

**Responses of Michael J. Edney
Questions for the Record**

**United States Senate Committee on the Judiciary
Subcommittee on Terrorism and Homeland Security
“Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond”**

Questions from Senator Kyl

1. You mentioned in your written statement that Congress has exclusive authority to determine who may enter this country. Has Congress authorized the Executive Branch to bring Guantanamo detainees to the United States?

The Supreme Court repeatedly has held that the Congress has exclusive authority to determine who may enter the United States.¹ For this proposition, the Court has relied on the explicit grant of authority to the Congress in the Constitution’s Naturalization Clause.² Accordingly, the Executive and Judicial Branches generally require the statutory authorization of the Congress before effecting the physical entry of an alien into the United States.

Only an aggressive interpretation of current statutory immigration law in favor of the Executive Branch would authorize the contemplated transfer of Guantanamo detainees to the

¹ *Demore v. Kim*, 538 U.S. 510, 521-22 (2003); *Reno v. Flores*, 507 U.S. 292, 305-06 (1993); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Matthews v. Diaz*, 426 U.S. 67, 81 (1976); *Kleindienst v. Mandel*, 408 U.S. 753, 765-66 (1972); *Graham v. Richardson*, 403 U.S. 365, 377 (1971); *Galvan v. Press*, 347 U.S. 522, 530 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 596 (1952) (Frankfurter, J., concurring); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-64 (1941); *Tiaco v. Forbes*, 228 U.S. 549, 556-57 (1913); *Fok Yung v. United States*, 185 U.S. 296, 302 (1902); *Wong Wing v. United States*, 163 U.S. 228, 237 (1896); *Lem Moon Sing v. United States*, 158 U.S. 538, 543, 547 (1895); *Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893); *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *The Chinese Exclusion Case*, 130 U.S. 581, 609 (1889).

² U.S. CONST. Art. I, § 8, cl. 4.

United States.³ This is especially so for individuals the Executive Branch continues to believe are members of al Qaeda-affiliated terrorist organizations and do not intend to try in federal court. Importantly, these immigration law questions are entirely independent of recent measures restricting the use of certain appropriations funds for transfers into the United States.⁴ The safer course would be for the Executive Branch to obtain explicit authorization from the Congress for any transfer of detainees into the United States prior to the closure of Guantanamo.

The Immigration and Nationality Act (“INA”), 8 U.S.C. § 1101 *et seq.*, governs the entry of aliens into the United States. The INA broadly prohibits admission into the United States of aliens who have engaged in terrorist activity, or who the Attorney General or the Secretary of Homeland Security knows or has a reasonable grounds to believe has engaged in terrorist activity.⁵ “Engaged in terrorist activity” is defined to reach conduct well beyond completing or attempting a terrorist act. It explicitly prohibits admitting members of terrorist organizations, those who endorse or espouse terrorist activity, and those who have received military-type training on behalf of a terrorist organization.⁶ The INA provides the Secretary of State with the

³ *But see* Remarks by the President on National Security, National Archives, Washington, DC (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (“We must recognize that these detention policies cannot be unbounded. They can’t simply be based on what I or the Executive Branch decides alone. That’s why my Administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law.”).

⁴ *See, e.g.*, H.R. 2892 § 553.

⁵ *See* 8 U.S.C. § 1182(a)(3)(B).

⁶ *Id.* at § 1182(a)(3)(B)(iv)-(ix).

authority to waive some terrorism-related restrictions, but expressly denies waiver authority for the above categories.⁷

The INA authorizes the Executive Branch to allow otherwise inadmissible aliens into the United States under certain specified circumstances. The Attorney General may “parole into the United *temporarily* . . . for urgent humanitarian reasons or significant public benefit any alien *applying for admission* to the United States.”⁸ This authority is a poor fit for transferring all categories of Guantanamo detainees to the United States. Parole authority reaches only aliens “applying for admission,” consistent with providing the Attorney General authority to make limited and temporary exceptions for those voluntarily seeking entry to the United States. Guantanamo detainees are not applying for admission to the United States in any traditional sense: They are held involuntarily and would be transferred to the United States against their will.⁹ In addition, many detainees transferred from Guantanamo would not be present in the United States “temporarily.”

⁷ See 8 U.S.C. § 1182(d)(B)(1). To be sure, the Executive Branch determines who meets the statutory criteria for having “engaged in terrorist” activity. But determining that a Guantanamo detainee does not meet the statutory criteria for having “engaged in terrorist activity” would be inconsistent with any theory of holding the person once in the United States, either for prosecution in federal court for terrorist acts, or for prosecution by military commission for violation of the laws of war, or as a member of al Qaeda under the laws of war.

⁸ 8 U.S.C. § 1182(d)(5); (emphasis added); *see also* Letter from Attorney General Eric Holder to Senator Jeff Sessions (June 16, 2009) (citing parole authority under 8 U.S.C. § 1182(d)(5) for transfer of detainees from Guantanamo into the United States).

⁹ The D.C. Circuit noted this feature of the immigration laws in overturning a lower court ruling ordering entry into the United States. *See Kiyemba v. Obama*, 555 F.3d 1022, 1031 (D.C. Cir. 2008), *cert. granted* __ S. Ct. __ (Oct. 21, 2009) (“explaining that a Guantanamo detainee “(a) has never entered or attempted to enter the country, and (b) *has never applied*

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Some transfers could be argued to be similar to extradition. The Attorney General's Board of Immigration Appeals has referred to the extradition of an alien criminal defendant as an exercise of parole authority, and extradition is also involuntary. The BIA neither addressed the subject at length nor analyzed section 1182(d)(5) as amended by the Illegal Immigration & Immigrant Responsibility Act of 1996.¹⁰ Nor did the BIA consider the interaction of parole authority and the specific prohibition on terrorist entry. The practice of extradition for criminal prosecution in federal court may be better rooted in the express statutory authority for extradition or as a long-standing custom not explicitly barred by statute, rather than as parole.¹¹ Even if

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for admission under the immigration laws.") (emphasis added). Cf. *Wang Zong Xiao v. Reno*, 837 F. Supp. 1506, 1563 (C.D. Cal. 1993) (suggesting that "applicant for admission" refers to merely presenting one's self at the border and does not entail an inquiry into voluntariness); INS General Counsel Op. No. 98-10, *Authority to Parole Applicants for Admission Who Are Not Also Arriving Aliens* (Aug. 21, 1998) (stating that an "applicant for admission" need not present himself at the border before being eligible for parole).

¹⁰ See, e.g., *In re Badalamenti*, 19 I. & N. Dec. 623 (BIA 1988). The BIA cited a submission by the Public Health Service appended to a House Committee Report on the predecessor of section 1182(d)(5). The Public Health Service submission stated that the Attorney General should have "broader discretionary authority" to parole inadmissible aliens into the United States "in cases where it is strictly in the public interest to have the inadmissible alien in the United States, such as, for instance, as a witness or for the purpose of prosecution." H. Rep. 82-1365, *reprinted at* 1952 U.S.C.C.A.N. 1653, 1706. The Public Health Service never analyzed the case of an individual brought to the United States—by extradition or otherwise—against his will or whether such a person could be regarded as "applying for admission." And the BIA panel—without linking its analysis to the Attorney General's original statutory parole authority—held that an alien extradited into the United States "against his will" could not be considered an "applicant for admission." *Badalamenti*, 19 I. & N. Dec. at 626.

¹¹ See 18 U.S.C. § 3184. Immigration law now expressly deems aliens who are "brought to the United States after having been interdicted in international or United States waters" as "applicants for admission" and thus arguably subject to the Attorney General's parole authority. See 8 U.S.C. § 1225(a)(1). It is possible that some Guantanamo detainees may qualify for parole authority under this provision. Many Guantanamo detainees, however, were apprehended in Afghanistan and Pakistan.

there is a customary parole authority for the limited purpose of criminal prosecution outside the specific context of extradition, this category would not reach the entirety of the Guantanamo population, some of whom the Administration plans to try by military commission or hold under the laws of war.

2. (a) What is the legal risk that al Qaeda operatives, acquitted by military commissions in the United States, will be released in the United States?

(b) What if no third country can be forced to accept the detainee, is release more likely?

Under the current state of Supreme Court precedent, it is possible that a Guantanamo detainee—once transferred to the United States and acquitted here by military commission or federal criminal court—would be ordered released by a federal court. That risk arises from federal immigration law and Supreme Court decisions holding that aliens inside the United States have constitutional rights against indefinite detention pending removal.

The circumstances that may give rise to court-ordered release are not far-fetched. Once in the United States, the Executive Branch likely would seek to deport a Guantanamo detainee after acquittal by military commission or criminal trial. Many of the Guantanamo detainees, however, cannot be transferred to another country because no government is willing to take them. For others, citizenship cannot be established to the satisfaction of any foreign government. Foreign governments reject still others because they are assessed to be dangerous. Court-ordered release into the United States is less likely so long as the detainees are held at Guantanamo, because of the Congress's plenary power over questions of entry.¹²

In *Zadvydas v. Davis*,¹³ the Supreme Court suggested that aliens may have a constitutional right to release if they cannot be removed within six months of a deportation

¹² See Written Testimony of Michael J. Edney (July 28, 2009) at 20-21. The Supreme Court may decide this question during the October 2009 Term. See also *Kiyemba v. Obama*, 555 F.3d 1022, 1031 (D.C. Cir. 2008) (holding that courts lack authority to order Guantanamo detainees released into the United States), *cert. granted* __ S. Ct. __ (Oct. 21, 2009)

¹³ 533 U.S. 678 (2001).

order.¹⁴ According to the Court, the key distinction is setting foot on U.S. soil, which Guantanamo detainees have not yet done: “[O]nce an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”¹⁵

The Court held open the question of whether its ruling would apply to aliens who are believed to be terrorists.¹⁶ We do not know how the Court would decide this question. Context would be important. A court may view a military commission acquittal as placing a Guantanamo detainee outside the terrorism context. After all, a military panel—or a federal court jury—already will have disagreed with the Government’s characterization of the detainee’s past. The atmosphere of an acquittal may obscure the many reasons a Guantanamo detainee might be acquitted, including the hard choice the Government might have made on revealing classified information during trial.

Relying on *Zadvydas*, a court may hold that a Guantanamo detainee—transferred to the United States and acquitted on U.S. soil—has a constitutional right to be released in the United States within six months if no foreign country can be found to take him. If kept at Guantanamo,

¹⁴ The Court did not directly reach the constitutional question. Rather, the Court construed the statute authorizing detention pending removal not to permit indefinite detention in order to avoid a serious constitutional question. *See Zadvydas*, 533 U.S. at 690; *see also N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 508-09 (1979) (explaining that courts may construe ambiguous statutory terms to avoid resolving a serious constitutional question).

¹⁵ *Id.* at 693.

¹⁶ *Id.* at 696 (“Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”)

detainees would not have such a right under the *Zadvydas* line of cases and the territorial distinction those cases draw.¹⁷

It is worth noting two matters. First, after *Zadvydas*, Congress enacted the USA PATRIOT Act that authorized the detention of certain deportable aliens believed to have engaged in terrorism for renewable periods of six months, “if the release of the alien will threaten the national security of the United States, or the safety of the community.”¹⁸ This statutory change reduces risk. Nevertheless, this statute would not directly control a constitutional right imposed following the reasoning in *Zadvydas*, and there is a risk that a court would disagree with the assessment of national security risk by the Attorney General.¹⁹

Second, Congress may reduce the chances of court-ordered release by statutorily designating Guantanamo detainees as paroled into the United States, thus as excludable aliens, and then authorizing their indefinite detention if they cannot be deported. As explained in response to Question 1, current law may not provide authority to parole all Guantanamo detainees into the United States. If deemed excludable, the continued detention of Guantanamo detainees would present a different constitutional question.²⁰ The Court also has explicitly left

¹⁷ See *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009).

¹⁸ 8 U.S.C. § 1226a(a).

¹⁹ See *Zadvydas*, 533 U.S. at 692 (“the Constitution may well preclude granting ‘an administrative body the unreviewable authority to make determinations implicating fundamental rights’”).

²⁰ See *Zadvydas*, 533 U.S. at 692-94.

open whether the Constitution permits the indefinite detention of excludable aliens.²¹ The Court previously had decided in *Shaughnessy v. United States ex rel Mezei* that excludable aliens lack constitutional rights and may be detained indefinitely pending removal.²² That the Court has not recently affirmed *Shaughnessy*, and indeed undermined *Shaughnessy* by extending certain constitutional rights to aliens wholly outside the United States,²³ creates uncertainty as to whether such a statutory fix would work.

²¹ See *Clark v. Martinez*, 543 U.S. 371 (2005) (interpreting that same statute at issue in *Zadvydas* not to provide authority to detain excludable aliens indefinitely).

²² 345 U.S. 206 (1953).

²³ See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

3. (a) If al Qaeda detainees are moved to the United States, will they have new rights to challenge their conditions of confinement in federal court?

(b) What legal rules will govern that litigation?

Once inside the United States, Guantanamo detainees may have new claims to several constitutional protections.²⁴ Persons enjoying U.S. constitutional rights, under certain circumstances, may sue federal officials for money damages for violating those rights.²⁵ *Bivens* has been the basis for modern prison litigation in the United States, a system that involves close judicial management over the conditions of confinement.

If imprisoned in the United States, Guantanamo detainees can be expected to seek judicial review of decisions regarding isolation from other prisoners, the quality and quantity of food, and the amount of daily exercise. Also of particular note would be religious practices. Unless modified by Congress, the Religious Freedom Restoration Act (“RFRA”) would apply to Guantanamo detainees held inside the United States.²⁶ RFRA has been the basis of several

²⁴ Written Testimony of Michael J. Edney (July 28, 2009) at 17-19; *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.”).

²⁵ *Bivens v. Six Unnamed Federal Agents*, 403 U.S. 365, 382-83 (1971).

²⁶ 42 U.S.C. § 2000bb-1 and § 2000bb-2 (“A person whose religious exercise has been burdened in violation of [RFRA] may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.”).

lawsuits seeking rights to common prayer, as well as against the grooming of hair for security purposes.²⁷

The specter of constitutional litigation can have as great an effect on prison conditions as successful lawsuits. With regard to one convicted al Qaeda terrorist, the possibility of litigation may have had some effect. Richard Reed—an al Qaeda operative convicted of a plot to destroy American Airlines flight 63 from Paris to Miami in 2001—was released from Special Administrative Measures (“SAMs”) at the Supermax facility in Florence, Colorado in June 2009. Reed had filed suit claiming that the measures, which included isolation from other convicted terrorists and close monitoring of outgoing mail, violated his rights under the First Amendment’s Free Exercise Clause to gather in prayer.²⁸ That lawsuit did not go to verdict, but the litigation undoubtedly had an effect on prison personnel in terminating the SAMs.

²⁷ See, e.g., *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58 (D.D.C. 2006); *Elmaghraby v. Ashcroft*, No. 04 CV 1409, 2005 U.S. Dist. LEXIS 21434 (E.D.N.Y. Sept. 27, 2005).

²⁸ See, e.g., Debra Burlingame, *Revenge of the Shoe Bomber: Terrorist Sues to Resume His Jihad from Prison*, WALL ST. J. (July 29, 2009).

4. The Administration has proposed a “voluntariness” standard for determining whether a defendant’s statement may be admitted into evidence. Do you think such a standard will effectively require the reading of Miranda warnings to make any statement admissible?

The Congress should take great care before adopting the Administration’s proposal to amend the Military Commissions Act of 2006 regarding the admission of statements against the accused.²⁹ Proposed legislation would amend the MCA to bar the admission of any statement by the accused obtained through cruel, inhuman, or degrading treatment, as defined by the Detainee Treatment Act of 2005, no matter when the statement occurred.³⁰ The Administration wants Congress to take an additional significant step, making inadmissible any statement deemed “involuntary.”³¹ There is a substantial risk that statutorily mandating a “voluntariness” standard would effectively require the reading of *Miranda* warnings on the battlefield.

Before the Supreme Court decided *Miranda*, courts asked whether the a defendant’s statement was “voluntary” to determine whether it could be admitted into evidence. The voluntariness test looked to the “totality of the circumstances” to “determine whether a defendant’s will was overborne.”³² By the time of *Escobedo v. Illinois*,³³ the voluntariness

²⁹ Transcript of July 28, 2009, Senate Judiciary Committee, Subcommittee on Terrorism and Homeland Security Sub-committee Hearing, at 125 (“Hearing Transcript”)

³⁰ Under current law, statements obtained by such cruel, inhuman, or degrading treatment after the enactment of the DTA are inadmissible. Pending legislation would apply that standard retroactively.

³¹ Statement of David Kris, Assistant Attorney General for the National Security Division (July 28, 2009); Transcript 53-56.

³² See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973)

³³ 378 U.S. 478 (1974).

inquiry was developing the ingredients of modern *Miranda* warnings. Did the defendant know that he was not required by law to talk? Did he know that he could have the assistance of counsel? Did he believe that his silence could be used against him in a criminal trial? ³⁴

The *Miranda* Court viewed these inquiries as labor intensive.³⁵ The Supreme Court decided to resolve this perceived dilemma by requiring for admissibility the reading of a series of warnings, prior to taking a statement in custody.³⁶ The warnings were “prophylactic.” If given, courts could substantially curtail the inquiry into voluntariness.³⁷ According to the Court, the need for the specified warnings increased with the severity of the conditions: “Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.”³⁸

³⁴ *Escobedo*, 378 U.S. at 483, 85, 91; *Miranda v. Arizona*, 384 U.S. 436, 464-66, 465 (1966). (“Our holding [in *Escobedo*] stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation.”)

³⁵ *Miranda*, 384 U.S. at 468-69 (“Assessments of the knowledge the defendant possessed based on information as to his age, education, intelligence, or prior content of authorities, can never be more than speculation.”)

³⁶ In its most recent description of the relationship between the voluntariness standard and *Miranda* warnings, the Court explained that the “totality of the circumstances test [searching for voluntariness] is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner.” *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

³⁷ As the Court recently explained, “the requirement that *Miranda* warnings be given does not, of course, dispense with the voluntariness inquiry. But . . . cases in which a defendant can make a colorable argument that a self-incriminating statement was ‘compelled’ despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare.” *Dickerson*, 530 U.S. at 444; see also *Berkemer v. McCarty*, 468 U.S. 420, 453 (1984).

³⁸ *Miranda*, 384 U.S. at 458.

There is a risk that *Miranda*-type warnings would be a natural outgrowth of imposing a voluntariness standard on military commissions. Without *Miranda*-type warnings, prosecutors would enter into a military commission uncertain of whether a judge would find a defendant sufficiently knowledgeable to have made a “voluntary” statement. One need only to retrace the *Miranda* Court’s steps from voluntariness review. Indeed, the *Miranda* Court required warnings prior to custodial interrogations because lack of voluntariness—“compulsion”—was “inherent in custodial surroundings.”³⁹ If *Miranda*’s treatment of the “voluntariness” test were taken seriously, the “unfamiliar surroundings” of a police station in the United States would be nothing compared to the harsh realities of capture on the battlefield, where immediately prior to custody the captors often had sought to use lethal force against the detained. Alien detainees captured on foreign battlegrounds also may not be familiar with U.S. rules.⁴⁰ The same search for voluntariness—looking at all the circumstances—may be even more likely to require *Miranda*-style warnings in the wartime context.

There can be little doubt that our military and intelligence personnel in the field would feel pressure to ensure that any statement obtained would be admissible in either military commission or federal criminal proceedings. The President and the witnesses at the hearing of this Committee have stated that the policy of this Administration is either to try enemy combatants by federal criminal trial, as a first preference, or by military commissions or to release them. What the Administration has characterized as the “fifth category” of enemy

³⁹ *Id.*

⁴⁰ See *Escobedo*, 378 U.S. at 486 (looking to the defendant’s educational background and knowledge of criminal law, to determine whether a statement in the absence of an attorney or a warning that he could have one was voluntary).

combatant, those who cannot be tried but absolutely must be held for national security reasons, is to remain as small as possible. The dilemma for troops and intelligence officers on the field of battle is this: If they do not obtain “voluntary” statements from the defendant indicating guilt, there will be a substantial risk that such enemy combatants will be released back into the conflict. Troops in the field will have to navigate the understandable need to obtain fresh intelligence from the captured—that can be used in winning the battle and saving American lives—and ensuring that the enemy combatant is incapacitated for at least the duration of hostilities. Due to the policies recently discussed by the Executive Branch and the legal standards urged on the Congress, the battlefields of Afghanistan may well become laboratories in the long-standing debate over whether *Miranda* warnings facilitate or deter the communication of truthful information. Some might argue that a continuing armed conflict is no place to resolve this empirical question.

5. Do you agree with the Administration that material support for terrorism is not an offense against the law of war?

The Military Commissions Act defines material support for terrorism as an offense triable by military commission.⁴¹ Congress’s resolution of the question whether material support for terrorism is a violation of the law of war is arguably definitive, given the affirmative textual grant of authority in the Constitution “to define and punish Offences against the Law of Nations.”⁴²

There is external evidence supporting Congress’s conclusion that “material support for terrorism” is a violation of the law of war. Several recent international agreements have condemned support of terrorism; the U.N. Security Council has called for those “supporting terrorism” to be “brought to justice” (implying that they have committed an internationally cognizable crime). The international tribunals for the former Yugoslavia and Rwanda consider aiding and abetting acts which the MCA defines as terrorism to be a war crime.⁴³ Further, as far back as the 1890’s, Congress recognized that supplying and sheltering those who commit violence against civilian populations is a violation of the laws of war.⁴⁴

⁴¹ 10 U.S.C. § 950v(25).

⁴² U.S. CONST. ART. I, § 8, cl. 10.

⁴³ *Khulumani v. Barclay*, 504 F.3d 254, 274 (2d Cir. 2007) (Katzmann, J., concurring) (collecting sources); *see also id.* at 270-71 n.6 (comparing the material support for terrorism offense under the MCA to aiding and abetting liability); 10 U.S.C. § 950v(24) (defining terrorism as violence against protected persons to achieve political ends).

⁴⁴ H.R. Doc. No 65, 55th Cong. 3d Sess., 234 (1894) (“numerous rebels . . . that furnish[ed] the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents [we]re banding together . . . for the purpose of assisting the enemy to rob, to maraud, and to

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6. Why do you think the Obama Administration has only been able to transfer a handful of detainees from Guantanamo since Inauguration Day?

The challenges of reducing the population at Guantanamo faced by the prior Administration likely have not abated. First, the prospect of mistreatment in a detainee's home country is a barrier to releasing the Guantanamo population. As a matter of policy, the United States does not transfer alien enemy combatants from Guantanamo to a country where it is more likely than not they will be tortured. The United States had not been able to reach that level of comfort for several of the home countries of Guantanamo detainees. Second, it is difficult to find a third country, for those who may be mistreated or whose citizenship is difficult to establish, willing to take Guantanamo detainees. Many foreign countries assess Guantanamo detainees to be security risks.

Third, it is often difficult to obtain adequate assurances that certain detainees will be monitored in their home countries. As suspected members of al Qaeda, the United States will not transfer a detainee to a nation where they will pose a substantial risk of returning to terrorist activity. The press has reported that Yemen is one such country; there are more than 90 Yemenis held at Guantanamo. The importance of this issue cannot be understated. The unwillingness of foreign countries to undertake even the simplest measures to mitigate the risks of Guantanamo's detainees—from travel bans to periodic check-ins—leaves the United States with a stark choice. The United States must detain the individual, or bear the full risk of his future dangerousness at large. Fourth, there is some population of particularly dangerous al Qaeda terrorists at

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lay waste to the country. All such persons are by the laws of war in every civilized country . . .”).

Guantanamo where the American people are safe only if they are in secure U.S. custody. These are not new challenges, and thoughtfully addressing them will take time.

Questions from Senator Sessions

1. In the appendix to its July 20, 2009, memorandum, the Detention Policy Task Force stated that “[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.” The administration can then overrule the presumption and proceed via military commission if there are “compelling factors” that “make it more appropriate to prosecute a case in a reformed military commission.” In your testimony, you criticized this ad hoc type of decision-making, instead favoring a clear set of rules setting forth the appropriate venue for prosecution based upon the type of case and detainee rather than the likely outcome of the case. In your view, what would such rules look like and which categories of cases and detainees do you believe should be handled by military commissions? Please explain the legal and/or policy rationale for your answer.

I continue to believe that the Administration should not choose between military commissions and federal criminal trials on the basis of the strength of evidence and the need to protect intelligence sources and methods in any particular case. Should the Administration retain military commissions, a strong historical and normative case can be made for trying by military commission all (1) alien, (2) members of al Qaeda, (3) who have violated the laws of war by military commission, and (4) who were captured outside the United States.⁴⁵

Taking the category of al Qaeda members who have potentially violated the laws of war, perhaps the most difficult question is between aliens who have been captured outside the United States, on the one hand, and U.S. citizens captured abroad or in the United States and aliens captured inside the United States, on the other hand. The distinction is grounded in a long line of Supreme Court decisions, extending certain constitutional rights to U.S. citizens throughout the world and aliens within the United States are entitled to constitutional rights.⁴⁶ The Executive Branch reasonably could conclude that such individuals, even though members of al Qaeda,

⁴⁵ Statement of Michael J. Edney at 13-15; Hearing Transcript at 116, 120-21.

⁴⁶ *Zadvydas v. Davis*, 533 U.S. 678 (2001).

should be tried through the federal criminal process. Federal criminal procedures are tailored to meet such constitutional standards.

Such categorical distinctions—trying all members of a force who have violated the laws of war through the same system—are consistent with the laws of war. The Third Geneva Convention obligates state parties to try “prisoners of war” in the same manner reserved for its own forces.⁴⁷ The Convention defines prisoner of war by the characteristics of the force of which a combatant is a member.⁴⁸

These categorical distinctions also avoid a danger in sorting Guantanamo detainees between military commissions and federal criminal trials on the basis of evidentiary concerns and other problems of proof. The Administration has proposed a presumption in favor of federal criminal trials, which is rebuttable by factors such as the evidence available and the need to protect classified sources and methods.⁴⁹ This method of sorting defendants potentially threatens integrity of both systems. It implies that the military commission system is a form of secondary justice. And it compromises the procedural protections of the federal criminal justice system. For enemy combatants, the rights and procedures in the federal criminal justice system could be enjoyed until they make a difference in a particular case. A better approach would be to defend military commissions or federal criminal trials—for an entire category of individuals.

⁴⁷ Third Geneva Convention Art. 82-88

⁴⁸ *Id.* at Art. 4.

⁴⁹ Preliminary Report of the Detention Policy Task Force (July 21, 2009) at App. A.

2. The Detention Policy Task Force lists factors to consider in deciding whether to seek Article III prosecution or a military commission trial. In the second set of factors listed, the Task Force lists “protection of intelligence sources and methods” and “legal or evidentiary problems that might attend prosecution in the other jurisdiction” and “resource concerns.” Wouldn’t a military commission prosecution generally protect all of these interests better than a civilian criminal trial?

The military commission system was designed specifically to address the challenges posed by holding trials regarding the actions of an enemy force, undertaken outside this country during a time of continuing armed conflict. Federal criminal procedures were not crafted for this purpose. They are rules of general applicability, directed at handling the run of cases most of which will concern conduct largely completed, occurring within this country, and based on evidence geographically proximate to domestic law enforcement.

With regard to the protection of sources and methods, federal criminal trials follow the rules set forth in the Classified Information Procedures Act (“CIPA”). As explained below, CIPA was designed to allow prosecutors, in an orderly fashion, to make the classic prosecutorial choice, between exposing sources and methods to the public and prosecuting the matter.⁵⁰ CIPA requires notice before the defendant reveals classified information. If the classified information is relevant to the charges, nothing in CIPA bars its disclosure. Similarly, CIPA does not on its own provide special methods for allowing the government to use certain evidence without revealing all the classified sources and methods used to obtain it.

By contrast, the political branches made a considered decision on how sources and methods should be protected in the MCA. A carefully considered and unified rule on this issue is undoubtedly preferable to the opinions of various courts searching for a substantive standard to protect classified information not specified in CIPA.

⁵⁰ See also Statement of Michael J. Edney at 7-11.

Similarly, “legal and evidentiary problems” associated with prosecuting suspected al Qaeda operatives are likely to be better addressed by a system tailored to those problems, rather than one designed for the run of domestic cases. One specific challenge in prosecuting members of a foreign terrorist organization is the chain of custody for evidence obtained abroad. The evidence is transported from other countries and often recovered by U.S. personnel whose primary mission (unlike U.S. law enforcement personnel) is to carry out military operations, not build criminal cases. Military commission rules provide specific hearsay and authentication rules to account for this dilemma.⁵¹

⁵¹ Compare 10 U.S.C. § 949a(b)(2)(E) with Fed. R. Evid. 801-07; see also Statement of Michael J. Edney at 11-13.

3. How do you respond to those who claim that the Classified Information Procedures Act (CIPA) provides adequate protections to allow for terrorism prosecutions in Article III courts?

CIPA was designed for trials against those suspected of espionage—often U.S. government employees—and to protect the classified information already possessed by the defendant from further public disclosure.⁵² CIPA requires the defendant to give notice of the intent to introduce classified information into evidence.⁵³ CIPA is a strictly procedural rule: It provides a stepwise process for the court to evaluate classified information proposed to be used at trial. The Government may request *ex parte*, *in camera* proceedings to address the relevance of classified information and to consider alternatives to admitting into evidence (and thereby disclosing) classified information.⁵⁴

Importantly, CIPA itself does not contain a substantive privilege for classified information.⁵⁵ Courts have struggled to determine the appropriate standard for determining whether classified information should be provided to the defense in discovery or whether a defendant should be permitted to reveal classified information at trial. Some courts have followed the standard governing all criminal discovery, requiring disclosure of classified information if it is relevant to the defense.⁵⁶ Others have imposed a slightly higher standard,

⁵² See Statement of Michael J. Edney at 7-11.

⁵³ 50 U.S.C. App. 3 § 5.

⁵⁴ *Id.* at § 6.

⁵⁵ See *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008); *United States v. Yunis*, 867 F.2d 617, 623 (D.C. Cir. 1989).

⁵⁶ *United States v. Rosen*, 557 F.3d 192, 199-200 (4th Cir. 2009) (appearing to require the discovery of classified evidence under only the relevance standard of F. R. Crim. P. 16); H.R.

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requiring the disclosure of the classified information only if it is relevant and helpful to the defense.⁵⁷ Courts also have attempted to borrow requirements from the state secrets privilege.⁵⁸ Primarily designed for civil proceedings not initiated at the option of the Government, the state secrets privilege itself is an imperfect fit for criminal matters.⁵⁹ Fewer appellate courts have had the occasion to establish standards for allowing the substitution of summaries or admissions of discrete material facts for the admission of classified information. CIPA provides procedures for considering such substitutes, but does not specify under what circumstances such substitutes should be permitted.⁶⁰

In this sense, CIPA is directed at orderly governmental decisionmaking. CIPA protects classified information to some degree by preventing surprise . By requiring notice before the introduction of classified information and pretrial rulings on the relevance of pretrial information to the defense, CIPA provides the Government the time necessary to obtain the assessment of high-level Government officials on the effect of the classified information's disclosure. In this

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Rep. No. 96-831, pt. 1, at 27 (1980) (noting that CIPA “is not intended to affect the discovery rights of the defendant”).

⁵⁷ *Yunis*, 867 F.2d at 621 (CIPA “creates no new rights or limits on the discovery of a specific area of classified information”). Lacking guidance from the Congress, the court in *Yunis* borrowed a more protective standard from *Roviaro v. United States*, 353 U.S. 53 (1957), providing a privilege to protect the identity of confidential informants. *Id.* at 61 (“Where the disclosure of an informer’s identity, or of the contents of his communication, is relevant and helpful to the defense, or is essential to a fair determination of the cause, the privilege must give way.”)

⁵⁸ See *Aref*, 533 F.3d at 79-80.

⁵⁹ H.R. Rep. No. 96-831, pt. 1 at n. 12 (“The common law state secrets privilege is not applicable in the criminal arena.”).

⁶⁰ 50 U.S.C. App. 3 § 3.

way, CIPA allows a fully informed Government determination whether the benefits of prosecuting and incapacitating particular defendant outweigh the damage to national security of the disclosing the classified information at issue.⁶¹ CIPA adds interlocutory appeal rights, so that the Government may obtain the second opinion of the appellate courts in the event the trial court deems classified information discoverable or relevant in the prosecution. 50 U.S.C. App. § 7.

By contrast, the Military Commissions Act establishes substantive standards governing whether classified information is provided to the defendant in discovery, protected from disclosure at trial, and allowed to be substituted.⁶² In addition, the MCA particularly protects classified information for intelligence sources and methods. To admit evidence at trial, the Government need not reveal in all cases classified intelligence sources and methods underlying the evidence. Instead, the trial judge *ex parte* and *in camera* may determine whether the provenance of the evidence is reliable.⁶³ At the same time, Congress established certain

⁶¹ 50 U.S.C. App. 3 § 6(e) (providing procedures for the dismissal of the prosecution rather than allowing disclosure of the information).

⁶² See 10 U.S.C. § 949d(f)(1) (establishing an explicit privilege for classified information); § 949d(f)(2) (requiring the military judge to authorize substitutes or summaries of classified information); § 949j(d)(1) (providing a standard for adjudicating requests for substitutions or summaries: When the classified information is “exculpatory,” the defendant shall be provided of an “adequate substitute.”)

⁶³ See 10 U.S.C. § 949d(f)(2)(B) (“The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security,

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protections for defendants. There will be no secret trials: No evidence may be presented to the commission's members that is not also provided to the defendant.⁶⁴ With regard to discovery, the defendant receives all exculpatory evidence, classified or not, unless an adequate substitute is available.⁶⁵

Whether or not the MCA strikes the perfect balance between protecting classified information and ensuring that defendants may present an adequate defense, it bears an institutional advantage. The Constitution vests primary responsibility for national security matters in the political branches—the Congress and the President.⁶⁶ The Supreme Court has recognized the explicit textual grant of authority to the other two branches and is hesitant to decide legal questions with national security consequences.⁶⁷ The political branches are

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an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.”)

⁶⁴ 10 U.S.C. § 949d(b).

⁶⁵ 10 U.S.C. 949j(d)(2). In this regard, the MCA is more protective of classified information than the common law standard to protect classified information hypothesized by some courts in federal criminal cases. The “relevant and helpful to the defense” standard requires more classified information to be turned over to the defense than the MCA’s “exculpatory” standard. *See Aref*, 553, F3d at 80 (“To be helpful or material to the defense, evidence need not rise to the level that would trigger the Government’s obligation under *Brady v. Maryland* to disclose ‘exculpatory’ information”).

⁶⁶ *See, e.g.*, U.S. CONST. Art. I, § 8, cl. 11-16; Art. II, § 2.

⁶⁷ As the Supreme Court explained in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), “unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the executive in military and national security affairs.” *Id.* at 530. *See also id.* (explaining that the Executive Branch has primary constitutional authority to protect classified information and that “protective judgments should be made by those with necessary expertise in protecting classified information”); *Haig v. Agee*, 453, U.S. 280, 292 (1981) (foreign policy and national security “are so exclusively entrusted to the political

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regularly briefed on national security threats and are better situated to determine the degree to which national security information must be protected during a time of continuing armed conflict.⁶⁸

Relying on CIPA to protect national security information in al Qaeda trials leaves a difficult decision to the branch least suited to decide national security matters. Better would be for the Congress and the President to set substantive standards through legislation and leave to the Judicial Branch a discrete question it has answered since *Marbury v. Madison*—whether the statutory standard falls within the discretion provided those branches by the Constitution.

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branches of government as to be largely immune from judicial inquiry or interference”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

⁶⁸ *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (Jackson, J.) (explaining that national security judgments depend on the regular flow of classified briefings and courts lack the “aptitude, facilities [and] responsibility” to review such information and make such judgments”); *Cf. Boumediene v. Bush*, 128 S.Ct. 2229, 2276-77 (2008) (“Unlike the President and some designated Members of Congress, neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”)

4. The Department of Justice had a number of problems with CIPA during the trial of Zacarias Moussaoui. Does Congress need to amend CIPA to help the Department better protect classified evidence in terrorism trials and, if so, what reforms should Congress consider?

As explained in the last answer, CIPA provides no standard for the protection of classified information. The question arises whether CIPA should be amended to provide such a substantive standard. A standard for all cases involving classified information—from espionage to terrorism—may be difficult to establish.

Terrorism defendants present unique challenges. In the best of circumstances, a terrorist’s plot is detected prior to completion, and his incapacitation is essential to protecting American lives. If detention of al Qaeda members captured abroad without criminal trial is not used in any significant numbers,⁶⁹ a stark choice would be presented: Between revealing the classified sources and methods underlying otherwise admissible evidence during a continuing armed conflict and taking a dangerous terrorist off the streets. This context might require a different balance than espionage or other cases concerning classified information. A global standard for all classified information-related prosecutions may not be warranted; a special standard for terrorism cases may be.

The *Moussaoui* case raises questions about the *procedures* established by CIPA. CIPA establishes special procedures to ensure a second review of issues involving classified information prior to disclosure. Specifically, CIPA authorized expedited interlocutory appeals of

⁶⁹ See Remarks by the President on National Security, National Archives, Washington, DC (May 21, 2009), available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (“Now there remains the question of detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. . . . We’re going to exhaust every avenue we have to prosecute those at Guantanamo who pose a danger to this country.”);

trial court orders “authorizing the disclosure of classified information” in a criminal case.⁷⁰ The United States Courts of Appeals for the Fourth Circuit held that an order giving the defendant, suspected to be the “20th hijacker” in the September 11th attacks, classified information was not an order of “disclosure” subject to interlocutory appeal. The Court explained that the interlocutory appeal provisions “is concerned with the disclosure of classified information by the defendant to be public at a trial or pretrial proceeding, not the pretrial disclosure of classified information to the defendant or his attorneys.”⁷¹

This interpretation of CIPA should be corrected. The government should not be forced to reveal classified information until it is certain that the applicable standard so requires. Verification by the court of appeals—a second set of eyes—is an obvious safeguard given the sensitivity of this information. Absent such review, passing classified information to a suspected member of al Qaeda may have been unnecessary.

I understand that Senators Kyl and Cornyn have proposed legislation to overturn the Fourth Circuit’s interpretation.⁷² This statutory change is well-advised.

⁷⁰ 50 U.S.C. App. 3 § 7(a).

⁷¹ *United States v. Moussaoui*, 333 F.3d 509, 514 (4th Cir. 2003), *rehearing en banc denied*, 336 F.3d 279 (4th Cir. 2003).

⁷² HENO9943 to S.1692.