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**LAW OF WAR DETENTION AND THE
PRESIDENT'S EXECUTIVE ORDER
ESTABLISHING PERIODIC REVIEW
BOARDS FOR GUANTANAMO DETAINEES**

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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LAW OF WAR DETENTION AND THE PRESIDENT'S EXECUTIVE ORDER ESTABLISHING PERIODIC REVIEW BOARDS FOR GUANTANAMO DETAINEES

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
Washington, DC, Thursday, March 17, 2011.

The committee met, pursuant to call, at 1:02 p.m., in room 2118, Rayburn House Office Building, Hon. Howard P. "Buck" McKeon (chairman of the committee) presiding.

**OPENING STATEMENT OF HON. HOWARD P. "BUCK" MCKEON,
A REPRESENTATIVE FROM CALIFORNIA, CHAIRMAN, COMMITTEE ON ARMED SERVICES**

The CHAIRMAN. The committee will come to order.

Good afternoon. The House Armed Services Committee meets this afternoon to receive testimony on law of war detention and the President's recent executive order.

Before we begin, I want to provide notice to all members that I will be departing with the regular order of questioning by Republican members. Consistent with committee rule 11, Ranking Member Smith has provided his concurrence for us to proceed in this manner.

As you all know, we are approaching the 10-year anniversary of the devastating attacks of September 11th, 2001. It has also been nearly 10 years since Congress authorized the war in response to those attacks. As we approach that solemn marker, we need to ensure that our men and women in uniform have the legal authorities necessary to target and detain those who seek to harm us.

It is time for Congress to show leadership in this area and not continue to leave it to the courts to define our enemies and circumscribe the parameters of war. While I support an administrative review process designed to ensure the continued detention of each Guantanamo detainee as necessary, I have significant concerns about the review process established pursuant to the President's executive order issued last week.

Detainees currently have nearly unlimited access to lawyers for their habeas cases in Federal court. According to personnel at Guantanamo, there were over 1,400 legal visits to detainees in 2010. These cases are taking years to resolve, involve intense resources, and necessitate hard questions regarding how to protect sensitive intelligence sources and methods.

I am concerned that by involving lawyers in the administrative review process, what is supposed to be an administrative evaluation of the threat posed by the detainees will turn into yet another

opportunity for lawyers to embroil our military in endless litigation.

I also fear that because of our concerns related to potential litigation, we are not capturing terrorists whom we need to neutralize and question for intelligence purposes. Without a comprehensive approach to detention, we will continue to lose out on opportunities for critical intelligence gathering.

This is also true at home, where we lack the flexibility needed to conduct extensive intelligence interviews of terrorists like the Christmas Day and Times Square bombers. There may be a number of different solutions to this problem and I am open to all of them, but something has to change.

I was heartened by the President's speech at the National Archives in May of 2009 when he said that he was committed to working with Congress to tackle these challenging questions. I have been very disappointed that those have turned out to be empty words and that the President has decided instead to go it alone.

I hope in the coming days and weeks, we will see a reversal of this trend. I look forward to addressing those challenging issues with the administration, my distinguished colleague, Ranking Member Smith, and all members of the committee.

Lastly, we cannot allow ourselves to become so caught up in the details of these issues that we neglect our fellow citizens, who lost so much nearly 10 years ago. Missing from the President's announcement last week was a commitment to move forward with the prosecution of those responsible for 9/11 attacks and provide a full and fair airing of the war crimes they committed. We cannot forget about the justice that the victims, their families and the American people deserve.

To address these issues, we are joined today by the deputy secretary of defense, William Lynn, and the general counsel of the Department of Defense, Jeh Johnson.

Gentlemen, thank you for appearing before us today, and I look forward to hearing your testimony.

Ranking Member Smith.

STATEMENT OF HON. ADAM SMITH, A REPRESENTATIVE FROM WASHINGTON, RANKING MEMBER, COMMITTEE ON ARMED SERVICES

Mr. SMITH. Thank you, Mr. Chairman. I appreciate you holding this hearing on this critically important issue. And I certainly agree that we need a better and clearer process for how to detain and interrogate those terrorists that plan attacks or commit attacks or threaten us. It is a very difficult area of the law to strike the balance.

I think the President's speech that the chairman referenced from a couple of years did a good job of doing that. It acknowledged the fact that we were going to need military commissions, and even acknowledged the fact that there were going to be some people that we were going to have to hold without trial.

But the President also very much emphasized that in doing that, we need to follow the law. We need to have a clear process in place for doing that. And I agree that that needs to be an executive and

legislative branch priority and that the two of us have to work together. The two groups have to work together to make that happen.

I also want to thank the chairman. He and I have had a number of discussions on this issue in terms of how we work it out going forward, and I appreciate that bipartisan approach. And I agree that we need to improve the process we have now.

I do want to point out that the legislation that the majority introduced last week I feel actually moves us in an even more dangerous direction and did not address those issues, and that there is another side to these concerns. And that is, we have to have a legal framework in place that upholds our Constitution, that upholds our values.

I mean, I think we have to do that for two reasons. One, it is part of the broader message in our struggle against Al Qaeda and their ideology to say that what we do here is superior to what they want to do, that freedom, opportunity, respect for individual rights is a critical piece of what makes our country great.

We cannot broadcast that message broadly to the world and then contradict it in our very own policies. And I think even the majority would agree, we have paid a price in some of the early ways that Guantanamo Bay was set up and what happened in Abu Ghraib for not doing that.

And the legislation that was introduced last week, I feel, pushes us back in that direction. It gives too much power, ironically, to the executive branch and too much power to the military to decide who to hold, by what standards, and then to have very little process in place for that to be reviewed by anyone outside of the military.

We need to make sure that there is a fair process in place for the reasons I stated before, but also to make sure that we can hold these people.

The courts will step in, if they feel that there is not a fair and constitutional process in place. We saw that happen in Guantanamo in the first place, where they stepped in and said habeas corpus is going to apply and began having review processes based on that that have led to the release of some inmates there. So we need to have that process for our national security as well.

And the final piece of this that I want to make everyone aware of, that is contained in the legislation that was introduced by the majority last week, is the fact that it turns Guantanamo Bay into, if you will, the Hotel California. You can check out anytime you want, but you can never leave.

That is not a sustainable situation. It makes it clear that nobody in Guantanamo, and that includes not just the people who are there now, but the people that certainly we are going to bring there in the future under the majority's piece of legislation because we are far, far from done with this issue, cannot be transferred to the United States at all, ever.

But it also sets up a series of restrictions for transferring any of these people back to their home country that are impossible to meet. You can read through the requirements that are there, but the Secretary of Defense himself has said he would never certify a transfer back to the home country based on the requirements that are in there.

And think about that for a minute. If we pick up somebody by mistake and take them to Guantanamo, we are still in no position under this legislation to ever let them out. That is extraordinarily problematic from a policy standpoint.

And beyond that, even if you have people who you pick up and convict and serve a certain sentence, when they are done serving their sentence, the legislation again has no contemplation whatsoever for how to ever let that person out.

So I do agree with the majority that we need to do better than we have done. I will even agree with the majority that there have been some missteps by this administration in how they handle this process. But I hope going forward we will work together to come up with a reasonable solution that balances all of our interests.

And I think this hearing is meant to begin that process. I applaud the chairman for doing that. I look forward to continuing to working with him and the Administration to get us the right solution on this very important public policy matter.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

We have been told, I think, that we could be having votes any time, which is unfortunate, but why don't we get right into your testimony, Secretary Lynn.

STATEMENT OF HON. WILLIAM J. LYNN III, DEPUTY SECRETARY, U.S. DEPARTMENT OF DEFENSE; AND HON. JEH JOHNSON, GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE

Secretary LYNN. Thank you very much, Mr. Chairman.

We have a longer written statement that I propose that you put in the record, and I would summarize it for you here.

The CHAIRMAN. Without objection, so ordered. Thank you.

Secretary LYNN. Then we will just turn to your questions.

First, I want to thank you, Mr. Chairman and Congressman Smith, for holding the hearing and giving us the opportunity to testify. I also appreciate the courtesy your staff availed us of in scheduling the hearing so that we could do it as the Administration has announced some important policies that you referred to.

The major announcement there was on March 7th, 2011, where the President announced several initiatives related to the legal framework for detention of detainees, including the detainees at Guantanamo Bay. We are here today to discuss those initiatives and any other questions that you might have.

As a preliminary matter, I need to note that President Obama remains committed to closing the detention facility at Guantanamo Bay. But regardless of where the detainees are located, we would be pursuing the initiatives that he just announced.

We in the Department share the President's view that these initiatives will strengthen our national security and at the same time promote the rule of law. Our goal is to ensure a system of detention that is balanced and fair with respect to the detainees and is sustainable and credible with the U.S. courts, Congress, the American people and our allies.

First, Secretary Gates has lifted the suspensions on new charges in military commission. The suspension was issued by the Sec-

retary in January of 2009 to permit the new Administration time to review the status of each detainee at Guantanamo pursuant to Executive Order 13492.

That review is now complete. We have also worked with Congress to reform military commissions, most notably through the Military Commissions Act of 2009, which was passed with bipartisan congressional support.

With that piece of legislation and other reforms, we believe that the military commissions, along with Federal civilian courts, are an important tool to bring detainees to justice.

At the same time, we respectfully disagree with the restrictions that Congress has imposed on transferring Guantanamo detainees to the United States in order to prosecute them in Federal court.

As the President has made clear and as the Secretary of Defense has stated publicly, we must have available to us all tools that exist for preventing and combating international terrorist activity and protecting our Nation, including the option of prosecuting terrorists in Federal court.

Second, the President signed an executive order that provides for the periodic review of those Guantanamo detainees who will be held in long-term detention.

As the President recognized in his National Archives address that you both cited, there are certain Guantanamo detainees who in effect remain at war with the United States and thereby pose a continuing threat to the security of the United States, but who have not been charged, convicted or designated for transfer.

For this group, the President said we must have a thorough process of periodic review so that any prolonged detention is carefully evaluated and justified.

The new periodic review process announced earlier this month satisfies that directive. It strengthens our national security by providing a solid and sustainable system for the review of individuals who have been designated for law of war detention or who have been designated for prosecution, but against whom no charges have yet been brought.

Third, the President announced that the administration will seek Senate advice and consent to ratification of Additional Protocol II to the 1949 Geneva Conventions. This treaty is applicable in non-international armed conflicts, such as our conflict against Al Qaeda.

The President also announced that he will follow, out of a sense of legal obligation, Article 75 of Additional Protocol I of the Geneva Conventions in international armed conflicts.

Over the years, international legal experts from across the political spectrum have called upon our Government to embrace these provisions. After careful analysis, we have concluded that the practices of our military are already consistent with them.

By embracing these two sets of safeguards, we promote the international law of armed conflict, including in our current conflict against Al Qaeda and its affiliates. We also send the message that we expect others to adhere to the same standards.

Overall, we believe these initiatives will promote clear, credible and lawful standards for the detention and prosecution of those

who remain at Guantanamo. This in turn benefits our national security as well as the safety of the American people.

With that brief opening, Mr. Chairman, I would be happy to take your questions.

[The joint prepared statement of Secretary Lynn and Mr. Johnson can be found in the Appendix on page 35.]

The CHAIRMAN. Thank you.

Mr. Johnson.

Mr. JOHNSON. Mr. Chairman, Mr. Smith, I am happy to defer to my colleague and his remarks, and I look forward to your questions.

The CHAIRMAN. Thank you very much.

I am going to defer my questions until later, so I will ask Mr. Thornberry. I yield 5 minutes to him.

Mr. THORNBERRY. Thank you, Mr. Chairman.

And, Mr. Johnson, I would like to start out on the authorization for the use of military force, because I think that is a basis upon which a lot of the rest of this depends.

The resolution, which was passed September 14, 2001, talks about those who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.

Surely, as 10 years have passed and Al Qaeda and other groups have evolved, it becomes increasingly difficult for you to authorize various actions that most of us agree need to be taken to protect the country and relating it all back to the attack of September 11. Is that true?

Mr. JOHNSON. Congressman, that is a very good question. Thank you for that question.

When I assess the legality of our operations against Al Qaeda and its affiliates, I look to the language you read as well as our definition of detention authority that we put out March 13, 2009, which I think is useful in informing our military activities and operations generally.

That definition refers to associated forces, which is a well-accepted, recognized interpretation in the law of war.

That said, I will agree with you that the conflict against Al Qaeda is evolving, because that organization is evolving. It is more decentralized now than it was 10 years ago.

I think that the current legal interpretations of the AUMF [Authorization for Use of Military Force] that we have and that we have used, which are solid, are sufficient to address the existing threats that I have certainly seen and that I have evaluated, so I think it has worked so far.

I believe, however, that we should carefully look at the language in the chairman's bill and in the Senate bill, which in effect, you know, reauthorizes military action, and evaluate it and have a serious discussion about it.

I am inclined to say that the existing authority is sufficient, but I think this is a serious discussion to have.

Mr. THORNBERRY. Well, as you well know, the D.C. Circuit in the Bahani case was looking for statutes to help scope the executive's detention authority.

And they looked at the Military Commissions Act, but as they recognized, we have the legal authority to detail under AUMF greater than those individuals that we can prosecute under the Military Commissions Act.

And so I guess the obvious question—you just mentioned the policy you use includes the word “associated forces.” Would it not be a good thing to put “associated forces” into a renewal of the authorization for the military force?

And doesn't that give you and the courts a stronger basis upon which to make decisions rather than a policy, to have it actually in statute?

Mr. JOHNSON. Congressman, I don't have an administration position for you on that. But I think that that is something that we should seriously think about.

Mr. THORNBERRY. Well, I hope we can do more than seriously think about it because it concerns me that, as we go further and further from 9/11, that the stretch back to those who planned, authorized, committed or aided in those particular attacks on that particular day is going to be more challenging.

And as I mentioned, the way that Al Qaeda and other groups are moving around the world and evolving is going to require either that we stretch language beyond real meaning or that we try to update our laws to keep track of the changes that are happening in the world. And I hope we can come to agreement on that.

Mr. Chairman, I yield back.

The CHAIRMAN. Thank you.

Ranking Member Smith.

Mr. SMITH. Thank you, Mr. Chairman.

I want to try to focus on the legislative proposals that the majority has put forward, because I agree, and I think you would as well, that we need legislation on this.

The executive order is helpful, moves us forward, but to have, you know, Congress present a clear set of policies for how to proceed with the military commissions, how we are going to handle these people, would be helpful. But I am concerned by a number of aspects of that legislation and want to explore them and get your concerns.

And the first area has to do with the complete turning over of this process to the military under the majority bill. Now, we have successfully tried many terrorists affiliated with Al Qaeda in Article III courts and incarcerated them right here in the United States of America, Ramzi Yousef perhaps being the most prominent, Zacarias Moussaoui and others as well.

But this piece of legislation would preclude that and it would require, if I read it correctly, even those who would be arrested attempting attacks here in the United States and even if they are U.S. citizens, to be removed to Guantanamo and go through a strictly military process.

There are, I believe, both legal and policy ramifications of that. It certainly empowers the military in a way over U.S. citizens that I think should be alarming to anyone who is concerned about giving the Government too much power.

I mean, the Government in this situation would be able to pick anyone they wanted and, if the military says you have committed

a terrorist act or even assisted in a terrorist act, you would then have virtually no rights, other than the basic habeas corpus right, whatsoever. And I think that expansion of power is problematic, certainly for the broader policy argument.

But let us talk about the legal piece of it and the concerns that, if we were to do that, decisions to try or incarcerate would be subject to constitutional challenge and that the courts might once again step into this process and force us to release people we would rather not release because we are not following a proper process.

Can you talk about that piece of it and why, in some instances, it still makes sense to have Article III courts as an option?

Mr. JOHNSON. Yes. I have looked at the bill that was offered last week pretty carefully at this stage. One of the things that I had concerns about when I read it was the provision that said that anyone who was eligible for detention under the AUMF must be put in military custody, unless the Secretary of Defense agrees to give him up.

And just the phrase “eligible for detention under the AUMF,” and there was another piece of the bill that included in that definition supporters, people who are not part of the enemy, but supporters of the enemy, would be swept up by that provision.

So I have some concerns about the breadth of that language. I suspect that it would give us litigation risk, without a doubt.

And my more general comment is you know, there are a number of provisions in the bill that I think are things that we ought to take very seriously and think about and carefully consider. And I think it was a very thoughtful piece of work.

The two other comments that I have, though, as this conflict evolves the way it is evolving, is let us not take options away from the military and our national security apparatus to meet those threats. Let us not take away the Article III option. Let us not take away the ability to transfer somebody to a particular place for reasons of national security. Don't restrict the military's options, as we deal with this evolving threat.

And the other comment I would make is I think we need to be careful about—I think in terms of the controversy surrounding our detention, we are moving in a good direction. We are doing better in the courts. I think we have had seven consecutive decisions in habeas where the Government has prevailed. We are doing better. And I actually believe we are winning back some credibility in the courts.

I think we took some hits, and we are winning back credibility. And so I think we need to be careful about provisions in legislation that will only make our detention practices more controversial and engender more litigation.

Mr. SMITH. And in winning back credibility, what that means is winning back the ability to withstand court challenge and be able to hold the people that we want to hold.

You know, I think a lot of times in this debate we have gotten lost in some of the broader arguments about, you know, the messaging issues. And I think it is very real and certainly Al Qaeda has used Guantanamo, Abu Ghraib, as I mentioned, against us. But forget about that for a moment. I mean, they are going to use a lot of very creative things against us.

But if we don't have that credibility with the courts, what that means is it will hamper our ability to hold who we need to hold for national security reasons.

So I hope we understand that as we get into some of the other peripheral arguments about what is right or wrong, this is about, you know, being able to uphold national security and be able to hold the people we need to hold to protect us.

You know, the President has acknowledged that we need to do that. And in many cases, we will have to hold people without trial, because they, as you mentioned in your opening remarks, Mr. Secretary, that, you know, they are a clear threat to us, and they still are at war with us. So I hope we will keep that in mind.

I have other questions, but I will hold them to the end.

The CHAIRMAN. Thank you.

Let me just say something about the bill that we introduced last week. That was a start of a process. I mentioned in my opening statement that the President had talked to me earlier and talked to me about working together. I had hoped that that would happen before the executive order was issued. It kind of moved up the process on our bill.

I would have loved to have had us all sit down together and come out right out of the chute with a bipartisan bill. But we are just starting the process.

So we will have lots more discussion. And I don't think this is probably even the point to go into great depth on the bill, because we will have opportunity to do that, and we will do it on a bipartisan basis. And it is far from—this is not a markup. And that will come somewhere down the road.

But I am totally truthful in saying that we will work on it in a bipartisan way.

Now—

Mr. SMITH. Mr. Chairman, if I may, let me acknowledge that. I think that is very true. You know, once we get started, I think we do need to look at the language to make sure it doesn't get moving too far down the track before we understand the limitations.

But I clearly acknowledge that you have reached out to me, and we are going to, you know, go forward and work together on this in a bipartisan way.

The CHAIRMAN. Thank you. And the reason I even bring it up right now is I don't want us to get hardened on any positions before we have a chance to sit down and understand each other's positions. I do not want this to become, you know, get on a partisan track or anything else. That is not the purpose.

Okay.

Mr. Forbes.

Mr. FORBES. Thank you, Mr. Chairman.

Mr. Johnson, thank you for your service and the work that you do.

Mr. Secretary, thank you for all that you are doing.

And I heard the word today "credibility with the courts." You know, one of the things we have got to be concerned about too is the loss of credibility we have with our citizens across the country.

Mr. Secretary, what would you tell them if they were to ask you what is the worst act of terrorism that has ever hit the United States soil? What would your answer be?

Secretary LYNN. The attacks on 9/11.

Mr. FORBES. And of the individuals that we at least view as defendants, how many of them are there, and where are they currently being detained?

Secretary LYNN. Several of the defendants are being detained at the Guantanamo Bay facility.

Mr. FORBES. Do you know how many?

Secretary LYNN. Five, I believe.

Mr. FORBES. You believe, you don't know right now, for certain How many—

Secretary LYNN. Five.

Mr. FORBES. Five defendants.

We are now almost 10 years out. The charges that were sworn against them were sworn on February 8th, 2008. They continued prosecution. They had 134 motions that the prosecutorial team was pushing against those defendants, the worst of the worst that, according to you, that have hit the United States.

And Mr. Johnson correctly states that we shouldn't take away options. And yet, you took away the major option that they had. The prosecutor said that he would have had guilty pleas and convictions within 6 months, and yet the administration came down and said no, and dismissed, without prejudice, all that work that had been done on January 21, 2010.

We are now past 2 years from that. Can you tell me, almost 10 years out, the five defendants, all of whom acknowledge that they did it, the prosecutor that said we would have had them with guilty pleas and guilty convictions, when are they going to be prosecuted? Can you tell me the day that we are going to file charges against them at this particular moment in time?

Secretary LYNN. As you know, Congressman, the attorney general proposed that these charges be brought in an Article III court. He felt that given that the location of the attacks that you cited were in the United States, given that the vast majority of the victims were American citizens, were civilians, not military, that it was more appropriate to try them in an Article III court.

That has been blocked by congressional action. And the Attorney General is now considering how to respond to that action and proceed from there.

Mr. FORBES. And it was blocked by a majority of his own party in the action that took place. So then right now, we don't know when those prosecutions are going to begin.

One of the things that is going to be important is that when they do begin, that we have the most experienced prosecutors that are prosecuting that case and these terrorist activities. What assurances can you give this committee, objectively, that you and the Secretary will make sure that we have the most experienced prosecutorial teams that are prosecuting these cases?

Secretary LYNN. Well, if the cases—I think you are talking about the case that if the cases were returned to the military commission—

Mr. FORBES. That is correct.

Secretary LYNN [continuing]. Which has not been decided. But if that were to be the case, we have kept the prosecution teams together in the military commission process. And we have ensured that we are able to utilize not just DOD [Department of Defense] prosecutors, but to tap the great expertise in the Department of Justice—

Mr. FORBES. Are you telling me that you have the same team completely together that was prosecuting these 9/11 defendants before those charges were dismissed?

Secretary LYNN. I don't think we have kept every individual, but we have kept the core of the teams together, and we would be prepared to act if that were the decision.

Mr. FORBES. Who do you have together on that team on the 9/11 defendants now, that you kept together?

Secretary LYNN. I can't give you by name.

Mr. FORBES. Would you follow up with me, please, and give me what part of that core team that you have still kept together?

Secretary LYNN. I am happy to do so, sir.

[The information referred to can be found in the Appendix on page 43.]

Mr. FORBES. Mr. Johnson.

Mr. JOHNSON. Sure. I could be wrong, but I believe it is the case that the prosecution team that was in place a year ago is still in place. I could be wrong about that—

Mr. FORBES. Just follow up with me, if you don't mind. I don't expect you to have the answer.

And the only other two questions I would have, and you may need to take these and get back to me, but what are the consequences of this delay? You know, we start having problems with evidence, problems with witnesses as it continues on—if you could give me an assessment, either you or Mr. Johnson, for the record and, also, the consequences of doing this two-track system, which seems to me to be a very convoluted, difficult system for us to do.

[The information referred to can be found in the Appendix on page 43.]

Mr. FORBES. And, Mr. Chairman, my time is up, so I will yield back.

The CHAIRMAN. Thank you.

Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman.

We are very heartened by your very sincere words about a joint effort to try to address this very important problem. Thank you. And I know that we are going to take full advantage of that.

I thank the witnesses for their testimony.

I was looking at the testimony about the disposition of individuals under Executive Order 13492, the review process at Guantanamo. And I just wanted to walk through and make sure that we understood it.

There were 67 individuals as a result of that process transferred out of Guantanamo. Is that correct?

Secretary LYNN. Sixty-seven since January of 2009, which is when the Obama process started. There were about 540 or so prior to that.

Mr. ANDREWS. Where were they transferred to?

Secretary LYNN. A variety of different nations. Some were repatriated to their home nation, others were transferred to third countries where we got security assurances. In both cases—

Mr. ANDREWS. How many were still incarcerated?

Secretary LYNN. How many of the 67?

Mr. ANDREWS. Yes.

Secretary LYNN. I would have to get that for the record.

[The information referred to can be found in the Appendix on page 43.]

Mr. ANDREWS. Do that for the record for us—and, obviously, the other half of that coin being how many are not incarcerated, or are free.

Second, on the 36 who were referred for prosecution, how many of the 36 have been referred for prosecution in the Article III courts?

Mr. JOHNSON. There were the five 9/11 defendants. And I believe that—I can't remember whether the 36 includes—I know the five. There might be one other in that category. I can't remember off-hand.

Mr. ANDREWS. Is it fair to say that the others are in a position where there is a decision being made about whether to prosecute them under a commission or an Article III court?

Mr. JOHNSON. Well, there were the five or six who have already been referred to military commissions.

Mr. ANDREWS. Right.

Mr. JOHNSON. And the remainder we have to still divvy up.

Mr. ANDREWS. Do you have some sense of when you are going to make the decision as to whether to prosecute them in a commission or an Article III court?

Mr. JOHNSON. We are working that right now.

Mr. ANDREWS. Okay. And then there was the—48, my understanding, are still detained under war authority. This is not meant to be a rhetorical question, but do we know how old the—all of these are not related to 9/11, correct? They are not all authorization of force of 9/11, is that correct?

Mr. JOHNSON. They are all detained under that authority.

Mr. ANDREWS. Okay.

Mr. JOHNSON. But they are not all squarely—

Mr. ANDREWS. What is the latest date of a material fact for one of those detainees? In other words, some of the facts are on 9/11, some of the facts are pre-9/11. What is the latest date for a material fact for any of the detainees?

Secretary LYNN. I think the last detainee was transferred into Guantanamo in about 2006.

Mr. ANDREWS. Let me ask a question that I think common-sense Americans would ask, and this is not a rhetorical question.

Since many of these people are detained because of their alleged conduct on or prior to September 11th, 2001, why hasn't there been some prosecution of them in the nearly 10 years that have taken place since then?

Mr. JOHNSON. As you know, Congressman, we are making efforts in that regard.

Mr. ANDREWS. I appreciate that, although I think—and I am fully aware we wouldn't want you ever to speculate in a way that

would undermine your case—but it is a pretty good rule of thumb that the older evidence is, the more difficult it is to present to a finder of fact, isn't it?

Mr. JOHNSON. That is correct.

Mr. ANDREWS. So, I mean, I am a little troubled that I don't hear a sense of urgency about moving the prosecutions more quickly, because the older these things get, the staler they get. Am I wrong about that or—

Mr. JOHNSON. You are generally correct that the older the facts get, the harder they are to prove up in a trial.

The commission's case against the five alleged 9/11 conspirators was dismissed without prejudice in January 2010, and figuring out the forum for that is under review right now.

Mr. ANDREWS. We would never want you to take a position contrary to your good judgment or the law, and I know that you won't. But we would also want some sense that, you know, the earlier resolution of these cases is better on any number of scores. I think I would personally urge you to give whatever urgency you could to that process.

I will yield back.

The CHAIRMAN. Thank you.

Mr. Wittman.

Mr. WITTMAN. Thank you, Mr. Chairman.

Secretary Lynn and General Counsel Johnson, thank you so much for joining us today, and thank you for your service to our country.

I wanted to talk a little bit. There were some assertions earlier on about the bill and about detainees going to Guantanamo and then staying there.

I wanted to talk a little bit about recidivism, because there is an element in the bill that talks about certification of countries where these detainees would go and making sure they were looking at ways to reduce recidivism.

So I wanted to look at the unclassified DIA [Defense Intelligence Agency] reports, and specifically looking at recidivism from 2004 through 2008, the rate varied between 5 and 8 percent. But if you look at the recidivism rate since 2008, we see that it is at about 25 percent. So there has been an increase.

And the question then becomes, what has caused this increase? And it has been fairly dramatic in recent years. So my question is, are those increases—is it due to a release at a higher rate of those detainees, or is it a change in reporting criteria, or is it improved monitoring? Or is there something else?

I really want to try to get at what is the cause behind this recent rise in recidivism since 2008.

Secretary LYNN. It is always hard to assess, but it takes a while to just understand the evidence of who is a recidivist. So in some cases what you are seeing is not an increase in recidivism, it is an increase in our understanding of recidivism, because in some cases the reentry process takes a while, and then it takes a while for us to gather the evidence to find that.

As I said, the numbers before is that there were about 540 detainees released 2008 and prior, and there have been 67 since. I

don't think it is an increase in the rate in the 67, it is a discovery of the recidivism rate of that total of a little over 600.

Mr. WITTMAN. So if we are talking about the rate then, and looking at what may or may not be the cause behind that, let me ask a little bit about pre-transfer security assurances. I know, obviously, the countries that they are going to, we want to make sure that those countries are doing everything they can, practicing their due diligence to make sure that those detainees don't make their way back to the battlefield.

Are you confident in the pre-transfer security assurances that those countries are providing us when we enter into an agreement to transfer a detainee there? Do you think that they are putting in place the proper controls to make sure that those detainees don't end up back on the battlefield?

Secretary LYNN. We have negotiated very seriously through the State Department those security assurances. We take them very seriously. We ask for very stringent security assurances. We have tried to improve the process based on just the recidivism, recognizing that rate that you have said.

We have moved away from block transfers that were done before, and we only do transfers now on an individual basis, so we have assurances for each individual detainee, as opposed to a block.

We have been working with the individual countries, and, frankly, where we find some backsliding by individual countries, we tend not to pursue further transfers with those countries. So we are conscious of the process and what you are talking about.

Mr. WITTMAN. You talk about making sure that you are diligent with those countries in making sure that they are properly practicing due diligence and keeping up with those detainees and making sure there is no backsliding. I am assuming in those instances you mean that you won't pursue agreements in the future, if those countries are backsliding.

But let me move on to another area, and that is rehabilitation and really being aggressive with countries in rehabilitation programs.

So the ones that do have detainees that haven't backslid, is there an effort there to make sure that they have programs to rehabilitate these detainees to, again, make sure that they are not going back to the battlefield—not only making sure that they keep up with them, but making sure that they are engaging them in ways that don't have or don't create opportunities or incentives for them to go back to the battlefield?

Secretary LYNN. We have engaged in those discussions. The major rehabilitation program is in Saudi Arabia. It is a very strong program. It is a lengthy program. It involves spiritual advice. It has family engagement. Nothing is going to be 100 percent effective, but we think that they have put in place a logical, sensible and a strong system.

Mr. WITTMAN. Okay.

Thank you, Mr. Chairman. I see my time is up. I will yield back.

The CHAIRMAN. Thank you.

Mr. Cooper.

Mr. COOPER. Thank you, Mr. Chairman. I have no questions at this time.

Mr. KISSELL. Thank you, Mr. Chairman.

First of all, I would like to thank the chairman and ranking member for working together on this. I think it is such an important issue of national significance that needs to be a nonpartisan way of approaching this, and I would really like to thank them at leading our committee forward this way.

Just a couple of questions, then.

I appreciate our witnesses being here.

The 168, I think, remaining detainees, is that about the right number?

Secretary LYNN. I think it is a couple more than that.

Mr. KISSELL. Is there an assumption that should be made of the—being that we have released, I think the number is 500 and some prior to 2008, 60-some since, almost 600 then have been released. Is there any assumption should be made that—I know that some of the ones remaining are still in the fight, that there really is little hope, I would think, that we will ever change their minds.

But the rest of those guys there, is there any assumption that should be made that these are more dangerous than perhaps the ones that have been released? Are they just unfortunate they got caught and the process has kind of stopped?

Secretary LYNN. I think you should assume that the 48 that we have determined should be in long-term detention, that that determination was based on a review of the threat that they pose and that those are the ones that I used the President's description that they continue to be at war at us and they continue to pose a significant threat to our national security.

So I think you should assume those are indeed more dangerous than the ones that we have released.

Mr. KISSELL. And then the 100 and some that aren't that 48, once again, is it just a matter of the process has failed to move forward for whatever reason and they just got caught there?

Secretary LYNN. There are three principal groups in there. There are some that we plan to prosecute. I think the number is 36 that we are looking to prosecute and we are proceeding on that process, either in an Article III or a military commission forum.

The remainder, then, are detainees from other nations where we have not been able to find an appropriate transfer location where we get the appropriate security assurances, and we are continuing to review that.

And then there is a large population of Yemenis, and the President has determined that given the situation in Yemen and the fluid situation and the strong presence of Al Qaeda, that is not a nation that we can send detainees back to.

Mr. KISSELL. And one time before—

Secretary LYNN. At this time.

Mr. KISSELL [continuing]. In hearings—and, Mr. Johnson, it might have been you that I asked the question to—at the time I was told that there is nothing that we are considering that should be any influence to the people in the battlefield in terms of how they fight their fight, how they take care of their business.

They look after themselves and defeat their enemy without having to worry about, you know, Miranda rights or anything like that.

So there is nothing that is going to back up to the battlefield that we are talking about now. Is that correct?

Mr. JOHNSON. That is correct. I don't believe that it is the job of a soldier or a Marine at the point of capture to be reading somebody their Miranda rights. They are not in the business of evidence collection or arresting people. They are in the business of engaging the enemy on the battlefield.

Mr. KISSELL. Well, and I would just like to conclude by agreeing with my colleague, Mr. Andrews, and the sentiment of others that have been expressed here. You know, this 10 years time has drug on. It is time to make this process start working. And I appreciate you all's effort to do this.

And once again I appreciate the chairman and ranking member for working together to move this process forward, too.

Thank you.

The CHAIRMAN. Thank you.

We not only have to work together. There is another body also. So there are a lot of us that need to work together, and I think it is a very important issue, and we will continue doing so.

Mr. ROONEY.

Mr. ROONEY. Thank you, Mr. Chairman.

You know, Mr. Chairman, I think somebody said that this isn't a markup, but to me it is kind of feeling that way, especially when the ranking member said something about what our bill could or might do. And I jumped up and asked staff and said, "Wait a minute, that is not correct." And they said, "No, that is not correct."

And you know, I think that it is also kind of interesting that Mr. Andrews' line of questioning, which I usually wouldn't agree with 99 percent of the time, I completely agree with.

I just think I feel like we are—hopefully, this is an opportunity and it is not something that we are missing by talking about this in a way that you are starting to see kind of a unified front up here in what we should be doing after 10 years, versus, you know, what we have done.

And whether it is Article III or military commission, we have worked together with the administration. We have worked together as a Congress to get military commissions where they are.

And, you know, as a former judge advocate, you know, and somebody who has talked to defense counsels and members of the JAG [Judge Advocate General] Corps, I kind of feel like we have the system in place we need. And the problems with Article III and evidence and intelligence and that kind of thing, and cost, really, really are pushing us in the direction of just let us get something done here.

With that, I want to ask, really quickly—I have a lot of questions here, so I want to try to get as many in as I can.

Mr. Secretary, just generally speaking, philosophically, do you believe that the military commission system represents the values of our judicial system?

Secretary LYNN. Yes, I do.

Mr. ROONEY. Do you think that the military lawyers, both defense and prosecution, are generally capable and fair?

Secretary LYNN. We have superb lawyers on both sides.

Mr. ROONEY. Do you see intelligence problems and the divulgence thereof either with sources or methods or gaining evidence and using that to prosecute in an Article III court?

Secretary LYNN. I think that is one of the considerations as you decide which is the better forum between Article III and a military commission is how best to protect the sources and methods in gathering intelligence.

Mr. ROONEY. I guess what I am getting at is, if we have got military commissions that we think represent our values—and you yourself said a lot of these guys down there are still at war with us; the Department of Justice wanted to try to move some of these guys to New York because they attacked civilians, but it was an act of war—if military commissions represent who we are and our values and the lawyers and the prosecutors and defense counsels are people that we can all be proud of and that due process can move forward and protect our intelligence and our evidence, why aren't we doing it?

I mean, why aren't we doing it and just forget about Article III when it comes to the people we have at Gitmo?

Secretary LYNN. We think that would be a one-size-fits-all approach. We think the better approach would be to use all of the tools we have in our judicial system—the Article III approach, the military commission approach. Take the approach that best fits the circumstances of the crime and proceed down that.

As you said, both reflect our values, but in some cases we are better able to proceed down an Article III path, where we have had considerable success prosecuting and convicting terrorists—several hundred in the last decade alone—or in some cases, the military commission path is the better, given the way the evidence was collected given the location of the alleged crime.

And what we think we ought to do is to decide which is the better forum based on the circumstances of the case.

Mr. ROONEY. Do you think the Administration should do that unilaterally without Congress?

Secretary LYNN. I think the decision on prosecution is an executive branch decision, yes, sir.

Mr. ROONEY. Okay, let me move on because I am running out of time.

Mr. Johnson, if we could move into the executive order specifically with regard to the periodic review board, which is another level of review, which may not be a bad thing—I am not saying that, but it is something that the President decided unilaterally—when the President's executive order contemplates that the Government will need to turn over vast numbers of documents, here again discovery, including all relevant mitigating information, that is a broader standard that is even used in our habeas cases in Federal court.

Are you concerned about the breadth of information that we would be potentially turning over in discovery?

Mr. JOHNSON. Without a doubt, we are going to have to put in place a system and personnel to deal with this review process that has been established.

I do think it is appropriate for a law of war detainee to have the opportunity to see the evidence, consistent with national security.

If there are circumstances where for classification, we can't share it, we won't share it. But I do think it is appropriate that the detainees have the opportunity to see what the Government has, and for the board to as well.

Mr. ROONEY. And if I could real quick just, also in the executive order the detainee qualifies for continued detention whether or not they constitute a significant threat to the United States. Could you try to explain to us in as easy terms as possible what does a "significant threat" mean?

Mr. JOHNSON. I think that the term will likely be better addressed in the implementing guidelines. I also believe that the term will develop some meaning as we go forward in the actual evaluations. I can tell you that that term in the drafting, there was no conscious effort to in some way raise the bar so that we would be releasing more people. So that was not the intent behind that phrase.

Mr. ROONEY. Mr. Chairman, I am over time.

I appreciate your answers. Thank you.

I yield back.

The CHAIRMAN. Thank you.

Mrs. Davis.

Mrs. DAVIS. Thank you, Mr. Chairman.

And thank you both for being here and for your service.

How do you plan to deal with those prisoners that have been detained at the detention facility in Parwan on classified evidence alone and evidence that we cannot turn over to the Afghan Government?

Is there a plan for how these prisoners will be tried? And are there plans to move them anywhere else? And what is the percentage, really, of detainees at the DFIP [Detention Facility in Parwan] who can be turned over to the Afghan Government for court trial? Are there any who can be?

Secretary LYNN. As we go through the detainee review boards in Afghanistan at Parwan, I think we find generally between a third and a half of the detainees could be referred for prosecution. And I think, if I remember correctly, that the Afghans are preparing about 400 cases pursuant to those referrals.

Mrs. DAVIS. On that issue of information that we can share or in many cases not share, how do you deal with that?

Secretary LYNN. Well, it has to be done on a case-by-case basis. I don't think as a broad matter that it has posed a problem in terms of prosecutions. There are probably individuals where we have had to withhold, but in most of the cases, we have been able to share the appropriate information to allow the Afghan Government to proceed.

Mrs. DAVIS. Is there anything about the facility that is an issue in terms of Parwan's reintegration program? What kind of success or lack thereof have we seen? Have any of those detainees been released by the review boards and have they come back in in any cases? What do we know about that?

Secretary LYNN. One of the reasons that we constructed the facility at Parwan is that we found that the old facility, which was basically an old airplane hangar that had been converted into a de-

tention facility, actually promoted more increasing radicalization of the population.

And by having a more modern facility with appropriate security safeguards, but better conditions for the detainees and a better ability for the guard force to monitor them, I think we have been able to address that issue of increasing radicalization.

Mrs. DAVIS. Do we have any numbers in that regard in terms of the number of successful individuals who have been reintroduced back into society? And how do you determine success? Is that basically—

Secretary LYNN. I do not have numbers for the releases from Parwan as to where they have gone in society and what the success rate is.

Mrs. DAVIS. All right. Thank you.

I yield back my time.

The CHAIRMAN. Thank you.

Mr. Schilling.

Mr. SCHILLING. Good evening, fellows.

There are a couple of questions I want to get to. In fiscal year 2011, the defense authorization bill, Congress prohibited the transfer and release of the Guantanamo detainees to or within the United States. President Obama signed this bill into law, and then a week ago this past Monday the White House announced that it would seek repeal of the restrictions imposed by Congress.

Which aspect of the prohibition are you seeking to repeal? Are you seeking to move Gitmo detainees to the United States for detention or prosecution? Or are you seeking to release the detainees into the United States? Or all of the above?

Secretary LYNN. The President, I think, has been clear that he thinks that we should pursue Article III prosecutions in the United States, and he would certainly want to see that repealed. He has been equally clear that we were not going to release detainees into the United States.

Mr. SCHILLING. Is the Administration still considering opening the Thomson, Illinois, prison as a possible detention site for the detainees?

Secretary LYNN. We would certainly like to close Guantanamo. Thomson was the location that we had identified to move the remaining detainees to. Obviously, we haven't succeeded in that—in Congress at this point. I don't think we have changed course, but we recognize that we have quite a bit of persuading to do.

Mr. SCHILLING. So basically, Thomson, Illinois, is still on the table?

Secretary LYNN. To the extent there is a table.

Mr. SCHILLING. Okay. And then, have you looked at what the cost would be of relocating the detainees to the United States for detention and then, if so, how much would it cost?

Secretary LYNN. At one point, I had all these costs in my head. I am afraid I don't right now. But I can tell you the overall assumption, when we were doing the analysis 12 or 18 months ago, where there was an initial cost to moving to Thomson, but the cost of Thomson operations were lower than Guantanamo, and so the initial costs were paid back in, I think, a period of 2 or 3 years.

Mr. SCHILLING. Very good, thank you. And I yield back my time.

The CHAIRMAN. Thank you.

Mrs. HANABUSA.

Ms. HANABUSA. Thank you, Mr. Chairman.

Mr. Secretary, in the final report on Guantanamo, we have, of course, 126 who have been approved for transfer, 44 referred to military commissions, 48 considered to be basically too dangerous and 30 who are detainees who are in conditional detention.

Who made the decision as to who would fit in each one of these categories?

Secretary LYNN. There was an interagency review process that started with a task force that assessed all the intelligence, the legal, all of the information available on each of the detainees. That was reviewed by a deputy's committee and ultimately by the principal's committee of the National Security Council.

Ms. HANABUSA. So it wasn't any kind of trial or any kind of a legal proceeding where whoever may be falling in whichever category had some kind of rights to either contest or to have a say?

Secretary LYNN. This wasn't a legal proceeding. This was a review process. Most of these detainees have been pursuing habeas actions, and that has been their legal avenue.

Ms. HANABUSA. That brings for me a question to Mr. Johnson.

Of the habeas corpus petitions, I think 57 were filed and 37 actually prevailed. So they were released in some form or another.

Now, my question is, when you think of habeas corpus, you think about it in terms of our legal system and the criminal rights associated with it. Now, do those same laws apply when a detainee avails himself of habeas corpus?

Mr. JOHNSON. A habeas proceeding is a civil proceeding, not a criminal proceeding. And in the habeas cases that are in Federal court here in Washington, as the practice has evolved, we see that detainees' discovery rights have been expanding over time.

In limited instances, I think it is the case that the district courts wanted to hear from live witnesses. That happens once in a while. The practice has evolved, but it is fundamentally a civil proceeding with a different burden of proof. It is not proof beyond a reasonable doubt.

Ms. HANABUSA. No, I understand that. But I am saying that they avail themselves of the same rights that you and I might have, if we were filing a habeas corpus proceeding? Would that be a correct statement?

Mr. JOHNSON. Generally, yes, in the Federal courts in the United States, yes.

Ms. HANABUSA. And in that light, how many of these habeas corpus proceedings that they have prevailed on have resulted with civil litigation against the United States for either improper detaining, civil rights—maybe not civil rights in the classic sense, but have we had those kinds of basically liability exposure as a result of us losing the habeas corpus proceedings?

Mr. JOHNSON. No, not really. There have been some cases brought by former detainees, who were released or transferred back to their home country who then brought up litigation as a former detainee. Detainees have not had a lot of success in those cases.

Ms. HANABUSA. But they have been brought?

Mr. JOHNSON. There have been a few of them, yes, by former detainees.

Ms. HANABUSA. Now, my other question to you is now the proceeding here is you want all the different rights available. Now, if you go to an Article III proceeding, which, of course, is our Federal court system—and you touched upon the fact that, when they are—I guess, they are not arrested, but they are picked up in a war situation, you don't have Miranda—so how and what set of laws are going to govern in a Federal court proceeding under Article III? What kind of laws?

Mr. JOHNSON. Basically, what the courts are doing is trying to evaluate whether the detainee fits within our definition of unprivileged enemy belligerent, the AUMF, as informed by our definition of who we say we can detain.

And that is not the application of any particular state or Federal Law. It is the application of the habeas remedy, and the courts are trying to assess whether the detainee fits within the AUMF authority that the Congress gave us.

And in the cases where the Government has not prevailed, it has been not through any, you know, unorthodox legal interpretation. It is because there simply was not the intelligence and the evidence that we were able to put together to justify continuing holding that person.

There were some decisions that we disagree with, obviously, and we have appealed those. But it is not the application of any particular body of law except for the habeas law that is developing now in these cases.

Ms. HANABUSA. Thank you.

The CHAIRMAN. Thank you.

Mr. Griffin.

Mr. GRIFFIN. Thank you, Mr. Chairman.

Thank you all for your testimony today.

I would like to start just by clarifying something. I heard a reference earlier to the bill. I think someone indicated that an Abdulmutallab situation, where someone has picked up in the United States, would have to be sent to Gitmo under the bill.

That is not the case. They would just simply be detained by DOD, and they would not necessarily have to go to Gitmo. But I just wanted to clarify that.

Mr. Secretary, I want to talk a little bit about the Abdulmutallab situation. If that sort of incident, Christmas Day incident, were to happen today, would DOD be consulted in any way? Is there a role for DOD to play in that process if it were to happen today?

And both of you?

Mr. JOHNSON. Yes.

Secretary LYNN. Yes.

Mr. GRIFFIN. Could you elaborate on that?

Mr. JOHNSON. I believe—

Mr. GRIFFIN. Part of written protocol, or is this just—

Mr. JOHNSON. No, it is not part of a written protocol, but—and I hesitate on hypotheticals—but if an individual who had attempted to commit a terrorist act, and it appeared that he was part of A.Q. [Al Qaeda] or an affiliate—in other words, he had trained at a camp, an A.Q.-run camp—were arrested here in the United

States in the process of trying to commit a terrorist act as part of the ongoing conflict, I believe it is the case that we, along with the intelligence community, the interagency would be consulted about the disposition of that individual, yes.

Mr. GRIFFIN. Okay. If there is any doubt, would you confirm that and maybe get back to us on that, just if there is any doubt?

Mr. JOHNSON. Okay.

Mr. GRIFFIN. I mean, if the answer is yes, the answer is yes.

Secondly, Mr. Secretary and Mr. Johnson—this may be better suited to you, Mr. Johnson. Many members I have talked with here have had serious concerns about allegations that sensitive materials have been provided to detainees, potentially, through their attorneys.

And my understanding is there is a security protocol in place for Federal habeas corpus cases that provides, sort of, a walled-off privilege team to ensure that the classified information is not passed.

My understanding is there is not such a privilege team in the military context. And so if you could comment on that generally and let me know whether we plan to keep things as they are or possibly have something like that enacted?

Mr. JOHNSON. One of the things I discovered is that we do not have a similar protocol in place for commissions cases like the one we have in habeas cases. And so the convening authority has developed one. He recently settled on the document, and he put it out to the defense counsel for comment.

I imagine the defense counsel is not too happy with it. And so the convening authority and the defense counsel will consult each other on the document that the convening authority proposes to put in place, which is modeled after the privilege team protocol for the habeas cases.

And there are a number of other reforms that I think we put in place over the last 12 months or so to deal with the situation that you have described.

Mr. GRIFFIN. Okay, great. And I assume, at the appropriate point, we could get a briefing on that, maybe.

And lastly—I have got just a short amount of time here—in response to one of the three executive orders that President Obama issued in January 2009, my understanding is the White House established an interagency team to question terrorists known as the high-value interrogation group.

DOD was involved in the creation of this group—that is my understanding—and plays a role in its operations.

I don't want you to disclose anything that you shouldn't. I understand you can't share, maybe, specific details, but could you give us an idea about how well this group is functioning, whether this has been a good development?

Mr. JOHNSON. I haven't heard of any issues.

Secretary LYNN. I think it has only been used in a couple of instances, and I don't think I can go further than that here.

I think we have set up the processes. And the intent here was that we would have the ability to fly subject matter experts to a potential capture so that we had people who had a base of knowl-

edge involved in the questioning, rather than just who happened to be there.

And so I think the principle is right. I think we put the procedures in place to exercise it where necessary.

Mr. GRIFFIN. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. Johnson.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Chairman.

Gentlemen, thank you for your appearance today. And I had the occasion to visit Guantanamo, the facility in which the enemy combatants are being held. And I was impressed with the conditions that I could see under which they are being held. And I didn't see the particular cells that they are in, but is it 6 feet by 12 feet, something like that—cells, you know?

Secretary LYNN. I think they vary. Some cells are that size, some that there is more of a community-based process. So it is a variety. There is not a single cell size.

Mr. JOHNSON OF GEORGIA. And with the high-value detainees, they are held in individual cells. Correct?

Secretary LYNN. I don't think in an open forum I can go very far on that.

Mr. JOHNSON OF GEORGIA. Okay. Well, they are not shackled while they are in their cells, are they?

Secretary LYNN. I think what I would assure you, Congressman, is that with all of the detainees at Guantanamo, we are following very strictly the provisions of the Geneva Convention.

Mr. JOHNSON OF GEORGIA. Well, I will tell you, I didn't see any prisoners that were shackled in their cells, while we were there. And what time do they get up in the morning?

Secretary LYNN. I am not sure.

Mr. JOHNSON OF GEORGIA. Are they forcibly kept awake until a certain hour of the day before they can go back to sleep?

Secretary LYNN. No.

Mr. JOHNSON OF GEORGIA. And they are not forced to sleep naked?

Secretary LYNN. No.

Mr. JOHNSON OF GEORGIA. Not forced to undergo a strip search every morning?

Secretary LYNN. No.

Mr. JOHNSON OF GEORGIA. And but now yet, a gentleman is being held in U.S. custody. It is Private 1st Class Bradley Manning, being currently held at Quantico, charged with serious offenses. And let me state clearly and forcibly that if he is convicted of those charges, then he should be severely punished.

But from what I have seen down at Guantanamo and what I have heard about the conditions of confinement for Private Manning, it seems to me that the enemy combatants are being treated better than he. And he is just simply an accused. He has not been convicted of anything. And I am concerned about that.

Mr. JOHNSON. Congressman, Private Manning is in pre-trial confinement, which is a common thing in the military justice system and in our civilian criminal justice system. And there are a variety of reasons why somebody is in pre-trial confinement before their trial.

I think, frankly, that there has been a fair amount of misinformation.

Mr. JOHNSON OF GEORGIA. So he is not being held in a 6-by-12-foot cell with 1 hour per day outside of the cell, and he is shackled while he is in the cell? And it is not true that he is awakened at 5 a.m., 7 a.m. on the weekends, and forcibly kept awake until 8 p.m. and routinely awakened in the middle of the night? That is not true?

And it is not true that he is forced to sleep naked and subjected to naked examination every morning? Those things are not true?

Mr. JOHNSON. Private Manning is, first of all, not in solitary confinement. He has never been in solitary confinement. That is a piece of public misinformation.

It is public that he currently is in a classification status called maximum security. However, someone in maximum security at Quantico occupies the same type of cell, which is a single-occupancy cell—I don't know the dimensions—that a medium security pre-trial detainee at Guantanamo would occupy, the very same type of cell.

And you could have a maximum security confinee and a medium security confinee there in the same row of cells, and they can, in fact, converse with each other. The difference in—

Mr. JOHNSON OF GEORGIA. But no one else is held under those same conditions of confinement, though, that Private Manning is being held under?

The CHAIRMAN. Mr. Johnson, your time has expired.

And perhaps Mr. Johnson can follow back with you off the record.

Mr. JOHNSON OF GEORGIA. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

Mr. JOHNSON OF GEORGIA. And thank you for your answers.

The CHAIRMAN. Thank you.

Mr. Bartlett.

Mr. BARTLETT. Thank you very much.

I am genuinely conflicted. With one person out of 22 in the world, and we have a fourth of all the good things in the world, and I ask myself, how come?

It is not because we no longer have the world's best work ethic. It is not because we have the most respect for technical education. This year, the Chinese will graduate seven times as many engineers as we graduate. It is not because we have the most respect for the nuclear family, because nearly 50 percent of our kids are now born out of wedlock.

Why is it then, that we are so darn fortunate?

I think a major reason is the enormous respect that we have for civil liberties. There is no other constitution, there is no other bill of rights that so defines and protects these God-given civil liberties. I think we put at risk who we are as the world's only economic and military superpower if we permit any corrosion of these civil liberties.

I note in the Constitution that it is people that are protected, not just citizens. I read it over and over again, in the Bill of Rights.

The expediency of the moment to enhance national security has resulted in indefinite detention of individuals, some of them even

U.S. citizens, without any charges. And the President has made an incredible public statement that even if tried in court and found innocent, we are going to detain them indefinitely, because we know they are guilty and are a threat to our country.

If the expediency of the moment permits these bizarre rationalizations, Mr. Lynn and Mr. Johnson, I am concerned that future rationalizations for national security could target you and me for indefinite detention and denial of our civil liberties.

I have 10 kids and 17 grandkids and 2 great-grandkids. I, obviously, have a lot of reasons for maximum national security. But at what price? Dissuade me, please, from my concerns and free me from the torment of my conflict.

Secretary LYNN. Congressman, I think you are right to be conflicted. I think with these detainees, we are in a difficult situation, in particular with the ones that I think you are focused on, which are the 48 that we have done, frankly, a comprehensive review, and we have determined that they, as I said, continue to be at war with the United States and continue to pose a threat.

And we have the legal authority to hold them, as they have gone through their habeas proceedings and the court has held, indeed, that there is a legal basis for holding them.

But I think the significance of the executive order—I am not sure it is going to make you rest completely easy, and maybe you shouldn't, but I think it should ease you some—the significance of this most recent order is one part of it was to set up a process which is a continual review process of these 48.

It allows for an initial review after 1 year, and then file reviews every 6 months, to ensure that we continue to believe these individuals pose a significant threat, that there has been no change in circumstances, no additional information has been found.

We give the detainees a robust process to bring forward any information that they think is relevant. And then we have another comprehensive review every 3 years. This is, I think intended to be a protection against exactly what you fear, that this is somehow an indefinite detention authority without recourse.

Mr. BARTLETT. What about the President's incredible statement, that even if found innocent, we know they are guilty, and we will keep them detained indefinitely?

Secretary LYNN. That is not a statement I have ever heard.

Mr. BARTLETT. It is a statement I have heard widely reported, sir.

Thank you very much, Mr. Chairman. I yield back.

The CHAIRMAN. Thank you.

Mr. Larsen.

Mr. LARSEN. Mr. Chairman, I just would alert anyone who wants to be next to go ahead and be next. Most of the information I need to get from the hearing is in the testimony and just to be sure I am understanding the process that the Administration's executive order is laying out. I will do any follow-up questions based on that at a later time.

Thank you. I yield back.

The CHAIRMAN. Thank you.

The gentleman yields back.

Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman.

And thank you, Secretary Lynn, for being here.

And, Mr. Johnson, as a fellow former JAG officer, I appreciate your service.

I have had the privilege of actually visiting Guantanamo Bay three different times. Each time I go, with my background in the state senate on the corrections and penology committee, I am very familiar with detention facilities. It is a world-class facility.

It is a facility where we have young people who are truly serving our country well. It was extraordinary to me to see the young National Guard members from Puerto Rico, who were serving on my last visit.

And it is so encouraging because to me illegal enemy combatants should be held in accordance with international law, as we did in World War II, even, beginning further, during the American Civil War it was understood by President Abraham Lincoln that our Constitution is not a suicide pact.

Keeping that in mind, a lot of American citizens don't understand, you correctly identified, that persons being detained there are a threat to the security of the American people, American families.

But also, there are a number of people being held who cannot be released back to their home country for different reasons, such as their own security. Could each of you comment on the different reasons why we would hold people for an indefinite period?

Secretary LYNN. Well, as I indicated earlier, there are several different groups that make up the bulk of the detainees in Guantanamo. There are the 48 where we have done this comprehensive review, and those are the ones that remain a continuing threat.

There are the 36 who we are looking at the opportunities or the options for prosecution. There are a smaller group that we are continuing to look at transfer options, if we can find the appropriate security assurances.

And then there is a fairly large group of Yemenis, who many of which we think pose a relatively modest risk, except for where they would return to, Yemen, because of the situation in Yemen and the strong Al Qaeda presence. These are not—I wouldn't call this indefinite detention in the same way as with the 48, but we don't have any options right now that would allow us to transfer them with appropriate security assurances.

Mr. WILSON. And—

Excuse me. Go ahead, please.

Mr. JOHNSON. Sorry, Congressman Wilson. I was with you on your last trip to Guantanamo. And you are absolutely correct that we have got a professional and a professionally run facility down there. The guard force, as you know, is first-rate.

The point I would like to make is that law of war detention of a congressionally declared enemy is not new. It is a very traditional concept. In a congressionally declared conflict, armies are supposed to capture and kill the enemy. And when we capture the enemy, we don't capture them with the purpose of releasing them, and we don't capture them for the purposes of all of them being prosecuted.

So the concept of holding onto your enemy once you capture them is not new. It is very traditional. And it is an authority that the Supreme Court has said that we have.

Mr. WILSON. Another thing that I learned that was so interesting, that the American people can understand. Some of these were detained on the battlefield in the middle of Afghanistan. They were from, say, Uighurs from China. They were Chechnians from Russia.

On their person, they would have, say, \$500 in U.S. currency or they would have a particular Citizen watch. It may seem very peculiar for somebody in the middle of Afghanistan to have, except for one thing. That particular watch had a timer. That meant that they were a graduate of bomb school.

And so I truly support both of your efforts, and I am glad I believe the President has now determined that Guantanamo Bay is a proper location for people who are truly a threat to the people of the United States.

Thank you very much.

The CHAIRMAN. Thank you.

Mr. West.

Mr. WEST. Thank you, Mr. Chairman and Mr. Ranking Member. And gentlemen, thank you for being here today.

I, too, had the opportunity a couple weeks ago to go visit Guantanamo. And of course, I have had in a previous life some trips over to various vacation spots, being in Iraq and Afghanistan.

I think one of the things we have to come to grips with and what causes us so much consternation is really to understand are we dealing with criminals or are we dealing with enemy combatants. And if we are dealing with enemy combatants, are they legal or illegal enemy combatants?

And so I would like to ask a series of questions. The gentleman who shot our four airmen, killing two of those airmen in Frankfurt, Germany, do you consider that a criminal or an enemy combatant?

Mr. JOHNSON. Congressman, I hesitate to comment on a particular case. I will say this, that the first thing I would ask myself is, is this person part of the congressionally declared enemy in the congressionally declared armed conflict? That is the—that is the question I think we have to ask.

If the person who commits a violent act against our military is part of Al Qaeda or an associated force, then that is something that may well be a matter for our military versus law enforcement. But, you know, it is hard to generalize here.

Mr. WEST. Well, see, I think one of the problems is if you go back and you look at World War II, I mean, in World War II we did not go to fight the 12th Panzer Battalion or the 55th Japanese Infantry regiment.

So, I mean, we are going to see more of these incidents where our men and women in uniform are being attacked, and I think that one of the critical things that we have to do in this Nation is really defining this enemy and defining the battlefield so we don't have these moments of indecision.

I look at what just happened recently with the Somali pirates. I mean, we have 15 of them that we have now brought to the Norfolk courthouse for doing something where they basically com-

mandeered a U.S.-flag vessel, being a civilian vessel, and executed four Americans.

Now, history will tell me that back in the early 1800s, we had something similar to that happening and we sent the Marines. Do you believe that these Somali pirates should be entered into our U.S. civilian court system? Or should they be brought down to Guantanamo Bay?

Mr. JOHNSON. Guantanamo Bay is intended for enemy combatants, the enemy being the congressionally declared enemy. I think we have to be careful—and I am sure you appreciate this—we have to be careful about the slippery slope. Not every action of our Government against a bad person or even a terrorist should necessarily be a military action. We have to be careful not to over-militarize our approach to acts of terrorism.

I think there is a place for law enforcement, not necessarily U.S. law enforcement, law enforcement of other well-developed nations. But I think that given this unconventional conflict we are in against a non-state actor, we have to be vigilant not to let the slippery slope creep into our thinking about who our congressionally declared enemy is in this armed conflict. And that is something that I have to assess almost daily in my job.

Mr. WEST. So if Al Qaeda were tomorrow to change their name to the Bombay Bicycle Boys Club, would they not be a congressionally termed enemy? I mean, would we treat them different?

Mr. JOHNSON. If they changed their name, hopefully our intelligence would be able to figure that out and we would realize that it is still Al Qaeda.

Mr. WEST. I think the most important thing that we have to do is to not constrain ourselves in understanding this modern 21st-century battlefield and it is only this named enemy or that named enemy, because what is Hamas? And of course, before there was Al Qaeda, the number one terrorist organization that killed the most amount of Americans was Hezbollah. So do we not see Hezbollah as an enemy force?

I will finish up on this last question. Twenty-four years of age, Omar Khadr, who is guilty of five war crimes, to include killing a U.S. serviceman, will be released out of Guantanamo Bay next year and sent back to his native country of Canada. What was the genesis of coming forth with this deal? And how can you explain that to the parents of that American serviceman who was killed?

Mr. JOHNSON. That was an arrangement reached between the prosecutors, the defense counsel, ultimately endorsed by the convening authority. As general counsel of the Department of Defense, I don't make prosecution judgments or plea arrangements. I am not supposed to.

I am satisfied that the parties collectively did what they needed to do. And I also know that the victim's family was consulted throughout the process.

Mr. WEST. Well, I know that we talked about credibility. And I think the most important credibility we must maintain is the credibility we have with our men and women in uniform.

Thank you very much.

And I yield back, Mr. Chairman.

The CHAIRMAN. Thank you.

Ranking Member Smith.

Mr. SMITH. Thank you, Mr. Chair.

Just a couple of closing comments on our side. I don't really have any additional questions.

The biggest thing is that I want to agree with the chairman. There is a very strong need for the executive branch and the legislative branch to work together on this, and I don't think we have done a good enough job on that to this point.

And I would strongly encourage the executive branch and the White House to work directly with Mr. McKeon and with the Republicans as we craft this legislation, because part of my concern is that, you know, absent that sort of collaborative process—I mean, at this point we both sort of agree that we don't want to talk to any—both sides don't want to talk to each other about what they are actually doing until they present it, and then we will fight about it.

There is a real danger in that if the legislation gets moving in a direction that is not properly reined in. I think that was one of my comments earlier about the legislation that was released last week, both by Senator McCain on the Senate side and here in the House by the chairman.

You know, we do need the advice of the executive branch. And frankly, it has been there on and off, but I don't think it has been as active as it should have been, working with Congress either, you know, Republican or Democrat, to say, "Hey, what are you talking about? Here is what we are talking about. Let us try to work this out."

You know, and I think the, you know, the question of the militarization of this is one of my concerns. And it may be true that under this legislation, they would not be required to take them to Guantanamo. If they are doing military tribunals and that is where they are doing military tribunals, I would suspect that would be the outcome.

But it is absolutely true that the legislation would put the military in charge of essentially U.S. prosecutions. If you had, you know, crimes like the attempted bombing in Times Square, under the new legislation it would be the military that would be responsible for holding, trying and interrogating that person right here on U.S. soil. That is extremely problematic to give the military that amount of power.

And then you can ask the question if you were trying to find collaborators who worked with them, who would be subject to this as well, who is doing that investigation? If the military is ultimately responsible for holding, interrogating and trying these people, wouldn't the military then be involved in a domestic U.S. investigation to try to find who it is that they are supposed to grab?

Those sorts of implications, I think, are alarming and I think they would be alarming to the majority party as well, once we played it out. But absent a collaborative process between the executive branch and the legislative branch, you wind up with that.

And I think, you know, many of us would agree that the prohibitions contained in the National Defense Authorization Act from last year had consequences that we would rather not have seen that

came about because there was a battle and one side won, and that is where we wound up, instead of a collaborative process.

So I, you know, applaud the chairman for holding this hearing and would encourage greater collaboration between the executive and the legislative branches as we move forward with this process.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, and I appreciate your comments.

There is a reason for that. None of us has all the brainpower to make all the best decisions, and I think the more all of us are involved in the process, the more chance we have of getting a better product and not making mistakes. And that is my whole purpose in this. And I am sure we will work together. And I know that we are not far from the Senate in this.

My goal is to have legislation come out that will be helpful in the war that we are engaged in.

With that, thank you very much. The votes were postponed, so we were able to get through the hearing. I appreciate your patience. I appreciate all the members being here.

And with that, this hearing will be adjourned. Thank you.

[Whereupon, at 2:36 p.m., the committee was adjourned.]

A P P E N D I X

MARCH 17, 2011

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

MARCH 17, 2011

**Prepared Statement of
William J. Lynn, Deputy Secretary of Defense, and
Jeh Charles Johnson, General Counsel of the Department of Defense
for the House Armed Services Committee
March 17, 2011**

Chairman McKeon and Congressman Smith, thank you for the opportunity to testify here today.

On March 7, 2011, the President announced several initiatives related to the legal framework for detention and detainees, including the detainees at Guantanamo Bay. We are here today to discuss those initiatives in greater detail and answer any questions you may have about them.

As a preliminary matter, we note that the Obama Administration remains committed to closing the detention facility at Guantanamo Bay. Like the President, we in the Department of Defense believe these initiatives will strengthen our national security and, at the same time, promote the rule of law; regardless of where the detainees are located, we would be moving forward with them. Our goal is to ensure a system of detention that is balanced and fair with respect to the detainees and is sustainable and credible with the U.S. courts, the Congress, the American public and our allies and coalition partners in the current conflict.

First, Secretary Gates lifted the suspension on new charges in military commissions for cases that have been evaluated pursuant to the prosecution protocol between the Departments of Defense and Justice. The suspension was issued by the Secretary in January 2009 to permit the new Administration time to review the status of each detainee at Guantanamo, pursuant to Executive Order 13492. That review is complete. In addition, as the President called for in his National Archives address in May 2009, we have worked with the Congress to reform military commissions. And, the Military Commissions Act of 2009, which was passed with bipartisan congressional support and the support of our JAG leadership, incorporated a number of reforms, including a ban on the use of statements obtained through cruel, inhuman and degrading treatment in commissions prosecutions, and an enhanced system for the handling of classified information in commissions cases. In the last two years we also issued a new Manual for Military Commissions, appointed retired Navy Judge Advocate General Bruce MacDonald to be the Convening Authority, and revised the rules for press access to commissions proceedings. With these reforms, we believe that

military commissions, along with federal civilian courts, are an available and important tool for the U.S. to bring detainees to justice.

As the President has made clear, we respectfully disagree with the restrictions that the Congress has imposed on transferring Guantanamo detainees to the United States for the purpose of prosecuting them in federal court. We repeat here what Secretary Gates has said publicly about that:

“In addition to bringing detainees to justice in reformed military commissions, I believe that it is important that we maintain the option of prosecuting alleged terrorists in federal courts in the United States. For reasons of national security, we must have available to us all the tools that exist for preventing and combating international terrorist activity, and protecting our Nation. For years, our federal courts have proven to be a secure and effective means for bringing terrorists to justice. To completely foreclose this option is unwise and unnecessary.”

Simply put, bringing detainees to justice is an essential part of our arsenal in the war against al Qaeda and its affiliates, and the Executive Branch must be able to draw on all aspects of our justice system, including Article III courts.

Second, the President signed Executive Order 13567, providing for periodic review of those Guantanamo detainees who will be held in long-term detention under the Authorization for the Use of Military Force as informed by the law of war. In his National Archives address, the President recognized that there are certain Guantanamo detainees who, in effect, remain at war with the United States and thereby pose a continuing threat to the security of the United States, but who have not been charged, convicted or designated for transfer. For this group, “[w]e must have a through process of periodic review, so that any prolonged detention is carefully evaluated and justified.” The new periodic review process announced last week satisfies this directive, and strengthens our national security by providing a solid and sustainable system for the review of individuals who have been designated for law of war detention, or who have been designated for prosecution but against whom no charges have been brought.

It is important to note that the system of periodic review established by the Executive Order is not new in concept. The previous Administration periodically reviewed the status of Guantanamo detainees and, between 2002 and January 20, 2009, transferred about 540 detainees to other countries.

In the current Administration, as mandated by Executive Order 13492, a Task Force of senior officials at Defense, State, Homeland Security, Justice and from the intelligence community conducted a thorough consideration of the Guantanamo detainees' cases. Over the last two years, 67 detainees have been transferred from Guantanamo. As a result of the Task Force process, 48 detainees were designated for continued law of war detention, and 36 were referred for prosecution in either federal court or by military commission.

The periodic review established by Executive Order 13567 will apply to those designated for law of war detention, and to those who have been designated for prosecution, but against whom no charges have yet been brought. Detainees have the right to challenge the legality of their detention in federal court, and most have in fact done so. The periodic review process is intended to assess whether continued detention of each of these individuals is "necessary to protect against a significant threat to the security of the United States." And, as the Executive Order itself makes clear, no detainee at Guantanamo will be released into the United States. Finally, any transfer or release will be completed in accordance with restrictions and requirements imposed by law.

Third, the President announced that the Administration strongly supports Additional Protocol II to the 1949 Geneva Conventions, and will seek Senate advice and consent to ratification of this important treaty. This protocol contains detailed humane treatment standards and fair trial guarantees that apply in non-international armed conflicts, such as our conflict against al Qaeda. Additional Protocol II was originally submitted to the Senate for advice and consent by the Reagan Administration in 1987, but in the almost 25 years since, the Senate has not acted on it. The Administration has also determined that we will choose "out of a sense of legal obligation" to follow Article 75 of Additional Protocol I of the Geneva Conventions in international armed conflicts. Article 75 contains basic humane treatment standards for those captured in international armed conflicts. To be clear, the Administration is not seeking Senate advice and consent to ratification of Additional Protocol I. Like prior Administrations, we continue to have concerns about other aspects of Additional Protocol I.

Over the years, international legal experts from across the political spectrum have called upon our government to embrace Additional Protocol II and Article 75. And, after careful interagency analysis, we have concluded that the practices of our military are already consistent with these two sets of standards. Further, since the Vietnam War, our military has supported Article 75 for the protection of our own

captured personnel if they were denied prisoner of war status during an international armed conflict. By embracing these two sets of safeguards, we promote the international law of armed conflict, including in our current conflict against al Qaeda and its affiliates, and we send the message that we expect others to adhere to these same standards.

Overall, we believe these initiatives will promote clear, credible and lawful standards for the detention and prosecution of those who remain at Guantanamo. This, in turn, benefits our national security and the safety of the American people.

Two final notes: in the habeas litigation brought by Guantanamo detainees, the government has recently prevailed in seven separate cases at the District Court level, and we have been successful in several more cases at the circuit court level. We work hard to present careful and reasoned legal and factual defenses in these cases, and we believe our efforts are reflected in these decisions of the courts.

We also believe that the Department's working relationship with the International Committee for the Red Cross is as good as it has been in recent times. We meet regularly with the ICRC to discuss their concerns and reports. It is also the case that the ICRC is promptly notified of every detainee of the Department, and the ICRC has access to all the Department's detention facilities.

We look forward to your questions.



William J. Lynn, III
Deputy Secretary of Defense

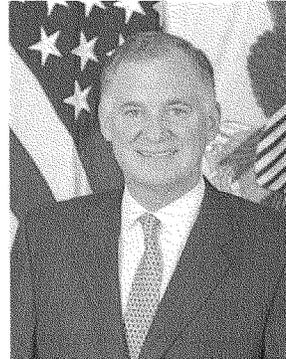


William J. Lynn III is the 30th Deputy Secretary of Defense. Mr. Lynn's career has included extensive public service at various levels within government. Mr. Lynn served as the Under Secretary of Defense (Comptroller) from 1997 until 2001 and for four years prior to that he was the Director of Program Analysis and Evaluation (PA&E) in the Office of the Secretary of Defense.

Before entering the Department of Defense in 1993, Mr. Lynn served for six years on the staff of Senator Edward Kennedy as liaison to the Senate Armed Services Committee. Prior to 1987, he was a senior fellow at the National Defense University and was on the professional staff of the Institute for Defense Analyses. From 1982 to 1985, he served as the executive director of the Defense Organization Project at the Center for Strategic and International Studies.

Mr. Lynn also has experience in the private sector from 2001-2009. He served as senior vice president of Government Operations and Strategy at Raytheon Company. He also served as executive vice president of DFI International, a Washington-based management consulting firm, from 2001 to 2002.

A graduate of Dartmouth College, Mr. Lynn has a law degree from Cornell Law School and a master's in public affairs from the Woodrow Wilson School at Princeton University. His publications include a book, *Toward a More Effective Defense*, as well as articles in various newspapers and professional journals. He has been recognized for numerous professional and service contributions, including three DoD medals for distinguished public service, the Joint Distinguished Civilian Service Award from the Chairman of the Joint Chiefs of Staff, and awards from the Army, Navy and Air Force.





Jeh C. Johnson
General Counsel



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

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

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



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

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

Following the 2008 election, Mr. Johnson served on President-Elect Obama's transition team, and was then publicly designated by the President-Elect for nomination to the position of General Counsel of the Department of Defense on January 8, 2009, followed by formal nomination on January 20, 2009, and confirmation by the Senate on February 9, 2009.

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

**WITNESS RESPONSES TO QUESTIONS ASKED DURING
THE HEARING**

MARCH 17, 2011

RESPONSES TO QUESTIONS SUBMITTED BY MR. FORBES

Secretary LYNN. [The information was not available at the time of printing.] [See page 11.]

Secretary LYNN. [The information was not available at the time of printing.] [See page 11.]

RESPONSE TO QUESTION SUBMITTED BY MR. ANDREWS

Secretary LYNN. [The information was not available at the time of printing.] [See page 12.]

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

MARCH 17, 2011

QUESTIONS SUBMITTED BY MR. MCKEON

Mr. MCKEON. 1. Please describe the manner in which prosecutors and defense attorneys are selected to serve in the Office of Military Commissions Prosecution and Defense, including any particular expertise or criteria required for such service.

Secretary LYNN. [The information was not available at the time of printing.]

Mr. MCKEON. 2. Please provide the number of military or DOD prosecutors currently assigned to the Office of Military Commissions Prosecution, whether they are active duty or reservists, the numbers of years they've been assigned to the office, and a general description of how many of these prosecutors have experience in counterterrorism or other national-security related cases.

Secretary LYNN. [The information was not available at the time of printing.]

Mr. MCKEON. 3. Please provide the number of prosecutors the Department of Justice has assigned to the Office of Military Commissions Prosecution, the numbers of years they've been assigned to the office, and a general description of how many of these prosecutors have experience in counterterrorism or other national-security related cases.

Secretary LYNN. [The information was not available at the time of printing.]

Mr. MCKEON. 4. How is the Department ensuring that the military's most experienced trial attorneys are being assigned to the Office of Military Commissions?

Secretary LYNN. [The information was not available at the time of printing.]

Mr. MCKEON. 5. Please provide the FY12 funding request for the Office of Military Commissions.

Secretary LYNN. [The information was not available at the time of printing.]

Mr. MCKEON. 1. Please respond to the following questions regarding the President's executive establishing Periodic Review Boards (PRB) for Guantanamo detainees:

a) The standard described in the executive order for whether a detainee qualifies for continued detention is whether they constitute a "significant threat" to the United States. What constitutes a "significant threat?" Is this the same standard that was used by the Guantanamo Review Task Force? If not, how does it differ?

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

Mr. MCKEON. b) What role will a detainee's counsel play in the PRB process? What kinds of filings will be allowed? What appearances will they be able to make? Will there be oral arguments presented to the PRB?

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

Mr. MCKEON. c) What role will the detainee's counsel play during file reviews? Will the detainee's personal representative or counsel be entitled to any discovery during file reviews?

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

Mr. MCKEON. d) The executive order states that the Government will need to turn over all relevant "mitigating information." What standard will be used to determine if information is "mitigating?" Will this obligation be narrowed in the implementing guidelines? If so, how?

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

Mr. MCKEON. e) How will relevancy be determined by the PRB? Is this an issue to be litigated by the detainee's counsel?

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

Mr. MCKEON. f) How will the reliability of materials be determined by the PRB? Will the detainee's counsel be entitled to discovery on the issue of reliability of information before the PRB?

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

Mr. MCKEON. g) How long is each PRB expected to take and how many personnel will be needed to implement them?

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

Mr. MCKEON. h) The executive order contemplates that "all information in the detainee disposition recommendations produced by the Task Force established under Executive Order 13492 that is relevant to the determination" shall be provided to the PRB, the detainee's personal representative, and the detainee's counsel. Please describe what types of information are contained within each "recommendation." Do

they include supporting intelligence information? Approximately how much information is contained within each set of recommendations?

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

Mr. MCKEON. 1. When will the implementing guidance be issued? Will the Committee be consulted prior to its release?

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

Mr. MCKEON. 2. You mentioned that the Department would be consulted regarding how to handle and interrogate a suspected terrorist if an incident similar to the Christmas Day bombing attempt were to happen today. Are other agencies required to consult with DOD? Has this consultation been formalized in any way? What role would DOD play?

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

Mr. MCKEON. 3. Please list the Guantanamo detainee cases that have been designated for prosecution in the military commission system.

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

Mr. MCKEON. 4. Please list the Guantanamo detainee cases that have been designated for prosecution in U.S. federal court.

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

Mr. MCKEON. 5. In the Ghailani case in New York, Judge Kaplan held that testimony from one of the Government's key witnesses was inadmissible because the Government learned of the existence of the witness from involuntary statements of the defendant. The new Manual for Military Commissions includes a new rule known as the "derivative evidence rule." In a footnote to his opinion, Judge Kaplan noted that this rule could lead to the same kind of results in a military commission.

a) What will the impact of this rule be and why was it incorporated into the new manual?

b) What impact will this rule have on military commission cases?

c) Is it possible to still revise the Manual?

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

Mr. MCKEON. 6. Does the Administration's announcement on March 7, 2011 regarding Additional Protocols I and II have any effect on the targeting, detention, or prosecution of al Qaeda, the Taliban, or associated forces?

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

Mr. MCKEON. 7. During the Guantanamo Review Task Force's evaluations, for how many detainees was the Task Force unable to reach a unanimous decision?

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

Mr. MCKEON. 8. Has the Administration undergone any internal reviews to determine if there are any lessons to be learned or policies that should be changed from detainees who have returned to the fight?

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

QUESTIONS SUBMITTED BY MRS. DAVIS

Mrs. DAVIS. 1. How do you plan to deal with those prisoners detained at the DFIP (Detention Facility in Parwan) on classified evidence alone, evidence that cannot be turned over to the Afghan government?

Secretary LYNN. [The information was not available at the time of printing.]

Mrs. DAVIS. 2. Are there plans to move those prisoners somewhere else when we leave?

Secretary LYNN. [The information was not available at the time of printing.]

Mrs. DAVIS. 3. What is the percentage of detainees at the DFIP who can be turned over to the Afghan government for court trial?

Secretary LYNN. [The information was not available at the time of printing.]

Mrs. DAVIS. 4. How many detainees have been released by the review boards?

a) Of those, how many have gone back to fight against us?

b) How many have been rehabilitated and reintroduced successfully back into Afghan society?

c) How are you measuring the effectiveness of these efforts?

Secretary LYNN. [The information was not available at the time of printing.]

Mrs. DAVIS. 5. US forces were scheduled to begin transitioning detention operations at the DFIP in Parwan to the Government of Afghanistan in January 2011. Why didn't this occur on time?

Secretary LYNN. [The information was not available at the time of printing.]

Mrs. DAVIS. 6. Could you please explain the criteria used for determining whether a case is best suited for a military commission or federal court? Is this based on classified evidence?

Secretary LYNN. [The information was not available at the time of printing.]

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

QUESTIONS SUBMITTED BY MR. FRANKS

Mr. FRANKS. 1. A recent report by the Director of National Intelligence stated that, "Of the 150 former GTMO detainees assessed as confirmed or suspected of re-engaging in terrorist or insurgent activities, the Intelligence Community assesses that 13 are dead, 54 are in custody, and 83 remain at large, and based on trends identified during the past 6 years, the Intelligence Community further assesses that if additional detainees are transferred from GTMO, some of them will reengage in terrorist or insurgent activities." These numbers trouble me and I am concerned with the efficacy of reengagement of GTMO detainees. What is being done to decrease this number from 83 to zero at large detainees suspect or confirmed as re-engaging in terrorist or insurgent activities and once at zero, what must be done to keep it there? I need not remind anyone what just a handful of terrorists have done and can do to terrorize our nation and its people.

Secretary LYNN. [The information was not available at the time of printing.]

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

QUESTION SUBMITTED BY MR. LANGEVIN

Mr. LANGEVIN. 1. During the recent hearing before the full committee, you testified that any Bills introduced regarding Guantanamo Bay should not "limit options available to the military" in dealing with the facility, detentions and the Authorization for Use of Military Force (AUMF).

A recent Bill introduced by Chairman McKeon on this topic appears to give the military broad powers to detain any members of Al Qaeda, the Taliban and associated forces subject to the AUMF. This portion of the legislation is the subject of much debate in Congress about how much power to give the military.

a) Where does the military feel the line should be drawn? On the one hand, we hear it is unwise to "limit military options" in the ongoing conflict and detention

efforts. On the other hand, giving the military free reign to round up any of the above participants on US soil (instead of having law enforcement and US Criminal Court involvement) appears to raise the possibility of a conflict with the Posse Comitatus Act.

b) Can you please provide further clarification on your statement above?

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

QUESTIONS SUBMITTED BY MR. COOPER

Mr. COOPER. 1. It was mentioned that between 2004 and 2008 there were approximately 500 prisoners released from GTMO. Since 2009 there have been 67 releases. How many of the 67 releases were due to habeas proceedings vs. releases from habeas proceedings for the period from 2004–2008?

Secretary LYNN. [The information was not available at the time of printing.]

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

QUESTIONS SUBMITTED BY MS. HANABUSA

Ms. HANABUSA. 1. When a detainee is “transferred” do they sign a “waiver of rights” against the United States? The assumption is that a detainee who qualifies for transfer is not a detainee who, in effect, remains at war with the United States.

Secretary LYNN. [The information was not available at the time of printing.]

Ms. HANABUSA. 2. In anticipation of a non-Miranda situation, will it cause problems in light of the fact that the developing law in habeas corpus case is expanding rights of the detainees per your testimony?

Secretary LYNN. [The information was not available at the time of printing.]

Ms. HANABUSA. 3. Who and or what is the procedure to be followed will that determine forum choice for a detainee?

Secretary LYNN. [The information was not available at the time of printing.]

Ms. HANABUSA. 4. Can the lessons of Foreign Intelligence Surveillance Act (FISA) be applicable?

Secretary LYNN. [The information was not available at the time of printing.]

Ms. HANABUSA. 5. How many enemy combatants are in Afghanistan and/or other non-US areas who are to be tried in US Courts?

Secretary LYNN. [The information was not available at the time of printing.]

Ms. HANABUSA. 6. The Executive Order of March 7, 2011 states that the review of detainees is limited to continued law of war detentions. Does this mean if you are in the “approval for transfer” or “continued detention” you are not entitled to review if they do not transfer after a year?

Secretary LYNN. [The information was not available at the time of printing.]

Ms. HANABUSA. 7. For Yemenis and “approved for transfer” if no country takes them or if Yemen is not quite ready does the United States continue the detention?

Secretary LYNN. [The information was not available at the time of printing.]

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