

HEARING TO RECEIVE TESTIMONY ON LEGAL ISSUES REGARDING MILITARY COMMIS- SIONS AND THE TRIAL OF DETAINEES FOR VIOLATIONS OF THE LAW OF WAR

TUESDAY, JULY 7, 2009

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC.

The committee met, pursuant to notice, at 9:34 a.m. in room SD-106, Dirksen Senate Office Building, Senator Carl Levin (chairman) presiding.

Committee members present: Senators Levin, Lieberman, Reed, Bill Nelson, Ben Nelson, Webb, Udall, Hagan, Begich, McCain, Inhofe, Sessions, Chambliss, Graham, Thune, Martinez, and Collins.

Committee staff members present: Richard D. DeBobes, staff director; and Leah C. Brewer, nominations and hearings clerk.

Majority staff members present: Gerard J. Leeling, counsel; Peter K. Levine, general counsel; and William G.P. Monahan, counsel.

Minority staff members present: Joseph W. Bowab, Republican staff director; Richard H. Fontaine, Jr., deputy minority staff director; Michael V. Kostiw, professional staff member; and David M. Morriss, minority counsel.

Staff assistants present: Mary C. Holloway, Paul J. Hubbard, and Christine G. Lang.

Committee members' assistants present: James Tuite, assistant to Senator Byrd; Christopher Griffin, assistant to Senator Lieberman; Carolyn A. Chuhta, assistant to Senator Reed; Neal Higgins, assistant to Senator Bill Nelson; Ann Premer, assistant to Senator Ben Nelson; Patrick Hayes, assistant to Senator Bayh; Gordon I. Peterson, assistant to Senator Webb; Roger Pena, assistant to Senator Hagan; Lindsay Young, assistant to Senator Begich; Gerald Thomas, assistant to Senator Burriss; Anthony J. Lazarski, assistant to Senator Inhofe; Lenwood Landrum and Sandra Luff, assistants to Senator Sessions; Clyde A. Taylor IV, assistant to Senator Chambliss; Adam G. Brake, assistant to Senator Graham; Jason Van Beek, assistant to Senator Thune; Dan Fisk and Brian W. Walsh, assistants to Senator Martinez; and Chip Kenneth, assistant to Senator Collins.

OPENING STATEMENT OF SENATOR CARL LEVIN, CHAIRMAN

Chairman LEVIN. Good morning, everybody. The committee meets today to consider the important issue of military commissions and the trial of detainees for violations of the law of war.

On June 25, the committee unanimously voted to include a provision on military commissions in the National Defense Authorization Act for Fiscal Year 2010. This bill has now been sent to the full Senate for its consideration. I thank our Ranking Member Senator McCain as well as Senator Graham and all the members of the committee for their work on this important matter.

In its 2006 decision in the Hamdan case, the Supreme Court held that Common Article 3 of the Geneva Conventions prohibits the trial of detainees for violations of the law of war, unless the trial is conducted "by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples." The court concluded that: "The regular military courts in our system are the courtmartial established by congressional statutes," but that a military commission can be regularly constituted by the standards of our military justice system "if some practical need explains deviations from courtmartial practice."

Similarly, the court found that the provision for "judicial guarantees which are recognized as indispensable by civilized peoples" requires at a minimum that any deviation from the procedures governing courtmartial be justified by evident practical need.

The Supreme Court found that the military commissions established pursuant to President Bush's military order of November 13, 2001, fail to meet that test. The military commissions subsequently authorized by Congress in the Military Commissions Act of 2006 also clearly fail to meet that test as well because they deviate from courtmartial practice by permitting the routine use of coerced testimony, by authorizing reliance on hearsay evidence even when direct evidence is reasonably available, and by establishing a presumption that the procedures and precedents applicable in trials by court martials will not apply to military commissions.

The double failure that I've just described to establish a system that provides basic guarantees of fairness identified by our Supreme Court has placed a cloud over military commissions and has led some to conclude that the use of military commissions can never be fair, credible, or consistent with our basic principles of justice. While the previous Congress's effort failed to meet the standards established by the Supreme Court in the Hamdan case, I believe that military commissions can be designed to meet those standards and that if they do they can play a legitimate role in prosecuting violations of the law of war.

President Obama has said that he believes this as well. In his May 21, 2009, speech at the National Archives, the President said: "Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence gathering. They allow for the safety and security of participants and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in Federal courts."

Now, “Instead of using the flawed commissions of the last 7 years”—now I’m continuing the quote of President Obama: “Instead of using the flawed commissions of the last 7 years, my administration is bringing our commissions in line with the rule of law. We will no longer permit the use of evidence as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay, and we will give detainees greater latitude in selecting their own counsel and more protections if they refuse to testify.

“These reforms,” he said, “among others, will make our military commissions a more credible and effective means of administering justice, and I will work with Congress and members of both parties, as well as legal authorities across the political spectrum, on legislation to ensure that these commissions are fair, legitimate, and effective.”

The procedures for military commissions have varied over the years, as the procedures followed in our military justice system have varied. The Supreme Court noted in the Hamdan case that, while procedures governing trials by military commission are typically those governing courtmartial, the “uniformity principle” is not an inflexible one. It does not preclude all departures from the procedures dictated for use by courtmartial, but any departure, the Supreme Court said, “must be tailored to the exigency that necessitates it.”

That is the standard that we’ve tried to apply in adopting the procedures for military commissions that we have included in the bill that we referred to the full Senate. This new language addresses a long series of problems with the military commission procedures currently in law. For example, relative to the admissibility of coerced testimony, the provision in our bill would eliminate the double standard in existing law under which coerced statements are admissible if they were obtained prior to December 30, 2005.

Relative to the use of hearsay evidence, the provision in our bill would eliminate the extraordinary language in the existing law which places the burden on detainees to prove that hearsay evidence introduced against them is not reliable and probative.

Relative to the issue of access to classified evidence and exculpatory evidence, the provision in our bill would eliminate the unique procedures and requirements which have hampered the ability of defense teams to obtain information and have led to so much litigation. We would substitute the more established procedures based on the Uniform Code of Military Justice, with modest changes to ensure that the government cannot be required to disclose classified information to unauthorized persons.

Of great importance, the provision in our bill would reverse the existing presumption in the Military Commissions Act of 2006 that rules and procedures applicable to trials by courtmartial would not apply. Our new language says, by contrast, that “Except as otherwise provided, the procedures and rules of evidence applicable in trials by general courtmartials of the United States shall apply in trials by military commission under this chapter.”

The exceptions to this rule are, as suggested by the Supreme Court, carefully tailored to the unique circumstances of the conduct of military and intelligence operations during hostilities.

3 years ago when the committee considered similar legislation on military commissions, I urged that we apply two tests. First, will we be able to live with the procedures that we establish if the tables are turned and our own troops are subjected to similar procedures? Second, is the bill consistent with our American system of justice and will it stand up to scrutiny on judicial review? I believe those remain the right questions for us to consider and that the language that we have included in the National Defense Authorization Act for Fiscal Year 2010 meets both tests.

Over the last 3 years, we have seen the legal advisor top the Convening Authority for Military Commissions forced to step aside after a military judge found that he had compromised his objectivity by aligning himself with the prosecution. We have had prosecutors resign after making allegations of improper command influence and serious deficiencies in the military commission process. We have had the chief defense counsel raise serious concerns about the adequacy of resources made available to defendants in military commission cases, writing that, "Regardless of its other procedures, no trial system will be fair unless the serious deficiencies in the current system's approach to defense resources are rectified."

So even if we're able to enact new legislation that successfully addresses the shortcomings in existing law, we still have a long way to go to restore public confidence in military commissions and the justice that they produce. However, we will not be able to restore confidence in military commissions at all unless we first substitute new procedures and language to address the problems with the existing statute.

Again, I want to thank Senator McCain, Senator Graham, and the other members of the committee for all of the work that they've put into this bill and to this issue. The Senate will be considering the entire bill, including these provisions, hopefully starting next Monday or Tuesday.

Senator McCain.

Senator MCCAIN. Mr. Chairman, Senator Inhofe has asked to make a brief comment if that's agreeable to you.

Chairman LEVIN. Sure, of course.

Senator INHOFE. I thank the ranking member for this courtesy. Unfortunately, I'm the ranking member on Environment and Public Works. We have a hearing that's going on at the same time. So I do have a list of non-lawyer questions I'll be submitting for the record, such things as the impact of placing detainees in the U.S. prisons system pretrial and posttrial, the security risks of escape, where these detainees will be tried and at what risk, the advantages of using the complex we've all seen down there, the Expeditionary Legal Complex that is designed for tribunals, the rules of evidence that are between a tribunal and a Federal court system, and lastly a discussion—some questions about the advisability of reading Miranda rights to captured terrorists.

So I thank you, and I will be submitting these and I appreciate the opportunity to make that statement.

[The prepared statement of Senator Inhofe follows:]

[COMMITTEE INSERT]

Chairman LEVIN. Thank you, Senator Inhofe.
Senator McCain.

STATEMENT OF SENATOR JOHN MCCAIN

Senator MCCAIN. Thank you, Mr. Chairman. I want to join you in welcoming our witnesses on both panels this morning. I appreciate your scheduling the hearing and I appreciate the expert advice and experience in these matters that our witnesses bring to our discussions on military commission and detainee policy.

This committee has led the way in dealing with detainee issues and developing legislation on detainee matters, sometimes in cooperation with the White House and sometimes over its strong objections. The National Defense Authorization Act for Fiscal Year 2010, which was reported out of this committee unanimously on June 25, again takes a leading role by including changes to the Military Commission Act of 2006.

I'm pleased to have worked with you and Senator Graham and others on this legislation. While we haven't resolved all the thorny issues that military commissions and other aspects of detainee policy present, I believe we've made substantial progress that will strengthen the military commissions system during appellate review, provide a careful balance between protection of national security and American values, and allow the trials to move forward with greater efficiency toward a just and fair result.

The first panel is composed of experts in national security and legal matters from within the government, including senior officials of the Department of Defense, Justice Department, and our uniformed Judge Advocate General Corps. The witnesses on our second panel have similar practical and academic experience, but are now outside the government. I'm particularly interested in hearing the views of witnesses on both panels on problems that have been encountered implementing the current military commissions system, including the speed of bringing cases to trial and what should be done to make the system work more smoothly, ways in which to deal with the important issue of protection of classified information, whether the current military commissions system adequately addresses alleged terrorist acts by al Qaeda and its operatives that occurred before the attacks on September 11, 2001, such as the bombing of the USS *Cole* and our East African embassies, whether the rules on use of hearsay testimony at trial strike the right balance between the conditions of an ongoing war or whether improvements should be made, whether the definition of "unlawful enemy combatant" or "unprivileged belligerent" should be modified, whether changes should be made in the appellate review of military commissions.

While our hearing today is focused on military commissions and the trial of detainees for violations of the law of war, there are a number of enormously difficult issues related to detainee policy that we must also come to grips with in a comprehensive fashion before we can close the detention facility at Guantanamo Bay, as President Obama has pledged to do.

Mr. Chairman, the issues presented by the detainees at Guantanamo and overseas in Afghanistan are among the most difficult

policy decisions this administration faces. I look forward to hearing the views of our witnesses and working with you on these matters as the DOD bill moves forward toward floor consideration and conference with the House of Representatives.

Thank you, Mr. Chairman.

[The prepared statement of Senator McCain follows:]

[COMMITTEE INSERT]

Chairman LEVIN. Thank you so much, Senator McCain.

We'll first now hear from our inside panel, first the General Counsel for the Department of Defense, Jeh Johnson.

**STATEMENT OF HON. JEH C. JOHNSON, GENERAL COUNSEL,
DEPARTMENT OF DEFENSE**

Mr. JOHNSON. Thank you very much, Mr. Chairman, Senator McCain, members of this committee. You have my prepared statement. I will dispense with the full reading of it and just make some abbreviated opening comments here.

Chairman LEVIN. All the statements will be made part of the record in full.

Mr. JOHNSON. Thank you.

I want to thank this committee for taking the initiative on a bipartisan basis to seek reform of military commissions. As you know, in his speech, as the chairman remarked, at the National Archives on May 21 President Obama called for the reform of military commissions and pledged to work with the Congress to amend the Military Commissions Act of 2006. So, speaking on behalf of the administration, we welcome the opportunity to be here today and to work with you on this important initiative.

Military commissions can and should contribute to our National security by becoming a viable forum for trying those who violate the laws of war. By working to improve military commissions, to make the process more fair and credible, we enhance our national security by providing the government with effective alternatives for bringing to justice those international terrorists who violate the laws of war.

Those are the remarks I wanted to make initially. Senator, I look forward to your questions.

[The prepared statement of Mr. Johnson follows:]

Chairman LEVIN. Thank you very much, Mr. Johnson.

Next is the assistant Attorney General for National Security Division at the Department of Justice, David Kris.

Mr. Kris.

**STATEMENT OF HON. DAVID S. KRIS, ASSISTANT ATTORNEY
GENERAL, NATIONAL SECURITY DIVISION, DEPARTMENT OF
JUSTICE**

Mr. KRIS. Thank you, Mr. Chairman, Senator McCain, and members of the committee. I come from the Justice Department and this is my first appearance before this committee. I thought I might begin just by briefly explaining how I think my work relates to that of the committee with respect to military commissions.

The National Security Division, which I lead, combines all of DOJ's major national security personnel and functions. Our basic mission is to protect national security consistent with the rule of

law and civil liberties. In keeping with that, we support all lawful methods for achieving that protection, including but not limited to prosecution in an Article 3 court or before a military commission.

In the last administration, NSD assembled a team of experienced Federal prosecutors drawn from across the country to assist the DOD office of Military Commissions and litigate cases at Gitmo. I can assure you that assistance will continue. The man who led that team for the National Security Division is now my deputy and a member of that team has since been recalled to active duty and is now the lead prosecutor at OMC.

As the President explained, when prosecution is feasible and otherwise appropriate we will prosecute terrorists in Federal court or in military commissions. In the 1990s I prosecuted a group of violent extremists and, like their more modern counterparts, they engaged in extensive “law-fare,” which made the trials challenging. But the prosecution succeeded, not only because it incarcerated these defendants, some of them for a very long time indeed, but also because it deprived them of any shred of legitimacy.

Military commissions can help do the same for those who violate the law of war—not only detain them for longer than might otherwise be possible under the law of war, but also brand them as illegitimate war criminals. To do this effectively, however, the commissions themselves must first be reformed, and the committee’s bill is a tremendous step in that direction. As you know from my written testimony and that of Mr. Johnson and Admiral MacDonald, the administration appreciates the bill very much and supports much of it. You have made an incredibly valuable contribution with the bill.

So I want to thank you again for inviting me here and I look forward to answering your questions.

[The prepared statement of Mr. Kris follows:]

Chairman LEVIN. Thank you very much, Mr. Kris.

Admiral MacDonald.

**STATEMENT OF VICE ADMIRAL BRUCE E. MACDONALD, USN,
JUDGE ADVOCATE GENERAL, UNITED STATES NAVY**

Admiral MACDONALD. Thank you, Mr. Chairman, Senator McCain, members of the committee. Thank you very much for providing me with the opportunity to present my personal views of section 1031 of the National Defense Authorization Act.

In 2006 when this committee was working to establish a permanent framework for military commissions through the Military Commissions Act, I had the opportunity to share my views with the Senate Judiciary Committee and the House Armed Services Committee. At that time I recommended that a comprehensive framework for military commissions should clearly establish the jurisdiction of the commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe substantive offenses. I stated that the Uniform Code of Military Justice should be used as a model for the commissions process.

I am pleased to say that this committee’s legislative proposal addresses the concerns I had in 2006 following the enactment of the Military Commissions Act. Overall, I believe that this legislation

establishes a balanced framework to provide important rights and protections to an accused, while also providing the government with the means of prosecuting alleged alien unprivileged enemy belligerents.

In reviewing your legislation, I would identify two areas where additional clarity would be most helpful to our practitioners. First, the legislation relies upon the current courtmartial rules of evidence to address the handling of classified information. Unfortunately, the cognizant military rule, MRE-505, does not have a very robust history. Over time we have discovered that, while MRE-505 has some benefits, the military rules on the use of classified information fall short of our overall goals.

On the other hand, for over 20 years Article 3 courts have relied upon the Classified Information Procedures Act, or CIPA. In light of the history and experience of CIPA, as well as the practical difficulties with the use of MRE-505 to date, I recommend using a modified CIPA process as a touchstone for military commissions going forward.

Second, I agree with the provision calling for the military judge to evaluate the admissibility of allegedly coerced statements using a totality of the circumstances totality of the circumstances test to determine reliability. However, to assist our practitioners in the field, I recommend that you develop a list of considerations to be evaluated in making this determination. Those considerations should include: the degree to which the statement is corroborated; the indicia of reliability in the statement itself; and to what degree the will of the person making the statement was overborne.

Once again, thank you, Mr. Chairman, for the opportunity to testify and I look forward to answering your questions.

[The prepared statement of Admiral MacDonald follows:]

Chairman LEVIN. Thank you very much, Admiral MacDonald.

As the Judge Advocate General of the United States Navy, your testimony is obviously very, very important to us. You emphasize that you're speaking in a personal capacity here today and we understand that. We would ask, however, if there are some differences between the uniformed Navy and your own personal views. We will ask the Secretary if there are any such differences. We assume Mr. Johnson is speaking for the entire Department of Defense, but since you put it that way we will make that inquiry of the Secretary of the Navy.

Let's try a 6-minute round here. We've got not only two panels, but we've also got a room which is Reserved for some other purpose previously at 12:30. I hope we'll have enough time. So we'll try a 6-minute first round.

Let me ask you first, Mr. Johnson. I quoted from the Hamdan case in my opening remarks, saying that the court in Hamdan said that "the regular military courts in our system are the court-martials established by congressional statutes," but they also said that a military commission can be regularly constituted if there's a practical need that explains deviations from courtmartial practice. We attempted in our language to do exactly that.

My question first of you is, in your view does our bill conform to the Hamdan standards?

Mr. JOHNSON. Senator, as you noted, Hamdan requires—and of course, Hamdan was at a time that the Military Commissions Act of 2006 did not exist, as I recall. But the holding of Hamdan was that military commissions—and I'm not going to get this exactly right—but that military commissions should depart from UCMJ courts only in situations of evident practical need.

The proposed legislation in our view definitely brings us closer to the UCMJ model and the circumstances under which the military commissions contemplated by this bill and UCMJ courts differ are in our judgment circumstances that are necessary given the needs here. For example, there is no Miranda requirement imposed by this legislation. Article 31 of the UCMJ is specifically excluded from application here. Article 31 is what calls for Miranda warnings in UCMJ circumstances.

The legislation also takes what I believe is a very appropriate and practical approach to hearsay. As you noted in your opening remarks, Mr. Chairman, the burden is no longer on the opponent to demonstrate that hearsay should be excluded. There is a notice requirement in the proposed legislation and if the proponent of the hearsay can demonstrate reliability and materiality and that the declarant is not available as a practical matter, given the unique circumstances of military operations and intelligence operations, the hearsay could be admitted.

Military commissions are fundamentally different from UCMJ courts in that most often what you have in military justice is the punishment of a member of the U.S. military for some violation of the UCMJ, very often directed—of some sort of domestic nature. Military commissions are obviously for violations of the law of war. They are very often prosecuting people captured on the battlefield and, just given the nature of the way evidence is collected, there needs to be a recognition that the military can't be expected to change how it does business to engage in evidence collection on the battlefield.

So the way this legislation deals with the hearsay rules I think is quite appropriate and is certainly an example of evident practical need.

I would say the same when it comes to the rules on authenticity set forth in this proposed legislation. There is not a requirement like you would see in UCMJ courts or in civilian courts for what we in civilian courts would know as a strict chain of custody. There is a more practical approach, given the needs of military operations and intelligence collection.

Chairman LEVIN. Can I interrupt you there because of our short time. If you could expand for the record any places where you believe that there's—where we fall short of complying with the Hamdan standards, I'd appreciate that if you could do that for the record.

Mr. JOHNSON. Yes, I'd be happy to.

Chairman LEVIN. And you could expand your answer, too.

Mr. JOHNSON. Sorry for going on so long, Senator.

Chairman LEVIN. We've only got 6 minutes.

Mr. Kris, let me ask you, representing the Department of Justice: In your judgment, do you believe that this bill as drafted, that these provisions conform to the Hamdan standards?

Mr. KRIS. Yes. To the extent that the uniformity principle from Hamdan applies to a statutorily created system of commissions, I think it is met here. Jeh mentioned some of the differences and I think his justifications make sense. We have some recommendations for change, but those aren't rooted in the uniformity principle at all.

Chairman LEVIN. While I'm asking you questions, it's been argued that it's not appropriate for the Department of Defense to prosecute terrorists. Do you believe that it is appropriate for the Department of Defense to prosecute alleged terrorists with these military commissions, instead of the Department of Justice doing all the prosecuting in Article 3 courts?

Mr. KRIS. Yes. I think the President made clear in his May 21st speech that we will prosecute in Federal court and where there is a law of war violation and under a reformed system of military commissions we will also prosecute law of war violations in those commissions. I think the President said it best when he said that we need to be using all instruments of national power against this adversary, and that includes military commissions.

Chairman LEVIN. Thank you. My time has expired.

Senator McCain.

Senator MCCAIN. Well, thank you, Mr. Chairman.

Mr. Johnson and Mr. Kris, if trials were held in Guantanamo or the United States would there be any difference in the proceedings?

Mr. JOHNSON. Senator, if military commissions were held in the continental United States I think that we have to carefully consider the possibility that some level of due process may apply that the courts have not determined applies now. I think that that assessment has to be carefully evaluated and carefully made. I think that—

Senator MCCAIN. So what you're saying is that you believe there could be some significant difference in procedure if the trials were held in Guantanamo or the United States of America?

Mr. JOHNSON. I'm not sure I would be prepared to say significant difference, Senator.

Senator MCCAIN. Well, I think it would be important for this committee to know what your view is. It might have something to do with the way that we shape legislation. If they're going to have all kinds of additional rights if they are tried in the United States of America as opposed to Guantanamo, I think that the committee and the American people should know that.

Mr. JOHNSON. One of the things that I mentioned in my prepared statement, Senator, is that when it comes to the admissibility of statements the administration believes that a voluntariness standard should apply that takes account of the realities of military operations. We think that that is something that due process may require, particularly if the commissions come to the United States, that the courts may impose a voluntariness standard.

Senator MCCAIN. Well, I hope that you and Mr. Kris will provide for the record what you think the differences in the process would be as to the location of those trials. I think it's very important. Certainly it is to me.

Mr. Kris, in your statement on page 2 you said: "It's the administration's view that there is a serious risk that courts would hold

the admission of involuntary statements of the accused in military commission proceedings is unconstitutional.” Does that infer that these individuals have constitutional rights?

Mr. KRIS. Yes.

Senator MCCAIN. They do? What are those constitutional rights of people who are not citizens of the United States of America, who were captured on a battlefield committing acts of war against the United States?

Mr. KRIS. Our analysis, Senator, is that the due process clause applies to military commissions and imposes a constitutional floor on the procedures that would govern such commissions, including against enemy aliens.

Senator MCCAIN. What would those be, Mr. Kris?

Mr. KRIS. Well, they’d be a number of due process- based rights, one of which Mr. Johnson just mentioned is we think there is a serious risk that courts will find that a voluntariness standard is required by the due process clause for admission of—

Senator MCCAIN. So you are saying that these people who are in Guantanamo, were part of September 11 or have committed acts of war against the United States, are entitled to constitutional rights of the Constitution of the United States of America?

Mr. KRIS. Within the framework that I just described, I think the answer is yes. The due process clause guarantees and imposes some requirements—that’s the way I think I would put it—on the conduct and rules governing these commissions.

Senator MCCAIN. Well, that’s very interesting because I had never proceeded under that assumption in drafting this legislation and previous legislation. The fact is that they are entitled to Geneva protections under the Geneva Conventions, which apply, and the rules of war. I did not know nor know of any time in American history where enemy combatants were given rights under the United States Constitution.

Mr. KRIS. I do think, Senator, there’s a difference between their rights—for example, they would not be entitled to the rights under Geneva for prisoners of war because these are—

Senator MCCAIN. No, their rights under the treatment of enemy combatants, the Geneva Conventions Common Article 3.

Mr. KRIS. Yes. Okay, thank you.

Senator MCCAIN. But we now have established that it is the view of the administration that enemy combatants or belligerents, whatever the new name that you’d like to call them, are now entitled to rights under the United States—constitutional rights of U.S. citizens?

Mr. KRIS. Well, not at all. I don’t think that that’s right. I mean, both in terms of how we would describe this as a due process requirement that applies to the commissions even if they are prosecuting enemy aliens; and also I don’t think it’s right to equate the rights or the rules that are required for commission proceedings against aliens necessarily with those that would apply against U.S. citizens. Those might come out differently. This is an extremely complicated area of law, as you know.

Senator MCCAIN. It certainly is, Mr. Kris. But your statement for the record was “It’s the administration’s view that there are serious risks that courts would hold that admission of involuntary state-

ments of the accused in military commission proceedings is unconstitutional.”

Mr. KRIS. Yes.

Senator MCCAIN. Therefore it means that they have some constitutional rights.

Mr. Chairman, I know that there are other questions by the witnesses—of the witnesses, and if there’s a second round maybe I’ll take advantage of it. Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator McCain.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman. Thanks to the witnesses.

Mr. Johnson, let me begin with an expression of appreciation for the process that the administration has gone through to come to the point that you’re at today. For me as we’ve gone through this deliberation about how to treat what I call prisoners of war, that is those suspected of violating the laws of war, it seems to me that we’ve had a hard time putting this in the context of our own sets of fairness related to the unique war we’re in.

Obviously, this is a war against terrorists. They don’t fight in uniform. They don’t fight for, for the most part, for nation states. This war may go on for a long time. But nonetheless, it seemed to me along the way that there was no sense to those who are arguing that these individuals apprehended for violations of the law of war should be tried in our Federal courts. In the sense that Senator McCain has just said, I don’t think they have the constitutional rights that we associate with American citizenship. Also they have not in my opinion violated Federal criminal law. They’ve violated the laws of war.

So that I know that there were some who expected that the Obama Administration’s review would end up recommending that all of these cases go to Federal court, and I appreciate the fact that you have not come to that conclusion, although I have some questions about some of the subparts of what you’ve done. But I think this is really a very significant, very open-minded, very fair, very ultimately historic process you went through and reached I think generally speaking the right balance, and I appreciate it.

You were asked just a moment ago whether you thought that the military commission provisions of the National Defense Authorization Act were within the Hamdan ruling of the Supreme Court. I want to ask you whether your judgment is that the military commission provisions of the NDAA are within the requirements of the Geneva Convention?

Mr. JOHNSON. Yes, Senator, with room to spare, yes. One of my personal objectives, frankly, is that we devise a system that comports with the Geneva Conventions as well as Hamdan, as well as applicable U.S. laws. So I think the answer to your question is yes, sir.

Senator LIEBERMAN. Well, I thank you for that answer. I agree with you, and I particularly appreciate the clause you added, which is that the military commission provisions of the National Defense Authorization Act are not only within the requirements of the Geneva Conventions, but, as you said, with room to spare. I agree that we hold ourselves to very high standards, sometimes stand-

ards that are so high that they are unrealistic and in some sense self-destructive in the context of the war we're in.

But I agree with you that what we've provided for in this legislation of this committee is well within the Geneva Conventions.

Let me ask you a specific question that came up in the last exchange and testimony of Mr. Kris. In light of the judgment of the Supreme Court in the Hamdan case that certainly to me suggested approval of the Court of Appeals for Armed Forces as the place that the accused here can appeal from a judgment of the military commission—and the Court of Appeals for Armed Forces is not a standard Article 3 Federal court, as you well know—why is the administration seeking a right of appeal from the military commissions to Article 3 Federal courts? Mr. Kris or Mr. Johnson?

Mr. JOHNSON. Senator, let me take a stab at that initially at least. First, we agree and endorse the position expressed in the bill that it should be an expanded scope of review, review of the facts as well as the law. Our view is that we should retain the Court of Military Commission's review and then have appeal directly to the D.C. Circuit. That would be in effect a four-tiered level of review, beginning with the trial court, and in our view would resemble in many respects UCMJ justice because you have that intermediate level of appellate court, rather than an appeal directly from the military commission's trial level court to the CAF. So it would be our preference to have an appeal directly to the D.C. Circuit.

But we agree with the concept of the expanded scope of review.

Senator LIEBERMAN. Is it fair to say, then, that the administration's suggested changes in this regard are not rooted in the Supreme Court's uniformity principles as stated in Hamdan, but they're rooted in some other requirement or some sense of the administration about what's fair and just here?

Mr. JOHNSON. I think that's a fair statement, Senator.

Senator LIEBERMAN. Let me ask you just to comment, to go back to what I said at the beginning and just describe in the time that's left in my questioning period, why you reached the judgment on behalf of the administration or why the President ultimately reached the judgment that these cases that we're talking about should not primarily go to our Federal courts?

Mr. JOHNSON. Well, as you probably know, the President signed an executive order mandating a review of each detainee's situation. That review is ongoing and, as you've seen in at least one instance, a detainee who had a pending military commissions case against him was transferred for prosecution in the Southern District of New York.

I think it is fair to say that what the President and the administration have concluded is at least some of these detainees should be prosecuted for violations of the laws of war, that military commissions justice is the more appropriate forum, dependent upon a variety of factors. In some situations, you have a situation where a detainee has violated both Title 18 and the laws of war, and we want to retain military commissions as a viable and realistic option. Whether almost everyone or everyone who is now a pending military commissions defendant will stay that way, I couldn't say. The review is ongoing.

Senator LIEBERMAN. Thanks.

I want to just close the loop on the previous question, because my time is up, which is that I think the committee has made the right judgment in saying that the right of appeal from the military commissions should be to the U.S. Court of Appeals for the Armed Forces and that there shouldn't be an appeal to the Circuit Court for the District.

Thank you.

Chairman LEVIN. Thank you, Senator Lieberman.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman. I'd like to, one, compliment you and Senator McCain for trying to come up with a new bill. I think it would help the country if we could reform the process and I think we're very close to a bill that we all can be proud of.

About the appeals, the main thing for the public to understand is that any verdict rendered in a military commission trial will work its way into the civilian courts. Is that correct?

Mr. JOHNSON. Yes, sir.

Senator GRAHAM. So no one will be imprisoned in this country based on a military commission verdict that does not have a chance to have their day in Federal court, civilian court?

Mr. JOHNSON. Assuming they appeal, that's correct, yes, sir.

Senator GRAHAM. Okay. Now, when it comes to the idea of location, the courtroom at Guantanamo Bay is uniquely set up, I think, to do these trials. I would be interested to get your thoughts about how the location would matter. I'm not so sure, after the Supreme Court decisions treating Guantanamo Bay as an extension of the United States, that it would matter greatly. So like Senator McCain, I'd like to know how location would matter.

Admiral MacDonald, one of the issues that we're grappling with is the "material support for terrorism." I think I understand the administration's view that that is not a traditional charge under the law of armed conflict. But under the Uniform Code of Military Justice, we incorporate the Assimilated Crimes Act. Could that doctrine be used here?

Admiral MACDONALD. Yes, sir. You could incorporate it in under Title 18 through the Assimilated Crimes Act into the UCMJ and it could be charged.

Senator GRAHAM. I think, Mr. Johnson, that gets back to your point. Some of these people can be charged under both sets of laws. Is that what you were trying to tell us?

Mr. JOHNSON. Yes, sir.

Senator GRAHAM. Now, Mr. Kris, do you agree with that theory, that we could use the assimilated crimes doctrine to incorporate material support using a Title 18 offense?

Mr. KRIS. I think you could do that as a formal matter. There still remains the question whether material support historically was a law of war offense, under that label or a different label.

Senator GRAHAM. I totally agree with that debate. But if you were able to incorporate Title 18 offenses, that would resolve that issue, isn't that correct?

Mr. KRIS. It would, again to the extent that it's a viable law of war offense.

Senator GRAHAM. All right, thank you.

Now, when it comes to evidentiary standards, are you familiar with The Hague procedures when they try international war criminals?

Mr. KRIS. I am not.

Senator GRAHAM. Well, one thing I would suggest that you look at, I think our hearsay rules are much more restrictive, quite frankly. Do you agree with that, Admiral MacDonald?

Admiral MACDONALD. Yes, sir, I do. We talked about this in 2006. We looked at the International Criminal Tribunal for Rwanda and for Yugoslavia, and both of those tribunals have very liberal hearsay rules.

Senator GRAHAM. When it comes to involuntariness, what kind of standard do they use in terms of admitting statements from the accused?

Admiral MACDONALD. It's the reliability of the statement.

Senator GRAHAM. The point I'm making to the committee, that if you compare our military commissions system, particularly the reformed version, to an international court trial at The Hague, we're much more, for lack of a better word, liberal in terms of providing due process and protections to the accused than you would get if you were going to go to The Hague. I have no problem with that, quite frankly. I think that's a good thing.

Now, let's get back to what the courts are likely to look at in a military commission trial, Mr. Kris. I think the debate is a bit confusing. It's not so much whether the individual accused has a constitutional status as an American citizen, but the courts will look at these trials in terms of due process and they will make a judgment as to whether or not it meets some minimum standard expected of an American court; is that correct?

Mr. KRIS. That is essentially exactly what I was saying to the Senator.

Senator GRAHAM. I think that is correct. When you look at the history of military commissions, the World War Two German saboteurs trials is not exactly the showcase you would want to use. Those trials were conducted in a matter of days from the time the evidence was received to judgment was rendered, and they passed scrutiny, but I think when we look back in time it's not something we would want to repeat. Is that your opinion?

Mr. KRIS. I think I essentially agree with what you just said, and I think Justice Scalia has referred to the Kirin case as not the court's finest hour. So I think there is some question about whether you could apply those precedents straight on, given recent developments in the law.

Senator GRAHAM. Do you have a problem with the totality of the circumstances test if we fill in the blanks in terms of admission of statements?

Mr. KRIS. No, on the contrary, I think the totality of the circumstances test is the right test. Of course, the administration's position is that it should be used to determine voluntariness, albeit voluntariness sort of that reflects the realities of a wartime situation. But I do think totality of the circumstances is what the judge would look at.

Senator GRAHAM. The final thought here is about the difference between an Article 3 trial and a military commission trial. One of the big concerns that we have as a Nation—Mr. Johnson, what percentage of the Guantanamo Bay detainees do you believe will be held off the battlefield but never go to an Article 3 court or a military commission trial?

Mr. JOHNSON. Well, a percentage or a number is tough to say at this point, Senator. As I mentioned a moment ago, our review of these detainees is ongoing. I do think that we should all assume that for purposes of national security and the protection of the American people there will be at the end of this review a category of people that we in the administration believe must be retained for reasons of public safety and national security. And they're not necessarily people that we'll prosecute.

Senator GRAHAM. Either the evidence is not the type you would take to a beyond a reasonable doubt trial or it has some national security implications.

I'd just like to finish on this note. Admiral MacDonald, under domestic criminal law is there any theory that would justify an indefinite detention of a criminal suspect without a trial?

Admiral MACDONALD. In our own domestic law?

Senator GRAHAM. Right.

Admiral MACDONALD. Not that I know of, Senator.

Senator GRAHAM. In the military setting, is it a permissible behavior of a country to hold someone under the theory that they're a belligerent enemy combatant indefinitely if the evidence justifies that finding?

Admiral MACDONALD. Yes, sir, it is. That's a recognized principle of the law of war.

Senator GRAHAM. Do you agree with that, Mr. Johnson?

Mr. JOHNSON. Yes. The Supreme Court held that in Hamdi in 2004.

Senator GRAHAM. Do you agree with that, Mr. Kris?

Mr. KRIS. Yes, I agree with Mr. Johnson, yes.

Senator GRAHAM. So to conclude, the only theory that would allow this country to indefinitely detain someone without a criminal trial would be the fact that we find them to be part of the enemy force, they're still dangerous, and they're not subject to being released; is that correct? The process that would render that decision?

Mr. KRIS. I'm not sure that dangerousness is actually even part of the initial judgment under the—

Senator GRAHAM. That's true, it's not required.

Mr. KRIS. I mean, I think their status—and that's obviously being litigated now in the habeas cases. And I do think under Hamdi the court said that at some point that authority to detain could run out. But essentially I agree, I think, with what you're saying, yes.

Senator GRAHAM. Thank you.

Chairman LEVIN. Thank you, Senator Graham.

Senator Ben Nelson.

Senator BEN NELSON. Thank you, Mr. Chairman.

I think what you said in terms of geography is that—well, let me ask. Is it "geography matters" in terms of Article 22 courtmartial

or commissions, or geography may matter? In other words, where these military commission hearings are held, if outside the continental United States then perhaps a U.S. court would not or, could I say, could not intervene to provide extra protections under the Constitution? Mr. Kris?

Mr. KRIS. The analysis really depends on a variety of factors and it may be—I think it is the case that geography would have some impact on it. But it is very difficult to be precise and predict exactly what would happen.

Senator BEN NELSON. Would there be a difference between Guantanamo and, let's say, Bagram Air Force Base, Bagram Base, in terms of geography and what the courts may do with an Article 2 hearing?

Mr. KRIS. I want to be very careful. That is a matter that is currently in litigation, so I think I want to just be very careful to say that I think there could be some differences, but probably not go much further than that.

Senator BEN NELSON. Mr. Johnson, what are your thoughts about geography?

Mr. JOHNSON. Senator, much of this is uncharted territory in the courts in terms of what rights, if any, would apply to these detainees. I would say that it's our view that the detainees would not—whether in the United States or anyplace else, do not enjoy the full panoply of constitutional rights that an American citizen in this country would enjoy.

Senator BEN NELSON. But on a continuum, what I hear you saying at the present time under the current law their rights are at this level, but it's not clear whether or not the courts could rule that the rights increase in numbers or in depth?

Mr. JOHNSON. Well, let me try it this way. I think it is fair to say that it is our view that some level of a voluntariness requirement would be applied to statements that we would seek to offer in a military commissions case, a military commissions prosecution and that the ex post facto clause in the Constitution would apply if, hypothetically, these cases were prosecuted in the United States.

I would note, however, that in practice our military commissions judges have engaged in an ex post facto analysis anyway in assessing the prosecutability of certain of these detainees at Guantanamo. Judge Allred specifically went through an ex post facto analysis at Guantanamo. And I'm advised that in practice many of our military commissions judges have gone through a voluntariness analysis in assessing the admissibility of statements.

Senator BEN NELSON. Mr. Johnson, can you speak to the progress of the Guantanamo review task force? I think there were 779 people who were detained at Guantanamo. 544 as I understand it have been transferred, with 229 remaining. Is that a fairly accurate number as far as you know?

Mr. JOHNSON. Those numbers sound accurate to me, Senator.

Senator BEN NELSON. Do we know the status of the remaining detainees? I understand that there are those that could be tried under either Article 2 or Article 3 courts, but do we know how many have already been determined to be, let's say, under Article 3? Because as I understand it Article 3 means that they would be coming to Federal courts for prosecution.

Mr. JOHNSON. At this point we have not completed our review, so I don't have precise numbers for you. But I think it is fair to assume that at the end of the review we will have detainees in the five categories that the President outlined in his May 21st speech. There will be some prosecuted in Article 3 or we would seek to prosecute in Article 3, some in military commissions, and some in that fifth category, some that are not prosecuted for various reasons, but for reasons of the safety of the American people and national security we want to continue to detain pursuant to the authority granted by this Congress with the AUMF and the Supreme Court holding.

Senator BEN NELSON. Do you have any idea when that review may be completed?

Mr. JOHNSON. Before the end of the year.

Senator BEN NELSON. This year?

Mr. JOHNSON. Yes, sir.

Senator BEN NELSON. Okay.

Admiral MacDONALD, in your written testimony you addressed the proffered amendment to the Military Commissions Report or Act reported out by your committee and indicated that for the most part it addressed all of the matters that are and were of concern with regard to the '06 Military Commissions Act. Beyond the two issues that you highlight in your testimony, are there any other matters that ought to be addressed?

Admiral MACDONALD. No, sir. Those are the two that I was referring to that we were unable to get back in 2006.

Senator BEN NELSON. I suppose in asking where the administration proposes to hold the military tribunals, Article 2 cases—is it fair for me to ask what the administration's view is of where to hold these, based on the fact that geography may matter?

Mr. JOHNSON. We've certainly made no decisions about that. The Congress in the supplemental that was recently passed asserted its rights and prerogatives to know what we have in mind in this regard.

Senator BEN NELSON. I suppose that's why I'm asking.

Mr. JOHNSON. No decisions have been made and we continue to consider various options.

Senator BEN NELSON. I assume there might be some advise and consent in conjunction with that?

Mr. JOHNSON. I think in the supplemental language you've pretty much mandated that.

Senator BEN NELSON. Thank you.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you, Senator Nelson.

Senator Martinez.

Senator MARTINEZ. Mr. Chairman, thank you very much.

Mr. Johnson, I'd like to ask, how will the Executive Branch make a determination of who gets tried under Article 3 and who may get tried in MCA?

Mr. JOHNSON. Senator, that is something that Mr. Kris and I have actually been working on as the representative of DOJ and I as the representative of the Department of Defense. As Mr. Kris stated, the President stated that where feasible we would seek to

prosecute detainees in Article 3 courts. We are working through an expression of factors.

Senator MARTINEZ. Do you have a preference for an Article 3 court proceeding as opposed to a military commission proceeding? And is that by your preference or is that by rights that may be imbedded upon the detainee?

Mr. JOHNSON. I would state it in terms of, where feasible, we would prosecute people in Article 3 courts. But then you have to go through a variety of factors. For example: the identity of the victims; is there a law of war offense that could be more effectively prosecuted versus a Title 18 offense; identity of the place of capture, for example.

We're working through now a variety of factors for our prosecution teams to consider in terms of what direction to go. But I think the intent is to have a flexible set of factors, because it is the case that many of these detainees can be viewed to have violated—those that are prosecutable, viewed to have violated both the laws of war in Title 18.

Senator MARTINEZ. Admiral MacDonald, I wanted to ask you about the appeal process as envisioned, with the four-tiered process. It seems to me that if a defendant were charged with a Federal crime, a U.S. citizen were charged with a Federal crime somewhere in Florida, that that defendant essentially has a one-tier appellate system, from a Federal district court to a circuit court of appeal, with a very unlikely appeal to the Supreme Court.

So a defendant in an American court, a citizen of this country, would not have as many appellate tiers as would one of the detainees in this instance, is that correct?

Admiral MACDONALD. Yes, sir. But remember, Senator, we're talking about conforming the commissions to the UCMJ and to our courtmartial process, and our courtmartial process has—all of the services have a court of criminal appeals as a first tier of appellate rights. After that they appeal to the Court of Appeals for the Armed Forces, which is the first civilian court within our military justice system to which they can appeal, and after that they have the right of appeal to the Supreme Court.

So I think what we're saying is that if you want to, to the extent that you can, stay faithful to the UCMJ, that one way to approach it on appeal would be to allow the Court of Military Commission's review, either military judges that currently sit on that court now or a combination of military and civilian judges, that they would have factual and legal sufficiency review powers, and then after that you could either go into the Federal system, to the D.C. Circuit as it's constituted today, or you could go to CAF and mirror the UCMJ system. Either of those paths would lead you ultimately to the Supreme Court.

Now, can CAF do legal or factual sufficiency? Yes, Senator, they can. They're very skilled jurists. If the bill contains and continues to contain an appeal to the CAF and that body is given both factual and legal sufficiency review, CAF can do that. So I think I would prefer the current system because our military judges are used to doing factual and legal sufficiency. But if you choose to go the CAF route, the CAF judges are capable of doing it.

Senator MARTINEZ. You made recommendations with regards to how to handle classified evidence and also the standard for the admission of coerced statements. Do you have any other recommendations that you would make?

Admiral MACDONALD. No, sir, those are the two. And those really go to—Senator McCain mentioned that we've got to get these commissions moving and the practical aspects. That's really what my two recommendations go to. We are finding—and this is through discussions with the chief prosecutor—that they are having a lot of difficulty in using Military Rule of Evidence 505 to govern classified evidence.

The recommendation to you is a CIPA-like process, a Classified Information Procedures Act type of process. I would call it CIPA-plus, where we import the good parts of MRE-505, which is to close a proceeding, a military commission when classified, close it to the public when classified evidence is being introduced; that we would take that in, add it to the CIPA rules, where we have 20 years of Federal practice that our judges can rely upon. My personal opinion is that's probably a better approach to get these commissions moving.

One of the complaints from the prosecutors is that the judges are demanding that they do everything with written submission, instead of what CIPA allows, which is an ex parte hearing where you can go in before the judge, you can get the issues resolved, and we can move on. So that's why I recommended that the committee take a look at CIPA-plus as a substitute perhaps for the provision that talks about MRE-505.

On the voluntariness piece, I do disagree with the administration on this. I think the committee's got it right on the reliability standard that exists in the bill. I think fundamentally there is a difference between a voluntariness standard that grew up in a law enforcement environment, that that's different than the law of war context we find ourselves in.

I am worried that a military judge that has a voluntariness standard imposed upon them is going to look at a statement taken at the point of a rifle when a soldier goes in, breaks down the door, and takes a statement from a detainee—I'm worried that they're going to apply a voluntariness standard to that. I would argue that's an inherently coercive environment, when you have a rifle pointed at you. I'm concerned a judge is going to look at that under a strict voluntariness standard and say that statement doesn't come in.

I would rather see this as part of a totality of the circumstances leading to is the statement inherently reliable. What I proposed is a series of factors that would give the judge more guidance perhaps on how to do that analysis.

Senator MARTINEZ. Thank you very much.

Chairman LEVIN. If you have actual language on your factors, you might want to share it with us, not now but for the record.

[The information referred to follows:]

[COMMITTEE INSERT]

Admiral MACDONALD. Yes, sir. Yes, Senator, I will.

Senator MCCAIN. But you're basically in agreement with the legislation passed through the committee?

Admiral MACDONALD. Yes, Senator, I am.

Senator MCCAIN. Thank you.

Chairman LEVIN. Senator Udall.

Senator UDALL. Good morning, gentlemen. Thank you. Mr. Chairman, thank you. Senator McCain, Senator Graham, I know Senator Reed, have all worked very, very diligently on this important set of questions.

I have to note, can you imagine a lot of other countries in the world having this kind of discussion? It's a tough discussion. It's been contentious. But here we sit, in the best American tradition, deciding something as important as this.

I was a member of the Armed Services Committee in the House for 4 years and I voted for legislation identical to the bill being proposed by this committee in the year 2006 that I thought struck a balance between military necessity and basic due process. That bill didn't pass and I voted against the Military Commissions Act that we're discussing today. At the time, I thought that it risked tying up—that is, the bill we passed—the prosecution of terrorists with new, untested legal norms that didn't meet the requirements of the Hamdan decision. I thought it might endanger our service members by attempting to rewrite and limit our compliance with Common Article 3 of the Geneva Conventions. I thought it might undermine the basic standards of U.S. law and it departed from a body of law well understood by our troops.

Given that, I'm really glad we're here today looking at this opportunity to revisit this important legislation.

Admiral MacDonald, if I might turn to you, I was a member of the HASC almost 3 years ago when you testified about the importance of reciprocity. I want to quote you. You said that you would be concerned about other nationals looking in on the United States and making a determination that if it's good enough for the United States it's good enough for us, and perhaps doing a lot of damage and harm internationally if one of our service women or service men were taken and held as a detainee.

How do you think the military commission provisions in Senate 1390 measure up in terms of reciprocity? Are these provisions good enough for the United States in your view?

Admiral MACDONALD. Yes, sir, Senator, they are. And I would get back to what Senator Levin said. You know, the two major points here that we have to be concerned about are the reciprocity issue and are we creating a just and fair system. I think we need to be prepared to take any unlawful or unprivileged enemy combatant to one of these commissions.

If we believe that we have created a fair and just process with this bill, we should not be shy about taking anyone before these commissions for, I think, Senator, just that reason. I would be very comfortable having a U.S. service member subjected to these rules.

Senator UDALL. Thank you for that answer.

Mr. Kris and Mr. Johnson, if I might turn to you on the question of sunset provisions. Mr. Kris, you state that the DOJ supports such a sunset provision. Could you talk a little bit more along those lines? Then Mr. Johnson, I'd like to hear the DOD's views on a sunset provision, if you would.

Mr. KRIS. Yes, thank you, Senator. With respect to the sunset, of course, I'm not representing the Department of Justice alone, but all of my testimony is representing the administration as a whole. But our basic idea I guess that underlies the sunset—and we haven't specified any specific number of years—is as long as there's a continuity provision to allow pending cases to continue past the sunset that it's a good idea for Congress to come back and take another look at this after the passage of some time and see whether there have been any developments that counsel some changes or a fresh look. That's really I think what it boils down to.

Senator UDALL. Mr. Johnson?

Mr. JOHNSON. Senator, I would agree with what Mr. Kris said, provided that it doesn't jeopardize ongoing prosecutions. We think in the administration a sunset provision is a good idea. We don't have a magic period of years. But given the reality of changing circumstances on an international level and lessons that could be learned from military commissions prosecutions in the immediate years forward, we think a sunset provision is a good idea.

Senator UDALL. Thank you for those insights.

If I might, let me turn to a follow-up question on comments that the chairman made in his opening statement on providing the resources for the defense side of the efforts that we're discussing today. The chief defense counsel issued a memo that I thought raised some troubling issues and I'd be interested in views of each of the panelists on the current military commission system and whether the committee bill addresses the needs of the defense efforts appropriately.

Maybe we can start with Admiral MacDonald and move back across.

Admiral MACDONALD. Sir, actually I agree with the concerns expressed in the senior defense counsel's memorandum. These have been longstanding concerns about resources, about access to experts. I think it's something that needs to be addressed.

I don't see anything, to your point about is it in the current bill, I don't see anything in terms of resourcing that would get at that, that particular issue. But I do think that the defense counsel need more resources.

Senator UDALL. Mr. Johnson?

Mr. JOHNSON. Senator, the legislation itself codifies a rule change we made in May to permit the detainee more latitude in selecting his defense counsel. But in terms of resources, at present Colonel Maciola, who I consult with often, who is the chief defense counsel, has 43 military lawyers assigned to him, 5 civilian, and I'm told he's authorized to go up to 52.

In response to your question about can we do better, one of the things that I'm focused on, that I'm concerned about, whether or not it's in this legislation is something that I intend to push on, is making sure that our defense counsel are adequately trained in capital cases. In the civilian world you have the concept of "learned counsel." There are ABA standards for what are learned counsel for capital cases. I think we owe it to the system to make sure that our defense counsel are adequately trained to handle capital cases.

Senator UDALL. Mr. Kris, my time's expired, so if you could be succinct. But I'd like to hear your answer.

Mr. KRIS. Fortunately, I can be. This is primarily a Department of Defense issue and so I'd just like to associate myself with the remarks of my colleagues. One thing to point out is that the committee's bill does follow our rule change in allowing a choice of counsel. I think it doesn't define the pool from which that choice would be made, and that would be something I think we'd like to work with you on.

Senator UDALL. Thanks again, gentlemen, for your enlightening testimony. It will help us answer some important questions. Thank you.

Chairman LEVIN. Thank you, Senator Udall.

Senator Reed.

Senator REED. Thank you, Mr. Chairman. Thank you, gentlemen.

I just want to clarify some issues that have been previously touched upon. It's my understanding that in the Boumediene case in 2008 that the Supreme Court recognized the right of habeas corpus, that it's a constitutional right. Is that correct, Mr. Kris?

Mr. KRIS. Yes.

Senator REED. So there is at least one constitutional right that's been recognized in terms of enemy aliens and that is habeas corpus; is that correct?

Mr. KRIS. Yes.

Senator REED. And that's the only one?

Mr. KRIS. So far, I believe that's the only right the Supreme Court has said applies there.

Senator REED. The issue that we've talked about with respect to sort of the geography of these trials is that—and it's just at this point to get your opinion—moving some of this military commission to the United States might engender other appeals that could trigger requests for additional constitutional rights?

Mr. KRIS. I think, regardless of where these cases are held, there will be appeals, depending on which appellate process is adopted, and there are a number of them under consideration, including in the bill. What results from those appeals I think, as Mr. Johnson and I have both said, is very difficult to predict because there's been quite a lot of development in the law over the last 50 years since commissions were last used.

Obviously, there is some standard of due process that applies to a military commission. Exactly what that standard is, as I say, is sometimes difficult to discern. In light of developments like the Boumediene decision, it can be I think also increasingly difficult to be sure. I do think geography may play a role in the rights or the procedures that are required. But again, it's hard to know for sure.

Senator REED. Let me also raise another issue. That is, Admiral MacDonald pointed out the law of war recognizes the indefinite detention of combatants until the end of hostilities. My impression is that Hamdan Reserved that issue and did not decide it. Is that accurate, Mr. Kris?

Mr. KRIS. I think you may be referring to Hamdi.

Senator REED. Hamdi.

Mr. KRIS. Which is the decision in which the court recognized the authority to detain under the law of war, and the court left open,

I think, the question whether that authority would at some point run out. So I think that's an accurate statement.

Senator REED. I would presume that the category of individuals, that fifth category, those that have to be held because of their potential, will have the right to habeas to periodically at least raise the issue of whether they still should be detained? Mr. Johnson?

Mr. JOHNSON. Well, in fact almost all, if not all, of the Guantanamo detainees are suing the government in habeas. The President in his May 21 remarks stated with respect to that fifth category that there would be some form of periodic review, even subsequent to habeas proceeding, and that is something that we're working on now.

Senator REED. Thank you.

One of the other reasons to move quickly but thoughtfully in this process of military commissions is that this is a way in which to ensure due process prior to a court deciding one of the habeas cases; is that accurate?

Mr. JOHNSON. That's a fair statement.

Senator REED. That's a fair statement. So that I think it would serve us well to move with dispatch, but thoughtfully, on this legislation.

Mr. JOHNSON. Yes, sir.

Senator REED. Admiral MacDonald, you commented about the voluntariness standard and your concerns, legitimate concerns, about it would—it might tend to, I won't say confuse, but it might tend to complicate the decisionmaking of military judges. But ultimately aren't we in a practical position trying to speculate about what the Supreme Court will hold, because that's one reason why we're here today doing this again?

Admiral MACDONALD. Yes, sir. I would agree with everything that's been stated this morning about how unsettled the law is in this particular area. What I would propose is using voluntariness, not as the only standard, but subsuming that as one of a number of factors, others being the extent to which a statement is corroborated, looking at the reliability of the statement within the four corners of the document itself.

My opinion is that the Supreme Court or a Federal court would recognize that there are fundamental differences between a standard that grew up in a law enforcement paradigm versus one that we're trying to understand in a law of war paradigm. The reason I talk about this balancing test, this totality of the circumstances and the number of factors, is I think that will provide the judge with a kind of a guidepost. So for example, if you're evaluating a statement that was taken at the point of capture, you might weigh voluntariness less, because it's a more coercive environment, than you would corroboration and the four corners of the document.

As you become more attenuated from the battlefield, so for example 6 months, a year after the detainee is removed from the battlefield and is in a facility like Guantanamo, then perhaps voluntariness in the judge's mind would be more important. But we would leave that to the military judge to determine on a case by case basis as he or she sees it.

Senator REED. Thank you very much, Admiral.

If I may have one final question, please, of Mr. Johnson. Is it your intention or have you decided to either try, give everyone who's in Guantanamo some type of due process, either military commission or a trial in Article 3 courts, or are there some people that simply will not get any procedure at all, that will be deemed to be an enemy combatant who will be detained?

Mr. JOHNSON. Putting aside anyone who has been released or may be transferred to a third country in the future, I think it's accurate to say that the remaining population will either be detained because we've been upheld in the habeas litigation and they're subject to that periodic review I referred to a moment ago, or those that violate the laws of war, that we feel we can and should prosecute, we prosecute in a military commission, and those that can be prosecuted for violations of Title 18 will be referred to the Department of Justice and Article 3 courts.

Senator REED. Thank you, Mr. Johnson.

Chairman LEVIN. Thank you, Senator Reed.

Senator Hagan.

Senator HAGAN. Thank you, Mr. Chairman, and thank you, gentlemen.

As you know, over the course of many years the former administration has released a number of detainees from Guantanamo. Obviously, we are hoping that many of the other countries will take some of these detainees that are remaining. But we need to be mindful of the fact that the countries in the region, such as Yemen, are currently incapable of mitigating the threat posed by the returned Guantanamo Bay detainees, whether the country lacks the appropriate institutions or mechanisms of enforcement, such as a counterterrorism law, or just the ability to prosecute these detainees. Additionally, many countries in the region may not be willing to accept them.

I think we need to work with the countries in the region that have a proven track record in rehabilitating the terrorists to accept detainees transferred from Guantanamo Bay. According to the Office of the Secretary of Defense, Saudi Arabia remains one of the most reliable counterterrorism partners in accepting detainees that have transferred from Guantanamo Bay. The Saudis have actually institutionalized a rehabilitation program that was developed by the ministry of interior to de-radicalize and rehabilitate the former detainees for reintegration into the society in Saudi Arabia.

According to the Office of the Secretary of Defense, efforts are under way to convince Saudi Arabia to accept some of the Yemeni detainees that have Saudi tribal affiliations into the Kingdom's rehabilitation program.

My question for all of you is, how is the Department of Defense addressing the problem that many countries in the region are just simply not capable of mitigating the threat posed by the Guantanamo Bay detainees and they lack the appropriate institutions and mechanisms to prosecute them? And also, can you provide your opinion on working with the countries in the region, such as Saudi Arabia, to accept these Yemeni detainees that are transferred from Guantanamo Bay that share the same tribal affiliations?

Mr. JOHNSON. Senator, I agree with just about everything you said. Many people do not understand that it's not as simple as, oh,

XYZ country is will to take the detainee back, so we can send them back. There needs to be in place an adequate rehabilitation program where the circumstances warrant or the ability to monitor in that accepting nation so that the detainee doesn't simply return to the fight and that we minimize to the fullest extent possible any acts of recidivism for those who are transferred or released.

The safety of the American people is the utmost concern. So we believe strongly that rehabilitation programs like the one you referred to are something that we should encourage, promote, and it's something we're very, very focused on.

Senator HAGAN. Mr. Kris?

Mr. KRIS. I agree with everything that Mr. Johnson said. It is absolutely essential that when we transfer these people to foreign countries that we do so under conditions that ensure safety. The rehabilitation program that the Saudis have is an excellent program from what I understand.

Admiral MACDONALD. Senator, I would agree with Mr. Johnson on this. Particularly with our military members, we're concerned about returning fighters to the battlefield. So this is a big issue for us. But I think the way Mr. Johnson characterized it is exactly right.

Senator HAGAN. Thank you.

Also, I think that we need to be mindful that, although the interrogation of detainees produces obviously valuable information and sources of intelligence, we also know that they can compromise the ability to prosecute detainee, obviously, if the evidence obtained is through an interrogation method that would involve torture.

Mr. Kris, can you just describe the process in which the Department of Justice is reviewing the evidence associated with each of the Guantanamo Bay detainees to determine if they can in fact be prosecuted and how is the Department of Justice working with the Department of Defense in this regard?

Mr. KRIS. Yes, I'd be happy to do that, Senator. Mr. Johnson and I are working closely together on this. There is obviously the review by the task force that was set up by the executive order, that makes judgments about whether cases are potentially prosecutable. At that point they need to be reviewed both by the Justice Department and the Defense Department, working together to try to figure out, are these cases really appropriate to indict either in an Article 3 court or to bring before a military commission.

As Mr. Johnson and I have talked about, this is a fact-intensive judgment. It requires a careful assessment of all of the evidence, identity of the victims, location of the offense, and a variety of other factors.

I would point out, I guess, that these kinds of forum selection choices are not unfamiliar to Federal prosecutors. They have to make these kinds of choices in other cases as well, whether it's between Federal and State or U.S. and foreign or even UCMJ and Article 3 courts. So there has to be a process where the case is really carefully reviewed and worked up by a joint team and then a judgment made about whether and where it ought be prosecuted.

Senator HAGAN. Thank you.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Hagan.

We're going to have a 2-minute second round with this panel. I wish it could be a lot longer.

First to Admiral MacDonald. I didn't ask you this question the first round, so let me ask you now. Do you believe that our language conforms to the Hamdan standards?

Admiral MACDONALD. Yes, sir, I do.

Chairman LEVIN. Second, Admiral, I think Mr. Johnson said that the preference here would be to have more Article 3 trials. We will I think hear some testimony that all the trials should be Article 3, that there shouldn't be any military commissions. I'm wondering if you could tell us as kind of a military man, but a JAG officer in the Navy, why military commissions at all? Why not try everybody under—what are those circumstances which make it difficult, that I think Mr. Kris and Mr. Johnson are working through, as to why would you want to try anyone under military commissions or need to try anybody with military commissions?

Admiral MACDONALD. Well, Senator, I think again it goes back to the Uniform Code of Military Justice and Federal law is designed for a different model. It's designed for law enforcement. We're in a wartime environment.

Chairman LEVIN. Give us some practical parts of that environment which would lead you to conclude we ought to have military commissions try people or that we need to have the military commissions?

Admiral MACDONALD. Well, again, Senator, it would go to that very coercive environment. We're relying upon our soldiers to go into a dangerous environment, where in many instances they have to break down doors, and we're worried about their safety. They're worried about it. We don't want them to have to stop and think about giving Miranda rights or giving Article 31B rights under the UCMJ. We don't want them thinking, in my personal opinion, about whether or not the statements that they are getting from someone in a house that they've just broken into, whether that statement is purely voluntary or not.

I think that that's recognized and the Supreme Court recognized that in the Hamdan case, that there are these unique circumstances that come up in a law of war environment that just cannot be handled under two different systems that were created for a completely different reason.

The other thing that I would say, sir, is—and this is to your point in your opening about a fair and just process. I think we need to be clear. As we go forward with these commissions, we need to feel that these commissions can try anyone, anyone that fits within the jurisdictional definition that you've put in the bill, the personal jurisdiction section. We ought to feel very comfortable taking anyone.

Now, I understand that the President prefers Article 3 courts. But in my opinion, when we leave here today we ought to be looking at this bill and saying to ourselves, it is fair and just; to Senator Udall's question, we would feel very comfortable having our own service members tried under this kind of a process.

I don't think we should kid ourselves. Anybody should be able to—any enemy combatant should be able to be tried under this process.

Chairman LEVIN. Admiral, just quickly, relative to your totality of the circumstances point as to whether or not a statement obtained is coercive: In our bill, a statement that is obtained through cruel, inhuman, and degrading treatment is not admissible, period. What you are suggesting is that, instead of adding a “voluntary standard” to that, that there be something much more carefully defined so that a judge can look at the totality of the circumstances to take into account these factors involving warfare and the use of force. Is that accurate?

Admiral MACDONALD. Yes, Senator. We pushed in 2006 to eliminate the discrimination between statements taken before December 30, 2005, the date of the Detainee Treatment Act, and a standard imposed to statements after. Your bill eliminates that distinction and so statements taken under torture are eliminated. CID statements, they’re eliminated. I’m talking about some level of coercion below those two standards.

Chairman LEVIN. And torture is defined by the Geneva Conventions.

Admiral MACDONALD. Yes, sir.

Chairman LEVIN. Now, there’s one more thing I have to clear up and this is this question of location. Our bill clearly is not going to distinguish as to what the procedures are dependent on where the location of the military commission is. I mean, there’s no way that our statutory language can make that distinction.

I think that you were pressed, Mr. Johnson, and I think Mr. Kris to some extent, to describe where it might make a difference, I guess in terms of a judicial or court or a judge’s opinion as to depending on where the location is. I don’t see that at all. I must tell you, I don’t see how the location of a military commissions hearing can have an effect at all. It won’t have an effect nor can it in the way we write the procedures.

Finally, however, on the other side of the coin, if you’re going to try people for Article 3 crimes, which is your preference, there’s no way practically those folks can be tried in Guantanamo. You cannot have a jury empanelment that takes months, with hundreds of citizens dragged down to Guantanamo to live while a jury is being empaneled in an Article 3 criminal case.

So there are many reasons why we need to bring people, if we’re going to try them for crimes under Article 3, which we want to, why you need to bring them to the United States as a practical matter. As far as where a military commission is held, I don’t see that there is a difference. You’ve been asked for the record to give us any thoughts on that, and of course that request I know you will honor and give some thought to.

But I just don’t offhand see that it could make any difference as to the procedures as to where a military commission is held. That’s a statement. It’s not a question. I’m way over my time. If you want to react to that for the record—Mr. Kris?

Mr. KRIS. First, I agree with you that it’s hard to imagine an Article 3 prosecution occurring at Guantanamo. Second, in talking about location Jeh and I have been I think perhaps cautious just because these are difficult issues, and we will get you something for the record.

But third, I just want to make clear, despite the difficulties, our best prediction is that voluntariness will be required as a matter of due process here. It's a voluntariness standard that is based on totality of the circumstances and it's very similar, I think, to what Admiral MacDonald was talking about. That is, you have to take account of the realities of war. But I do want to make clear that we've come to that conclusion.

Chairman LEVIN. That is the position of the administration. We'll welcome language from both of you on that. But our bill as it stands does incorporate the Geneva Conventions.

Senator Graham.

Senator GRAHAM. Thank you, Mr. Chairman.

I think we'll find some common ground here about the evidentiary standard as far as a statement goes. I think we both view it the same, that—Admiral MacDonald, you described the situation very well. When you're in detention outside the battlefield, the analysis will be different than if you're in the middle of a firefight. The judges should be able to accommodate those circumstances. I don't think there's really a whole lot of difference, Mr. Kris, between you and Admiral MacDonald when you get there.

But this location issue is very important because of the politics of this, for lack of a better word. Mr. Johnson, is it your view that closing Guantanamo Bay would be an overall benefit to the war effort and starting over on detainee policy?

Mr. JOHNSON. It's my view, Senator, which is also the view of the administration, but it's my view that closing Guantanamo enhances national security.

Senator GRAHAM. Well, I would just like to—maybe being the odd guy out as a Republican, I believe that also, simply because Generals Petraeus, Odierno, and every other combat commander has said that being able to start over with detainee policy would take a tool off the table used by our enemies, because Guantanamo Bay, quite frankly, is the best-run military prison in history right now. Do we all agree with that, the current state, Admiral?

Admiral MACDONALD. Yes, sir, I do.

Senator GRAHAM. Mr. Johnson?

Mr. JOHNSON. I've been there. The professionalism of the Guards at Guantanamo is remarkable. I've visited civilian clients in a few Federal Bureau of Prisons places and I agree that the professionalism of our personnel there is really remarkable.

Mr. KRIS. I too have visited Gitmo and I also was quite impressed.

Senator GRAHAM. And to the Guard force families who may be listening, what your loved one goes through every day at Guantanamo Bay is a real sacrifice. That is a tough place to do duty. But having said that, it is what it is, and starting over with detainee policy I think could help the country.

Mr. Kris, you said one of the goals of a reformed commission is to let the international community know that there's a formal legitimacy to the commission that we haven't been able to have otherwise; is that correct?

Mr. KRIS. I do think it is important, and I take it to be one of the main reasons that we're doing this work, that the committee is doing this work, is to enhance the legitimacy.

Senator GRAHAM. I totally agree. But the last thought is, I just can't believe, quite frankly, given the Supreme Court cases, that if you close Guantanamo Bay, move the detainees withinside the United States and performed a military commission trial like we did in World War Two, that there'd be a substantial difference. What I don't want to have taken away from this hearing is that if we close Guantanamo Bay and move the detainees within the United States that they're going to be conferred—that there will be conferred upon them a plethora of legal rights they wouldn't have otherwise.

Can you just address that?

Mr. KRIS. It may be helpful if we say this. There's a number of I think relatively modest differences between the committee's bill and the administration's proposal. But as you've said, they're not vast and we do approve of and support the bill.

The changes that we're recommending we think would be ample to survive constitutional review even if the commissions were held in the United States.

Senator GRAHAM. Just the location alone is not going to change the dynamic the court would apply in a dramatic way?

Mr. KRIS. No. And we think that what we're proposing will pass muster comfortably in the United States.

Mr. JOHNSON. Senator, we're not suggesting—and I want to emphasize that—that the full range of constitutional rights would apply depending upon location. We have referred in this hearing today to voluntariness, and Mr. Kris is right, when you look at the suggestion from the administration on a totality of the circumstances voluntariness test it's really not that different from what Admiral MacDonald has described.

Admiral MACDONALD. Senator, I think as you have just pointed out, this is really coming down to that, that particular right, and the voluntariness test. I would align myself with Mr. Kris that blaming the situs of the military commission in terms of additional constitutional rights should not matter in this. I think we probably can reach some common ground between what I would consider to be a balancing test using voluntariness and what the administration's position is right now.

Chairman LEVIN. Thank you, Senator Graham.

Senator Lieberman.

Senator LIEBERMAN. Thanks, Mr. Chairman.

Chairman Levin asked Admiral MacDonald a question, a rhetorical question of why would you try any of these people in a military commission setting, as our bill requires? I thought your answer, Admiral MacDonald, was compelling and very principled. To a certain extent, I suppose what I really want to do is ask the question from a different perspective of Mr. Johnson and Mr. Kris, which is: Why would one prefer—why would anyone prefer to try people apprehended for violations of the law of war in an Article 3 Federal court? As you said, Mr. Johnson—I was disappointed with your answer and it kind of pulled me back a little bit from my feeling of appreciate toward the administration for accepting the role for the military commissions in handling these people.

I mean, the fact is that from the beginning of our country, from the Revolutionary War, we've used military tribunals to try war

criminals or people we have apprehended, captured, for violations of the law of war. Again, I think the unique circumstances of this war on terrorism against the people who attacked us on 9–11 may have led us down, including the Supreme Court, some roads that are not only to me ultimately unjust, but inconsistent with the long history that we've had here.

We talked before about how the military commissions are not only within the Hamdan decision, but certainly within the Geneva Convention, which is the international standard for fairness and justice in handling people captured during a war.

So why would you, in light of all that, say that the administration prefers to bring these people before Article 3 Federal courts instead of military commissions, which are really today's version of the tribunals that we've used throughout our history to deal in a just way with prisoners of war?

Mr. JOHNSON. Senator, please don't misinterpret my remarks. I applaud this committee's effort and this committee's initiative to reform the Military Commissions Act. I think that military commissions should be a viable, ready alternative for national security reasons for dealing with those who violate the laws of war, and I'm glad we're having this discussion right now and I thank the committee for undertaking this.

As we said, by and large we definitely support what you're doing. The President's made that clear. When you're dealing with terrorists whose—and I'm going to say this on behalf of the administration. When you're dealing with terrorists, who one of their fundamental aims is killing innocent civilians, it is the administration view that when you direct violence on innocent civilians, let's say in the continental United States, that it may be appropriate that that person be brought to justice in a civilian public forum in the continental United States because the act of violence that was committed against the civilians was a violation of Title 18 as well as the law of war.

So we believe strongly that both alternatives should exist.

Senator LIEBERMAN. Well, I hear you. I respectfully disagree insofar as the administration has stated today a preference for trying these people in Article 3 courts, because I think, based on what you've just said, essentially the effect of it is to give these war criminals, people we believe are war criminals—that's why we captured them—the greater legal protections of the Federal courts because they have chosen to do something that has pretty much not been done before in our history, which is to attack Americans, to kill people here in America, as they did in 9–11, civilians, innocents, it doesn't matter, and to do it outside of uniform.

So I think it puts us in a very odd position that we're giving these terrorists greater protections in our Federal courts than we've given war criminals at any other time throughout our history, even though in my opinion they are at least as brutal and inhumane, probably more brutal and inhumane, than any war criminals we've apprehended over the course of the many wars we've been involved in.

So I think we end up, yes, it may be also an act of murder to have killed people who were in the Trade Towers, the Twin Towers on 9–11, but it was an act of war and the people who did that don't

deserve the same constitutional protections in our Federal courts as people who may be accused of murder in New York City do. I say New York City because the attack was there.

I'm over my time. This is a very important discussion which I look forward to continuing with respect, with you and others in the administration.

Thank you.

Chairman LEVIN. Thank you, Senator.

Senator Martinez.

Senator MARTINEZ. Thank you, sir.

To follow up on that, I think that it's fascinating for us to discuss a person like Khalid Sheikh Mohammed, who didn't wear a uniform and in fact inflicted great harm upon civilians, not only here but in other parts of the world, and considers himself to be a part of a movement, of a political movement, that we would then consider a person like that to have a preference for trying him as a criminal under Title 18 in an Article 3 court, as opposed to in a military tribunal, and according him an additional set of legal rights.

That begs another question. If we are doing Article 3 trials, as the chairman was suggesting, we then also are talking about closing Guantanamo by the end of the year. There's no way for 220-some odd people to be processed through some proceeding, whether Article 3 or military commissions, in that time frame. So where will they then be? I guess they'll be here. And what about those that are then acquitted? Where do they go? What happens to them?

Would you mind touching on those issues?

Mr. JOHNSON. Well, you're correct, you can't prosecute some significant subset of 229 people before January. So those that we think are prosecutable and should be detained we will continue to detain, whether it's at Guantanamo or someplace else.

The question of what happens if there is an acquittal is an interesting question. We talk about that often within the administration. I think that as a matter of legal authority if you have the authority under the laws of war to detain someone—and the Hamdi decision said that in 2004—that is true irrespective of what happens on the prosecution side.

Senator MARTINEZ. So therefore the prosecution becomes a moot point?

Mr. JOHNSON. No, no, I'm not saying that at all. I'm saying you raised the issue of what happens if there is an acquittal.

Senator MARTINEZ. Right.

Mr. JOHNSON. And in my judgment, as a matter of legal authority—you could get there—there might be policy judgments one would make, but as a matter of legal authority, if a review panel has determined this person is a security threat and they've lost in their habeas and we've gone through our periodic review and we've made the assessment the person's a security threat and should not be released, if for some reason he's not convicted for a lengthy prison sentence, then as a matter of legal authority I think it's our view that we would have the ability to detain that person.

Whether in fact that actually happens I think would depend upon the circumstances and the facts of the particular case. But as a matter of legal authority, I think we have law of war authority,

pursuant to the authority Congress granted us with AUMF as the Supreme Court interpreted it, to hold that person, provided they continue to be a security threat and we have the authority in the first place.

Senator MARTINEZ. Thank you.

My time is up, but I will just conclude with a comment, that I truly believe that these are not criminals, that these are people engaged in a very profound battle against this country as part of a non-state actor for some of them, but they nonetheless do not really belong treated as criminals, but as people that are involved in something much deeper and greater than that.

Chairman LEVIN. Thank you, Senator Martinez.

Senator Udall.

Senator UDALL. Thank you, Mr. Chairman. I'll be brief.

I want to thank the three panelists for your excellent testimony. I want to also acknowledge the fact that the civilian judicial system is interfacing and working with the military judicial system. I speak as a non-lawyer, so I'm already getting into deep water here. But it seems to me that our judicial system is a living, evolving, growing thing, if you will, and we're working here to make sure that it's nurtured. Another way to look at this perhaps is you've got two different kinds of software systems that we're trying to integrate and understand together. So again, I want to thank the civilian and the defense establishments for working together.

Any time I have remaining, Mr. Chairman, I pre-yield it to the great questions from the JAG officer who sits on the Senate committee, Senator Graham, who I thought has been very, very informative, very incisive with his questions and comments today.

Senator GRAHAM. Really, we do have two legal systems. Habeas rights have been granted to Guantanamo Bay detainees. While I don't agree with that, under the bill that Senator Levin and I wrote every detainee would wind up in Federal court, the D.C. Circuit Court of Appeals. The Supreme Court ruled that habeas rights apply to the detainees.

We need to look at a Nation about creating uniformity to these habeas rights. Do we as a Nation want habeas petitions to allow for lawsuits against our own troops? A medical malpractice case was brought under the old habeas system. I think, Senator Udall, we can streamline the habeas process. There is a role for an independent judiciary.

I would just like to conclude with this. No one should be detained in America for an indefinite period of time that doesn't go to a civilian court or a military court without an independent judicial review. I don't want people to believe that folks are in jail because somebody like Dick Cheney or fill in the blank with a politician said so. It doesn't bother me at all that all of our cases will go to civilian judges and the military and the CIA has to prove to a civilian court that these people are dangerous and they're part of the enemy. Once that's been done, then I think it's crazy just to arbitrarily say you've got to let them go. If our intelligence community, upon a periodic review annually had, believes that they present a danger to this country, I think it would be crazy to say you've got to let them go, because you don't under the law of armed conflict.

But just to end, Senator Udall, we need a hybrid system. We need civilian judges involved in this war because it's a war without end. As the President said last week, there will never be a definable end to this war. An enemy combatant determination can be a de facto life sentence. I don't want to put people in a dark hole forever. I want them to have a way forward based on their own conduct. Some of them will be able to get out of jail because they've rehabilitated themselves and some of them may in fact die in jail. But I want it to be a process that's not arbitrary, that's not based on a politician saying so, but a collaborative process with an independent judiciary legitimizing our actions.

I think that's what this country has been lacking and that's what we need to go forward. That's not being soft on terrorism. That's applying American values to this war.

Chairman LEVIN. Thank you.

Senator Reed.

Senator REED. Thank you.

This has been a very thoughtful discussion. There's been a discussion about the value of trying everyone in a military tribunal, military commission, or trying people in civilian courts. I think, just for the record, that there is a value to trying some of these individuals in civilian courts because they are criminals, and because when they try to claim a mantle of warrior and that is feeding into their appeal out in the greater Islamic world, but in fact they're criminals. They have committed premeditated murder. In that situation I think they should—if we can mount a case effectively in court, we should not only do that, but they should be not only convicted, but also identified as criminals, not as soldiers, not as warriors, etcetera.

Now, there are other cases where, captured on the battlefield or because of practical considerations, a military tribunal will work. I just wonder, Admiral MacDonald, as a uniformed officer do you have a reaction to that?

Admiral MACDONALD. Senator, I guess my only point would be this, is that I think we need at the end of the day to have full faith and confidence that what we're creating in this bill is a fair and just process. I am sensitive, too, that there may be situations where going to an Article 3 court, going to Federal court, may be the right decision, given the facts and circumstances that exist in a case.

But I just want—I think it's absolutely vital that when we leave here at the end of the day it's not because we believe that what we've created is a second class legal system. We need to look at this that this can stand alone in the world and we are willing to be judged by what we're putting together today. That's my only point, is that you ought to feel very comfortable sending anybody to these commissions process with these changes because we believe it's a fair and just system.

Senator REED. The ultimate test would be if an American service man or service woman were subject to these procedures we would consider them to be appropriate.

Admiral MACDONALD. Yes, Senator.

Senator REED. Thank you.

Chairman LEVIN. Thank you.

I will just conclude by saying what our bill does not address, does not purport to decide or address. One, we do not decide whether a person will be tried—who's going to be tried, is tried by an Article 3 court or a military commission. We've been told there's going to be some of each for various reasons. We do not make that decision in this bill at all, don't try to, don't purport to.

Second, we do not address the question of where a trial takes place. That is not addressed in this bill.

Third, what we do do is address the procedures that would apply where there are military commission trials. It's pretty obvious to me as chairman that those procedures will apply regardless of where the military commission is held. There can't be any difference in the way we write a bill on that. I disagree with the suggestion that somehow or other it will make a difference in terms of a court ruling, Supreme Court or otherwise, as to whether or not a military commission proceeding is held in the United States or in Guantanamo. I just as a lawyer cannot imagine the Supreme Court or any other court saying, well, this commission was held in one place, therefore one rule, constitutional rule, applies; if it were held in another place, a different constitutional rule applies.

Given what the court has decided in *Boumediene* and what the court has decided in *Hamdan*, I just can't imagine there would be any difference in that decision, whether trial court or Supreme Court, as to where this military commission proceeding took place.

Finally on the voluntariness issue, hopefully we can come up with some common language on that. But in any event, we have language in the bill which incorporates the requirements of the Geneva Conventions in terms of coercion, in terms of whether or not a statement can be used against a defendant.

Thank you all very much for your wonderful testimony here. Your very carefully thought out testimony will be made part of the record. We'll have some additional questions for the record, and we'll now move to our second panel.

[Pause.]

Chairman LEVIN. If we can all leave very quietly, those of us who are leaving. You're going to miss a great second panel, but please leave quietly if you are going to.

On the second panel we have three distinguished experts on military commissions from outside of the government. You're our outside panel. First, retired Vice Admiral John Hutson capped a distinguished 27-year career as a Navy lawyer by serving as the Judge Advocate General—you're a Rear Admiral. I've been corrected.

Admiral Hutson: Well, if I had retired after the legislation it would be different.

Chairman LEVIN. Your mike wasn't on. You may want to have everyone else to hear that. You may not want anybody to hear your response.

Rear Admiral John Hutson capped a distinguished 27-year career as a Navy lawyer, served as the Judge Advocate General of the Navy from 1997 to the year 2000. He is currently Dean and President of the Franklin Pierce Law Center.

Second, retired Major General John Altenburg completed a 28-year career as an Army lawyer, serving as assistant Judge Advo-

cate General of the Army from 1997 to 2001, and as the first Appointing Authority for Military Commissions from 2003 to 2006.

Finally, Daniel Marcus served as General Counsel of the 9–11 Commission, after spending a number of years in the White House Counsel's Office and the Department of Justice. He now teaches national security law and constitutional law at the Washington College of Law at American University.

Gentlemen, we thank you. We didn't give you much notice about this hearing. It's a very important hearing and we greatly appreciate your attendance and the work that you put in all your lives for this Nation.

Admiral Hutson, we'll start with you.

**STATEMENT OF REAR ADMIRAL JOHN D. HUTSON, USN [RET.],
FORMER JUDGE ADVOCATE GENERAL OF THE NAVY**

Admiral Hutson: Thank you, Mr. Chairman. I very much appreciate this opportunity. The honor and privilege that it is is not lost on me.

I'll be brief. I've got a written statement, but let me summarize it basically in a sentence that I'll amplify on just very briefly, which is that we don't ask the Department of Justice to fight our wars and I think we shouldn't ask the Department of Defense to prosecute our terrorists. I respectfully disagree with Senator Martinez. I think that they are criminals and they ought to be treated as such, and to somehow elevate them to the status of, say, Major Andre I think is inappropriate.

I have two concerns particularly. One is that right now the U.S. military is, if not the most highly respected institution in the United States, it's certainly among the very top. There are a couple reasons for this. One is that the military carefully restricts itself to its primary mission, which is to fight and win our wars, to provide the time and the space necessary for the real solutions, social, cultural, religious and otherwise, to take place. Then, once that mission is limited to warfighting, the military does that very, very well, just as the Department of Justice prosecutes criminals very, very well.

So there is that.

The other aspect for me is that the Department of Justice has scores of experienced prosecutors, decades of precedent and experience, lots of judges, and great credibility, justifiable credibility in this area, that the Department of Defense simply doesn't have. The Department of Defense personnel policy is to rotate people every 2 or 3 or 4 years. They will never ever get the experience that Federal prosecutors have or that Federal judges have.

So I think we're missing an opportunity to display the greatest judicial system on the face of the Earth, to shout it from the rooftops. Rather than doing that, we're sort of hiding it under a bushel and bringing out the uniformed service persons. I admire and am proud of the job that they do, but it's simply not the primary responsibility of the Department of Defense or the United States military or armed forces to perform that function, and I'd rather see it where it should be, in the very capable hands of the Department of Justice.

Thank you, sir.

[The prepared statement of Admiral Hutson follows:]
 Chairman LEVIN. Thank you, Admiral, very much.
 General Altenburg.

**STATEMENT OF MAJOR GENERAL JOHN D. ALTENBURG, JR.,
 USA [RET.], FORMER APPOINTING AUTHORITY FOR MILITARY COMMISSIONS**

General ALTENBURG. Thank you, Chairman Levin and members of the committee.

Military commissions are an appropriate, long validated, constitutional mechanism for law of war violations. Military commissions have always adapted to both the operational needs of the particular conflict and to the then-existing state of criminal law.

This proposed statute tracks the current state of criminal law in its most important respects and codifies or incorporates advanced thinking in criminal law since the 1940's use of commissions by the United States. This is true especially in areas such as hearsay and self-incrimination, including the reliability concern that the Supreme Court has emphasized in the last 50 years.

Our military in the 21st century fights in a more complex manner, meaning that Congress must forthrightly acknowledge how this complexity impacts on military commissions, including evidence gathered by intelligence personnel, not just conventional forces, operations and places and under circumstances that would not serve our security, diplomatic posture, or stability of other nations to be made public, and confronting an enemy of uncommon ruthlessness and ability to reach anywhere, at any time, making personal security of participants in the investigative and trial process an especially sensitive and appropriate consideration.

I applaud the efforts of the committee in proposing this amendment to the Military Commissions Act. I think that there are several reasons why these people should be prosecuted at military commissions, among them the fact that we're prosecuting them for war crimes and not violations of Title 18. They may have also committed violations of Title 18, but we're prosecuting them for war crimes.

It's a part of the Commander in Chief's authority to prosecute war criminals during a war and just after a war. It serves as a deterrent to others. The UCMJ—sometimes we use the word "UCMJ" and we act like that's just courtmartial and military commissions are different. The UCMJ includes four tribunals. Courtmartial is the one we're most familiar with and therefore oftentimes we shorthand and say "UCMJ" when we mean courtmartial.

But military commissions have been around for a couple hundred years and courts of inquiry for well over 100 years, and the *provo* courts are the least used. But I think that's an important distinction that we should all keep in mind.

I would ask the same question that a couple of Senators have asked in response to my colleagues' comments, and that is why would we apply domestic criminal law due process for alien unlawful belligerents who've abandoned all civility and respect for international law?

I'd just to just two things that I'd like to comment on that I think need to be addressed. One is, quite frankly, merely a quibble, and

that is that I believe, because the service courts have the experience of the factfinding role, the experience and the expertise honed over years and years, that a more appropriate place for the intermediate appeal would be the existing Court of Military Commissions Review and not the CAF. The CAF I'm sure, as an earlier speaker mentioned, certainly has the expertise to do the factfinding role. I just think it's better placed with the military appellate judges because of their experience in that regard. I think it would be somewhat onerous to place that on the CAF. Their experience is with criminal law for the most part. Military criminal law is very similar to domestic criminal law, and we're now into an area of law of war, something that's fairly arcane, in dealing with these types of crimes.

The other thing that I think needs to be addressed is the issue of the death penalty. It's somewhat ambiguous in the Military Commissions Act, and I'll just kind of state what the scenario is. If a detainee wants to plead guilty to a capital offense, he can do that. But the way the Military Commissions Act is written, it says that he has to be found guilty by a jury, guilty by commissions. There's a way to wordsmith that to make sure that it's very clear and that we don't spend hours and days litigating at the military commissions proceedings whether he really can do that and exactly what that means. I'd be happy to submit that in additional comments or in response to questions as to what proposed language it would be. It would just make it very clear, because I know that prosecutors and defense lawyers and judges are trying to grapple with that because some people want to plead guilty to a capital offense. Of course, they want to be a martyr for their cause and that's another discussion. But I think that it should be possible for them to plead guilty to a capital offense and then be sentenced by the court.

Thank you, sir.

[The prepared statement of General Altenberg follows:]

Chairman LEVIN. Thank you very much.

Mr. Marcus.

STATEMENT OF DANIEL MARCUS, FELLOW IN LAW AND GOVERNMENT, WASHINGTON COLLEGE OF LAW, AMERICAN UNIVERSITY

Mr. MARCUS. Thank you, Mr. Chairman. I appreciate the opportunity to testify today. I've submitted a statement for the record and I'll just say a few words in summary.

I do believe there is a role for Article 3 courts in some cases involving some of the Guantanamo detainees and some of the other individuals who've been treated as enemy combatants at one time or another since September 11. I believe our Article 3 courts have shown themselves able to effectively try terrorists in Federal courts in the Moussaoui and the Padilla case and some of the earlier cases.

So I think, for example, someone like Padilla or someone like al-Marri, who was arrested by law enforcement authorities in the United States, far from the traditional battlefield, is an appropriate candidate for Article 3 criminal prosecution.

I notice that one of the Guantanamo detainees was recently transferred to the Federal court system and will be tried in the Southern District of New York in connection with crimes connected with the bombing of the East Africa embassies in 1998. I think he is also an appropriate candidate for an Article 3 court because it's not clear that he's appropriately treated by a military tribunal since his acts were committed at a time when we arguably were not at war with al Qaeda in a strict military sense.

I do believe that, while the Federal courts can try many terrorism cases, that there are a lot of terrorism cases involving the Guantanamo detainees that would be difficult, not impossible but difficult, to try in a Federal court, and I think that an improved military commissions system is an appropriate way of trying these defendants.

I think this committee's bill takes major steps toward perfecting the existing military commission system, which was already improved significantly by the Military Commissions Act. But I do think there are some additional steps that could be taken and I've outlined some of those in my testimony.

[The prepared statement of Mr. Marcus follows:]

Chairman LEVIN. Thank you very much, Mr. Marcus.

Go into some of the details? Why is it difficult to try some of or most of the Guantanamo people in Article 3 courts?

Mr. MARCUS. Well, I think there are two main reasons and I think they were averted to in the testimony of the first panel. There are some Federal court rules with respect to admissibility of statements, the Miranda rules for example, the fruit of the poisonous tree doctrine, that would make it difficult to admit some statements by detainees that are probably—that should be admitted as reliable, voluntary statements under all the circumstances.

I think I would associate myself with the very interesting dialogue between the Justice Department and Defense Department representatives and Admiral MacDonald about the issue of voluntary statements and the "all of the circumstances" test. I would align myself with Mr. Johnson and Mr. Kris and with the administration, that I think we need a totality of the circumstances test, but it has to be anchored to voluntariness. I do think the principle in our system that confessions should be admitted only if they are voluntary is a very important constitutional and policy principle and we ought to adhere to it. I think it may well be possible, as you and Senator Graham have suggested, to work out some language between that of the committee's bill and—I haven't seen the administration's language—that would satisfy these concerns.

The second reason I think is that—and I'm not an expert, unlike my colleagues, on military procedures—but I take it that in military commissions it will be easier to close proceedings to handle classified evidence and to handle sensitive national security issues. Obviously we don't want completely closed proceedings, but I think there's more flexibility in the military commissions system to ensure that we can get the national security information that we need to convict these guys without compromise national security.

Chairman LEVIN. General Altenburg, why do we need military commissions? Go to some of the practicalities? And then I'm going to ask you, Admiral, to comment on their testimony.

General ALTENBURG. Senator Levin, we don't need military commissions unless we want to prosecute some of these people. We can just detain the people who we captured on the battlefield and have discussions and debates with international legal scholars about, what does this 21st century non-state actor paradigm mean for the right under the Geneva Convention to detain people you've captured until the war is over if you can't really define when the war is over, you're not capturing territory, there's no capital to get, so forth and so on.

So we can just detain them and not worry about it.

Chairman LEVIN. Why is it desirable from a practical perspective?

General ALTENBURG. It's desirable—as a practical matter—first of all, it's desirable because we can show the American people just how bad these people are, number one, and also to the international community we can show these people how bad they are.

The reason we have to have military commissions is, quite frankly, as the professor alluded to, some of these people can't be tried in Article 3 courts. There's just not the evidence to try in Article 3 courts. My own view is that alien, unprivileged belligerents captured on the battlefield should not be entitled to the constitutional protections that American citizens have. I don't think we should settle for some second-rate system, but in my mind the MCA together with what you've put together in the last few weeks exceeds all international standards. It certainly exceeds anything that's being done at The Hague.

One of the great failings several years ago in our government was in failing to educate the public as to what the standards are and what is at stake that the law of war applies. Instead, critics have been able to define the terms of the debate and the debate has been framed in the context of domestic criminal law. That's not what the debate should have been about. There were many issues to debate—how do you tell when the war is over, what do we do about non-state actors, how do we characterize them. There were lots of things to debate, but the whole thing of people thinking that there's a right to speedy trial and when do I get my lawyer—and Senator, I know you've probably heard before the comment that throughout the Vietnam War the United States Government's position was consistent with regard to the people that were captured and kept by the North Vietnamese. That position was: You take care of them. Even though you're not a signatory to the Geneva Conventions, we expect you to treat them with dignity and respect. And when the war is over, you will return them to us.

The United States Government, Democratic and Republican, never said: When do they get a lawyer? When do they get a trial? How can you hold them? This isn't fair. That was never an issue. And we never heard anybody 7 or 8 years ago talking about that and educating our public that that's what the standard should be, and not domestic criminal law.

Chairman LEVIN. General, you've said that these procedures as we've drafted them exceed the procedures at The Hague in terms of protection for people. You've also indicated that you have a couple suggestions that you've made relative to our language. Other

than those two suggestions, do you believe this is the right direction for us to go as we've drafted it?

General ALTENBURG. Yes, Senator I do.

Chairman LEVIN. Now, Admiral Hutson, let me put the question to you a little more concisely perhaps, or precisely. We've had witnesses, not just today but long before today, that point to the implausibility of some of the procedures being provided to detainees, including Miranda warnings to prisoners that are captured in the course of hostilities, the impracticability of documenting the chain of custody for physical evidence collected on the battlefield, the difficulties posed by the need to use highly sensitive national security information, including evidence from intelligence sources whose identity cannot be made public.

Tell us why we can do without—why is it not appropriate to use military commissions, providing those commissions meet the standards that the Supreme Court has set out in Hamdan?

Admiral Hutson: Mr. Chairman, I'm not sure that it is inappropriate to use military commissions. I'm only suggesting that I think that the much better avenue is to use the tried and true U.S. district court system, the Federal system, that has tried many, many, many terrorists quite successfully over the years. I think fundamentally what this debate comes down to for me is that I think I've got more faith in the flexibility and adaptability of the Federal courts than others perhaps have.

Miranda is a judge-made law. The word "Miranda" is no place in the Constitution. Voluntariness has a place in the Constitution. I think that U.S. district courts are going to be fundamentally capable of dealing with the vagaries of those issues, and they are not going to, as somebody suggested earlier, require the soldier to give Miranda rights after he breaks down the door and holds somebody at gunpoint. That's not the mission. It's not a law enforcement mission. At that point it's not an intelligence-gathering mission. That's all part of the war.

I don't think that the Federal Rules of Evidence or the Federal Rules of Criminal Procedure are going to require that. Now, if I am wrong about that I would urge that this committee—and the Judiciary Committee I suspect would have a dog in that fight—might want to look at those rules and make modest changes to the extent you feel it's necessary, rather than creating this whole parallel system, because this whole parallel system to the extent it complies with Common Article 3 and provides all the judicial guarantees considered to be indispensable by civilized people, then we've duplicated to a large extent the Federal court system and there's just no reason to do that.

Moreover, I think you lose, as I mentioned earlier, a lot of expertise and experience and precedent. And you're going to bring up a lot—you're going to bring down on the shoulders of the U.S. armed forces a lot of criticism, because we've tried this twice before and just as surely as God made little green apples, this process is going to be criticized. Fairly or unfairly, it's going to be criticized by appellate lawyers, by media, by critics.

The military doesn't need it. The Department of Justice won't have to endure it. We'll end up with the world being preoccupied not with the crimes of the terrorists, but with the perceived alleged

deficiencies in our system. I'd just rather use the system that's out there and has worked so well over the years.

Chairman LEVIN. I think a parallel system has existed for a long time. This is not a creation of a parallel system.

Senator Graham.

Senator GRAHAM. Admiral Hutson, I have a lot of respect for you and we've had a lot of debates about this. But I'm going to be very blunt with you. On July 12, 2006, you came before the House and the Senate and you urged us to use the UCMJ as the model, and you said: "I was an early supporter of the concept of military commissions and their use in the war on terror. I believed then and I still believe now that they are historically grounded and the proper forum to prosecute alleged terrorists." And you submitted to the committee changes to the UCMJ that you thought were practical.

What's changed?

Admiral HUTSON. Well, I think I was an early supporter of military commissions, before we actually put flesh on the bones. I was convinced in those days, quite frankly, that if you populated commissions with people like John Altemburg they were going to fly, it was going to be great. As it turned out, they weren't. We have been here now for how many years, and we've tried two cases.

Senator GRAHAM. Yes, but my point is that you said that the UCMJ should be the starting point and that you believed that the military system was a sound way to try terrorists, and you suggested to the Congress that you would deviate from the UCMJ, but only when necessary. Quite frankly, I agree with you. I do not agree with you now when you say that we should abandon the military commission as an option, because I do believe, as the other two witnesses have indicated, that it has a very strong role to play in this fight we're in, and historically it's been used in the past.

I would like to submit, Mr. Chairman, the testimony of Admiral Hutson from July 12, 2006, to the House.

Chairman LEVIN. That'll be received.

[The information referred to follows:]

[COMMITTEE INSERT]

Senator GRAHAM. Now, I don't want to belabor the point. What we're trying to do is find a way to make the commissions as effective as possible. Let's get back to this idea about what Senator Reed, who is a dear friend—if we looked at every detainee as a common criminal, Mr. Marcus, a domestic crime, what legal theory would we have to hold someone indefinitely if they were all viewed as a domestic criminal law prism? How could you do that?

Mr. MARCUS. Senator, I don't think there is any existing authority. I'm not sure there should be.

Senator GRAHAM. Mr. Chairman, I'd like to associate—it would be the biggest mistake this country could make, would be to use the criminal model, but yet still hold people indefinitely without trial. I do not believe that is a choice we have to make, but if we're going to view these people as common criminals across the board, then we've lost the ability to use military law, which would allow detention. Do you agree, if you use the law of armed conflict you could detain someone indefinitely?

Mr. MARCUS. Yes, I do, Senator, subject to the caveat of Justice O'Connor's opinion in the Hamdi case, saving the issue of forever.

Senator GRAHAM. General Altenburg, in the Hamdi case Justice O'Connor said you've got to have something akin to Article 5 under the Geneva Convention to make the initial determination. Under the Geneva Convention, all that's required under Article 5 to determine status is an independent tribunal; is that correct?

General ALTENBURG. Yes.

Senator GRAHAM. In the battlefield world that could be one person. Is that right, Admiral Hutson?

Admiral HUTSON. Yes, I think that's right.

General ALTENBURG. Senator, under the Geneva Convention that's true. However, the United States has implemented it so that it requires three officers. You cannot, for example, use just one officer.

Senator GRAHAM. Okay, so it's a three-officer decision. The point I'm trying to make is that I don't want to use the Article 5 dynamic because—Admiral Hutson, you said before, this is a war without end. We're going to need something new. So it goes back to Senator Udall's statement, we've got to come up with a hybrid system.

For those people that we're not going to try or be able to try, we're going to have to do something beyond Article 5. That's where I think civilian courts under habeas play a very important role. So I want to make sure we preserve that.

Admiral Hutson, you want to say something?

Admiral HUTSON. Thank you, sir. I think we've already in some respects made a decision that they're criminals, in the sense that we're prosecuting them in the first place. I don't think—first of all, I don't think you have to make the choice of prosecuting them or holding them. If you want to hold them, you can hold them.

Senator GRAHAM. Under what theory?

Admiral HUTSON. Under the theory that they are prisoners presumably caught in the war. But in World War Two, in Korea, in Vietnam, we didn't prosecute Hitler's driver.

Senator GRAHAM. Right.

Admiral HUTSON. We held him if we had him, until the cessation of the hostilities.

Once you decided—putting aside KSM and people like that, once you decided that you're going to prosecute somebody like Hicks, you've already in my mind made the decision that he's a criminal.

Senator GRAHAM. A criminal under the law of armed conflict. The point I'm trying to make is that domestic criminal law applied to the detainee population would not allow this Nation to honorably hold someone indefinitely. Do you all agree with that?

General ALTENBURG. I do.

Admiral HUTSON. I do, yes, sir.

Mr. MARCUS. Yes, sir.

Senator GRAHAM. Do any of you doubt that some of the people being held at Guantanamo Bay, if released tomorrow, would go back to killing Americans?

General ALTENBURG. I agree with that statement.

Senator GRAHAM. Admiral Hutson?

Admiral HUTSON. I haven't looked at their files, but it's certainly possible. I would presume that would be the case.

Senator GRAHAM. I'll just end with this, Mr. Chairman. I want to compliment this committee. I think you have taken a very rea-

soned approach to military commissions. They're historically valid. The Supreme Court has told us how they should be formed. And what we are doing with this bill in my opinion is setting a standard beyond what international law would require if they were brought to The Hague and is something the Nation can be proud of. I don't think we've weakened ourselves at all. I think the extra process that we're providing these detainees will confer a legitimacy to the trials that is necessary for us to win this war. I think we're very close to producing a product the Nation can be proud of, and I've enjoyed working with you.

Chairman LEVIN. Well, thank you very much, Senator Graham, for all the energy and effort and experience that you've put into this effort. It's been invaluable.

Senator Begich.

Senator BEGICH. Chairman, thank you very much. Thank you, Mr. Chairman and Senator Graham, for your work on this.

Just kind of a tag-on here, I just have some clarification questions. Admiral Hutson, I'm following up on what Senator Graham said. In 2006 you made some comments in regards to the commission and the concept of the commission with some recommendations. Then in your explanation that you just gave you indicated you supported the concept if it would have had certain people on it, and then you were kind of stopped there in your explanation.

I'm just trying to find out the difference from then to now, just so I understand. Then I have another follow-up for you.

Admiral HUTSON. I think the difference is time. We can't walk that cat back. We've tried this twice. It's been roundly criticized. I very much admire the work that this committee has done with this proposed legislation. The question is what do we get out at the other end of the process, and I have to say that I've come to believe—I've changed my mind. I've come to believe that the Federal courts have demonstrated over the years their ability to do this.

As I said before—I'm just repeating myself very quickly—I worry about the criticism that it's going to bring on the military, that we're asking the military to try to be the organization responsible for prosecuting the worst criminals, among the worst criminals in our Nation's history. That's just not part of the DOD, United States armed forces, mission. I think it's a distraction that is unnecessary, given the fact that we've got this well-regarded Department of Justice and Federal court system.

Senator BEGICH. Let me ask you this. First a comment. I don't worry too much about criticism for the DOD or others. It's life. No matter what you make, in decisions you're going to get criticized for something, even if you do something that you think is very well intended. But that's the way life is and I think the DOD has withstood criticism on many fronts over the decades and I'm not too worried about that. That shouldn't be a reason why we design policy, about if you're going to get criticized or not.

But do you then believe that all detainees should go through the Federal court system and there should be no commission of this kind or any element of this? When I say "this," in this situation that we're in now or any future situation in any conflict?

Admiral HUTSON. I was gratified when I heard Jeh Johnson say that—although not everybody was—that there was an administra-

tion preference for Article 3 courts. I would not—I'm not saying that I can't conceive of a situation in which the military commission would be appropriate. I don't see these terrorists or the alleged terrorists as being warriors or combatants. I see them as being criminals and thugs that sort of mindlessly and heedlessly commit war crimes. I'd prosecute them as criminals.

Senator BEGICH. What I heard there was—and I want to make sure we're on the same, what I'm hearing and what you're saying. That is, in this situation the commission is not necessarily the best idea. But you did not rule out that in other conflicts in the future a commission may not be a bad idea.

Admiral HUTSON. No, absolutely.

Senator BEGICH. Then why not just set it up now? Let's just do it. I mean, because your earlier argument was we've tried this, gone down this path twice, and it didn't work, and you kind of wrote it off. Now you've said that it's okay maybe in the future with some other conflict, that may not be determined yet. So why not just set it up? We've got a good format now. Let's just do it.

Admiral HUTSON. I didn't want to get into that because it's not a bad argument. Just once I've set it up I wouldn't use it unless we're talking about Himmler and Goering.

Senator BEGICH. I guess my thought on this is—and I have listened to the chairman explain this to me in a variety of ways, most recently in one of our committee meetings—I'm convinced that it seems to be a logical approach. So I'm struggling on your rationale why it isn't in this situation. I guess I would just respectfully disagree. But I appreciate your comments.

To the other two, I don't know if you have any comments. But I'm just trying to get clarification. I don't know if you two have any additional comments.

Mr. MARCUS. I would just say it's an interesting dialogue. There is a real debate as to whether we should treat the situation we're in as an armed conflict or whether we should treat it as a law enforcement, criminal law matter. But I think Congress made the decision in September 2001 to treat this as an armed conflict, to authorize the President to use military force.

As I said in my prepared statement, we do have to take account of the fact that this is not a traditional war and that's why I think the committee has taken some steps, by changing the definition of "enemy combatant," "unlawful enemy combatant," from the way it was in the MCA, to try to limit the scope of the armed conflict approach to this.

But I think as long as we're in an armed conflict authorized by Congress it's appropriate to use the military justice system to prosecute people for war crimes.

Senator BEGICH. Thank you very much.

General?

General ALTENBURG. Senator, I think that the fact that we cherish our military and what our military does for this country traditionally, and especially today, can lead us astray in trying to ennoble all people that are warriors or consider themselves warriors around the world. There's lots of bad soldiers in lots of countries and they're still protected by the law of war and they're still treated as soldiers.

My good friend Dean Hutson I think misses the mark a little bit when he talks about he doesn't want to give them credit for that or he doesn't want to somehow ennoble them by considering them warriors. He's right that they're criminals. They're war criminals. He's right that they should be disparaged and that they're despicable and all of that. But still, based on what they've done, they have made themselves into soldiers and they made themselves into, quite frankly, a formidable enemy of this country, and that's why I think that the use of military commissions and the use of military law is not only consistent, but paramount and should be used.

I agree that the Article 3 courts where they can be used may be appropriate, especially where you have Title 18 offenses and you don't have war crimes. But I think it's an important tool for this government and that they should use military commissions in the context of this war.

Senator BEGICH. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEVIN. Thank you very much, Senator Begich.

I think Senator Begich's point is a critical one here, that, regardless of whether or not people think that most or all of the detainees should be tried in Article 3 courts, we're not addressing that issue in this legislation. We are trying to reform our military commission law so that it passes muster in the Supreme Court. That's our goal.

We're not deciding here where people would be tried, whether Guantanamo or here. We're not deciding whether or not they be tried by commission or Article 3 courts. What we are doing is what I think everybody really wants us to do, including you, Admiral, which is to have procedures here which will pass muster. You very forthrightly acknowledged in your answer to Senator Begich, I thought, exactly that point. That's what our goal is here.

It can be argued elsewhere about Guantanamo or here. If you're going to have Article 3 trials, you clearly have to have those trials here in the United States, whether it's 10 percent, 30 percent, 70 percent. Whatever the percent is of people held in Guantanamo, you cannot empanel juries for Article 3 crimes down in Guantanamo. It's not practical to do it.

So there's many reasons why we have got to reform these procedures so that they pass muster and we're going to continue to make that effort.

We thank the three of you for your contribution to that effort. You have differences of opinion, obviously, but they're all valuable to us. If there are any suggested changes in the language that you have specifically other than the ones that you may have addressed here today, feel free to get those to us this week for the record because we're going to be taking this bill to the floor next week.

We also have a written statement that's been presented to the committee from Professor David Glazer, Loyola Law School in L.A.; an article prepared by retired Federal Judge Patricia Wald for the National Institute of Military Justice. These materials will also be included in the record.

[The information referred to follows:]

[COMMITTEE INSERT]

Chairman LEVIN. If there's no—any additional questions, Senator Begich?

Senator BEGICH. No, thank you.

Chairman LEVIN. If not, again with our thanks, we will stand adjourned.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]