before charges are brought and referred to a court-martial under article 32 of UCMJ.

The prior status review tribunal proceedings were so flawed that the threshold decision has to be remade to determine whether individuals are, in fact, unprivileged combatants. I believe this new re-

view can take place and should take place before an independent factfinder, and therefore should occur separate and apart from the current review of cases by the Administration.

After the new status determination is made, my legislation would require any person determined to be an unlawful combatant to be either tried in court with a preference for the military courts-martial, transferred to a NATO-run detention facility or another country, or held in accordance with the law of armed conflict until the cessation of hostilities related to the initial detention or such time as they're no longer deemed a threat.

Finally, my legislation will require those determined not to be unlawful combatants and not suspected of violating any law be transferred to the person's country of citizenship, place of capture or different country, as long as there are adequate assurances that they will not be the subject of torture; or be released.

Mr. Chairman, I urge the Subcommittee to examine the courts-martial framework as an option that can both restore confidence in our detention regime while ensuring our national security needs are met. I thank you again, Mr. Chairman, and I yield back.

Mr. NADLER. I thank you.

[The prepared statement of Mr. Schiff follows:]

PREPARED STATEMENT OF THE HONORABLE ADAM B. SCHIFF, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA, AND MEMBER, COMMITTEE ON THE JUDICIARY

Mr. Chairman, I'd like to thank you for providing me with the opportunity to testify before the Subcommittee today on this important issue.

Since al Qaeda and Taliban detainees first arrived at Guantánamo in 2002, Congress has failed to adopt a framework for the detention and prosecution of unlawful combatants that could pass constitutional muster. For years the Majority in Congress was not interested in addressing, or even holding hearings on this issue, and was comfortable with delegating these difficult decisions to the executive branch and eventually the courts. I want to commend the Chairman for his leadership in convening this hearing today.

Earlier this year, the President took an important step by indicating that the detention facility at Guantánamo Bay will be closed within a year. The poorly thought-out prison, and the torture that took place there, have called into question American adherence to the rule of law and discouraged our allies from cooperating with us.

Apart from Guantánamo, however, a number of difficult questions still remain. Any post-Guantánamo system to detain unlawful combatants must meet our national security needs and also provide adequate due process to minimize the likelihood of error. Congress must be involved in the formulation of this new system, and changes should not be made solely by Executive Order.

When a suspected terrorist is captured on a foreign battlefield, the accepted laws of war allow us to hold an unlawful (or unprivileged) combatant for the duration of the war and to prosecute them for crimes. Two determinations must then be made—whether the person is an unlawful combatant, and whether the person has committed criminal offenses. The question confronting us now is: Who should make these decisions, and how?

The Bush administration established tribunals to determine whether someone at Guantánamo was an unlawful combatant, and military commissions to handle any prosecutions. The current Administration has indicated their intention to continue using military commissions after making a number of changes to the rules. Notwithstanding the changes announced by the Administration, I believe the commissions system has proved so flawed, and its due process so inadequate and discredited, that it should be completely junked.

Some have called for the creation of a new national security court to try detainees and others have advocated moving all detainees into the federal criminal courts. I have proposed what I believe is a far better solution. Earlier this year, I introduced H.R. 1315, the Terrorist Detainees Procedures Act of 2009—legislation that would make use of the military courts-martial to prosecute detainees who are unlawful combatants.

Military courts-martial have a long history of dispensing justice without compromising military operations. Cases are tried before military judges using a set of due process protections provided for under the Uniform Code of Military Justice (UCMJ). Almost any wartime offense could be tried in a military court-martial, and their use would allow us to show the world that we are giving detainees the same procedural protections we give our own servicemembers. Military courts-martial are also well-equipped to provide for the safeguarding of classified information and to deal with unavailable witnesses or involuntary statements in a manner that is fair and provides due process.

The military courts-martial framework does not currently have a mechanism to make initial determinations of whether someone is an unlawful combatant, but this can easily be changed by Congress—and my legislation would make such a change. Specifically, it would create a new status review procedure for all detainees currently held at Guantánamo to determine whether each individual is properly designated as an unlawful combatant.

A panel of three military judges would be convened in the military courts-martial to conduct the reviews. This process, which replaces the previous Combatant Status Review Tribunals, would follow the same established pre-trial investigation procedures used before charges are referred to a court-martial under Article 32 of the UCMJ.

The prior status review tribunal proceedings were so flawed that the threshold decision has to be remade to determine whether individuals are in fact unprivileged combatants. I believe this new review must be before an independent fact finder and therefore should occur separate and apart from the current review of case files by the Administration.

After the new status determination is made, my legislation would require any person determined to be an unlawful combatant to either be tried in court, with a preference for the courts-martial avenue; transferred to a NATO-run detention facility or another country; or held in accordance with the law of armed conflict until the cessation of hostilities directly related to the initial detention, or such time as they are no longer deemed to be a threat.

Finally, my legislation would require that those determined not to be unlawful combatants and not suspected of violating any law, be transferred to the person's country of citizenship, place of capture, or a different country, as long as there are adequate assurances that they will not be subject to torture; or be released.

Mr. Chairman, I urge the Subcommittee to examine the courts-martial framework as an option that can both restore confidence in our detention regime while ensuring our national security needs are met.

Mr. NADLER. I yield to myself to ask you a couple of questions.

Granting all the premises and the desirability of doing exactly what you said, couldn't lawful and for that matter unlawful combatants accused of crimes against laws of war be tried in a court-martial today? In other words, why do we need legislation for this?

Mr. SCHIFF. Well, there are two issues. One is what is the mechanism to make the initial determination are they an unlawful combatant?

Mr. NADLER. That's the second question.

Mr. SCHIFF. Well, I view it as a threshold question, because unless you determine through lawful process they're an unprivileged combatant, they're not subject to prosecution, they're a POW. So we don't currently have a status review tribunal, and the legislation will be necessary to use the courts-martial for that process.

Now, can these detainees be tried before military courts-martial? I think the answer is yes.

Mr. NADLER. So, in other words, the bill does deal with the threshold question.

Mr. SCHIFF. The bill deals with the threshold question, but it also sets out a menu of options, including military courts-martial; including, in particular cases, the Federal criminal courts; includ-

ing transfer to a NATO detention facility. So the bill includes really the whole range of options.

But yes, you're right. In terms of if you had an adequate status determination, can you bring someone before trial in a military courts-martial, I think the answer is yes.

Mr. NADLER. Thank you.

Mr. SENSENBRENNER. Mr. Chairman.

Mr. NADLER. The gentleman from Wisconsin is recognized.

Mr. SENSENBRENNER. Mr. Chairman, I have two questions. First of all, have you looked at the Geneva Convention to see whether that Convention would allow detainees and/or POWs to be tried before a military court under a court-martial act?

Mr. SCHIFF. I believe it would.

Mr. SENSENBRENNER. How so?

Mr. SCHIFF. Well, I believe there's nothing in the Geneva Convention that precludes us from trying an unlawful unprivileged combatant. They are subject to prosecution, they're not a POW. Nothing in the Geneva Convention that I'm aware of precludes their prosecution in any appropriate forum.

Mr. SENSENBRENNER. Now, my second question is do you disagree with the Obama administration that it does not want the Military Commissions Act repealed, but they want to amend it by simply tweaking some of the evidentiary rules that govern proceedings before military commissions?

Mr. SCHIFF. Depending on how substantial the tweaks are, you could make military commissions identical with military courts-martial if you adopt the UCMJ, for example. Some of the rules that they are proposing move the military commissions in the direction of the due process you find in military courts-martial. They don't go the distance. And because I think in the case of Guantanamo the military commission established by the Bush administration has been so discredited, I think that we're better off moving to a different venue.

But to answer your question, depending on how far they're willing to go in terms of the rules, if they make the military commissions look like the military courts-martial, that would come close to satisfying the concerns that I have.

Mr. SENSENBRENNER. It seems to me from what you've just said is that you ought to give those who are defendants before whatever procedure is utilized more rights, such as the rights that are given soldiers who are being court-martialed, rather than what the Obama administration is proposing. Do I hear you correctly on that?

Mr. SCHIFF. No, you don't, because what the Obama administration has said is that in some cases they are going to bring people before military commissions; in other cases they are going to bring people before Federal district courts. In the cases where they bring people before Federal district courts, that would be a much greater level of due process than what I am proposing in the military courts-martial.

Mr. SENSENBRENNER. But the Bush administration had the same choice of whether to bring a detainee before a military commission or before a Federal district court, haven't they?

Mr. SCHIFF. Did the Bush administration have that choice?

Mr. SENSENBRENNER. Yes.

Mr. SCHIFF. They did have that choice. And what they chose to do with that choice is largely bring people before military commissions that were so flawed that none of the convictions were upheld. Few could actually get through the process. And I don't think any successfully were prosecuted by the military commission. So you would have to look at what the Bush administration did as a pretty abject failure in terms of bringing these people to justice.

Mr. SENSENBRENNER. Well, I thank the gentleman for recognizing me. I'm not sure that what my distinguished colleague is proposing would be any more successful. And I yield back the balance of my time.

Mr. NADLER. I thank the gentleman.

We'll now turn—I thank the gentleman for his testimony. The gentleman is excused with our thanks.

We will now turn to the second panel. In the interest of time, I will introduce the witnesses while they are taking their seats. Lieutenant Colonel Darrel Vandeveld, and I hope I got that pronunciation correct.

Lieutenant Colonel VANDEVELD. You did. Thank you.

Mr. NADLER. Lieutenant Colonel Darrel Vandeveld is with the Judge Advocate General's Office of the U.S. Army Reserve and was with the Guantanamo Military Commission. He is a senior deputy attorney general for the Commonwealth of Pennsylvania, currently assigned to the Erie Regional Bureau of Consumer Protection. He received his B.A. in philosophy and his J.D. from the University of California. I won't read his long list of declarations except to note that he was awarded the Bronze Star and the Iraq Campaign Medal.

Deborah Pearlstein is an associate research scholar in the Law and Public Affairs Program at the Woodrow Wilson School of Public and International Affairs at Princeton University. She received her J.D. from Harvard Law School, where she was the articles editor of the Harvard Law Review. Ms. Pearlstein clerked for Judge Michael Boudin of the U.S. Court of Appeals for the First Circuit, and for Justice John Paul Stevens. From 2003 to 2006, Ms. Pearlstein served as the founding director of the Law and Security Program at Human Rights First, where she led the organization's efforts in research, litigation and advocacy surrounding U.S. detention and interrogation operations. She was recently appointed to the ABA's Advisory Committee on Law and National Security. In addition to her law degree, Ms. Pearlstein holds an A.B. from Cornell University.

Thomas Joscelyn—and I hope I got that correct—Thomas Joscelyn is a senior fellow at the Foundation for Defense of Democracies, where he is also the executive director of the Center for Law and Counterterrorism. Most of his research and writing is focused on how al-Qaeda and its affiliates operate around the world. For the past 2 years, he has conducted a major study of the detainees held at Guantanamo. In 2006, Mr. Joscelyn was named one of the Claremont Institute's Lincoln Fellows. He holds a B.A. in economics from the University of Chicago.

Denny LeBoeuf is the director of the ACLU's John Adams Project, assisting in the defense of the capitally charged Guanta-

namo detainees. She has been a capital defendant for over 20 years, representing persons facing death at trial and in postconviction in State and Federal courts, and she teaches and consults with capital defense teams nationally. Ms. LeBoeuf was the founding director of the Capital Postconviction Project of Louisiana and is a member of the 2003 committee that formulated the ABA guidelines for the appointment and performance of defense counsel in death penalty cases. From 2006 to 2007, she was chair of the Orleans Parish Public Defenders Board, coordinating the reform and restoration of indigent defense in post-Katrina New Orleans. She holds a J.D. from Tulane University and a B.A. from Hunter College.

I am pleased to welcome all of you. Each of your written statements will be made a part of the record in its entirety. I would ask that you now summarize your testimony in 5 minutes or less.

I already explained about the lights. I don't have to repeat that.

And before we begin, it is customary for the Committee to swear in its witnesses. If you would please swear and raise your right hand to take the oath.

[Witnesses sworn.]

Mr. NADLER. Thank you.

Let the record reflect that the witnesses answered in the affirmative.

You may be seated.

I will now start by recognizing for 5 minutes our first witness Lieutenant Colonel Vandeveld.

TESTIMONY OF LIEUTENANT COLONEL DARREL J. VANDEVELD, FORMER PROSECUTOR, GUANTANAMO BAY MILITARY COMMISSIONS

Lieutenant Colonel VANDEVELD. Thank you, Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee. I do want to thank you all for inviting me to testify today on the issues surrounding the military commission system, including what I consider to be the mistaken proposal to revise and revive the—what I view as the irretrievably flawed military commissions at Guantanamo Bay.

Before I begin, I do want to mention very briefly that yesterday I watched the Senate Armed Services Committee Webcast, and I noticed that everybody seemed to be dressed in dark blue suits, including Senator Levin, who I met in Baghdad in 2006, and for a very brief, fleeting, shining moment, I thought I was going to witness a memorial service for the Military Commissions Act. After 5 seconds I realized that was not the case, and that the Committee took up its business in a very professional manner.

In any event, Chairman Nadler did introduce me. I do want to mention, I have served in Iraq, I have served in Afghanistan, I have served in Africa, I have served in Bosnia, all since 2001. I'm a reservist. All told I have served 4½ years on Active Duty; since 9/11, 2 years—over 2 years in combat zones. But most importantly for purposes of this hearing, I did serve on Active Duty as a prosecutor in the Office of Military Commissions in Guantanamo Bay from May 2007 through December 2008. I went to Guantanamo with this experience, this combat experience, this experience on Ac-

tive Duty firmly embedded in mind, and I went there with a purpose. And my purpose was to prosecute as many detainees as I possibly could, prosecute them within the bounds of the law as aggressively as I could, and to exact the punishment, the most profound punishment that I could, even the death penalty if warranted.

And so I believed the President when I went there and thought I was prosecuting the worst of the worst. Obviously when I got there, I experienced a profound change of heart and mind when I realized through firsthand observation and through my own actions that what I was seeing at Guantanamo was not at all consistent with our core values of justice and due process of law.

I want to offer a single, straightforward message. The military system, military commission system, really is beyond repair. There have been three trials in 7 years when you add the military tribunals. One of them was a politically enforced guilty plea, one involved a detainee who boycotted his trial, and the final one was probably the rebuke of a lifetime to the prosecutors at Guantanamo, the Hamdan case, which finally did come to trial and resulted in a sentence, an effective sentence, of 5 months. Hamdan has now been released. He's back in Yemen doing what, I don't know.

From my own perspective, though, I was assigned to prosecute several cases. At one point I was responsible for one-third of all the prosecutions at Guantanamo. One in particular led to my change of heart and my decision to ask to be relieved from the commissions. Unlike what some may have been told, I didn't resign; I asked to be reassigned either back to Afghanistan or Iraq to finish out my term, because one of the tenets of being a soldier is that soldiers don't quit, and I was not going to quit.

But I was prosecuting somebody called Mohammed Jawad, who remains in custody to this day. I was presented—I see I'm running out of time, so I'll be very brief—I was presented with what I thought was the entire evidence in the Jawad case. And as I searched through the evidence and the documents, it became clear to me, as it would to any experienced prosecutor, that the file was not complete. There were references to documents that didn't exist. There was a video recording of a confession that should have been in the file that was not.

I searched for this evidence, and ultimately what I did find was evidence that Jawad had been mistreated not only at the Bagram Theater Internment Facility where he was hooded, slapped, shackled, pushed down a flight of stairs. While he was at Guantanamo, he was subjected to the so-called "frequent flyer program" where he was moved every 2½ hours for 14 days, in violation of a direct order of the Commander of Joint Task Force Guantanamo at the time. And so it was a result of these realizations which came over time that turned me from what I would call a true believer into somebody who felt truly deceived by the commissions. And that is why I left, and that is why I am testifying today. Thank you.

Mr. CONYERS. Mr. Chairman I ask unanimous consent that the Colonel be given 2 additional minutes.

Mr. NADLER. Without objection, the colonel will be given 2 additional minutes to amplify his testimony.

Lieutenant Colonel VANDEVELD. Thank you very much. I appreciate that.

I didn't come to this conclusion about Mr. Jawad lightly. In fact, I was assisted by a very able defense counsel named Major David Frakt from the U.S. Air Force. He's a Harvard law graduate. He's a professor at a law school in California. And it was really through his tutelage for somebody who was disinclined to believe his assertions and through his repeated requests for information that I began to uncover this mistreatment of Mr. Jawad.

And in particular what I discovered was that the evidence against Mr. Jawad consisted principally of two confessions: one taken by the Afghans when he was apprehended in December 2002, and then another one which was taken from him shortly, within hours, by U.S. forces after they received custody of Mr. Jawad, for want of a better way to put it. In fact, what developed was that the first confession, the Afghans held a gun to Mr. Jawad's head and told him they would not only kill him, but they would track down and kill members of his family if he didn't confess.

The video recording of the subsequent interrogation by the U.S. interrogators disappeared. I sent out a servicewide inquiry. It turned up to be—turned up nowhere. After I left the commissions, my request to be reassigned denied, the military judge in the case suppressed those two confessions as having been the product of torture. So today Mr. Jawad is in custody 6, 7 years after the fact with virtually no evidence against him. His only hope for release is the grant of a habeas petition which is pending before the Federal district court, and—and I'll conclude with that except by saying that if—I'm out of time.

Mr. NADLER. Finish your statement.

Lieutenant Colonel VANDEVELD. I was going to say, I have children of my own, and Mr. Jawad was a juvenile at the time. I could not countenance in good conscience the treatment that Mr. Jawad suffered at the hands of my fellow servicemembers, and I was appalled. And I would ask that, if anything results from these hearings, that steps be taken to make sure that juveniles and the excesses that have occurred in the past never occur again. Thank you.

Mr. NADLER. I thank the gentleman.

[The prepared statement of Lieutenant Colonel Darrel Vandeveld follows:]

PREPARED STATEMENT OF LT. COL. DARRELL VANDEVELD

Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee, I want to thank you for inviting me to testify on the legal issues surrounding the military commissions system, including the mistaken proposals to revise and revive the irretrievably flawed military commissions at Guantanamo Bay.

I am a Lieutenant Colonel in the US Army Reserve Judge Advocate General's Corps. Since the September 2001 attacks, I have served in Bosnia, Africa, Iraq and Afghanistan. I have been awarded the Bronze Star Medal, the Iraqi Campaign Medal, the Joint Service Commendation Medal, and two Joint Meritorious Unit Awards. In civilian life, I am a senior prosecutor for the Commonwealth of Pennsylvania, and since graduating from law school, I have tried well over one hundred criminal jury trials.[1]

[1] Obviously, the views I express are wholly my own, and should not be taken as representative of the Department of Defense, the Department of the Army, or, certainly, my civilian employer.

Most importantly for the purposes of this hearing, I served on active duty as a prosecutor at the Office of Military Commissions in Guantanamo Bay, Cuba, from May 2007 to September 2008. I proudly went to Guantanamo to serve our country as a prosecutor charged with bringing to justice detainees who President George Bush had said were "the worst of the worst." But I eventually left Guantanamo after concluding that I could not ethically or legally prosecute the assigned case. I became the seventh military prosecutor at Guantanamo to resign because I could not ethically or legally prosecute the defendant within the military commission system at Guantanamo.

I am here today to offer a single, straightforward message: the military commission system is broken beyond repair. Even good faith efforts at revision, such as the legislation recently passed by the Senate Armed Services Committee, leave in place provisions that are illegal and unconstitutional, undermine defendants' basic fair trial rights, create unacceptable risks of wrongful prosecution, place our men and women in uniform at risk of unfair prosecution by other nations abroad, harm the reputation of the United States, invite time consuming litigation before federal courts, and, most importantly, undermine the fundamental values of justice and liberty upon which this great country was founded. It is my firm belief that if the United States continues to prosecute terrorism suspects through military commissions, past will become prologue. Inevitably, we will find ourselves once again with a discredited system, with a series of unfavorable rulings by federal courts, and with few, if any, successful prosecutions.

My concerns appear to have been vindicated by the Justice Department's Office of Legal Counsel. As the members of this committee are no doubt aware, the *Wall Street Journal* reported last week that the OLC has issued an opinion finding that detainees tried by military commissions can claim certain constitutional rights, including the Constitution's prohibition on the use of statements obtained through coercive interrogations. Not only does this opinion bind the Executive branch to uphold a higher standard of admissibility of evidence than that afforded by either the current military commission rules or the Senate Armed Services Committee's legislation, but it also raises the specter of eventual invalidation by the Supreme Court of any prosecution of a detainee now held at Guantanamo.

At the very least, the OLC opinion should caution legislators that the Senate Armed Services Committee proposal, which permits the use of coerced evidence, is likely to spur protracted litigation and result in even more delay. And at this point, we cannot afford to delay justice any longer. Seven years of detention without charge is long enough. It is time for government to charge the individuals it is going to charge before regularly constituted Article III courts or military courts-martial, and resettle or repatriate the others. Indefinite detention of those imprisoned at Guantanamo without charge is anathema both to U.S. constitutional values and to the rule of law.

I was not always so skeptical about the capacity of military commissions to deliver justice. I entered my job at the Office of Military Commissions as a "true believer." I had heard stories about abuse at Guantanamo, but I brushed them off as hyperbole. When one of the detainees I was prosecuting, a young Afghan named Mohammed Jawad, told the court that he was only 16 at the time of his arrest, and that he had been subject to horrible abuse, I accused him of exaggerating and ridiculed his story as "idiotic." I did not believe that he was a juvenile, and I railed against Jawad's military defense attorney, whom I suspected of being a terrorist sympathizer.

The case against Jawad seemed uncomplicated. He stood accused of carrying out a hand-grenade attack on two U.S. Special Forces soldiers and their Afghan interpreter in December 2002, under instructions from a domestic insurgent group. Jawad had confessed to his role in the attack on a videotape recorded by U.S. personnel. To me, the case appeared to be as simple as the street crimes I had prosecuted by the dozens in civilian life, and seemed likely to produce a quick, clean conviction, and an unmarred early victory for the prosecution, vindicating the concept of the Guantanamo Military Commissions.

As I delved deeper into Jawad's case file, however, I soon discovered a number of disturbing anomalies. And when I attempted to bring these anomalies to the attention of my supervisors, they were harshly dismissive of my concerns and actually, on some unspoken level, began to question my loyalty, even though my combat experience exceeded both theirs combined. I began to realize that the problems with Jawad's case were symptomatic of the military commissions regime as a whole. Indeed, if any case was likely to be free of such anomalies, it should have been that of Mr. Jawad, whose alleged crime was as straightforward as any on the prosecutor's docket. Instead, gathering the evidence against Mr. Jawad was like looking into Pandora's box: I uncovered a confession obtained through torture, two suicide

attempts by the accused, abusive interrogations, the withholding of exculpatory evidence from the defense, judicial incompetence, and ugly attempts to cover up the failures of an irretrievably broken system.

Evidence from U.S. Army criminal investigators showed that Jawad had been hooded, slapped repeatedly across the face and then thrown down at least one flight of stairs while in U.S. custody in Afghanistan. Detainee records show that once at Guantanamo, he was subjected to a sleep deprivation regime, known as the "frequent flier program," during which he was moved to different cells 112 times over a 14-day period—an average of once every 2½ hours, and that he had tried to commit suicide by banging his head repeatedly against a wall. Evidence from a bone scan showed that he was, in fact, a juvenile when he was initially taken into U.S. custody. Field reports, and examinations by US medical personnel in the hours after Jawad had been apprehended, indicated that he had been recruited by terrorists who drugged him and lied to him, and that he probably hadn't committed the crime for which he was being charged. In fact, the military had obtained confessions from at least two other individuals for the same crime.

In this way, I came to realize that Mr. Jawad had probably been telling the truth to the court from the very beginning. I implored my supervisors to allow Mr. Jawad to reach a plea agreement, in hopes that he would soon be released and returned to Afghanistan, but they not only rebuffed my requests, they refused even to listen to my explanation of my rationale for the agreement. I then made the enormously painful decision to ask to be reassigned from the Commissions, and personally petitioned the Army's top lawyer, to return to Iraq or Afghanistan to serve the remainder of my obligation. I simply could not in good conscience continue to work for an ad hoc, hastily-created apparatus—as opposed to the military itself—whose evident resort to expediency and ethical compromise were so contrary to my own and to those the Army has enshrined and preached since I enlisted so many years ago.

The military commissions cannot be fixed, because their very creation—and the only reason to prefer military commissions over federal criminal courts for the Guantanamo detainees—can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation. The problems manifest themselves in at least three ways, each of which I witnessed during my time at Guantanamo and which would remain problematic under the present proposal. They are, first, the rules of admissibility of evidence, including the relaxation of restrictions on the admissibility of evidence obtained through coercion and of hearsay; second, the gathering and handling of evidence, including legal and institutional restrictions on the disclosure of sensitive or classified evidence to the defense; and third, institutional deficiencies, including the insufficient experience and qualifications of both judges and counsel, and the inadequate provision of resources to the defense. Each of these shortcomings, I believe, will prove persistent even in the face of the most ardent, well-meaning legislative repackaging. I will address each in turn.

ADMISSIBILITY OF EVIDENCE

The rules of admissibility of evidence established by the Military Commissions Act were deeply flawed, and the Senate Armed Services Committee legislation would continue most of these flaws. In particular, I am deeply troubled to learn that the new legislation would continue to allow into evidence statements obtained through coercion. The impetus for this rule is obvious. The sad reality is that virtually every detainee—Mohammed Jawad is a salient example—has been subjected to torture and abuse repeatedly. Many of them are mentally ill as a result, some profoundly so.

One reason coerced confessions are prohibited is moral repugnance; the other is practical experience, as they are unreliable. For some of the prisoners, such as some of the High Value Detainees, coerced statements may be corroborated by evidence that would be admissible. For others, only an unreliable coerced statement provides a tenuous theory of prosecution. Such cases should rightfully give any prosecutor pause. Disallowing evidence obtained through coercion would result in the eviscération of many of the cases that might otherwise, on the most tenuous of theories, have been prosecuted. Instead of recognizing this sad reality and resettling or repatriating those prisoners against whom the government has insufficient and tainted evidence, the present legislation, in effect, opts to continue the charade. Thus, in place of the ban on the use of coerced statements mandated by the Due Process Clause of the Constitution, the present legislation disallows only statements obtained through torture or cruel, inhuman or degrading treatment.

These changes will only exacerbate the practical impossibility of achieving justice at Guantanamo. The ban on the use of involuntary statements or confessions as evi-

dence against an accused is a fundamental principle of the American criminal justice system. The Uniformed Code of Military Justice bans as "involuntary" statements obtained "through the use of coercion, unlawful influence, or unlawful inducement." That is the law that applies in every court-martial—absolutely no coerced evidence may be admitted. In contrast, it is unclear what, precisely, constitutes cruel, inhuman or degrading treatment under U.S. law. Indeed, the definition of cruel, inhuman, or degrading treatment has never been litigated before U.S. courts, and has, in the recent past, been the subject of discredited interpretations by Executive Branch attorneys.[2]

I am convinced that all prosecutions based on coerced evidence will ultimately be overturned by the courts. Coerced evidence is banned from every courtroom in America. It is inconceivable that our courts will find that there somehow is an exception from the ancient protection against prosecutions based on forced confessions.

I was also disappointed to learn that the Senate Armed Services Committee legislation would continue the military commissions' practice of allowing hearsay into evidence. President Obama has argued that such an expansive admissibility standard "would be consistent with international standards, such as those employed in international criminal tribunals." Unfortunately, the President's statement is misleading at best. Although international tribunals in the former Yugoslavia, Rwanda, Sierra Leone, and elsewhere do admit hearsay evidence, they differ fundamentally from military commissions in two significant ways. First, international tribunals use judges with experience in criminal law and procedure who are qualified to consider hearsay and determine its value. By contrast, the military commissions employ lay jurors who, once exposed to hearsay, lack the legal expertise to determine its probative value and discount it where appropriate. Second, judges in international tribunals issue detailed opinions in which they analyze each piece of evidence and provide an explanation of any corroborating testimony. Unlike the lay jurors in the military commissions, then, the professional judges at international tribunals must justify, in explicit terms, any reliance on hearsay.

These rules of evidence represent significant departures from typical federal criminal court trials, courts-martial proceedings, and proceedings before international tribunals. As such, they will ultimately found to be unconstitutional and also will very likely be found to fail to comply with Common Article 3 of the Geneva Conventions, which require trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Language from *Hamdan* indicates that the Supreme Court might find these provisions problematic. In a portion of his concurring opinion endorsed by the majority,[3] Justice Kennedy noted specific deficiencies in the commissions' rules of evidence, which, he argued, "could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability," including "unsworn written statements," and "coerced declarations."[4]

GATHERING AND HANDLING OF EVIDENCE

The military commissions suffer from enormous problems surrounding the gathering and handling of evidence. The "case files" compiled the commissions' investigators and prosecutors are nothing like the investigation and case files assembled by military or civilian police agencies and prosecution offices, which typically follow a standardized format, include initial reports of investigation, subsequent reports compiled by investigators, and the like. But for the military commissions, there is no central repository for case files, no method for cataloguing and storing physical evidence, nor any other system for assembling a potential case into a readily intelligible format that is the sine qua non of a successful prosecution.

While no experienced prosecutor, much less one who had performed his or her duties in the fog of war, would expect that potential war crimes would be presented, at least initially, in "tidy little packages," at the time I inherited the Jawad case, Mr. Jawad had been in U.S. custody for approximately five years. It seemed reasonable to expect at the very least that after such a lengthy period of time, all available evidence would have been collected, catalogued, systemized, and evaluated thor-

[2] In 2005, for example, President Bush's Office of Legal Counsel concluded that CIA "enhanced interrogation techniques," including waterboarding, walling, dousing with water down to 41 F, stress positions, wall standing, cramped confinement, nudity, restrictions of caloric intake down to 1,000 kcal/day, sleep deprivation for up to 180 hours, shackling, clothing in adult diapers, slapping and other techniques involving "physical interaction with the detainee" *did not* constitute cruel and inhuman or degrading treatment inconsistent with U.S. treaty obligations under Article 16 of the UN Convention Against Torture.

[3] Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006).

[4] *Id.* at 652–53 (Kennedy, J., concurring).

oughly—particularly since the suspect had been imprisoned throughout the entire time the case should have been undergoing preparation.

The obvious reason behind the shoddy preparation of evidence against Mr. Jawad is that it was not gathered in anticipation of any semblance of a "real" trial. With the government setting an extremely low evidentiary bar for continued detention without charge, with the focus on extracting information through coercive interrogations rather than on prosecution, and with the understanding that any trials will forego fundamental due process protections, there is little incentive for investigators to engage in the type of careful, systematic gathering of evidence that one would find in a typical civilian trial. In the case of Mr. Jawad, these incentives proved manifestly perverse; they allowed for the prolonged detention and abusive treatment of a juvenile who is very likely innocent of any wrongdoing.

It took enormous amounts of time and effort for me to gather the evidence in Jawad's case, which was scattered in various locations throughout the military bureaucracy. Certain crucial documents had been tossed into a locker at Guantanamo and promptly forgotten. Crucially, none of it had been disclosed to the defense. Despite my best efforts, I was never able to locate some key pieces of evidence, such as the videotape of Jawad's initial confession to U.S. forces—which, incidentally, the commission has ruled was obtained through torture.

Another persistent problem with the military commissions is the excessive restrictions on the disclosure of classified or sensitive evidence to defense counsel. Over-classification and protective orders can make it almost impossible for defense attorneys to formulate a viable case. Defense counsel are no less professional than their counterparts in the prosecution, and there is no reason that the military commission rules should deny them access to this information, once granted the appropriate security clearances. They can and should be trusted not to share such information with their clients as the law requires. As it stands, names of potential defense witnesses are routinely redacted from discovery materials, and protective orders hinder the defense's ability to ascertain such witness's identities through its own investigation.

Over-broad protective orders impair information sharing among defense team members and create unnecessary delay, and over-classification makes it impossible to pursue any investigation based on information from the client, including such simple pieces of information as the names and addresses of family members. Beyond such legally-mandated restrictions, institutional shortcomings also inhibit the discovery process. The chaotic state of the evidence and the absence of any systematic, reliable method of preserving and cataloguing evidence make it nigh impossible for prosecutors to comply with the discovery obligations mandated by their rules of professional conduct, even in a case as seemingly uncomplicated as Mr. Jawad's.

INSTITUTIONAL DEFICIENCIES

The military commissions suffer from numerous institutional deficiencies, which undermine the pursuit of justice and have created a kind of "circus" atmosphere at GTMO. First, the military judges who preside over the military commissions will not always possess the requisite experience in handling high-profile cases. They have spent much of their professional lives processing the various low-level and low-ranking servicemembers, in proceedings where defendants typically treat judges with an enormous degree of deference. These judges have scant experience in actually controlling courtrooms or the detainees. The detainees, on the other hand, are not in the slightest intimidated by the military judges. They view them as lackeys of an illegitimate system.

Still, the judges at Guantanamo have displayed a remarkable independence that has clearly confounded the architects of the commissions system, who evidently believed that both the military judges and the commissions panel members would serve as little more than an "amen chorus," witlessly endorsing every pronouncement, however thin, false, or ill-conceived, by the prosecution.[5]

[5] These judges—Col. (Ret.) Ralph Kohlmann, despite his earlier published misgivings about the tribunals (*see* Kohlmann, R., *Forum Shoppers Beware: the Mismatch between the Military Tribunal Option and United States Security Strategy*, concluding, "even a good military tribunal is a bad idea." [Paper written for the Naval War College, 1 March 2002, available at http://www.uniset.ca/misc/kohlmann.html.]), COL (Ret.) Peter Brownback, CAPT (Ret.) Keith Allred, and COL Stephen Henley, the Chief of the Trial Judiciary at Guantanamo and for the US Army—distinguished themselves by their very independence, rejecting prosecution arguments regarding jurisdiction (rulings overturned by the politically-constituted Court of Military Commission Review, in a decision, *United States v. Khadr*, that even the proponents of the commissions recognize would not survive scrutiny in a regularly-constituted court and have hence sought to amend the MCA of 2006 to address this inevitable outcome; in COL Henley's case,

The habeas rulings alone show the unspeakable travesty—the shame—of holding so many of these innocent prisoners for so long, without charge, without access to lawyers, or even without access to the very "evidence" sought to justify their prolonged imprisonment.

A second, critical institutional deficiency is the inadequate provision of resources to the defense. I was pleased to see that the Senate Armed Services Committee report references the recent Memorandum for the Attorney General and General Counsel of the Department of Defense from the Office of the Chief of Defense Counsel at the Commissions, which calls for the provision of more resources to defense counsel, ending the practice of giving the prosecution input on defense resources, and ensuring that at least one "learned" defense counsel is assigned to all capital cases. Such reforms represent the bare minimum required for these trials to meet ABA standards on this issue, and should be adopted. But these changes cannot be simply recommended, they must be mandatory.

Before concluding, I would request that the members of this subcommittee engage in the kind of role reversal that senior military officers routinely consider. Imagine that U.S. soldiers captured on the battlefield were, today, being subjected to the type of trial proceedings that we plan set up through these military commissions. Imagine that our service members had been tortured or abused, and that the commissions hearing their cases allowed into evidence statements obtained through coercion. Imagine that defense counsel were thoroughly under resourced and prohibited even from viewing information critical to their cases, and that exculpatory evidence was hidden. Imagine that the evidence against our soldiers was so weak, and had been gathered and compiled in such a shoddy and disorganized manner, that the commissions allowed hearsay into evidence—to be analyzed not by professional judges but by lay jurors—just to "make sure" that any and all prosecutions were successful. How would our government react to such trials? I imagine the uproar would be close to deafening.

I am convinced that even the well-intentioned changes made to the military commissions by the Senate Armed Services Committee legislation will create a real risk that, in the future, American men and women in uniform will be subject to a farcical trial regime of this nature. By declining to uphold the fair trial rights of the terrorism suspects in our custody, we place our own soldiers at risk.

The answer to this conundrum is simple and time honored. We do not need military commissions. They are broken and beyond repair. We do not need indefinite detention, and we do not need a new system of "national security courts." Instead, we should try those whose guilt we can prove while observing "the judicial guarantees which are recognized as indispensable by civilized peoples"—in other words, using those long-standing rules of due process required by Article III courts and military courts-martial—and resettle or repatriate those whom we cannot. That is the only solution that is consistent with American values and American law.

Mr. NADLER. Ms. Pearlstein is recognized for 5 minutes.

TESTIMONY OF DEBORAH N. PEARLSTEIN, ASSOCIATE RESEARCH SCHOLAR, WOODROW WILSON SCHOOL OF PUBLIC AND INTERNATIONAL AFFAIRS, PRINCETON, NJ

Ms. PEARLSTEIN. Thank you. Subcommittee Chairman Nadler, Ranking Member Sensenbrenner, Members of the Subcommittee, thank you for the opportunity to testify on this important subject.

I, like countless others in the civilian and military legal and security communities, have argued that the military commission as created by the Bush administration and codified by Congress in the Military Commissions Act of 2006 were a failure both as a matter of policy and law. I strongly hold that view today. Yet while I con-

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he ignored what must have been the condemnation of his colleagues to hold, as described above, that Jawad's confessions had been obtained through torture. Judge Allred also adopted the only plausible definition of what constitutes a "war crime," incorporated this traditional definition into his instructions to the panel in *United States v. Hamdan*, with the result that the panel acquitted Hamdan of the principal charge against him, conspiracy to commit violations of the law of war. The panel also delivered the prosecution the rebuke of a lifetime when, after the prosecutor asked for a thirty-year sentence, they adjudged an effective sentence of approximately five months.

tinue to doubt that the use of a new military commission system going forward is a wise or necessary course of policy, and I explain why I believe that to be the case in greater detail in my written statement, I've long said and continue to believe that it is possible to conduct military commission proceedings for certain crimes in a way that comports with U.S. and international law.

Ensuring that any commission to be employed meets those standards is now a key responsibility of Congress. In this brief statement I would like to highlight some of the key changes that will be essential for Congress to pursue if it is to bring the Military Commissions Act of 2006 in line with prevailing U.S. and international law.

Based on a preliminary review, I believe the Levin bill addresses some, but not all of these concerns. As my written testimony details, the MCA, the Military Commissions Act, leaves in place a structure and set of procedural rules that in key respects fall short of existing U.S. and international law. President Obama's announcement signaling his intention to rely on commissions going forward recognized these deficits in part, and the changes the President has ordered, most importantly the absolute prohibition as evidence of statements that have been obtained from detainees using torture or cruel, inhuman and degrading interrogation methods, are a positive first step.

The bill now circulating in the Senate authored by Senator Levin also includes some important positive modifications, as I understand the draft language. In particular it wisely removes language in the MCA that prohibited defendants from so much as mentioning the Geneva Conventions in commission proceedings. Whether or not the Geneva Conventions provide a plaintiff in a civil case a cause of action to get into Federal court, the Geneva Conventions are, at a minimum, available as a rule of decision in cases before the Federal courts. Such availability is mandated by the Constitution, declaring all treaties made to be part of the supreme law of the land and consistent with the Supreme Court's application of the Geneva Conventions in *Hamdan v. Rumsfeld.*

The courts must and do have the authority to apply all applicable law in deciding cases or controversies properly before them. Nonetheless these changes do not suffice to bring the contemplated commissions fully in line with U.S. and international law. I would highlight in this brief moment two particular concerns here, although there are others.

First, while the Levin bill appropriately excludes statements made under torture, it still fails to ensure that commission rules adequately reflect the degree of voluntariness required by the U.S. Constitution for evidence to be admissible in criminal court. U.S. criminal trials in civilian court as well as in courts-martial have long prohibited the admission of involuntary statements at trial. Such statements have been recognized as inherently unreliable, and use at trial has been understood to create perverse incentives for detaining authorities to apply coercion beyond that authorized by law. Involuntary statements are constitutionally inadmissible, and they have no place in trials under color of U.S. law.

Second, although the Levin bill is not entirely clear in this respect, provisions authorizing the review of commission decisions by

civilian courts must not circumscribe the jurisdiction of the Federal review courts to exclude either questions of fact or issues of law. Particularly given the article I status of the commissions, it is essential that article III judicial review, review by the independent Federal courts, be as thorough as possible. The review should extend to questions of fact, subject to respect by the court to the extent commission findings have the power to persuade. And the scope of legal review should include the Constitution, laws and treaties of the United States.

While correction of these and other provisions I outline in my written statement would go some distance toward correcting the remaining legal failings of the commission system, they do not of themselves constitute an affirmative case for why prosecutions in the military commissions instead of in the article III courts is a wise course of action. On the contrary, I believe that case remains to be made.

Neither do such changes in law suffice to justify renewed faith in a system that has, as we've just heard, proved to date to be far worse in practice than one might have imagined based only on its inadequate rules on paper. As the President himself noted in his recent speech at the National Archives, instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al-Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained.

The military commissions have understandably been tarred with the same brush. The burden is now on the United States to demonstrate that any commission proceedings going forward can and should be fairly viewed as more legitimate than those past. For these and other reasons set forth in my written testimony, I continue to believe that trial and article III courts must remain the rule for prosecuting violations to criminal law. The use of any new commission system should remain exceptional and strictly limited in scope and duration to the narrow purpose that it is intended to serve.

As ever, I'm grateful for the Subcommittee's efforts and for the opportunity to share my views on these issues.

Mr. NADLER. I thank the lady.

[The prepared statement of Ms. Pearlstein follows:]

Statement of
Deborah N. Pearlstein

Prepared Testimony to the
Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
United States House of Representatives
July 8, 2009

Legal Issues Surrounding the Military Commissions System

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Legal Issues Surrounding the Military Commissions System

Introduction

Chairman Conyers, Subcommittee Chairman Nadler, Ranking Member Sensenbrenner, members of the Subcommittee, thank you for giving me the opportunity to testify on this important subject. President Obama's announcement of May 15, 2009, that he recognized military commissions, if properly constituted, as an appropriate venue for trying detainees for violations of the laws of war took many in the national security law community by surprise.[1] Shortly after taking office, the President had instructed prosecutors to seek a suspension of Bush Administration military commission proceedings, a move that was widely thought to signal the end of the use of such tribunals. I, and many others in the civilian and military legal and security communities, have argued that the military commissions, as created by the Bush Administration and codified by Congress in the Military Commissions Act of 2006, were a failure, both as a matter of policy and law. I strongly hold that view today. Yet while I continue to doubt that the use of a new military commission system going forward is a wise or necessary course of policy, I also believe that it is possible to conduct military commission proceedings for certain crimes in a way that comports with U.S. and international law.

[1] The White House, Statement of President Barack Obama on Military Commissions, May 15, 2009, available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/.

Ensuring that any commission to be employed meets those standards is now a key responsibility of Congress.

In this testimony, I first put current efforts to employ military commissions in context, highlighting why it is wrong to accept recent suggestions that the Obama Administration's policy in this area is simply a continuation of policies advanced by George W. Bush. A second section explains why I believe military commissions can be used lawfully, and sets forth specific recommendations for amendments to pursue and consider to the Military Commissions Act of 2006 (MCA). The third section outlines why I believe policy concerns continue to attend the pursuit of military commissions going forward. While the Administration appears to have settled already on its policy to the contrary, it is worth recognizing the policy challenges any commission system will face in order to best ensure that any system going forward is attuned to minimizing those faults.

Understanding the Context

Recent suggestions that the Obama Administration's invocation of military commissions should be understood as a continuation of Bush policies are badly mistaken.[2] They both mischaracterize what Bush commission policy was, and they assume the contours of any Obama commission system going forward are already settled. The first error rewrites history. The second assumes the answers to the questions before Congress today. This section briefly reviews some of the key reasons why the Bush commissions announced in 2001 were so profoundly troubling. Its goal is to make clear

[2] *See, e.g.*, Jack Goldsmith, *The Cheney Fallacy: Why Barack Obama is Waging a More Effective War Against Terrorism than George W. Bush*, THE NEW REPUBLIC, May 18, 2009, available at http://www.tnr.com/politics/story.html?id=1c733cac-c273-48c5-9140-80443cd1f5c2&p=4; Benjamin Wittes and Jack Goldsmith, *Will Obama Follow Bush or FDR?*, WASH. POST, June 29, 2009, available at http://www.washingtonpost.com/wp-dyn/content/article/2009/06/28/AR2009062802288.html.

that the military commission system as it stands today is in no sense a product of Bush policy, but instead the result of a substantial reformation brought about by eight years of sustained bipartisan criticism, vigorous outside advocacy, courageous internal military opposition, historic litigation, massive legislation, and ultimately, democratic election. What the commissions are, and what they may yet become, will not be because of Bush Administration policy, but despite it.

The Military Order President Bush issued in November 2001 authorized the creation of a system of military tribunals to try a sweeping range of individuals, including anyone who, for example, has "as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy."[3] The decision to create the commissions was evidently reached without the input of key members of the Departments of Defense and Justice,[4] and was properly greeted with widespread, bipartisan condemnation.[5] While the criticisms were many and varied, virtually all of the major domestic human rights organizations agreed: it was *possible* to conduct lawful military trials for violations of the law of war, but the Bush Administration regime did not meet even the most basic tests of the rule of law.[6] Among the Bush system's key

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[3] President George W. Bush, Military Order Regarding Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, November 13, 2001, available at http://news.findlaw.com/wsj/docs/terrorism/bushtribunalord111301.html.

[4] *See, e.g.*, Adam Liptak, *U.S. Barred Legal Review of Detentions, Lawyer Says*, N.Y. TIMES, May 19, 2004, available at http://www.nytimes.com/2004/05/19/international/middleeast/19LAWY.html.

[5] *See, e.g.*, Robert A. Levy, *Indefensible – The Case Against Military Tribunals*, WALL ST. J., Nov. 25, 2002; *see also* William Safire, *Voices of Negativism*, N.Y. TIMES, Dec. 6, 2001. The criticism in some respects grew as the Pentagon began announcing some of the details of commission rules. *See, e.g.*, National Association of Criminal Defense Lawyers, Ethics Advisory Committee, Opinion 03-04, approved by the NACDL Board of Directors August 2, 2003, available at http://www.nacdl.org/public.nsf/2cdd02b415ca3a64852566d6000daa79/ethicsopinions/$FILE/Ethics_Op_03-04.pdf (concluding that it would be "unethical for a criminal defense lawyer to represent a person accused before these military commissions because the conditions imposed upon defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation").

[6] *See, e.g.*, Laura W. Murphy and Timothy Edgar, Letter to Members of Congress Regarding Military Tribunals, Nov. 29, 2001, available at http://www.aclu.org/natsec/emergpowers/14374leg20011129.html

failings: (1) the President simply did not possess unilateral authority under the Constitution to create war crimes tribunals without proper authorization from Congress (not to mention without *any* review by the independent courts); (2) the system appeared to lack any significant set of procedural protections for, or indeed any recognition at all of, the rights of those tried before it (including the right to be tried based on evidence not obtained from torture or cruel treatment); and (3) the system contemplated asserting jurisdiction over a range of "offenses" that went far beyond those specific "war crimes" defined in U.S. and international law – the only crimes that may be lawfully tried before a military tribunal of this nature.[7]

It was in response to this kind of overwhelming condemnation – condemnation that would come to be shared by the courts – that the Administration soon began revising commission rules. Indeed, from the time the commissions were announced in 2001 until the Supreme Court's heard oral arguments in the 2006 case invalidating the commissions, *Hamdan v. Rumsfeld*, commission rules were revised or amended no fewer than 15 times.[8] While the revisions were intended to address the commission's many on-paper deficits, the fact that even the most basic commission rules remained a moving target

("While the ACLU does not believe that the use of military tribunals is unconstitutional in all circumstances, the ACLU strongly opposes the Military Order…"); Human Rights First, Military Commission Trial Observation, Jan. 9, 2006, available at http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-010906.asp ("Military commissions are not necessarily in and of themselves a problem."); Human Rights Watch, Letter to Secretary Rumsfeld on Military Commissions, Dec. 13, 2001, available at http://www.hrw.org/en/news/2001/12/13/letter-secretary-rumsfeld-military-commissions (urging that military commission rules be adopted to ensure they comply with U.S. and international law guaranteeing the right to a fair trial).

[7] For a detailed account of these arguments, see generally Brief for Petitioner Salim Hamdan, *Hamdan v. Rumsfeld, et al.*, No. 05-184 (U.S. S. Ct. Jan. 6, 2006), available at http://www.hamdanvrumsfeld.com/petbriefhamdanfinal.pdf.

[8] For a chronology of military commission development between 2001-2006, see HUMAN RIGHTS FIRST, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE RULES FOR MILITARY COMMISSIONS (2006), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf.

throughout this period undermined any claim they might have had to being a stable, or any sense regular, system of law.

But the problems on paper explained only part of the Bush commission failings. Beginning with the first commission proceedings in 2004, it became clear that the commissions in practice were not an impartial system of justice. These failings were evident in the reports of the many human rights monitors who sat, as I did, in commission proceedings in the early years. Whether from the lengthy fight with the Defense Department to open the trials to any kind of public view, or from the desks and printers and paralegals that prosecutors had (and defense attorneys did not), from the quality of the translators available (who may or may not have known enough of the relevant language to make proceedings comprehensible to the defendant), or from some of the initial selected commissioners (including one officer whose responsibilities in Afghanistan included sorting and sending detainees to Guantanamo in the first place) – it was clear that the commission system was far removed from the ideal of American justice any who have trained at our law schools could recognize.[9] Such failings also became more dramatically evident in the statements of the multiple military prosecutors who resigned from the early commission system at substantial cost to their careers – primarily over concerns that potentially exculpatory evidence was being withheld from the defense.[10] The cumulative result of such practice was to create the appearance and reality of a system skewed badly in favor of the prosecution.

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[9] Human Rights First, for example, sent a series of monitors to observe military commission proceedings at Guantanamo Bay since their commencement in 2004. I was the first such observer on behalf of Human Rights First, for which I then served as Director of that organization's Law and Security Program. My reports, and those of subsequent Human Rights First monitors, may be found here: http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm.

[10] *See, e.g.*, Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1 (military commission prosecutor complaining of evidence withheld by the C.I.A. and of evidence

In the face of this record, it was thus not surprising that more than three dozen amicus briefs were filed in the Supreme Court embracing Mr. Hamdan's challenge to the legality of the commissions – with signatories variously including a distinguished group of retired American admirals and generals, nearly two dozen former U.S. diplomats, more than 400 members of the European Union and British parliaments, and hundreds of leading American scholars in constitutional, military, and international law.[11] And the Supreme Court ultimately agreed in substantial part with each of the major categories of criticism identified above: (1) the commissions had not been properly authorized; (2) the commission structure and procedures violated U.S. and international law in multiple respects; and (3) the commission likely exceeded its jurisdiction in charging Mr. Hamdan with "conspiracy," an offense not plainly recognized by the common law of war.[12] The Bush Administration commissions had been categorically repudiated by the nation's highest court, and those proceedings that had begun under them came to an end.

The MCA – the commission structure currently on the books – was Congress' attempt to start over, to create a commission system that complied with U.S. and international law. While the MCA itself has multiple deficits, as I will address below, there can be no question that it remedied the first major legal deficit of the Bush Administration commissions. Military commissions have now been authorized by Congress under chapter 47A of title 10 of the U.S. Code. Moreover, the MCA recognizes, albeit to an inappropriately limited extent, the authority of the civilian federal

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misrepresented by other members of prosecution team); Jess Bravin, *Two Prosecutors at Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1.

[11] All briefs filed in the *Hamdan* case are available online at http://www.hamdanvrumsfeld.com/briefs.

[12] Hamdan v. Rumsfeld, 548 U.S. 557 (2006). Four justices agreed that the charge of conspiracy in this setting lacked sufficient authorization; Justice Kennedy believed it was not necessary for the Court to reach the question of the conspiracy charge in invalidating the commissions. *Hamdan*, 548 U.S., at 655 (Kennedy, J., concurring).

courts to review judgments of the commissions.[13] Whatever form the commissions may take going forward, they can no longer be assailed on one of the grounds that made them so profoundly troubling in their initial incarnation – that they enabled the President to act as judge, jury and executioner. Such differences alone are enough to categorically distinguish what comes next from anything the Bush Administration contemplated before the Supreme Court compelled it to change course in 2006.

Whether a new commission system will address the remaining deficits – the protection of basic individual rights, jurisdiction limited to crimes that violate the existing law of war, and attention to the practical demands of ensuring basic trial fairness – is yet to be determined. Under any circumstances, Congress, the President, and the courts will bear shared responsibility for the legality of any commission proceedings to come.

The Future of Military Commissions: Laws and Legal Structure

As noted above, while the MCA may in principle remedy the failure of lawful authority that fatally undermined the Bush Administration commissions, it leaves in place a structure and set of procedural rules that in key respects falls short of existing U.S. and international law. President Obama's announcement signaling his intention to rely on commissions going forward recognized these deficits in part, and the changes the President has ordered – most important, the absolute prohibition as evidence of statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods – are a positive first step.[14]

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[13] *See* MCA, 10 U.S.C. §950g (providing for review by the U.S. Court of Appeals for the District of Columbia Circuit and the U.S. Supreme Court).
[14] The White House, Statement of President Barack Obama on Military Commissions, May 15, 2009, available at http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-

But these changes do not suffice to bring the contemplated commissions fully in line with U.S. and international law protecting individual trial rights; indeed, in some places, the MCA expressly rejects the notion that the commissions must comply with these standards. Moreover, the changes announced to date leave in place two charging offenses – commission crimes of conspiracy and "material support" – that are not substantive offenses under the law of war. While such offenses may be properly tried in regular criminal court, they have no place in a lawfully constituted war crimes tribunal. Although the following should not be considered an exhaustive list, this section highlights some of the most important changes to the MCA that Congress will need to make or consider if commissions are to go forward. They are listed in order of their appearance in the MCA.

- Clarify MCA §948d(a) ("A military commission under this chapter shall have jurisdiction to try any offense made punishable *by this chapter or the law of war* when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.") (emphasis added). This provision raises two concerns. First, it could be read as an effort by Congress to criminalize conduct under "this chapter" of the MCA whether or not the conduct was already prohibited by the criminal law at the time the defendant acted. Retroactive application of a new criminal offense, not already a violation of the law of war, would be a violation of the Ex Post Facto Clause of the U.S. Constitution. Second, the language "by this

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Military-Commissions/ ("The Secretary of Defense will notify the Congress of several changes to the rules governing the commissions. The rule changes will ensure that: First, statements that have been obtained from detainees using cruel, inhuman and degrading interrogation methods will no longer be admitted as evidence at trial. Second, the use of hearsay will be limited, so that the burden will no longer be on the party who objects to hearsay to disprove its reliability. Third, the accused will have greater latitude in selecting their counsel. Fourth, basic protections will be provided for those who refuse to testify. And fifth, military commission judges may establish the jurisdiction of their own courts.").

chapter or the law of war" appears to acknowledge that the offenses listed in the MCA are not coextensive with, and reflective of, the law of war. Yet Congress' power under Article I of the Constitution to "define and punish ... Offences against the Law of Nations" does not give Congress the authority unilaterally to declare any crime it sees fit a "war crime" regardless whether that act is actually an offense in the substantive law comprising the "Law of Nations."[15]

- Delete MCA §948(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."). Whether or not the Geneva Conventions provide a plaintiff in a civil case a cause of action to get into federal court, the Geneva Conventions are, at a minimum, available as a rule of decision in cases before the federal courts. Such availability is mandated by the Constitution, declaring "all Treaties made" part of the "supreme Law of the Land," and consistent with the Supreme Court's application of the Geneva Conventions through the Uniform Code of Military Justice in *Hamdan v. Rumsfeld*.[16] Yet this section, as well as the similarly worded MCA §5, would seem intended to deny courts the power to look to whole bodies of law in the cases they decide.[17] As Justice Kennedy's

[15] *See Hamdan*, 548 U.S., at 598-613 (quoting In re Yamashita, 327 U.S. 1, 13 (1946) ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge proffered against him is of a violation of the law of war.")).

[16] In rejecting the President's arguments that the military commissions convened at Guantanamo Bay were properly authorized, the *Hamdan* Court looked in part to a federal statute expressly invoking the law of war (the Uniform Code of Military Justice) as limiting the President's authority to convene military commissions. *Hamdan*, 548 U.S., at 613-35.

[17] These provisions are particularly troubling in this regard when viewed alongside, for example, MCA § 6(a)(2), which purports to forbid courts from relying on foreign or international law in interpreting the federal War Crimes Act, or MCA § 6(a)(3), which affords the President the "authority for the United States to interpret the meaning and application of the Geneva Conventions." For more detailed discussion of why these provisions pose special problems, see Deborah N. Pearlstein, *Saying What the Law Is*, 1 HARV. L. POL'Y REV. (Online) (Nov 6, 2006), http://www.hlpronline.com/2006/07/pearlstein_01.htm; NEW YORK CITY BAR, REPORT CONCERNING THE MILITARY COMMISSIONS ACT OF 2006 RESTRICTING HABEAS CORPUS

concurrence in *Hamdan* emphasized, whatever the procedural mechanisms for enforcing treaty requirements, as far as the federal government is concerned, "requirements they are nonetheless."[18] The courts must, and do, have the authority to apply all applicable law in deciding cases or controversies properly before them.

- Review MCA §948r (excluding statements made by torture) and §949a(b)(2)(D) (providing that no statement shall be deemed inadmissible "on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with" the MCA torture-exclusion provision) to ensure that they adequately reflect the degree of voluntariness required by the U.S. Constitution for evidence to be admissible in criminal court. U.S. criminal trials in civilian court, as well as courts martial, have long prohibited the admission of "involuntary" statements at trial. Such statements have been recognized as inherently unreliable, and allowing them to be used at trial has been understood to create perverse incentives for detaining authorities to apply coercion beyond that authorized by law.[19]
- Revise MCA §950f(b-c) ("(b) In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law. (c) The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the

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JURISDICTION AND INTERFERING WITH JUDICIAL ENFORCEMENT OF THE GENEVA CONVENTIONS (March 2007), at pp. 12-17, available at http://www.nycbar.org/pdf/report/Restoration_Habeas_Corpus.pdf.

[18] *Hamdan*, 548 U.S., at 635 (Kennedy, J., concurring) ("The provision is part of a treaty the United States has ratified and thus accepted as binding law."); *cf.* Sanchez-Llamas v. Oregon, 126 S.Ct. at 2684 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) at 177 (1803) ("If treaties are to be given effect as federal law [under our legal system], determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department,' headed by the 'one supreme Court' established by the Constitution."); Williams v. Taylor, 529 U.S. 362, 378-79 (2000) (opinion of Stevens, J.) ("At the core of [the judicial] power is the federal courts' independent responsibility--independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States--to interpret federal law.").

[19] *See* United States v. Raddatz, 447 U.S. 667 (1980).

consideration of— (1) whether the final decision was consistent with the standards and procedures specified in this chapter; and (2) to the extent applicable, the Constitution and the laws of the United States."). There is no apparent reason for circumscribing the jurisdiction of the federal courts in this manner. Particularly given the Article I status of the commissions, it is essential that Article III judicial review be as thorough as possible. Review should extend to questions of fact, subject to respect by the court to the extent commission findings have the power to persuade. And, consistent with the concerns raised about MCA §§5-6 above, the scope of review should be clarified to include "the Constitution, laws *and treaties* of the United States."

- Revise MCA §950v (listing crimes triable by military commissions) to exclude, at a minimum, the offense of "providing material support for terrorism," and the offense of "conspiracy." I have as yet unearthed no credible authority suggesting that "material support" has ever been understood as a war crime. The offense is not listed as such in the U.S. War Crimes Act, 18 U.S.C. § 2441, in the U.S. Army Law of War Handbook (2005), or in any of the major treaties defining such offenses (including the statutes of the International Criminal Court, or the International Criminal Tribunals for the Former Yugoslavia or Rwanda). Likewise, as at least four justices of the Supreme Court have already recognized, "conspiracy" as charged in the prior commissions "is not a recognized violation of the law of war."[20] If the principal justification for pursuing commission trials instead of prosecution in civilian court is that the subject of the commissions are

[20] *Hamdan*, 548 U.S., at 598-613 (noting that neither of the Geneva Conventions nor the Hague Conventions identifies conspiracy as a war crime). Again, Justice Kennedy believed it was not necessary for the Court to yet reach that question. *Hamdan*, 548 U.S., at 655 (Kennedy, J., concurring).

specialized, and specific, war crimes, then it is critical the charging offenses not infringe on what is otherwise an ordinary part of domestic criminal law.

The Future of Military Commissions: Policy

While correction of these provisions would go a long way toward addressing the remaining legal failings of the commission system, they do not of themselves constitute an affirmative case for why prosecutions in military commissions instead of in the Article III courts is a wise course of action. On the contrary, that case remains to be made. As a distinguished group of retired admirals and generals recently put the question: "If significant procedural differences exist between new military commissions and the civilian system, public attention at any trial will inevitably focus on those differences. The world will continue to be preoccupied not with the crimes of the terrorists but with the deficiencies of our system. If, on the other hand, the procedural differences are minor, then it is hard to see the benefit of creating again a new system of justice that will be subject to challenge and delay."[21]

Neither do such changes in law suffice to justify renewed faith in a system that, as indicated above, proved in practice to be far worse than one might have imagined based only on its inadequate rules on paper. The Obama Administration may succeed in securing adequate resources for both prosecution and defense counsel, in demanding accurate translation services for the court and all trial participants, and in sharing with defense counsel all the potentially exculpatory information apparently withheld in the

[21] Letter of Vice Admiral Lee Gunn, et al. to President Barack Obama, May 15, 2009, available at http://www.humanrightsfirst.org/pdf/090515-ctn-opp-mil-camp.pdf.

past Administration.[22] But it will be exceedingly difficult to overcome the reality and the recent memory of where these commissions have been. This President is obviously acutely attuned to the importance of the perceptions of the international community – a community not only of international allies and sources of intelligence, but also of those people the President believed would be further enraged by, for example, the release of new photos from the torture at Abu Ghraib. As the President himself noted in his recent speech at the National Archives: "Instead of serving as a tool to counter terrorism, Guantanamo became a symbol that helped al Qaeda recruit terrorists to its cause. Indeed, the existence of Guantanamo likely created more terrorists around the world than it ever detained."[23] The military commissions have been, understandably, tarred with the same brush. And they will inevitably face far more challenges in the courts going forward than would prosecutions pursued in civilian courts. Whatever tactical gain the Administration may seek in pursuing these trials, it must also recognize that the use of commissions at this stage will inevitably come with a strategic cost of conducting trials under a system many will continue to see as lacking in the legitimacy of standard Article III courts.

In addition to correcting the commission rules on paper, then, I believe it is important for the Administration and Congress to take steps that will mitigate not only the reality but also the perception of unfairness that now understandably follows the idea of military commissions. Two steps in particular seem essential in this regard. First, all military commission trials conducted to resolve cases of detainees currently held at Guantanamo Bay should be held in the continental United States. Problems of access,

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[22] *See supra*, note 10.
[23] The White House, Remarks by the President on National Security, May 21, 2009, available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ [hereinafter National Archives Speech].

resources, cost and convenience that have plagued the Guantanamo military commissions simply need not accompany the adoption of any new system going forward. The profoundly destructive symbolism of Guantanamo, coupled with the practical hurdles posed by the need to transport defense counsel and court personnel alike to Cuba for every pretrial hearing, should make Guantanamo the last, not first, place for pursuing military commission trials under the Obama Administration. Seven years after the first detainees began arriving at Guantanamo, there is no longer any argument that these commissions are intended to be courts of exigency, with rules specially tailored to the highly specialized demands of the battlefield. The commissions now under contemplation are full fledged Article I courts, and proceedings therein should be treated as they would in any regular Article I system.

Second, the authority of the military commission system should be strictly limited in duration. As the President has recognized, the closure of Guantanamo involves a set of problems that is "difficult and complex," and that is the result of a "mess" not of the current Administration's making.[24] Trials have been grossly delayed; there are credible allegations that evidence has been mishandled; and some detainees have suffered such torture and mistreatment that their statements – whether or not true – can never be admissible in court.[25] It may be understandable in these extraordinary circumstances for the President and Congress to employ all lawful options available to resolve this highly particular set of dilemmas. It will be much less understandable going forward.

The substantive criminal law today sweeps much more broadly than it did when detainees first began arriving at Guantanamo Bay, with more offenses now extending to

[24] *Id.*
[25] See, e.g., Motion for Preservation of Torture Evidence, *Khan v. Gates*, No. 07-1324 (D.C. Cir., Nov. 30, 2007), available at http://ccrjustice.org/files/Khan_Redacted_Torture_Motion_12_07.pdf.

cover conduct outside the territory of the United States.[26] The law unequivocally prohibits the torture, or cruel, inhuman or degrading treatment of any detainee in the custody of any U.S. agency; we need not confront such pervasive problems of tainted evidence again. Once it becomes evident that criminal prosecution may be appropriate for a detainee in U.S. military, it is entirely possible to ensure that intelligence and law enforcement professionals work together to achieve both the goal of intelligence gathering and evidence collection.[27] And as the criminal courts engage a growing number of terrorism cases, their expertise in both managing classified evidence, and in meeting the security needs of terrorism trials, only increases.[28] This Administration has undertaken to make out a case that military commissions are a necessary and lawful tool to achieve the resolution of the cases now pending at Guantanamo Bay.[29] It has not made that case with respect to the security interests of the United States into the indefinite future. In cases where the law has been violated, criminal prosecution in Article III courts must remain the rule. The exceptional MCA should be limited accordingly.

Conclusion

In the end – as it was from the beginning – it is still possible to create a lawful set of rules for the operation of military commission trials. It remains a challenge for all three branches to see it done. As ever, I am grateful for the Subcommittee's efforts, and for the opportunity to share my views on these issues of such vital national importance.

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[26] *See, e.g.*, 18 U.S.C. §2339A (material support in furtherance of a terrorist act); 18 U.S.C. §2339D (receiving military training from a designated foreign terrorist organization).
[27] HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (May 2008), available at 101-05.
[28] *Id.*, at 121.
[29] *See* National Archives Speech, *supra*, note 23 ("We are currently in the process of reviewing each of the detainee cases at Guantanamo to determine the appropriate policy for dealing with them.... [G]oing forward, *these cases* will fall into five distinct categories.") (emphasis added).

Mr. NADLER. I now recognize Mr. Joscelyn for 5 minutes.

TESTIMONY OF THOMAS JOSCELYN, SENIOR FELLOW, FOUNDATION FOR DEFENSE OF DEMOCRACIES, WASHINGTON, DC

Mr. JOSCELYN. Thank you. I would like to thank the Members of the Subcommittee for inviting me here today as well.

The role of military commissions is an important and timely topic for discussion, especially as President Obama's administration decides how it will handle future detainees' cases. So I am grateful for the opportunity to present my views.

The military commission system is just one of the options the Obama administration is currently considering for trying terrorist suspects. In my opinion, it will take some work to make the commissions function properly. As has been documented here by the witnesses and several members of the panel, only a few commissions have completed their work from beginning to end, and I would say those commissions have mixed results as well.

For example, Salim Hamdan, who swore bayat, the ultimate oath of loyalty, to Osama bin Laden, and who served the terror master as a bodyguard and driver, received only a minimal sentence, 5½ years, for his devotion to al-Qaeda. Hamdan was even granted time served. Common criminals in the U.S. frequently receive longer and less lenient sentences. Hamdan was subsequently transferred to Yemen, a country that is home to one of the strongest al-Qaeda affiliates in the world and has a poor track record when it comes to keeping tabs on known al-Qaeda terrorists.

So the commissions have been far from perfect. This is not to suggest that there is a perfect system for trying terror suspects. There are flaws with each of the available options, including trials in Federal courts. The Federal courts have been uneven in their rulings. For example, the court's decision in *Parhat v. Gates* omitted key facts. Parhat is an ethic Uyghur from Western China. He was recently released to Bermuda. Parhat and his fellow Uyghurs held at Gitmo challenged their detention, and a court found that there was no basis for holding them. However, the court's decision was fatally flawed. The court ignored the fact that Parhat, as well as at least seven of his fellow Uyghurs, openly admitted that they were trained by a known al-Qaeda terrorist named Abdul Haq in a camp at Tora Bora, Afghanistan. The Obama administration's Treasury Department has subsequently designated Haq a senior al-Qaeda terrorist. Abdul Haq was not even mentioned in the Parhat decision. So the courts are far from perfect, too.

I could go on with more examples of flawed court decisions. I'm sure we can document more flaws in the commission system as well. But all of this is of secondary importance, in my view. The two most important reasons we detain terrorists are to prevent them from committing additional terrorist acts, and to gain additional intelligence about the terror network which thrives in the shadows. However the U.S. Government decides to proceed with the detainees' cases, it must make sure to protect the latter function in particular.

Intelligence is our primary weapon in this long war, and without it we could quickly find ourselves blind to our enemies' designs once again. All one has to do to understand the crucial value of this intelligence is look at the detainee population at Guantanamo. Admittedly it's somewhat of a mixed bag and always has been. Be-

cause the detainees at Guantanamo are most likely the candidates for trial by a military commission, I would like to take just a few minutes to summarize the detainee population.

The most lethal terrorists held at Gitmo are the 16 so-called, quote/unquote, high-value detainees. These terrorists are uniquely lethal and have been responsible for thousands of deaths around the world. Had they been left to their own devices, they would have surely murdered thousands more. To name just two of them, the ranks include Khalid Sheikh Mohammed, the chief planner of the September 11 attacks, otherwise known as KSM, and Ramzi Binalshibh, al-Qaeda's point man for the September 11 operation.

In my view, there is no material dispute over the high-value detainees' importance. From an intelligence perspective they not only had detailed knowledge about al-Qaeda's past attacks, but also extensive knowledge of al-Qaeda's ongoing operations at the time of their capture. We know that in the years following September 11, 2001, al-Qaeda plotted attacks across the planet, stretching from the continental U.S. to Southeast Asia. Numerous plots were disrupted because the so-called high-value terrorists were captured and interrogated.

Much of the history behind their interrogations remains to be told, and there is, of course, an ongoing controversy over the manner in which they were questioned, but we know for certain that the high-value detainees gave up vital details on al-Qaeda's global operations, including during interrogations and sessions in which they were subjected to the harshest treatment. The reason we know this is because even the new Director of National Intelligence, Dennis Blair, has written as much.

To give you a sense of urgency surrounding these interrogations, consider the circumstances that existed at the time of KSM's capture. KSM was captured in Pakistan on March 1, 2003. At the time of his capture, two terrorists working for al-Qaeda and working for KSM were plotting in the New York area to plot attacks.

This is just one example of the grave matters facing U.S. intelligence professionals at the time of KSM's capture. Similar examples could easily be provided for each of the other high-value detainees held at Guantanamo as well.

And it is not just the high-value detainees that crucial intelligence undermines when they were initially detained. Detainees at Gitmo include safe-house operators, bombmakers, terrorist trainers and trainees, al-Qaeda recruiters, committed recruits who desire martyrdom, Osama bin Laden's bodyguards, experienced fighters, and numerous other operatives who served the terror network in a variety of other functions. These are just some of the types of other detainees held at Guantanamo beyond the 16 high-value detainees. There are good reasons to suspect that all of them knew important details about al-Qaeda's operations at the time of their capture.

We now have the luxury many years later to debate how terrorists should be tried for their crimes. I think there are many important debates and arguments to be put forth in that regard, but we must remember that they did not stop on September 11. America has avoided being struck again, but this does not mean that they have stopped trying, and their attacks continue around the globe.

Whatever course we choose from here on out, intelligence must remain of paramount importance. Thank you.

Mr. NADLER. I thank the gentleman.

[The prepared statement of Mr. Joscelyn follows:]

PREPARED STATEMENT OF THOMAS JOSCELYN

Constitution Subcommittee Oversight Hearing on

"Legal Issues Surrounding the Military Commissions System"

July 8, 10:00 a.m. in Room 2141 Rayburn

Written Testimony of

Thomas Joscelyn

Senior Fellow, Foundation for Defense of Democracies

I would like to thank the members of the subcommittee for inviting me here today. The role of military commissions is an important and timely topic for discussion, especially as President Obama's administration decides how it will handle existing and future detainees' cases. So, I am grateful for the opportunity to present my views.

The military commission system is just one of the options the Obama administration is currently considering for trying terrorist suspects. In my opinion, it will take some work to make the commissions function properly.

Although the Military Commissions Act was passed in 2006, only a few commissions have completed their work. And those commissions have had mixed results. For example, Salim Hamdan, who swore bayat – the ultimate oath of loyalty – to Osama bin Laden and who served the terror master as a bodyguard and driver, received only a minimal sentence (five and one half years) for his devotion to al Qaeda. Hamdan was even granted time served. Common criminals in the U.S. frequently receive longer and less lenient sentences. Hamdan was subsequently transferred to Yemen, a country that is home to one of the strongest al Qaeda affiliates in the world and that has a poor track record when it comes to keeping tabs on known al Qaeda terrorists.

So, the commissions have been far from perfect. This is not to suggest that there is a perfect system for trying terrorist suspects. There are flaws with each of the available options, including trials in federal courts.

The federal courts have been uneven in their rulings. For example, the court's decision in *Parhat v. Gates* omitted key facts. Parhat is an ethnic Uighur from Western China. He was recently released to Bermuda. Parhat and his fellow Uighurs held at Gitmo challenged their detention, and a court found that there was no basis for holding them. However, the court's decision was fatally flawed. The court ignored the fact that Parhat, as well as at least seven of his fellow Uighurs, openly admitted that they were trained by a known al Qaeda terrorist named Abdul Haq in a camp at Tora Bora, Afghanistan.[1] The Obama administration's Treasury Department has subsequently designated Haq a senior al Qaeda terrorist.

Abdul Haq was not even mentioned in the *Parhat* decision.

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I could go on with more examples of flawed court decisions. I'm sure we can document more flaws in the commission system as well. But all of this is of secondary importance, in my view.

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[1] For excerpts of the Uighurs' testimony, see here: http://www.longwarjournal.org/archives/2009/04/the_uighurs_in_their.php

terror network, which thrives in the shadows. However the U.S. Government decides to proceed with the detainees' cases, it must make sure to protect this latter function, in particular. Intelligence is our primary weapon in this long war and without it we could quickly find ourselves blind to our enemies' designs once again.

All one has to do to understand the crucial value of this intelligence is look at the detainee population at Guantanamo. Because the detainees at Guantanamo are the most likely candidates for trial by military commission, I'd like to take just a few minutes to summarize the detainee population.

The most lethal terrorists held at Gitmo are the sixteen so-called "high value" detainees.[2] These terrorists are uniquely lethal, and have been responsible for thousands of deaths around the world. Had they been left to their own devices, they would have surely murdered thousands more. To name just two of them, their ranks include Khalid Sheikh Mohammed (KSM)), the chief planner of the September 11 attacks, and Ramzi Binalshibh, al Qaeda's point man for the September 11 operation.

In my view, there is no material dispute over the high value detainees' importance. From an intelligence perspective, they not only had detailed knowledge about al Qaeda's past attacks, but also extensive knowledge of al Qaeda's ongoing operations at the time of their capture.

We know that in the years following September 11, 2001, al Qaeda plotted attacks across the planet, stretching from the continental U.S. to Southeast Asia. Numerous plots were disrupted because the so-called "high value" terrorists were captured and interrogated.[3] Much of the history behind their interrogations remains to be told and there is, of course, an ongoing controversy over the manner in which they were questioned. But we know for certain that the "high value" detainees gave up vital details on al Qaeda's global operations, including during interrogation sessions in which they were subjected to the harshest treatment. The new Director of National Intelligence, Dennis Blair, has written as much. [4]

To give you a sense of the urgency surrounding these interrogations, consider the circumstances that existed at the time of KSM's capture. KSM was captured in Pakistan on March 1, 2003. A few weeks later, an al Qaeda-trained terrorist named Iyman Faris was arrested in the U.S. At the time of his arrest, Faris was casing targets such as the Brooklyn Bridge. Faris was acting on the orders of KSM and other senior al Qaeda terrorists.

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[2] A complete list of the "high value" detainees can be found here: http://projects.nytimes.com/guantanamo/detainees/high-value

[3] By and large, these interrogations took place not at Gitmo, but at so-called "black sites" around the world.

[4] On April 16, 2009, Blair wrote: "High value information came from interrogations in which those methods [enhanced interrogation techniques] were used and provided a deeper understanding of the al Qa'ida organization that was attacking this country."

A few weeks after Faris was arrested, yet another al Qaeda terrorist was arrested on American soil. Uzair Paracha was arrested in New York, and even had an office in the Garment District of Manhattan. Just as with Faris, Paracha was acting under orders from senior al Qaeda terrorists, including KSM, at the time of his arrest. Paracha attempted to assist other al Qaeda terrorists in their efforts to sneak into the U.S. Paracha most likely intended to smuggle explosives into the U.S. using his father's import-export company as well.

Both Faris and Paracha were subsequently convicted on terrorism-related charges.

I cannot say what role, if any, the interrogations of KSM played in the actual arrests of Faris and Paracha. But KSM clearly knew the details of their plotting, as well as the details of other al Qaeda terrorists' plans for attacking the American Homeland. Thus, the central goal of detaining KSM was not only to ensure that he himself could not commit any additional acts of terror, but to also learn what he knew about other al Qaeda operatives.

This includes terrorists who were already here - on American soil – months after the September 11 attacks.

These are just a few examples of the grave matters facing U.S. intelligence professionals at the time of KSM's capture. Similar examples could easily be provided for each of the other "high value" detainees held at Guantanamo as well. And it is not just the high value detainees who had crucial intelligence on their minds when they were initially detained.

Over the past two years, I have conducted an exhaustive study of the unclassified documents released from Guantanamo.[5] The detainees at Gitmo include safe house operators, bomb-makers, terrorist trainers and trainees, al Qaeda recruiters, committed recruits who desire martyrdom, Osama bin Laden's bodyguards, experienced fighters, and numerous other operatives who served the terror network in a variety of other functions.

Beyond the so-called "high value" detainees, here is just a short list of some of the detainees held at Guantanamo:

- **Ghassan Abdullah al Sharbi** – a former student of Embry Riddle University (Arizona), the same school where some of the September 11 hijackers learned to fly jumbo jets. Al Sharbi is a long-time al Qaeda terrorist and an admitted bomb-maker.

- **Fouad Mohaud Hasan al Rabia** – a Kuwaiti who was also educated at Embry Riddle (Florida). According to the government's unclassified files, al Rabia has extensive ties to al Qaeda.

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[5] Most of these documents can be found online here: http://projects.nytimes.com/guantanamo

- **Mohamedou Slahi** – a longtime recruiter for Osama bin Laden. Slahi recruited three of the four suicide hijack pilots for the September 11 operation. He also most likely activated the al Qaeda cell based in Montreal that was responsible for the millennium plot against the LAX airport.

- **Mohammed al Qahtani** – an al Qaeda recruit who was scheduled to be the 20th hijacker. Al Qahtani was turned away from the Orlando Airport in the summer of 2001 by a suspicious immigration official and was later identified as a would-be hijacker while at Gitmo.

- **The Rabbani Brothers (2)** - two brothers who were responsible for managing al Qaeda's safehouses in Pakistan. Most of the September 11 hijackers stayed at the Rabbani brothers' safe houses.

- **Abdul al Salem al Hilal** – a former member of the Yemeni Political Security Organization (PSO) who helped al Qaeda members transit the globe. In a wiretapped phone call during the summer of 2000, Italian authorities caught al Hilal discussing a hijacking operation that was most likely the September 11 attacks.

- **Noor Uthman Mohammed** – a long-time trainer at the Khalden camp in Afghanistan. Mohammed was reportedly slated to take part in a terrorist attack against Israel at some point in the future.

- **Muhammad Ahmad Abdallah al Ansi** - An unnamed "senior al Qaeda operative" cited in the U.S. government's unclassified files produced at Gitmo says that he took al Ansi and others to Karachi two months before September 11, 2001 "to teach them English and American behaviors." The same senior al Qaeda operative identified al Ansi "as one of the martyrs who had been readied" for al Qaeda's "Southeast Asia hijacking plan."

- **Saifullah Paracha** – the father of the aforementioned convicted terrorist Uzair Paracha. Along with his son, Saifullah assisted al Qaeda's post-September 11 planning against the American Homeland. It was his export-import business that al Qaeda considered using to bring explosives into the U.S.

- **Several terrorists captured with Ramzi Binalshibh** – During the raid that netted Ramzi Binalshibh in September 2002, several of Binalshibh's compatriots were also captured after a prolonged firefight. At the time of his capture, Binalshibh was plotting an attack against airline flights out of London's Heathrow Airport. Computers captured during that same raid contained extensive information on al Qaeda's plotting. According to the files produced at Gitmo, the computers contained a "flight simulator and flight navigation maps," as well as specific information on "United States military facilities and the layout of the exterior and interior views of various United

> States Navy ships." In addition, the computers contained "several files that discussed kidnapping, hijacking, smuggling money, weapons, ammunition, and lectures and essays on terrorist training, executions, assassinations, [guerrilla] warfare and United States Special Operations Forces."

These are just some of the other detainees held at Guantanamo, beyond the sixteen "high value" detainees. There are good reasons to suspect that all of them knew important details about al Qaeda's operations at the time of their capture.

It is not yet publicly known what the Obama administration plans to do with them, or the many other detainees like them. Whether the detainees are tried by a military commission, a federal court, or not all, we should keep in mind a central fact: The intelligence learned from them has played a crucial role in our fight against terrorism.

On September 11, 2001, America was caught blind. She had little to no intelligence inside our terrorist enemies. Through the capture and detention of terrorist suspects, America has filled in many of the gaps in her understanding of al Qaeda and global terrorist networks.

We now have the luxury, many years later, to debate how terrorists should be tried for their crimes. But we must always remember that they did not stop on September 11. America has avoided being struck again, but this does not mean that they have stopped trying. And their attacks continued around the globe.

Whatever course we choose from here on out, intelligence must remain of paramount importance. However the detainees in American custody are tried, there must be assurances that intelligence professionals continue to have the opportunity to learn what they know. And at least some of that intelligence must be protected in such a manner that we do not disclose to the enemy all that we know about them.

Thank you, again, for taking the time to hear my views. I am happy to answer any and all questions you may have.

ATTACHMENT

the weekly Standard

Clear and Present Danger
The Obama administration is about to discover that the terrorists detained at Guantánamo are there for good reason.
by Thomas Joscelyn
12/01/2008, Volume 014, Issue 11

On Sunday, November 16, CBS News's *60 Minutes* broadcast the first interview with President-elect Barack Obama. The exchange touched on a wide range of topics, from Obama's distaste for college football's computerized selection of a national champion to his plans for changing course in economic and foreign policy. At one point, Obama was asked about the terrorist detention facility at Guantánamo Bay, Cuba. He responded:

> I have said repeatedly that I intend to close Guantánamo, and I will follow through on that. I've said repeatedly that America doesn't torture and I'm going to make sure that we don't torture. Those are part and parcel of an effort to regain America's moral stature in the world.

The president-elect's comments were not surprising. He had often promised on the campaign trail to close Guantánamo. And in the days before the *60 Minutes* broadcast, anonymous officials from his transition team had let the press know that the president-elect would deliver on his pledge. They cannot yet say what the Obama administration will do with the 250 or so detainees still being held, but according to the *Washington Post*, the new team will review the government's files on each detainee and make a determination case by case.

Whatever happens to the detainees, the important point for much of the commentariat is that Guantánamo will be shuttered. For Guantánamo's many critics, the facility long ago became a symbol of all that is wrong with the Bush administration's conduct of the war on terror-from its cowboy-like unilateralism to its alleged widespread torture and abuse of terrorist suspects. That many dangerous enemies lurk in Guantánamo's cells has often been a secondary concern, if a concern at all. Thus, when President-elect Obama spoke of regaining "America's moral stature in the world," he was endorsing the widespread perception of Guantánamo as an American sin that originated in the Bush administration's overreaction to the terrorist attacks of September 11, 2001.

This perception, however, was always skewed. The new administration will soon discover from its review of the Guantánamo files what motivated its predecessor: The scope of the terrorist threat was far greater than anyone knew on September 11, 2001. But for the Bush administration's efforts, many more Americans surely would have perished.

This conclusion is based on a careful review of the thousands of pages of documents released from Guantánamo, as well as other publicly available evidence. In 2006, the Department of Defense began to release the documents to the public via its website. The files had been created during the Combatant Status Review Tribunals (CSRT) and Administrative Review Board (ARB) hearings held

for nearly 600 detainees. This unclassified cache includes both the government's allegations against each detainee and summarized transcripts of the detainees' testimony. Although the documents were released in response to a Freedom of Information Act (FOIA) request filed by the Associated Press, the intelligence contained in the files was largely ignored by the mainstream press for more than two years. Thus, the *New York Times* reported only the day before the recent presidential election that the files contain "sobering intelligence claims against many of the remaining detainees."

Indeed, they do. When the Obama administration reviews the Guantánamo files, here is what it will find.

THE HIGH VALUE DETAINEES

The most dangerous men currently incarcerated at Guantánamo are the 14 "high value" detainees. The Bush administration gave them this designation because they are uniquely lethal, having planned and participated in the most devastating terrorist attacks in history. Their collective dossier includes, among other attacks, 9/11, the American embassy bombings (August 7, 1998), the USS *Cole* bombing (October 12, 2000), and the Bali bombings (October 12, 2002). They are responsible for murdering thousands of civilians around the globe, from the eastern United States to Southeast Asia. Had they not been captured, they surely would have murdered thousands more.

The 14 were originally held not at Guantánamo, but at even more controversial black sites. And the "enhanced interrogation techniques" that have sparked international outrage were principally designed for them. One may doubt the necessity and morality of these techniques, including waterboarding, while still recognizing a fundamentally important point: The 14 high value detainees are not ordinary criminals, but perpetrators of an entirely different order of evil.

It is because of these men, in particular, that the Bush administration initiated the preventive detention regime of which Guantánamo is a part. Processing them as mere lawbreakers would not have advanced the war on terror. To read them their rights and provide them lawyers would have been to throw away their intelligence value. It would have allowed them to carry to the grave many details of still active terrorist plots. The Bush administration chose a different route-harsh interrogations designed to ferret out al Qaeda's current operations before it was too late to stop them or capture those involved.

It is not clear from the early press reports whether the Obama administration will continue preventive detention in any form. Some accounts suggest that the president-elect wants to abandon it entirely, rather than reforming it. During the campaign, Obama said he wanted to return to the way we did things in the 1990s, when terrorists were put on trial after the fact. "And, you know, let's take the example of Guantánamo," Obama said. "What we know is that, in previous terrorist attacks-for example, the first attack against the World Trade Center-we were able to arrest those responsible, put them on trial. They are currently in U.S. prisons, incapacitated."

This is not true. The chief bomb designer for the 1993 strike on the World Trade Center, Ramzi Yousef, was eventually detained years after the attack and was then convicted, and imprisoned. But the man who mixed the chemicals for the bomb, Abdul Rahman Yasin, is still at large, having fled to Saddam's Iraq shortly after the bomb left a crater several stories deep in southern Manhattan. More important, Obama's comment misses the fundamental lesson of 9/11. The successful prosecution of some of those responsible for the first World Trade Center bombing, as worthwhile as it was, did little to disrupt the broader terrorist network, which grew exponentially between 1993 and 2001. The best evidence of this is the fact that Ramzi Yousef's uncle, Khalid Sheikh Mohammed ("KSM"), continued

to operate unmolested long after his nephew was confined at a maximum security prison in Colorado.

KSM is the best known of the high value detainees imprisoned at Guantánamo. According to the 9/11 Commission, he first proposed to Osama bin Laden the plot that grew into the September 11 attacks, and he was involved throughout the operation. KSM has also admitted involvement in dozens of other plots and attacks, including providing some of the funds for the 1993 World Trade Center bombing. Members of KSM's family have been at the heart of al Qaeda's conspiracy. Another of KSM's nephews, Ammar al-Baluchi, is a high value detainee at Guantánamo. The government's files note that Ammar was a "key lieutenant for KSM" during the September 11 operation.

Ramzi Binalshibh, one of KSM's 9/11 coconspirators, is another high value detainee at Guantánamo. He was al Qaeda's chief liaison between the hijackers living in the West and more senior terrorists, such as KSM, who resided in Taliban-controlled Afghanistan. Al Qaeda central needed Binalshibh to coordinate various details of the plot. And the hijackers, including their ringleader, Mohammed Atta, relied on Binalshibh for both advice and cash. Some of the money Binalshibh provided the hijackers came from another high value detainee, Mustafa Ahmad al-Hawsawi. During the week prior to 9/11, four of the hijackers returned unused funds to al-Hawsawi.

If the new administration follows the vision set forth by candidate Obama, terrorists such as KSM, Binalshibh, al-Baluchi, and al-Hawsawi will be tried in our federal courts with the same constitutional protections as American citizens including the presumption of innocence. But trying elite terrorists for their crimes does nothing to expose the unconsummated plots they had already set in motion at the time of their capture. Had the Bush administration taken this approach, it is likely that America would have failed to stop many al Qaeda terrorist operations that were in fact foiled.

For example, in his autobiography, *At the Center of the Storm*, former Director of Central Intelligence George Tenet explained that KSM's interrogation led to the arrest of an entire cell that was plotting destruction. The same day KSM was detained in 2003, another terrorist named Majid Khan was picked up. During his interrogation, KSM admitted that Khan had recently passed along $50,000 to operatives working for al Qaeda's chieftain in Southeast Asia, a man known as Hambali. When interrogators confronted Khan with KSM's revelation, Khan confirmed it and said that he gave the money to an agent of Hambali named Zubair. Khan gave his interrogators Zubair's telephone number. Shortly thereafter, Zubair was taken into custody and gave up information that led to the arrest of yet another operative nicknamed "Lilie." According to Tenet, Lilie then provided information that led to Hambali's arrest in Thailand.

Khan, Hambali, Zubair, and Lilie are all high value detainees at Guantánamo. They were plotting the "second wave" of attacks on America when they were captured. According to the Guantánamo files, Zubair and Lilie were both chosen to be suicide hijackers in an al Qaeda attack on Los Angeles. They had also plotted against targets in Southeast Asia under the direction of Hambali. Hambali was responsible, in part, for planning the 2002 Bali bombings (killing more than 200 people) and a series of attacks on 30 churches in Indonesia on Christmas Eve 2000 (killing 19).

In addition to serving as an intermediary between KSM and the Hambali crew, Majid Khan was involved in other post-9/11 plots. Khan, who lived in Baltimore for years, was planning to smuggle explosives into the United States. He wanted to target gas stations and landmarks such as the Brooklyn Bridge, and he recommended to KSM that a truck driver living in Ohio named Iyman Faris could help. Faris, who had trained at an al Qaeda camp in Afghanistan, had begun preparations for these attacks. But within weeks of KSM's and Khan's capture, Faris was identified and arrested. Months later, Faris was convicted of providing material support to al Qaeda and sentenced to 20 years in prison.

Another of Khan's accomplices, a Pakistani named Uzair Paracha, was also arrested just weeks after Khan and KSM. In late March 2003, authorities raided Uzair's apartment in Brooklyn. There they found a number of incriminating pieces of evidence linking Uzair to Khan. In 2005 Uzair was convicted, and in 2006 he was sentenced to 30 years in federal prison.

Uzair's father, Saifullah Paracha, is a current resident of Guantánamo. Although he has not been designated a high value detainee, he clearly consorted with terrorists. Saifullah is reportedly a multimillionaire who owns a Pakistani media company and a textile business, which exported goods to the United States. Al Qaeda wanted to use Saifullah's textile business to smuggle explosives into the United States. Saifullah also offered his media company's services to Osama bin Laden for the production of al Qaeda's propaganda.

KSM and Khan were not the only high value detainees to give up crucial, life-saving details during their interrogations. In March 2002, Abu Zubaydah was captured at his safe house in Faisalabad, Pakistan. In *At the Center of the Storm*, Tenet says that Zubaydah unwittingly gave up information that led to the capture of Ramzi Binalshibh on September 11, 2002. At the time, Binalshibh was plotting an attack on Heathrow Airport in London. At least several of the detainees at Guantánamo were captured along with Zubaydah at his safe house in 2002, and they too were involved in al Qaeda's post-9/11 plotting. For example, Zubaydah intended to use one of them in an attack on Israel.

The greatest success of the Bush administration is that it stopped all of this, and more, from happening. The continental United States was under attack from an enemy unlike any other this nation has ever faced. There was no easy legal precedent or historical analogy. In the wake of 9/11, the Bush administration had to make up new rules as it went along. Critics are free to charge that the administration went too far. But the Obama administration may rapidly discover that treating the terrorist threat like any other matter in federal court, as candidate Obama proposed, is not only unrealistic but also dangerous.

It is true that the courts have had some notable post-9/11 successes, such as the convictions of Uzair Paracha and Iyman Faris. But those individuals were found out only because the Bush administration employed new methods to fight terrorism. Perhaps the Obama administration can achieve the same results without using the interrogation techniques employed by its predecessor. But it would be foolish to think that the government can eschew interrogations outside of the federal criminal justice system entirely. Going forward, the new president will need to approve at least some proactive measures if he is to stop al Qaeda's next attack.

Moreover, waging the war on terror requires more than just stopping individuals such as the 14 high value detainees. Tens of thousands of terrorists mean this nation harm. And over 200 of them remain at Guantánamo.

THE TERROR NETWORK

The high value detainees are the sharp tip of a very long spear. The threat they pose is relatively easy to identify. But the Obama administration is sure to ask: How dangerous are the other detainees?

Most of the 800 detainees held at one time or another at Guantánamo have been released or transferred. According to published reports, approximately 250 remain. Who they are is not entirely clear. The Pentagon has not released an official list.

In October, the *New York Times* published an online database listing 248 current detainees, in addition

to the 14 high value prisoners. The *Times* compiled this list through an exhaustive search of articles and other publicly available information. THE WEEKLY STANDARD has performed a similar review. While the list generated by the *Times* probably includes a handful of detainees who have been released or transferred, it appears to be mostly accurate. In any event, it is the best available.

The Department of Defense has released files for all but 6 of the 248 detainees on the *Times*'s list. We reviewed all of the unclassified documents for these 242 detainees as part of a comprehensive six-month study. Here are our findings.

While the 242 detainees may be less important than operatives at the level of KSM or Ramzi Binalshibh, it is clear that a number of dangerous individuals reside at Guantánamo. One such is Mohamed Qahtani, the terrorist who was selected by al Qaeda to become the "20th hijacker" on 9/11 but was turned away from the Orlando Airport by a suspicious immigration official. Qahtani is a member of a group dubbed the "Dirty Thirty," who were captured by Pakistani authorities while attempting to flee Afghanistan. They include a number of bodyguards for Osama bin Laden. At least several of the "Dirty Thirty" terrorists remain at Guantánamo.

But how should the Obama administration weigh the intelligence against Guantánamo residents who lack even Qahtani's high profile? We have identified four red flags the Obama administration should look for in the Guantánamo files. This methodology bears some similarities to that employed by the Combating Terrorism Center (CTC) at West Point in its study of the documents generated by the CSRTs at Guantánamo. Our study reviews those files, as well as the more comprehensive documents produced during the ARB hearings at Guantánamo. The new administration, of course, will have access to both of those sets of documents, as well as to the classified information on each detainee.

RED FLAG 1: Evidence that a detainee was committed to waging jihad, or holy war, against the perceived enemies of Islam is our first red flag. Jihad was a powerful motivation for many of the Guantánamo detainees, who traveled hundreds, if not thousands, of miles to get to Afghanistan. The Guantánamo files confirm that al Qaeda operates an extensive recruitment and indoctrination network stretching from the heart of Arabia to the mosques of Europe. Veteran jihadists, along with Islamic clerics, often act as recruiters, enticing the willing with heroic tales of fighting Allah's war. The recruiters frequently make travel arrangements, paying for recruits' travel and suggesting common routes to Afghanistan (mostly through Pakistan and Iran). Sheikhs also support al Qaeda's recruitment network by giving fiery sermons and issuing *fatwas* (religious edicts) calling for Muslims to support the jihad in Afghanistan against the United States, just as they called earlier for jihad against the Soviets, then the Northern Alliance. The call for jihad in Bosnia and Chechnya has also been a powerful recruitment tool, with wannabe jihadists sent first to Afghanistan to learn how to fight.

Of the 242 current detainees identified by the *Times*, our review found at least 116 (48 percent) to be allegedly connected to the jihadist recruiting network. This includes both recruiters and those recruited or inspired by the network to wage jihad. It does not include detainees who decided on their own to wage jihad or were inspired by other means including al Qaeda's propaganda.

One recruiter now at Guantánamo, a Mauritanian named Mohamedou Slahi, is particularly noteworthy. Slahi swore *bayat* (an oath of loyalty) to Osama bin Laden in 1990. He then trained at an al Qaeda camp in Afghanistan beginning in January 1991, followed bin Laden to Sudan, and later relocated to Germany. There, he recruited Ramzi Binalshibh and three 9/11 hijackers to al Qaeda's cause. The four recruits first traveled to Afghanistan for training at Slahi's urging. Slahi also spent some time as the imam of a mosque in Montreal. During Slahi's stint in Montreal, he allegedly facilitated al Qaeda's "millennium plot" against the Los Angeles International Airport (LAX). Ahmed

Ressam, the would-be LAX bomber, was captured while attempting to cross the Canadian border en route to California with a car full of explosives. Slahi most likely mentored Ressam during their time together in Montreal.

RED FLAG 2: On their way to join the jihad, most al Qaeda and Taliban recruits stay in guesthouses. The Obama administration should look for connections with these establishments in the Guantánamo files. The unclassified documents confirm that they are located throughout Pakistan, Afghanistan, and Iran. The word "guesthouse" may sound innocuous at first blush, but not just anyone can gain admittance. The guesthouse operators usually require that a known al Qaeda or Taliban member vouch for those who wish to stay there. And new residents are typically required to turn in their passports or other identification papers, sometimes receiving a new identity, before being shuttled off to a training facility or the front lines. The guesthouses also provide rudimentary religious and weapons training and act as staging facilities where jihadist fighters regroup between missions.

Of the 242 current detainees identified by the *Times*, our review found that at least 146 (60 percent) are alleged to have either operated or stayed in an al Qaeda or Taliban guesthouse.

Two guesthouse operators still in custody at Guantánamo warrant special scrutiny. The Rabbani brothers, Abu Rahman and Mohammed, operated a series of guesthouses for al Qaeda. The 9/11 Commission report says that the hijackers responsible for securing the planes on 9/11 stayed at a guesthouse that KSM requested Abu Rahman to secure in Karachi, Pakistan. They were then deployed to the United States. Other 9/11 hijackers stayed at the Karachi guesthouse as well. One Guantánamo file notes that Abu Rahman "identified 17 of the September 11, 2001, hijackers" as having stayed at his guesthouse. He was also able to identify several of the terrorists responsible for the August 7, 1998, embassy bombings as men he had assisted. Mohammed Rabbani, according to the Guantánamo files, assisted the retreat of 50 to 60 al Qaeda fighters from Afghanistan in December 2001.

RED FLAG 3: The Taliban's Afghanistan was a hub for terrorist training, and the Obama administration should look for evidence that a Guantánamo detainee received or provided training at one of the many facilities operated there by either the Taliban or al Qaeda. Prior to 9/11, both al Qaeda and Taliban trainees mingled at training facilities throughout Afghanistan. Some of these camps, such as the infamous al Farouq, offered basic training for those wishing to fight. Other camps, such as bin Laden's Tarnak Farms, were reserved for more specialized terrorist training. Recruits who traveled to Afghanistan could learn everything from how to operate an AK-47 to how to use poison or construct a truck bomb.

Of the 242 current detainees identified by the *Times*, our review found that at least 174 (72 percent) were either trainers or trainees. In a few instances, this training took place outside of Afghanistan, in, for example, Bosnia or Pakistan.

Al Qaeda's trainers are typically drawn from the ranks of the most experienced fighters. One current Guantánamo inmate, a Saudi named Ahmed Zaid Salim Zuhair, fought in Bosnia in the 1990s and later became an instructor at al Farouq. When captured, Zuhair had in his possession the watch of an American named William Jefferson, who worked for the United Nations in Bosnia and who was shot to death on November 21, 1995. One Guantánamo file notes that Zuhair "is believed to be responsible" for Jefferson's death. The Bosnian Supreme Court convicted Zuhair in 2000 for his participation in a car bombing in Mostar on September 18, 1997. But he was not imprisoned. Instead he remained at large, teaching others his methods for mayhem.

Another trainer in pre-9/11 Afghanistan, Noor Uthman Mohammed, was the deputy in charge of the infamous Khalden camp. Khalden was operated for years by high value detainee Abu Zubaydah and graduated many famous recruits, including three of the 9/11 hijackers. After the fall of the Taliban government in Afghanistan, Noor fled to Faisalabad, Pakistan, where he stayed in a safe house that Zubaydah operated. Noor was detained alongside Zubaydah, as well as several other current Guantánamo inmates, in late March 2002. One Guantánamo memo notes that Zubaydah was planning to use Noor in an operation against Israel at the time of their capture. During his Combatant Status Review Tribunal, Noor admitted that he was a trainer at Khalden and that he knew Zubaydah, but claimed that none of this had anything to do with al Qaeda. Noor's quasi-denial is meaningless-it is beyond dispute that Khalden was part of al Qaeda's elaborate pre-9/11 training infrastructure.

Terrorist training in Afghanistan was so commonplace that some current Guantánamo detainees have actually attempted to use it in their defense. Binyam Mohammed is an Ethiopian who lived in the United States briefly before moving to the United Kingdom in the 1990s. Mohammed has refused to participate in his hearings at Guantánamo, but one file notes that he admitted to his "personal representative" (provided to each detainee to represent his interests) that he had traveled to Afghanistan to gain the skills necessary to fight in Chechnya but had no other involvement with al Qaeda.

The government believes he was up to much more. According to the Guantánamo files, Binyam met a number of high-ranking al Qaeda officials in Afghanistan and Pakistan. They had tasked Binyam with attacking targets inside the United States. At one point, Binyam and José Padilla, who has been convicted on terrorism-related charges in a U.S. court, apparently investigated the possibility of detonating a "dirty bomb" (made with radioactive material) in the United States. This allegation has proven controversial as detractors say there is no evidence that Binyam or Padilla was even close to constructing such a device. But what is not widely appreciated is that the dirty bomb plot is just one option they discussed with senior al Qaeda terrorists. They also explored a wide range of possible targets and modes of attack, from striking U.S. subways to setting apartment buildings on fire using ordinary gas lines. Both Binyam and his would-be accomplice were caught before any attack could be attempted. Padilla, an American citizen, was captured in Chicago and underwent interrogation using highly controversial methods. Binyam was captured in Pakistan and claims that he, too, was tortured.

RED FLAG 4: Finally, the new administration should look for evidence of participation in hostilities in Afghanistan or elsewhere. Of the 242 current detainees identified by the *Times*, our review identified at least 112 (46 percent) who are alleged to have participated in hostilities. The bulk of these fought on the front lines in Afghanistan against either the Northern Alliance or American forces. But this count also includes detainees who were involved in terrorist attacks or were senior operational commanders in charge of deployed forces.

One detainee, Mohammed Fazl, was the Taliban's army chief of staff. He surrendered to the Northern Alliance with a force of more than 1,000 soldiers. The government's file on Fazl uotes that he "was responsible for widespread atrocities against noncombatants."

In sum, 227 (94 percent) of the 242 detainees we studied in detail had at least one of the four red flags outlined above; 181 (75 percent) had two or more red flags. Ultimately, however, this methodology is intended only to be suggestive. There are many other factors the Obama administration should study when weighing its options. Collectively, for example, the detainees have extensive ties to Islamic charities that are known to be al Qaeda fronts. And many of the remaining inmates have interacted with senior al Qaeda officials, including Osama bin Laden. Only a careful review of all of the

intelligence on the detainees, classified as well as unclassified, can illuminate just who these individuals are and what they were up to at the time of their capture.

The new administration will also have to contend with the roadblocks that have frustrated its predecessor's efforts to send detainees back to their home countries. Approximately 100 Yemenis, for instance, remain at Guantánamo, but as one file notes, "Yemen is not a nation supporting the Global War on Terrorism." Terrorists detained by Yemini authorities have a pattern of finding their way back to the battlefield.

When President-elect Obama spoke so confidently of closing Guantánamo on *60 Minutes*, he had a receptive audience. For years, the dominant story in the media has been the excesses of the Bush administration. Amazingly, much of this narrative was written by self-interested former inmates and the detainees' attorneys. They are always eager to provide journalists with statements about the evils of Guantánamo.

Throughout the controversy, the Bush administration has made only minimal efforts to engage its critics or explain its actions to the American people. As a result, coverage of Guantánamo has been one-sided, and the intelligence contained in the thousands of pages of unclassified documents has largely been ignored. The full story of the Guantánamo detainees remains to be told.

The faults of the Bush administration go beyond its strange failure to make its case to the public. Its refusal to release a complete list of the remaining detainees is an example of secrecy taken too far. Its use of techniques of dubious legality and morality to extract information is rightly questioned. And the military commissions approved by President Bush have proceeded at a snail's pace-only two detainees have been tried.

Obama will probably end the military commission system. He has suggested that he wants to try some of the detainees in a civilian court. But trying the most dangerous terrorists, such as the 14 high value detainees, in a civilian court will give them a forum in which to grandstand. Classified information, which may be necessary to convict them on some charges, will be difficult to protect in such a setting. It is possible that the Obama administration will create a special national security court to handle some of the cases. This is not a bad idea.

When the Bush administration sent the first detainees to the U.S. Naval Station Guantánamo Bay in 2002, it was improvising-understandable in a situation without precedent. The captured jihadists and terrorist agents were not conventional prisoners of war, and they were not ordinary criminals. In the ensuing seven years, the administration failed to replace its stopgap measure with an institutional response seen as legitimate. Bush's successors should remember, however, that he took the steps he did in the context of a war against enemies who are still seeking to attack our homeland. President Bush, whatever his faults, protected America after September 11, 2001. Shortly, it will fall to President Obama to do the same.

Thomas Joscelyn is the senior editor of the website Long War Journal. *Jonathan Church assisted in the research for this article.*

Mr. NADLER. I now recognize Ms. LeBoeuf for 5 minutes.

TESTIMONY OF DENISE "DENNY" LeBOEUF, DIRECTOR, JOHN ADAMS PROJECT, AMERICAN CIVIL LIBERTIES UNION, NEW ORLEANS, LA

Ms. LEBOEUF. Good morning, Chairman Nadler and Members of the Subcommittee. Thank you for inviting me to testify on behalf of the American Civil Liberties Union regarding the legal and moral implications of this misguided effort to revive the military commission.

Congress should not reform the commission. We do not need another system of justice, new and inferior by its very novelty. By design and by definition, the trial of Guantanamo detainees before a military commission cannot accomplish any of the goals of a legitimate justice system. The stated purpose of some proponents of military commission trials is to provide a forum where convictions are more likely than in a Federal court, and to use evidence that would rightly be inadmissible in a Federal court. Most particularly, these proponents wish to use statements that were obtained by torture and mistreatment.

Such trials will not be or look fair. They will not be or look competent. And they cannot produce reliable verdicts. Perhaps, worst of all, no judgments under the military commission will ever truly be final.

As director of the ACLU's John Adams' Project, I have attended and observed nearly all of the capital pretrial proceedings in the 9/11 conspiracy case at Guantanamo Bay. I can say without hesitation that as bad as the military commissions appeared on paper, they are far worse in practice, and that I am not alone in that judgment. In 20 years of defending indigent capital crimes in the deep South, I have not seen the blatant unfairness, the wholesale result-oriented injustices that I have witnessed in these proceedings. Two areas in particular display this unfairness.

Resources. Extreme disparity in resources between the government and defense are the norm in the commission. Military prosecutors have free access to all the resources of the Department of Justice, while military defense lawyers, many of whom are here today, have the assistance of civilian counsel only because the ACLU and the NACDL provide it. That includes routine requests that are dismissed or denied for ordinary resources. Almost no independent experts, investigators, or specialists have been granted in any of these cases. Far worse in the death penalty case, with no capital counsel provided and no attempt to comply with the ABA guidelines required by the Supreme Court in capital cases. Across the board, a total failure of the commission process in providing even a semblance of the tools needed for an adequate defense.

Access to counsel is another area. Year-long delays in security clearances, denial of the request for secure phone calls between clients and their attorneys, forced hooding and sensory deprivation during transport to attorney-client visits which discourage such meetings, overclassification of the defendants' accounts of them, mistreatment, refusal to assure prompt correspondence and provide a privilege team for declassification all combine to create nearly insurmountable barriers between clients and their lawyers.

Let me speak to the appearance of inadequacy at the commission proceedings. Despite repeated requests and the fact that 9/11 was the most investigated crime in the history of the United States, few investigative documents have been provided in the discovery to the defense, fortifying the perception that no real trial was ever contemplated.

Not 1 day, not 1 hour has gone by without significant translation problems. The commission is unable or unwilling to provide even minimally adequate translations in capital cases to non-English-speaking defendants, some whom act as their own lawyers.

An entire day was lost while the court and prosecutors debated with JTF-GTMO on how to order a cell extraction on one of the defendants who had been diagnosed as psychotic by Guantanamo doctors. Such cell extractions and the forced hoodings make it look as though mistreatment is still occurring, and the day lost to debate was a direct result of the denial of adequate opportunity for defense lawyers to communicate with their clients.

At the end of the day, the military judge called the proceedings, quote, a learning experience. I thought, it shouldn't be a learning experience. We shouldn't be making this up as we go along. It is supposed to be a capital trial conducted by a country ruled by laws. These cases belong in article III courts. We have nothing to fear from our own courts.

No matter how many cosmetic changes are made, the military commissions will always be a second-rate court system set up for illegitimate purposes. When verdicts and perhaps death sentences are rendered by such a court, they will be tainted forever. They may well be reversed by article III courts, and when that happens, it will not be the voices of the defendants or the defense lawyers decrying the cruel folly, it will be the voices of the families of 9/11, the citizens of this country and our allies around the world who want this process to end, as Congressman Delahunt said, ultimately with truth emerging from a fair trial. The military commissions cannot provide that.

Mr. NADLER. I thank you.

[The prepared statement of Ms. LeBoeuf follows:]

PREPARED STATEMENT OF DENISE "DENNY" LEBOEUF

Testimony of Denny LeBoeuf,
Director, John Adams Project
American Civil Liberties Union

Before the Constitution, Civil Rights,
And Civil Liberties Subcommittee of the
House Committee on the Judiciary

Hearing on Legal Issues Surrounding the Military Commissions System

July 8, 2009

Good morning Chairman Nadler, Chairman Conyers, Ranking Member Sensenbrenner, and Members of the Subcommittee. Thank you for inviting me to testify on behalf of the American Civil Liberties Union regarding the legal and moral implications of this misguided effort to revive the military commissions at Guantanamo Bay.

Congress should not revive or continue trials under Military Commissions in either their current or some modified form. Military Commissions do not offer a fair alternative to the ability of existing, regularly constituted federal courts to protect the legitimate interests of both the government and the criminally accused. The consistent experience of federal prosecutors handling complex, high-profile terrorism cases proves that federal courts are wholly capable of protecting classified information and national security interests while conducting a trial that bears all the historic hallmarks of fundamental due process. Against this record, proponents of the Military Commissions have argued that the principal of a Military Commission is to ensure convictions while avoiding or substantially weakening basic rules of fairness and reliability. In contrast, federal courts would exclude coerced statements and enforce the right of accused to meaningful cross-examination; any conviction that occurred in this forum would inspire public confidence. By design and by definition, the trial of Guantanamo detainees before a Military Commission cannot accomplish any of the goals of a legitimate justice system: such trials will

not be fair or look fair, they will not be competent or look competent, and so they cannot produce reliable verdicts. Perhaps worst of all, no judgments under the Military Commission will ever truly be final.

As the Director of the ACLU's John Adams Project, I have attended and observed nearly all of the capital pretrial proceedings in the 9/11 conspirators' cases. When the 9/11 conspiracy trial proceedings first began last summer, I was concerned that the Military Commissions Act created the potential for sham trials, show trials. Those concerns were only strengthened by my personal observation of the proceedings in Guantanamo. I can say without hesitation that, as bad as the Military Commissions appeared on paper, they have proved to be far worse in practice. That conclusion is shared by many other observers of Commission proceedings. In twenty years of defending indigent capital clients in the Deep South I have not seen the blatant unfairness I have witnessed in these proceedings.

Some examples:

- Delayed security clearances initially prevented attorneys from meeting with clients and still prevent capital counsel, investigators, and mitigation specialists from full participation;
- The Convening Authority has denied 47 of 55 requests for defense resources, including mitigation specialists, experts, and investigators. None of the detailed military counsel is qualified to serve as "learned counsel" in a capital case and defense teams have no ability to bring in independent experts (even if they are willing to work *pro bono*) unless the government determines that they have a "need to know."

- In the most egregious of these denials, the commissions denied requests for an independent expert psychiatrist for a capital defendant who is admittedly psychotic and who was tortured in CIA custody.
- Requirements that detainees wear eye and ear coverings en route to meet with their counsel have prevented attorney-client meetings because detainees experienced this sensory deprivation during extraordinary rendition, and told the International Red Cross that such hooding was physically painful and frightening.
- Defendants who are non-English speakers are denied translations of documents necessary to their defense.
- Adding to the difficulty of travel to Guantanamo for attorney-client visits, the commissions have failed to allow for secure phone calls between clients and attorneys, and have refused to provide adequate delivery of trial materials or timely de-classification of defense matters.
- The government continues to ignore specific requests for discovery and those discovery materials provided have been unusable or irrelevant.
- The government refuses to provide defense counsel with access to a "privilege team" (an independent classification authority), which has resulted in threats of prosecution against counsel after filing motions or making routine communications.
- Protective orders prevent defense teams for the "High-Value Detainees" from necessary communications amongst themselves or with experts, investigators, and mitigation specialists.

- Requests for funding specific investigation plans, services of experts, and resources for preparation of cases are not confidential and give the prosecution a window into and a say about the defense strategy.
- And as to the request for a legal pad so that a *pro se* defendant could write a motion, the trial judge -- a Marine colonel -- denied the request because "you have to make that motion in writing."

Let me speak to the appearance of inadequacy at the Commissions proceedings.

- Not one day – not one hour – has gone by without significant translation problems. The observers who come from recent war crimes trials in Europe and Africa are especially astonished at the apparent inability or unwillingness of the Commissions to provide even adequate translation of death penalty trials to the non-English speaking defendants, some of whom are acting as their own lawyers.
- Despite repeated requests and the fact that 9/11 was the most investigated crime in the history of the United States, very few investigative documents have been provided in discovery to the defense, fortifying the perception that no real trial is contemplated.
- An entire day was lost while the court and the prosecutors debated with JTF Gitmo on how to order and conduct a cell extraction on Ramzi bin al Shibh, one of the defendants who has been diagnosed as psychotic by the Guantanamo doctors. Such "cell extractions," like the forced hoodings for attorney visits, make it look as though mistreatment is still occurring, and the day lost to debate was a direct result of the denial of adequate defense resources and opportunity to communicate with their clients. At the end of the day, the Military Judge called the proceedings "a learning experience." It is

not supposed to be a "learning experience"; it is supposed to be a capital trial conducted by a country ruled by laws.

Article III courts can and should be the venue for these trials. Article III courts will begin with the presumption of fairness: our country and our allies will accept the verdicts of these courts where many will never accept the verdict of a court that was created to give second-rate justice. Those who insist that national security requires a new court system are mistaken for any number of reasons:

- Federal courts try crimes committed in Iraq and Afghanistan, as well as other war zones around the world, and are sufficiently flexible to allow introduction of reliable evidence.
- Miranda warnings are not required in a federal court if the statement is voluntary.
- The Classified Information Procedures Act (CIPA) has proven itself time and again to provide all the protections witnesses and intelligence sources require.

Use of Evidence Obtained Through Coercion

By contrast with Article III courts, the current proposals for the Military Commissions do not meet federal standards. Most importantly, the military commissions do not conform to either the Constitution or the Geneva Conventions. The legislation reported out by the Senate Armed Services Committee less than two weeks ago will result in convictions that will eventually be found to be unconstitutional and illegal. As social science and forensic sciences teach us more about the dangers of coerced evidence, it is regressive to establish – for the first time since the witch trials of the 17th century – an American system of justice that permits coerced evidence, and accusation by shadowy unnamed accusers who cannot be challenged or confronted. The use

of such evidence is unjust, unnecessary, and unwise: It is unjust because it may lead to the conviction of the innocent; and make no mistake, there are and there have been innocents locked up in Guantanamo[1]. It is unwise because the endeavor further drags our military and our military justice system into the sordid effort to hide the details of a detainee's torture, while allowing the prosecution to exploit the tainted product of such lawlessness.

Thus, for no good reason, the legislation reported out by the Senate Armed Services Committee foregoes the ban on the use of forced confessions mandated by the Due Process Clause of the U.S. Constitution, and directs that, where the degree of coercion used to obtain a statement is disputed, the military commissions ban only statements obtained through "cruel, inhuman, or degrading treatment" (CID). There are significant differences between the standard for coerced evidence and that for CID. The domestic legal standard for use of statements obtained through coercion has been developed over centuries and is a well-established feature of criminal proceedings in both U.S. civilian courts and military courts-martial. Indeed, the ban on the use of involuntary statements or confessions as evidence against an accused is a fundamental principle of the American criminal justice system, mandated by the Due Process Clause to the U.S. Constitution.[2] In contrast, the meaning of CID under U.S. law was disputed by the last Administration. Although international and foreign courts have adjudicated the meaning of CID on a number of occasions, domestic courts have never had the opportunity to do so.

Under the Constitution, for a confession to be voluntary, a criminal suspect must "choose[] to speak in the unfettered exercise of his own will."[3] Courts will exclude confessions

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[1] The Uighur cases alone demonstrate the truth of this statement. *See, e.g., Parhat v. Gates*, 532 F. 3rd 834, 836 (C.A.D.C. 2008)(noting that "It is undisputed that [petitioner] is not a member of al Qaida or the Taliban, and that he has never participated in any hostile action against the United States or its allies.")
[2] *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944). The ban applies whether the confession is self-incriminating or incriminating towards third-parties. *See id.* at 155-56.
[3] Malloy v. Hogan, 378 U.S. 1, 8 (1964).

"extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence."[4] They will look to "the totality of the circumstances"[5] surrounding the confession to determine "whether a defendant's will was overborne."[6] This determination "depend[s] upon a weighing of the circumstances of pressure against the power of resistance of the person confessing."[7] Once a defendant challenges a confession, "the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary."[8]

Although courts exclude forced confessions as unreliable, they are more fundamentally concerned with offering defendants a genuine "free choice"[9] to confess and ensuring a procedure that upholds "that fundamental fairness essential to the very concept of justice."[10] The Supreme Court has recognized that "important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will."[11] And although this test suggests a case by case approach—its outcome depends on both the actions of the government and the individual characteristics of the defendant—courts have consistently held that due process prohibits the use of statements obtained through certain types of physical and psychological coercion,[12] including solitary confinement, prolonged incommunicado detention, deprivation of food and sleep, beatings,

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[4] Hutto v. Ross, 429 U.S. 28, 30 (1976) (citing Bram v. United States, 168 U.S. 532, 542-43 (1897)).
[5] Frazier v. Cupp, 394 U.S. 731 (1969).
[6] Shneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).
[7] Stein v. New York, 346 U.S. 156, 185 (1953).
[8] Lego v. Twomey, 404 U.S. 477, 489 (1972).
[9] Watts v. Indiana, 388 U.S. 49, 53 (1949).
[10] Lisenba v. California, 314 U.S. 219, 236 (1941).
[11] Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
[12] *See, e.g., id.* ("The efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of persuasion.... [T]he blood of the accused is not the only hallmark of an unconstitutional inquisition.).

forced nudity, threats of death or physical harm to the defendant or to others, and promises of release, leniency in sentencing or other benefits.

Coerced confessions are also excluded under U.S. military law. The Uniformed Code of Military Justice bans as "involuntary" statements obtained "through the use of coercion, unlawful influence, or unlawful inducement."[13] The Manual for Courts-Martial offers explicit examples of such conduct, namely:

> Threats of bodily harm; Imposition of confinement or deprivation of privileges or necessities because a statement was not made by the accused, or threats thereof if a statement is not made; Promises of immunity or clemency as to any offense allegedly committed by the accused; Promises of reward or benefit, or threats of disadvantage likely to induce the accused to make the confession or admission.[14]

As in civilian courts, military courts must examine the totality of the circumstances, including both the characteristics of the accused and the details of the interrogation, to determine "whether the confession is the product of an essentially free and unconstrained choice by its maker."[15] In assessing the totality of the circumstances, military courts will look to factors such as "the condition of the accused, his health, age, education, and intelligence; the character of the detention, including the conditions of the questioning and rights warning; and the manner of the interrogation, including the length of the interrogation and the use of force, threats, promises, or deceptions."[16]

In contrast to the coerced evidence standard, no one knows precisely what it would mean to exclude only evidence obtained through torture and CID. The Senate has provided some minimal guidance on how courts might determine the meaning of CID, through a reservation to the UN Convention Against Torture providing that:

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[13] Uniform Code of Military Justice, 10 U.S.C. § 831, Art. 31.
[14] MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 304(c)(2) analysis, at A22-10 to A22-11.
[15] United States v. Bubonics, 45 M.J. 93 (C.A.A.F. 1996).
[16] United States v. Ellis, 57 M.J. 375, 379 (C.A.A.F. 2002).

> the United States considers itself bound…to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.[17]

There is thus at least an argument that, for purposes of adjudication before U.S. courts or military commissions, CID is coterminous with U.S. constitutional standards for detainee treatment under the Fifth, Eight and Fourteenth Amendments.[18]

But this argument only underscores the central irony behind the use of CID as the standard for admissibility for trial by military commissions: Under a certain reading of CID, it is coterminous with constitutional protections. Under any other reading, it is constitutionally suspect, and likely to be overturned by the Supreme Court. Indeed, the Justice Department's Office of Legal Counsel appears to have argued as much in a recent undisclosed opinion, as reported just last week by the *Wall Street Journal* and *New York Times*. According to these media reports, OLC concluded that some military commission convictions could be reversed as unconstitutional based on the use of coerced evidence.

In fact, in his testimony before the Senate Armed Services Committee just yesterday, Assistant Attorney General David Kris argued that the commissions should adopt the same voluntariness standard used in Federal courts and courts martial. "It is the Administration's view," he contended, "that there is a serious risk that courts would hold that admission of involuntary statements of the accused in military commission proceedings is unconstitutional."

It is thus unclear precisely why Congress would want to import such a poorly-defined and constitutionally suspect standard into the trials of terrorism suspects. Indeed, this seems like

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[17] 136 Cong. Rec. 36198 (1990).
[18] However, this Senate reservation applies only to the UN Convention Against Torture and does not purport to provide an authoritative definition of CID.

a recipe for endless litigation and delay. Even the Office of Legal Counsel under the Bush Administration, while putting forth the extreme (and incorrect) argument that "enhanced interrogation" techniques like waterboarding did not constitute CID because they do not "shock the conscience," nonetheless admitted that it could not "set forth a precise test for ascertaining" what, precisely, *was* CID.[19] (An appendix to this testimony offers legislators some examples of the circumstances in which courts have excluded evidence obtained through coercion, and where they might draw the line for evidence obtained through CID.) Instead of using the sometimes-disputed CID standard, Congress should embrace the clear rule mandated by our Constitution: no one is to be convicted under any American system of justice based on any coerced evidence. The rule should always be: no forced confessions.

Admission of hearsay evidence

The commissions are also flawed in their admission of hearsay evidence. The use of hearsay evidence in a trial by jury runs counter to both U.S. law and international standards of justice. The military commissions would allow convictions based on hearsay evidence that would be barred from every federal and state courtroom and every military court-martial in the United States.

The hearsay provision is also inconsistent with international practice. International tribunals like the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) admit hearsay evidence, but only because these tribunals use highly-qualified judges as fact-

[19] Memorandum from Steven G. Bradbury, Deputy Assistant Attorney Gen., Office of Legal Counsel, U.S. Dep't of Justice, for John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency, Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees, at 2 (May 30, 2005).

finders, who can be trusted to treat hearsay evidence "with caution."[20] The ICC, for example, requires that its judges "possess the qualifications required in their respective States for appointment to the highest judicial offices."[21] Typically, hearsay evidence will be accorded little weight unless it is supported by corroborating testimony. In the military commissions, by contrast, hearsay evidence is to be evaluated by lay jurors.

Moreover, judges at international criminal tribunals are required to issue lengthy written opinions explaining and justifying each individual piece of evidence that they utilize. By contrast, under the military commissions, once evidence is determined to be reliable by "a preponderance of the evidence"—a decidedly low bar—there is no record of how much weight the jurors give it.

These differences might seem technical, but in practice they have an enormous effect on the legitimacy of trial proceedings. As Michael Scharf has argued before the House Armed Services Committee, "Fundamentally, the reason behind the common law's relatively inflexible approach to hearsay evidence has been to ensure that lay jurors would not be unduly influenced by evidence that judges themselves knew, from experience, to be frail and unreliable."[22] The military commissions, then, represent an appalling mishmash of common and civil law approaches—a kind of chimera—importing the evidentiary rules of one system, tailored to the needs of trained and experienced judges, into the fact-finding mechanisms of the other, namely, trial by jury.

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[20] *Prosecutor v. Laurent Semanza*, ICTR-97-20-T (May 15, 2003). *See also* Michael P. Scharf, Testimony before the House Armed Services Committee, *available at* http://armedservices.house.gov/schedules/07-26-06ScharfTestimony.pdf (permanently archived at: http://law.cwru.edu/faculty/news_detail.asp?id=232&content_id=3).
[21] Rome Statute of the International Criminal Court, art. 36, July 17, 1998, 2187 U.N.T.S. 90.
[22] Scharf, *supra* note 19.

The result may produce convictions based on accusations made by a mentally ill person, or a tortured one – with no opportunity for the defendant to challenge the basis of the statements or to confront his accuser. Indeed, even the Administration testified yesterday that the restrictions on use of hearsay evidence in the Senate Armed Services Committee proposal are insufficient. Although the Administration's proposed changes do not go far enough, they nonetheless indicate that the Senate proposal falls well short of international standards. Denunciations by anonymous accusers have no place in a democracy.

The Right to Choose Defense Counsel

Another fundamental right denied to defendants at Guantanamo is the right to choose their defense counsel. Recently, in *United States v. Gonzalez-Lopez*, the Supreme Court emphasized the importance of the right to choose one's attorney. With Justice Scalia writing for the majority, the Court held that a defendant who is wrongly denied choice of counsel is entitled to have his conviction overturned.[23] Such an error qualifies as a "structural error" under the Sixth Amendment, and is not subject to review for harmlessness.[24]

Even the defendants at Nuremberg were offered free choice of counsel. Article 23 of the Constitution of the International Military Tribunal at Nuremberg stated:

> The function of Counsel for a Defendant may be discharged at the defendant's request by any Counsel professionally qualified to conduct cases before the Courts of his own country, or by any other person who may be specially authorized thereto by the Tribunal.[25]

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[23] United States v. Gonzalez-Lopez, 548 U.S. 140, 240 (2006).
[24] *See id.* at 148-51.
[25] Charter of the International Military Tribunal, 82 U.N.T.S. 279, Art. 16(d).

The Allies authorities drew up an initial list of lawyers for defendants to choose among, but defendants could request an attorney not on the list who then had to be approved.[26] German lawyers needed only to be qualified to conduct cases before German courts or be specifically authorized by the Tribunal, and national origin was not a factor for exclusion. In practice, no defendant was denied representation by the lawyer of his choice and a number of German lawyers appeared as defense counsel, including former members of the Nazi Party.[27]

By contrast, the revamped military commission rules will still not allow a defendant to choose his or her own attorney. Instead, the defendant can only choose from a pool of military defense lawyers, and then receive that lawyer only if he or she is available. That scheme does not meet the criteria explained by Supreme Court Justice Scalia as the standard for a fair trial.

Fair Trial Requirements in *Hamdan v. Rumsfeld*

Troublingly, the Senate Armed Services legislation does not comply with with Common Article 3 of the Geneva Conventions, requiring trial by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." In *Hamdan*, the Supreme Court found that a number of military commissions procedures violated "the barest of those trial protections that have been recognized by customary international law" as required by statute under the UCMJ,[28] including defendants' rights to be present, to be apprised of the evidence against them, and to legal assistance of their choosing.[29] The present legislation falls well short of correcting these flaws.

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[26] EUGENE DAVIDSON, THE TRIAL OF THE GERMANS 30 (1996).
[27] Michaïl Wladimiroff, *The Assignment of Defence Counsel Before the International Criminal Tribunal for Rwanda*, 12 LEIDEN J. INT'L L. 957, 964 (1999).
[28] Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006).
[29] *See id.* at 633-35.

The Court in *Hamdan* termed the right to be present "one of the most fundamental protections afforded not just by the Manual for Courts-Martial but also by the UCMJ itself," and concluded that, "Whether or not that departure technically is 'contrary to or inconsistent with' the terms of the UCMJ, …the jettisoning of so basic a right cannot lightly be excused as 'practicable.'"[30] The Court points out that defendants' protections like the right to be present, the right to be apprised of the evidence against oneself, and the right to counsel of one's choosing are found in Protocol I of the Geneva Conventions and the International Covenant on Civil and Political Rights, and that military commissions following World War II found their violation to violate the laws of war.[31] The Court also offers a string of foundational cases indicating that depriving defendants of access to the evidence against them is inconsistent with fundamental fair trial rights.[32]

In a portion of his concurring opinion explicitly endorsed by the majority,[33] Justice Kennedy argues that certain structural deficiencies of the commissions "remove safeguards that are important to the fairness of the proceedings and the independence of the court."[34] These deficiencies include "the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress."[35] Lastly, Kennedy elaborates on deficiencies in the commissions' rules of evidence, including hearsay evidence and evidence obtained through coercion:

> The rule here could permit admission of multiple hearsay and other forms of evidence generally prohibited on grounds of unreliability. Indeed, the commission

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[30] *Id.* at 624.
[31] *Id.* at 633 & n.66.
[32] *Id.* at 635 n.67.
[33] *See id.* at 634.
[34] *Id.* at 651.
[35] *Id.*

> regulations specifically contemplate admission of unsworn written statements, …and they make no provision for exclusion of coerced declarations save those "established to have been made as a result of torture." …Besides, even if evidence is deemed nonprobative by the presiding officer at Hamdan's trial, the military-commission members still may view it. In another departure from court-martial practice the military, commission members may object to the presiding officer's evidence rulings and determine themselves, by majority vote, whether to admit the evidence.… [T]he Government has made no demonstration of practical need for these special rules and procedures, either in this particular case or as to the military commissions in general, …nor is any such need self-evident. For all the Government's regulations and submissions reveal, it would be feasible for most, if not all, of the conventional military evidence rules and procedures to be followed.[36]

If the Court found rules allowing evidence obtained through coercion and hearsay violative of the UCMJ in *Hamdan*, it is unclear what new "practical need" might legitimize such measures today. Indeed, federal courts will eventually find that the military commissions are illegal for violating the Geneva Conventions.

Conclusion

In summary, such obvious unfairness undermines both the perceived legitimacy and – equally important – the finality of any result. No matter how many cosmetic changes are made, when verdicts – and perhaps death sentences – are rendered in a system that refuses to provide the tools of a defense, that admits coerced testimony and unnamed accusers, and that ignores basic international human rights, those verdicts will be tainted forever.

Congress would do well to follow the prescient words of Justice Jackson in *Ashcraft v. Tennessee*:

> There have been, and are now, certain foreign nations with governments … which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental

[36] *Id.* at 652-53.

> torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.[37]

The Military Commissions can of course be made fairer, but if the changes are to be more than skin-deep, the trials will be equivalent to trials in federal court. The current proposals for "reformed" military commissions will never be "a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples" as required by the Geneva Conventions and reinforced by the Supreme Court. In particular, recent decisions of the United States Supreme Court demonstrate that a coalition of both moderate and conservative Justices stands ready to reject convictions and death sentences that rest on the untested statements of unknown accusers. When that happens, it will not be the voices of defendants or defense lawyers decrying this cruel folly: it will be the voices of the families of 9/11, the citizens of this country, and allies around the world, who want this process to end, ultimately, with the truth emerging from a fair trial. The Military Commissions can never provide that result.

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[37] Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

Mr. NADLER. We begin the questioning by recognizing myself for 5 minutes.

My first question—and please answer these questions briefly since I have a lot in 5 minutes.

Lieutenant Colonel Vandeveld, you heard Mr. Joscelyn and some others say repeatedly "known terrorists," and characterized a lot of the people at Guantanamo as terrorists. How do we know they are terrorists if they haven't been tried?

Lieutenant Colonel VANDEVELD. Mr. Chairman, there is no way to know that. When he testified, it reminded me of the term "documented gang members," which I heard often as a prosecutor. When I inquired further, documented gang members turned out to be nothing more than a police officer's entry into a computer system that somebody thought somebody was a gang member.

Mr. NADLER. So there is no way to know that?

Lieutenant Colonel VANDEVELD. There is no way to know that without a trial.

Mr. NADLER. Thank you.

Ms. Pearlstein, in this morning—yesterday the Deputy Defense Department general counsel Jay Johnson testified in the Senate that if for some reason he is not convicted, that is, a terrorism suspect, for a lengthy prison system in the military tribunal, that as a matter of legal authority, "I think it is our view that we would have the ability to detain that person." In other words, they are claiming the ability to detain someone indefinitely even if they are acquitted.

If a detainee is found not guilty either through a military commission system or a conventional court or court-martial, can they still be detained? And, if so, on what basis? And if the answer is yes, why bother with the farce of a trial of any sort?

Ms. PEARLSTEIN. The short answer is it depends whether or not their detention is otherwise authorized under the authorization for the use of military force and laws of war. And those are questions that are currently being very actively litigated, and we can talk about what the courts have held so far.

I would say there are some circumstances in which I could imagine that to be the case, particularly with respect to individuals who were——

Mr. NADLER. So you could imagine what to be the case?

Ms. PEARLSTEIN. The ongoing detention to be authorized under the AUMF and the law of war, particularly with respect to individuals who are involved in the ongoing conflict in Afghanistan, for example. But I think those circumstances are more limited than the Obama administration thinks they are.

But the answer to your second question, why would we try them at all if we can continue to detain some of them, I think has two answers. One is we can't continue to detain all of them. I suspect there is a small subset of people who we could lawfully continue to detain.

And the second answer to that is traditionally, if an armed conflict ends tomorrow and fortune smiles on us, we may want to—and some of these people have actually committed war crimes, murder of civilians, torture, et cetera. We want to hold them a lot longer than the duration of the war in Afghanistan. They should be sentenced to prison terms of 10, 20, 30 years. So that is why.

Now, I admit to you, it is deeply disturbing to hear the notion that there could be continued detention even with trial, but that

is, in fact, I think, under certain limited circumstances, a correct statement of the law.

Mr. NADLER. We will get back to that.

Also, Ms. Pearlstein, yesterday and today the issue came up as to whether the detainees are afforded greater constitutional rights if military commission trials are held in the United States instead of at Guantanamo or elsewhere, as, for instance, Iraq or Afghanistan. Is there a difference in the rights provided to detainees and the constitutional rights depending on where a trial is held, where they are detained?

Ms. PEARLSTEIN. The statement that I heard earlier, which is that Guantanamo detainees, if the trials were held here, would be afforded substantially more due process protections than they would be afforded in Guantanamo, I think is incorrect. I think that view of the applicability of the Constitution does not survive the Boumediene decision in which Justice Kennedy and a majority of the Court recognized that constitutional rights extend to individuals, even individuals held extraterritorially, to the extent it would not be impracticable or anomalous to apply those rights.

Mr. NADLER. So the physical location of an individual does not, except in a rare impossibility situation, affect their constitutional rights?

Ms. PEARLSTEIN. I think with respect to the trial rights that would apply for military commissions, it makes little difference whether those trials are held in Guantanamo or the U.S.

Mr. NADLER. Or Bagram? Or is that different?

Ms. PEARLSTEIN. I think the question was left open by the Supreme Court in Boumediene. But if is not impractical or anomalous to apply those trial rights, particularly including the——

Mr. NADLER. Then we have to——

Ms. PEARLSTEIN. Apply them.

Mr. NADLER. Thank you.

I yield such time as he may consume to the distinguished Chairman of the full Committee.

Mr. CONYERS. Just briefly. I wanted to inquire of Attorney Pearlstein that there might be cases—you suggest that no trials were appropriate, but they should be locked up for a much longer period than the war. I presume you mean the war in Afghanistan or Iraq. But under what basis?

Ms. PEARLSTEIN. I want to be clear in what I am actually contending. My view is if people can be tried either under ideally in the article III courts or, if lawfully constituted, military commissions, they should be tried, period.

The authorization for the use of military force has been construed by the Supreme Court in—as informed by the laws of war to authorize the detention of people engaged in armed conflict in Afghanistan in limited terms. Now, it is unclear how much farther that decision by the Supreme Court, the Hamdi decision, which came down in 2004, extends. But the district courts so far in the Guantanamo litigation have broadly embraced a somewhat limited view that the Administration has advanced, more limited than what the Administration has advanced, that it is possible, given the ongoing conflict in Afghanistan, and even broader—although it remains to be seen—that some of these people can lawfully be de-

tained under the combined authority of the Authorization for the Use of Military Force passed in 2001 and the laws of war.

Mr. NADLER. Reclaiming my time, and this will be the last question on that point, that is for someone who is fighting. Is there someone who is simply picked up or sold by some clan to us for bounty or whatever—someone who claims he wasn't fighting, wasn't a combatant, does there have to be some sort of due process to determine whether, in fact, this person just happened to be walking through the street?

Ms. PEARLSTEIN. Absolutely.

Mr. NADLER. What is that?

Ms. PEARLSTEIN. To be clear, the authority that has been recognized is recognized only as pursuant to the procedural protections afforded——

Mr. NADLER. And what proceeding is that?

Ms. PEARLSTEIN. Well, with respect to the Guantanamo detainees, they all now have a constitutional right to habeas corpus, to a review of their status.

Mr. NADLER. So anyone who we claim the authority to detain under the AUMF has a right to habeas corpus and, therefore, to a determination of their status?

Ms. PEARLSTEIN. The Supreme Court has held that with respect to those held in Guantanamo. The case is now about whether habeas extends to those held, for example, at Bagram, Afghanistan. But at a minimum, those people are entitled to substantial process under the interpretation of the AUMF that the Supreme Court has already given and what the Geneva Conventions——

Mr. NADLER. And have we given that process to people at Bagram or anyone else?

Ms. PEARLSTEIN. My view is that the process we have given to people at Bagram is insufficient under the prevailing standard.

Mr. NADLER. Thank you.

I now recognize the distinguished Chairman Emeritus of the Committee, the gentleman from Wisconsin, for 5 minutes.

Mr. SENSENBRENNER. Mr. Chairman, I thank the Chairman for yielding me this time.

What we are hearing today is a continuation of the assault by the American political left on the entire institution of Guantanamo Bay and the people who have been sent to Guantanamo Bay. And apparently, from what I have been hearing, the witnesses that the Majority has brought before the Committee think that the Obama administration seems to have sold out the desire to close Guantanamo and disperse those who have been detained at Guantanamo to wherever.

Let me say that I heard from Ms. Pearlstein that there wouldn't be any more rights given to people who were transferred from Guantanamo to elsewhere or were tried before some other type of a procedure. But that is in direct contradiction to the brief that Solicitor General Kagan filed with the Supreme Court.

I guess the concern that I have is that there has been a track record of people who have been released from Guantanamo going back home and continuing their battled ways. Yesterday foxnews.com had a story, "Former Gitmo Inmate Leading the Fight against the U.S. in Helmand," which is in Afghanistan. The man's

name is Mullah Zakir, who is also known as Abdullah Ghulam Rasoul. And one defense official said that, explaining why Zakir was released from GTMO to Afghan custody and then in 2008 into society, quote, "We were under incredible pressure from the world to release detainees at GTMO. You just don't know what people are going to do. He was no worse than anyone else being held at Guantanamo Bay," the official said.

So I think the fact that very few foreign countries are wanting to resettle these folks is an indication that they have complained about Guantanamo from a, quote, "world perspective." But when the time comes for burden sharing and dealing with these folks and perhaps trying them, other countries seem to have dived under the table and said, "No, that is your problem, Americans."

I just looked at what has happened to the Uyghurs who have been resettled in Bermuda. On June 17, the Royal Gazette, which is the newspaper in Bermuda, quoted the police commissioner as describing them as high risk. Now, what are we doing to countries that are friendly or territories that are friendly, since Bermuda is still a British colony?

And I guess the question that I would like to ask, having said all of this, is directed to you, Mr. Joscelyn, is why does it make sense to release a person who has been described by American officials as members of terrorist organizations to another country when the position of the United States itself is that a person should not be allowed to travel to the United States?

Mr. JOSCELYN. Well, with the Uyghurs in particular, we are asking about their—I have always said I do not consider those guys to be, quote/unquote, the worst of the worst. I do not consider them to be the most dangerous guys who were at Guantanamo. However, when you get into their files, and you get into the admissions that they made at their combatant status review tribunals and their administrative review board hearings, a sizable number of them admitted that they were trained by a senior al-Qaeda terrorist, as designated by the Obama administration, Abdul Haq.

So when you ask why does it make sense to release these type of guys to our allies or free them to our allies and not tell the full story of who they are and not make sure that there is some sort of full accountability and full transparency on who these guys are, I would say it doesn't make sense.

Just to double back to the Taliban commander, the search commander in Helmand Province that you mentioned, Congressman, Rasoul is a good example of a guy who downplayed his ties to the Taliban while in detention. He is the guy who said that he wasn't really a Taliban member or a fighter or anything of the sort. When he was released, and when he assumed his—and he is the Taliban's antisurge commander in Afghanistan, so he is tasked with fighting U.S. and British troops in Southern Afghanistan. When he basically announced that role, and when the Taliban announced that role, they also taunted us and said basically Rasoul all along was a confidante of Mullah Omar, the head of the Taliban. In fact, he was always a high-level Taliban leader.

So this is the type of thing that happens with these detainees. A lot of times what you will hear are people saying the detainees don't deny, as if that means they are not terrorists or they are not

a threat. Here's a good example of a guy who tried to downplay his ties to the Taliban, and, in fact, he was a Taliban leader all along.

Mr. SENSENBRENNER. And this was the guy that was released from GTMO to the Afghans because of, quote, world pressure, unquote, that was ginned up by people who disagree with the American policy in fighting terrorism. Am I right on that?

Mr. JOSCELYN. That's what the intelligence official in the Fox News piece said, yes. And just to add quickly, a lot of the pressure actually—and this is pretty interesting and probably not a topic to get into fully here today, but a lot of pressure sometimes comes from former detainees who themselves are actually al-Qaeda terrorists. And just recently an al-Qaeda terrorist who—you know, he was released above the objections by the Bush administration, above the objections of the CIA, DIA, FBI, and Department of Homeland Security. This guy's name is Moazzam Begg. He was orchestrating an al-Qaeda video game for the XBox 360 in which detainees at GTMO would shoot their way out of the facility and kill American soldiers, who they called, quote/unquote, just mercenaries.

But this type of pressure a lot of times comes from corridors that are very unsavory and comes from, in fact, our enemy. I would just clarify that.

Mr. SENSENBRENNER. Point made. And I yield back the balance of my time.

Ms. LEBOEUF. The characterization of Moazzam Begg is so far from the reality accepted by any—I mean, it boggles the mind.

Mr. SENSENBRENNER. Well, ma'am, I think you are willing to believe anything that appears in the press that these folks say. And I think what Mr. Joscelyn has said very clearly is that anybody who does that does that at the risk of the——

Mr. NADLER. The gentleman will suspend. If the gentleman wants to comment, I will grant him a minute to comment.

Mr. SENSENBRENNER. No. I am done.

Mr. NADLER. I will grant myself a minute to comment.

Mr. Joscelyn makes unsupported allegations against people based on anonymous sources. I would point out that the United States Circuit Court of Appeals for the District of Columbia Circuit in 2008 said, with regard to the Uyghurs, or with regard to one of them at least, quote. "It is undisputed that petitioner is not a member of al-Qaeda or the Taliban; that he has never participated in any hostile action against the United States or its allies," unquote. This was in the case of *Parhat v. Gates*, 532 F.3d 834, at page 836, a 2008 case.

I would also just make one comment that I hope that Mr. Joscelyn may address himself to this or some others at some point in the further questioning. I am not going to ask the question now because it is not my time, but I want to make the comment that Mr. Joscelyn made a lot of statements about how we have got terrible people at al-Qaeda—terrible people at Guantanamo, which I assume no one disagrees with; that some of them are certainly terrible, maybe all, maybe not, some of them are certainly terrible; but didn't say a word about what we ought to do. And the question that I think this hearing was called to address is what should our—what should our—not policy. What should we do going for-

ward? Should we have military tribunals? If we do, should the military tribunals have this set of procedures or that set of procedures? If we don't have military tribunals, what should substitute? And Mr. Joscelyn, aside from saying there is a lot of bad people there, which clearly there are, didn't say a word of any of this. And I would like to hear at some point what he thinks, given the fact that we need intelligence, and there ought to be people there, what we ought to do. We can't simply say we think they are bad people, somebody thinks they are bad people; therefore, lock them up forever without some sort of due process. That is not American.

Mr. SENSENBRENNER. Give Mr. Joscelyn a chance to answer your barrage.

Mr. NADLER. By unanimous consent, I'd be happy to give him time to answer. It wasn't my time.

Mr. JOSCELYN. I think probably part of the reason for the issue just brought up is because I'm not a lawyer, so I'm not well versed in all legal aspects of all the legal wrangling. My perspective is always from intelligence first and defeating the enemy, and that is the perspective I come from.

So what I tried to highlight in my testimony is that, from that perspective, from that of an intelligence analyst who studies these matters and spent thousands of hours studying the Guantanamo detainees, there are frequently facts left off the table in any of the venues that are being considered for trying suspects. And what I would say is that whatever process we move forward with—and I am not going to solve this answer for the U.S. Government; obviously, there are many Subcommittees and Committee hearings on this. There is a substantial political debate on how to handle all this. I'm not going to be able to wave a magic wand and give everybody a solution to this.

Mr. NADLER. In other words, you have no suggestions.

Mr. JOSCELYN. No. I would say that—basically what my colleague Andy McCarthy has suggested at the Foundation for Defense of Democracies, which is a national security-style court where intelligence is protected, and there are clear rules and guidelines for whoever goes to that court is a reasonable guideline. But I say that as a non-lawyer.

Ms. LEBOEUF. We don't need a suggestion of a system of courts if all you need to do is characterize people as known terrorists, if you want to say that somebody is the worst of the worst, if you want to say that somebody has been shown to be demonstrated.

Mr. NADLER. Thank you.

Next, I now recognize the distinguished Chairman of the Committee for 5 minutes.

Mr. CONYERS. Well, I think this is quite a revealing hearing. Mr. Joscelyn, you are not a lawyer by admission, but you are respectful of judicial proceedings and decisions, I presume.

Mr. JOSCELYN. Certainly.

Mr. CONYERS. And you do follow them in this area in which you rely on intelligence for quite a bit of your point of view. As a matter of fact, you may want to know that we have Members on the Judiciary Committee who are not lawyers who handle themselves quite well among a sea of lawyers. And in the Senate, the Judiciary Committee, the same thing applies.

So you are not suggesting that your comments derive from the fact that maybe some of these folks up for trial fooled the courts, the Federal court system, are you?

Mr. JOSCELYN. I am suggesting that in certain instances you can point to facts that are left off the table, and I don't know why that is. I can't tell you what was going on in the courts' mind. I can just tell you that, as an analyst, I know when a high-level al-Qaeda terrorist is identified by the detainees as the guy who trained them, that is an important fact that should make it into the record. That's all.

Mr. CONYERS. It should be.

Did you read the record?

Mr. JOSCELYN. I read as much as I could.

Mr. CONYERS. Okay. My congratulations. You may have—oh. Do you have access to classified documents?

Mr. JOSCELYN. No. And that is—you know, the bottom line there, too, is I have always admitted that there is a certain line where there is a certain amount of information I can't review as an outsider, but I would say, like the decision that I was just referencing, the information that I was getting at and talking about was not classified. It was available in the unclassified files.

Mr. CONYERS. Thank you.

Then the citation that Chairman Nadler made about referring to a Federal appeals court, did you have some question or suspicion that they didn't quite get it right and understand the nature of the person who was before them?

Mr. JOSCELYN. Again, I think that basically there were certain facts that you can see in the unclassified record which I think are important facts and recognizes they are important facts by—you're talking about the Parhat decision?

Mr. CONYERS. You're referring—yeah.

Mr. JOSCELYN. And which have been recognized as important facts that didn't make it in the case. Keep in mind that the group that trained these guys at Tora Bora, you know, publishes its Jihadist videos on the Web, and you can download them and see what this organization is. So—and this is not—to me, from an intelligence perspective and an analysis perspective, there is really no dispute over what this group is or who some of these guys are. But again, I have said over and over—I am not saying that we are going to lock them away and throw away the key. I am not saying they are the worst of the worst. I'm just saying let's get the facts right. That's all.

Mr. CONYERS. Well, then that means that you question not only the courts, but also the government lawyers trying the case, because you can see into it that obviously some things were hidden from the process and the court that should have been brought out about how potentially dangerous this person was. Is that not correct?

Mr. JOSCELYN. You know, basically I can't tell you exactly why these facts didn't make it in the court's possession. I don't know what the prosecution put forth to the judge.

Mr. CONYERS. You have said that.

Mr. JOSCELYN. But the bottom line is, again, it's just all I'm trying to do is establish a basic factual——

Mr. CONYERS. Let me ask you about the two Supreme Court cases. Do you think that there were things that the Supreme Court didn't know about in these two cases that ruled against our military commission procedures? Were there instances there that made you come to some concerns that you are now expressing about other cases?

Mr. JOSCELYN. You know, sitting here today, I don't have any examples to offer you of anything that the Court must know, no.

Mr. CONYERS. But do you feel that something may have been left out?

Mr. JOSCELYN. I don't feel one way or the other. I would have to review them in depth. It is an empirical question to me, not a——

Mr. CONYERS. You have a lot of talent. I would like to recommend law school to you at some future time, if you—because you seem to be very interested in trying to ascertain the truth in court and in trials. And it seems like somebody is missing something in the cases you reviewed, either the government lawyers or the judge itself.

I ask for 2 minutes more.

Mr. NADLER. Without objection.

Mr. CONYERS. Now, this hearing—I am a lawyer, so I don't want to be confused by what information is coming toward me, but, look, you don't have any answers as to what we should do. But Attorney Pearlstein, whose testimony I was very eager to receive, she says there may be times when you have to just lock them up forever. I mean, forget—maybe we can justify it under the laws of war, or maybe there is something else, but people could be so dangerous that although there are no charges that can be brought, that they may have to be kept. And I would like to turn to our ACLU counsel to help me fathom what her two fellow witnesses are trying to impart to the Judiciary Subcommittee this morning.

Ms. LEBOEUF. Thank you, Mr. Chairman.

First of all, what keeps getting confused in this discussion is that should Congress continue down the road that it began in 2006 after the failure of an executive attempt to create military commissions by reforming the one that isn't good enough that was created in 2006, all to take care of a problem that will not occur in the future, this is not a prospective problem. We are not taking statements under torture anymore. We are not going to do that anymore. Trying to have cases where the trials are dependent upon evidence, some of which was obtained under torture or cruel and inhumane and degrading treatment, is a problem, and it's a problem that should not be solved by creating an entirely new set of judicial procedures which will have no—the problem of novelty and the problem of ultimate—the loss of finality that I talked about, and that will produce the kind of show trial that we see at Guantanamo.

So the solution has to be one case at a time in Guantanamo for the retrospective analysis. Of course, neither the ACLU nor anyone who depends on Geneva's——

Mr. CONYERS. Mr. Chairman, I ask for a sufficient amount of time for the witness to make her statement. And then, in all fairness to Attorney Pearlstein, I mentioned her name, she certainly has got some comment.

Mr. NADLER. Without objection, Ms. LeBoeuf, we will give you enough time to finish your answer, and Ms. Pearlstein to make a comment.

Mr. CONYERS. That's all. And I won't ask any further questions. But I——

Mr. NADLER. Ms. LeBoeuf.

Ms. LEBOEUF. The Administration agreed and the Geneva requires that a court that affords the judicial guarantees recognized as indispensable by civilized people, so that means no indefinite detention. That is off the table. It means no coerced statements. That should be off the table.

Taking a look practically, one on one, at the cases that remain in Guantanamo where there are tainted pieces of evidence is, I believe, going to reduce down to a very small set the really problem cases, and we don't know until we have trials. That is what trials are for.

The Parhat case that Mr. Joscelyn keeps referring to wasn't a trial, it was a habeas proceeding. The government came in and said, we don't need a trial; we agreed that there's not enough evidence to have kept those people. We should never have picked them up in the first place.

So looking at these cases from the point of view of real-world litigators who look at real-world courtrooms, as Colonel Vandeveld and I and the other lawyers in these military commissions can tell you, is that the cases—one by one we take a look at these cases. We will find a way to try them. That is what our trials do. We have Federal courts that try terrorist—the terrorism cases have proceeded.

Mr. NADLER. Ms. Pearlstein.

Ms. PEARLSTEIN. Thank you.

I want to try to be very clear. I do not believe indefinite detention is lawful under any law. I do not believe that detention purely on the basis of some assessment of dangerous is lawful under any law. I do not believe that coercion, coerced testimony, torture, et cetera, are lawful under any law.

What I do believe is, for example, that if there is somebody at Guantanamo currently who was a commander of Taliban forces in battle against the United States in 2002, and I take it that it may be there is some small number of people who fit, for example, that description, that person is, in my view, a classic prisoner of war as that term is defined under the Geneva Conventions, as contemplated, I suspect, even by Congress in the Authorization for the Use of Military Force it passed in 2001. In my view, it is a reasonable and perhaps appropriate interpretation of those two bodies of law, the Authorization of the Use of Military Force together with the Geneva Convention, to recognize that that person's detention is permitted until the end of the conflict in Afghanistan, period. That is what I am suggesting.

Mr. NADLER. Thank you.

The gentleman from Arizona Mr. Franks is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman.

Mr. Chairman, this Administration has made many risky decisions related to terrorism. I an completely convinced that they do

not understand the fundamental mindset and philosophy and ideology that animates jihad. And I am afraid that a lot of the discussions that we have today will be revisited in the future, and I am afraid that jihad will certainly disabuse the Administration of some of their naivete in the future. I hope sincerely with my heart that my fears are unfounded and that I am totally wrong.

However, the proposals covered in this hearing require a great deal of risk. They require us to make ourselves more vulnerable to terrorists, in my opinion. Binyam Mohammed was released by the Obama administration to England earlier this year. Mohammed was a would-be accomplice of the would-be dirty bomber and now convicted terrorist Jose Padilla. Mohammed planned to carry out mass murder attacks in American cities. As has been reported, Mohammed is an Ethiopian-born Jihadist. As terrorist researcher Thomas Joscelyn, the gentleman that I think has acquitted himself very well today, has documented, Mohammed joined al-Qaeda in Afghanistan and met personally with Osama bin Laden and other top al-Qaeda figures. He received extensive, sophisticated terrorist training, and in 2002, when he was finally apprehended in Pakistan, he was almost certainly en route to the United States to conduct attacks with Jose Padilla, who has been convicted since then of terrorist offenses.

Padilla is a notorious—Padilla is notorious as the alleged dirty bomber because he, along with lesser known Mohammed, studied the possibility of constructing and detonating a radiological bomb in an American city. And as Mr. Joscelyn recounts, Mohammed and Padilla, quote, "explored a wide range of possible targets and modes of attack from striking U.S. subways to setting apartment buildings on fire using ordinary gas lines."

Just a short answer, Ms. Pearlstein, if you would. Do you dispute any of the factual assertions that I just quoted regarding Binyam Mohammed?

Lieutenant Colonel VANDEVELD. Actually, sir, may I address that?

Mr. FRANKS. No, sir. I asked her the question.

Lieutenant Colonel VANDEVELD. All right. I just want to point out, I prosecuted Binyam Mohammed, and I know the facts a little bit better than most people.

Mr. FRANKS. All right. Do you dispute any of the facts, sir?

Lieutenant Colonel VANDEVELD. I do. Definitely.

Mr. FRANKS. Which ones?

Lieutenant Colonel VANDEVELD. First of all, the dirty bomb plot was nothing more than downloading a satirical article written by Barbara Ehrenreich and others from a Web site and was dropped in the subsequent refiling of the charges. Mohammed was a drug addict. He is one of life's losers. If you have ever had any connection with him at all, you would understand he wouldn't pose a threat to anybody. The idea that he was going to America, as you put it, almost certainly to conduct terrorist activities is not borne out by the facts. I wish I could get into those because—but I can't because of national security considerations. But the idea that Mohammed is one of the worst of the worst or that he——

Mr. FRANKS. I didn't say that.

Lieutenant Colonel VANDEVELD. Yeah. Well, I know.

Mr. FRANKS. You haven't disputed any of the facts here at all, to make the point, but let me continue.

Ayman Saeed Abdullah Batarfi was cleared for release by the Justice Department, but he has not yet been released because a country willing to accept him has not yet been found. And, according to other reports, U.S. Justice Department has decided to release yet another detainee from Guantanamo, a Yemeni named Ayman Saeed Abdullah Batarfi. Based on Batarfi's own freely given testimony, he was certainly not an innocent swept up in the post-9/11 chaos of Afghanistan, as his lawyers claim. There are at least three aspects of Batarfi's testimony given before his administrative review board hearings at GTMO that are noteworthy.

First, Batarfi admitted that he was an employee of al Wafa, a charity that has been designated a terrorist organization. Al Wafa is discussed in brief in the 9/11 Commission Report as an al-Qaeda front.

Second, Batarfi admitted that he met with a Malaysian microbiologist and authorized the purchase of medical equipment for this individual. This microbiologist is most certainly Yazid Sufaat. Batarfi denies knowing if Sufaat was working on anthrax when they met in 2001.

Third, Batarfi admitted that he met with bin Laden in the Tora Bora mountains in 2001, and he admitted that he had purchased cyanide, but claims it was for dental fillings. He admitted that he stayed at various al-Qaeda and Taliban guesthouses, but says he didn't realize that they were facilities associated with Mr. bin Laden at the time.

Mr. Joscelyn, would you like to expand on any potential challenges you think the release of some of these terrorists represents to America?

Mr. JOSCELYN. Well, you know, I think that part of the problem here is that when you hear people talk about these guys, you hear—a lot of times you hear just the most selective version of facts that fits their case as if their defense lawyers are presenting it. And what I try to do in my research is just try and flesh out the whole picture and say, here's what these guys have admitted to even in the tribunal sessions or administrative review board hearings. Here's what the government says it knows about them from either those sources or other sources. And the bottom line is each one of these cases that you have outlined and each one of the cases, I think, at Guantanamo, as the Obama administration is rightfully doing, it requires an individual judgment.

So I think that basically there has to be judgment made on each one of these cases, how it is handled, what measure of due process is given to the detainees, and how to proceed going forward. So I don't want to provide a catch-all for all the detainees. I think that you don't want to say they are all the worst of the worst. You don't want to say that they are all going to be detained indefinitely. I am not here saying that. What I am saying is that basically, like the terrorists you just outlined that have been cleared for release, there are troubling facts that count against them, and there are substantial facts, and that has to weigh into any decisions made about them.

Mr. FRANKS. Mr. Chairman, it is a difficult situation that we face, but the challenge is here, the real problem here, is that the assertion that the Bush administration got it all wrong. And yet probably, when it is all said and done, the Obama administration will have to face some facts that, because of the challenging circumstances of this, that we'll have something like GTMO or some other detention facility with some type of military tribunal; or the terrorists will be very happy that we have changed it over and given them additional rights.

With that, I yield back.

Mr. NADLER. Thank you. And since that comment was, I think, directed at me, let me just make one comment here, and that is that all these facts about these individual cases which may or may not be true, I don't know, are interesting, but not, in my opinion, terribly relevant to this hearing.

We all admit that there are guilty people at Guantanamo. Some people assert there are innocent people at Guantanamo also. The question before—and not just Guantanamo, in detention elsewhere. The question of the hearing is what procedure a military tribunal, a court-martial, an article III court, a commission—how should we handle the situation, not whether there are bad people. We know that.

Mr. DELAHUNT. Would the Chair yield for a question?

Mr. NADLER. Well, I now recognize the gentleman for 5 minutes.

Mr. DELAHUNT. Okay. Well, I wanted to get extra time. I thought I would sneak it in.

You know, I hear we are willing to accept; other countries are willing to accept. I've had conversations in my capacity as Chair of the Oversight Subcommittee on Foreign Affairs, and there are countries that are willing to accept. They are waiting for the United States to accept. That, I would suggest, is logical.

Mr. Joscelyn, you are an advisor to Mr. Gingrich, correct?

Mr. JOSCELYN. I wouldn't say I am an adviser to Mr. Gingrich. I sent him one memo. It was an advisory memo.

Mr. DELAHUNT. But you indicated in a story that he relied on your research.

Mr. JOSCELYN. Right.

Mr. DELAHUNT. On your analysis. So maybe an advisor, but you send memos to him. Would you agree with his statement that the Uyghurs should all be sent back to China?

Mr. JOSCELYN. You know, that is a tricky topic. That is what Pakistan did earlier this year.

Mr. DELAHUNT. No. I am asking you the question.

Mr. JOSCELYN. I understand.

Mr. DELAHUNT. Do you agree with the gentleman that you have given advice to that it is not an American problem; the Uyghurs should be sent back to China?

Mr. JOSCELYN. Not necessarily.

Mr. DELAHUNT. You disagree with that.

Mr. JOSCELYN. I never argued that. I never argued that they should all be sent back to China.

Mr. DELAHUNT. I am glad to hear that, because clearly since you are a student of China and the Uyghur Autonomous Province, you know what is happening there now.

Mr. JOSCELYN. Sure. Could I have one comment?

Mr. DELAHUNT. No. I ask the questions, you give the answers, because we do have limited time.

You know, I would make the distinction between facts as you recite them and assertions. But I really want to be clear, because I think it is important in terms of your testimony, that your analysis is based upon unclassified information. Did you at any time have access to classified information as it relates to the Parhat case, to the Uyghurs in general?

Mr. JOSCELYN. No.

Mr. DELAHUNT. You did not?

Mr. JOSCELYN. No.

Mr. DELAHUNT. Okay. You are aware that the Court did.

Mr. JOSCELYN. Sure.

Mr. DELAHUNT. You are aware that the Bush administration did.

Mr. JOSCELYN. Sure.

Mr. DELAHUNT. You are aware that the Obama administration did.

Mr. JOSCELYN. I would assume so.

Mr. DELAHUNT. You are aware that the Department of Defense did.

Mr. JOSCELYN. Sure.

Mr. DELAHUNT. And they cleared them for release back in 2003; is that a fair statement?

Mr. JOSCELYN. I don't know that they cleared all of them for release in 2003. I think there were different circumstances. I am not sure.

Mr. DELAHUNT. You are unsure of that fact. Okay.

Do you know how the Uyghurs were apprehended?

Mr. JOSCELYN. The basic outline of the details I can recall offhand, yes.

Mr. DELAHUNT. Okay. Tell me.

Mr. JOSCELYN. Was they left Tora Bora, Afghanistan, during the bombing campaign there in 2001 and crossed the border into Pakistan. Or I believe they were sold over to Pakistani authorities for bounty. Yes.

Mr. DELAHUNT. They were sold.

Mr. JOSCELYN. I can't 100 percent verify that.

Mr. DELAHUNT. You can't verify that. But do you know the amount was that they were sold for?

Mr. JOSCELYN. I do not.

Mr. DELAHUNT. If I said $5,000, would you disagree with me?

Mr. JOSCELYN. No.

Mr. DELAHUNT. So, per Uyghur, it was $5,000. Could you tell me how the Pakistanis made an assessment as to whether they were terrorists or not?

Mr. JOSCELYN. How the Pakistanis themselves made the assessment?

Mr. DELAHUNT. Right.

Mr. JOSCELYN. No.

Mr. DELAHUNT. You can't do that.

Mr. JOSCELYN. I don't have any sources in the Pakistani Government that can tell me that, No.

Mr. DELAHUNT. Neither do I.

In terms of—you're aware, of course, that the Uyghurs are a persecuted minority.

Mr. JOSCELYN. Absolutely.

Mr. DELAHUNT. And that recently the Chinese Government has suggested that a woman by the name of Rebiya Kadeer is responsible for fomenting the unrest that is presently occurring in Northwest China.

Mr. JOSCELYN. I recognize that China has made that accusation, yes.

Mr. DELAHUNT. Are you aware that Ms. Kadeer was nominated for the Nobel Peace Prize on three different occasions?

Mr. JOSCELYN. I was not aware of that.

Mr. DELAHUNT. And they are suggesting that she is responsible for the unrest.

Are you familiar with the Department of State records, human rights report on the treatment of the Uyghurs by the Chinese?

Mr. JOSCELYN. I am—I remember reading some. I don't remember if I read the whole report.

Mr. DELAHUNT. What was the conclusion?

Mr. JOSCELYN. Certainly China has abused human rights routinely in Western China. Absolutely.

Mr. DELAHUNT. So we can agree on that.

Mr. JOSCELYN. Absolutely.

Mr. DELAHUNT. Are you aware of the fact that Communist Chinese intelligence agents were invited by the United States Government during the Bush administration to Guantanamo to interview the 22 Uyghurs that were there?

Mr. JOSCELYN. I have seen that report. And I don't know the exact details surrounding it, but I have seen that report.

Mr. DELAHUNT. You don't know about that?

Mr. JOSCELYN. I don't know exactly what happened or transpired during that session. No. I have seen the report.

Mr. DELAHUNT. Could I have an additional minute?

Mr. NADLER. The problem is that there are 3½ minutes left on the vote on the floor.

Mr. DELAHUNT. I will wait for the second round then.

Mr. NADLER. Thank you.

The gentleman's time has expired. The Committee will stand in recess until the votes on the floor. There is a 15-minute and two 5-minute votes. There are 3½ minutes left. The Committee will stand in recess. I ask the Members to return as soon as the last vote is completed. Thank you. The Committee stands in recess.

[Recess.]

Mr. NADLER. The Committee will come to order again. I thank the witnesses for their indulgence of our recess for the votes on the floor. Hopefully we will be able to conclude the hearing before there are more votes on the floor.

And with that, I will recognize the gentleman from Texas Mr. Gohmert for 5 minutes.

Mr. GOHMERT. Thank you, Mr. Chairman.

I do appreciate the witnesses. I know everybody's motivation here is out of an intention to preserve America that we hold dear. Civil rights are so critical, and I appreciate the protection of those. We have had some problems with that in recent years. But when

it comes to those who are part of a group who have declared war unto us or against us, it changes everything.

And I keep hearing people talk about—including some of you all—referring to this American tradition of due process. And my friend from Massachusetts had indicated you can bring these guys into supermax prisons here in the United States, and we wouldn't have to worry about them escaping. And I think he is right about that, but there are other problems, too.

These guys are good at recruiting terrorists, and when you have a potential virus that can kill the body, you shouldn't voluntarily bring that virus into the body so you can determine whether or not it may be lethal. That is not the way to do it. If you can examine it outside the body, that is the way to go.

So when we—and I heard witnesses say we have had commissions with mixed results. Well, Obama stopped commissions that were ongoing in the middle of the trial. You talk about tough on somebody. Talk to those families of victims who were hoping they would get closure, and this President stopped those in the middle of them. And I would readily admit, I believe that when President Bush created his own commissions without coming through Congress that it was—as the Supreme Court later said, that was not proper constitutionally. So it came through this body, and we had the commission set up, and that was a more appropriate way to do it.

And then, as Chief Justice Roberts pointed out in his dissent in the Boumediene case, the Supreme Court didn't take yes for an answer. And then they didn't take yes for the answer, and that is why Justice Scalia said you are trying to create criminal justice requirements for due process on the battlefield. This is going to cost American lives. I couldn't believe Scalia had the nerve to say that. I like the guy so much.

But he is right, you can't require our people in harm's way to go out and have people shooting at them and think, uh-uh, I had better go get the forensic kit and do DNA testing and look for hair, fingerprints, look for casings. You are fighting a war.

The American traditions are due process when people have declared war against us. And let me just read you. This is Khalid Sheikh Mohammed. You want to talk about interpreters, he didn't need one. This guy is smart. He is well versed in the Qur'an, and I would hope that you have read this. He filed it on behalf of himself and the four other defendants.

But some of his quotes were: "In God's book, he ordered us to fight you everywhere we find you, even if you were inside the holiest of the holy cities, the mosque of Mecca, the holy city of Mecca, and even during sacred months. In God's book, verse 9, al Tawba: Then fight and slay the pagans wherever you find them, and seize them and besiege them and lie in wait for them in each and every ambush."

He goes on. He says: "So our religion is a religion of fear and terror to the enemies of God: the Jews, the Christians, pagans. With God willing, we are terrorists to the bone. So many thanks to God."

He said: "We will make all of our materials available to defend and deter and egress you and the filthy Jews from our country."

He says also: "We fight you and destroy you and terrorize you. The jihad in God's cause is a great duty in our religion. We have news for you. The news is you will be greatly defeated in Afghanistan and Iraq, and that America will fall politically, militarily, and economically. Your end is very near. And your fall will be just as the fall of the towers on the blessed 9/11 day. We will leave this imprisonment with our noses raised high in dignity."

These are people who have declared war on us. That is a different standard. And I know a little about military justice, too, having been 4 years involved in it. I know a little about article 32, general court-martial. I have appealed capital murder convictions. I have been a prosecutor, a judge, a chief justice. So I know a little bit about this stuff.

But when you are talking about people who have declared war against our way of life, that American tradition of due process is different. And 5 minutes is just not much time to do anything, but let me read you, going back to the very start of the American tradition of due process.

George Washington, when he was fighting the Revolution for liberty, he said: "As the season is now fast approaching when every man must expect to be drawn into the field of action, it is highly necessary that we should be preparing our minds as well as everything necessary for it. It is a noble cause we are engaged in. It is the cause of virtue and mankind. Every simple advantage encumbered to us and our posterity depends on the vigor of our exertions. But it might not be amiss for the troops to know that if any man in action should presume to skulk, hide himself, or retreat from the enemy without the orders of his commanding officer, he will be instantly shot down as an example of cowardice."

Even if he were going to the latrine or something, they weren't going to have a trial, they were going to shoot them, because liberty is at risk. And when your liberty is at risk, we have the constitutional duty to provide for the common defense. And I am afraid history will judge us forcefully someday as it has all great civilizations that fail by saying they lost the stomach to defend their liberty.

Thank you, Mr. Chairman.

Mr. NADLER. Does the gentleman have a question for any of the witnesses? I will indulge him with the extra time.

Mr. GOHMERT. I do appreciate that.

I would like to ask, do any of you feel that the trials of Nuremburg also violated the American tradition?

Lieutenant General VANDEVELD. No. But they were obviously distinct, because they were created by treaty among the Allied Powers. They were presided over by judges who were trained in the law. And even though they had allowed for hearsay, the opinions had to be carefully explained. And they were in a much better position to evaluate the use of hearsay than would, say, a commissions panel.

The other thing I wanted to say——

Mr. GOHMERT. So were they not part of the American tradition?

Lieutenant Colonel VANDEVELD. They were part of the international tradition. But the other thing I did want to say——

Mr. GOHMERT. You realize how many things were violated, you all talked about are violated with what's being done now, right? You obviously are familiar with the trials at Nuremburg.

Lieutenant Colonel VANDEVELD. Yes, of course.

Mr. GOHMERT. And you understand they didn't provide a lot of the rights that you're saying are absolutely part of our American tradition of due process, right?

Ms. LEBOEUF. They did not accept coerced statements. They did provide counsel and all resources necessary for defense counsel. They did—and curiously——

Mr. GOHMERT. Are you aware of all the things they didn't provide though?

Ms. LEBOEUF. The system was not—there certainly are not—no—to my memory, there is nothing that was not provided in Nuremberg that I think would now be characterized or then be characterized as indispensably—to civilized nations as an indispensable—as a part of the justice system. And the comment about Nuremberg that is relevant to the military commissions trial is the one made by General Hartman, Thomas Hartman, the discredited former legal counsel to the convening authority, who said to the prosecutors: These military commissions at Guantanamo will not be like Nuremberg. There will be no acquittals.

You cannot set up a system to guarantee conviction.

Mr. NADLER. Thank you.

The time of the gentleman has expired.

The gentleman from Georgia is recognized for 5 minutes.

Mr. JOHNSON. Thank you, Mr. Chairman.

I am troubled by the fact that the Members or the witnesses who were selected by the—on this side of the aisle are all legal practitioners, if you will. They are lawyers, and they have a deep and healthy respect for the rule of law. And I know that you do also, Mr. Joscelyn. But I really think that it would have been great had the other side selected someone who was a lawyer who could support the status quo or defend any allegations that these military commissions have not—have, in fact, been very—they have been good. So we don't have that today.

I do appreciate you for being here, Mr. Joscelyn. And you are an intelligence analyst; is that correct?

Mr. JOSCELYN. I would say intelligence and counterterrorism analyst. But, yes.

Mr. JOHNSON. Okay. And so I respect your views, even though I will say that you did make allegations against kind of like a broad brushstroke against everybody being held in detention in Guantanamo, and with no evidence other than what you say admissions that the detainees have made. And I don't think, as most lawyers would agree, that these kind of statements that are rendered under duress and are rendered after being tortured are reliable. I don't think they are. They are inherently unreliable.

And so what I do want to ask, though, is, Ms. LeBoeuf, you are opposed to the military commission scheme that is already set out. And you are also, Lieutenant Colonel, is that correct?

Lieutenant Colonel VANDEVELD. Yes, sir.

Mr. JOHNSON. And what would be the alternative that you would recommend?

Lieutenant Colonel VANDEVELD. My alternative, if I may go first and I will be as brief as possible, is to urge those who can be tried in article III courts—and I understand the interagency task force established by President Obama's Executive Order is still conducting reviews. The reviews were supposed to have been completed in May; now the deadline has been extended to July. I heard general counsel Jay Johnson testify yesterday that they may not even be done by the end of the year. And so if they can be identified for trial in article III courts, they should. But many of those who are culpable or may be culpable at Guantanamo are foot soldiers, people who were captured in the process of planting roadside bombs and the like. They can be court-martialed.

Mr. JOHNSON. And none of these people have been able to give a—they have been so low-level, the overwhelming majority of them, that they were not able to even produce a location for Osama bin Laden after being repeatedly tortured.

Lieutenant Colonel VANDEVELD. That's correct. Those who were his bodyguards dispersed after the bombing began in October 2001. And obviously we received no actionable intelligence from them at the time.

Mr. JOHNSON. Okay. I'm going to stop you right there. I wish I had more time, but I want to get back to Ms. LeBoeuf.

Ms. LEBOEUF. Thank you, Congressman.

I think that the answer is trials in Federal courts, in article III courts, as the Obama administration said in its order in the first week, are the way to go, and that the practical—or rather the hypothetical problems that are raised again and again are simply not—they dissipate when you take a look at these cases, when litigating lawyers get in a room and take a look at the evidence. And the statement by the 9/11 conspirators, alleged conspirators, read by the Congressman from Texas, you know, led me to think that's not a coerced statement, that's a voluntary statement. It seems to me that a prosecutor wouldn't have a real tough time convicting somebody based on that sort of evidence.

I mean, I don't want to suggest that any conviction is an assured thing. I'm a defense lawyer. But the evidence—the process in Federal court has proven itself to be capable of trying, protecting all the evidence, identity of friendlies and intelligence operatives, to put the evidence on, to do it in a nuanced way. Juries don't see classified evidence, and neither do the defendants. We've convicted a bunch of people. They're already locked up.

Mr. JOHNSON. Well, what about the issue of national security secrets being revealed in a civilian trial setting?

Ms. LEBOEUF. That hasn't happened. We have the Classified Information Procedures Act, CIPA as its known, that has proven itself again and again to be a flexible and successful tool for assessing whether or not classified evidence can be introduced in a court of law. And we've had case after case after case.

Mr. NADLER. The time of the gentleman is expired.

I now recognize the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman.

I want to thank all the witnesses for your testimony. I missed some of it, as you well know, and I regret that, but we have multiple duties on this Hill.

One of the things that comes to mind to me is the questions or challenges as to the credentials of one of our witnesses Mr. Joscelyn. And it occurs to me this question: Mr. Joscelyn, or anyone in the panel, but especially you, would you know that whether if the President of the United States were to appoint you to the Supreme Court of the United States, would there be any qualifications that you would be missing that would disqualify you from such a role?

Mr. JOSCELYN. From the Supreme Court of the United States?

Mr. KING. Yes.

Mr. JOSCELYN. I would be the last person to be expected to be appointed to the Supreme Court of the United States.

Mr. KING. You would be ahead of me, Mr. Joscelyn. But you don't have to be a lawyer to be appointed to the Supreme Court.

Mr. JOSCELYN. That may be. I don't know either way.

Mr. KING. That's my point. So for someone to be indicted for not being a lawyer, however that might be used within the vernacular of this Committee, I think is something that most of the American people would object to that concept. We have an awful lot of smart people that can bring a lot of information to bear that have not graduated from law school or passed the bar.

Mr. JOHNSON. Would the gentleman yield?

Mr. KING. I would yield.

Mr. JOHNSON. Okay. Just a short statement. I'm not in any way downgrading or low-rating laypersons, but we have a defense lawyer, we have a prosecutor, and we have a—I mean, we have three lawyers here. And my only point was that we should try to do harder on your side to bring people who match the requirements of this hearing.

Mr. KING. Reclaiming my time. And I appreciate his point, and I hope he appreciates mine, that I simply want to illuminate the other side of the argument. I don't contend that the gentleman doesn't have an argument. I just illuminate the other side, which is that one could be appointed to, and some have been appointed to, the Supreme Court, confirmed and served honorably in that capacity and not as lawyers. So I make that point.

Then I look at the times that Congress has tried to comply with the decisions of the Supreme Court and have passed first the Detainee Treatment Act, and then we saw the Hamdan case, and then we did the Military Commissions Act. Then we saw the Boumediene case.

And this Congress has gone through, jumped through a lot of hoops to try to accommodate some judgments of the Supreme Court. And, in fact, we had article III, section 2 strip the Court, the Supreme Court, of having any jurisdiction over such acts, and yet—and directed the exclusive appeals to go to the D.C. Circuit where the D.C. Circuit found with the Congress and with the bill that was signed by the President at the time.

And so I wonder sometimes if the Supreme Court should go back and look at article III, section 2. Justice Scalia in his opinion in the Hamdan case wrote that the cases of article III, section 2 stripping are legion in the history of the United States, a very well-founded principle. And I want to make the point that we are here jumping through more hoops in an attempt to try to accommodate the ne-

cessity for national security at the same time we are attempting to accommodate a Supreme Court that I think has outstepped its bounds more than once with regard to these issues that have to do with the detainees.

And furthermore, Guantanamo Bay would not be an issue if it hadn't been for the fact that Amnesty International, a lot of other organizations around the country and the world had decided to make it a political issue. I'm among those who have been down to visit Guantanamo Bay, as has Mr. Johnson, and we are—what I saw down there was a location that most people who are incarcerated anywhere in the world would want to trade with them; air-conditioned cells, private rooms, menus with nine different items a day to choose three squares from, Korans for everybody who wants one, no Bibles for anyone because it ticks off people who want a Koran. The list goes on and on and on.

And so we are in the business here now of trying to accommodate a political issue, and I believe that President Obama has made a decision, and it was 2 days after he was inaugurated that he signed the Executive Order, and it has been since developed to be more complicated. Now we're trying to jump through it.

But the Military Commissions Act, to give authority to another Committee to sort these inmates out, the worst of the worst, and we have records of recidivism. And I have in my hand a press release from just last July 7. It's a Fox News article. Mullah Zakir, who was, I guess, a former inmate of Guantanamo Bay, was released because apparently he was not a risk, and now he rns out to be a commander for the Taliban in Afghanistan. And, you know, he was no worse than anyone else being held at Gitmo is what one official down there said. Well, now he is a commander of the Taliban.

One in seven recidivism rate roughly is what we saw when we turned the people loose who were the least risk to the American people. And now we have the worst of the worst. And the gentleman Mr. Joscelyn has evaluated these 242 remaining detainees.

I would ask unanimous consent for an extra additional minute, Mr. Chairman.

Mr. NADLER. Without objection.

Mr. KING. Thank you, Mr. Chairman. I appreciate that.

And this evaluation that I see shows that 227 out of 242 have exhibited signs that they are likely to go back into battle with the United States.

So I don't know how we gain anything by handing someone over to a committee to be determined whether they're going to go to the United States where they can be released into the streets of the United States, or be tried under the Commissions Act, which I'm actually for that, and I'm for doing it at Gitmo. But handing them over to NATO, I'll just tell you that in the end there will be innocent people who will die at the hands, and are, I think, today, dying at the hands of those that have been released from Gitmo. This is a political decision, not a prudent one, and there will be more that will, and among them——

Mr. DELAHUNT. Will my friend yield for a question?

Mr. KING. I yield to the gentleman from Massachusetts to a question.

Mr. DELAHUNT. I thank the gentleman for yielding.

I don't think there's any debate that there are some people that are guilty, and I don't believe there's a debate that there are some people who are totally innocent. What do we do about those that are totally innocent and are currently detained or have been detained? What's the gentleman's answer to that query?

Mr. KING. According to this chart that I'm looking at, those that don't show indications, that would be about 15. And I think we adjudicate them all through the review tribunals, the combat review tribunals. And if they are determined under that to be not guilty of the charges brought before them, then we have to repatriate them back to a country that will take them, most likely their country of origin.

Mr. DELAHUNT. Let me ask you this. If their country that they would be repatriated to practices systematic torture, and in cases such as China, for example——

Mr. KING. The Uyghurs.

Mr. DELAHUNT. The Uyghurs, there is a high likelihood that they will be executed. If we do not accept some, why should we expect other nations to accept any?

Mr. KING. Well, I would say to the gentleman from Massachusetts that any other nation that makes that argument, and some of them have made that argument, any nation that—we are facing this. Germany, for example, has said until the United States accepts some, we won't accept any, because if they aren't safe enough to come to the United States, then they aren't safe enough to come to Germany. And that applies to a number of other countries in the world. And our argument then needs to be, well, if we have to accept them into the United States, why do we need anyone to accept these inmates from Guantanamo Bay?

Mr. NADLER. If the gentleman will yield. On the assumption in a given case that someone is totally innocent. You can't hold them in jail forever if they are totally innocent, can you?

Mr. KING. These individuals were picked up on the battlefield.

Mr. NADLER. No, no. Excuse me. Some of them were picked up near the battlefield, and some of them weren't picked up anywhere near the battlefield. Many of them were picked up on the battlefield, but by no means all.

Mr. KING. And reclaiming what time I might have, I would submit that we have a different understanding of the battlefield.

Mr. DELAHUNT. Mr. Chairman, I would ask that the gentleman get an additional several minutes.

Mr. NADLER. The gentleman is granted some additional time at the Chair's discretion.

Mr. KING. This will be my first experience being granted an undetermined amount of time.

Mr. DELAHUNT. Well, we want you to have every experience possible.

Mr. KING. Let me just briefly compliment the gentleman from Massachusetts on his sense of humor, and now he's deploying it. But I would submit that the battlefield is a 360-degree battlefield. It's a different battlefield than the kind of battlefield that has lines of——

Mr. NADLER. Reclaiming——

Mr. DELAHUNT. Mr. Chairman——

Mr. NADLER. Ms. Jackson Lee is waiting, too. Reclaiming the Chair's time, or rather the Committee's time. We've heard your answer. Thank you. The gentleman's time is expired.

The gentlelady from Texas.

Mr. KING. And I would be happy to yield back then.

Mr. NADLER. Thank you.

The gentlelady from Texas.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Ms. LeBoeuf, let me pose the question to you that had been framed by my colleague from Iowa, and the framing of it is that we don't care about the security of this Nation. I think the ACLU has heard that refrained quite frequently and have been challenged for what seems to be by some opinion as overreaching, using the Supreme Court to, in fact, provide insecurity for the United States.

So help me understand, though you may have said it—I know that when it is repeated, more facts come to mind—the commitment that you thought you had with the present Administration, the previous announcement, and then ultimately the commitment that you want to have to keep that position; and what changes, secondarily, you would want to see in a military commission; and thirdly, how do you make the argument that you are not making this country less secure?

I also will say to you that I, too, have been to Guantanamo on many, many occasions. I went to Guantanamo when tents were there. So it is a considerably more improved facility, which I would hold that this is American, meaning that this is who we are, these are our values, so we're not doing anything extraordinary. But I think the underlying premise has to be that we are holding individuals under a creation, a creature of ours, military commissions, and the issue is can we secure intelligence, can we secure America if we do something different?

If you would start from the commitment and work your way through three questions that I have.

Ms. LEBOEUF. Thank you, Congresswoman. I'll do my best, and I may need a refresher. I want to make sure I do answer them.

First of all, "safe and free" is the slogan we have used from the beginning, because we need both. And safe means safe to be us. I find it interesting that the Congressman from Texas believes that if terrorists are locked up among American criminals, it will be the terrorists who recruit, when, in fact, perhaps it will be the criminals who were born and raised in a democracy who will recruit. One never knows.

Ms. JACKSON LEE. Might I interject, because my time is short. If you can go back to the original question. And I appreciate the overview as I gave you the overview. I would appreciate what was the commitment you had from the Administration.

Ms. LEBOEUF. Well, I mean, the commitment we had from the Administration is the commitment that President Obama gave to the United States, to the electorate that Guantanamo would be closed. He also spoke against the military commissions. And when the military commissions were put on hold immediately after the Administration was—after the inauguration, which I witnessed from Guantanamo, we believed that that was going to be the end.

Instead we have hearings next week. And while many Members of Congress have been to Guantanamo, I do not believe any Members of Congress have witnessed a military commission proceeding.

Ms. JACKSON LEE. And let me say that I probably have not witnessed it, but I have been briefed on it, and obviously I don't believe we have sat in on it. So let's go to the next question then.

What changes do you want in what is now still existing in military commission beyond the elimination? There is an elimination, meaning to end, and what would you put in place?

Ms. LEBOEUF. Congresswoman, I think that what's wrong with what the past Administration did and what this Administration seems to be starting to do is turning this upside down. You don't settle where these people belong by figuring out what end you want. You don't say, I want this guy to end up locked up for life, so therefore I'm going to look at the evidence and say maybe he would get acquitted in a Federal court, so I'm going to put him in a military commission where he can get less justice, or I'll put him away for life with no justice, no review, and call it preventive detention or indefinite detention under some other theory. That's what can't be done.

Mr. NADLER. Would the gentlelady yield for a moment?

Ms. JACKSON LEE. I would be happy to yield to the Chairman.

Mr. NADLER. Thank you.

In other words, I was quoted as saying the following, and tell me if you think it's a just definition of what we seem to be going toward: that we're going to divide the prisoners into different classifications. Those who we have good evidence against will get fair trials. Those who we have weak evidence again, we'll give less fair trials. Those we have no evidence against, we'll just keep them locked up for preventive detention without any trial at all. In other words, we'll fit the process to the result and, in fact, have kangaroo justice. Is that a fair description of what we seem to be going toward?

Ms. LEBOEUF. It's absolutely fair and far more eloquent than I was being. Thank you.

Mr. NADLER. I thank you.

And I thank the gentlelady, and I yield back to her.

Ms. LEBOEUF. And your question about how to reform military commissions——

Ms. JACKSON LEE. I'm sorry, I was getting ready to say so it's an upside down hybrid in essence. As the Chairman has indicated, there is a way of selection that has sort of intervening, I think, a nonstatutory, nonconstitutional process which is I'm just going to look at what I have and go eeny, meeney, miny, moe to a certain extent, because it is subjective to say what evidence is and who goes and who doesn't. But I would ask then on these military commissions would you believe that to be an effective going forward; would you believe that could be effective?

Ms. LEBOEUF. No, in a word. Of course, theoretically the military commissions can be modified, can be amended to make them fair courts, but once they are truly fair, they're going to look just like Federal court, and then there's no reason to accept the taint of the past unfairness of military commissions. Why drag them down when there's no need?

The only benefit that military commissions give you is that it's a second-rate system of justice, and you're going to get more convictions. If you want to accept that, then, you know, I mean, that answers itself. Yes, you can—the changes that are proposed are primarily cosmetic, particularly because of the burdens on defense counsel; not just resources, but choice of counsel. But if you proposed full change that would make this a Geneva-friendly—a real court of law, it would look like Federal courts. Why not put them in Federal court?

Ms. JACKSON LEE. And how do you protect America? This is my last question, Mr. Chairman, and I will yield back. How do you refute that we are releasing terrorists into our society?

Ms. LEBOEUF. Well, the analysis that I have seen, not done by Fox News, but done by Seton Hall's very able academic committee, shows far smaller numbers of people who may be engaged in behavior that's inimical to the United States. Of the 500 people or so that the Bush administration released with no process whatsoever, it can be presumed that a few are making trouble, but that's a small few, and that's no reason to turn justice upside down. Senator McCain said it the best: It isn't about them, it's about us. Safe to be us, that's what we need.

Mr. NADLER. The gentlelady's time is expired.

Ms. JACKSON LEE. I yield back. Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

And before we conclude the hearing, unlike every other questioner who we indulged with a couple of extra minutes, we cut off Mr. Delahunt rather sharply before because we had to go for a vote. So I will recognize Mr. Delahunt for a few minutes now if he wishes to.

Mr. DELAHUNT. Well, Mr. Chairman, this has been a very good hearing, and I'm going to have a hearing in front of the Foreign Affairs Committee where my intention is to invite many of the same witnesses.

I would like to address some questions to Mr. Joscelyn. Can you identify Mr. Hasan Mahsum.

Mr. JOSCELYN. Mahsum, yes.

Mr. DELAHUNT. Who is he?

Mr. JOSCELYN. He was a former leader of ETIM/TIP. That's the Eastern Turkistan Islam Movement/Turkistan Islam Party. And he reportedly died in northern Pakistan, I believe, in 2003.

Mr. DELAHUNT. Right. Did he—was there information regarding any relationship that he would have had with al-Qaeda or the Taliban?

Mr. JOSCELYN. Mahsum's story is admittedly more murky than Abdul Haq's story, and that's why I focused my analysis on Abdul Haq.

Mr. DELAHUNT. Well, let's focus on the gentleman who purportedly died. What do you know about him and any statements that he might have made regarding al-Qaeda and the Taliban?

Mr. JOSCELYN. Well, I mean, first of all, I don't know that he made any statements regarding al-Qaeda and the Taliban.

Mr. DELAHUNT. You don't.

Mr. JOSCELYN. I don't know of anything he said specifically.

Mr. DELAHUNT. You don't.

Mr. JOSCELYN. No. I mean——

Mr. DELAHUNT. You're not familiar with an interview that he gave on Radio Free Asia?

Mr. JOSCELYN. Are you talking about an interview where he denied any relation with al-Qaeda himself?

Mr. DELAHUNT. That is exactly what I'm referring to. Are you familiar with it?

Mr. JOSCELYN. I didn't remember it offhand, but now you're reminding me of it.

Mr. DELAHUNT. I'm glad I could refresh your memory.

ETIM—first of all, let me ask you this. I noticed just now that your biography indicates you received your bachelor's degree in economics.

Mr. JOSCELYN. Right.

Mr. DELAHUNT. How did you come to become an intel agent?

Mr. JOSCELYN. Well, I'm not an intel agent, I'm an intel analyst.

Mr. DELAHUNT. I mean, an intel analyst, right.

Mr. JOSCELYN. It was an entrepreneurial endeavor after 9/11 that I started.

Mr. DELAHUNT. Have you been to the Uyghur—the autonomous Uyghur territory.

Mr. JOSCELYN. I have not.

Mr. DELAHUNT. Have you been to China?

Mr. JOSCELYN. No.

Mr. DELAHUNT. Do you speak Mandarin?

Mr. JOSCELYN. I do not.

Mr. DELAHUNT. Do you speak Uyghur?

Mr. JOSCELYN. No.

Mr. DELAHUNT. Let's talk about ETIM and this camp. How big was the camp?

Mr. JOSCELYN. How big in what sense?

Mr. DELAHUNT. How many men were there?

Mr. JOSCELYN. From what I've read, a few dozen at a time.

Mr. DELAHUNT. A few dozen at a time, okay.

It would appear from all of the transcripts that I've read that are unclassified that there's a consistent theme that those men that were there fled China because of persecution. Have you read similar statements coming from them?

Mr. JOSCELYN. I have read that some of them have said that, yes.

Mr. DELAHUNT. Okay. Anyhow, let me just read into the record, Mr. Hasan Mahsum may have a relationship—this was a question that was posed to Mr. Parhat. Do you know anything about this? Mr. Parhat said, I don't think so. The people in Turkestan will not associate with al-Qaeda.

Now, you're familiar with the form of Islam that the Uyghurs practice, correct?

Mr. JOSCELYN. I don't think there's one form of Islam Uyghurs practice, from my readings on the topic.

Mr. DELAHUNT. Well, in terms of your readings, which one seems to receive the preference, if you will, by a vast majority of the Uyghurs?

Mr. JOSCELYN. Certainly not the Jihadist Islam as practiced by the ETIM.

Mr. DELAHUNT. And ETIM, we had a hearing in my committee where scholars, Uyghur scholars, people prominent in the community, had never heard of ETIM. And there's still some—you used the term "murky." Let me suggest that it's murky, but let's grant that there is an ETIM. We'll see you in front of my committee——

Mr. JOSCELYN. I'll be happy to.

Mr. DELAHUNT [continuing]. Where we will welcome you.

And let me just say to you, Colonel, you have my respect.

Mr. CONYERS. Mr. Chairman.

Mr. NADLER. I thank the gentleman.

For what purpose does the Chairman seek recognition?

Mr. CONYERS. For the usual reasons, to have the last conversation with these very energetic and stamina-contained witnesses that have been with us today.

Mr. NADLER. The gentleman is recognized.

Mr. KING. Mr. Chairman.

Mr. CONYERS. Oh, I'm sorry. Steve King has come in, unbeknownst to me.

Mr. KING. I would just ask if the Chairman would yield to an inquiry.

Mr. CONYERS. Of course.

Mr. NADLER. Which Chairman?

Mr. KING. Well, I asked the Chairman of the Subcommittee actually.

As I am watching this second round take place de facto, I would like to have the Chairman of the overall Committee have the last word. And so if we're going to do a full second round, I would appreciate the opportunity.

Mr. NADLER. Yeah. I hadn't intended to do a full second round, but I could not say no to the Chairman of the full Committee, so let him proceed. And if you want to be recognized, I'll recognize you.

Mr. KING. Thank you, Mr. Chairman.

Mr. CONYERS. Well, thank you very much. I thought that there was going to be a second round.

I merely wanted to go through these four excellent witnesses today, all with slightly different viewpoints. And I would like to ask Colonel Vandeveld his feelings now about the issues that are attempting to be resolved here. First, most people believe that the military commission should be abolished. Secondly, and this is my impression, secondly, many people don't think that they can be perfected. And this goes against some of the Senate proposals by my good friend, the senior Chairman of the Armed Services Commission, from Michigan. And third, there still seems to be some lingering problem that I'm sorry I haven't resolved since I heard it that there may be a justifiable reason to keep people in prison when we don't have any charges to bring against them; they're bad people, we think they may be bad people, or they were bad people and we can't prove it, whatever the reason. And from a distinguished member of the bar like Ms. Pearlstein, whose overall testimony I find quite important and relevant, I just have a little bit of doubt as this hearing closes down as to what kind of circumstances could there be that a person can't be tried in a Federal

court or tried by a military court-martial? What is their problem, and what are your impressions about the comments?

This is the period in which we allow you to reflect upon statements that you've heard from your fellow witnesses that you might want to share with us today that either interest you or concern you.

Lieutenant Colonel VANDEVELD. Thank you, sir.

I was struck when Mr. King spoke about the difficulty Congress is having with complying with the Supreme Court's various orders regarding the commissions. In fact, there have been four Supreme Court cases, and the government's position has not prevailed in each situation.

It seems to me that if Congress wanted to save—and I don't mean to be flip by saying this, but if Congress wanted to save itself a lot of work, it could simply abrogate the military commissions entirely, and that would permit military courts-martial to go forward, which have already been tested, which are well accepted. And as I say, those who, for security reasons or reasons of national security, protections of sources and methods, have to be tried under more stringent circumstances can be tried in article III courts. And so I see a system already in place, two systems already in place, for dealing with the detainees at Guantanamo.

As far as preventive detention goes, prolonged detention, it's been my experience, based upon my review of evidence at Guantanamo, is that most of the evidence of someone's future dangerousness is derived either from statements by the detainees themselves who engage in braggadocio or fellow detainees who decide they want to curry favor with the prison officials and denounce somebody. I don't know of any reputable psychiatrist who would testify in any court of law that somebody—they could predict with certainty about someone's future dangerousness.

And I'm always reminded in that respect of Dick Cheney's comments in 1985 when he was a Member of Congress that Nelson Mandela should be continued to be held at Robben Island because he was a terrorist. And he reaffirmed his commitment to that position after Mr. Mandela was awarded the Peace Prize in 1994. So clearly, if a decision like that is left up to the executive, there is also the possibility of human error. If it's left up to courts—and I'll be finished up in 2 seconds—if it's left up to courts, then we find ourselves in the same position. As we know from cases like Judge Samuel Kent, judges are human, they make mistakes. We know from the 5-4 decisions that consistently come out of the U.S. Supreme Court that judges have an ideological bias, and I don't see how that's avoidable.

So I would urge this Committee to abrogate entirely, repeal the Military Commissions Act and restart courts-martial and article III proceedings for those cases that need it, and I thank you.

Mr. CONYERS. I thank you very much.

With the indulgence of the Chair, I would like to ask the same question of our ACLU counsel.

Ms. LEBOEUF. I think it's been clear that the two lawyers at this table who have either witnessed or been at the commissions do not think that their continued existence is a wise course, that they cannot be made fair, and they cannot be made to look fair.

We hear a lot about arrests on the battlefield and Miranda on the battlefield. This is a distraction. Most of the people at Guantanamo were not arrested in battlefields; they were arrested in apartments. And Miranda is not a question; voluntariness is the question.

We can't hide from what the commissions were set up to do, not just try people with tainted evidence, but hide the details and identities of those who obtained that tainted evidence, to hide the details and the identities of torturers. And if that's the goal, the result will be illegitimate.

There is no system under our law that permits us to put people—to deprive people of their liberty without process of law. You can't do it. In war, when it is a legitimate war, and there are prisoners of war, that's a different issue, the hypotheticals that Ms. Pearlstein gave, perhaps if it applies to anyone at all at Guantanamo, if indeed it is a legitimate war. But we can't back away from what we are set out to do here. And what I believe Congress has set out to do is figure out a way to assess the cases at Guantanamo with a system of law that we and our allies can rely upon, and that is doable.

Mr. NADLER. The gentleman's time is expired.

The gentleman from Iowa is recognized for 5 minutes.

Mr. KING. Thank you, Mr. Chairman.

Mr. CONYERS. Would Steve King allow me just one?

Mr. KING. I would be happy to, Mr. Chairman.

Mr. CONYERS. You see, I feel very badly because I got the feeling intuitively that Attorney Pearlstein wanted to get in on the discussion since her ideas came up. And it seems unfair of me to ask them and not her.

Ms. PEARLSTEIN. Thank you. Thank you very much. I appreciate it.

Mr. CONYERS. I thank Mr. Steve King of Iowa.

Ms. PEARLSTEIN. And thank you, Congressman, as well.

I'll be brief. First, to clarify, I've also been to Guantanamo, observed the military commission proceedings. I spent a year and a half of my career working to get access to the commission proceedings and was in the first team of human rights observers to go to Guantanamo to observe them. And I could not concur more strongly with Lieutenant Colonel Vandeveld and Ms. LeBoeuf that the commissions to date have been, as I said in my testimony, a gross failure of law and policy. There is nothing that I have said in my written or oral testimony that should indicate to the contrary. In fact, I think I've been quite clear that I disagree profoundly that these commissions should be continued.

What should be done with respect to the resolution of the cases at Guantanamo? I very much hope that with respect to the Chairman's characterization of the approach that we are on the way to taking is wrong, if that is indeed the approach, it would be not only contrary to law, but an embarrassment to the United States.

What I think we should do, if I could wave a magic wand and set policy here, is divide the detainees into two categories with a very limited exception as I set forth for a third. Category 1 is that the people who should be prosecuted who have done something wrong should be prosecuted in article III courts. I continue to be-

lieve that's possible. The President and the Senate Armed Services Committee appeared to disagree with me, and that is why I have offered recommendations for, if they are to pursue the course of military commissions, how I think they can do that most effectively.

A second category are the people that should be released or transferred, either because they have done absolutely nothing wrong or are not combatants of any kind. And even the Bush administration before it left identified some remaining 50 to 60 people who fit that category, and I understand those people are in the process of being released or transferred now.

I believe that there is a limited, very limited, third category. A person who commanded Taliban troops in battle, for example, in 2002 could be transferred to the Afghans for continued detention, or I think could be transferred by the United States for continued detention. Do I think that's a wise course? I think it comes with tremendous strategic costs to the Administration and the United States in light of the policy course and the unlawful course we have pursued in the last 8 years. We are now behind the ball in protecting human rights internationally and abiding by our own law that not only jeopardizes and has jeopardized our relations with our allies, including our joint counterterrorism efforts, it has set us back a generation in combating terrorism around the world.

Mr. CONYERS. But those who have led combat as you described as a limited number, they can be treated as prisoners of war.

Ms. PEARLSTEIN. They could be treated—they should have and could have been treated as prisoners of war during the international armed conflict phase of the conflict with the United States and Afghanistan. If we continue to detain them in Afghanistan, my view would be that as a matter of policy it is wise to treat them as prisoners of war now.

Mr. NADLER. The gentleman from Iowa continues to have the time.

Mr. CONYERS. I thank the gentleman.

Mr. KING. Thank you, Mr. Chairman.

I'm always happy to hear the input as requested by the Chairman of the full Committee and the Subcommittee for that matter. And I would start this by saying I was struck by the analysis of Lieutenant Colonel Vandeveld that we have had four Supreme Court decisions on this case, on this subject matter, and that the government's position hasn't prevailed in any of them.

I would submit that it clearly did with the cases that went before the D.C. Circuit. And in the cases where the Supreme Court overreached their jurisdiction and reversed the D.C. Circuit, yes, the final analysis prevailing, that's what I think the gentleman is referring to. But the point is that this Congress told the Supreme Court you didn't have jurisdiction, and they heard the cases anyway. And our Founding Fathers never imagined that the Legislature wouldn't be jealous of protecting its own power.

And from my perspective, I received the Hamdan case on Thursday. It came out on a Thursday. I got my hands on the decision on Friday. I sat in my backyard on Saturday morning, and by 1:30 in the afternoon I came to a conclusion all written up with margin notes in red ink. But it was too late because the President and the

respective Chairs of the Judiciary Committee and the House and the Senate and, I presume also at that time, Ranking Members had already made the statement we were going to try to comply with the Supreme Court.

I think that this Congress has got to jealousy protect its constitutional power, or we end up with these kind of analyses that cause us to jump through these hoops.

And I thought it was also interesting that Lieutenant Colonel Vandeveld then later on said that judges have ideological bias, and we can't get away from that. So I think that balances this. And I think you see it with a legitimate perspective. And I just add mine to your very legitimate testimony, and I appreciate the points you made.

Mr. CONYERS. Would the gentleman allow me to inquire?

Mr. KING. I would yield.

Mr. CONYERS. What would we do; after you wrote those notes in the margin of the decision, how would you take on the United States Supreme Court?

Mr. KING. I would tell them that we have given them direction that's consistent with the Constitution, and we have national security at stake. And it would have to be—the President of the United States would have to be in the same position, and consistently with that of the Legislature, and we would have to proceed. And we might pass a resolution that simply says national security and the Constitution are more important than the built-in bias potentially of the Supreme Court itself, and that they didn't have jurisdiction, and that we take an oath to the Constitution as well, not an oath to their interpretation of it as they amend it on the fly. The nine Supreme Court Justices are the last nine people on the planet that should be amending our Constitution.

Mr. CONYERS. You're saying, in other words, there ought to be a law.

Mr. KING. I just simply said a resolution, because we already passed a law, and the Supreme Court stretched across that, in my opinion.

Mr. CONYERS. Well, resolutions——

Mr. KING. And I think the majority of the D.C. Circuit would agree with me.

Mr. CONYERS. Resolutions are statements of view without any—they carry no force.

Mr. KING. Reclaiming my time. Then I suggest that we proceed under the laws that we had passed that were legitimate, because national security is more important. And I would weigh that decision very, very heavily as well.

Mr. NADLER. Would the gentleman yield?

Mr. KING. I hope we can extend the clock because I've got a point I would like to make.

Mr. NADLER. I'll take only about 15 seconds.

Mr. KING. Sure.

Mr. NADLER. In other words, what the gentleman is saying when you say we should proceed under the laws, et cetera, is that we should ignore the decision of the Supreme Court because we think it wrong?

Mr. KING. We have those circumstances that arise, yes. And I recognize the precedents that have been established for 206 years. However, I make the point that what is the Chairman and the Chairman of the Subcommittee and the full Committee, what's their alternative if the Supreme Court determines that they are going to make decisions that put the security of the United States at risk that are extraconstitutional decisions? Do we have no voice?

Mr. CONYERS. Are you suggesting that they are removable by some process?

Mr. NADLER. Did the gentleman want to answer?

Mr. KING. Just continue the dialogue.

Mr. NADLER. I'll answer in one sentence.

Mr. CONYERS. You can't answer for him.

Mr. NADLER. No, he asked me a question.

If the Supreme Court rules incorrectly, if it's a statutory matter, we can pass a statute. If it is a constitutional matter as this is, our only recourse is to amend the Constitution through the normal process of doing that.

Mr. CONYERS. Well, there is still yet another—I guess it's—I didn't know if I heard this in the tone of his remarks. Are you suggesting that they may be removed through some constitutional process?

Mr. KING. I didn't make that suggestion. What I'm really suggesting is there is precedent for what I have suggested. In the case of important national security issues, when the Court has made, in the collective judgment of the Congress and the executive branch, an extraconstitutional decision where we clearly, under clear precedent in article III, section 2, strip their jurisdiction, then I think we apply in the national security circumstances, put it up for a vote, and we use the Andrew Jackson rule: You made the decision, now you enforce it. That's my position. And may I now reclaim my time?

Mr. NADLER. You can reclaim your time, what's left of it.

Mr. KING. And I would ask if a couple of minutes could be put on the clock.

Mr. CONYERS. I'll ask that he be given unanimous consent for as many minutes as you and I deprived him of.

Mr. NADLER. I'll rule that as 2 minutes.

Mr. KING. That was exactly gentlemanly, and I appreciate that.

And so recovering my time and reestablishing this line of questioning, the question was the point was also raised by Lieutenant Colonel Vandeveld on evaluating someone's future dangerousness. And it's an interesting expression, and I think it's an accurate one. But I know that the gentleman, Mr. Joscelyn, has evaluated each of these and each of these detainees. And I'm aware that there are on average about 20 attacks on our guards on any given day down at Guantanamo Bay. About half of the time they're throwing feces in the faces of our guards. The other half of the time, it's a physical attack designed to physically injure them. The worst thing that we do to punish them is reduce their outdoor exercise time down to 2 hours a day. And as far as I can determine there are no charges brought against them for assaulting our guards. But I wonder if, Mr. Joscelyn, if you've evaluated the number of inmates that have attacked our guards and if that's part of your calculus.

Mr. JOSCELYN. I have not evaluated those data. My analyses were primarily based on taking into account all of the unclassified material on each detainee and figuring out compiling sort of a biography on each of them, and that was sort of the heart of my analysis. I did not conduct a true future of dangerousness, future dangerousness study. That is not something I have done.

Mr. KING. And so I would submit this thought for the deliberation of the panel, and also the witnesses, because you're part of the brain trust here today, that if we had a statute that we could use to charge these detainees when they attack our guards, wouldn't we also then have the foundation by which we might be able to resolve some of the legal entanglement that we're in simply by bringing those charges against them and sentencing them under our charge that we would, I think, have to create here in this Congress of attacking our guards?

I mean, I walked amongst a group of inmates just this past week who were incarcerated in the United States. There was no problem. I could walk among them, talk to them, turn my back on them, and no one had any sense of alarm. But our guards dare not do that because they're attacked every day. Not a day goes by at Guantanamo Bay. Is there anyone on the panel that would like to address that idea?

Mr. NADLER. The gentleman's time is expired, but I'll permit someone on the panel to answer that question.

Ms. LEBOEUF. If any of the—most of the detainees, particularly the high-value detainees, are under protective order that prohibits any word being spoken about the conditions of confinement. So had they said anything about any attacks witnessed or perpetrated against guards to their attorneys, their attorneys would be prohibited from saying it to anyone else.

Mr. NADLER. Thank you.

The gentleman's time is expired. I now recognize myself for my second round since we took a second round.

Colonel Vandeveld, very quickly, because I want to have a number of other questions, if someone lays a roadside bomb in Afghanistan, is that an act of war, or is that a crime, and why?

Lieutenant Colonel VANDEVELD. In order for a crime to be a crime of war, it has to be either directed at a protected person——

Mr. NADLER. No, no. Assuming someone tries to kill American soldiers, is that a crime, or is that an act of war?

Lieutenant Colonel VANDEVELD. That's a matter of debate. In my opinion, it is not an act of war.

Mr. NADLER. Why?

Lieutenant Colonel VANDEVELD. Because the target would be lawful assuming that it was targeted against U.S. soldiers.

Mr. NADLER. So it would be an act of war?

Lieutenant Colonel VANDEVELD. I'm sorry, it would be an act of war, but it wouldn't be a war crime.

Mr. NADLER. That's what I'm saying. So that would be an act of war, it wouldn't be a crime. So the person who did that presumably, if captured, would be a prisoner of war, but would not be subject to criminal prosecution.

Lieutenant Colonel VANDEVELD. Correct, unless they had lost their combatant immunity by not wearing a uniform.

Mr. NADLER. In a guerrilla war, if they're not wearing a uniform, that would be a crime then.

Lieutenant Colonel VANDEVELD. They would be subject to prosecution because they would not have combatant immunity.

Mr. NADLER. Okay. Thank you.

Now, I'm obviously disturbed by the discussion of the ability of the President to declare that someone who has been acquitted in a trial can be detained indefinitely nonetheless. Now, I presume—and I'm going to ask this of Ms. Pearlstein and of Ms. LeBoeuf—I presume that that is not pursuant to any power to detain people indefinitely on the grounds of potential danger, but it is pursuant, if it exists at all, to the ability of holding someone, of holding a combatant—or is the combat during a war, is that the source of that power?

Ms. LEBOEUF. I think the Hamdi decision, Chairman, is—clearly gives a limited and—although not specific, but some—you know, there's an expiration date on it—a limited authority under the AUMF to hold nonpunitively, that is, not a punishment, you know, imprisonment, but to hold someone for some period of time because of their combatant status.

Mr. NADLER. The period of time being while the war is on.

Ms. LEBOEUF. That would be under traditional laws of war, certainly. But the Hamdi decision made—Justice O'Connor made this distinction between punitive detention and nonpunitive detention and said that Hamdan gave, as I say, limited authority in limited cases, and clearly indicated that that wouldn't last forever.

Mr. NADLER. So when the President said that there's some people who are too dangerous to release, or if anybody proposed preventive detention because of someone's potential future dangerous conduct, there is no legal authority for that.

Ms. LEBOEUF. No.

Mr. NADLER. None.

Ms. LEBOEUF. None.

Mr. NADLER. And there shouldn't be.

Ms. LEBOEUF. No, that's right.

Mr. NADLER. Why not?

Ms. LEBOEUF. Because we don't have magic balls. These aren't the witch trials.

Mr. NADLER. Thank you.

Ms. Pearlstein, would you address yourself to those two questions, please?

Ms. PEARLSTEIN. The President does not have the authority to detain people on the basis of dangerousness.

Mr. NADLER. Does Congress have the power to give him that authority?

Ms. PEARLSTEIN. No, I don't believe it does, because I believe that detention on the basis of dangerousness alone is unconstitutional.

Mr. NADLER. Okay.

Ms. PEARLSTEIN. The Supreme Court has never authorized a statute of that nature, and I think would be contrary to due process and most of the values that the United States stands for.

Mr. NADLER. And if Congress had such a power, under what delegated provision of the Constitution—from whence in the Constitution might Congress derive such a power?

Ms. PEARLSTEIN. If Congress had such a power?

Mr. NADLER. Is there any provision you can think of that someone could misinterpret to give us that power?

Ms. PEARLSTEIN. The foreign commerce clause.

Mr. NADLER. The what?

Ms. PEARLSTEIN. The foreign commerce clause. For example, if we wanted to exercise extraterritorial authority to detain people on the basis of dangerousness, the only theory I can conceive of is the foreign commerce clause.

Mr. NADLER. Now, what about—you did talk before about the ability to hold someone, and I presumed you meant—and the Chairman of the Committee asked about this before. I presumed you were talking about keeping somebody out of combat as a prisoner of war or analogous to that.

Ms. PEARLSTEIN. That's right.

Mr. NADLER. And what authorities are there to that, and how is it limited, and to what extent?

Ms. PEARLSTEIN. What the Supreme Court held in Hamdi is that the authorization for the use of military force, the statute that Congress passed in 2001 authorizing the President to use military force, included with it some implied detention authority so that the President could detain, in Hamdi's case, somebody who was actively engaged, directly engaged, in hostilities against the United States in Afghanistan.

Mr. NADLER. Now, the traditional situation—in World War II things were simple. If you found someone wearing a Wehrmacht uniform, holding a rifle, and you captured him in Normandy, then he was obviously a prisoner of war, and you put him in the prisoner of war camp for the balance of the war. If you pick up someone in Afghanistan who says, no, I live in this village, I'm not a combatant, I didn't have a rifle in my hand, or, I had a rifle in my hand, I was going out hunting supper, that's how I make my living, I hunt, or whatever, what process is necessary or legal or required to determine who is a legitimate—I don't know if we would call them a prisoner of war if he's not in uniform or a combatant. We have the authority to hold combatants for the duration of the combat, you've said, but is there some necessity for some sort of process to figure out if someone is indeed a combatant?

I mean, I keep hearing my Republican friends talking about terrorists, and they should have rights, and they shouldn't have rights. And my constant question is, well, that may be, maybe terrorists shouldn't have rights, but someone has the right to have a fair process as to whether, in fact, they are a terrorist or, in this case, a combatant. So what process is necessary or is legal to——

Mr. KING. Will the Chairman yield?

Mr. NADLER. No, I will not yield at this point, not until I get an answer to this question.

What process is necessary to determine whether someone is or is not, in fact, a combatant? Are we giving it that process, or are current processes adequate to that?

Ms. PEARLSTEIN. The answer to the second question is our current processes in Afghanistan are not adequate.

Mr. NADLER. Excuse me?

Ms. PEARLSTEIN. Are not adequate.

The answer to the first question is if we are talking about a circumstance of traditional international armed conflict, as was the case in 2002 in Afghanistan, the Geneva Conventions provide under article V that they're entitled to a hearing, a status hearing, to determine whether or not, in fact, they can be detained. And the Army has regulations providing how those hearings are to be carried out. And indeed, that was exactly what the Army did in Iraq in 1991 and in many other instances.

Since the litigation post-September 11, 2001, it is now increasingly clear that those people also likely have, or at least some set of those people also likely have, some additional set of due process rights, including the right to habeas corpus. And the question of whether the Boumediene decision recognizing a constitutional right to habeas corpus of the Guantanamo detainees, many of whom were captured under those circumstances, extends to at least some of those people in Bagram now.

Mr. NADLER. So is a habeas corpus proceeding a substitute or an adequate substitute for an article III proceeding?

Ms. PEARLSTEIN. I would certainly say that it is an adequate substitute.

Mr. NADLER. That it is inadequate or adequate.

Ms. PEARLSTEIN. It is more than adequate.

Mr. KING. Will the gentleman yield?

Mr. NADLER. I will in a minute after I finish this line.

Ms. PEARLSTEIN. I should be clear, the Supreme Court has not yet held that habeas is required under those circumstances.

Mr. NADLER. So if habeas is not required, an article V proceeding would be required?

Ms. PEARLSTEIN. An article V proceeding would be required under any circumstance.

Mr. NADLER. So anyone who is held in Guantanamo or anywhere else today for that matter, so if someone says that we want to hold this person despite the fact that he was acquitted in a military tribunal, let's say, or we want to hold this person who hasn't been tried in a military tribunal because he's a combatant, he is entitled either to habeas corpus or article V proceeding?

Ms. PEARLSTEIN. Are you talking about the circumstances in Afghanistan today?

Mr. NADLER. In Afghanistan, in Bagram, in Guantanamo, anywhere. What process is necessary for someone whom we say, we're not charging you with a crime, we want to hold him as a combatant.

Ms. PEARLSTEIN. This gets slightly complicated, so if you would just indulge me a moment. There are two kinds of armed conflict recognized under international law; international armed conflict, state against state, U.S. versus Afghanistan, which most would say ended in 2003 with the transfer of sovereignty. There is also so-called noninternational armed conflict, which would be better described as transnational armed conflict. That is armed conflict be-

tween two parties where one party is not a state, but an organization, a substate, a failed state, et cetera.

Mr. NADLER. A civil war.

Ms. PEARLSTEIN. Civil war classically, yes, absolutely.

There is nothing in international law that precludes continued detention in a circumstance of noninternational armed conflict.

Mr. NADLER. Without any process.

Ms. PEARLSTEIN. There is Common article III, which requires some basic standard of process, but it doesn't give much content to what that amount of process would be required.

What is required is some separate affirmative authority. That is, there is nothing in international law that precludes continued detention, nor is there anything in international law that provides any state the authority to engage in continued detention.

Mr. NADLER. My final question. From what you're saying now, to hold someone in a civil war in which we are supporting one side, the government, which is what we normally do, to hold someone as a combatant in that sort of situation, does Congress need to act to set up a proceeding or process, or is that process already in existence, and what is it?

Ms. PEARLSTEIN. My view is that Congress needs to not only specifically authorize detention—and the Supreme Court has now held at least to an extent the AUMF was that authorization, at least to the some extent—and to provide for an adequate set of proceedings. Now, some would say the CSRT might account for that because CSRTs aren't even—they don't even get CSRTs in Afghanistan. Others would say you need full-blown habeas. It might be that something in between would pass sort of scrutiny under this Supreme Court. But you need some level of due process protection.

Mr. NADLER. Which you don't have if Congress doesn't act.

Ms. PEARLSTEIN. Or unless the courts—right now the courts—the district court with the Bagram case says that habeas extends to Afghanistan.

Mr. NADLER. We'll have to see what the courts say.

I yield to the gentleman from Iowa.

Mr. KING. Thank you, Mr. Chairman.

The circumstances have changed a bit since I asked you to yield. I was very interested also in the testimony of the witness. So unless we are going to have a third round of questioning, I will just simply yield back.

Mr. NADLER. I appreciate that. I am sure everybody appreciates that.

I thank the witnesses for their participation and their patience. Without objection—first of all, I yield back. Without objection, all Members have 5 legislative days to submit to the Chair additional written questions for the witnesses, which we will forward and ask the witnesses to respond as promptly as you can so that their answers may be made part of the record.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion into the record.

And, again, thank you to the Members of the Committee, and thank you to the witnesses. The hearing is adjourned.

[Whereupon, at 1:44 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

VICE ADMIRAL LEE F. GUNN, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL JAMES P. CULLEN, USA (RET.)

May 14, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Dear Mr. President:

During your campaign you eloquently defended the American justice system as a tool for helping us regain the moral high ground in the fight against terrorism and you called for the use of our civilian courts or military courts martial to try terrorist suspects. We are concerned by recent reports that the administration may now be considering steps to resume the military commissions at Guantánamo and to continue prolonged detention without trial.

We strongly agree with Attorney General Eric Holder's statement on May 1st that the guilty plea of Ali Saleh Kahlah al-Marri "reflects what we can achieve when we have faith in our criminal justice system and are unwavering in our commitment to the values upon which the nation was founded and the rule of law." Attempts to resume military commission trials or to establish a system of indefinite detention without trial would have the opposite effect, perpetuating the harmful symbolism of Guantánamo, undermining our counterterrorism efforts and squandering an opportunity to demonstrate the strength of the American system of justice.

The military commissions system, even with added procedural safeguards, cannot provide the "swift and sure justice" that you recognized during your campaign is essential to "better protect the American people and our values." In seven years, fewer than thirty Guantánamo prisoners were criminally charged in the commissions, and only two cases proceeded to trial. The commission system lacks domestic and international credibility and has shown itself vulnerable to unlawful command influence, manipulation and political pressure. Reinventing commissions so deeply associated with Guantánamo Bay will merely add to the erosion of international confidence in American justice, provide more fodder for America's enemies, and lead to prolonged challenges and years of continued litigation.

If significant procedural differences exist between new military commissions and the civilian system, public attention at any trial will inevitably focus on those differences. The world will continue to be preoccupied not with the crimes of the terrorists but with the deficiencies of our system. If, on the other hand, the procedural differences are

minor, then it is hard to see the benefit of creating again a new system of justice that will be subject to challenge and delay.

Instead of reinstating the military commissions, the administration should permanently reject past trial and detention policies that have unwittingly reinforced al Qaeda's efforts to elevate its followers as warriors. Focus should turn to prosecutions in civilian courts, which serve to delegitimize terrorists as criminals undeserving of combatant status. Our message to these men should be the one Judge William Young delivered to Richard Reid, the convicted al Qaeda terrorist known as the "shoe bomber," when he sentenced him to life plus 110 years in prison:

> You are not an enemy combatant. You are a terrorist. You are not a soldier in any war. You are a terrorist. To give you that reference, to call you a soldier gives you far too much stature...

Our federal criminal justice system has capably handled hundreds of complex terrorism cases like the Reid case, rendering decisions that are widely respected as legitimate. U.S. federal courts have repeatedly demonstrated the flexibility and competence needed to tackle classified information, court room and prison security, and other challenges that arise in terrorism trials.

Of course most Guantánamo detainees have never been charged with any crime before any tribunal. Indefinite detention without trial is Guantánamo's fundamental characteristic, and should not be preserved.

It has long been accepted that in an international armed conflict, fighters can be detained to prevent them from returning to the battlefield. But this is a conflict in which the distinction between combatants and civilians is often impossible to make. Indeed, we have come to learn that many of the Guantánamo detainees were captured far from any battlefield and under circumstances that have traditionally been the provenance of civilian justice. It is inconsistent with humanitarian law and fundamental principles of justice to expand the scope of war, as the Bush administration did, to justify the detention of anyone the President deems dangerous.

The Guantánamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not great enough to warrant departure from hundreds of years of western criminal justice traditions.

We recognize that the Bush administration's legacy of failed detention policies requires your administration to make difficult decisions in a tight timeframe. But the policies you adopt must address the problem not only of the approximately 245 detainees in Guantánamo but of the tens of thousand of similarly situated people around the world.

How can the U.S. government most effectively reduce the number of people intent on inflicting grave harm against the United States? According the Army's 2006 Counterinsurgency Manual, we must demonstrate an unequivocal commitment to upholding the rule of law and basic principles of human rights. We urge you not to make a costly step in the opposite direction by reinstating military commissions at Guantánamo or embracing a policy of prolonged detention without trial.

Sincerely,

Vice Admiral Lee F. Gunn, USN (Ret.)
Rear Admiral John D. Hutson, USN (Ret.)
Brigadier General James P. Cullen, USA (Ret.)

DEPARTMENT OF DEFENSE
OFFICE OF THE CHIEF DEFENSE COUNSEL
1600 DEFENSE PENTAGON
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June 9, 2009

MEMORANDUM FOR ATTORNEY GENERAL OF THE UNITED STATES
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE

SUBJECT: Request for Adequate Resources

I am writing as The Chief Defense Counsel on behalf of the Office of Military Commissions-Defense in response to requests for suggestions from the defense regarding changes in the process afforded to the accused currently charged in cases before the military commissions. As you may be aware, I do not represent any accused; rather, I write solely in my capacity as the official charged with the duties to "facilitate the proper representation of all accused referred to a trial before a military commission" and to "take appropriate measures to ensure that each defense counsel is capable of zealous representation." Regulation for Trial by Military Commission §§ 9-1(a)(2) & (8).

In that capacity, I will address an area critical to ensuring any system of trials going forward will meet the standards of fairness contemplated by the President's Executive Order and his other recent statements about the new military commission system: adequate resourcing of the defense. Regardless of its other procedures, no trial system will be fair unless the severe deficiencies in the current system's approach to defense resources are rectified.

Fair trials require adequate resources for the defense to perform its constitutionally mandated function: It is imperative that any effort by this Administration to make the commissions process more fair must address the problem of resources. Adequate resourcing of all defense teams, capital and non-capital, requires recognition of the special needs in these cases for adequate access to competent translation and interpretation services; retained outside experts on psychological, cultural and other issues; and other resources required to investigate and defend non-English-speaking accused in multinational cases.

The correct standard for provision of resources: The Uniform Code of Military Justice guarantees that the defense "shall have equal opportunity to obtain witnesses and other evidence" as the prosecution. Art. 46 (10 U.S.C. § 846). The Criminal Justice Act, which governs the provision of expert, investigative, and other services to the defense in federal court prosecutions, guarantees that all such services "necessary for adequate representation" shall be provided by the government to defendants unable to pay for them. 18 U.S.C. 3006A(e). By contrast, the Military Commissions Act of 2006 mandates only a "reasonable opportunity" to obtain witnesses and evidence – neither an "equal opportunity" nor the services "necessary" to obtain "adequate" access. 10 U.S.C. § 949j(a).

Whether because of this language or for other reasons,[1] to date the accused have consistently been denied needed resources or, at best, have obtained these resources only after long delays and time consuming litigation that would not have been necessary in a minimally fair system.

The standard for provision of resources should therefore be brought in line with the language of Article 46 and the Criminal Justice Act. Whatever language is used, the baseline standard for the provision of expert, investigative and other resources should comport with the practice in federal courts for cases of similar complexity and needs. Executive Order 13492 and subsequent statements by the President and the Attorney General establish federal court procedures as the benchmark of fairness for these prosecutions, with individual accused to be tried under other procedures only on the basis of some special necessity. Whatever special necessity may require different procedures in those cases, that necessity cannot justify denying these accused the same resources they would have in federal court and the same opportunity to make their defense. Federal court practice in comparable cases – involving non-English-speaking defendants, alleged extraterritorial crimes, the need for significant expert assistance in cultural and psychological matters, and international travel for investigative purposes – ought therefore set the standard. No other arrangement can satisfy the President's intention to bring military commissions "in line with the rule of law" and to ensure that the commissions are a "fair, legitimate, and effective" alternative to federal court prosecution, rather than serving as a *de facto* dumping ground for accused that the government decides to treat less fairly than others.

Fair procedures for obtaining resources: For similar reasons, the procedures by which these resources are obtained ought to comport with federal court practice. In particular, there is no basis for allowing the prosecution advance notice of the resources that will be provided to the defense, much less the right to contest the defense's need for those resources. That is the practice in courts-martial, where the military is often able to provide its own experts to aid the defense, and where a convening authority is ordinarily not an attorney, not steeped in the case, and has competing operational obligations which require him to rely heavily on trial counsel for input. Moreover, military commission trials have a more limited purpose (retribution and punishment) than traditional court-martial practice (which includes the purpose of maintaining good order and discipline in the military), and do not involve American service members who share the cultural and professional background of the military's experts. To the contrary, for the commission accused an affiliation with the American military is generally an enormous impediment to the open and free communication that is critical to expert assistance.

For all of these reasons, the practice of giving the prosecution input on defense resources makes no sense whatsoever in the context of these cases. Nor is there any justification for allowing the prosecution a preview of defense strategies that this practice allows. We already

[1] No standard, no matter how generous or fair the language and intention, can guarantee a fair defense if the administering is done in an unfair manner. Decisions by the Convening Authority in response to reasonable requests for resources in virtually every commission case have been unreasonably unfair by any measure. In light of these problems, selection of a Convening Authority (or equivalent position) in any new system will be a critical decision, one in which detailed defense counsel ought to be given a voice.

know of more than one case in which we suspect the prosecution and other government agents have taken advantage of information about proposed defense travel and investigative efforts to either (1) attempt to change or delay defense investigative efforts; and/or (2) change or expedite government investigative efforts. In short, the defense should have the right to make all requests for expert, investigative and other assistance *ex parte*, both to the Convening Authority (or similar position within the new system) and to the judge who presides over pretrial and trial proceedings. All federal criminal defendants are expressly granted this critical procedural right. *See* 18 U.S.C. § 3006A(e)(1)("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an *ex parte* application."). The accused in the new system should have it as well.

Capital cases: Resource problems in the current commissions system have been particularly egregious in the capital cases. Federal law, both statutory and constitutional, recognizes that capital cases present exceptional issues and require significantly more expert, investigative and other services than do non-capital cases. Most importantly, federal law has long guaranteed to every federal capital defendant at least one defense counsel "learned in the law applicable to capital cases," and currently entitles capital defendants to two attorneys, one of whom must be so "learned." 18 U.S.C. § 3005.[2] This requirement has been fleshed out by American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (Feb. 2003 Ed.).[3] The ABA Guidelines were drafted "to set forth a national standard of practice for the defense of capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction," including "military proceedings, whether by way of court-martial, military commission or tribunal, or otherwise." *Id.* at 919, 921. A rule similarly guaranteeing at least two counsel to capital accused in the new system, one of whom is "learned in the law applicable to capital cases," is critical to bring the military commissions in alignment with the current consensus about what is required to provide effective defense representation in capital cases and to avoid the likelihood that the federal courts, exercising habeas jurisdiction, would not set aside any capital verdicts obtained.[4]

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[2] 18 U.S.C. 3005 provides:

> Whoever is indicted for treason or other capital crime shall be allowed to make his full defense by counsel; and the court before which the defendant is to be tried, or a judge thereof, shall promptly, upon the defendant's request, assign 2 such counsel, of whom at least 1 shall be learned in the law applicable to capital cases, and who shall have free access to the accused at all reasonable hours. In assigning counsel under this section, the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts. The defendant shall be allowed, in his defense to make any proof that he can produce by lawful witnesses, and shall have the like process of the court to compel his witnesses to appear at his trial, as is usually granted to compel witnesses to appear on behalf of the prosecution.

[3] *See, e.g.*, The Guiding Hand of Counsel: ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 HOFSTRA L.REV. 903 (2003).

[4] *See e.g. Rompilla v. Beard*, 545 U.S. 374, 387 n.7 (2005); *Wiggins v. Smith*, 539 U.S.510, 524 (2003) ("Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar

There are currently five detainees facing capital trial by military commissions. Not one of the ten military lawyers assigned to their cases meets the minimal ABA standards (a simple function of the fact that capital cases are rare in military justice practice). Rather, the defense teams have informally associated with qualified capital counsel funded through NGOs. This situation is unstable at best – it is far from clear that the NGOs will be able to continue to fund the "learned counsel," especially if the cases proceed to trial. More important, it is flatly inconsistent with the notion that these accused are being treated as fairly as the accused who are sent to federal court. I respectfully submit that The United States should not rely on funding from outside sources to ensure fundamental fairness to individuals whom it may potentially execute. To the extent that qualified capital counsel are not available in the Office of the Chief Defense Counsel, they should be retained and funded by the United States Government at the current Criminal Justice Act rate for capital attorneys, as is done in every federal capital case.

Very respectfully,

Peter R. Masciola
Colonel, USAF-ANGUS
Chief Defense Counsel

cc:
Mr. Paul Koffsky
LTG Scott Black
Lt Gen Jack Rives
VADM Bruce MacDonald
BGen James Walker
Colonel Mark Martins
Mr. Brad Wiegmann

Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.'") (*quoting Strickland v. Washington*, 466 U.S. 667, 688 (1984)).