

THE GUANTANAMO DETENTION FACILITY AND THE FUTURE OF U.S. DETENTION POLICY

HEARING

BEFORE THE

COMMITTEE ON ARMED SERVICES UNITED STATES SENATE

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

FEBRUARY 5, 2015

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THE GUANTANAMO DETENTION FACILITY AND THE FUTURE OF U.S. DETENTION POLICY

THURSDAY, FEBRUARY 5, 2015

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

The committee met, pursuant to notice, at 9:50 a.m. in room SD-G50, Dirksen Senate Office Building, Senator John McCain (chairman) presiding.

Committee members present: Senators McCain, Sessions, Ayotte, Cotton, Rounds, Ernst, Tillis, Sullivan, Graham, Reed, Manchin, Shaheen, Gillibrand, Blumenthal, Donnelly, Kaine, King, and Heinrich.

OPENING STATEMENT OF SENATOR JACK REED

Senator REED. Senator McCain, the chairman, has asked me to call the hearing to order. He is currently, along with many of our colleagues, at the National Prayer Breakfast, and that is not finishing as promptly as they anticipated.

As such, what I am going to do is ask unanimous consent that Senator McCain's opening statement be submitted for the record, that my opening statement be submitted for the record.

[The prepared statements of Senators McCain and Reed follow:]

PREPARED STATEMENT BY SENATOR JOHN MCCAIN

This committee meets today to review U.S. detention policy and the President's ongoing efforts to close the detention facility at Guantanamo Bay (GTMO), Cuba.

For many years, I have believed that it would further U.S. national security interests to close the Guantanamo detention facility. I still do. In no way is that a criticism of the honorable service and professionalism of our men and women in uniform, who ensure that our detention operations at Guantanamo are conducted responsibly and consistent with our Nation's values.

Let me also say that the recent successes of radical groups like ISIL, al-Qaeda, and Boko Haram, as well as our lack of a strategy to counter them, are a far more powerful source of radicalization and terrorist recruitment today than anything happening at GTMO. All of that said, I still believe we can, and should, look beyond the detention facility at Guantanamo Bay.

The problem is that, for more than 6 years now, the Obama administration has offered no comprehensive plan to responsibly close the Guantanamo detention facility. It has not provided Congress with clear, compelling, and specific answers to the many challenging questions that must be resolved if the American people, and their elected representatives, are to have confidence that closing Guantanamo can be done in a way that supports our national security, rather than undermine it. Such questions include:

- How, and in what kind of venue, will we bring charges against those detainees who can and should be tried for their crimes?
- What are the specific conditions that must be put in place in order to ensure that the foreign transfer or repatriation of those Guantanamo detain-

ees who have been cleared for release by our military and intelligence professionals can be done in a way that is secure, responsible, and sustainable?

- What will be done with those detainees who could be responsibly transferred but whose countries of origin are governed by state sponsors of terrorism or are currently beset by chronic instability, insurgency, or large-scale and growing presences of violent Islamist groups like al-Qaeda or ISIL?

- More specifically, what is to be done with the dozens of Guantanamo detainees who come from Yemen—a country that is collapsing into chaos as al-Qaeda fighters and an Iranian-backed insurgency battle for control?

- And perhaps the most difficult question of all: What is the plan for the dozens of detainees that the Administration's own internal review categorized as those that we are incapable of trying but who are too dangerous for release? How would the long-term detention of these individuals occur? Would it occur inside the United States? If so, how, where, at what cost, and pursuant to what legal authority? Would there be mechanisms for periodic judicial review, such as a habeas proceeding or something like it? How could we ensure that there will not be a court-ordered release of a dangerous terrorist that is in long-term detention inside the United States? What would we do if that happened?

I could go on.

Instead of providing answers to these and other questions, which we have consistently sought, and which is difficult but not impossible, what we now have instead is the perception of a President rushing to fulfill a political promise, including through reported efforts to pressure the Secretary and the Department of Defense to move faster, without having explained whether these recent foreign transfers are being done responsibly and in furtherance of a comprehensive plan to close the Guantanamo detention facility.

What's equally troubling is that, in the absence of resolution to Guantanamo, our Nation continues to lack a clear policy to detain and humanely interrogate terrorist detainees for the purpose of intelligence gathering in what is a rapidly expanding conflict against violent extremist enemies.

The simple question is: If we were to capture a high-value terrorist today, where would he be detained and for how long? Would he be interrogated as long as necessary to exploit his full intelligence value, or would that important process be cut short when he is read his Miranda rights and sent into the criminal justice system? What signal does this send to our young men and women in uniform, who may feel that they are left with an unsettling choice: whether killing our enemies is preferable to detaining them, watching them released, and having to face them another day on the battlefield?

This is not an unfair question. Especially in the absence of a clear detention and interrogation policy. Especially when 30 percent of former Guantanamo detainees are either known to, or suspected to have, returned to the fight. And especially when one of the five Taliban detainees who were sent to Qatar last year in a prisoner swap is already suspected, according to published media reports, of re-engaging in the fight.

As these questions remain unanswered, this committee intends to mark up legislation introduced by Senator Ayotte concerning U.S. detention policy and the Guantanamo Bay detention facility. We will do this through regular order with fulsome debate and amendments. And this committee will continue to press for a coherent detention policy.

As General James Mattis testified before this committee, the implication of a perplexing lack of detention policy is that we are not even certain of ourselves enough to hold as prisoners those we have captured in the fight. This confusion must end. Our Armed Forces deserve a comprehensive detention strategy that allows them to fight this metastasizing, global, and brutal enemy without their eyes closed.

PREPARED STATEMENT BY SENATOR JACK REED

Welcome to our witnesses this morning. This morning's hearing is an opportunity to hear from the administration on its policy relating to the Guantanamo (GTMO) detention facility and the recent progress in transferring detainees out of that facility.

Senior government officials, both Democrats and Republicans, have called for closing the Guantanamo detention facility because of the harm its continued operation causes for U.S. national security interests. President Bush set the goal of closing GTMO because he said "the detention facility had become a propaganda tool for our enemies and a distraction for our allies." Former Secretary of Defense Bob Gates

called GTMO a “taint” on the United States’ international standing, and former Chairman of the Joint Chiefs Admiral Mike Mullen said he was concerned that GITMO’s continued existence because it has been “a recruiting symbol for those extremists and jihadists who would fight us.” I have a recent letter to Chairman McCain and myself from 42 general and flag officers calling for the closure of Guantanamo, and I would ask that it be submitted for the record.

This committee has played an instrumental role in setting the U.S. detention policy at Guantanamo. We have required the Department of Defense to assess and address risks before transferring any GTMO detainee, but we have never prohibited such transfers. Two years ago, in fact, we modified the law to ensure that the Department had greater flexibility in balancing and addressing risks. The result of this legislation has been that the Department has had a dramatically better record on recidivism under the Obama administration than it did under his predecessor.

However, other legislative provisions have significantly restricted the transfer of GTMO detainees. In particular, Congress has imposed a prohibition on modifying or constructing any facility in the United States to hold GTMO detainees. Congress has also imposed a ban on bringing GTMO detainees to the United States for any reason. The effect of these prohibitions has been to deprive the President of a critical and successful tool in the fight against terrorism, the ability to try suspected terrorists in Federal courts, where hundreds of dangerous individuals have been convicted on terrorism-related charges or to hold enemy combatants in the United States subject to the

due process requirements acknowledged in *Hamdan v. Rumsfeld*. These congressionally-imposed restrictions also interfere with our military leaders’ ability to manage detainees as part of the armed conflict with al-Qaeda and associated forces.

In the last Congress, under the leadership of Senator Levin and Senator McCain, this committee and the Senate sought to ease these restrictions. In 2013, the Senate voted 55 to 43 to authorize the transfer of GTMO detainees to the United States, subject to stringent conditions. In 2014, the version of the National Defense Authorization Act that was overwhelmingly approved by this committee included a similar provision, after the committee voted 26–0 in favor of an amendment offered by Senator Graham to require expedited congressional review of the administration’s plan to implement such transfers. Unfortunately, neither provision was enacted into law.

Now, legislation introduced in the Senate would take a dramatic step, blocking all transfers of GITMO detainees for any reason, based on some judgments about risk that were made as much as a decade ago. Administration critics have cited the figure that around 30 percent of GTMO detainees are suspected or confirmed of returning to the fight. But the fact is that most of these detainees were released during the Bush administration, not the Obama administration. Under the Obama-era review procedures, my understanding is that fewer than 10 percent of transferred GTMO detainees are even suspected, never mind confirmed, of having re-engaged in terrorist activities. I hope our witnesses this morning will provide us the latest recidivism numbers and help us better understanding exactly what those numbers mean.

The blanket prohibition in the proposed legislation would negate our military’s ability to evaluate and mitigate risks, and transfer detainees consistent with the best judgments of our senior-most military leaders. It would also render meaningless the administrative review boards, known as Periodic Review Boards, which regularly review individual detainee cases to determine whether they continue to pose a threat to U.S. national security interests. Under this proposed legislation, even if a board found that a detainee no longer posed a threat to the United States, the Department would be legally prohibited from transferring that individual out of detention at Guantanamo.

I hope you will address how the detention of terrorist suspects will be handled in the future. In recent years, a number of suspected terrorists captured overseas have been subject to interrogation for national security and intelligence purposes, then brought to custody in the United States, and tried in court. These include Ahmed Warsame; Abu Gaith, who was Osama bin Laden’s son-in-law; and al-Libi, captured in Libya and brought to New York for trial. These cases demonstrate alternatives to GTMO that result in terrorist suspects being brought to justice.

I thank the witnesses and look forward to their testimony.

Senator REED. And, at this time, I’ll call on the panel for their testimony. When the testimony is concluded, we will begin a round of questioning.

With that, Mr. Rasmussen, are you prepared to go first, or is it Secretary McKeon?

Mr. RASMUSSEN. I believe it's—

Mr. McKEON. It's up to you, sir.

Senator REED. Secretary McKeon, please. You go right ahead, Mr. Secretary.

**STATEMENT OF HON. BRIAN P. McKEON, PRINCIPAL DEPUTY
UNDER SECRETARY OF DEFENSE FOR POLICY, DEPART-
MENT OF DEFENSE**

Mr. McKEON. Okay. Thank you very much, Senator Reed.

Members of the committee, thank you for the opportunity to testify today on the Detention Center at Guantanamo Bay, our policies on transferring detainees, and related issues.

On January 22, 2009, President Obama signed Executive Order 13492, which ordered the closure of the Detention Center at Guantanamo Bay, Cuba. Pursuant to that order, a special task force was established to broadly review information in the possession of the U.S. Government about the detainees, and determine the possibility of their release. Through that rigorous interagency effort, a certain number of detainees were approved for transfer, a certain number were referred for prosecution or further review, and a certain number were designated for continued Law of War detention.

Since then, pursuant to Executive Order 13567, signed in March of 2011, and consistent with Section 10–23 of the National Defense Authorization Act (NDAA) for fiscal 2012, a Periodic Review Board has begun to review the status of those detainees not currently eligible for transfer, except for those detainees against whom charges are pending or a judgment of conviction has been entered.

When the President came into office 6 years ago, there were 242 detainees at Guantanamo Bay. Today, because of the work of the task force and subsequent efforts, 122 detainees remain. Of these, 54 are eligible for transfer, 10 are being prosecuted or have been sentenced, and 58 are being reviewed by the periodic review process.

In his nearly 2 years as Secretary, Secretary Hagel has approved the transfer of 44 detainees, 11 of whom were transferred in 2013, 28 of whom were transferred last year, and 5 of whom have been transferred this year. The great majority of these transfers authorized by the Secretary occurred under the authorities of Section 10–35 of the NDAA for fiscal '14. We urge you to maintain these authorities.

Mr. Chairman, members of the committee, I want to make a fundamental point regarding the Detention Facility at Guantanamo. The President has determined that closing it is a national security imperative. The President and his national security team believe that the continued operation of the facility weakens our national security by draining resources, damaging our relationships with key allies, and is used by violent extremists to incite local populations. It is no coincidence that the recent ISIS videos showing the barbaric burning of a Jordanian pilot and the savage execution of a Japanese hostage each showed the victims clothed in an orange jumpsuit believed by many to be the symbol of the Guantanamo Detention Facility.

Forty retired military leaders, all retired general or flag officers, wrote this committee last week and stated, "It is hard to overstate

how damaging the continued existence of the Detention Facility at Guantanamo has been and continues to be. It is a critical national security issue. Many of us have been told on repeated occasions by our friends and countries around the world that the greatest single action the United States can take to fight terrorism is to close Guantanamo.”

This letter is signed by General Charles Krulak, retired Commandant of the Marine Corps; Major General Michael Lehnert, the first commanding general of the Joint Task Force at Guantanamo; General Joseph Hoar, former head of CENTCOM; and 37 other retired senior military leaders. Many other military leaders acknowledged the need to close the facility, including the current and former Chairman of the Joint Chiefs, General Dempsey, and Admiral Mullen.

In 2010, General Petraeus, then Commander of CENTCOM, stated, “I’ve been on the record for well over a year, saying that Guantanamo should be closed. I think whenever we have perhaps taken expedient measures, they have turned around and bitten us on the backside.”

Senior figures across the political spectrum have made clear that Guantanamo poses risks to our National security and should be closed. Former Secretaries Gates and Panetta, and the current Secretary, Secretary Hagel, all support closure of Guantanamo.

Finally, President George W. Bush concluded that the Guantanamo Detention Facility was, quote, “a propaganda tool for our enemies and a distraction for our allies,” end quote.

I will now briefly address some of the issues that were raised by the committee’s letter of invitation:

Twenty-seven detainees have been transferred since November 2014. These detainees have been transferred to nine different countries. Key features of the process that leads to a decision to transfer include: a comprehensive interagency review and rigorous examination of information regarding the detainee; the security situation in the potential host country; and the willingness and capability of the potential country to implement and maintain appropriate compliance with security measures. Those initial reviews were conducted by career professionals from across the government.

Next, any transfer decision requires an assessment by the special envoys of the security situation in the receiving country, and the willingness and capability of that country to comply with security assurances. We also have the Intelligence Community (IC) look at that issue.

Finally, each decision to transfer has been subject to unanimous agreement of six principals: the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Attorney General, the Chairman of the Joint Chiefs, and, finally, the Secretary of Defense. Under Section 10–35 of the NDAA, the Secretary may approve the transfer if he determines that it is in the National security interests of the United States and that actions have been, or are planned to be, taken that will substantially mitigate the risk of the detainee engaging in terrorist or other hostile activity that threatens the United States or U.S. persons or interests.

A primary concern that we have regarding a potential transfer is whether the detainee will return to the fight or otherwise reengage in acts of terrorism or acts that threaten U.S. persons. We take the possibility of a reengagement very seriously.

The most recent public data on reengagement of former detainees was released last September, and the data are current as of July 15, 2014. There is a significant lag in the public reporting, and I know you may have seen a more recent classified report on this matter.

The Office of the Director of National Intelligence categorizes the figures in three ways: the totals, the totals for before 22nd January 2009, when President Obama signed the Executive Order, and the total after 22nd January 2009, which refers to former detainees who departed Guantanamo after that date.

This is how the data breaks down:

The total number is 17.3 percent confirmed of reengaging, 12.4 percent suspected of reengagement, for a total of 29.7 percent confirmed or suspected.

Before January 2009—that is, those transferred in the last administration—the numbers showed 19 percent confirmed and 14.3 percent suspected reengaging, for a total of 33 percent.

The data after January 2009 shows that 6.8 percent confirmed of reengaging, 6 out of 88 transfers; 1.1 percent suspected; for a total of 7.9.

In other words, the rate of reengagement has been much lower for those transferred since 2009, which attests to the rigor of this new process. Of the detainees transferred during this administration, over 90 percent are neither confirmed nor suspected of having reengaged. This speaks to the careful scrutiny given to each transfer in this review process and the negotiation of agreements regarding security measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will mitigate the threat.

One additional point about the data. Of the 107 confirmed of reengaging, the vast majority of them transferred before 2009; 48 are either dead or in custody. Reengagement is not a free pass. We take any reports of suspected or confirmed reengagement very seriously and work in close coordination with our partners to mitigate reengagement or take follow-on action.

I cannot discuss the specific security assurances we receive from foreign governments with any specificity in an open session. I can tell that, among the types of measures we seek are the ability to restrict travel, monitor, provide information, and reintegration or rehabilitation programs.

Before a transfer, we have detailed, specific conversations with the receiving country about the potential threat the detainee may pose after transfer, and the agreement about measures the receiving country will take in order to mitigate the risk. We also review the capability of that country and its security establishment, and its track record in adhering to prior agreements.

Let me talk about the Periodic Review Board (PRB) process briefly. The PRB process is an interagency process established to review whether continued detention of detainees at Guantanamo remains necessary to protect against a continuing significant threat to U.S.

national security. We will provide your staff more information about the process and the PRB conduct of detainee risk assessments.

To date, the results of 10 full hearings for nine detainees have been made public. Six detainees have been made eligible for transfer, with appropriate security assurances, pursuant to this process. Two of the detainees made eligible by the process have already been transferred, one to Kuwait and one to Saudi Arabia. The other three detainees remain subject to Law of War detention. Efforts are being made to expedite this process and prioritize hearings.

You have asked us to address the legislation, recently introduced by Senator Ayotte and several members, which I understand may be marked up by the committee next week. In our view, this legislation would effectively ban most transfers from Guantanamo for 2 years. It reverts to the previous certification regime under the NDAA for fiscals '13 and '14—excuse me—fiscal '12 and '13—which resulted only in court-ordered transfers, transfers pursuant to plea agreements, and the use of only a few national security waivers. In addition, it adds a proposal to limit transfers based on Joint Task Force Guantanamo (JTF-GTMO) threat assessments that may be outdated or not include all available information. We believe that any decisions on transfers should be based on current information and individual assessments of detainees. Because this legislation, if enacted, would effectively block progress toward the goal of closing the Guantanamo Bay Detention Center, the administration will oppose it.

The proposed legislation bars transfers of any detainees to Yemen for 2 years. Seventy-six Yemeni nationals remain at Guantanamo; 47 are eligible for transfer, 26 for PRB review, and 2 have charges referred, and 1 is serving pre-sentence confinement. A ban on transfers to Yemen is unnecessary, because we are not, at the present time, seeking to transfer any of them to Yemen, especially in light of the recent further deterioration in the security situation there.

Since the President's moratorium on detainee transfers to Yemen was lifted nearly 2 years ago in favor of a case-by-case analysis, not a single detainee has been transferred to Yemen. The 12 Yemenis who have been transferred recently have been transferred to five other countries. We are currently seeking to find other third countries to take additional Yemenis.

Let me briefly talk about, in summary, what our plan is. Our plan to close Guantanamo has three main elements:

First, we will continue the process of responsibly transferring the 54 detainees eligible for transfer.

Second, we will continue the prosecution of detainees in the military commissions process and, if possible, in Federal court.

Third, we will continue and expedite the PRB process.

When we have concluded these three lines of effort, it is likely that several detainees cannot be prosecuted because they are too dangerous to transfer, even with security assurances, and they will remain in our custody.

Ultimately, closing the Detention Center at Guantanamo Bay will require us to consider additional options, including the possi-

bility of transferring some detainees to a secure facility in the United States. The Department of Justice has concluded that, in the event detainees are located to the United States, existing statutory safeguards and executive and congressional authorities provide robust protection of national security. We understand that such transfers are currently barred by statute. As a result, the Government is prohibited from prosecuting any detainees in the United States, even if it represents the best or only option for bringing the detainee to justice. The President has consistently opposed these restrictions, which curtail options for reducing the detainee population.

You asked us to address what happens if someone is captured on the battlefield. The disposition of an individual captured in the future will be handled on a case-by-case basis and by a process that is principled, credible, and sustainable. When a nation is engaged in hostilities, as we are, detaining the enemy to keep them off the battlefield is permissible and is the humanitarian alternative to lethal action. In some cases, those detained will be transferred to third countries. In others, they will be transferred to the United States for Federal prosecution after appropriate interrogation, as occurred in the case of Ahmed Warsame. Some cases may be appropriate for Law of War detention. The President has made clear we will not add to the population of the Detention Center at Guantanamo Bay.

In closing, I would note that President Bush worked toward closing Guantanamo, and many officials in his administration worked hard to achieve that objective. We are closer to this goal than many people may think. Of the nearly 800 detainees to have been held at Guantanamo since it opened in 2002, the vast majority have already been transferred, including more than 500 detainees transferred by the previous administration. The President and the National security experts of this administration believe it should be closed, as do the senior military leaders and civilian leadership of the Department of Defense. We believe the issue is not whether to close Guantanamo, the issue is how to do it.

Thank you very much for listening. I look forward to your questions.

[The prepared statement of Mr. McKeon follows:]

PREPARED STATEMENT BY HON. BRIAN P. MCKEON

Mr. Chairman, Ranking Member Reed, distinguished members of this committee, thank you for the opportunity to testify today on the detention center at Guantanamo Bay, our policies on transferring detainees, and related issues.

On January 22, 2009, President Obama signed Executive Order 13492, which ordered the closure of the detention center at Guantanamo Bay, Cuba. Pursuant to that order, a special task force was established to broadly review information in the possession of the U.S. Government about the detainees, and to determine the possibility of their release. Through that rigorous interagency effort, which continued for several months into 2010, a certain number of detainees were approved for transfer, a certain number of detainees were referred for prosecution or further review, and a certain number were designated for continued law of war detention.

Since then, pursuant to Executive Order 13567, signed on March 7, 2011, and consistent with section 1023 of the National Defense Authorization Act (NDAA) for Fiscal Year 2012, a Periodic Review Board has begun to review the status of those detainees not currently eligible for transfer except for those detainees against whom charges are pending or a judgment of conviction has been entered.

When President Obama came into office in January 2009, there were 242 detainees at Guantanamo Bay. Today, because of the work of the task force and subsequent efforts, 122 detainees remain. Of these, 54 are eligible for transfer, 10 are being prosecuted or have been sentenced, and 58 are being reviewed by the Periodic Review Process (PRB). In his nearly 2 years as Secretary of Defense, Secretary Hagel has approved the transfer of 44 detainees—11 of whom were transferred in 2013, 28 of whom were transferred last year, and 5 of whom have been transferred this year. The great majority of these transfers occurred under the authorities in section 1035 of the NDAA for Fiscal Year 2014. I urge you to maintain these authorities.

CLOSURE IS A NATIONAL SECURITY IMPERATIVE

Mr. Chairman and members of the committee, I want to make a fundamental point regarding the detention facility at Guantanamo Bay. The President has determined that closing this detention facility is a national security imperative. The President and his national security team all believe that the continued operation of the detention facility at Guantanamo weakens our national security by draining resources, damaging our relationships with key allies, and is used by violent extremists to incite local populations. It is no coincidence that the recent Islamic State of Iraq and al-Sham (ISIS) videos showing the barbaric burning of a Jordanian pilot and the savage execution of a Japanese hostage each showed the victim clothed in an orange jumpsuit, believed by many to be the symbol of the Guantanamo detention facility.

Forty retired military leaders—all retired general officers or flag officers—wrote the chairman and ranking member of this committee on January 28, 2015 and stated, “[I]t is hard to overstate how damaging the continued existence of the detention facility at Guantanamo has been and continues to be. It is a critical national security issue.” The letter continued, “[M]any of us have been told on repeated occasions by our friends in countries around the world that the greatest single action the United States can take to fight terrorism is to close Guantanamo.”

This letter is signed by General Charles C. Krulak, a retired Commandant of the Marine Corps, Major General Michael R. Lehnert, the first commanding general of the joint detention task force at Guantanamo, General Joseph Hoar, the former head of U.S. Central Command (CENTCOM), General David M. Maddox, the former head of the U.S. Army in Europe, and 36 other retired senior military leaders.

Many other military leaders acknowledge the need to close this detention facility. Admiral Michael Mullen and General Martin Dempsey, the former and current Chairman of the Joint Chiefs of Staff, support Guantanamo closure. In 2010, General David Petraeus, then the commander of CENTCOM stated, “I’ve been on the record on that for well over a year as well, saying that it [Guantanamo] should be closed. . . . And I think that whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside. . . . Abu Ghraib and other situations like that are nonbiodegradables. They don’t go away. The enemy continues to beat you with them like a stick.”

Senior figures across the political spectrum have made clear that Guantanamo poses profound risks to our National security and should be closed. Former Secretaries of Defense Robert Gates and Leon Panetta, and the current Secretary of Defense, Chuck Hagel, all support Guantanamo closure.

Finally, President George W. Bush concluded that the Guantanamo detention facility was “a propaganda tool for our enemies and a distraction for our allies.”

I will now briefly address the remaining specific issues addressed by the committee’s letter of invitation.

RECENT DECISIONS TO TRANSFER DETAINEES HELD AT THE DETENTION FACILITY AT GUANTANAMO BAY, CUBA, BY THE DEPARTMENT OF DEFENSE AND EXPLAIN HOW DETAINEES ARE DESIGNATED AS READY FOR TRANSFER

Twenty-seven detainees have been transferred since November 2014. These detainees have been transferred to nine different countries.

Key features of the process that leads to a decision to transfer include a comprehensive interagency review and rigorous examination of information regarding the detainee, the security situation in the potential host country, and the willingness and capability of the potential host country to implement and maintain appropriate compliance with security measures. Those initial reviews were conducted by career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and other agencies within the intelligence community. Next, any transfer

decision requires an assessment by the Special Envoys of the security situation in the receiving country, and of the willingness and capability of the country to comply with security assurances. Finally, each decision to transfer has been subject to the unanimous agreement of six Principals—the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Attorney General, the Chairman of the Joint Chiefs, and finally, the Secretary of Defense. Under section 1035 of the NDAA, the Secretary may approve the transfer if he determines that the transfer is in the national security interests of the United States and that actions have been or are planned to be taken that will substantially mitigate the risk of the detainee engaging in terrorist or other hostile activity that threatens the United States or U.S. persons or interests. The factors considered in making this determination include:

- The security situation in the foreign country to which the detainee is to be transferred;
- Confirmed past activities by individuals transferred to the foreign country to which the detainee is to be transferred;
- Actions taken by the United States or the foreign country to reduce the risk the individual will engage in terrorist or hostile activity;
- Security assurances provided by the foreign government; and
- An assessment of the willingness and capabilities of the foreign government to meet those security assurances.

A primary concern we have regarding a potential transfer is whether a detainee will “return to the fight” or otherwise reengage in acts that threaten the United States or U.S. persons. We take the possibility of reengagement very seriously. The most recent public data on reengagement of former Guantanamo detainees was released in September 2014 and are current as of July 15, 2014. There is a lag in the public reporting and I know you may have seen a more recent classified report on this matter. I can address updated classified statistics in a closed setting.

The Office of the Director of National Intelligence categorizes the figures in three ways: (1) Total; (2) Pre-22 January 2009, which refers to former detainees who departed Guantanamo prior to January 22, 2009; and (3) Post-22 January 2009, which refers to former detainees who departed Guantanamo after January 22, 2009, as follows:

- Total: 17.3 percent confirmed of reengaging (107 of 620); 12.4 percent suspected of reengaging (77 of 620), for a total of 29.7 percent confirmed or suspected of reengagement.
- Pre-22 January 2009: 19 percent confirmed of reengaging (101 of 532); 14.3 percent suspected of reengaging (76 of 532), for a total of 33.3 percent confirmed or suspected of reengagement.
- Post-22 January 2009: 6.8 percent confirmed of reengaging (6 of 88); 1.1 percent suspected of reengaging (1 of 88) for a total of 7.9 percent confirmed or suspected of reengagement.

In other words, the rate of reengagement has been much lower for those transferred since 2009, which attests to the rigor of this new process. Of the detainees transferred under this administration, over 90 percent are neither confirmed nor suspected of having reengaged. This statistic speaks to the result of the careful scrutiny given to each transfer in the intensive interagency review process, and the negotiation of agreements regarding security measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will mitigate the threat that the detainees will not pose a continuing threat to the United States and its allies after they have been transferred.

An additional point about the data: of the 107 confirmed of reengaging (the vast majority of them transferred prior to 2009), 48 are either dead or in custody.

Reengagement also does not equate to a free pass. We take any indications of suspected or confirmed reengagement very seriously, and we work in close coordination with our partners to mitigate reengagement and to take follow-on action when necessary.

EXPLAIN HOW SECURITY ARRANGEMENTS ARE DETERMINED TO BE SUFFICIENT TO TRANSFER DETAINEES TO RECEIVING COUNTRIES

I cannot discuss the specific security assurances we receive from foreign governments with any degree of specificity in open testimony. However, among the types of security measures that we seek are the ability to restrict travel, monitor, provide information, and reintegration/rehabilitation programs.

The decision to transfer is made only after detailed, specific conversations with the receiving country about the potential threat a detainee may pose after transfer

and the agreement about the measures the receiving country will take in order to sufficiently mitigate that potential threat. We also review the capability of the receiving country and its security establishment, and its track record in adhering to prior agreements in this regard.

PROVIDE A DETAILED EXPLANATION OF THE PROCEDURES OF THE PERIODIC REVIEW BOARD (PRB) AND PRB RISK ASSESSMENT

The PRB process is an interagency process established to review whether continued detention of detainees held at Guantanamo Bay remains necessary to protect against a continuing significant threat to U.S. national security. We will be providing your staff information detailing the process and the PRB conduct of detainee risk assessments.

To date, the results of 10 full hearings, for 9 detainees, have been made public. Six detainees have been made eligible for transfer with appropriate security assurances, pursuant to the PRB process. Two of these detainees made eligible by the PRB process have been transferred, one to Kuwait and one to Saudi Arabia. The other three detainees remain subject to law of war detention. Efforts are being made to expedite the PRB process and prioritize hearings.

PRB panels are made up of senior representatives from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff; and the Office of the Director of National Intelligence. Pursuant to the Executive Order, and consistent with section 1023 of the NDAA for Fiscal year 2012, the Department of Defense established the Periodic Review Secretariat (PRS) to administer the PRB review and hearing process. The PRS is responsible for overseeing the implementation of the process and coordinates with the agencies involved. It is headed by a retired admiral.

The PRB process makes an important contribution toward the administration's goal of closing Guantanamo Bay by ensuring a principled and sustainable process for reviewing and revisiting prior disposition determinations in light of the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

By necessity, detainee reviews involve consideration of highly classified intelligence in addition to information that can be made public. To enhance the transparency of these reviews, the Department of Defense operates a website sharing unclassified information with the public. Postings include milestones in each detainee's case, unclassified information associated with the PRB hearings, and the results of the detainee reviews. In addition, a portion of the PRB process is open to the press and representatives of NGOs.

The PRB process does not address the legality of any individual's detention under the authority of the Authorization for Use of Military Force, as informed by the laws of war. Detainees have the constitutional privilege of the writ of habeas corpus to challenge the legality of their detention, and nothing in Executive Order 13567 or its implementing guidelines is intended to affect the jurisdiction of Federal courts to determine the legality of their detention. If, at any time during the PRB process, material information calls into question the legality of detention, the matter is referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

PROPOSED LEGISLATION

The recent legislation proposed by Senator Ayotte and several members of this committee would effectively ban most transfers from Guantanamo for 2 years. It reverts to the previous certification regime under the NDAA for Fiscal Year 2012 and the NDAA for Fiscal Year 2013, which resulted only in court-ordered transfers, transfers pursuant to pleas agreements and only a few national security waivers. In addition, it adds a proposal to limit transfers based on Joint Task Force-GTMO threat assessments that may be outdated or not include all of the available information. We believe that any decisions regarding transfers should be based on current information and individual assessments of detainees.

Because this legislation, if enacted, would effectively block progress toward the goal of closing the Guantanamo Bay detention center, the administration opposes it.

YEMEN

The proposed legislation bars transfer of any detainees to Yemen for 2 years. Seventy-six Yemenis remain at Guantanamo Bay: 47 are eligible for transfer, 26 are eligible for PRB review, 2 have charges referred, and 1 is serving pre-sentence confinement.

A ban on transfers to Yemen is unnecessary because we are not, at the present time, seeking to transfer any of them in Yemen, especially in light of the recent further deterioration in the security situation. Since the President's moratorium on detainee transfers to Yemen was lifted nearly 2 years ago in favor of a case-by-case analysis, not a single detainee has been transferred to Yemen. The 12 Yemenis who have been transferred recently have been transferred to five countries: Slovakia, Georgia, Kazakhstan, Estonia, and Oman. We are currently seeking to find other third countries to take additional Yemenis.

PLAN TO CLOSE GUANTANAMO DETENTION FACILITY

Our plan has three main elements.

First, we will continue the process of responsibly transferring the 54 detainees eligible for transfer.

Second, we will continue the prosecution of detainees in the military commissions process, and if possible, in the Federal courts. Currently 7 detainees are being actively prosecuted under the military commission process; 5 accused of the September 11 attacks, 1 charged with the bombing of the USS *Cole*, and 1 charged with actions as a senior al Qaeda commander; and 3 are in the sentencing phase or are serving sentences.

Third, we will continue and expedite the PRB process.

When we have concluded these three lines of effort, it is likely that several detainees cannot be prosecuted but who are too dangerous to transfer, even with security assurances, will remain in our custody.

Ultimately, closing the detention center at Guantanamo Bay will require us to consider additional options, including the possibility of transferring some detainees to a secure facility in the United States. The Department of Justice has concluded that in the event detainees were relocated to the United States, existing statutory safeguards and executive and congressional authorities provide robust protection of national security. We understand that such transfers are currently barred by statute. As a result, the Government is prohibited from prosecuting any detainees in the United States, even if it represents the best—or only—option for bringing a detainee to justice. The President has consistently opposed these restrictions, which curtail options for managing the detainee population. We understand the committee has a continuing request for more information. We understand we need to work with Congress on this and I pledge to you we will do so.

EXPLAIN THE ADMINISTRATION'S POLICY REGARDING THE DETENTION OF FUTURE COMBATANTS CAPTURED ON THE BATTLEFIELD

The disposition of an individual captured in the future will be handled on a case-by-case basis and by a process that is principled, credible and sustainable. When a nation is engaged in hostilities, detaining the enemy to keep him off the battlefield is permissible and is a humanitarian alternative to lethal action. In some cases, those detained will be transferred to third countries. In other cases, they will be transferred to the United States for Federal prosecution, after appropriate interrogation, as occurred in the case of Ahmed Warsame. Some cases may be appropriate for law of war detention. But the President has made clear that we will not add to the population of the detention center at Guantanamo Bay.

CONCLUSION

President Bush worked towards closing Guantanamo, and many officials in his administration worked hard towards that objective. We are closer to this goal than many people may realize. Of the nearly 800 detainees to have been held at Guantanamo since the facility opened in 2002, the vast majority have already been transferred, including more than 500 detainees transferred by the previous administration. The President and the national security experts of this administration believe it should be closed. The senior military leaders of the country and the leaders of the Department of Defense concur. We believe the issue is not whether to close Guantanamo; the issue is how to do it.

Thank you and I look forward to your questions.

Senator REED. Well, thank you very much, Mr. Secretary.

And let me do something I neglected to do prior to asking for your testimony, that is to introduce the witnesses. I'm a little rusty at this.

Secretary McKeon, who just presented testimony, is Principal Deputy Under Secretary of Defense for Policy, Department of De-

fense. Mr. Nicholas Rasmussen is the Director of the National Counterintelligence Center, Office of the Director of National Intelligence; and Admiral Ross Myers is the Vice Deputy Director for Nuclear, Homeland Defense, and Current Operations, Joint Staff.

Mr. Rasmussen or Admiral Myers, do you have a statement?

Mr. RASMUSSEN. I believe I'm next—

Senator REED. Mr. Rasmussen, please.

Mr. RASMUSSEN.—Mr. Ranking Member.

STATEMENT OF NICHOLAS J. RASMUSSEN, DIRECTOR, NATIONAL COUNTERTERRORISM CENTER, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE

Mr. RASMUSSEN. And thank you for the opportunity to appear before the committee today for this discussion concerning Guantanamo detainees.

And I'll begin by discussing the intelligence community's support to the transfer process that Brian outlined in some detail; specifically, the analysis that the intelligence community provides.

The community provides a range of tailored intelligence assessments aimed at helping policymakers—

Senator REED. Could you adjust your mic, Mr. Rasmussen?

Mr. RASMUSSEN. I'm sorry.

Senator REED. Thank you.

Mr. RASMUSSEN. The intelligence community produces a range of tailored intelligence assessments aimed at helping policymakers make decisions about the potential transfer of detainees from the Guantanamo Detention Facility. These assessments include profiles that examine factors relevant to whether individual detainees pose continuing threats to the United States or to our allies. And, to echo Brian's remarks, we take the risk of reengagement very seriously. The community is continuously evaluating the global threat environment, and works to keep decisionmakers, including the Congress, informed of developments, especially with respect to threats to the United States.

As you know, we continue to face threats from a wide range of actors, from al-Qaeda and its affiliates, as well as from ISIL and those inspired by violent extremist messaging. The full force of brutality of these groups, such as ISIL, and ISIL in particular, is felt most acutely in Iraq, in Syria, and regionally in the Middle East and North Africa. Today's threat environment in Western countries is largely characterized by smaller-scale attacks. It's noteworthy that the majority of attacks conducted in the West in the last 8 months were, in fact, conducted by individual terrorists.

Accordingly, the IC's analysis on current Guantanamo detainees focuses most intently, most closely, on the potential for these detainees to threaten the U.S. and its interests overseas after they leave Guantanamo. These assessments aim to provide a comprehensive understanding of the detainee's background, the current mindset, and any links to individuals or groups that pose a terrorist threat to our interests. Those assessments also take into account the evolving terrorist threat to the United States, as well as security developments overseas, including in the detainee's home country, in conflict zones, and potential transfer destinations.

Intelligence community products do not state whether a detainee poses a high, medium, or low risk of reengagement, because we assess that the likelihood for a detainee to reengage is shaped by a combination or a synthesis of a number of personal and environmental factors. And, in addition to this individually focused analysis, the IC also provides assessments about potential destination countries, their capabilities, and their willingness to mitigate the potential detainee's threat.

Now, Brian also mentioned reengagement, so I'd like to discuss our role in monitoring individuals in the intelligence community for possible reengagement in terrorism.

Once a detainee is transferred from Guantanamo, the IC continuously monitors for indications of reengagement, and we work very closely with liaison partners to ensure the fullest understanding of a former detainee's activities. Through a formal and structured intelligence community coordination process that draws on the assessments of eight different intelligence agencies, we determine whether to designate a former detainee as reengaged.

Now, we determine that a former detainee is, you know, confirmed as having reengaged in terrorism when a preponderance of information identifies that individual as directly involved in terrorist or insurgent activities. We determine that a former detainee is suspected of reengaging in terrorism when we assess that plausible, but unverified, or even, in some cases, single-source reporting, indicates an individual is directly involved in such activities.

But, it's important to note, for the purpose of these definitions, engagement in anti-U.S. statements or engagement in propaganda activities does not, by itself, qualify as terrorist or insurgent activity. And it's also the case that some former detainees have been added to this list of suspected reengagement candidates and then later removed after information came to light suggesting that the individual had not, after all, reengaged.

And just to quickly run through the numbers that Brian cited again: 107, or 17.3 percent, of the 620 detainees who have been transferred from Guantanamo have been confirmed of reengagement in terrorist activities as of September 2014. And, at the same time, the IC assessed that an additional 77 former detainees, approximately 12 percent, were suspected of reengagement. Of the 88 transfers that have occurred since the interagency process that the Director of National Intelligence participates in was implemented in 2009, 6.8 percent of those transferred during that time have been confirmed of reengagement, with another 1 percent suspected of reengagement.

The next unclassified report that the intelligence community will put out on these reengagement numbers is expected in early March, and we will update those numbers, and they will reflect the most recent transfer activity. I can't say where those—where that will report will come out, but I would expect that those numbers will largely be in line with the trends I have just outlined.

And I'll stop there, Senator Reed, and I look forward to your questions.

[The prepared statement of Mr. Rasmussen follows:]

PREPARED STATEMENT BY NICHOLAS J. RASMUSSEN

Good morning Chairman McCain, Ranking Member Reed, and members of the committee. Thank you for the opportunity to appear before you today.

INTELLIGENCE COMMUNITY SUPPORT TO TRANSFER PROCESS

The Intelligence Community (IC) produces a range of tailored analysis aimed at helping policymakers make decisions regarding the potential transfer of detainees from the Guantanamo Bay detention facility. These assessments include profiles that examine factors relevant to whether individual detainees pose continuing threats to the United States and its allies.

To echo Principal Deputy Under Secretary McKeon's statement, we take the risk of reengagement very seriously. The IC is continuously evaluating the global threat environment and works to keep decisionmakers informed of developments, especially with respect to threats to the United States. Those assessments inform a range of national security policy decisions, including transfer considerations.

Accordingly, the IC's analysis on current Guantanamo detainees focuses on the potential for those detainees to threaten the United States and its interests overseas after they leave Guantanamo. These rigorous assessments aim to provide a comprehensive understanding of the detainee's background, current mindset, and any links to individuals or groups that pose a terrorist threat to U.S. interests. They also take into account the evolving terrorism threat to the United States, as well as security developments overseas, including in the detainee's home country and in conflict zones. IC products do not state whether a detainee poses a high, medium, or low risk of reengagement because we assess that likelihood to reengage is shaped by a synthesis of personal and environmental factors. In addition to the individually focused analysis, the IC also provides assessments about potential destination countries' capabilities and willingness to mitigate a detainee's threat.

MONITORING FOR REENGAGEMENT

Once a detainee is transferred from Guantanamo, the IC continuously monitors for indications of reengagement and works closely with liaison partners to ensure the fullest understanding of a former detainee's activities. Through a rigorous IC coordination process that draws on the assessments of eight IC agencies, we determine whether to designate a former detainee as reengaged. We say that a former detainee is "confirmed" as re-engaging in terrorism when a preponderance of information identifies that individual as directly involved in terrorist or insurgent activities. We say that a former detainee is "suspected" of re-engaging in terrorism when plausible but unverified or single-source reporting indicates that the individual is directly involved in terrorist or insurgent activities. For the purposes of these definitions, engagement in anti-U.S. statements or propaganda does not qualify as terrorist or insurgent activity. Moreover, a detainee may be confirmed as having reengaged in the absence of information that the detainee has engaged in conduct that poses a near-term threat to the United States or to U.S. persons or interests. Some former detainees have been added to the suspected list and later removed after information came to light suggesting that the individual had not reengaged, after all.

As Brian stated, 107 or 17.3 percent of the 620 detainees who had been transferred from Guantanamo had been confirmed of reengagement in terrorist or insurgent activities as of September 2014, and the IC assessed that an additional 77 former detainees, or 12.4 percent, were suspected of reengagement. Of the 88 transfers that occurred since the interagency process the DNI participates in was implemented in 2009, 6 or 6.8 percent were confirmed of reengagement in terrorist or insurgent activities, and 1 or 1.1 percent was suspected. The next unclassified report on reengagement, expected in early March, will update those numbers and reflect the most recent transfers.

Mr. Chairman, Mr. Ranking Member, this concludes my testimony. I look forward to your questions.

Senator REED. Thank you very much.
Admiral Myers, do you have comments?

STATEMENT OF RADM ROSS A. MYERS, VICE DEPUTY DIRECTOR FOR NUCLEAR, HOMELAND DEFENSE, AND CURRENT OPERATIONS, JOINT STAFF

Admiral MYERS. Ranking Member Reed, distinguished members of the committee, thank you for having me here today to discuss this important topic.

As the Joint Staff's representative in the capacity of Current Operations, I appreciate all your efforts and focus on this matter. May I also extend my personal thanks for your unwavering dedication and support to the men and women of the Armed Forces.

I look forward to answering your questions.

Thank you very much.

Senator REED. Thank you for your statement, Admiral. It was succinct and to the point.

Let me first ask—there was a letter reference from 42 general officers addressed to Senator McCain and myself, and I would ask unanimous consent that it be made part of the record. And, hearing no objections, so ordered.

[The information referred to follows:]

See Appendix A.

Senator REED. With the presumption that the Chairman, when he arrives, will be immediately recognized, let me ask a few questions and then begin to recognize my colleagues.

You've both—you've all testified that the trend line is going down significantly. And, Secretary McKeon, your—you see this continuing, in terms of recidivism, which is a critical issue. Is that your conclusion?

Mr. MCKEON. Senator Reed, that's certainly what we're seeing in the data. We've transferred a number of people recently. It's probably too soon to say whether they've reengaged or not, because they're still getting settled, but we don't have any indications for—we feel good about the—where we are with those. That's correct.

Senator REED. Let me also ask both you and Mr. Rasmussen, is—as you analyze these individual cases of recidivism, are you using it to inform your judgments, going forward; i.e., the circumstances of the individual, the country to which he or—presumably he, but, in some cases, perhaps she—goes back to, anything like that? So, this is a continuing learning experience, and you feel you're getting more capable of making judgments about the usefulness of returning the individual.

Mr. MCKEON. The answer to that is yes, sir. And we take a very close look, not just at the individual who may be transferred, but the assurances that the country agrees to sign up to, and the capability of its own security services to uphold the agreement. And the IC and the embassy help us with that kind of assessment.

Senator REED. And there is a check on the assurances that are given by these various countries so that we are confident that they have the—both the capacity and the will, and are actually keeping up their end of the bargain. Is that accurate?

Mr. MCKEON. We continue to monitor compliance with agreements, through various means, including the U.S. Embassy and, where appropriate, liaison services, and our own capabilities.

Senator REED. Let me go to one of the major points that you made, that is the—and specifically to Mr. Rasmussen—that the

continued operation of Guantanamo gives some of our adversaries a—propaganda points with respect to recruitment, retention, magnifying their operations. Is that your—the assessment of the intelligence community?

Mr. RASMUSSEN. Yes, Senator. From the Director of National Intelligence's perspective, who is asked to weigh in on these transfer decisions from the perspective of intelligence, what underpins all of his decisionmaking in this regard is an analytical judgment that he has made, that the community has made, that the benefits to national security from closing Guantanamo, in some cases, in many cases, outweigh the risks that are incurred by releasing individual detainees. And it's precisely because of that continued featuring of Guantanamo in the terrorist narrative that he's made that calculation, the fact that Guantanamo features in terrorist propaganda, it features in terrorist recruitment, and we assess that it has continued significant resonance in the population that our terrorist adversaries are trying to recruit among. ISIL has used Guantanamo in its English-language propaganda, including their online English-language magazine. AQAP, al-Qaeda in the Arabian Peninsula, the al-Qaeda affiliate operating in Yemen, has used Guantanamo in their propaganda. And it's also noteworthy that the al-Qaeda's senior leader, Ayman al-Zawahiri, continues to reference Guantanamo in his communications with al-Qaeda members around the world. So, yes, Senator.

Senator REED. Thank you.

This is a specific issue which we're going to have to face. General Kelly, who is the Commander of U.S. South Command, has voiced concern about the medical facilities there. You have an aging population of individuals. And last year, in the Senate version of the defense authorization bill, we put in language that will allow for a temporary transfer, because of a medical condition, of an individual to a more appropriate facility for care, on a temporary basis, in the United States. This was not ultimately adopted. But, is that something that concerns you, going forward, just in terms of a population that obviously is going to be in—if this closure is delayed, more and more in need of socialized care?

Mr. McKEON. It does, Senator. There are a certain number of members of the population who have acute healthcare issues. And, as they get older, those will continue to get worse. And so, I was down to visit, a couple of months ago, and had a conversation with the Joint Task Force (JTF) Commander, Admiral Cozad, about this. And his concern is, it's quite expensive. They have to bring in specialists to treat these individual matters, from the States. And I think we would prefer if we could, on a short-term basis, as you indicated in your legislation, bring them to the United States for such specialist care, as needed.

Senator REED. Thank you very much.

Senator Tillis, please.

Senator TILLIS. Thank you, Senator Reed.

Gentlemen, thank you for being here today.

I have a question about the five Talibanis who were released. I think we got notified through the press, back in May of last year. And my question for anyone on the panel would be, Would the—

were the five Talibanis who were released subject to a PB—or the periodic review?

Mr. McKEON. They were not, sir.

Senator TILLIS. They were not. And if not, why?

Mr. McKEON. I was not in the Department at that time, sir. I would have to go back and ask that question. As you know, it was part of a—an exchange for Sergeant Bergdahl.

Senator TILLIS. So, the assessment of their risk level didn't go through the processes that were established?

Mr. McKEON. No, I didn't want to leave you with that impression. The—so, the Periodic Review Board process makes a determination of whether Law of War detention of the individual is still permissible. The statute that you have given us requires the Secretary still to make the determination, prior to any transfer, of the National security interests and the substantial mitigation of the risk. And that, sir, was—that was undertaken.

Senator TILLIS. I know—I don't believe you were there at the time, but why do you think the Department decided not to notify Congress, as per the statutes?

Mr. McKEON. Sir, I believe the Secretary—

Senator TILLIS. And perhaps, what's the legal basis for that, as well?

Mr. McKEON. Yeah. Sir, I used to be a—well, I'm still a lawyer, technically, and I was the counsel on the Senate Foreign Relations Committee for 12 years, but they've stopped paying me to give legal judgments, and it would be malpractice for me to try to opine on it.

What—my understanding is, the Department of Justice and Mr. Preston, the general counsel of the Department, interpreted the President's powers, because of the security risk and safety of Sergeant Bergdahl, necessitated proceeding without the 30-day notice. But, I—I'm happy to get you the more refined legal answer, because I'm not the person to do that for the Department.

[The information referred to follows:]

The Department of Defense previously provided this information to the Committee in December 2014. Please see the attached letter to the Committee Chairman and its attachment. See Appendix A.

Senator TILLIS. Thank you.

Another release of four Afghanistan nationals, I believe back in December. Why did the administration not require continued detention of these four detainees?

Mr. McKEON. Sir, these individuals had been, I believe, cleared for transfer, back in—approved for transfer in 2009 by—

Senator TILLIS. Did they go through the Periodic Review—

Mr. McKEON.—by the task force.

Senator TILLIS. Did they go—

Mr. McKEON. No, they were already cleared—approved for transfer by the 2009 task force, sir.

Senator TILLIS. Another question I had is with respect to the process. The—I noted that the—a detainee is entitled to having counsel, which presumably means that the information that the Periodic Review Board uses to determine—or to make a determination is available to that counsel. Is that same information available

to the public or to the Congress, on the Periodic Review cases that have gone through?

Mr. McKEON. Sir, the—with the Periodic Review Board, the detainee has a right to a personal representative who is a military officer. He can employ private counsel. And if that person is given a clearance, we can share certain classified information. We have tried to have some measure of transparency with the PRB process in releasing information about the hearings on the Department Web site. We are not able to share everything that's available to the PRB, because some of the information is classified.

Senator TILLIS. Thank you.

Thank you, Senator Reed.

Senator REED. Thank you very much.

Senator King, please.

Senator KING. Thank you.

Mr. Rasmussen, it seems to me the key question here is weighing the risk of individual recidivism versus what I would call a reputational risk, or the recruiting risk, of the facility itself. Could you elaborate on what the Director of National Intelligence—I mean, that's what's—that's what this is all about, it seems to me. Is it more dangerous for the National interest to keep Guantanamo open, because of its use as recruiting tool, or is there a greater risk of the people being released reengaging? Give me your thinking on that. Is that the question?

Mr. RASMUSSEN. Sure. Happy to answer that, Senator King.

Because the Director of National Intelligence does have a voice in the process to approve a transfer, he does look at, as I said earlier, all of the relevant information related to the detainee's specific background—background before going to Guantanamo, background while—during the course of detention at Guantanamo, and anything we know, as I said, about the environment into which he might be transferred.

At the same time, though, as he—as I said earlier, he has that underlying analytic judgment that the Director of National Intelligence has made very—has been very clear about, that there is a cost, in terms of our National security, that we're bearing because of the continued operation of Guantanamo, in the context of recruitment and potential radicalization of future terrorist adversaries.

So, I—so, the weighing process that he goes through looks at both factors. That does not mean, in all cases, he will look at detainees and say, "Ah, operating—continuing to operating Guantanamo creates too big an obstacle for him to oppose a transfer." It is still the case that there are some detainees that he would consider too dangerous to return in a transfer, almost—unless there were extraordinary arrangements made for their monitoring and disposition overseas.

So, that calculus that has been made is not a single cookie-cutter calculus that's made in every case, but it is informed by this underlying assessment, as I've said—

Senator KING. Well—

Mr. RASMUSSEN.—about the continued—

Senator KING.—if this is the—one of the key questions—and it sounds like that it is—I would appreciate it if you or some of the

witnesses could supply to this committee data supporting evidence of this recruiting factor, just—rather than a reference to what al-Baghdadi said or something, but a real set of materials—written materials, the way it's being used. Because it seems to me that's one of the most important questions we have. And if we're going to decide to close the facility and—or if, collectively, the United States Government's going to decide to close the facility based upon that, we'd better know that it's real, and not just a perceived threat.

[The information referred to follows:]

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Senator KING. Mr. McKeon, is the administration contemplating a further executive order to close the facility, beyond what the current process is—how the current process operates?

Mr. McKEON. I'm unaware of any contemplation of an additional executive order. As I said in my statement, Senator, we're working on the three lines of effort: transfers, the PRB process, and—I'm blanking out on the third one.

Senator KING. But, there's no further—you don't know of any other contemplation of additional executive—exercise of executive authority to simply close the facility.

Mr. McKEON. I am not, sir. We are operating under the President's executive order from 2009.

Senator KING. The question that bothers me is, okay, if we decide it's been in the National interest to close it, there still are some people there that are very dangerous. Can we hold these people in the United States, under the Law of War? And the second question is, How does the Law of War analysis work if the war, which was the war in Afghanistan, is officially over? Does that undermine the legal analysis? In other words, we could bring some very bad guys here, put them in maximum security prisons, on the assumption that they're Law of War detainees, and then suddenly find that they're subject to habeas and we don't have enough evidence to convict them in a Federal court. In other words, that—you understand where I'm going with the legal question.

Mr. McKEON. I do, sir. On your second question, the detainees are already subject to habeas, or they can file habeas petitions, in the D.C. Circuit, pursuant to Supreme Court rulings, so that wouldn't be a—

Senator KING. So, there's no difference between—

Mr. McKEON.—that would not be a change.

Senator KING.—between Guantanamo and someplace in the United States, in that regard—in that legal regard.

Mr. McKEON. That's correct.

As to the question of the legal authority to continue to hold them, the—we are relying on the 2001 Authorization for Use of Military Force (AUMF), and it's informed by the Law of War. So, if we did reach a point where the 2001 AUMF is either repealed by the Congress or we've decided it was no longer sustainable, based on the situation in Afghanistan, then we would have an authority issue to wrestle with. There's no question about that.

Senator KING. Thank you, gentlemen. Thank you for your testimony.

Thank you.

Mr. Chairman, welcome back.

Chairman MCCAIN [presiding]. Thank you. The—your other members that were in attendance at the National Prayer Day Breakfast will be coming in, and that obviously is the reason for me being late.

I want to thank the witnesses.

Thank you, Senator Reed, for proceeding.

And I'll withhold my questioning until Senator—Senator Sullivan.

Senator SULLIVAN. Thank you, Mr. Chair.

And thank you, gentlemen.

Mr. Rasmussen, congratulations on your recent appointment.

So, I wanted to follow up on Senator King's questions. You know, there's a lot of discussion here about how Guantanamo potentially weakens national security, that you made in your testimony. At the same time, I think we would all agree that allowing known terrorists back on the battlefield to engage our troops, our citizens, also weakens our National security. And I think that that is one of the big concerns, certainly of the—this committee and Members of the Congress, and, I'm certain, also members of the administration.

So, from a broad perspective, of the remaining GTMO detainees, how many are currently assessed to be high- or medium-risk?

Mr. MCKEON. Senator, I don't have those numbers at my fingertips. And if you're referring to the assessments that were done by JTF-GTMO, back in the last decade, my impression is, knowing the population of that which we've already transferred using those categories, I think we have transferred most of those who were low-risk, but I don't know the precise data. We'll have to get that to you, sir.

[The information referred to follows:]

[Deleted.]

Senator SULLIVAN. But, I mean, of the current remaining detainees, we don't have a handle on what's—who's high- or medium-risk right now?

Mr. MCKEON. I don't have that at my fingertips. As we—both I and Nick Rasmussen explained, sir, when we bring forward a case for possible transfer, we look at the totality of the evidence, what the detainee had done on the battlefield, how they've behaved at Guantanamo, what their current—what our assessment is of their intentions. So, it's not just to look at the assessments that were done—

Chairman MCCAIN. Mr. Secretary, you're not answering the question. If you don't have the information, then submit it. nt to this committee to know who's low-risk, medium-risk, and high-risk. I would have expected you to come to this hearing with that information.

Mr. MCKEON. Yes, Mr. Chairman.

I should add that these risk levels, in terms of who's in what category, is classified. So, we'd be happy to have that conversation with you in a classified session, as well.

I just don't have those numbers at my fingertips. I think it's safe to say many of them are in the medium- or high-risk category.

Senator SULLIVAN. Well, it would be very important for us to know that as we move forward.

Mr. McKEON. Yes, sir.

Senator SULLIVAN. Let me just—Senator Tillis touched on this issue of the notification of Congress. And I think a lot of people were very disturbed by that, just by reading it in the paper. Can you, again—and if you don't have it here, perhaps with the Attorney General's help, provide a detailed—detailed legal reasoning of why a very simple statutory requirement for notification of Congress on the release of the Taliban five was not undertaken?

[The information referred to follows:]

[Deleted.]

Senator SULLIVAN. Because I think one of the things that is troubling is, there's a lack of trust, here. There's a lack of trust on the numbers, there's not certainty on what the end game is. And when a simple request—it's not a request, it's the law. And one of the things that I'm—been concerned, more broadly with the administration, is, they've used certain statutes as advisory. Maybe they need to do them, maybe they don't. This was a clear directive, from the Congress, in the law, that this administration violated. And, as far as I can tell, there's been no good explanation. I read about them in the press, they seem to change. It would be very important to get a definitive explanation from this administration on why they violated that statute. To me, it seems like a clear violation of that statute. Can we get that?

Mr. McKEON. Certainly. And you may already have it, sir. I believe the Government Accountability Office (GAO) did a review on the legal issue, in the Department. And probably the Department of Justice provided a detailed explanation of our position. And I think we have provided it to the committee, but, if we have not, we will submit it.

[The information referred to follows:]

The Department of Defense previously provided this information to the Committee in December 2014. Please see the attached letter to the Committee Chairman and its attachment. See Appendix A.

Senator SULLIVAN. And one other thing. I know that—I understand there was an Memorandum of Understanding (MOU) between—with—regarding the Taliban five, that they have a—my understanding is, a 1-year restriction with regard to their activities and movements. After a year, are they free to go and do whatever they want, return back to Afghanistan? I think, again, that's a concern, not only for this committee, but for the American people.

Mr. McKEON. You're correct about the 1-year matter, sir. We—the agreement between our two governments is classified, and we've briefed it to your staff and, I think, some of the members, in closed session. And I'd want to get into that in a closed session, about what happens after 1 year.

Senator SULLIVAN. Okay.

Thank you, Mr. Chairman.

Chairman MCCAIN. Senator Donnelly.

Senator DONNELLY. Thank you, Mr. Chairman.

A recent Department of Justice report noted there are a number of statutory provisions that should render Guantanamo detainees

relocated to the U.S. inadmissible under immigration laws, but one of the most difficult scenarios hinted at in the report involves what happens if a judge orders the release of a detainee because the Laws of War no longer permit their detention. In that case, if a detainee cannot be repatriated to their home country or a third country, the U.S. could face the need to keep that detainee in the U.S. So, where does that individual go?

Mr. McKEON. Sir, if we come to that position, which I think we're some ways away from that day, we will have—it's a very good question, and we will have to plan for that possibility. We don't expect that would happen if we brought the detainees here, but—

Senator DONNELLY. But, it can. I mean, it's—we don't expect it, but we can. So, what do we do with that person? It has been suggested, I've heard some say, "Well, an immigration detention center." You know, I think the people of the country want a better answer than that when you're talking about the people we're dealing with.

Mr. McKEON. If we were to bring them to the United States, we would make sure that we had some continuing authority to keep them. I don't think we would roll the dice on losing the authority to detain them.

Senator DONNELLY. And then, additionally, what's your assessment of the risks involved in this situation? I mean, that's, I think—you know, as we look through this whole process, this is one of those conundrums that we have to have an answer to. What's your assessment of the risks on that, sir?

Mr. McKEON. I'm not an immigration lawyer, sir. I'm probably not qualified to give you an answer on that. I do know, and I believe the Department of Justice report speaks in some—and the Homeland Security Department analyzed all these issues in some detail. We are, of course, currently barred from bringing the detainees to the United States.

Senator DONNELLY. No, I understand. But, if they do—

Mr. McKEON. So, we are not—

Senator DONNELLY.—come here—that's—I was on a trip to Guantanamo recently, and this is one of the subjects that we talked about and said, you know, I think before you get all the answers on this, you need an answer on this, where, if they're in the U.S. and this happens, what do you do with the person at that point?

Mr. McKEON. Yeah, I understand. And if—if and when we get to that point, where we propose an option to bring them to the United States, we will have an answer.

Senator DONNELLY. I think we need an answer at that point, thank you.

In terms of—you know, other than the Taliban-five piece, how many 30-day congressional notifications meeting the requirements of the FY-14 NDAA has been sent to the committee in the past year?

Mr. McKEON. I don't know the number. All other cases, the 30-day notification was provided.

Senator DONNELLY. Okay.

And then, you know, there's some concern that the detainees that are being transferred, it's on an assessment from more than 4 years ago by the review—the Guantanamo Review Task Force. As we look at this, the Periodic Review Board process was created, in part, to regularly update this. Do you know what has caused the slowness of this? Is that—do you find that to be true? And do you know what has caused the slowness of this?

Mr. McKEON. Sir, I want to separate two things, here, sir.

Senator DONNELLY. Okay.

Mr. McKEON. If somebody has already been cleared by the 2009 task force, and we find a place to which we can transfer them, and a package is brought to the Secretary to make the determination, we have an updated assessment on the individual. We're not relying solely on the 2009 task force work.

The PRB is looking at people who were not previously cleared, taking another look at whether we should continue to hold them under Law of War detention or they can be approved for transfer. We had—it took some time to stand up the PRB process. And it's gone a little bit slowly, but we're trying to pick up the pace.

Senator DONNELLY. Okay.

And, you know, just to—as I wrap, here—from that trip, which was a little bit ago—I mean, that's—the question that I asked is—the question that has stuck with me is, What are we going to do with this person? Would we—we hope for the best, but we plan for the worst. And so, I think that's something that has to be answered.

And, by the way, Mr. Secretary, I think you showed great wisdom in your choice of colleges when you were younger, as well.

Thank you, Mr. Chairman.

Chairman MCCAIN. Senator Graham.

Senator GRAHAM. Thank you.

Thank you, all three, for dealing with what I think is a very difficult issue, issue of great national security importance. And so—I know you've got a tough portfolio to deal with, so I want to go into the questioning with that understanding.

To Senator Donnelly, I had this very conversation with President Obama probably 3 years ago. I was supporting transferring the prisoners from Guantanamo Bay back to Illinois, in a maximum security setting controlled by the military. And we worked through what would happen. All these people have had habeas hearings, are entitled to that habeas hearing. No one's at Guantanamo Bay today without a Federal judge finding that the Government's evidence is sufficient to hold them as an enemy combatant. So, if you transfer them back to the United States, do you create new legal rights?

We had a Law of War statute that would govern that to make sure they just wouldn't walk out the door. And we actually went through that process. But, the problem is, you've got to admit that we're at war. You've got to tell our friends on the left that these are not just common criminals, and they will be governed by the Law of War, not common criminal concepts. So, I—it's unfortunate we could not close that discussion, because I think it would have been better for all of us.

My goal is to keep people in jail that represent a national security threat to the United States. Common sense would tell us that, if you're still in Guantanamo Bay after all of these years, you're probably a high risk threat——

[A disturbance in the audience.]

Senator GRAHAM. I think he may get his wish.

I'm a military lawyer, served with this man behind you. I really want to conduct the war within the values of our country. I want to be tough on the enemy, but also follow principles that have guided us well, like the Geneva Convention and treating people under the Law of War consistent with the requirements of the Law of War.

But, would you agree with me that anybody left in Guantanamo Bay today is probably a high-risk threat—that we wouldn't have kept them that long? Just common sense tells you, if you're still in jail after all these years, you've had numerous review boards, that you're probably dangerous, in the eyes of the people who say you still should be there.

Mr. McKEON. I would agree that all of them in—pose some risk. There are, however, many——

Senator GRAHAM. No, no, I'm not talking about some risk, I'm talking about obvious common sense, here.

Mr. McKEON. Well, but I would say, Senator, several of these people remaining were cleared, approved for transfer 6 years ago. We just have not found a place to send them.

Senator GRAHAM. Well, is that the—what percentage of the population falls in that category?

Mr. McKEON. It's around——

Senator GRAHAM. Previously cleared.

Mr. McKEON. It's around 50.

Senator GRAHAM. Okay, so what percentage—they were cleared 6 years ago.

Mr. McKEON. There's——

Senator GRAHAM. We're holding 50 people——

Mr. McKEON. It's 54——

Senator GRAHAM.—because we can't find a place to put them.

Mr. McKEON. It's 54, sir.

Senator GRAHAM. Fifty-four out of how many?

Mr. McKEON. 122 remain.

Senator GRAHAM. Okay. So, the rest of them, would you agree that they are high-risk?

Mr. McKEON. Well, several of them are under prosecution, so definitely in those cases——

Senator GRAHAM. Okay, so take them off the table. Right?

Mr. McKEON. And the remainder are—have previously been determined to be held, and should be held, under Law of War detention, and we didn't have a prosecution option.

Senator GRAHAM. Right.

Mr. McKEON. But, those are going through the PRB process——

Senator GRAHAM. Right.

Mr. McKEON.—to take another look.

Senator GRAHAM. Okay. So, we've got 50 people, we've got no place to send them. And the rest of them are either going to be prosecuted or represent a high risk to the country.

Mr. McKEON. Well, as I said, we're taking a new look, through the PRB process at the——

Senator GRAHAM. The previous PRBs——

Mr. McKEON.—group that was in Law of War——

Senator GRAHAM.—concluded they had a high risk, right? They wouldn't still be there.

Mr. McKEON. The——

Senator GRAHAM. So, the only thing is, are you going to create a new review process that's politically motivated to find a reason to let these guys out, or are you going to go with the past judgments? Because I don't think these guys are getting any better.

Do you agree that, with the Obama administration, that we're at the end of hostilities and that justified the release of the Taliban five?

Mr. McKEON. We're not at the end of hostilities in Afghanistan.

Senator GRAHAM. Well, they said that the reason we transferred the Taliban five is because you traditionally swap prisoners when hostilities are over. Therefore, we get our guy back, because the war is basically over, and we release five of the commanders of the Taliban.

I agree with you, the concept that the end of hostilities justifies the transfers of these five is ridiculous. So, I don't know why the administration would say that. Do you?

Mr. McKEON. Well, I said—I agree with you, sir, that hostilities are not over. I didn't——

Senator GRAHAM. Or—great.

Mr. McKEON.—agree with your other——

Senator GRAHAM. So, let's just——

Mr. McKEON.—assertion.

Senator GRAHAM. Okay, let's go forward as a committee. No one should be transferred because of the concept of end of hostilities.

Second, if you have any deficiency in legal authority to hold these people, would you please inform the Congress of what you need that you don't have? And I'd bet you, in a bipartisan fashion, we can provide it to you.

Mr. McKEON. Yes.

Senator GRAHAM. Do you feel like you have a deficiency today?

Mr. McKEON. Not today.

Senator GRAHAM. Okay. Do you feel like you will have a deficiency in the near future?

Mr. McKEON. In Afghanistan, not in the near future. In a couple of years, we may.

Senator GRAHAM. Well, the couple of years is in the near future. So, I challenge——

Mr. McKEON. Oh.

Senator GRAHAM.—you to send to us legislation that would deal with a problem that's 2 years away, because I finally want to get ahead of the war on terror and not always play catchup.

Thank you very much for your service.

Chairman MCCAIN. Senator Heinrich.

Senator HEINRICH. Thank you, Chairman.

And I actually want to return to this point, return to the point that I think not only Senator Graham made, but Senator Donnelly made.

There are some of these folks, who will never be transferred, never be released, that are clearly a real risk. And, at some point, if we're going to close Guantanamo, we need to do something with them. And so, I would suggest to you that, if you don't have adequate statutory authority to ensure their detention, should they be transferred to some sort of a high-security facility in the continental United States, I would suggest that you spell out what kind of authority you need and ask this body for that authority. Because, at some point, we're going to have to deal with that situation.

I want to return to the statistics quickly, the data, and make sure I understand those correctly. I have heard repeatedly, again and again, from not only colleagues, but in the press, of 30 percent, 33 percent recidivism. I want to make sure I understand and that you're very clear about the data. If I understand your testimony, that, since the interagency review process was put in place, that, since that time, the recidivism data suggests we're—you've reduced that from 33 percent in the previous administration to now 6.8 percent, with another 1.1 percent potentially suspected. Is that an accurate trend? Is that what your testimony speaks to?

Mr. McKEON. Sir, I'll let Mr. Rasmussen speak to this, because the data is owned by the intelligence community.

Senator HEINRICH. Mr. Rasmussen.

Mr. RASMUSSEN. Senator, I think the 30-percent number comes from the two numbers both Brian and I cited in our prepared remarks, and that is the assessment of the community that, of the 620 overall detainees, regardless of when, who have been transferred from Guantanamo, a little over 17 percent of them have been confirmed by the intelligence community of having reengaged in terrorist or insurgent activities. So, that's 17 percent confirmed.

Senator HEINRICH. Right.

Mr. RASMUSSEN. Another 12 percent, a little over 12 percent—

Senator HEINRICH. Suspected.

Mr. RASMUSSEN.—fall into the “suspected of reengagement” category that I mentioned earlier. So, in aggregate—

Senator HEINRICH. And—

Mr. RASMUSSEN.—that would be 30 percent of the total population—

Senator HEINRICH. Okay.

Mr. RASMUSSEN.—of folks who have—

Senator HEINRICH. And if you just look at—

Mr. RASMUSSEN.—became—

Senator HEINRICH.—post-interagency review—

Mr. RASMUSSEN. If you break out just the number of detainees who have been transferred since the 2009 interagency process in which the DNI, the Director of National Intelligence, has played a role, that number is 6.8 percent confirmed, with 1.1 percent, or one detainee, suspected. And again, that's an ongoing number, and we owe you and the rest of the Congress a March update on that as a—in our next report.

Senator HEINRICH. We very much look forward to that. Obviously, any level of recidivism is unacceptable, but that is immense progress.

I want to touch on the cost of this facility again, the fiscal cost. We have spent about \$5 billion on this facility since it opened in 2002; on average, about \$493 million each year for the last 5 years. And in 2014, the American taxpayer spent more than 3 million per Guantanamo detainee. And compare that with about \$78,000 it costs to house a prisoner at Colorado supermax prison. So, I would ask either of you, given the austere budget environment we are in today—and I hope we do something on this committee about that—and the myriad of very real threats, are we spending those tax dollars in a way that gives us the maximum security return for our investment?

And, Mr. Rasmussen, I would ask your opinion on that, as well.

Mr. RASMUSSEN. I think I'm probably better deferring to my Defense Department colleagues on that, because it—again, in terms of operation of the facility and the costs associated, that falls squarely in DOD's budget lane.

Senator HEINRICH. I mean, it goes back to the relative risks that we were talking about before, that Senator King brought up.

Mr. McKEON. Senator, the numbers sound right. The number I have for fiscal '14 is about \$400 million on Guantanamo. And the number I've always heard about the cost of one person at supermax is around 80,000.

No, the President has taken the view that this drains our resources and is a—we could secure these prisoners for much less. We're not focused primarily on the cost, we're focused more on the National security view that it's a risk to our security to keep Guantanamo open, but that—the cost issue is accurate.

Senator HEINRICH. Okay.

Thank you.

Chairman MCCAIN. Senator Cotton.

Senator COTTON. Mr. McKeon, in early December, the members of the Senate Intelligence Community sent Secretary Hagel a classified letter about the Guantanamo five. I can't discuss the contents of that letter here, but it's been almost 2 months now. We would like to receive a response to that letter before proceeding with Mr. Carter's confirmation. Can you talk to the Secretary and see about getting us a prompt response to that letter?

Mr. McKEON. Sir, certainly. And I know the answer should be coming shortly. For reasons that are not clear to me, although the letter was dated in early December, I think we only received it in the Department about 3 and a half weeks ago.

Senator COTTON. Okay.

Mr. Rasmussen, you said, in your opening statement, that anti-American incitement or statements does not necessarily equal recidivism or reengagement. Does it violate the memorandum of understandings, however, that we have with the receiving countries?

Mr. RASMUSSEN. I can't speak, in this session, about the specific understandings we have with our—with the partners with whom—the countries with whom we have worked to transfer detainees. But, one of the key features of any of those agreements is, of course, monitoring ongoing activity by the detainees, which covers a wide range of factors and would certainly include, you know, all manner of their activities. My comments in my prepared statement just spoke to kind of a definitional threshold for what would con-

stitute reengagement, for the purposes of an—of a threat assessment.

Senator COTTON. We consider anti-American incitement by Islamic terrorists pretty serious business, don't we?

Mr. RASMUSSEN. Absolutely. And I—

Senator COTTON. Anwar al-Awlaki would say that we consider it very serious business, wouldn't he?

Mr. RASMUSSEN. Absolutely.

Senator COTTON. Mr. McKeon, you said, earlier to Senator Graham, that the United States—the administration is barred from bringing Guantanamo detainees to the United States mainland. It's also barred from releasing detainees without 30 days' congressional notification. Why should the American people believe that that obligation will be any more respected than the prior notification obligation was last year?

Mr. McKEON. Sir, the lack of notification in the Bergdahl case has not been repeated. I don't expect it to be repeated. And—

Senator COTTON. But, my point is that all laws are created equal. There was a law that required prior notification. It was not followed. There is a law that prohibits detainees from coming to Guantanamo Bay. This administration has a habit of surprising the American people on national security matters. What assurance can we receive that there will not be a Guantanamo detainee on our shores tomorrow morning?

Mr. McKEON. Senator, what I can say is, as to the 30-day-notice issue, our lawyers believed we had a valid legal reason for the action we took. And we'll get you that explanation.

The Department of Defense previously provided this information to the Committee in December 2014. Please see the attached letter to the Committee Chairman and its attachment. See Appendix A.

Mr. McKEON. On the issue that you're asking, we are focused on transfers in the PRB process. I'm not aware of any conversations not to follow the current statutory bar.

Senator COTTON. Okay. Now I want to explore the so-called risk balance between recidivism of released terrorists and the propaganda value that terrorists get from Guantanamo Bay. How many recidivists are there at Guantanamo Bay right now?

Mr. McKEON. I'm not sure I follow the question. We think we—we don't have any—

Senator COTTON. How many detainees at Guantanamo Bay are engaging in terrorism or anti-American excitement?

Mr. McKEON. They're pretty locked down.

Senator COTTON. There are none—

Mr. McKEON. I don't think there—

Senator COTTON.—because they're detained, because they only engage in that kind of recidivism overseas.

Now, let's look at the propaganda value. How many detainees were at Guantanamo Bay on September 11, 2001?

Mr. McKEON. Zero.

Senator COTTON. How many were there in October 2000, when al-Qaeda bombed the USS *Cole*?

Mr. McKEON. Zero.

Senator COTTON. What about in 1998, when they bombed our embassies?

Mr. McKEON. The facility was not opened before 2002, Senator. Senator COTTON. 1993 and the first World Trade Center bombing?

Mr. McKEON. Same answer.

Senator COTTON. 1979, when Iran took over our embassy? 1983, when Hezbollah bombed our embassy and our marine barracks in Lebanon? The answer is zero.

Mr. McKEON. Correct.

Senator COTTON. Islamic terrorists don't need an excuse to attack the United States. They don't attack us for what they do. They attack us for who we are. It is not a security decision. It is a political decision based on a promise the President made on his campaign. To say that it is a security decision based on propaganda value that our enemies get from it is a pretext to justify a political decision.

In my opinion, the only problem with Guantanamo Bay is, there are too many empty beds and cells there right now. We should be sending more terrorists there for further interrogation to keep this country safe. As far as I'm concerned, every last one of them can rot in hell. But, as long as they don't do that, then they can rot in Guantanamo Bay.

Chairman McCAIN. Senator Manchin.

Senator MANCHIN. Thank you, Mr. Chairman.

And, on that happy note—

[Laughter.]

Senator MANCHIN.—let's—I had, really, the same feeling that Senator Cotton had, for a lot, a lot of years. Then I went to Guantanamo with some other Senators. And I came back changed. And I asked my Chairman, here, and he gave me some insight that he had. And I know everybody's trying to form their own direction and their own thought process on this. I can only tell you what I saw, I would not ask—if your child was in the military and a guard in that detail, I would not ask anybody's children to be in that position, guarding in that type of a condition there, because I'm seeing the abuse that the prisoners have on our guards. I couldn't believe it. And I'd like to see a few of them in a United States hardened prison, to see if they changed their attitude just a little bit. I know we could do a little different job on them here than they're doing over there.

So, all I've heard about propaganda, I have to agree with Senator Cotton on that—I don't think they need an excuse to attack America. That's—to me, that doesn't hold water. What does is \$3 million per detainee and \$80,000 to the hardened prisons we have. We have nobody escaping, we don't have any ones who have escaped from America.

I'm understanding—and you all maybe can help me with this, because I'm—I have to from my own opinion of where I would be on this if we had a vote. Do you close it? Do you keep it? What do you do with the prisoners? What do you do with the detainees? What do you do with the ones who are held for crimes and trials and things of this sort? I know there's a lot of legal things that are making—formulating these decisions. But, there's got to be a way to do it to where you don't have them all in a cluster, to where they can scheme and talk and plan and plot and then go right back into the fight.

So, have you all looked at—could we house them here? Could we imprison them here? And do it and feel secured and safe? Because a lot of West Virginians and a lot of Americans think, “Oh, out of sight, out of mind. Keep them on the island in prison, that’s fine.” But, what I saw there, them not—it’s not an atmosphere that our guards should be in, or our military people should—with their talents, should be used and wasted along those lines, is what I saw.

So, if someone can comment to that. Do we—could we do it here? Have you spoken in detail—I’m sorry, I was at other committee meetings—can it be done safely? And what do you do with the detainees? Because right now, we’re just putting them back over in that part of the world, we’re paying somebody else to take care them. And a lot of them are going back into the fight. I think that’s the problem. If one goes back into the fight, that’s one too many if we could have kept them off the battlefield, endangering any of our soldiers or anybody else over there.

So, any comment on that?

[Disturbance in the audience.]

Senator MANCHIN. We’re going to give you your time to speak, too, honey. We’re just—I’ve got to get to this first. If you can—

Admiral Myers or—I’m sorry—

Mr. McKEON. Senator—

Senator MANCHIN.—McKeon?

Mr. McKEON. Senator, I’m happy to respond, first on the Guard force, as I’ve seen them in action, as well, and I just—

Senator MANCHIN. I just want to say that I think their attack on this country, they lost their rights, as far as their attacking this country. So, with that being said, I would—that’s how I feel about it.

Mr. McKEON.—the men and women of the Guard force, who, as you know, many of them are National Guard MP specialists, do a terrific job under very difficult and challenging—

Senator MANCHIN. Horrible conditions.

Mr. McKEON.—conditions.

On the issue of “could we do it in the United States,” yes, we could. In the first term—Senator Graham made some reference to it—there was an effort underway to explore the possibility of the Government purchasing a State prison in Illinois that was underutilized, and using one part of it for the Bureau of Prisons and another part for detainees that the United States military would hold. We would still have military guards, because we are holding them under Law of War detention—

Senator MANCHIN. That’s the—

Mr. McKEON.—authority, not—

Senator MANCHIN. That’s the detainees.

Mr. McKEON. Yes, sir. So, we would still hold them under some kind of military guard, were we to bring them in the United States, unless we were able to prosecute all of them in Federal court and put them into the Bureau of Prisons system. But, there are a number of detainees that we’ve already determined we will not be able—very unlikely we will be able to prosecute in Federal court.

Senator MANCHIN. How about the ones that are waiting for—or that we have charges against, waiting for prosecution? Could they

be dispersed in the prison systems that we have, our maximum security prison systems?

Mr. McKEON. Well, sir, the ones that are currently facing charges and trial are in the Office of Military Commission system, which we have a courtroom set up there in——

Senator MANCHIN. I saw it.

Mr. McKEON.—Guantanamo that you——

Senator MANCHIN. I saw that.

Mr. McKEON.—when you were there. So, it would be the same situation, in the sense that, if they were still on trial and that's——

Senator MANCHIN. But, it's been 13 years, the Guantanamo five haven't been.

Mr. McKEON. The 9/11 trial will probably go on for quite some time. If they are convicted and sentenced, they would still be in the military system.

But, the short answer is yes, we could do it here. It would still be a military guard system. They would not be in the Bureau of Prisons.

Senator MANCHIN. My time has expired. Thank you very much.

Chairman MCCAIN. Senator Ayotte.

Senator AYOTTE. Thank you, Chairman.

My question would be, yes or no, has any suspected or confirmed detainee that's been released from Guantanamo been involved in an attack that has killed a United States, NATO, or coalition servicemember?

Mr. McKEON. Senator, I don't know the data by heart of all the—those who have reengaged, of—there are over 100. We'll have to get you that answer.

[The information referred to follows:]

The Department of Defense defers to the Office of the Director of National Intelligence and the National Counterterrorism Center regarding information about former detainees who were allegedly involved in attacks that resulted in the deaths of U.S. citizens or members of U.S., coalition, or allied forces.

Senator AYOTTE. Well, I think that's very important for people to understand. If any of these detainees have been—are suspected or confirmed for having been involved in killing us, our NATO allies, or a coalition servicemember, I—I'm actually surprised you don't know the answer to that.

One thing that has been reported. I'd—it was reported in the Washington Post that Abu Sufian bin Qumu, who is alleged to have been involved in the attack on our consulate in Benghazi, former Guantanamo detainee. But, I'd like to get your answer to that.

What I would like to understand is the 6.8 percent that the administration is touting that they're doing so well. Those are only the cases of confirmed detainees that have reengaged. Does that number include the Taliban-five member that has now been reported to have engaged in additional activity that would be reengagement for terrorism?

Mr. RASMUSSEN. The number you're referring to, Senator, the 6.8-percent number, predates any consideration of the reengagement status of the Taliban members you're talking about. As I mentioned, the next report due out on that, updating the numbers on this, is due out in early March. We should be in a position then

to assess, as an intelligence matter, whether reengagement has, in fact, taken place.

Senator AYOTTE. Well—and, of course, on May 31st, the administration transferred—of the five that they transferred, they transferred Mohammed Fazul, a member of the Taliban five. Fazul commanded main force opposing the U.S.-backed Northern Alliance in 2001. He served as chief of staff of the army under the Taliban and is accused of war crimes. One of the things that shocked me most about it is that one of the Taliban commanders on the ground in Helmand Province said it's the best news he had heard in 12 years. He said, "Fazul's return is like pouring 10,000 Taliban fighters into the battle on the side of the jihad. Now the Taliban have the right lion to lead them in the final moment before victory in Afghanistan."

So, I think we—I think the American people deserve to know whether any of the Taliban five have reengaged. I'm glad that, as I understand you've confirmed today, that there are no conditions on them returning, after the year, to Afghanistan. In other words, there aren't additional conditions on their release, unless you're telling me that there are.

And that's my question I have for the people who have been released in the last months by the administration. And I would just like to ask you, with some of them:

So, on November 5th of 2014, one of the detainees was transferred to Kuwait. What we know about him publicly that I can speak about is that he was arrested in 2002 for being a member of al-Qaeda, accused of participating in several militant trainings, and of being an affiliate of Abu Qatada, who was the most infamous jihadi recruiter in the U.K. He was a member of al-Qaeda, a recruiter, and a courier. Were there any conditions put on this individual's release? In other words, was he transferred to Kuwait to another prison, or was he let go?

Mr. McKEON. Senator, there are security assurances provided with every transfer. I can't get into the specifics of those in this setting. We could do it with you in closed session.

Senator AYOTTE. I think the American people have a right to know—

Chairman MCCAIN. Why is it—

Senator AYOTTE.—whether someone—

Chairman MCCAIN. Why is this information classified, Mr. Secretary? Why shouldn't the American people know the conditions under which people are released?

Senator AYOTTE. Within our own criminal justice system, if we release someone from one facility to another, and we were releasing someone who was accused out in the public, why can't we know if they're being held again or if they're out where they can pose risks to other individuals?

And I'm going to go—I won't go—my time will go through on all this, but if I went through, again in November, four transfers to Georgia, and just some of the background, publicly, of these individuals that have been transferred, one was assessed as a "likely pose threat to the United States," one was assessed to be—have involved in IED attacks against the U.S. and coalition forces, one is believed to have been affiliated with al-Qaeda at a high level, and,

in fact, one is described, by the Defense Intelligence Agency (DIA) previously, as among the top 52 enemy combatants at JTF-GTMO who posed the most significant threat of reengagement in acts of terrorism if released.

And I could go on and on about each of the backgrounds of the individuals that you've just released since November. And, in each of them, I would like to know, were they transferred to other jails, where they can't get back out, or were they just transferred to their families so that they can reengage in terrorism? I think that we deserve to know, from the administration when they release someone, are they just releasing them back, where it makes it very easy for them to reengage in terrorism activity, or are they putting them in another prison? Because the public reports about each of these individuals have been that they've been released, not to other prisons, but to their families.

Mr. McKEON. Senator, on your question and the Chairman's question, many of the agreements that we have with foreign governments are classified. So, that's the short answer, sir, on why we can't get into details in this session, although we can certainly brief you on—

Senator AYOTTE. Well—

Mr. McKEON. They are somewhere in between open release and a prison. The kind of assurances that we generally get are travel restrictions, some kind of monitoring, information-sharing from the government on what they are seeing, and monitoring the detainees themselves.

In terms of the five transferred to Qatar, what I can say is, none of them have returned to the battlefield, they are all still in Qatar, they're under a travel restriction. And what I said about—I think it may have been before you came in, Senator. After 1 year—we have said publicly that the restrictions are in place for 1 year. After—what happens after 1 year, we'd like to talk to you about in a classified setting.

Senator AYOTTE. So—I know my time is up, but I do not understand why the American people can't be told a basic question, when you're transferring someone who's been previously designated as one of the top enemy combatants, who was posing risk to the United States of America, members of al-Qaeda, when they're being transferred, how do you assure the American people, if they're not be incarcerated again, that they won't reengage? And I think that's basic information that the American people deserve to know.

Thank you.

Chairman MCCAIN. Well, Senator, since we are going to mark up legislation on this issue next week, declassification of that information, I think, could be a part of that legislation. The American people need to know the conditions under which avowed enemies of the United States of America are—the conditions and restraints that may or may not be placed on them.

Senator KAINE.

Senator KAINE. Thank you, Mr. Chairman.

And, like you, I agree, the American people knowing more is a helpful thing.

This is a balancing-act question. I take seriously the recidivism danger. And I'm going to get to that in a minute. But, I think to

say that the concern about the propaganda value of Guantanamo is just a political argument that the President has cooked up ignores an awful lot of facts and an awful lot of opinions by very talented national security individuals. A CIA Open Source Center study in January—released in January, says that there have been at least 30 occasions since 2010 in which al-Qaeda and affiliates have referred to GTMO as justification for recruitment and violent jihad. DNI Clapper sent us a note, to the Intelligence Committee, November 2013, arguing that closing GTMO would, quote, “deny al-Qaeda leaders of the ability to use the alleged ongoing mistreatment of detainees to further their global jihadist narrative.” And he cited the al-Qaeda magazine’s Inspire promoting the Boston bombing and highlighting the ongoing detention of prisoners at GTMO as a reason to engage in jihad. Forty-two former generals and admirals signed a letter, on January 29 to this committee, stating that the abuses that occurred at Guantanamo have made the facility a symbol to the world of the United States that is unconstrained by constitutional values.

It strikes me that the propaganda value of Guantanamo is not something that the President cooked up out of thin air, it’s something that our security professionals are telling us. And they’re telling us loud and clear. So, we have to balance a recidivism risk against that propaganda value.

On recidivism, let me ask you this. Federal courts have convicted 556 people on terrorism or terrorism-related charges from September 2001 to December of 2013. Forty-four of those cases were tried in my State. Has anyone convicted of a terrorism charge in a Federal court in the United States ever escaped?

Mr. McKEON. Sir, I’m not the expert on that, but I do believe nobody ever escapes from supermax prisons.

Senator KAINE. Let me submit that to the question. If we’re concerned about recidivism, I would like to know, for the record, whether anyone convicted—of the 556 terrorism convictions since 9/11 that have been done in the Federal court system of the United States, has anyone ever escaped? I’ll submit that one for the record.

[The information referred to follows:]

Although that is a question best answered by the Justice Department, in our interactions with the Justice Department, we have been informed several times that no one convicted of terrorism charges since 9/11 has ever escaped from Bureau of Prisons maximum security facilities.

Senator KAINE. Let me ask another question. There’s been—

Mr. McKEON. Senator Kaine, I’m told by somebody with more knowledge, the answer is no.

Senator KAINE. Okay. But, I want it for the record, because I want it answered in writing, and I want all committee members to have it.

With respect to the Taliban five, we were briefed, in a classified setting, about some information. I then saw this information in public, stated by the Secretary of Defense in newspapers. He was quoted. But, I want to ask this question for the record. Was there any evidence that any member of the Taliban five had ever been engaged in violent activity against the United States or any U.S. personnel when they were imprisoned at Guantanamo?

Secretary Hagel has said that there is no—do you know, Secretary McKeon?

Mr. McKEON. Not while they were at Guantanamo. No, sir.

Senator KAINE. No, prior to their imprisonment at Guantanamo, when they were in prison, was there any evidence that any of the Taliban five had been engaged in any activity or planning to target U.S. or U.S. personnel?

Mr. McKEON. Sir, I'm told that information on this—classified, and we'd have to talk to you about it in that setting or provide you a classified answer.

Senator KAINE. Well, I—I'm upset about this, for the same reason the Chairman said. We need information. I was told this in a setting that was classified, and then I saw Secretary Hagel talking about it publicly. So, I'm assuming him talking about it publicly means it's no longer classified. But, I want to submit that question for the record.

Mr. McKEON. Let me double check that for you, sir. I'm not aware of the quotation from the Secretary.

[The information referred to follows:]

[Deleted.]

Senator KAINE. Finally, with—an important point for all of us—we're all concerned about the ongoing viability of the 2001 AUMF, and there's efforts and dialogue with the White House to determine whether that should be revised in some way. And I just wanted to underline—I think testimony was given earlier that the continued legal ability to detain at Guantanamo does hinge upon the continuing viability of that AUMF. And so, if it were to—for example, to sunset or be repealed, the legal status of the Guantanamo detainees would be at least questionable. Am I correct about that?

Mr. McKEON. That's correct.

Senator KAINE. So, in terms of our own work or the Foreign Relations Committee's work on that AUMF, it's pretty important. As we look at that, we need to take into account the effect on remaining Guantanamo detainees.

The last thing, I just want to—on the numbers. I mentioned that 556 people had been tried on terrorism or terrorism-related charges in the Federal courts of this country since September 2001. And not a single individual so convicted has escaped. Am I correct that the military commissions have only conducted eight trials since 2001?

Mr. McKEON. That number sounds right, but we can confirm that for you. It's been very few.

[The information referred to follows:]

Regarding the questions related to terrorism-related charges in Federal courts, those questions are best answered by the Justice Department. However, in our interactions with the Justice Department we have been informed several times that no one convicted of terrorism charges since 9/11 has ever escaped from Bureau of Prisons maximum security facilities. And you are correct that military commissions have only conducted eight trials since 2001.

Senator KAINE. Those who would argue that this is something that cannot be dealt with through the Article 3 courts of the United States that have withstood the test of time since 1787 are clearly, in my view, not looking at this data.

Thank you, Mr. Chairman.

Chairman MCCAIN. Senator Ernst.

Senator ERNST. Thank you, Mr. Chairman.

Thank you, gentlemen, for being here today.

This is a very, very tough issue, and I would like to commend Senator Cotton for his passion on this subject. There are a number of members of this committee that have served this Nation, as you do. And Senator Cotton has been a warrior. He has been a warrior on the ground in Iraq. I have been a logistician on the ground in Iraq. And all of us face uncertainty when we serve our country. Senator Cotton, most certainly, deserves kudos for serving his Nation in a very difficult time and in a very difficult situation, when we are looking at terrorists. So, his perspective is slightly different than my own, but I think we feel the same way, that, whether it's someone who is kicking in doors and looking for terrorists, and facing the threat of the enemy at close range or whether it's somebody that's driving trucks up and down the roads, delivering supplies and worrying about IEDs that are planted by these terrorists—drivers just driving by, doing what they can do to support our warriors, taken out by terrorists—whether it's innocent civilians here in the United States.

Al-Baghdadi, before he was released at Camp Bucca in Iraq, had stated, "I'll see you guys in New York." And, you know, I don't have a doubt that either al-Baghdadi or one of his extreme terrorists will find their way back to New York or somewhere in this great country. They have an amazing network that reaches all around the globe.

And what I do not want to see—and all of us should be able to agree on this—that we do not want to see detainees from GTMO being released and returning to the fight. And my sentiments are exactly like Senator Cotton's. I could care less. They really should not be out there, where they can threaten American lives or our NATO allies, their lives.

So, I would like to hear from you, generally, the types of activities that our detainees—just so everybody understands, the types of activities our GTMO detainees were involved in before they were taken to Guantanamo. Please explain to me, so—I know many people will watch this testimony today, they will hear the testimony. I would like to know what types of activities they were engaged in before they were detained.

And anybody, please.

Mr. McKEON. Senator, of the detainees remaining at Guantanamo, they've been involved in a range of terrorist activities. The worst of them are the names that you would know, like Khalid Sheikh Mohammed, who planned several attacks, including the 9/11 attacks, and is—that's the trial he is facing at the military commission. The—one of the protagonists in the bombing of the U.S.S. Cole is also under trial in the military commission. The terrorists—or the people who are at Guantanamo have engaged in a range of activities, from being active on the battlefield to providing support functions to terrorist leadership. It's—it runs the gamut.

Nick can have more detail.

Mr. RASMUSSEN. I think Brian characterized it just right. It runs the gamut from known senior-leader terrorist figures exercising leadership positions in terrorist organizations—some of the names,

Under Secretary McKeon mentioned—but, then also including the full range of individuals who have played a role in al-Qaeda plotting or in providing support activities or in providing support to the Taliban, as well.

Senator ERNST. So, these are individuals who have murdered thousands of Americans, been involved with the planning of murdering of thousands of American servicemembers, whether they're here on United States soil, as with the 9/11 attacks, the U.S.S. Cole, where they killed many of our servicemembers, whether it's innocent civilians in Syria and Iraq. They did not need Guantanamo Bay to be emboldened to do those activities.

So, I push back on the President and this administration, in that they will kill, regardless of whether they are at Guantanamo, or not, that they are driven, they are terrorists, they will do that. Do you agree with that?

Mr. McKEON. Senator, I agree that terrorists are driven. What I would say about Guantanamo, in general, in the view of the administration, is, there is certainly a risk to release. And we try to substantially mitigate the risk. And I think we've had some success in doing that. But, we believe there's a risk in keeping Guantanamo open. The military leadership of the country has said that. You have the letter from three dozen former military leaders who think it is a propaganda tool that inspires recruitment of additional terrorists.

I agree with Senator Cotton, there's plenty of terrorists out there who don't need Guantanamo to want to attack the United States or U.S. interests. But, we do think that it does serve as a propaganda tool that leads to greater recruitment of the terrorist organizations.

Senator ERNST. Well, I—that is the administration's point of view. I would beg to differ. I think they are going to do what they are going to do, regardless of Guantanamo Bay and their imprisonment there.

My time is expired. Thank you, gentlemen, very much.

Thank you, Mr. Chairman.

Chairman MCCAIN. Senator Reed.

Senator REED. Three quick questions.

First, following up this discussion of the Guantanamo as an accelerator of terrorist activity or deterrence, et cetera. Mr. Rasmussen, you've mentioned, in your testimony, that the—Guantanamo is consciously used by a host of terrorist organizations to recruit, to propagandize. That is a fact. Is that correct?

Mr. RASMUSSEN. Well, we certainly just—purely just judging by anecdotal evidence and looking at the material that the terrorist organizations put out, much of it in English language, which, when we see something in English language, we assess that they are trying to reach potential terrorists or extremists here in the United States or in Western Europe—or Western European countries. And we certainly see the issue of Guantanamo feature in that propaganda.

Senator King asked a very good question, though. We need to draw the line a little more tightly and a little more concretely between anecdotal evidence of the way terrorists use this information and what we can say with more precision about recruitment efforts.

But, I would say this. The terrorist landscape we face right now is increasingly characterized by actors who are not necessarily affiliated or tied to a terrorist hierarchy or leadership. They operate on their own, in many cases. In many cases, they radicalize and mobilize themselves to violence on their own. So, that particular type of messaging activity that goes on from terrorist organizations uses many, many factors. And Guantanamo is one of them, not the—certainly not the only one. Other aspects of U.S. foreign policy feature in that, as well. But, I just would have to—it's indisputable that this does—that this material does not feature in terrorist propaganda. We do owe the committee a better understanding, though, of the direct connection, the causality.

Senator REED. Thank you. And, very quickly, because I—Mr. Secretary, there's a discussion of the classification of some of these arrangements with other countries. Is it fair to say that it's the other country that might insist much more on the classification, for their own purposes, on—as a condition of cooperation, than the United States? Is that a fair judgment?

Mr. MCKEON. That's a fair statement, yes, sir.

Senator REED. Thank you.

And then, finally, Mr. Secretary, the issue which is—this has been a very useful hearing—about the status of enemy combatants at the cessation of hostilities, that would affect Guantanamo and any other place that an individual is being held. If hostilities come to an end legally, then our ability to hold enemy combatants, as I understand, will—ceases. So, we will have to address this question, regardless of whether Guantanamo is open or closed. Is that fair?

Mr. MCKEON. That's correct.

Senator REED. Thank you.

Chairman MCCAIN. Senator Rounds.

Senator ROUNDS. Thank you, Mr. Chairman.

Senator Reed hits exactly on the question that I was going to ask. And my question would have been—and if you've answered it already, I'll defer—but, what happens at the end of hostilities? What is the plan for taking care of the issues, resolving these individuals, who may very well still be there, combatants, individuals who are being held as enemy belligerents and who, as we understand right now, may very well have to be released once hostilities cease? What is the plan to take care of the issue?

Mr. MCKEON. What we're working on now, Senator, as I went through in my opening statement, but you all were still at the Prayer Breakfast, is to try to transfer those who have already been approved for transfer. It's about 50 or so. We have a number of prosecutions underway in the military commissions. Those will take some time. And we have a Periodic Review Board process that is reexamining several who were first looked at and determined to be held under Law of War detention authority.

There is some number—I can't tell you what that will be—that we are unlikely to be able to release, at the end of the day, as we run through this process. And, following the President's charge that he wants to close Guantanamo, we've got to look at all options. One of the options would be possibility of bringing the remaining detainees back to the United States. We can't do that now, because of the statutory ban. So, we would have to come to the Congress

to talk to you about that, and repeal that statutory ban. And if we were at the end of hostilities and the question of our authority—our ability to hold them was in question, we would—part of that conversation would be, What is the authority we need from the Congress to continue to hold those people?

Senator ROUNDS. Can you give us some kind of a timeframe as to when you would be making those requests?

Mr. McKEON. I cannot give you a timeframe right now, sir, no.

Senator ROUNDS. Thank you.

That's all I have, Mr. Chairman.

Chairman MCCAIN. I thank the witnesses for being here today.

For the record, in 2009 the then legal counsel of the White House came to my office and met with me and Senator Graham, said they wanted to close Guantanamo. And I said, "Fine. I do, too. Give us a plan." In the intervening years, there has never been a plan forthcoming from the White House, and there obviously isn't, today.

Yemen is descending into chaos. We don't know what to do with the present population. How many are capability? What are we going to do with the remaining 70? How many of the remaining detainees are assessed to be high- or medium-risk? We couldn't be told that today. Where will we send the detainees in these countries of origin that are governed by state sponsors of terrorism or are currently beset by instability, insurgency, or growing extremist groups, like al-Qaeda or ISIL? Of the detainees assessed to be too dangerous to release, but incapable of prosecution, we have no plan for that. The administration, we hope, will seek additional authorities to detain elsewhere, such as the United States. And we don't know how we ensure that there will not be a court-martial release of a dangerous terrorist that is in long-term detention inside the United States, which is the reason why we need legislation.

So, here we are, 6 years into the Obama administration, and we still haven't complied with the requirements of the NDAA, nor do we have a concrete plan as to how to address the issues that I just described. That's why, 6 years later, we are having this hearing. And I, again, urge the administration—you just responded to Senator Rounds, you don't know when we are going to come forth with a proposal—we need a proposal. And, in its absence over 6 years, Congress has acted. And we will continue to act unless we can work in close coordination with the administration to come up with a plan. And one of those plans that is—is for us to make sure that these individuals, who are judged too dangerous to return, are not allowed to, and accommodation is made for the continued incarceration of those individuals.

I thank the witnesses for being here today.

And Senator Ayotte, I think, would like to make a final comment.

Senator AYOTTE. Mr. Chairman, with permission, can I have a—followup questions? I don't know if anyone else is, but I'm happy to direct that if you—I know you have to go.

Chairman MCCAIN. Oh, I'm—

Senator Manchin, did you want to—I'm sorry.

Senator MANCHIN. Go ahead, Senator. I'll go after Senator Ayotte.

Chairman MCCAIN. Go ahead.

Senator AYOTTE. Oh, thank you.

I wanted to ask about this. First of all, let me just make the point. As we—as you look at the Taliban five, I just think the point needs to be made, very clearly. They were top commanders in the Taliban. I read you the quote about what one of the commanders on the ground said in Helmand Province about, “It’s like pouring 10,000 jihadists back into the fight.” So, you can’t say that they weren’t directly involved. So—because they, themselves, only issued the commands to kill Americans, and didn’t kill the Americans, themselves, the leaders are often more important than the foot soldiers asked to carry this out. And so, I don’t understand the argument made from—with all respect to my colleague from Virginia, but these were—the American people need to understand, these were top Taliban leaders, who themselves made many orders that were involved in killing us and our allies in Afghanistan.

I would like to ask Admiral Myers—we had General Mattis before the committee the other day, former Commander of CENTCOM. I’m sure you know the general. And one thing he said, when he talked about our detention policy, and he said that he did not understand—he was perplexed by our lack of detention policy. And, in fact, when I asked him about it, he said that, “Ma’am, first and foremost, I believe this. We go into a fight we’ve not seemed certain of, ourselves, enough to hold prisoners. The people who we’ve taken in the fight—for example, in 1944, did we take Rommel’s troops who were in POW camps in Texas and let them go back and get another shot at us at Normandy? We kept them until the war was over. We didn’t start this war. And if an enemy wants to fight or be a truckdriver, we didn’t say to—his radio operators could be released because they didn’t have a significant role. If you sign up with the enemy, they should know, we’re coming after you. If the President, the Commander in Chief, sends us out there, and if you’re taken prisoner, you’ll be prisoner until the war is over. I mean, this is pretty much warfighting 301 or advanced warfight—this is not advanced warfighting, not warfighting 301 or advanced warfare, this is kind of 101, ma’am. And my biggest concern I have, then, having been in the infantry for years, is, if our troops find that they are taking someone prisoner a second time, they will just—and they have just scraped one of their buddies off the pavement and zipped him into a bag, the potential for maintaining the ethical imperative we expect of our Armed Forces is going to be undercut if, in fact, the integrity of our war effort does not take these people off the battlefield permanently if taken prisoner. In other words, they will take things into their own hands and under the pressures of warfare.”

Admiral, do you share General Mattis’s concerns? If you’ve—if we’ve captured someone on the battlefield, and then our men and women in uniform encounter them again after having seen, obviously, their brothers and sisters in arms killed by this enemy, don’t you think that’s a real concern and that our men and women in uniform should never be forced to confront someone that we had previously captured?

Admiral MYERS. Well, Senator, I do have the utmost respect for General Mattis. I do not believe that the current policy, which I cannot necessarily speak to the policy, but I do not believe the morale of the men and women of the Armed Forces on the combat

field have any impact—whether it's the same person the first time, second time, whatever. A combatant is a combatant. I do not believe it is impacting the morale, as far as those actually engaging in combat operations.

Senator AYOTTE. Okay. But, let me ask you this. If we captured someone in battle, do you think our men and women in uniform should ever have to confront them again? Yes or no? We had them. We had them captured, we had them incarcerated, we release them. Do you believe they should ever have to confront them again?

Admiral MYERS. I do not believe anyone should ever have to confront them. However, as you have seen through history, through various reasons, that's not always the case, and people have reentered the battlefield through the history of time.

Senator AYOTTE. Well, they're going to reenter the battlefield when they're being transferred to third-party countries, where they're not even being incarcerated again, and where there are very few conditions on their confinement, if any. And I think this is something that is atrocious, that one of our men and women in uniform, or any of our allies or anyone working with us, should ever be forced—when we had someone captured as a prisoner of war, we had them taken from the battlefield, that they would ever confront them again. And I—it seems to me that is one of the fundamental problems we face, here.

And the other question I would like to ask Secretary McKeon. If we get Ayman al-Zawahiri tomorrow, the head of al-Qaeda, or al-Baghdadi, the head of ISIS, where—what will we do with them? Where will we put them? I understand what my colleague from Virginia said about Article 3 courts. Will they be told they have a right to remain silent? Will they be Mirandized? Or will we interrogate them and find out what they're planning, in terms of killing us and our allies?

Mr. McKEON. Senator Ayotte, our policy, if we detain new people on the battlefield, is to examine them on a—and follow a case-by-case basis, depending on all the circumstances. We would certainly interrogate them. If we had an Article 3 case that we could build against them, we would pursue that.

Senator AYOTTE. So—

Mr. McKEON. We—

Senator AYOTTE. So, I guess where—where—where would you put al-Baghdadi? Where would you put Ayman al-Zawahiri? Do you know the answer to that—

Mr. McKEON. In the first—

Senator AYOTTE.—Secretary McKeon? Do you know—

Mr. McKEON. In the first—

Senator AYOTTE.—where we would put them?

Mr. McKEON. In the first instance, we would interrogate them—

Senator AYOTTE. Where would you interrogate them?

Mr. McKEON.—in situ, where we pick them up. If we pick up—

Senator AYOTTE. Okay. But, after that—

Mr. McKEON.—or we could do it in another place. We've done it with Mr. Warsame on a U.S. ship.

Senator AYOTTE. Right. So, ship. And you can only keep someone on a ship for so long, because it's temporary. When we get the leaders of these terrorist groups—this is the problem I've been asking since I got in this Senate, and I've been asking top levels of this administration for years—if we catch the head of al-Qaeda tomorrow, what do we do with them? And you know what I've heard, time and time and again? "We're working on our detention policy. We'll get back to you." It's been years. And what worries me is, as we sit here, to the Chairman's point, so many questions remain unanswered, including—having Baghdadi or Zawahiri on a ship for a temporary basis is not long enough to interrogate them to find out what they know about al-Qaeda, about ISIS, to protect Americans. And there seems to be no plan for that.

Mr. McKEON. Senator, if we were to get one of these people that you mentioned, and we could build an Article 3 case, we would ultimately bring them to the United States for prosecution, probably in New York or Virginia, where these kinds of national security cases are usually prosecuted. If we can't build an Article 3 case, we would look at whether we could prosecute them through the military commissions process. We would look at all options, but we would certainly interrogate them for some time before we put them into any prosecution lane.

Senator AYOTTE. Well, except you know, of course, once they go into an Article 3 court, they're entitled to Miranda, they're told they have the right to remain silent, they're entitled to rights to speedy trial. And so, we, at that point, aren't going to get a chance to fully interrogate someone.

Mr. McKEON. Well, but, Senator, we would do the interrogation at the front end, with an interrogation team. And then, if there was an option for Federal court prosecution, we would bring in a separate FBI team that had not been—what we call a "clean team," that had not been privy to the prior military or IC interrogation, to then build the case. So, it would be a separate interrogation. We would be able to get the intelligence value, which we did in—

Senator AYOTTE. How long would you hold—

Mr. McKEON.—which we did in the case of Mr. Warsame, we did it in the case of Mr. al-Libi.

Senator AYOTTE. And in both of al-Libi and Warsame situations, you held them for, I would say, far too insufficient of a time, because you had them on ships because this administration is so adverse to putting anyone in Guantanamo. They'd rather hold someone who's a terrorist on a temporary basis on a ship rather than make sure that we can have the opportunity for a lengthy investigate—interrogation. As you know, sometimes it takes a long time to gather all the information that someone like the head of al-Qaeda or the head of ISIS would know.

Mr. McKEON. Senator—

Chairman MCCAIN. Go ahead, please answer.

Mr. McKEON. Yes.

Senator, I don't think there have been any pressure on the intelligence professionals who do these interrogations to speed it up. And I believe, although I would double check this for the record, that, even after he went into the Federal court system, Mr. Warsame gave us quite a bit of information.

Mr. McKEON. Federal prosecutors have quite a lot of tools, in terms of encouraging cooperation as they bring a case. So, we are not without tools to get the proper information.

Senator AYOTTE. So, Mr.——

Chairman MCCAIN. The Senator's time really has expired.

Senator AYOTTE. Thank you.

Chairman MCCAIN. Senator Sessions. And if you'll close it down, Senator Sessions, thank you.

Senator SESSIONS. All right, thank you.

While—Senator Ayotte, thank you for those questions. It goes to what I believe we need to think about, here.

Mr. Rasmussen, was it al-Libi that was captured by a commando team in Libya and taken to a ship?

Mr. RASMUSSEN. That's correct.

Senator SESSIONS. And wasn't that a high-risk thing for American soldiers? And they were sent in to capture him alive so that he could be interrogated, because I believe the New York Times referred to him as "the mother load of intelligence possibilities," since he was involved all the way back to the Khobar Towers activities of al-Qaeda?

Mr. RASMUSSEN. I'd certainly defer to my Pentagon colleagues to talk about the level of risk that our forces experienced in trying to carry out that operation.

What we assessed, from an intelligence perspective, was that a figure like al-Libi would have a tremendous amount of historical knowledge about al-Qaeda and whether it——

Senator SESSIONS. Well, thank you.

Mr. RASMUSSEN.—was associated——

Senator SESSIONS. And I think that's why we put our people at risk to capture him.

Mr. McKeon, isn't it true—and I'll just try to be brief and we'll wrap up—but, isn't it true that a person connected with al-Qaeda, a person connected with ISIL and other terrorist—I'll just say those two—can—if captured, they qualify as prisoners of war?

Mr. McKEON. If they meet the standard for Law of War detention under the AUMF and Laws of War, yes, sir.

Senator SESSIONS. And certainly, Mr. al-Libi would have qualified. Is that—we've issued authorization of—of force against al-Qaeda.

Mr. McKEON. Sir, I would say, in the case of Mr. al-Libi, and in all cases, there is a preference to capture, if possible, for the intelligence gain, but the judgment is made primarily by——

Senator SESSIONS. Well, I know——

Mr. McKEON.—our military colleagues, of whether that is feasible. And if it's——

Senator SESSIONS. I'm just trying to wrap up.

Mr. McKEON. No, I understand, sir. I just wanted to give you the whole picture——

Senator SESSIONS. I understand what the——

Mr. McKEON. Yes.

Senator SESSIONS. We all know that.

So, the question—so, under the laws of war, a person who's an unlawful—who is a prisoner of war can be detained until the conflict is over, on the general principles of war. And——

Mr. McKEON. Technically, sir, they're unlawful enemy combatants, typically, if they're not considered POWs, at Guantanamo.

Senator SESSIONS. Well, they could be both, could they not?

Mr. McKEON. Conceivably.

Senator SESSIONS. Conceivably? I don't know why there would be any difficulty in having them qualify as both.

Mr. McKEON. Sir, this is where I'm getting out of my lane with the legal question and I ask somebody from our General Counsel's Office. Generally, we don't consider them POWs.

Senator SESSIONS. Well, you also don't consider there's a difference between civilian prosecution and military detention and military commission trials, either, in which case, as Senator Ayotte said, you're dead wrong.

So, if a person is then captured, if they're taken for military trial—civilian trial—as I understood your testimony, if they can be prosecuted in an Article 3 civilian court, they will be. Is that the policy we're now operating under?

Mr. McKEON. No, sir. What I was saying is that all options are on the table, and we would look at prosecution in both Article 3 court or military commissions. But, if we can do it in the Article 3 process, I wouldn't say there's a preference, but we have a good ability to do that.

Senator SESSIONS. Well, you almost—

Mr. McKEON. With some—

Senator SESSIONS.—repeated what you said before—

Mr. McKEON. With—

Senator SESSIONS.—which was, if we can prosecute them in Article 3 court, we will. And that is what you are doing today, in reality, is it not?

Mr. McKEON. Well, we have done it in some of the select cases, and we've done it with considerable success and a lot faster pace than the military commissions. So, I—

Senator SESSIONS. If—and I've prosecuted in Federal court—

Mr. McKEON. Yes, I'm aware of that, sir.

Senator SESSIONS.—civilian court. Senator Ayotte is correct, a person is brought into Federal civilian court, they are immediately appointed a lawyer, or, if they or their allies or conspirators have money, they can hire their own lawyer. Isn't that correct?

Mr. McKEON. That's correct.

Senator SESSIONS. And, before they can be asked any questions, they are given their Miranda rights and told not to answer questions, correct? And—

Mr. McKEON. Once they are in that system. But, we've done the interrogations with our IC and military professionals before we put them into that system.

Senator SESSIONS. And if they—

Mr. McKEON. And they're not—

Senator SESSIONS.—have a—

Mr. McKEON.—they are not Mirandized in that context.

Senator SESSIONS. And if they have a lawyer, the lawyer is going to tell them not to cooperate unless he tells them to for some other—for some reason. Isn't that correct? That's what good lawyers do.

Mr. McKEON. That's what good—

Senator SESSIONS. "Don't talk to the police until I—you and I talk and I approve of it."

Mr. McKEON. That's what a good lawyer would do——

Senator SESSIONS. That's what goes on——

Mr. McKEON.—that's correct.

Senator SESSIONS.—in the real world. Then the person charged in civilian court has a right to demand a speedy trial, he has a right to demand discovery of the government's case, he has a right to documents that could be relevant to his case, and he can ask for information that frequently, in my experience, implicates the issues of national security and intelligence and how it's gathered, and that kind of thing. I'm sure Mr. al-Libi is going to demand information about how he was captured and how you had information about him, some of which——

Mr. McKEON. Well, we——

Senator SESSIONS.—we don't want to give up.

Mr. McKEON. He's deceased, sir. He died before trial.

Senator SESSIONS. He was taken from the ship after how many days?

Mr. McKEON. I don't know how long he was on the ship.

Senator SESSIONS. Mr. Rasmussen, how many days?

Mr. RASMUSSEN. I think it was a small number of days, but it—driven, in this particular case, by his rapidly deteriorating health status——

Senator SESSIONS. And—well, he could have been taken to any doctor, or any doctor could have been flown to Guantanamo to treat him. But, instead, when he was taken to a doctor, he didn't—in Maryland, as I recall—he didn't have to be put in civilian court; he could still be maintained in military custody.

So, if the person is taken to military custody and treated as an unlawful combatant or as a—certainly as a prisoner of war, then they could be detained, and they could be interviewed over a period of months.

And isn't it true, Mr. McKeon, that a person held in that condition is not entitled to a lawyer? Just like German prisoners of war and Japanese prisoners of war and American prisoners of war were not provided lawyers.

Mr. McKEON. Well, if we put them in the military commissions process, they would have a lawyer.

Senator SESSIONS. If you'd move them to a trial, I understand that. If you move them to a trial, and actually put them in a status of being an—prosecuting for unlawful acts against the laws of war, then they do have to have a—an attorney. But, you can hold them for months, could you not, and gradually build up a relationship with them in an attempt to obtain more information over time?

Mr. McKEON. That's correct, but that's not precluded in the criminal system. And, as you know, as a prosecutor, sir, the Federal prosecutors have a lot of powers to encourage cooperation.

Senator SESSIONS. They don't have any more powers than the military prosecutors would have. That's just a myth you guys have been talking about. All the powers they have is a plea bargain. They can be plea-bargained in military commissions, too. If any of you don't know that, I'll tell you that.

Mr. McKEON. I'm——

Senator SESSIONS. So, to me—I'll just wrap up. The vote is ongoing. There is absolutely no way that you can contend over a number of cases, as a matter of policy, it's better for the National security of the United States that people be promptly taken to civilian court to be tried in civilian court rather than be tried in—held in military commissions and tried at our will. And, as I understand it, if, even after being detained in military detention, over a period of a year or more, they could still be sent to civilian court for trial. But, I would think we'd want to try them in military court.

Mr. McKEON. Well, sir, I think we would look at all options. And if I—I didn't—

Senator SESSIONS. Have you—in the last number of years, how many have been sent for trial in military commission?

Mr. McKEON. Well, we have military commissions ongoing at Guantanamo. And what I would say, in terms of—

Senator SESSIONS. Well, under this President, in the recent months, the years that people have been captured, have any been sent to trial there?

Mr. McKEON. We have not added—

Senator SESSIONS. If so, how—

Mr. McKEON. We have not added to the population at Guantanamo Bay, that's correct.

What I would say, sir, in terms of the efficacy of the two systems, because the military commission system is essentially new, because of the new statutory framework, lawyers are litigating to death every new issue, and these cases are dragging on for quite some time. Whereas, in the civilian court system, because of the speedy trial and the efficiency of our courts, we're getting convictions and putting these people in prison fairly quickly.

Senator SESSIONS. Well, they can be done that way in military commissions. The problems will be worked out. The judge is taking everything as a first impression, so I'm sure they take a little more time at it. But, had we been moving these cases forward for a long time, those issues would have been decided, I'm sure, by now, and the cases could probably move faster. And they have different issues.

So, I'll wrap up. My time is up.

I just want you to know, I appreciate that you're advocating for the President's policies, that we improvidently—they were a product of an improvident campaign promise, based on lack of understanding of the reality at Guantanamo. Why it is a perfectly humane and good place to keep people, why it provides and we set up procedures to try them fairly, and it gave us maximum ability to take people, like al-Libi and others, and keep them, over time, to develop intelligence, over time, and in a way that we are in control of the situation, rather than a Federal judge, whose duty is to respond to case management, moving cases, who has not a duty to try to assist the Government in obtaining intelligence.

Senator Graham and others, and Ayotte, who have been prosecutors, see it as I do and are more knowledgeable than I, but I really strongly feel this a mistake and it's not helpful to the national security of the United States.

Thank you all.

And the meeting is adjourned.

[Whereupon, at 11:46 a.m., the committee adjourned.]

QUESTIONS SUBMITTED BY SENATOR JAMES M. INHOFE

DETENTION FACILITY AT GUANTANAMO BAY

1. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, do you believe the detention facility at Guantanamo Bay (GTMO) is a state-of-the-art facility that provides humane treatment for all detainees?

Mr. McKEON. Yes. All detainees are housed in state-of-the-art, climate controlled facilities that are modeled after county prisons in the United States. This is consistent with the Convention Against Torture and Common Article 3 of the Geneva Conventions of 1949, as well as U.S. law.

In a 2009 review of the facility, Admiral Patrick Walsh concluded “that the conditions of confinement in Guantanamo are in conformity with Common Article 3 of the Geneva Conventions.” The Secretary of Defense endorsed those findings and passed them to the President. Regular visits by Department of Defense (DOD) personnel continue to affirm that all detainees at Guantanamo Bay, Cuba, are treated humanely in modern, secure facilities.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. Yes.

2. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, the detention facility at GTMO has been visited by many organizations to include multiple human rights organizations, the International Committee of the Red Cross (ICRC), Attorney General Holder, and independent commission led by Admiral Walsh. What was their assessment of the facility and care of the detainees?

Mr. McKEON. Department guidance and policies direct that DOD components ensure that all personnel adhere to the standards of Common Article 3 of the Geneva Conventions when it comes to detention, treatment, and interrogation of detainees, this includes prohibitions against cruel treatment and torture and that care is provided to wounded and sick detainees.

In February 2009, Admiral Patrick Walsh, upon completion of a review of detention conditions at the facilities at Guantanamo Bay, Cuba, found that the conditions of detention in Guantanamo are in conformity with Common Article 3. In addition, Admiral Walsh reported that the chain of command responsible for the Guantanamo detention mission consistently seeks to go beyond a minimalist approach to compliance with Common Article 3, and endeavors to enhance conditions in a manner as humane as possible consistent with security concerns.

Since the detention facility opened in January 2002, the ICRC has visited over 100 times. We continue to engage regularly with the ICRC, and it reports to us after each visit about detainee and detention concerns and observations.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. Although I do not know which “multiple human rights organizations” you are referencing, I can assure you that Joint Task Force Guantanamo takes seriously the input provided on the facility and care of detainees, including input from the ICRC. In 2009, Admiral Walsh told the press: “After considerable deliberation and a comprehensive review, it is our judgment that the conditions of confinement, in Guantanamo, are in conformity with Common Article 3 of the Geneva Conventions . . . it was apparent that the chain of command responsible for the detention mission at Guantanamo consistently seeks to go beyond the minimum standard in complying with Common Article 3.”

3. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, is the detention facility at GTMO fully compliant with Geneva Convention?

Mr. McKEON. Yes. The Geneva Conventions of 1949, and specifically Common Article 3, require parties to an armed conflict to treat detainees humanely and prohibit cruel treatment and torture. Admiral Walsh’s report of February 2009 confirmed that the detention facility at Guantanamo Bay, Cuba, was in conformity with Common Article 3 of the Geneva Conventions. Regular visits by U.S. Southern Command, as well as other DOD officials, continue to confirm that the detention conditions remain fully compliant with Common Article 3.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. In my opinion it is fully compliant, but I must defer legal conclusions and compliance to DOD General Counsel.

4. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, how many detainees have been charged and how many have been tried in the Expeditionary Legal Complex at GTMO? Why?

Mr. McKEON. Military commission trials have resulted in eight convictions, seven pursuant to guilty pleas. In addition, two other individuals pleaded guilty pursuant to pretrial agreements, which include cooperating with the United States, and are awaiting their respective sentencing hearings. Appellate rulings have vacated two of the convictions and this has shaped the charging options available to the prosecution for future and ongoing cases.

Seven individuals are currently facing prosecution in active military commission proceedings at the Expeditionary Legal Complex at GTMO.

The three cases (one of which is a joint trial for five individuals) are in the pre-trial motions phase and will enter the merits phase once each accused has had a full opportunity to raise and litigate his pre-trial motions.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. Military Commission trials have resulted in eight convictions, seven of which were pursuant to guilty pleas. Appellate courts have vacated two of the convictions. Currently seven detainees are facing trial for: the September 11 attacks, the bombing of the USS *Cole*, and for committing attacks on coalition forces in Afghanistan. I must defer to the Office of Military Commissions to explain why they were charged and tried.

5. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, what is your position with regard to the President's policy of trying detainees in civilian courts versus military commissions?

Mr. McKEON. In our efforts to protect U.S. national security, both military commissions and Federal courts can be appropriate, depending on the circumstances of the specific case, and both provide tools that are effective and legitimate.

Although I would defer to the Department of Justice for the statistics, numerous terrorism prosecutions in Federal court have resulted in convictions, both before and after September 11, 2001.

To date, only a few prosecutions in the military commissions system operating today have resulted in convictions. Despite the low number, military commissions remain a viable tool to handle cases that cannot be prosecuted in Federal courts or that are not appropriate to be prosecuted in Federal courts, such as for violations of the laws of war.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. I believe it is important to our national security to remove combatants from the battlefield and to prosecute them when appropriate. I defer to Secretary McKeon on the related policy positions.

PRESIDENT OBAMA'S CATCH AND RELEASE PROGRAM

6. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, of the remaining GTMO detainees, how many are currently assessed to be high or medium risk?

Mr. McKEON. [Deleted.]

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. The risk classification numbers of detainees who remain at GTMO can be provided in a classified format.

7. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, how many have ever been assessed to be high or medium risk?

Mr. McKEON. [Deleted.]

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. I defer to the Intelligence Community for an intelligence assessment/statement on how many detainees have ever been assessed to be in the high and medium risk categories.

8. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, in general, what is the basis of those assessments and why might they change?

Mr. McKEON. The current process involves a comprehensive review of each detainee by an interagency group that looks at information on the detainee, including the factors that influenced the detainee pre-capture, the detainee's behavior and ac-

tions while in detention, intelligence and information collected since capture, and the detainee's potential actions post-transfer. Assessments could change or be updated based on new information/intelligence or detainee behavior/actions and any such new information or behavior would be assessed by the Intelligence Community or the Periodic Review Board.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. In general, intelligence assessments consider all of the information that we know about a detainee at that time. I defer to Mr. Rasmussen and the Intelligence Community on what could cause an assessment to change.

RECIDIVISM

9. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, of the GTMO detainees that the United States has confirmed returned to the fight, can you assure this committee that none of them have been responsible for the deaths of additional United States or coalition personnel after their release from GTMO?

Mr. McKEON. Unfortunately, former GTMO detainees have been responsible for or have contributed to the deaths of U.S. and coalition personnel since their transfer from GTMO. The Intelligence Community may be able to provide further information in a classified setting as to the details.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. I do not personally know of any U.S. servicemember deaths that have occurred due to the actions of detainees released from GTMO. I defer to the Intelligence Community for an intelligence assessment/statement.

RETURNING NAVAL STATION GUANTANAMO BAY TO CUBA

10. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, are you aware of any administration or DOD plans to close Naval Station Guantanamo Bay over the next 2 years?

Mr. McKEON. No.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. I am not aware of any such plans.

11. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, is it administration and DOD policy that Guantanamo will remain in the possession of the United States during this administration?

Mr. McKEON. Yes.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. I am not personally aware of any plans to transfer possession of Guantanamo.

12. Senator INHOFE. Secretary McKeon, Mr. Rasmussen, Rear Admiral Myers, are any of you aware of Naval Station Guantanamo Bay being used as a bargaining chip in this administration's quest for full diplomatic relations with Cuba?

Mr. McKEON. No. Assistant Secretary of State Roberta Jacobson recently testified to Congress that the issue of the Guantanamo Naval Station closure is not on the table during discussions with Cuban officials.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. No.

QUESTIONS SUBMITTED BY SENATOR KELLY AYOTTE

GUANTANAMO AS A PROPAGANDA TOOL

13. Senator AYOTTE. Secretary McKeon, a recurrent theme during the hearing and from the administration officials is that Guantanamo should be closed because it is a propaganda tool for our enemies. Do you agree that the facility is lawful and humane?

Mr. McKEON. Yes. The detainees who remain at the Guantanamo Bay detention facility continue to be detained lawfully, both as a matter of international law and U.S. domestic law. All U.S. military detention operations conducted in connection with armed conflict, including those at Guantanamo Bay, are carried out in accordance with the law of armed conflict, also known as the law of war or international

humanitarian law, including Common Article 3 of the Geneva Conventions of 1949, and all other applicable international and domestic laws.

The continued operation, however, of the facility damages our relationships with key allies and is used by violent extremists to incite local populations. As a result, while the facility is lawful and humane, closing it is still a national security imperative.

14. Senator AYOTTE. Secretary McKeon, the administration has options in the face of this false propaganda: it can fight it by exposing the lies suggesting that we do not treat detainees in accordance with the law, or it can reinforce it by insisting that the correct response is simply to close the facility. Will you detail what steps the United States has taken to counter the terrorists' false narrative and emphasize to the world that Guantanamo detainees are held lawfully, safely, and humanely?

Mr. McKEON. Closing the detention facilities at Guantanamo Bay, Cuba, is a national security imperative; it drains resources and hurts relations with key allies, in addition to being a propaganda tool.

The Department, in partnership with the State Department, regularly participates in international fora in which we make it clear that we are fully committed to ensuring that individuals we detain in any armed conflict are treated humanely in all circumstances, consistent with applicable U.S. treaty obligations, U.S. domestic law, and U.S. policy.

Our Department hosts a number of international groups as they visit the detention facilities at Guantanamo Bay, Cuba. We use these opportunities to allow these international groups, ranging from foreign government parliamentarians to senior ranking foreign diplomatic personnel, to view all the detention facilities within appropriate security guidelines and to engage directly and have discussions with the commander and staff of the detention facilities. These engagements help to dispel the myths often associated with the detention facilities at Guantanamo Bay, Cuba.

15. Senator AYOTTE. Secretary McKeon, if the use of the Guantanamo facility as a propaganda tool is a key problem that makes keeping the facility problematic for the administration, why hasn't more been done to expose the fact that this is a hollow symbol for our enemies?

Mr. McKEON. We have undertaken efforts to engage with other nations and the media on the facts concerning the detention operations at Guantanamo Bay, Cuba. Yet the facility itself remains a powerful symbol used by violent extremists. Videos put out by the Islamic State of Iraq and the Levant (ISIL) regularly show their victims dressed in orange jumpsuits, a clear reference to the dress of detainees at Guantanamo Bay, Cuba.

While the Department remains committed to closing the detention facility we also continue to engage publicly with those who question the safe, legal, and humane care and custody of the detainees at Guantanamo Bay, Cuba.

THIRD-COUNTRY OVERSIGHT

16. Senator AYOTTE. Secretary McKeon, recently, President Jose Mujica of Uruguay has made statements suggesting that Uruguayan authorities may not be doing the best job monitoring the six Guantanamo detainees recently transferred there. Will DOD provide the committee with the Memorandum of Understanding between the Department and Uruguay? When you provide the Memorandum, please highlight the commitments made by Uruguay to monitor these detainees.

Mr. McKEON. The resettlement conditions for the transfer of six Guantanamo detainees to Uruguay were documented in an exchange of diplomatic notes between the Department of State and the Government of Uruguay. I refer you to the Department of State regarding access to these diplomatic notes.

17. Senator AYOTTE. Mr. Rasmussen, how confident are you that the Uruguayan government actively is monitoring these detainees and knows precisely where they are?

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

18. Senator AYOTTE. Secretary McKeon, what steps would you recommend the President take should Uruguay fail to live up to its monitoring commitments?

Mr. McKEON. DOD works closely with the Department of State and the Intelligence Community to continually monitor and assess the Government of Uruguay's adherence to its commitments regarding the resettlement of the six Guantanamo detainees. Additionally, the U.S. Embassy in Montevideo remains engaged on a reg-

ular basis with Government of Uruguay on the resettlement of the detainees. In instances where a government fails to live up to its commitments, DOD works with the Department of State on appropriate actions, such as demarches, high-level leadership engagement, intelligence sharing, and counterterrorism support.

19. Senator AYOTTE. Secretary McKeon, under what circumstances would you recommend that the President request a foreign country, who has agreed to accept a detainee, return that individual to the detention facility at Guantanamo Bay?

Mr. McKEON. I cannot speculate on such hypotheticals. To date, we have not had such a case arise.

NATIONAL SECURITY INTERESTS

20. Senator AYOTTE. Secretary McKeon, of the remaining 122 detainees at Guantanamo how many of the 122 have ever been designated or assessed as high, medium, and low risk. Provide a number for each category adding up to 122.

Mr. McKEON. [Deleted.]

21. Senator AYOTTE. Secretary McKeon, of the 33 Guantanamo detainees released/transferred in 2014 and 2015, please list what each detainee's highest assessed or designated risk level was by Joint Task Force Guantanamo: high, medium, or low risk to the United States, its interests, or its allies. If their risk rating was lowered, please provide the date that occurred, and the risk rating to which the detainee was redesignated.

Mr. McKEON. [Deleted.]

22. Senator AYOTTE. Secretary McKeon, for each of the 33 Guantanamo detainees released/transferred in 2014 and 2015, are these detainees being held in prison or are they free to roam in the country or even leave the country?

Mr. McKEON. DOD has no information indicating that detainees transferred in 2014 and 2015 are held in prison. I refer you to the State Department or to the latest edition of the classified report provided to this committee in accordance with section 319 of the Supplemental Appropriations Act of 2009 (Public Law 111-32) for further information. The assurances that we negotiate with receiving countries generally call for a range of measures, including restrictions on foreign travel for a period of time.

23. Senator AYOTTE. Secretary McKeon, what kind of surveillance, if any, are they under?

Mr. McKEON. The security assurances negotiated with other countries to receive detainees from Guantanamo are classified by the Department of State. DOD defers to the Department of State on providing additional information to the committee regarding those assurances.

24. Senator AYOTTE. Secretary McKeon, what agreements do we have with the respective government (be prepared to discuss the specific terms of each agreement)?

Mr. McKEON. The security assurances negotiated with other countries to receive detainees from Guantanamo are classified by the Department of State. DOD defers to the Department of State on providing additional information to the committee regarding those assurances.

25. Senator AYOTTE. Secretary McKeon, when does that agreement sunset?

Mr. McKEON. The security assurances negotiated with other countries to receive detainees from Guantanamo are classified by the Department of State. DOD defers to the Department of State on providing additional information to the committee regarding those assurances.

26. Senator AYOTTE. Secretary McKeon, what will be the status of the detainee after that sunset?

Mr. McKEON. The security assurances negotiated with other countries to receive detainees from Guantanamo are classified by the Department of State. DOD defers to the Department of State on providing additional information to the committee regarding those assurances.

27. Senator AYOTTE. Secretary McKeon, how do we monitor whether each country is fulfilling its agreement?

Mr. McKEON. DOD works closely with the Department of State and the Intelligence Community to continually monitor and assess a foreign government's adher-

ence to its commitments regarding the resettlement of Guantanamo detainees. We do so through a variety of means, including diplomatic engagement and, where appropriate, through liaison services.

28. Senator AYOTTE. Secretary McKeon, is each country fulfilling its agreement?

Mr. McKEON. The U.S. Government has regular conversations with foreign governments regarding the implementation of security measures following the transfer of individuals from Guantanamo to those foreign governments. In instances in which DOD receives information that suggests that a lapse has occurred, we work with the Department of State and other departments and agencies to take appropriate action commensurate with the nature of the occurrence. DOD defers to the Department of State on providing additional information to the committee regarding foreign governments' adherence to agreements.

29. Senator AYOTTE. Secretary McKeon, which one(s)?

Mr. McKEON. The security assurances negotiated with other countries to receive detainees from Guantanamo are classified by the Department of State. DOD defers to the Department of State on providing additional information to the Committee regarding those assurances.

30. Senator AYOTTE. Secretary McKeon, what action was taken?

Mr. McKEON. The U.S. Government has regular conversations with foreign governments regarding the implementation of security measures following the transfer of individuals from Guantanamo to those foreign governments. In instances in which DOD receives information that suggests that a lapse has occurred, we work with the Department of State and other departments and agencies to take appropriate action commensurate with the nature of the occurrence. DOD defers to the Department of State on providing additional information to the committee regarding specific actions taken.

31. Senator AYOTTE. Secretary McKeon, were detainees later transferred to any country that failed to fulfill an agreement?

Mr. McKEON. DOD defers to the Department of State on providing information to the committee regarding foreign governments' adherence to agreements. DOD reviews previously negotiated security assurances and the status of prior detainee transfers when assessing whether to transfer additional detainees to a country. As required by the National Defense Authorization Act for Fiscal Year 2014 (Public Law 113-66), the Secretary of Defense evaluates and takes into consideration any confirmed cases of former detainee reengagement when considering detainees for transfer to a particular country.

32. Senator AYOTTE. Mr. Rasmussen, of the 33 released/transferred, to what degree do U.S. intelligence officials have the ability to go back to ask the former detainees questions?

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

33. Senator AYOTTE. Mr. Rasmussen, has the United States done that?

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

34. Senator AYOTTE. Secretary McKeon, can the Taliban 5 go back to Afghanistan this summer?

Mr. McKEON. The detainees transferred to Qatar do not currently possess travel documents that would permit their travel to Afghanistan. We remain in continuous communication with the Qatari and Afghan governments regarding the former detainees and their disposition following the expiration of the Memorandum of Understanding regarding their transfer on May 31, 2015.

35. Senator AYOTTE. Secretary McKeon, to be clear, if a released detainee generates terrorist propaganda, this is not technically considered reengagement, correct?

Mr. McKEON. The Intelligence Community (IC) is responsible for assessments regarding former detainee reengagement in terrorist or insurgent activities and should be consulted for a definitive response to this question. The definition of terrorist or insurgent activities published by the IC includes: planning terrorist operations, conducting a terrorist or insurgent attack against Coalition or host-nation forces or civilians, conducting a suicide bombing, financing terrorist operations, re-

cruiting others for terrorist operations, and arranging for movement of individuals involved in terrorist operations.

36. Senator AYOTTE. Secretary McKeon, can a member of al Qaeda or the Taliban play a significant role in terrorist planning and leadership without being in the respective country?

Mr. McKEON. If left alone, it is possible that a member of al Qaeda or the Taliban can play such a role. It is for that reason that the Department of State works with a country that agreed to accept a detainee on provisions to ensure this doesn't happen. It is also the reason the intelligence community continues to focus on threats and the United States continues to work closely with allies and partners on shared security concerns.

37. Senator AYOTTE. Secretary McKeon, have any of the other 28 detainees (not including the Taliban 5) transferred in 2014 or 2015 reengaged in terrorism?

Mr. McKEON. DOD defers to the Office of the Director of National Intelligence on information about former detainees who are confirmed or suspected of reengaging in terrorist activities. On February 27, 2015, the Department of Justice and the Office of the Director of National Intelligence submitted the latest edition of a classified report to this committee in accordance with section 319 of the Supplemental Appropriations Act of 2009 (Public Law 111-32). That report provides a description of the number of individuals released or transferred from Guantanamo who are confirmed or suspected of returning to terrorist activities.

38. Senator AYOTTE. Secretary McKeon, if yes, how so?

Mr. McKEON. DOD defers to the Office of the Director of National Intelligence on information about former detainees who are confirmed or suspected of reengaging in terrorist activities.

39. Senator AYOTTE. Secretary McKeon, of the 107 detainees who are confirmed as reengaging in terrorism, which countries were they transferred to?

Mr. McKEON. DOD defers to the Office of the Director of National Intelligence on information about former detainees who are confirmed or suspected of reengaging in terrorist activities.

40. Senator AYOTTE. Secretary McKeon, what kind of terrorist activities did they participate in?

Mr. McKEON. DOD defers to the Office of the Director of National Intelligence on information about former detainees who are confirmed or suspected of reengaging in terrorist activities.

41. Senator AYOTTE. Secretary McKeon, of the 77 detainees who are suspected of reengaging in terrorism, which countries were they transferred to?

Mr. McKEON. DOD defers to the Office of the Director of National Intelligence on information about former detainees who are confirmed or suspected of reengaging in terrorist activities.

42. Senator AYOTTE. Secretary McKeon, what kind of terrorist activity are they suspected of participating in?

Mr. McKEON. DOD defers to the Office of the Director of National Intelligence on information about former detainees who are confirmed or suspected of reengaging in terrorist activities.

43. Senator AYOTTE. Secretary McKeon, have any former Guantanamo detainees been directly/indirectly involved in attacks against Americans or U.S. or coalition forces?

Mr. McKEON. Unfortunately, former GTMO detainees have been responsible for or have contributed to the deaths of U.S. and coalition personnel since their transfer from GTMO. The Intelligence Community may be able to provide further information in a classified setting as to the details.

44. Senator AYOTTE. Secretary McKeon, have any of these attacks resulted in U.S. or coalition/allied deaths?

Mr. McKEON. Unfortunately, former GTMO detainees have been responsible for or have contributed to the deaths of U.S. and coalition personnel since their transfer from GTMO. The Intelligence Community may be able to provide further information in a classified setting as to the details.

QUESTIONS SUBMITTED BY SENATOR JEANNE SHAHEEN

GUANTANAMO DETAINEE ASSESSMENTS

45. Senator SHAHEEN. Secretary McKeon, Mr. Rasmussen, Admiral Myers, can you explain in detail why the administration considers the assessments conducted by the Guantanamo Review Task Force and the Periodic Review Board to be superior to the assessments conducted previously?

Mr. McKEON. The GTMO Review Task Force (EOTF) was an exhaustive interagency effort that took into account earlier assessments in the course of a more comprehensive review of U.S. intelligence and other information with respect to each detainee.

- The Task Force consisted of more than 60 career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, DOD, Department of State, Department of Homeland Security, Central Intelligence Agency, Federal Bureau of Investigation, and other agencies within the Intelligence Community.
- The Task Force assembled large volumes of information from across the government relevant to determining the proper disposition of each detainee. Task Force members examined this information critically, giving careful consideration to the threat posed by the detainee, the reliability of the underlying information, and the interests of national security.
- Based on the Task Force's evaluations and recommendations, senior officials representing each agency responsible for the review reached unanimous determinations on the appropriate disposition for all detainees. In the large majority of cases, the Review Panel was able to reach a consensus. Where the Review Panel was not able to reach a unanimous decision—or when additional review was appropriate—the Principals met to determine the proper disposition.

Similarly, the interagency Periodic Review Board consists of senior officials from the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff. The Periodic Review Board's decisions are based on more current information than the EOTF determinations. Additionally, Principals from the agencies represented on the Periodic Review Board have the ability to request a review of decisions made by the Periodic Review Board and the Principals must review the decisions if the Periodic Review Board is not able to reach a consensus.

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

Admiral MYERS. Any decisions regarding detainee transfers should be based on all current information. The EOTF was an exhaustive interagency effort which took into account earlier assessments in the course of a more comprehensive review of U.S. intelligence and other information with respect to each detainee. Similarly, the interagency Periodic Review Board's decisions are based on even more current and comprehensive information than the EOTF determinations.

46. Senator SHAHEEN. Mr. Rasmussen, in judging the continued risk posed by individual Guantanamo detainees, does the Intelligence Community believe that more recent risk assessments considered by the Guantanamo Review Task Force and Periodic Review Board offer a better picture of a detainee's risk profile compared to more dated assessments?

Mr. Rasmussen did not respond in time for printing. When received, answer will be retained in committee files.

TRANSFERS TO YEMEN

47. Senator SHAHEEN. Secretary McKeon, a majority of those Guantanamo detainees who have been cleared for transfer are citizens of Yemen, a country that in just the past few weeks has experienced a total collapse of its government. Does the administration have any plans to transfer Yemeni detainees back to their home country as long as the security situation there is so precarious?

Mr. McKEON. No. DOD is not aware of any plans to transfer Guantanamo detainees to Yemen given the current security situation there.

QUESTIONS SUBMITTED BY SENATOR JOE DONNELLY

STABILITY OF THE GUANTANAMO BAY SITE

48. Senator DONNELLY. Secretary McKeon, in January 2015, Cuban President Raul Castro demanded that the United States return the Guantanamo Naval Base to Cuba as a part of normalizing diplomatic relations between our countries. I would not support such a concession given the strategic value of the base. What is DOD's position on that demand?

Mr. McKEON. No. Assistant Secretary of State Roberta Jacobson recently testified to Congress that the issue of the Guantanamo Naval Station closure is not on the table during discussions with Cuban officials.

49. Senator DONNELLY. Secretary McKeon, whether through a political dispute, natural disaster or other circumstances, if the United States were to lose the ability to detain enemy combatants at Guantanamo Bay Naval Base and transfers to the United States remained prohibited, what is the back-up plan for housing the Guantanamo detainees?

Mr. McKEON. I do not foresee a political dispute causing us to lose our ability to detain enemy combatants at Guantanamo Bay. The President as directed the closure of the detention center, and we are working toward that objective. As you note, transfers to the United States are currently prohibited. DOD has no other detention facility outside the United States. There are a number of potential locations in the United States that could safely and securely house detainees should transfers to the United States be permitted.

QUESTIONS SUBMITTED BY SENATOR TIM KAINE

ESCAPEES AND RECIDIVISM

50. Senator KAINE. Secretary McKeon, of the 556 individuals tried and convicted of terrorism related charges in the Federal court system since September 11 has anyone ever escaped?

Mr. McKEON. Although that is a question best answered by the Justice Department, in our interactions with the Justice Department, we have been informed several times that no one convicted of terrorism charges since September 11 has ever escaped from Bureau of Prisons maximum security facilities.

TALIBAN 5

51. Senator KAINE. Secretary McKeon, is there any evidence that any member of the Taliban 5 had ever engaged in violent activity against the United States, or any U.S. personnel, prior to or during the time they were in imprisoned at Guantanamo?

Mr. McKEON. [Deleted.]

TRIALS

52. Senator KAINE. Secretary McKeon, 556 individuals have been tried on terrorism or related charges in Federal court since September 2001. Is it correct that military commissions have only conducted eight terrorism trials during this same period?

Mr. McKEON. Military commission trials have resulted in eight convictions since September 2001. There are currently commissions cases ongoing involving seven other unprivileged enemy belligerents detained at Guantanamo Bay, Cuba. Military commissions are courts of limited jurisdiction created to try unprivileged enemy belligerents in cases that have very unique evidentiary challenges. These are factually and legally complex cases. As various appellate courts reviewed those cases, appellate rulings vacated two convictions and limited the charging options available to the prosecution for future and ongoing cases.

APPENDIX A



COMPTROLLER

UNDER SECRETARY OF DEFENSE
1100 DEFENSE PENTAGON
WASHINGTON, DC 20301-1100

DEC 5 2014

The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Consistent with section 145.8 of OMB Circular A-11, this letter reports the views of the Department of Defense regarding the opinion of the U.S. Government Accountability Office (GAO), dated August 21, 2014, concluding that the Department of Defense's transfer of five detainees from Guantanamo Bay to Qatar without 30 days' advance notice to Congress as described in section 1035(d) of the National Defense Authorization Act for Fiscal Year 2014 violated section 8111 of the Department of Defense Appropriations Act, 2014, and that the Department's obligation of appropriated funds to carry out the transfer therefore violated the Antideficiency Act, 31 U.S.C. § 1341(a). The Department disagrees with GAO's conclusion.

As previously explained to Congress and GAO, the Administration concluded that the transfer of the five detainees could lawfully proceed, in the exercise of the President's constitutional authority to protect the lives of Americans abroad and, specifically, to protect U.S. service members, notwithstanding the absence of 30 days' notice as described in section 1035(d). In response to GAO's request, the Department provided a statement of the Administration's legal views on the application of section 8111 to the transfer (enclosed), in which both the Department of Justice and the Department of Defense concurred, presenting three separate grounds for concluding that the transfer did not violate federal law. First, section 8111 bars the use of funds for transfers that do not comply with section 1035, but section 1035, unlike the version of the provision covering the prior year, conditions the authority to make transfers only on the Secretary's making certain determinations (which the Secretary made), not on his providing advance notice under section 1035(d). Second, even if section 1035 were read to make compliance with the notice requirement a condition on transfers, the provision should not be read, in the absence of a clear statement, to apply where providing the notice would interfere with the President's exercise of his constitutional authority to protect the life of an American service member. Third, if section 1035(d) were nonetheless read to apply in those circumstances, it would be unconstitutional as applied.

Observing that it is not GAO's role to determine the constitutionality of federal statutes, GAO's opinion expressly declined to address the constitutionality of section 8111 or section 1035 as applied in this instance. GAO's opinion similarly failed to take into account the potential constitutional infirmities when construing these statutes. Accordingly, the legal analysis in the opinion is incomplete, and GAO's stated conclusion is unfounded.

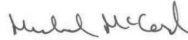


GAO's conclusion with respect to the Antideficiency Act is premised on its analysis of section 8111 and is likewise incorrect. GAO's opinion states: "If an agency incurs an obligation in excess of or in advance of amounts that are legally available, the agency has violated the Antideficiency Act." The opinion further asserts that "DoD obligated funds that were not legally available for obligation because DoD did not satisfy the notification requirements under section 8111." To the contrary, for the reasons explained in the statement of the Administration's legal views, the use of appropriated funds to effect the transfer of the five detainees was lawful under section 8111, either as a matter of statutory interpretation or under separation of powers principles. Because funds appropriated by Congress for purposes including detainee transfers were, under the circumstances presented here, legally available for obligation notwithstanding the absence of 30 days' advance notice, there was no violation of the Antideficiency Act.

The foregoing is concurred in by the Department of Justice.

Identical letters are being submitted to the President, President of the Senate, Speaker of the House of Representatives, Chairman of the House Committee on Armed Services, Chairman of the Subcommittee on Defense of the Senate Committee on Appropriations, Chairman of the Subcommittee on Defense of the House Committee on Appropriations, and Comptroller General of the United States.

Sincerely,



Michael McCord

Enclosure:
As stated

cc:
The Honorable James M. Inhofe
Ranking Member

Administration Views Provided to the Government Accountability Office

July 31, 2014

3. Please provide your legal views on the application of section 8111 of the Consolidated Appropriations Act, 2014 to the transfer of the five individuals.

Under the particular circumstances presented, the transfer of the five individuals at issue was lawful notwithstanding the absence of 30 days' advance notice. Section 8111 of division C of the Consolidated Appropriations Act, 2014, Pub. L. 113-76, 128 Stat. 131, provides that "[n]one of the funds appropriated ... in this Act may be used to transfer any [Guantanamo detainee] to the custody or control of the individual's country of origin, any other foreign country, or any other foreign entity except in accordance with section 1035 of the [National Defense Authorization Act for Fiscal Year 2014 ("FY 2014 NDAA"), Pub. L. 113-66, 127 Stat. 851]." Section 8111 did not prohibit the transfer of the five individuals for one of three possible reasons.

1. Under the best reading of section 8111, that provision prohibits the use of appropriated funds to make a covered transfer only if the transfer is unlawful under section 1035. Here, although questions have been raised about the Administration's compliance with the notice requirement in section 1035(d), the transfer itself was lawful under section 1035, because section 1035 does not make notice a precondition of transfer.

Section 1035(b) states that, except as provided in section 1035(a), "the Secretary of Defense may transfer an individual detained at Guantanamo to the custody or control of ... a foreign country[] only if the Secretary determines" two things—(1) that actions have or will be taken that substantially mitigate the risk that the individual will engage in activity that threatens the United States or U.S. persons or interests and (2) that the transfer is in the national security interest of the United States. Section 1035(c) lists several factors that the Secretary "shall specifically evaluate and take into consideration" "[i]n making the determination specified in subsection (b)," but section 1035 does not impose any other preconditions on the Secretary's authority under section 1035(b) to make transfers. In the case of the transfer of the five individuals, the Secretary made the two determinations required by section 1035(b) after evaluating and taking into consideration the factors specified in section 1035(c). The transfer was therefore lawful under section 1035.

The fact that the Secretary did not provide notice 30 days before the transfer as described in section 1035(d) does not alter that conclusion. Section 1035(d) states that the Secretary "shall notify the appropriate committees of Congress of a determination . . . under subsection . . . (b) not later than 30 days before" a covered transfer, but section 1035(d) specifies no consequence for the failure to make that notification. Thus, while section 1035(d) imposes a legal requirement that the Secretary provide Congress with notice 30 days before making certain transfers, neither it nor any other provision of section 1035 (or the FY 2014 NDAA) states that a transfer that is otherwise authorized by section 1035(b) is rendered unlawful by the absence of the notification.

The language of the transfer restriction in the prior version of the National Defense Authorization Act, the NDAA for Fiscal Year 2013 (“FY 2013 NDAA”), Pub. L. 112-239, 126 Stat. 1914, supports this plain language reading of the FY 2014 NDAA. The FY 2013 transfer restriction stated that, subject to a limited exception, the Secretary could not use any funds available to the Department of Defense to make a transfer “unless the Secretary submit[ted] to Congress” a certification containing specified findings “not later than 30 days before the transfer.” FY 2013 NDAA, section 1028(a) (1). Unlike the language in section 1035 of the FY 2014 NDAA, the FY 2013 language expressly conditioned the lawfulness of a transfer on the Secretary’s notifying Congress 30 days in advance of the transfer. Congress’s deliberate decision not to use that language in the FY 2014 NDAA strongly suggests that the FY 2014 NDAA—as its plain text indicates—does not condition the lawfulness of the transfer itself on the provision of notice.

Accordingly, under this reading of section 8111, the use of appropriated funds to effect the transfer of the five individuals was lawful under section 8111 because the transfer was lawful under section 1035, regardless of whether the Administration complied with any notice requirement imposed by section 1035(d).

2. Section 8111 might be read more broadly, to prohibit the use of appropriated funds to make a transfer not only when the transfer is itself unlawful under section 1035, but also whenever any other applicable requirements in section 1035, including the notice requirement in section 1035(d), are not satisfied. Even under that broader reading, however, the transfer of the five individuals did not violate section 8111 because, under the particular circumstances of this transfer, the absence of 30 days’ advance notice did not violate section 1035(d), for one of two reasons.

a. First, section 1035(d) might be construed as having been inapplicable to this particular transfer. The transfer was necessary to secure the release of a captive U.S. soldier, and the Administration had determined that providing notice as specified in the statute could jeopardize negotiations to secure the soldier’s release and endanger the soldier’s life. In those circumstances, providing notice would have interfered with the Executive’s performance of two related functions that the Constitution assigns to the President: protecting the lives of Americans abroad and protecting U.S. service members. Such interference would “significantly alter the balance between Congress and the President,” and could even raise constitutional concerns; and courts have required a “clear statement” from Congress before they will interpret a statute to have such an effect. *Armstrong v. Bush*, 924 F.2d 282, 289 D.C. Cir. (1991). Congress may not have spoken with sufficient clarity in section 1035(d) because the notice requirement does not in its terms apply to a time-sensitive prisoner exchange designed to save the life of a U.S. soldier. *Cf. Bond v. United States*, 134 S. Ct. 2077, 2090-93 (2014).

b. Second, if section 1035(d) were construed as applicable to the transfer, the statute would be unconstitutional as applied because requiring 30 days' notice of the transfer would have violated the constitutionally-mandated separation of powers. Compliance with a 30 days' notice requirement in these circumstances would have "prevent[ed] the Executive Branch from accomplishing its constitutionally assigned functions," *Morrison v. Olson*, 487 U.S. 654, 695 (1988), without being "justified by an overriding need" to promote legitimate objectives of Congress, *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 443 (1977). As just discussed, the Administration had determined that providing notice as specified in the statute would undermine the Executive's efforts to protect the life of a U.S. soldier. Congress's desire to have 30 days to weigh in on the determination that the Secretary had already made, in accordance with criteria specified by Congress, that the transfer did not pose the risks that Congress was seeking to avoid, was not a sufficiently weighty interest to justify this frustration of the Executive's ability to carry out these constitutionally assigned functions. Thus, even though, as a general matter, Congress had authority under its constitutional powers related to war and the military to enact section 1035(d), that provision would have been unconstitutional to the extent it applied to the unique circumstances of this transfer. And, just as section 1035(d) would be unconstitutional to the extent it was construed as applicable to the transfer, the broader reading of section 8111 would likewise be unconstitutional as applied to that transfer, because it would attempt to impose through the spending power the same unconstitutional requirement that section 1035(d) would attempt to impose directly.

Accordingly, even under this reading of section 8111, the use of appropriated funds to effect the transfer of the five individuals was lawful under section 8111, either as matter of statutory interpretation or under separation of powers principles.

3. Finally, note that GAO itself held that various statutory funding restrictions against U.S. combat operations in Southeast Asia did not apply to the rescue of Americans, including the attempted rescue of the crew of the *Mayaguez*. *Letter to the Hon. Thomas Eagleton*, 55 Comp. Gen. 1081 (1976). Having earlier noted the President's constitutional power to order such rescue operations, GAO stated that "neither the language of the acts nor their legislative histories make clear congressional intent respecting the President's power to rescue Americans abroad," *id.* at 1086, and therefore that "the availability of appropriations for rescue operations for Americans is not flatly precluded by the . . . funding limitation statutes," *id.* at 1088. The literal language of some of the restrictions, GAO conceded, would seem to cover rescue operations, but GAO read that language as aimed at offensive operations, *id.* at 1087. Here, for the reasons described earlier, the literal language of Section 8111 need not be construed to apply to this transfer, and reading the provision to apply to it would have rendered the provision unconstitutional as applied. Accordingly, GAO precedent supports the conclusion that section 8111 did not prohibit the use of appropriated funds to carry out the transfer.

