UNITED STATES OF AMERICA v. KHALID SHEIKH MOHAMMED, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	**D-131/132** Defense Special Request for Relief and Motion for Appropriate Relief: Extension of Time to Submit Witness List and Indefinite Continuance of the R.M.C. 909 Hearing until the Executive Review is Completed and the Law Applicable to Trial by Military Commission is Settled **Ruling**

1. On 5 August 2009, the Military Commission issued a pretrial order requiring the defense to submit its proposed witness list for the Rule for Military Commission (RMC) 909 incompetence determination hearing by 20 August 2009 and to submit any witness production motions by 31 August 2009. On 17 August 2009, detailed counsel for Mr. al Hawsawi filed a special request for relief seeking an enlargement of time to submit the witness list. Counsel asserts that, as the Convening Authority has not identified the forensic psychologist previously ordered produced by the Military Commission,[1] the defense will need at least one

[1] See D-117 Ruling (Defense Motion for Appropriate Relief: Appointment of Expert Consultants).

month to consult with him or her once named to adequately prepare for the scheduled 22-25 September 2009 hearing. On 18 August 2009, counsel for Messrs. al Hawsawi and bin al Shibh filed a joint motion for appropriate relief seeking a delay in the RMC 909 hearings and an indefinite continuance for all commission proceedings until resolution of pending legislation in Congress amending the Military Commissions Act of 2006 and the ongoing interagency review of this case is complete. The government opposes both the special request for relief and the motion for appropriate relief.

2. The Military Commission acknowledges that the evidence phase of the RMC 909 hearings may not be complete by 25 September 2009. Additional sessions may be required, as circumstances dictate. Further, consistent with its orders in P-009 and P-010, the Military Commission does not anticipate issuing a ruling on either accused's competency to stand trial before the Interagency Task Force operating pursuant to Executive order 13492 of January 22, 2009, has made its recommendations and the Review Panel in connection with the same has made a decision as to the disposition of this case. Additionally, although amendments to

the Military Commissions Act of 2006 have been proposed, none of the pending legislative changes appear to impact the RMC 909 hearing and the defense has not presented a compelling argument why the Commission should not begin hearing from witnesses and receiving documentary evidence relevant to the sole issue before it, the accused's current competency to stand trial by military commission.

3. The defense request to extend the filing deadline for its RMC 909 witness list and motions to delay the RMC 909 hearing and indefinitely continue all military commission sessions are DENIED. Absent extraordinary circumstances compelling further delay, the Military Commission will begin the incompetence determination hearings on 22 September 2009.

4. The Military Commission directs that a copy of this order be served upon the prosecution and all defense counsel of record, and that it be provided to the Clerk of Court for public release. The Military Commission further directs the Clerk of Court to have this order translated into Arabic and served upon

each of the above named accused. The underlying defense motion will also be provided to the Clerk of Court for public release, after appropriate redactions for privacy and security considerations

So Ordered this 20th Day of August 2009:

/s/
Stephen R. Henley
Colonel, U.S. Army
Military Judge

Callahan, Shannon Ms, OSD OMC Convening Authority

From: Jackson, Jon MAJ OSD OMC Defense
Sent: Monday, August 17, 2009 11:09 AM
To: [redacted]

[redacted]

ing

Subject: US v Mohammed (al Hawsawi):Special Request for Relief (U)
Signed By: [redacted]

UNCLASSIFIED

Sir:

Please accept this Special Request for Relief in the case of United States v. Mohammed, et al. This request is submitted by detailed counsel for Mr. al Hawsawi.

FACTS

1. On 22 July 2009, counsel for Mr. al Hawsawi submitted a request to the Convening Authority requesting the appointment of a forensic psychologist.

2. On 5 August 2009, the military judge established a deadline of 20 August 2009 for defense witness requests and a 31 August 2009 for motions to compel witness production.

3. As of the date of this request, the Convening Authority has not responded to counsel's request for an expert.

SPECIFIC RELIEF REQUESTED:

4. The defense respectfully requests a delay in a) the deadline for submission of a witness list and b) the RCM 909 until such a time we have a response from the Convening Authority and an opportunity to prepare for the RCM 909 hearing.

JUSTIFICATION

5. Counsel for Mr. al Hawsawi do not have a mental health expert. Without a response from the Convening Authority, a motion to compel production is not ripe. Further even if the request is granted, counsel would not have the

opportunity to meet with the expert and prepare a witness list in advance of the 20 August 2009 deadline. Further, counsel would need time to consult with the expert in preparation of the RCM 909 hearing. In the 22 July 2009 request for expert assistance, defense counsel requested one month of the expert's time to prepare for the upcoming 909.

Major Jon Scott Jackson
Defense Counsel
Office of Military Commissions
office [redacted]
cell [redacted]

MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **KHALID SHEIKH MOHAMMED,** **WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH,** **RAMZI BIN AL SHIBH,** **ALI ABDUL AZIZ ALI,** **MUSTAFA AHMED ADAM AL HAWSAWI**	**D-___** **Defense Motion for Appropriate Relief** Indefinite Continuance of the R.M.C. 909 hearing until the Executive Review is Completed and the Law Applicable to Trial by Military Commission is Settled Dated: 18 August 2009

1. **Timeliness:** This motion is timely filed.

2. **Relief Sought:** Messrs. bin al Shibh and al Hawsawi, by and through detailed defense counsel, respectfully request the Commission continue the proceedings indefinitely, or until such time as:

a. The government provides notice to the Commission and the defense of the final outcome and result of the ongoing interagency review of the present case, as ordered by Executive Order 13492; and

b. If the case is to be tried by military commission, a final resolution is reached as to the status of legislation passed by both houses of Congress, awaiting conference as part of the National Defense Authorization Act for Fiscal Year 2010 (NDAA FY10), that amends the Military Commissions Act of 2006 (MCA) and any subsequent changes made by the President or the Secretary of Defense to the Manual for Military Commissions resulting thereafter.

3. **Overview:**

a. As ordered by the President and repeatedly emphasized by U.S. Government officials, the review of this case remains ongoing. Specifically, the review relevant to the present motion is whether this case will be prosecuted and, if so, whether that will be before military commission or an Article III court. Subsequent to the last session of the Commission, the government announced its presumption that this case will be tried by an Article III court. Thus, the relief sought by the defense is logical, narrowly tailored, and justified to request the case be halted pending resolution of the precise issues (review and legislation) currently being tackled by the Executive and the Congress. What was true when argued by the government in January and May remains true today – "[i]t would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to proceed with this military

commission – a commission that would, if resumed, proceed under a *new set of rules*." (emphasis added)

b. As this is a capital trial, it must not be permitted to proceed in a forum described by the Military Judge as "a system in which uncertainty is the norm and where the rules appear random and indiscriminate." Commission Ruling, D-126, ¶ 5. Thus, the parties cannot litigate the incompetency determination as scheduled because the parties are entitled to notice as to the final nature of the proceedings. Proceeding with the incompetence determination hearing, a critical stage of the proceedings, under the cloud of uncertainty regarding the status of the case and the law applicable to trial by military commissions, would not serve the interests of justice. Rather, denial of the requested relief would only add to the perception that this forum is not a legitimate tribunal that affords judicial guarantees recognized as indispensable by civilized peoples.

4. <u>Burden and Standard of Proof</u>: As the moving party, the defense bears the burden to prove that the requested continuance is in the interests of justice. The burden of proof on any factual issue the resolution of which is necessary to decide whether the government can demonstrate an additional continuance is necessary shall be by a preponderance of the evidence. *See* R.M.C. 905(c)(1).

5. <u>Facts</u>:

a. On 22 January 2009, the President ordered the Secretary of Defense "to take steps sufficient to ensure … that all proceedings of such military commissions to which charges have been referred but in which no judgment has been rendered … are halted." Executive Order (EO) 13492, § 7, 74 Fed. Reg. 4892 (Jan. 27, 2009). EO 13492 also ordered that an interagency review of each detainee's case be conducted to determine whether the detainee was subject to transfer/release, prosecution, or "other disposition." *Id.* at § 4(c).

b. The prosecution moved for a 120-day continuance of the proceedings on 21 January 2009, at a time when Messrs. bin al Shibh and al Hawsawi had hearings docketed to determine their capacity to stand trial. This motion was granted by the Commission on that same date. *See* Commission Ruling, P-009. On 20 May, the prosecution filed a supplemental motion requesting an additional 120 day continuance until 17 September 2009 to complete the review. Counsel for Mr. bin al Shibh took no position on this motion; counsel for Mr. al Hawsawi did not object to the requested relief. The Commission granted the government's motion and scheduled a hearing for 16 July for the purpose to "conduct a status conference to address any unresolved discovery matters related to the incompetence determination hearings for Messrs. Al Shibh and Al Hawsawi." Commission Ruling, P-010, 11 June 2009, ¶ 5. Additionally, the Commission scheduled the R.M.C. 909 hearing to be held for the represented accuseds on 21-25 September 2009.

c. On 9 July 2009, detailed defense counsel for the represented accuseds moved the Commission to delay and defer the session scheduled for 16 July "until such time as the Executive has determined its course of action for the future of military commissions." Defense Motion, D-126, ¶ 2. The government opposed the requested relief. This Motion was denied the

next day, 10 July, and a written ruling was issued on 20 July. *See* Commission Ruling, D-126.

d. A session pursuant to R.M.C. 803 was held in Guantanamo Bay, Cuba on 16 July 2009. Mr. bin al Shibh did not attend the session and the Military Judge determined his absence was voluntary. Mr. al Hawsawi briefly attended the session but requested to be excused. It appeared he had been lured to attend under false pretenses conveyed to him by representatives of the government. The Military Judge excused Mr. al Hawsawi's presence.

e. On 20 July 2009, the Detention Policy Task Force, established by EO 13493, issued a Memorandum to the Attorney General and Secretary of Defense. *See* DPTF Memo, [**Attachment A**]. The Task Force reiterated the President's Order that federal court would be used to prosecute "enemy terrorists." *Id*. at pg. 2. Additionally, the Task Force established a protocol to government disposition of cases referred for possible prosecution which stated, "[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution." *Id*. at Tab A, ¶ 2.

f. On 24 July 2009, the Hon. Jeh Johnson, Department of Defense (DoD) General Counsel, testified before the House Armed Services Committee (HASC), along with Mr. David Kris, Assistant Attorney General, Department of Justice, National Security Division. Mr. Johnson and Mr. Kris previously testified before the Senate Armed Services Committee (SASC) on 7 July 2009. *See, e.g*., Defense Motion, D-126, ¶ 5.a.ii; Attachments B, C. In his written remarks, Mr. Johnson stated that "Mr. Kris and I have agreed upon a protocol for determining when cases for prosecution should be pursued in an Article III federal court or by military commission." *See* Johnson Remarks to HASC, 24 July 2009, pg. 3 [**Attachment B**]. Mr. Johnson echoed the presumption established by the DPTF Memo wherein he stated, "[t]here is a presumption that, where feasible, such cases should be prosecuted in Article III federal courts." *Id*.

g. Before the HASC, Mr. Johnson also spoke about the offense, "Providing Material Support for Terrorism," and stated, "[w]e looked at it carefully and concluded the historical precedent for Material Support for Terrorism as a law of war offense was questionable and therefore Material Support should be prosecuted, if it is prosecuted, in Article III Courts."[1] Mr. Kris again confirmed the Justice Department's conclusion that material support is not a violation of the law of war, by including near-identical remarks that he provided to the Senate:

> There are serious questions as to whether material support for terrorism or terrorist groups is a traditional violation of the law of war. The President has made clear that military commissions are to be used only to prosecute law of war offenses. Although identifying traditional law of war offenses can be a difficult legal and historical exercise, our experts believe that there is a significant likelihood that appellate courts will ultimately conclude

[1] Both Messrs. bin al Shibh and al Hawsawi are charged with Providing Material Support for Terrorism, 10 U.S.C. §950v(b)(25). *See* Charge IX. The conclusion that material support is not a violation of the law of war was first stated by Mr. Johnson and Mr. Kris before the SASC on 7 July 2009. *See* Defense Motion, D-126, Attachments B, C.

> that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the system's legitimacy.
>
> Kris Remarks to HASC, 24 July 2009, pg. 3 [**Attachment C**].

h. CAPT John Murphy, JAG Corps, U.S. Navy Reserve, Chief Prosecutor, Office of Military Commissions, detailed himself to the present case in July 2009. On 21 July 2009, he met with four members of the U.S. House of Representatives, who sit on the HASC, in Guantanamo Bay. During this meeting, CAPT Murphy informed the Congressmen that he is going to ask for another continuance of the present case. The following was stated during the HASC hearing, in an exchange between Congressman J. Randy Forbes and Mr. Johson:

> **Forbes:** And on that, ah... the Chief Prosecutor told us that that is now necessitating that he go in and ask for a continuance on September 11th, which he said is far from certain that he will be granted. Are you familiar with the fact that he's going to have to do that in that proceeding?
>
> **Johnson:** The um-ah... continuances have in fact been granted in the 9/11 case.
>
> **Forbes:** And--and are you familiar with the fact that he's got to ask for one on September 11th because he can't go forward with this trial now, with this ah... tribunal?
>
> **Johnson:** It--it's currently stayed, it's curr--
>
> **Forbes:** Ah... and--and--and he also then told us that there's a very good chance that the judge, since he has already asked for continuances as you mentioned, had--would--may not grant that continuance and if the judge doesn't grant that continuance he has said that he will have to dismiss the charges against the defendant because he can't move forward based on this Executive Order. Are you familiar with that?
>
> **Johnson:** I--I agree that continuances are up to the discretion of the trial judge.
>
> **Forbes:** But you also agree that if he can't get ah... that continuance that he can't move forward with the commission and he will have t--to dismiss those charges?
>
> **Johnson:** Yes.
>
> Transcript, HASC Hearing, July 24, 2009 (Part II) [**Attachment D**]

i. In another exchange during the HASC hearing on 24 July, between Congressman Howard P. "Buck" McKeon, Ranking Member, and Mr. Kris, the following was stated regarding the forum preferences of U.S. Government officials, including the Chief Prosecutor, for detainee cases:

> **McKeon**: We, when we met with the, the four of us that went to, Guantanamo Monday. We had an opportunity to meet with the lead prosecutor. His preference was that all, all of the trials be done in the Mili--, by the Military Commissions.
>
> **Kris**: Um... ok, I mean that is really, that's not the administration's position, that we make a bright-line determination sitting here today, that all of the cases be prosecuted there but rather that they be worked up and evaluated in--in a case by case fact intensive way, looking carefully at all of the elements of the case and then make a decision about which is the appropriate forum
>
> Transcript, HASC Hearing, Part I, July 24, 2009 [**Attachment E**]

j. On 4 August 2009, *The Washington Post* reported that, "[t]he U.S. attorney's offices in Alexandria and Manhattan are embroiled in intense competition over the opportunity to prosecute Khalid Sheik Mohammed, the self-proclaimed mastermind of the Sept. 11, 2001, attacks, *and his co-conspirators*, according to Justice Department and law enforcement sources." Peter Finn, Jerry Markon, Del Quentin Wilber, "Va., N.Y. Districts Vie for 9/11 Case," *The Washington Post*, August 4, 2009, Pg. 1 (emphasis added) [**Attachment F**]. This article described how the respective offices want the trial of the accuseds to be held in its respective jurisdictions.

k. As the government has consistently acknowledged, the review of the present case to determine if it will be prosecuted and, if so, in what forum, is not yet completed. As of 12 August 2009, the status of the present case has been reported. *See* **Attachment G**, Filed UNDER SEAL as it is classified as CONFIDENTIAL.

6. <u>Discussion</u>:

I. THE INTERESTS OF JUSTICE REQUIRE THE INDEFINITE CONTINUANCE BE GRANTED TO AFFORD THE EXECUTIVE TIME TO COMPLETE ITS REVIEW OF THE PRESENT CASE

a. A military judge shall grant a continuance only upon finding that the interests of justice served by taking such action outweigh the best interest of both the public and the accused in a prompt trial of the accused. *See* R.M.C. 707(b)(4)(E)(i). The phrase, "interests of justice" is not defined in the Manual, nor the MCA. However, this phrase has been repeatedly invoked by the prosecution to mean that, in the context of a continuance request, the Commission should not take any action that would "render moot any proceedings conducted during the pendency of the review, necessitate re-litigation of the issues, and produce legal consequences affected the options available to the Administration following its review." Government Motion for 120-Day Continuance, P-009, ¶ 6.c; *see also* Government Motion for Additional 120-Day Continuance, P-010, ¶ 7.c.

b. The Commission previously denied a defense motion for a continuance of the R.M.C. 909 hearing and characterized the relief sought as "an open-ended delay pending

resolution of all conceivable issues by Congress and the Administration." Commission Ruling, D-126, ¶ 5. The defense respectfully submits that characterization of the relief previously sought, and sought in the present motion, is inaccurate. The present request is not a meritless claim, based upon imagination or wild conjecture, for resolution of "all conceivable issues." Rather, the relief sought by the defense is logical, narrowly tailored, and justified to request the case be halted pending resolution of the precise issues (review and legislation) currently being tackled by the Executive and the Congress.

c. The relief sought herein is entirely premised upon the record of Congressional hearings, the bills currently passed before both houses of Congress that await conference,[2] the testimony of public officials, and memorandum of the Detention Policy Task Force. This ample record supports the following facts: the MCA will be amended as part of the NDAA FY10, likely before the end of the fiscal year (30 September 2009); The Executive will make changes to the Manual for Military Commissions after the MCA is amended; this case is currently being reviewed as ordered by the President; there is a presumption that this case will be tried, if at all, in an Article III courtroom. The presumption in favor of Article III courts had not been announced when the Commission last considered whether an indefinite continuance is in the "interests of justice." That this presumption is now policy tips the scale in favor of granting the relief sought.

d. The President's Order was clear – that during the pendency of the Review, all proceedings are to be halted. EO 13492, § 7. Although this order is not binding upon the Military Judge, it necessitates the requested relief be granted. The prosecution has already acknowledged that the "scope of request" in its previous continuance requests was not to exceed any hearing that was in excess of "on the record hearings with counsel, the accused, and the military judge." Government Motion, P-010, fn. 3. In granting the government's request, the Commission noted that "[a]bsent good cause shown for continued delay, said incompetence determination hearings are scheduled for 21-15 September 2009." Commission Ruling, P-010, P 5. The incompetence hearing will include the taking of evidence, including the testimony of over twenty witnesses, and a determination by the Commission that is a critical stage of the proceeding. Without question, it will be beyond the scope of what the government is permitted to do under EO 13942. The Chief Prosecutor admitted as such to the Congress when he told them that if the continuance he is going to seek is denied in September, he will be forced to dismiss the charges. *See* Attachment D, pg. 5.

e. This case remains under review and the ultimate outcome has not yet been determined. *See* Attachment G (UNDER SEAL – CONFIDENTIAL). The policy presumption in favor of Article III courts, coupled with the reporting that two U.S. Attorney's Offices are lobbying the Attorney General to prosecute the present case, is strong evidence that the charges currently pending before the Commission will be withdrawn/dismissed so this case can be transferred for prosecution in a U.S. District Court. However, it is also clear that there are some individuals, including the Chief Prosecutor detailed to the present case, who prefer this, and all detainee cases, be prosecuted by military commission. *See* Attachment E, pg. 2. If the United States Government, at this point in the review process, is unable to speak with a clear, uniform

[2] The respective bills are S.1390 (Senate) and H.R. 2647 (House). The Congress is currently on recess with session scheduled to resume on 8 September 2009.

voice then – "[i]t would be inefficient and potentially unjust to deny the continuance motion in this case before there is a final decision to proceed with this military commission – a commission that would, if resumed, proceed under a new set of rules." Government Motion, P-009, at ¶ 7.c.

II. THE INTERESTS OF JUSTICE REQUIRE AN INDEFINITE CONTINUANCE UNTIL THE NATURE OF THE PROCEEDINGS IS DEFINED AND THE LAW GOVERNING COMMISSIONS IS SETTLED

a. Messrs. bin al Shibh and al Hawsawi face the death penalty. As this is a capital trial, it must not be permitted to proceed "within a system in which uncertainty is the norm and where the rules appear random and indiscriminate." Commission Ruling, D-126, ¶ 5. A capital trial of this magnitude should not be a "learning process," (*See* Transcript ICO *U.S. v. Mohammed, et. al*, 22 September 2008, pg. 30), but the very zenith of judicial guarantees that civilized peoples afford to criminal defendants. As this is a capital case, exacting standards must be met to assure that it is a fair proceeding, and that "extraordinary measures [be taken] to insure that the Accused 'is afforded process that will guarantee, as much as is humanly possible, that [a sentence of death not be] imposed out of whim, passion, prejudice, or mistake.'" *Caldwell v. Mississippi*, 472 U.S. 320, 329 n.2 (1985); *quoting Eddings v. Oklahoma*, 455 U.S. 104, 118 (1981) (O'Connor, J., concurring). Indeed, "[t]ime and again the [Supreme] Court has condemned procedures in capital cases that might be completely acceptable in an ordinary case." *Caspari v. Bolden*, 510 U.S. 383, 393 (1994); *quoting Strickland v. Washington*, 466 U.S. 668, 704-705 (1984) (Brennan, J., concurring in part and dissenting in part); s*ee also Kyles v. Whitley*, 514 U.S. 419, 422 (1995) (noting that the Court's "duty to search for constitutional error with painstaking care is never more exacting than in a capital case.").

b. Previously, the Commission found that the defense motion for a continuance was "unpersuasive given that none of proposed rule changes attributed to the Executive and Legislative Branches thus far will have a direct impact on the only issue currently before the Commission – the RMC 909 incompetence proceedings." Commission Ruling, D-126, ¶ 5. The mental capacity of the accused is an interlocutory question of fact. *See* R.M.C. 909(e)(1). The standard to be applied is that:

> [t]rial may proceed unless it is establish that the accused is presently suffering from a mental disease or defect rendering him or her mentally incompetent to the extent that he or she is unable to understand the *nature of the proceedings* or to conduct or cooperate intelligently in the defense of the case.

R.M.C. 909(e)(2)(emphasis added). Thus, the "nature of the proceedings" is currently at issue before the Commission because it must find the represented accuseds capable of understanding it.

c. The scope of the rules applicable to trial by military commission, as they presently exist, has not yet been defined, and, as discussed herein, the rules are about to change.

Under these circumstances, no person, including the counsel detailed to represent the parties,[3] can fully understand the "nature of the proceedings." The Commission itself acknowledged that the nature of the proceedings is unclear when it stated that this is a system where "uncertainty is the norm and where the rules appear random and indiscriminate." Ruling, D-126, ¶ 5. Thus, the parties cannot litigate the incompetency determination as scheduled because the parties are entitled to notice as to the true nature of the proceedings. *See Lankford v. Idaho*, 500 U.S. 110 (1991) (holding the sentencing process violated the Due Process Clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge may sentence him to death.).

d. At present, the parties are not even sure whether the accuseds are entitled to constitutional and due process rights. The defense has repeatedly moved the Commission to consider this fundamental question and the Commission has refused to do so. Rather, the Commission assured the parties that "[t]he current military commission rules as interpreted by the military judge provide adequate protections and will ensure the fundamental fairness of the incompetency determination proceedings." Commission Ruling, D-126, fn. 2. This assurance provides no guidance to the litigants preparing for this hearing. Indeed, the parties are even unaware whether the Constitution applies or whether the Commission considers itself bound by U.S. Supreme Court precedent.[4]

e. As the Commission has been briefed, the government's characterization of the "nature of the proceeding" in this trial by military commission is much more limited and understated than the defense. *See, e.g.*, Government Response, D-119, ¶4.g. ("It also bears noting that the accused has been constant in his desire to represent himself in these proceedings, plead guilty and proudly assert responsibility for the attacks that killed 2,973 people on September 11, 2001. Should be allowed to do so, his case would likely neither be long nor particularly stressful."). The defense believes, based upon decades of federal and military appellate court opinions, that more due process would be afforded before a death sentence could be announced. The answer to this question, of course, may turn on whether this Commission believes that *stare decisis* applies to these proceedings or whether the only case law applicable, as persuasive authority, would be that of other cases tried by military commission (thus limiting the body of persuasive precedent to a finite number of opinions issued within the last several years). If the latter, detailed counsel will likely be compelled to raise professional responsibility issues regarding their participation in such a proceeding. Regardless, this case is about to enter a critical stage of the proceedings without any notice or resolution of these issues.

f. Indeed, whether any accused could, as the government has repeatedly claimed, plead guilty and "martyr himself," is an open question before the Commission. *See* MJ-010 (Military Judge's Direct Brief). Another illustration as to the uncertainty of the "nature of the proceedings" is that one of the charges currently before this Commission, Charge IX, will likely

[3] Additionally, the defense has repeatedly raised with the Commission the issue that it has not been provided the opportunity to consult with "learned counsel," properly qualified to litigate capital cases, as required under the American Bar Association Guidelines. *See, e.g.*, Defense Motions, D-010, D-085. This fundamental issue, like others, remains unresolved.

[4] As previously briefed, the government itself has made contradictory assertions on this fundamental, yet rudimentary question. *See, e.g.* Defense Motion, D-126, pg. 9.

not even be an offense able to be tried by military commission after the MCA is amended. Both Mr. Johnson and Mr. Kris have on several occasions lobbied the Congress to remove this offense from the MCA because both the Department of Defense and the Department of Justice have concluded it is not a traditional violation of the law of war. *See*, *e.g.*, Attachment C, pg. 3. To proceed with this charge would be in violation of the Supreme Court's ruling that "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war." *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2780 (2006).

III. CONCLUSION

a. The President has pledged to work with Congress to reform military commissions to make them a "fair, legitimate, and effective" venue for trying detainees for offenses in violations of the law of war. Though this review remains ongoing, the commissions as they currently exist have ubiquitously been acknowledged to fall well short of this goal. As the Detention Policy Task Force acknowledged, "[d]espite the benefit of Congressional involvement, the commissions still suffered from a perceived lack of legitimacy." Attachment A, pg. 2. This view was also stated by Mr. Johnson before the HASC, "[m]ilitary commissions can and should contribute to our national security by *becoming* a viable forum for trying those who violate the law of war."

b. Proceeding with the incompetence determination hearing, a critical stage of the proceedings, under the cloud of uncertainty regarding the status of the case and the law applicable to trial by military commissions, would not serve the interests of justice. Rather, denial of the requested relief would only add to the perception that this forum is not a legitimate tribunal that affords judicial guarantees recognized as indispensable by civilized peoples.

7. Request for Oral Argument: In order to ensure a prompt resolution of this matter, the defense waives it right to oral argument. Also, in order to avoid undue waste and expenditure of time and money making logistical plans to secure the presence of witnesses, expert consultants, and commission personnel, the defense respectfully requests the Commission issue a ruling on this matter at the earliest possible date.

8. Request for Witnesses: None.

9. Conference with Opposing Counsel: Pursuant to Military Commissions Rules of Court, Rule 3.3, the defense conferred with the prosecution on 13 August 2009. The prosecution opposes the requested relief.

10. Attachments:

A. Detention Policy Task Force Memorandum, 20 July 2009

B. Johnson Remarks to HASC, 24 July 2009

C. Kris Remarks to HASC, 24 July 2009

D. Transcript, HASC Hearing, July 24, 2009 (Part II)

E. Transcript, HASC Hearing, July 24, 2009 (Part I)

F. Peter Finn, Jerry Markon, Del Quentin Wilber, "Va., N.Y. Districts Vie for 9/11 Case," *The Washington Post*, August 4, 2009, Pg. 1

G. FILED UNDER SEAL (CONFIDENTIAL)

Respectfully submitted,

By: _____
CDR SUZANNE LACHELIER, JAGC, USNR
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Detailed Defense Counsel for
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By: _____
MAJ JON JACKSON, JA, USAR
LCDR GRETCHEN SOSBEE, JAGC, USN
Detailed/Civilian Defense Counsel for
Mr. Mustafa Ahmed Adam al Hawsawi

Attachment A

Detention Policy Task Force

Washington D.C. 20530

July 20, 2009

MEMORANDUM FOR THE ATTORNEY GENERAL
THE SECRETARY OF DEFENSE

FROM: Brad Wiegmann 20 Jul 09
Colonel Mark Martins 20 July 09

RE: ***Preliminary Report***

The Detention Policy Task Force has thus far focused much of its work on developing options for the lawful disposition of detainees held at Guantánamo Bay. Important questions remain concerning our policies in the future regarding apprehension, detention, and treatment of suspected terrorists, as part of our broader strategy to defeat al Qaeda and its affiliates. We need to consider in greater depth how our military, intelligence, and law enforcement personnel will best support these activities; how we can work together more effectively to plan and execute these activities; what the rules and boundaries should be for any future detention under the law of war; how we can best reconcile our intelligence-gathering efforts with any such detention; how we can make both federal courts and military commissions more effective fora for prosecuting terrorists; how international law will apply in this future context; whether to revise our detention policies in Afghanistan in any respect; and how to incorporate reintegration programs into our detention and transfer policies, among other key issues. As it prepares to address this range of issues, the Task Force submits this preliminary report on two matters—military commissions and a process for determination of prosecution forum—on which significant policy decisions have been made.

Military Commissions

In the current conflict with al Qaeda, the Taliban, and affiliated forces, the unlawful activities of our adversaries can in many cases be fairly characterized both as violations of the law of war and as terrorism offenses under our federal criminal code. This reflects the nature of the conflict in which we are engaged, in which the enemy is a non-state actor and criminal enterprise bent on attacking innocent civilians on a massive scale. The President has concluded that, just as the defeat of al Qaeda will require employment of all instruments of national power—military, intelligence, law enforcement, and diplomatic—so too must we have the ability to hold our enemies accountable for their crimes in more than one forum, namely both federal courts and military commissions. The two systems are not mutually exclusive but should instead complement one another.

As the President has concluded, in cases where enemy terrorists have violated our criminal laws, we will, where feasible, prosecute them in federal court. Federal courts have proven on many occasions that they can successfully meet the challenges of international terrorism prosecutions, and the legitimacy of their verdicts is unquestioned. Although these cases can sometimes be complex and challenging, federal prosecutors have successfully convicted many terrorists in federal courts, including in cases involving extraterritorial crimes. A broad range of terrorism offenses with extraterritorial reach are available in the criminal code, and procedures exist to protect classified information in federal court trials where necessary. The evidentiary rules at trial are well-established, and experienced prosecutors can often find ways to overcome any challenges those rules may pose to introduction of critical evidence in specific cases. There are currently many individuals in our federal prisons who were tried and convicted for terrorism-related offenses in our federal courts, including such notorious figures as Sheikh Omar Abdel-Rahman and Ramzi Youssef, convicted in the 1993 World Trade Center bombing; Wadih El Hage, convicted in the 1998 East Africa Embassy bombings; Zacarias Moussaoui, convicted as a co-conspirator in the 9/11 attacks; and would-be shoe-bomber Richard Reid.

That said, it is also clear that federal courts have not traditionally been used to try violations of the laws of war, and that they are not always best suited to the task. In some cases, prosecutions of such crimes in reformed military commissions will offer a more appropriate forum, and in those instances, cases should be prosecuted there. Military commissions have been used by the United States to try those who have violated the law of war for more than two centuries. They have been used during World War II, the Philippine Insurrection, the Civil War, and the Mexican War, and precursor military tribunals were used even before the founding of the Republic by colonial forces during the Revolutionary War. As the Supreme Court explained in *Hamdan v. Rumsfeld*, military commissions were "born of military necessity" and may be convened "when there is a need to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." 548 U.S. 557, 590 (2006) (citing W. Winthrop, *Military Law and Precedents*, (2d ed. 1920)). The Court has made clear that "Congress has the power and responsibility to determine the necessity for military courts, and to provide the jurisdiction and procedures applicable to them." *Id.* at 645.

The prior Administration initially established military commissions without Congressional authorization to prosecute individuals who committed war crimes in the current conflict with al Qaeda, the Taliban, and affiliated forces. Many believed that the procedures for such commissions did not afford adequate process to the accused, and, as a result, the perceived legitimacy of the commissions system was undermined. In 2006, the Supreme Court struck down the commissions as unlawful. *See Hamdan*, 548 U.S. 557. Congress responded quickly by adopting the Military Commissions Act of 2006 (MCA), which provided a detailed statutory system for the commissions that addressed some of the shortcomings of the predecessor system while introducing other areas of controversy. Despite the benefit of Congressional involvement, the commissions still suffered from a perceived lack of legitimacy, in part because of the legacy of the prior system and in part because some of the provisions, such as those that allowed the use of evidence obtained through cruel and inhuman treatment, did not comport with fundamental fairness.

The President has committed to reforming the existing commissions to ensure that they both protect national security and afford due process. As he has concluded, military commissions can and should continue to be available as a forum for the prosecution of our enemies for violations of the laws of war, provided the system is fair, effective, and lawful. Properly reformed military commissions can allow for the protection of sensitive sources and methods of intelligence-gathering; allow for the safety and security of participants; and take into account the realities of the battlefield and the particular challenges of gathering evidence during military operations overseas, while also providing due process to the accused. For example, some of our customary rules of criminal procedure, such as the *Miranda* rule, are aimed at regulating the way police gather evidence for domestic criminal prosecutions and at deterring police misconduct. Our soldiers should not be required to give *Miranda* warnings to enemy forces captured on the battlefield; applying these rules in such a context would be impractical and dangerous. Similarly, strict hearsay rules may not afford either the prosecution or the defense sufficient flexibility to submit the best available evidence from the battlefield, which may be reliable, probative and lawfully obtained.

Military commissions that take into account these concerns are necessarily somewhat different than our federal courts, but no less legitimate. The principal factors that make military commissions a distinct and appropriate forum lie in the military character of the proceedings and the nature of the offenses subject to their jurisdiction (i.e. violations of the law of war). Their jurisdiction is substantially narrower than our federal courts: they are properly used only in connection with an armed conflict, and only to prosecute offenses against the law of war committed in the course of that conflict. Like federal court prosecutions, however, military commission prosecutions are ultimately subject to Supreme Court review and must afford process to the accused sufficient to withstand judicial scrutiny. As Justice Kennedy has noted, the question of what process is "due" takes into account the "particular context." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 278 (1990) (Kennedy, J., concurring). In this context, we recognize that the Court may apply certain due process protections for the accused, while also affording a measure of deference to the political branches with regard to rules that acknowledge national security interests.

If military commissions are to serve as a legitimate part of the U.S. justice system, significant reforms are appropriate to ensure that they are lawful, fair and effective. On May 15, the Administration announced five rule changes—developed with the support of the Judge Advocates General, the Staff Judge Advocate to the Commandant of the Marine Corps, and the Legal Counsel to the Chairman of the Joint Chiefs of Staff—as a first step toward meaningful reform of the commissions established by the MCA. These rule changes prohibit the admission of statements obtained through cruel, inhuman, and degrading treatment; provide detainees greater latitude in the choice of counsel; afford basic protections for those defendants who refuse to testify; reform the use of hearsay by putting the burden on the party trying to use the statement; and make clear that military judges may determine their own jurisdiction. Each of these changes enhances the fairness and the legitimacy of the commission process without compromising our ability to bring terrorists to justice.

In late June, the Senate Armed Service Committee (SASC) took the next step by reporting to the full Senate legislation (section 1031 of S.1390) to reform the MCA. As

Administration officials stated in their testimony before the Committee on July 7, the Administration believes that the SASC bill has identified most of the key elements that need to be changed in existing law and is a good framework for reforming the commissions. In many areas, the Administration fully supports the provisions adopted by the SASC, while in others the Administration has identified a somewhat different approach, and is committed to working with the Committee and other members of Congress to address these limited differences. Among the important changes to the MCA that the Administration supports are: (1) codifying in law a prohibition on use of statements obtained through cruel, inhuman and degrading treatment; (2) further regulating the use of hearsay, to bring the rule more in line with the rules in federal court or courts-martial while preserving an important exception pertaining to the unique circumstances of military and intelligence operations; (3) adopting a "voluntariness" standard for the admission of statements of the accused, while taking into account the challenges and realities of the battlefield; (4) incorporating classified information procedures that are more similar to those applicable in federal court, but appropriately modified for the military commissions context, and to reflect lessons learned in terrorism prosecutions; (5) reforming the appellate process to give reviewing courts more authority to correct both legal and factual errors at the trial level; (6) adopting clear rules requiring the government to disclose exculpatory evidence to the accused; (7) ensuring that the offenses charged in military commissions are law of war offenses; and (8) including a sunset provision requiring Congress to reevaluate the legislation after a term of years. We believe these and other changes will make it possible to have military commissions that are fair, effective, and lawful, without compromising our ability to bring terrorists to justice.

Statutory and rule changes alone are not sufficient to ensure that military commissions function fairly and effectively, however. We continue to work to ensure that military commissions prosecutors and defense counsel have the resources necessary for their work, including adequate translation services, timely hearing transcripts, and expert witnesses. We are also focused on whether defense lawyers detailed to represent detainees accused of capital crimes, in particular, have adequate resources and training. The Administration is committed to responding to these concerns and ensuring that both defense counsel and prosecutors are provided sufficient resources to perform their functions, consistent with their professional obligations. We note that military commission defense counsel, prosecutors, judges, and other officials have amply demonstrated their professionalism, integrity, and independence in the cases that have been litigated thus far.

Prosecution Forum Decisions

As with the overlapping jurisdiction of federal and state courts, or U.S. and foreign courts, the availability of both federal courts and military commissions to prosecute al Qaeda and affiliated forces will create choices for prosecutors. These must be fact-intensive and case-by-case determinations, based on a broad set of factors, in keeping with standards traditionally used by federal prosecutors. Accordingly, the Departments of Justice and Defense have developed a set of criteria for determining when a case should be prosecuted in a reformed military commission rather than in federal court. See Tab A. These criteria include the nature of the offenses to be charged; the identity of victims of the offense; the location in which the offense occurred and the context in which the defendant was apprehended; evidentiary issues; and the extent to which the forum would permit a full presentation of the accused's wrongful conduct,

among others. Decisions about the appropriate forum for prosecution of Guantánamo detainees will be made on a case-by-case basis in the months ahead.

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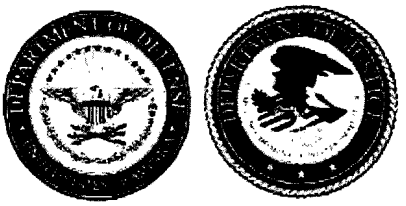
Justice for the many victims of the ruthless attacks of al Qaeda and its affiliates has been too long delayed. Prosecution is one way, but only one way, to protect the American people from such attacks. Where appropriate, prosecution of those responsible must occur as soon as possible, whether in federal court or before a military commission. Justice cannot be done, however, unless those who are accused of crimes are proved guilty beyond a reasonable doubt in a court of law that affords them a full and fair opportunity to contest the charges against them.



Determination of Guantanamo Cases Referred for Prosecution

This protocol governs disposition of cases referred for possible prosecution pursuant to Section 4(c)(3) of Executive Order 13492, which applies to detainees held at Guantanamo Bay, Cuba.

1. Process for Determination of Prosecution. When a case is referred, it will be assigned to a team composed of Assistant United States Attorneys, attorneys from the National Security Division (NSD) of the Department of Justice (DOJ), and personnel from the Department of Defense (DOD), including prosecutors from the Office of Military Commissions, which will further investigate and develop the case for prosecution.

Thereafter, the prosecution team will recommend, based on the factors set forth below, whether the case should be prosecuted in an Article III court (including venue) or a reformed military commission. If the prosecution team concludes that prosecution is not feasible in any forum, it may recommend that the case be returned to the Executive Order 13492 Review for other appropriate disposition.

NSD and the participating DOD entities will then jointly determine whether the case is feasible for prosecution, and the appropriate forum (and if necessary, venue) for that prosecution. They will transmit that determination to the Attorney General through the Deputy Attorney General, along with materials from any DOJ or DOD entity that disagrees with the determination. The Attorney General, in consultation with the Secretary of Defense, will make the final decision as to the appropriate forum and (if necessary) venue for any prosecution. Where a case is to be prosecuted, both DOJ and DOD will be expected to support the prosecution regardless of forum and venue.

2. Factors for Determination of Prosecution. There is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution. Nonetheless, where other compelling factors make it more appropriate to prosecute a case in a reformed military commission, it may be prosecuted there. That inquiry turns on the following three broad sets of factors, which are based on forum-selection factors traditionally used by federal prosecutors:

A. Strength of Interest. The factors to be considered here are the nature of the offenses to be charged or any pending charges; the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities.

B. Efficiency. The factors to be considered here are protection of intelligence sources and methods; the venue in which the case would be tried; issues related to multiple-defendant trials; foreign policy concerns; legal or evidentiary problems that might attend prosecution in the other jurisdiction; and efficiency and resource concerns.

C. Other Prosecution Considerations. The factors to be considered here are the extent to which the forum, and the offenses that could be charged in that forum, permit a full presentation of the wrongful conduct allegedly committed by the accused, and the available sentence upon conviction of those offenses.

3. Independence of Authorities. Nothing in this protocol is intended to restrict, and will not restrict, the appropriate exercise of independent discretion within the respective justice systems, including disposition of cases not referred to trial. Federal prosecutors will evaluate their cases under traditional principles of federal prosecution, including the standards set forth in Sections 9-27.220 and 9-27.240 of the United States Attorneys' Manual.

4. Disclaimer of Rights. This document is not intended to create any rights, privileges, or benefits to prospective or actual defendants in any forum. See *United States v. Caceres*, 440 U.S. 741 (1979).

Attachment B

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Attachment C

Department of Justice

STATEMENT OF

DAVID KRIS
ASSISTANT ATTORNEY GENERAL

BEFORE THE

ARMED SERVICES COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES

ENTITLED

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

PRESENTED

JULY 24 2009

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I will be happy to answer any questions you have.

Attachment D

United States House of Representative

House Armed Services Committee

Friday, July 24, 2009 - 10:00am - 2118 Rayburn - Open

The full committee will meet to receive testimony on reforming the Military Commissions Act of 2006 and detainee policy.

Video Webcast Part II (1:46:47)
(Partial transcription from 11:15 to 17:30)

Witnesses:

The Honorable Jeh Charles Johnson General Counsel U.S. Department of Defense

The Honorable David Kris

Assistant Attorney General

U.S. Department of Justice

Forbes: Thank you... I was with the group that went down to Guantanamo on Monday. Ah... we did meet with your Chief Prosecutor, Mr. Johnson. He's under your jurisdiction, I would take it, is that correct, under your department?

Johnson: The Office of General Counsel has um... supervisory authority over the OMC.

Forbes: You're familiar—you're familiar with Mr. Murphy and his confidence and I take it he's the best guy we have to be in that Chief Prosecutor position or he wouldn't be--

Johnson: He is an experienced professional prosecutor, Yes Sir.

Forbes: I want to narrow in on the 9/11 defendants because we talk about detainees and sometimes we don't have faces with names but as to the 9/11 defendants who are detainees there who are undergoing this prosecution, there's been a referral. Um... that's ah... being prosecuted or was being prosecuted. The Chief Prosecutor said his goal was to get justice for the victims of

terror and for the citizens of the United States. Is that a fair and just goal?

Johnson: That is a fair and just goal for the United States government, Yes Sir.

Forbes: Um... is that the goal of this administration?

Johnson: Ah... yes, Sir.

Forbes: Ah... if that's the case and that is a standard, should that standard be changed simply because someone has a perception that that standard is wrong?

Johnson: I don't believe so.

Forbes: Um... in that particular case then, I want to go to the 9/11 attacks and the prosecution that's undergoing there. Are you aware of the number of pleadings and motions that have already been resolved in that one, um... proceeding alone?

Johnson: I know that in that case and in several others of the pending cases we have as many as perhaps a hundred (100) pretrial motions that have been resolved, Yes Sir.

Forbes: In that particular case and Mr. Chairman I would ask that this be submitted as part of the record it's

from the Department of Defense listing fifty-six (56) motions that have already been resolved in that one (1) proceeding.

Skelton: Without objection.

Forbes: Um... and, and of those fifty-six (56) um... Mr. Murphy told us when we were down there on Monday, the Executive Order the president signed didn't just talk about a review, as you mentioned earlier, but it actually stayed the proceedings for the military tribunals going on. Is that correct?

Johnson: Yes, Sir.

Forbes: And on that, ah... the Chief Prosecutor told us that that is now necessitating that he go in and ask for a continuance on September 11th, which he said is far from certain that he will be granted. Are you familiar with the fact that he's going to have to do that in that proceeding?

Johnson: The um-ah... continuances have in fact been granted in the 9/11 case.

Forbes: And--and are you familiar with the fact that he's got to ask for one on September 11th because he can't go forward with this trial now, with this ah... tribunal?

Johnson: It--it's currently stayed, it's curr--

Forbes: Ah... and--and--and he also then told us that there's a very good chance that the judge, since he has already asked for continuances as you mentioned, had--would--may not grant that continuance and if the judge doesn't grant that continuance he has said that he will have to dismiss the charges against the defendant because he can't move forward based on this Executive Order. Are you familiar with that?

Johnson: I--I agree that continuances are up to the discretion of the trial judge.

Forbes: But you also agree that if he can't get ah... that continuance that he can't move forward with the commission and he will have t--to dismiss those charges?

Johnson: Yes.

Forbes: And--and if he has to dismiss those charges, why in the world would the administration put him in a

position to risk dismissing the charges against the 9/11 defendants?

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

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

Johnson: Because on--in--in certain context ah... people who violate the laws of war or violate federal criminal laws should be brought to justice--

Forbes: Did the--did the defend--

Johnson: The public I think expects that.

Forbes: Is it your opinion, your personal opinion that the individuals, the defendants in the 9/11 um... attacks

violated ah... were acts of war or were they violations of criminal law?

Johnson: I cannot comment on a particular case, I don't think it would be prudent for me to do that given my position in the department, Sir.

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

Kris: I--I'm not going to testify in my personal opinion, but I think um... it is fair to say that they are both--

Forbes: Mr. Kris, you're not prepared to give us your personal opinion when you came here? Every other wit-- well, I'm out of time, I'll hopefully come back but I want to just prep y'all when I do get some more time. We've been asking all of our witnesses their personal opinions when they come in here, that's what we look to you for. Mr. Chairman my time's out.

Kris: Congressman, I beg your pardon, I--I just want to make clear, I'm testifying as an administration witness. I know some of the military officials can testify in their personal capacity and give their personal opinions but I will say that I think the 9/11 attacks are both violations of the law of war and of the criminal laws of the United States.

Forbes: Thank you, (NOT AUDIBLE)

Skelton: Mr. Kris, you understand the difference between a case being dismissed with prejudice of dismissed without prejudice? You understand the difference?

Kris: I do, yes.

Skelton: If it's dismissed without prejudice, it may be re-filed. Am I correct?

Kris: Yes

Skelton: If it's dismissed with prejudice, that person may not be tried under the same charge. Is that correct?

Kris: That would normally be true, yes.

Forbes: Mr. Chairman?

Skelton: Yes.

Forbes: Would--would the gentlemen yield.

Skelton: Yes.

Forbes: Based on that line of questioning I'd just like to put in the record that the Chief Prosecutor would agree that there might be a possibility that he can re-file this but the problem would be that--and I think Mr. Larson and Mr. McKeon would agree that he said that it--it could take another eighteen (18) months just to get where they are right now because of all these proceedings because they'd have to start from scratch and also that it could be that the speedy trial laws would actually prohibit him from bringing the case again. All of that's up in the air. And I'll just yield back, thank the gentlemen.

Attachment E

United States House of Representative

House Armed Services Committee

Friday, July 24, 2009 - 10:00am - 2118 Rayburn - Open

The full committee will meet to receive testimony on reforming the Military Commissions Act of 2006 and detainee policy.

Video Webcast Part I (51:19)
(Partial transcription from 30:30 to 34:34)

Witnesses:

The Honorable Jeh Charles Johnson
General Counsel
U.S. Department of Defense

The Honorable David Kris
Assistant Attorney General
U.S. Department of Justice

McKeon: We, when we met with the, the four of us that went to, Guantanamo Monday. We had an opportunity to meet with the lead prosecutor. His preference was that all, all of the trials be done in the Mili--, by the Military Commissions.

Kris: Um... ok, I mean that is really, that's not the administration's position, that we make a bright-line determination sitting here today, that all of the cases be prosecuted there but rather that they be worked up and evaluated in--in a case by case fact intensive way, looking carefully at all of the elements of the case and then make a decision about which is the appropriate forum but that we do that working together, the way Jay and I have worked together, ah... on the protocol. Um... and the second, I guess, point to make about it is that these kinds of forum-selection-choices are--are not alien to government officials; they're similar to, ah... choices that have to be made all the time. Whether it be between a federal and a state court,

between a U.S. court and a foreign court, between a federal court and a UCMJ proceeding--

McKeon: Look, this situation is kind of unique though, with this--

Kris: Absolutely--

McKeon: The terrorist situation and, and the problems we've had leading up to, to this--

Kris: You are absolutely right--

McKeon: Are--are you concerned, at all, that--that dividing up into two systems and the preference that going to one or the other might buttress the--the ah... view that Military Commissions are second class type courts?

Kris: I mean it's a very good point. I mean, first, I don't mean to minimize the challenges associated with this. It is a unique situation. Um... we are working hard, Jay and I and--and people in our shops to do this--to do this right. Um... it's difficult, challenging, consequential, we think we can do it; um... we are set up to do it. Um... I think it's

vitally important on the last point you made to understand we are working very very hard with the Congress now. We're actively discussing amendments to the Military Commissions Act with the Senate counterpart of this committee. We--

McKeon: You're--who--you're working with the Congress—who--who in the Congress are you working with?

Kris: Well the--the Senate Arms Services Committee as you know has reported out the, a Levi... Senator Levins Bill--

McKeon: They--they passed a bill last night and I have--I have it here that they say it's the sense of Congress that the preferred forum for the trial of al--alien unprivileged enemy belligerent subject to this chapter for violations of law of war and other offenses made punishable by this chapter is trial by Military Commission under this chapter.

Kris: No, I--I'm aware of that and I--I appreciate that that's the sense of--of that committee and the possible sense of the Congress. Wh--what I meant was

that, just to respond to the second class justice point, we--we are investing and the Congress is investing a huge amount of energy and effort to reform Military Commissions Act in a variety of ways, as you know, and we think with those reforms the Military Commissions system would not be a second class justice system. It would be a first class--

McKeon: No, I don't think it is. What my question was, do we think that the perception would be that it is because of this prejudging and moving some to one tr--trial some to oth--another?

Kris: Um... we don't--

McKeon: Let me, let me--

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

McKeon: But there has to--by definition, there would have to be some judgment made if you decide that one goes here and one goes there--

Kris: That's absolutely right, and we'll do that--

McKeon: And that, and we--and we really can't control the perception of that process once the media or other people get hold of it. We can't control how the perception will be.

Kris: Well, heh... it's certainly true that I don't make any claim to be able to control the media, um... but Mr. Johnson and I are here--

McKeon: Probably nobody in this room does.

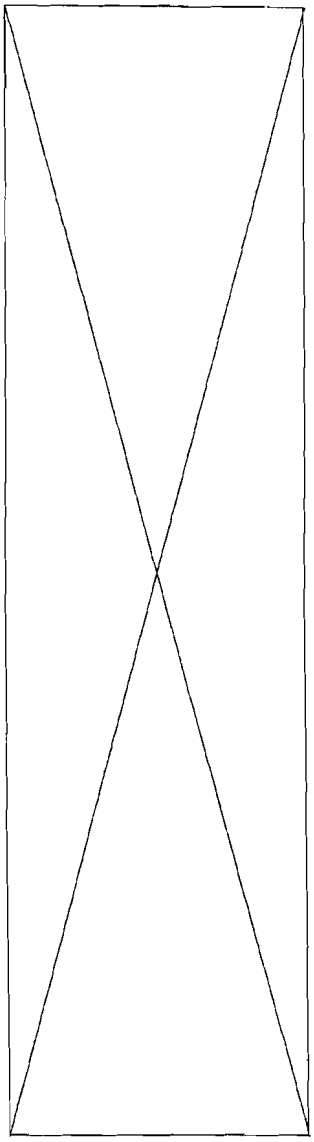
Kris: But we're here to tell you and I think to tell people who are listening to this, that it is not the case that, ah... Military Commissions, as we're proposing to reform them, will be second class.

Attachment F

The Washington Post

Va., N.Y. Districts Vie for 9/11 Case

U.S. Attorneys Seek Trial of Alleged Leader Mohammed



By Peter Finn, Jerry Markon and Del Quentin Wilber
Washington Post Staff Writers
Tuesday, August 4, 2009

The U.S. attorney's offices in Alexandria and Manhattan are embroiled in intense competition over the opportunity to prosecute Khalid Sheik Mohammed, the self-proclaimed mastermind of the Sept. 11, 2001, attacks, and his co-conspirators, according to Justice Department and law enforcement sources.

At a time when many state officials are determined to keep suspected terrorists out of their jurisdictions, federal prosecutors are in a hidden struggle to have potentially history-making trials held in their districts. "There's competition on all of these guys, and that's to be expected -- these are big cases," said a Justice Department official, who spoke on the condition of anonymity Monday because of the sensitivity of the deliberations.

The two U.S. attorney's offices have a history of competition, ever since Alexandria prosecutors were chosen to make the case against Zacarias Moussaoui, the only person involved in the Sept. 11 conspiracy to be tried in the United States. The competition over Moussaoui grew so intense that it led to a compromise: The case was brought in Alexandria by a Justice Department team that included a New York-based prosecutor.

In an effort to meet President Obama's commitment to close the U.S. military prison at Guantanamo Bay, Cuba, by January, the Justice Department has begun to send the files of approximately 30 detainees to U.S. attorney's offices in the District of Columbia, Alexandria and the Southern and Eastern districts of New York. Federal prosecutors are being asked to determine which terrorism suspects can be tried in federal criminal court, according to Justice Department sources.

Each office is also working with Defense Department prosecutors to decide if some cases should be assigned to military commissions. The Obama administration suspended the work of the commissions in January, but has since said it will revive them with modifications that would give detainees greater legal rights.

"There is a presumption, where feasible, that referred cases will be prosecuted in federal court," said David Kris, assistant attorney general for national security, speaking before a Senate Judiciary subcommittee last week. "But that presumption can be overcome if other compelling factors make it more appropriate to prosecute in the commission."

Justice Department officials expect each federal jurisdiction to end up with a handful of high-profile criminal trials. The department, for instance, is considering assigning to the U.S. District Court for the

District of Columbia the case of Riduan Isamuddin, better known by his nom de guerre, Hambali. The Indonesian is accused of leading the Jemaah Islamiah group, an organization allied with al-Qaeda that is accused of staging the 2002 Bali nightclub bombing.

Hambali was captured in Thailand in August 2003 and was held in a secret CIA prison until September 2006, when he was transferred to Guantanamo Bay. He is among 16 detainees held at the top-secret Camp 7 at Guantanamo Bay, but he has never been charged in a military commission. There are 229 detainees remaining at the prison.

Federal prosecutors recently met with the District's chief judge, Royce C. Lamberth, to discuss the prospect of some detainees being tried in his courthouse, the sources said. Lamberth could not be reached for comment Monday.

Attorney General Eric H. Holder Jr. met separately with the U.S. attorneys from various jurisdictions last week amid what two law enforcement sources described as fierce lobbying over the assignment of cases.

"Holder was brought in to hear people out," said one law enforcement source in Virginia. Officials at the U.S. attorney's offices in Alexandria, the District and New York declined to comment.

The Associated Press reported Monday that Holder had met with the officials, but that account did not specify that prosecutors were vying for certain cases.

Officials said that prosecutors in the Eastern District of Virginia argued that they should get the case of Mohammed and possibly four others who were charged in a military commission at Guantanamo Bay with organizing the attacks on New York and the Pentagon. The Alexandria prosecutors are citing their office's experience in high-profile terrorism cases, especially the prosecution of Moussaoui.

Both local and state officials in Virginia have said they are opposed to any trials of Guantanamo Bay detainees in Alexandria, citing security issues and disruption to the life of the city. Justice Department officials also cautioned that security concerns could be a key factor in deciding where to hold certain trials. The attack on the Pentagon in Arlington allows prosecutors in Virginia to claim jurisdiction.

Federal prosecutors in the Southern District of New York think the men who orchestrated the attack on the World Trade Center, especially Mohammed, should be tried in Manhattan. Before Sept. 11, New York was the site of numerous high-profile terrorist trials, including the prosecution of those involved in the first attack on the World Trade Center, in 1993, and the 1998 East Africa embassy bombings.

Ahmed Ghailani, the first Guantanamo Bay detainee sent to the United States for criminal trial, was sent in June to the Southern District of New York. Ghailani, a Tanzanian, pleaded not guilty to charges that he helped plan the embassy bombings in Kenya and Tanzania, which killed 224 people, including 12 Americans. The transfer generated little opposition in New York.

Separately, the administration is considering the creation of a hybrid prison-courthouse complex to house those remaining detainees not returned home or transferred to third countries. Administration officials said an interagency task force has cleared for release more than 50 of the detainees, and the State Department is negotiating with dozens of countries in an effort to resettle them.

Officials said they are considering Fort Leavenworth, Kan., and the Standish Maximum Correctional Facility in Michigan as sites for Guantanamo Bay detainees.

Republican members of the Kansas congressional delegation and the state's Democratic governor said they are opposed to the use of Fort Leavenworth.

"Housing foreign combatants is outside the mission parameters of Fort Leavenworth," said Gov. Mark Parkinson in a statement Monday. "To dramatically change its mission now would mean undoing more than a century's worth of work in teaching and training our military leaders. The stigma of what Guantanamo Bay has come to represent must not be attached to the Heartland."

Some Michigan politicians said they are open to converting a state prison to hold Guantanamo Bay detainees.

"I have spoken with local officials, who have indicated a willingness to listen to a proposal the administration might put forward," said Rep. Bart Stupak (D-Mich.), whose district includes Standish. "Officials from the departments of Defense, Homeland Security and Justice will be visiting sites under consideration over the next few weeks. It is important to remember that Standish is just one option under consideration and no decision has been made. . . . Any proposal must have a comprehensive security analysis and economic and job-creation implications."

Staff researcher Julie Tate contributed to this report.

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Attachment G

To be filed with the Senior Security Advisor
UNDER SEAL