PROTECTING U.S. CITIZENS' CONSTITUTIONAL RIGHTS DURING THE WAR ON TERROR

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

MAY 22, 2013

Serial No. 113–21

Printed for the use of the Committee on the Judiciary

Available via the World Wide Web: http://judiciary.house.gov

U.S. GOVERNMENT PRINTING OFFICE

81–173 PDF WASHINGTON : 2013

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PROTECTING U.S. CITIZENS' CONSTITUTIONAL RIGHTS DURING THE WAR ON TERROR

WEDNESDAY, MAY 22, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 10:13 a.m., in room 2141, Rayburn House Office Building, the Honorable Bob Goodlatte (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Chabot, King, Franks, Gohmert, Poe, Farenthold, Conyers, Nadler, Scott, Lofgren, Jackson Lee, Johnson, Chu, Richmond, and DelBene.

Staff Present: (Majority) Shelley Husband, Chief of Staff & General Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Allison Halataei, Parliamentarian & General Counsel; Jason Cervenak, Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; and Aaron Hiller, Counsel.

Mr. GOODLATTE. Good morning. The Judiciary Committee will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time, and we welcome everyone to today's hearing on "Protecting U.S. Citizens' Constitutional Rights During the War on Terror."

I will begin by recognizing myself for an opening statement and then the Ranking Member of the Committee. I want to welcome everyone to today's hearing on "Protecting U.S. Citizens' Constitutional Rights During the War on Terror." On September 18, 2001, Congress enacted the Authorization for the Use of Military Force, which empowered the President to use all necessary and appropriate force against those Nations, organizations or persons he determined, planned, authorized, committed or aided the terrorist attacks in order to prevent any future acts of international terrorism against the United States.

Section 1021 of the fiscal year 2012 National Defense Authorization Act reaffirms the President's authority to detain so-called enemy combatants by affirming that the authority of the President to use all necessary and appropriate force, pursuant to the authorization for use of military force includes the authority for the

Armed Forces of the United States to detain covered persons pending disposition under the law of war.

The law defines "covered person" as either a person who planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks, or a person who was a part of or substantially supported al-Qaeda, the Taliban or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or who has directly supported such hostilities in aid of such enemy forces.

It defines disposition under the law of war to include first detention under the law of war without trial until the end of the hostilities; two, trial by military commission; three, trial by an alternative court or competent tribunal having lawful jurisdiction; and four, transfer of the custody or control of the person's country of origin, any other foreign country to the custody or control of the person's country of origin, any other foreign country or any other foreign entity.

A number of Members from both sides of the aisle have expressed extreme discomfort and even outrage at the notion that a United States citizen apprehended on United States soil can potentially be held indefinitely under this act without receiving their full panoply of rights guaranteed under the constitution. I, for one, share this concern.

I support making it clear that the United States citizens apprehended and detained in the United States, pursuant to the authorization for use of military force or the National Defense Authorization Act, should be transferred for trial in proceedings by a court established under Article III of the Constitution or by an appropriate State court and that such trial and proceedings have all the due process as provided for under the Constitution of the United States.

I intend to explore avenues through this Committee to achieve a similar result. I am not persuaded by those who say that in practice this Administration and future Administrations will not exercise their authority to indefinitely detain United States citizens who have been apprehended in the United States. The mere notion that this authority exists is troubling in and of itself, and I believe that this body should make clear that citizens of this Nation cannot be detained without receiving all of their due process rights in an Article III court.

In an attempt to address the concerns of those of us who are troubled by the indefinite detention authority under the AUMF, the Fiscal Year 2013 National Defense Authorization Act included language reaffirming the availability of the writ of habeas corpus for any person detained in the United States pursuant to the 2001 Authorization for Use of Military Force or the Fiscal Year 2012 National Defense Authorization Act. While this provision is a step in the right direction, it does not go far enough to ensure that Americans are receiving all the due process rights the constitution confers.

For instance, the petitioner is placed at a disadvantage vis-a-vis the government when petitioning for is a writ of habeas corpus. Hearsay evidence is permissible against the detained individual

and the government enjoys a rebuttable presumption that its evidence is accurate and authentic. So, essentially, a United States citizen has the burden of proving he or she is not an enemy combatant in order to escape indefinite detention, rather than the other way around, rather than the requirement that one be proven—that one be considered innocent until proven guilty. To most Americans, this would seem unfair.

As we begin consideration of the fiscal year 2014 National Defense Authorization Act, it is my sincere hope that we can fully confront these important issues and finally put them behind us, keeping in mind that we should never sacrifice our freedom for our security. For if we do, as Ben Franklin correctly pointed out, we will not have either one. I look forward to hearing from today's witnesses, and now it is my pleasure to recognize the gentleman from Michigan, the Ranking Member of the Committee, Mr. Conyers, for his opening statement.

Mr. CONYERS. Thank you, Chairman Goodlatte.

This is an important hearing, and while I will not cite you among the two people I am about to quote, namely James Madison and Justice Stevens, I do commend you for holding this hearing and opening us up for a very important discussion.

Why Madison? Because he said, "Of all the enemies to public liberty war is, perhaps, the most to be dreaded, . . . No Nation could preserve its freedom in the midst of continual warfare."

And of course, our beloved Supreme Court Justice John Paul Stevens wrote in *Rumsfeld v. Padilla*, "If this nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."

And since September 11, 2001, it seems to me and others here that we have strayed from this wisdom, and this hearing is a welcome sign that we are beginning to try to find our way back. Three principles: One is Ex parte Milligan. If the civilian courts are open for business, we ought to use them to try civilians, and the Supreme Court, in 1866, explained laws and usages of war can never be applied to citizens in States which have upheld the authority of the government and where the courts are open and their processes unobstructed. That decision, Milligan, is applicable today as it was in the throes of the civil war.

Since September 11, 2001, we convicted almost 500 individuals of terrorism-related charges in civilian courts. Not one has ever escaped, and among the Federal district courts, 60 of them in 37 States have participated in these convictions. None has ever suffered retaliations or reprisal. The courts have not been a target.

In short, no weapon in our counterterrorism arsenal is more effective than our civilian criminal courts. By adhering to *Milligan*, we both secure our Nation and give appropriate deference to the rule of law. Now, there may be limited exceptions to the *Milligan* rule, but they should be used sparingly and only when expressly permitted by Congress, and I am particularly concerned about the speed with which some would have us abandon this principle in the moments immediately following a national emergency.

Example, in the aftermath of the Boston Marathon bombing, some of our colleagues urged the President to treat the surviving suspect as an enemy combatant rather than as a criminal defend-

ant. That request was, to put it kindly, misguided. The enemy combat option, as those Members described it, is not even available in this case as a matter of law, for there is simply no evidence to support the claim that the suspect in the case is a covered person, as defined by the National Defense Authorization Act, who may be held indefinitely under the auspices of the 2001 Authorization for the Use of Military Force.

Now, even if the combat option were available, it is not clear why we would want to choose it. The government has never successfully exercised that option for a United States citizen captured on United States' soil. Why would we risk an uncertain military commission on one hand for the full weight of the Federal judiciary on the other? Why risk a military commission that we altered, by the way, four times yet and still have it with certain flaws.

I believe we should expand the scope of this discussion from the narrow topic of United States citizens captured on American soil to include others within the United States and even others abroad. It is well established that all persons in the custody of the United States, not merely citizens, may challenge their detention in a Federal court. The Supreme Court reiterated that principle with respect to the Guantanamo detainees in *Boumediene v. Bush*, and we should no longer entertain the legal fiction that the prison at Guantanamo Bay is somehow outside the jurisdiction of the United States. There are 166 persons there, 86 of whom have already been cleared for transfer. There is no compelling reason to hold these suspected terrorists indefinitely, their countries of origin notwithstanding.

The means to bring them to justice, if warranted, is available to us at any time we have the courage to bring these persons to trial, and if we are to have a serious debate about how to make 13 years of indefinite detention in Guantanamo square with our values and our Constitution, then we ought to include everyone in our custody as part of this discussion.

And so I join with the Chairman of this Committee in welcoming the witnesses, particularly our one witness, Professor O'Connell, and I yield back anytime I have.

And if I have extended, I thank the Chairman for his courtesy.

Mr. GOODLATTE. We thank the Ranking Member for his comments.

And the Chair was about to ask if other Members would agree to submit their opening statements.

Mr. NADLER. If I could.

Mr. GOODLATTE. The gentlemen from New York has a brief statement he wants to make.

Mr. NADLER. Yes, thank you.

Mr. GOODLATTE. Recognize for——

Mr. NADLER. I just want to thank the Chairman for calling this very important hearing on this very crucial subject. I want to say that I find myself in general agreement with both the comments of the Ranking Member and of the Chairman, and I look forward to working with the Chairman and the Ranking Member on remedial legislation.

I just want to say one thing, and that is, everything the Chairman said about American citizens in the United States I agree

with. I think it also applies to noncitizens in the United States, since the Constitution makes no distinction with respect to the constitutional rights in the Bill of Rights on people in the United States, whether they be citizens or not.

Having said that, again, I think this hearing is long overdue. We have to rein in perhaps the executive branch and make sure that when we are in a long-term war, war on terror, call it what you will, the executive, regardless of the war at least, following a 50-year Cold War, punctuated by some periods of hot wars, so it has been since 1945, almost a constant state of mobilization, so to speak. James Madison's words ring very, very true, and it is our job to try to make sure that our civil liberties survive intact.

I thank you. I yield back.

Mr. GOODLATTE. I thank the gentleman.

And we will now welcome our distinguished panel today.

And if you would all rise, I'll begin by swearing you all in.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much.

Let the record reflect that all the witnesses responded in the affirmative.

Thank you, and I'll now introduce our distinguished panel.

Our first witness is Professor Robert Chesney, the Charles I. Francis Professor in Law and associate dean for academic affairs at the University of Texas School of Law. Professor Chesney specializes in a broad range of issues regarding U.S. national security law, such as military detention, the role of the judiciary in national security affairs and terrorism related prosecutions. He is a nonresident senior fellow of the Brookings Institution as well as a team member of the Council on Foreign Relations. Previously, he served on President Obama's detention policy task force. Mr. Chesney earned his bachelor's degree in political science and psychology from Texas Christian University and subsequently graduated magna cum laude from Harvard Law School.

We welcome his experience and expertise.

Our second witness today is Mr. Benjamin Wittes, the senior fellow in governing studies at the Brookings Institution and co-director of the Harvard Law School Brookings Project on Law and Security. He's the author of "Law and the Long War: A Future of Justice in the Age of Terror," published in June 2008, and the editor of the 2009 Brookings book, "Legislating the War on Terror: An Agenda for Reform." Mr. Wittes cofounded and is editor-in-chief of the Lawfare blog, a non-idealogical discussion of hard national security choices. Between 1997 and 2006, he served as an editorial writer for the Washington Post, specializing in legal affairs. Mr. Wittes is also an alumnus of Oberlin College. We thank him for serving as a witness today and look forward to his insight into this complex topic

Our third witness is Mr. Steven Engel, a partner at Dechert, LLP law firm. Previously, he clerked on the U.S. Court of Appeals for the Ninth Circuit for now Chief Judge Alex Kozinski and on the U.S. Supreme Court for Associate Justice Anthony M. Kennedy. Mr. Engel is a member of the Pro Bono Panel for the U.S. Court of Appeals for the Second Circuit, and he also served as deputy assistant attorney general for the United States Department of Jus-

tice's Office of Legal Counsel. Mr. Engel graduated with his bachelor's degree sum cum laude from Harvard and his JD from Yale Law School where he served as the essay editor of the Yale Law Journal. We are pleased to have him with us today.

Our final witness is Professor Mary Ellen O'Connell from the University of Notre Dame, where she serves as the Robert and Marion Short Chair in Law and Research Professor of International Dispute Resolution at the Kroc Institute for International Peace studies. That's a long title.

Ms. O'CONNELL. Very long title.

Mr. GOODLATTE. Previously she taught at the Ohio State University as the William Saxbe Designated Professor of Law at the Moritz College of Law, as well as a fellow of the Mershon Center for the Study of International Security and Public Policy. She has also taught courses on international law in Italy and Germany. Professor O'Connell graduated Phi Beta Kappa from the Northwestern University and received her JD from the Columbia University School of Law, where she won the Berger prize for international law. We are pleased to have her with us today.

Thank you all for joining, and we will begin with Professor Chesney.

TESTIMONY OF ROBERT CHESNEY, CHARLES I. FRANCIS PROFESSOR OF LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW, UNIVERSITY OF TEXAS SCHOOL OF LAW, AND A NON-RESIDENT SENIOR FELLOW, THE BROOKINGS INSTITUTION

Mr. CHESNEY. Thank you. Thank you, Chairman Goodlatte, Ranking Member Conyers, and Members of the Committee. My colleague, Ben Wittes and I prepared a joint written statement supporting a single recommendation. Specifically, we recommend that Congress codify what already has become the practical status quo with respect to military detention of persons captured in the United States; that is, Congress should put to rest the question at long last of the legality of such detentions, explicitly stating the detention authority under the AUMF and NDAA for fiscal 2012 does not extend to any person captured within the territory of the United States.

In support of this view, I'll use my time to discuss the legal backdrop against which this question arises, and then the next witness, my colleague, Mr. Wittes, will discuss the practical and policy consideration that support our recommendation against the backdrop of those legal considerations.

So, on the law, there are a handful of points that bear emphasis. First, we begin with the proposition that it is quite clear that when a U.S. citizen becomes a soldier in the Armed Forces of an enemy during war, that citizen is subject to detention just like any other enemy soldier, even if it's in the United States, as the Civil War emphasized and demonstrated to us on a grand scale. Supreme Court said as much in Ex parte Quirin during World War II, when it was confronted with at least two individuals amongst a group of German military personnel who had come into the United States as saboteurs. And in Ex parte Quirin, the Court said their citizenship doesn't relieve them of the consequences of their belligerency.

That's not the only relevant consideration, however. Quirin is just one pole in this debate. The other pole, as was mentioned by Ranking Member Conyers a moment, Ex parte Milligan, a Civil War era case in which the government confronted what we might today describe as a sleeper cell, a clandestine group of individuals who were plotting to carry out an attack on a military installation, In that case, an Indiana POW camp where Confederate soldiers were held. These men were plotting to seize weapons, attack the Union forces there, free the Confederate forces and further the cause of the Confederacy. The thing was, they were not themselves Confederate military personnel. And the Supreme Court in 1866 in a landmark decision held that where persons are not members of the military force of the enemy and where the civilian courts are otherwise open, in such circumstances, military authority was not appropriate.

Now, for some, post-9/11 events that we grapple with look a lot like Ex parte Quirin; for others, they look a lot like Ex parte Milligan. The problem, of course, is that in many, if not most, of these instances, they partake of both those decisions, and they have elements that pull in both directions. Complicating matters further, since World War II in the Quirin decision, we've had a statutory development, the adoption in the early 1970's of the Non-Detention Act. The Non-Detention act, in brief, states that detention of citizens must be pursuant to statute, thus raising forever after, as long as that's on the books, the question of whether any given authorization for force or declaration of war is explicitly clear enough to justify citizen detention, even if detention would otherwise be lawful in light of Milligan and Quirin.

So, that's the backdrop that the courts have had to struggle with in the post-9/11 period in the handful of instances in which citizens or persons captured in the United States have come into military custody. It's important to realize there have only been three such instances, if we set aside the John Walker Lindh example, and maybe that's a brief fourth one.

The first major instance to come to head was the HAMDI case. Now, Hamdi was captured on the battlefield in Afghanistan. He was very analogous to a more conventional scenario where the person allegedly was a member of the armed forces of the enemy in a war zone, and the Supreme Court made clear that in those circumstances, if the factual claims against him were true, there is detention authority.

The cases that are of more interest today are the cases of Jose Padilla and Ali al-Marri; Jose Padilla, an American citizen; al-Marri, not a citizen but lawfully present in the United States when he was captured, both captured here, both alleged al-Qaeda sleeper cell members.

Suffice to say that the courts splintered widely and wildly as to the legality of their detention. In Padilla's case, it never reached a merits decision by a majority of the supreme court, and yet we can count heads and say that there was in fact a majority to say no in his case, most likely on the grounds of the Non-Detention Act. We can say that because when his case did reach the court, there was a brief—there was a ruling on procedure that the majority focused on, but there were four dissenters who focused on the

merits. One other member of the Court, Justice Scalia, made clear in another case, the *Hamdi* case, that he was hostile to the position of citizen detention as well. Counting heads, it was fairly clear the government would lose on the merits, which is the most likely reason why the government ultimately transferred him to civilian custody.

Now, my time has expired, so I will stop here and let my colleague, Mr. Wittes, continue with the policy implications of this uncertainty.

Mr. GOODLATTE. Mr. Wittes, welcome.

TESTIMONY OF BENJAMIN WITTES, SENIOR FELLOW IN GOVERNANCE STUDIES AND RESEARCH DIRECTOR IN PUBLIC LAW, THE BROOKINGS INSTITUTION

Mr. WITTES. Thank you, Chairman Goodlatte, Ranking Member Conyers and Member of the Committee.

I want to pick up right where Professor Chesney left off and discuss briefly our single recommendation that as he said, Congress should put to rest the uncertainty he described over domestic military detention by clarifying that neither the AUMF nor the NDAA 2012 should be read to confer detention authority over persons captured within the United States, whether citizens or not.

The benefits of keeping the military detention option open are slim and hypothetical while the offsetting costs are substantial, in our view. The executive branch, let me start by saying, has no interest in using detention authority domestically, contrary to a lot of the popular mythology. The Bush Administration actually had little appetite for military detention in such cases all along.

The experiments that Professor Chesney refers to of detention with Padilla and al-Marri did very little to encourage a different course, given the legal uncertainties the cases exposed, and that uncertainty has in turn created an enormous disincentive for any Administration of whatever political stripe to attempt this sort of detention again.

So, a de facto policy developed in favor of using the criminal justice apparatus whenever humanly possible for terrorist suspects apprehended in the United States. While military detention has remained potentially available as a theoretical matter, therefore, it is not functionally available for two simple reasons: First, because executive branch lawyers are not adequately confident that the Supreme Court would affirm its legality; and secondly, because the executive has a far more reliable alternative in the criminal justice apparatus.

The Obama Administration later made this unstated policy official, announcing publicly that it would use the criminal justice system exclusively both for domestic captures and for citizens captured anywhere in the world.

But ironically, even as this strong bipartisan executive norm against military detention of domestic captures developed, a fierce commitment to this type of detention has also developed in some quarters. The fact that the norm against detention is not currently written into law has helped fuel this commitment, enabling the

persistent perception that there is greater policy latitude than functionally exists. The result is that every time a major terrorist suspect has been taken into custody domestically in recent years, the country explodes in the exact same unproductive and divisive political debate.

In other words, there's a big gulf between the real functional state of play in which the criminal justice system provides the exclusive means of processing terrorist suspects captured within the United States and the perception in some quarters that military detention remains a viable option, perhaps even a norm for domestic terrorist captures, and that gulf has real costs.

Closing off the possibility of the executive branch's trying such detention again in the future is not without potential cost of its own. It is certainly possible that we will one day again confront a case like that of Jose Padilla, which was a very scary case, in which strong evidence exists that an individual member of an AUMF covered group poses a huge threat within the United States but in which the evidence supporting this view is either too sensitive to disclose or inadmissible, and in such a situation, flexibility would be a real virtue.

But we believe that situation is far less likely to develop today than it was when the Bush Administration conduct—confronted the Padilla case in 2002. To put it bluntly, we're a lot better at these cases now than we were then. And aside from a Padilla-like scenario, a ban on military detention for domestic captures would foreclose no course of action that is realistically available to the executive branch now, given its own preferences and prudential judgments. It would, rather, merely codify the existing understanding reflected in executive branch policy and practice, policy and practice that has been reinforced over the years by well-informed expectations about the likely views of the justices on the underlying legal questions.

In other words, the costs of the legal uncertainty and political friction overhanging the domestic military detention option simply outweigh any hypothetical benefits of continuing to leave that option open as a statutory matter, and we, therefore, favor legislation that would clarify that military detention in counterterrorism under the AUMF is not available with respect to any persons arrested within the United States.

We look forward to answering your questions. Thank you.

Mr. GOODLATTE. Thank you, Mr. Wittes.

[The joint prepared statement of Mr. Chesney and Mr. Wittes follows:]

Prepared Statement of

Robert Chesney

Professor of Law at the University of Texas School of Law and Non-Resident Senior Fellow at the Brookings Institution

and

Benjamin Wittes

Senior Fellow at the Brookings Institution

before the

House Committee on the Judiciary

"Protecting U.S. Citizens' Constitutional Rights During the War on Terror"

May 22, 2013

OPENING REMARKS

Robert Chesney is the Charles I. Francis Professor in Law at the University of Texas School of Law and a non-resident senior fellow at Brookings. He is a co-founder of the Lawfare blog.

Benjamin Wittes is a senior fellow in Governance Studies at The Brookings Institution. He co-founded and is the editor-in-chief of the Lawfare blog.

Thank you, Chairman Goodlatte, Ranking Member Conyers, and members of the committee for this opportunity to give our views on the subject of military detention under the laws of war of terrorist suspects arrested within the United States.

This written statement represents the views of Robert Chesney, Professor of Law at the University of Texas School of Law and Non-Resident Senior Fellow at the Brookings Institution, and Benjamin Wittes, Senior Fellow at the Brookings Institution.

We would like to make four major points today, points which lead to a single recommendation:

First, a review of the relevant case law suggests that the Supreme Court as currently aligned would probably *not* approve the use of long-term military detention under color of the Authorization for the Use of Military force (AUMF) with respect to a United States citizen detainee who was arrested by law enforcement authorities within the United States. Whether it would approve detention for a non-citizen captured within the United States is also in doubt, though the matter is less clear in that setting.

Second, current criminal justice authorities provide ample grounds for ensuring the incapacitation of such persons in most foreseeable instances. There is little if anything to be gained for the executive branch in gambling with the domestic military detention option, which would carry significant litigation risk and guarantee divisive political friction.

Third, although the Bush administration did use military detention for domestic captures in two instances—one involving a citizen, another a non-citizen—it typically relied on the criminal justice system instead. Indeed, in the case of the citizen detainee, it eventually backed away in the face of a looming judicial reversal. The Obama administration has stayed this course, taking similar action with respect to the domestic non-citizen detainee in military custody. Today it is highly unlikely that an administration of either party would attempt to use these authorities again.

Fourth, because these options nonetheless have not formally been foreclosed in law, there are periodic surges of interest in them by both political supporters and opponents. Supporters demand their use in cases like that of the Boston Marathon bombing. Opponents, meanwhile, have gone to court to seek injunctive relief against law of war detention authorities based on speculative fears of military

detentions that will not take place. All of this is disruptive, undesirable, and unnecessary.

Based on these observations, we therefore recommend that Congress codify in statute today's practical status quo. That is, Congress should state explicitly that detention authority under the AUMF and the NDAA does not extend to any persons captured within the territory of the United States. We provide a more expansive discussion of these points below, in two parts. The first part outlines the legal context against which these issues arise today. The second discusses the practical and policy consequences of leaving the current status quo uncodified in statute and explains our recommendation for legislation.

The Legal Context of Military Detention of Citizens and Persons Captured Within the United States

In some circumstances, the domestic use of law of war detention clearly is lawful and appropriate. The American Civil War provides the best example: Just about every one of the Confederate soldiers attacked and detained by Union forces in that conflict were American citizens. The problem of citizens' fighting for the enemy has not been limited to the Civil War, however. For varying reasons, American citizens have fought for the enemy in several other conflicts as well.

World War II provides a pair of striking examples that resulted in federal court decisions. One involved an American citizen--Gaetano Territo--who grew up in Italy and was conscripted into the Italian Army, only to be captured during the allied invasion of Sicily and then held for years as a POW. The other involved a group of saboteurs--two of with claims to American citizenship--who were dispatched by the German military to conduct a campaign of bombings in the United States, only to be captured after one of the men reached out to the FBI to reveal the plot. Both cases generated clear statements from the courts to the effect that an American who becomes a member of the enemy's armed forces during a war has no right to be treated differently than other enemy soldiers. *In re Territo* (a Ninth Circuit decision) applied that rule in affirming that it was perfectly lawful to hold Territo as a POW, and *Ex parte Quirin* (a Supreme Court decision) not only said the same but also approved prosecution by military commission for both the citizens and non-citizens among the captured German saboteurs.

Not all cases are so clear cut, however. Consider the famous case *Ex parte Milligan*, which involved events during the American Civil War. Milligan and others were taken into custody by military authorities in Indiana, and eventually prosecuted by

military commission for plotting to seize arms and use them to break prisoners out of a nearby POW camp maintained by the Union. The Supreme Court ultimately held that Milligan should not have been subjected to these measures because he was not said to be part of the Confederate armed forces and because the civilian courts were still open and functioning in Indiana at that time.

The line between *Milligan*, on one hand, and *Territo* and *Quirin*, on the other, is clear enough: persons who are part of the armed forces of the enemy during an armed conflict are not relieved from military detention (or from prosecution by military commission in the event of a war crime allegation) simply by virtue of being U.S. citizens. Where the person is *not* part of the enemy's armed forces, however, military detention or trial is not an option if ordinary civilian courts remain open. This thumbnail sketch provides key context for understanding post-9/11 debates regarding the constitutionality of military detention for U.S. citizens.

But there is a second important element to consider as well: in the context of any given conflict fought under color of a congressional authorization to use force, the courts have to consider whether Congress intended for the executive branch to wield detention authority over citizens in the first place. This was not a question that generated attention prior to the mid-20th century, but it is a pressing question today, thanks to the Non-Detention Act of 1971 (18 USC § 4001(a)), which provides that citizens may not be detained other than pursuant to statute. That law requires the executive branch, and ultimately the courts, to ask whether an authorization to use force that may not mention detention explicitly nonetheless authorizes it implicitly--and thus counts as sufficient statutory authority to satisfy the Non-Detention Act.

Against this backdrop, consider the events of the post-9/11 period as they relate to the detention of citizens and of other persons captured within the United States. The question of citizen detention arose briefly at the very outset of the conflict in Afghanistan, thanks to the capture of "American Taliban" John Walker Lindh. Lindh was in military custody initially, and unavoidably so in the circumstances. After a time, however, the Bush administration chose to transfer him into the civilian criminal justice system in the United States, the first of many successful prosecutions in the Bush years involving persons linked to the Taliban and al Qaeda. That move prevented exploration of whether Lindh could simply have been held for the duration of hostilities like other enemy fighters.

As it turned out, however, Lindh was not the only citizen fighting with the Taliban. Yaser Esam Hamdi had been born in Louisiana, and thus had a plausible claim to citizenship as well. This came out after his capture in Afghanistan and after his transfer to Guantanamo. At that point, he was promptly shifted to a military facility within the United States, but unlike Lindh, Hamdi remained in

military custody. His situation was quite similar to that of Gaetano Territo (the Italian-American POW discussed above) except that crucially, Hamdi did not concede that he had been part of the enemy's armed forces. Ultimately, his habeas corpus petition reached the Supreme Court, which in 2004 issued a split decision: As a citizen, Hamdi was entitled to more process than he had thus far received, but on the other hand, he would indeed be subject to military detention if the government could prove he had been a Taliban fighter, as it alleged.

The Court in *Hamdi* went out of its way to confine its holding to the particular facts presented in that case, plainly conscious that other fact patterns might arise in circumstances that did not so clearly track *Territo* or *Quirin*. The justices had one such example before them at that very moment: the case of Jose Padilla.

Jose Padilla was an American citizen who went abroad to join the jihad movement prior to 9/11. He became famous in May 2002 when he was arrested in Chicago coming off an international flight. The government announced that he was an al Qaeda agent planning an attack in the United States, possibly involving a "dirty" (i.e., radiological) bomb. He was not arrested on criminal charges, however, but rather was held on a "material witness" arrest warrant (a centuries-old statutory authority to use the power of arrest when necessary to ensure that a witness is available to testify before a grand jury or at trial). As we explain in more detail in the next section, the problem the government faced was that its knowledge about Padilla's plans was based at least in part on the coercive--and highly classified--interrogation of a separate suspected al Qaeda member. With criminal prosecution not plausible for the time being, and the clock ticking on the viability of material-witness detention, the Bush administration eventually opted to shift Padilla into military custody. Habeas litigation, not surprisingly, followed thereafter.

Padilla's case closely resembled the *Quirin* scenario, in that he was said to be an agent of the enemy who had entered the United States surreptitiously in an attempt to carry out bombings. It also had elements of *Milligan*, however, in that that Padilla was not alleged to be a soldier in any sort of recognized armed force, but rather was part of a clandestine terrorist network. That terrorist network *was* the enemy in the current conflict, of course, which is why many viewed the situation as a direct repeat of *Quirin*. This made sense to the first district judge to consider the matter, at any rate. Relying on *Quirin* and distinguishing *Milligan*, future Attorney General Michael Mukasey held in *Padilla ex rel. Newman v. Bush* that Padilla was detainable in theory, expressly rejecting the argument that his citizenship immunized him--though also insisting that Padilla be allowed to challenge the factual basis for the government's claims. The Second Circuit Court of Appeals reversed, however, concluding that for a non-battlefield capture like Padilla, the Non-Detention Act would not be satisfied without a clear statement

from Congress of its intention for the AUMF to provide detention authority over citizens.

The stage was set for the Supreme Court to settle the matter, but things quickly got complicated. Four of the Justices took the position that Padilla was not subject to detention. Five, however, withheld judgment on the merits in favor of focusing on a procedural error: The petition, they said, should have been litigated in the federal court in South Carolina and in the Fourth Circuit Court of Appeals, not in New York and in the Second Circuit.

Notwithstanding the Supreme Court's vacating of the Second Circuit's ruling, it was clear from the contemporaneous *Hamdi* decision that one of the five justices in *Padilla* majority almost certainly would side with Padilla on the merits. Justice Scalia dissented in *Hamdi*, arguing that detention should not be available for U.S. citizens even in the clearer circumstances *Hamdi* presented. It thus appeared only a matter of time and procedure before a majority of the Court would hold that detention under the AUMF was not available for U.S. citizens captured inside the United States.

We never found out what would happen, however. Padilla prevailed again on remand to a district judge in South Carolina, and then lost before the Fourth Circuit based on a new argument: that Padilla was exactly like Hamdi in that he had borne arms on the Afghan battlefield in late 2001, but simply had been luckier in remaining free until 2002. At any rate, the next stop was the Supreme Court, again, and no small prospect of defeat for the government. Most observers believe this prospect explains why the Bush administration at that stage transferred Padilla back to civilian custody--where he faced criminal trial at long last. Padilla was prosecuted in federal court in Florida on charges relating to his pre-9/11 conduct (going abroad in hopes of joining the jihad movement, in effect), was convicted, and is now serving a prison sentence.

The end of the Padilla litigation did not end the opportunity for courts to struggle with the question of detention authority in the United States. There was one other domestic military detainee in the Bush years, a Qatari man named Ali Saleh Kahlah al-Marri. As in Padilla's case, the government first used civilian authorities to detain al-Marri after concluding that he might be an al Qaeda agent. As in Padilla's case, it eventually moved him into military custody. And as in Padilla's case, the resulting habeas litigation was a mess, with a variety of judges embracing a broad array of different theories. First, the district judge concluded that there was no obstacle to detaining al-Marri, as he was not a citizen and thus the AUMF need not be more explicit in providing for detention in his case. The Fourth Circuit disagreed, however, with the initial panel opinion concluding that as a lawful resident, al-Marri had Fifth Amendment rights, that those rights precluded

detention beyond what the law of war might allow in this case, and that the law of war did not permit detention in this circumstance. This in turn led to an *en banc* banc review by the full court, which splintered wildly across an array of opinions. A slim majority sided with the government, but without a single unifying theory to explain that result. Once more, the Supreme Court might have resolved the matter, and it did grant *certiorari* in an apparent bid to do so. But following the Padilla path once again, the government--now the Obama administration--transferred al-Marri to the civilian criminal justice system, mooting the issue and leaving the question of detention authority for domestic captures under the AUMF in doubt.

There has been no new case of domestic military detention--whether involving citizens or non-citizens--since those cases from the early years of post-9/11 counterterrorism, nor any clarification of the legal questions that the aforementioned cases raised.

Indeed, the issues involved appeared entirely dormant until Congress took up the question of domestic detention in the course of crafting the National Defense Authorization Act for Fiscal Year 2012. An initial draft of that bill contained a clause that provided for detention authority to extend to citizens and to others within the United States. The language used to accomplish that result was decidedly indirect, but once its meaning became clear, it drew extensive criticism. There was sharp debate in Congress--and more generally--with respect to whether such authority should, in fact, be confirmed, and proposals emerged to reframe the bill to accomplish the opposite result--i.e., clarifying that there is *not* detention authority in such cases. This proved equally difficult to move forward, so in the end, Congress opted for the easiest course of action: the NDAA FY'12 explicitly states that nothing in the bill should be taken as weighing in one way or the other on the question of domestic and citizen detention.

The net (and intended) effect was to leave in place the veil of uncertainty that had been generated by the combination of the *Hamdi*, *Padilla*, and *al-Marri* decisions of the prior decade. Future presidents were left free to roll the dice by asserting such authority, or not, as they might see fit to try.

What Should Congress Do?

In our view, Congress should put this issue to rest at last by clarifying that neither the AUMF nor the NDAA FY'12 should be read to confer detention authority over persons captured in the United States (regardless of citizenship). The benefits of keeping the option open in theory are slim, while the offsetting costs are substantial.

We say the benefits are slim chiefly because the executive branch has so little interest in using detention authority domestically. The Bush administration had little appetite for military detention in such cases all along, preferring in almost all instances involving al Qaeda suspects in the United States to stick with the civilian criminal justice system. The experiment of military detention with Padilla and al-Marri did little to encourage a different course, given the legal uncertainty the cases exposed. That uncertainty has, in turn, created an enormous disincentive for any administration—of whatever political stripe—to attempt this sort of detention again. A *de facto* policy thus developed in favor of using the criminal justice apparatus whenever humanly possible for terrorist suspects apprehended in the United States. And whenever humanly possible turned out to mean always; while military detention may remain *potentially* available as a theoretical matter, it is not *functionally* available for the simple reasons that (i) executive branch lawyers are not adequately confident that the Supreme Court would affirm its legality and (ii) in any event, they have a viable and far-more-reliable alternative in the criminal justice apparatus.

In September 2010, the Obama administration made this unstated policy official, announcing that it would use the criminal justice system exclusively both for domestic captures and for citizens captured anywhere in the world. In a speech at the Harvard Law School, then-White House official John Brennan stated:

> it is the firm position of the Obama Administration that suspected terrorists arrested inside the United States will—in keeping with long-standing tradition—be processed through our Article III courts. As they should be. Our military does not patrol our streets or enforce our laws—nor should it.
>
> . . .
>
> Similarly, when it comes to U.S. citizens involved in terrorist-related activity, whether they are captured overseas or at home, we will prosecute them in our criminal justice system.

To put the matter simply, military detention for citizens or for terrorist suspects captured domestically, was tried a handful of times early in the Bush administration; the strategy was abandoned; it has been many years since there was any appetite in the executive branch—under the control of either party—for trying it again; and it has for some time been the stated policy of the executive branch *not* to attempt it under any circumstances. We do not expect any administration of either party to break blithely with the consensus that has developed absent some dramatically changed circumstance. The litigation risk is simply too great, and the criminal justice system's performance has been too strong to warrant assuming this risk.

But ironically, even as this strong executive norm against military detention of domestic captures and citizens has developed, a fierce commitment to this type of detention has also developed in some quarters. The fact that the norm against detention is not currently written into law has helped fuel this commitment, enabling the persistent perception that there is greater policy latitude than functionally exists. The result is that every time a major terrorist suspect has been taken into custody domestically in recent years—the arrest of Djokhar Tsarnaev is only the most recent example—the country explodes in the exact same unproductive and divisive political debate. To caricature it only slightly, one side argues that the suspect should have been held in military custody, instead of being processed through the criminal justice system; it decries the reading of the suspect his *Miranda* rights; and it criticizes the administration, more generally, for a supposed return to a pre-9/11 law enforcement paradigm. The other side, meanwhile, defends the civilian justice system, while also demanding the closure of Guantánamo and attacking the performance of military commissions for good measure.

This kabuki dance of a debate is not merely a matter of rhetoric. Separate and apart from the U.S. citizen detention language we described above, in the course of producing the 2012 NDAA Congress also explored the option of *mandating* military detention for suspects (citizen or not) taken into custody within the United States. The administration resisted these efforts, and the resulting language in conference committee ultimately stopped far short of requiring military detention. The administration further softened the effects of that language, moreover, through its subsequent interpretation of the new language. All of which brings us back to our point: there is a big gulf between the real, functional state of play (in which the criminal justice system provides the exclusive means of processing terrorist suspects captured within the United States) and the perception in some quarters that military detention remains a viable option, perhaps even a norm, for domestic and citizen terrorist captures.

That gulf has real costs. Most obviously, it generates significant political friction every time a major terrorist arrest happens in the United States. It increases the apparent political polarization of an area that should be above politics—and in which the counterterrorism reality is far less polarized than the inter-branch relations over the issue would suggest. And it reinforces the perception that domestic military detention remains a viable option, needlessly alarming those who fear it and needlessly misleading those who wish to see it. The resulting confusion fuels sharp debate over something that is no longer meaningfully an option in functional terms. That debate even spills over at times into litigation, most notably—and disruptively—in the context of the *Hedges* case in New York (in which journalists and activists persuaded a district judge to enjoin enforcement of

detention authority, despite the utter implausibility of the claim that they might be subjected to it).

To be clear, closing off the possibility of the executive branch's trying such detention again in the future is not without potential costs. Consider the Padilla case once more. Contrary to the mythology that has developed about it over the years, the decision to move Padilla into military custody did not result from some ideological commitment on the part of the Bush administration to domestic military detention or to expanding executive power. It was, rather, a least-bad alternative in a circumstance in which options within the criminal justice system appeared to have run out. Recall that the government initially held Padilla in the criminal justice system. As then-Deputy Attorney General James Comey explained in 2004:

> Padilla was arrested by the FBI in Chicago on a material witness warrant authorized by a federal judge in New York. And he was transferred to Manhattan where I was then the United States attorney.
>
> He was appointed a lawyer at public expense. And we set about trying to see if he would tell the grand jury what he knew about al Qaeda.
>
> With time running out in that process, on June 9th of 2002, just about two years ago, the president of the United States ordered that Padilla be turned over to the custody of the Department of Defense as an enemy combatant, where he remains.
>
> . . .
>
> Had we tried to make a case against Jose Padilla through our criminal justice system, something that I, as the United States attorney in New York, could not do at that time without jeopardizing intelligence sources, he would very likely have followed his lawyer's advice and said nothing, which would have been his constitutional right.
>
> He would likely have ended up a free man, with our only hope being to try to follow him 24 hours a day, seven days a week, and hope—pray, really—that we didn't lose him.

It is certainly possible that we will one day again confront a case in which strong evidence exists that an individual member of an AUMF-covered group poses a huge threat within the United States, but in which the evidence supporting this view is either too sensitive to disclose or inadmissible for any of several reasons. In such a situation, legislation prohibiting the military detention of suspects captured in the United States in theory could precipitate an outcome like the one that Comey feared in 2002. From that perspective, the option of at least attempting to

sustain military detention, despite the legal uncertainty we described above, would be attractive.

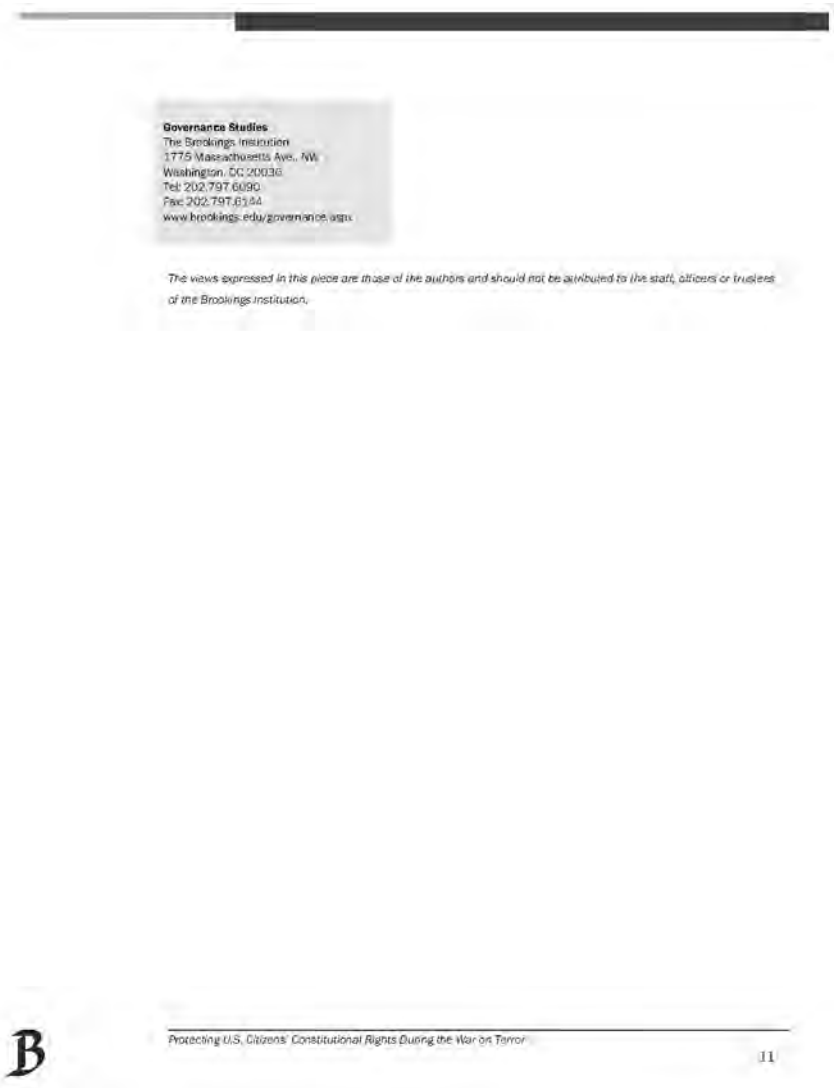
For a variety of reasons, however, we believe that situation is far less likely to develop today than it was in 2002. Law enforcement practice has improved substantially in this space. The FBI and Justice Department have developed significant expertise in handling suspects like Padilla. And as we mentioned before, one of the reasons the information developed against Padilla was unusable by Comey was that it had been obtained by the CIA using highly-coercive means; those means are no longer in use. None of this eliminates the possibility of a case like Padilla's developing in the future, of course, but it does suggest that such scenarios are unlikely to arise. Indeed, such a situation has not arisen since the earliest years of the war on terror.

Aside from a Padilla-like scenario, a ban on military detention in domestic capture scenarios thus would foreclose no course of action that is realistically available to the executive branch at this stage given its own preferences. It would, rather, merely codify the existing understanding reflected in executive branch policy and practice—policy and practice reinforced over the years by well-informed expectations about the likely views of the justices on the underlying legal issues.

Adopting such a change, it is worth emphasizing, would run with the grain of America's traditional wariness when it comes to a domestic security role for the U.S. military. There have unfortunately been times in our nation's history when it has been necessary and proper for the military to play such a role. It is far from clear that this is the case today, however, given the demonstrated capacity of the criminal justice system in the counterterrorism context.

In the final analysis, we conclude that the manifest legal uncertainty and political friction overhanging the domestic military detention option entail costs that, in our view, outweigh the hypothetical benefits of continuing to leave that option open as a statutory matter. We therefore favor legislation that would clarify that military detention in counterterrorism under the AUMF is not available with respect to any persons--whether United States citizens or aliens--arrested within the United States.

We look forward to addressing your questions.



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Mr. Engel, welcome.

TESTIMONY OF STEVEN A. ENGEL, PARTNER, DECHERT, LLP

Mr. ENGEL. Thank you. Chairman Goodlatte, Ranking Member Conyers and Members of the Committee——

Mr. GOODLATTE. If you want to pull that microphone closer and be sure it is turned on.

Mr. ENGEL. No, I have a better light. Thank you, Mr. Chairman, and thank the Members of the Committee for the opportunity to appear here today.

For more than 10 years, the United States has been engaged in an armed conflict against al-Qaeda, the Taliban and associated forces. That conflict, while centered outside our borders, has not been limited to external threats. To the contrary, on September 11, al-Qaeda proved that it had the military capability to inflict an attack on our homeland as devastating as anything we had experienced before. The war on terror presents special issues when it comes to the rights secured to U.S.—United States citizens. With the nature of the enemy less defined and the enemy set on attacking on our homeland, the war on terror requires that the government work to detect and stop terrorist plots at home.

The means by which we seek to stop such threats and the rights of those, including American citizens detained on our soil, pose special challenges to ensure that we protect the constitutional rights of Americans at the same time as we protect their lives. Indeed, the topic of today's hearing is hardly theoretical.

Just 1 month ago, we saw that the domestic threat posed by al-Qaeda and its idealogical allies remains very real. On April 15, 2013, two American citizens committed a terrorist attack in Boston that claimed the lives of three people and seriously injured hundreds more. In the manhunt that followed, those same individuals murdered a police officer, they critically injured another and apparently were planning to commit another terrorist attack had they not been stopped. The City of Boston, as we all know, was shut down for nearly 2 days.

The Boston Marathon attack makes the topic of today's hearing quite timely. The apprehension of the second bomber, Dzohkar Tsarnaev, raised questions about whether he should have been detained by civilian law enforcement or transferred to military custody. It also raised questions about what rights Mr. Tsarnaev had while in police custody, including whether and when he should have received Miranda warnings.

Let me say a word here with respect to Mr. Tsarnaev's detention. The Supreme Court has made clear that a U.S. citizen who joins up with a foreign enemy may be detained in military custody. In the war on terror, the Supreme Court specifically upheld the military detention of a U.S. citizen captured in Afghanistan. During World War II, the court held that an American citizen arrested within our borders likewise could be held and prosecuted in military custody. The fact that an enemy combatant could also be prosecuted in the civilian justice system is not a legal reason why he may not also be subject to military detention.

Of course, as the Chairman noted, that citizen would have a full right to the writ of habeas corpus, which is the fundamental bulwark against arbitrary detention. Now, whether Mr. Tsarnaev was in fact an enemy combatant, of course, is a separate question. Based on the publicly available information, there is certainly reason to doubt that Mr. Tsarnaev had joined an enemy force as opposed simply to have taken inspiration from al-Qaeda and its idealogical adherence. While Mr. Tsarnaev thus may appropriately have been treated as a criminal suspect, the Boston marathon case is instructive because the facts will not have to change very much to lead to a very different conclusion. If like the German saboteurs in World War II, Mr. Tsarnaev had trained with the enemy and re-

turned to our country to commit a terrorist act of war, then the President could well have ordered and held in military custody. With a few additional facts, such determination might also appear wise. What if Mr. Tsarnaev was part of a larger terrorist cell whose members remained at large? What if Mr. Tsarnaev knew of the next plot, but the government needed the time to interrogate him before providing him with a lawyer? And what if government did not want to publicly disclose to our enemies the intelligence that they had relied upon in support of arresting him? Under those circumstances, the President might well determine that it is both lawful and necessary to transfer a terrorist to military custody.

And again, if you believe that the September 11th attacks were an act of war, it is a remarkable position to think that if the hijackers were caught on the morning of September 11th, they could not be treated as enemy combatants and held in military custody.

Now, in fighting the war on terror and in protecting our citizens, the United States must have the flexibility to use all of the tools at its disposal, including both its military and civilian capabilities. We have been successful over the past 10 years precisely because we have recognized that the war on terror is a problem that required both. We would serve neither the Constitution nor our national security well if we were to limit the lawful means at the President's disposal in combatting these threats.

Thank you, Chairman Goodlatte and Ranking Member Conyers, for the opportunity to appear here today. Ensuring that the government has struck the appropriate balance between liberty and security is certainly a matter worthy of this Committee's attention, and I look forward to your questions.

Mr. GOODLATTE. Thank you, Mr. Engel.

[The prepared statement of Mr. Engel follows:]

United States House of Representatives, Committee on the Judiciary

Hearing on "Protecting U.S. Citizens' Constitutional Rights During the War on Terror"

May 22, 2013

Statement of Steven A. Engel

Former Deputy Assistant Attorney General

Office of Legal Counsel

U.S. Department of Justice

Statement of Steven A. Engel[1]

Former Deputy Assistant Attorney General,
Office of Legal Counsel, U.S. Department of Justice

May 22, 2013

Chairman Goodlatte, Ranking Member Conyers, and the Members of the Committee, thank you for the invitation to testify today on protecting U.S. citizens' constitutional rights during the War on Terror.

For more than ten years now, the United States has been engaged in an armed conflict against Al Qaeda, the Taliban, and associated forces. That conflict, while centered outside our borders, has not been limited to external threats. To the contrary, on September 11th, Al Qaeda proved that it had the military capability to inflict an attack on our homeland as devastating as anything that our Nation had experienced before.

While Al Qaeda clearly demonstrated that it represented a military threat to our country, the group and its associated forces are quite different from prior enemies. Al Qaeda is not a nation state, and its forces neither wear uniforms nor control territory in a conventional sense. Rather, Al Qaeda operates outside of, or in the shadows of, the laws of nation states, by exploiting power vacuums in failed states, making opportunistic alliances where available, and operating covertly within nations. As time has passed, the

[1] Steven A. Engel is a partner in the Washington, DC office of Dechert LLP. From February 2007 to January 2009, he served as a Deputy Assistant Attorney General in the Office of Legal Counsel of the Department of Justice, and from June 2006 to January 2009, as counsel in that office. Mr. Engel graduated Yale Law School, Cambridge University, and Harvard College *summa cum laude*, and he served as a law clerk to Justice Anthony M. Kennedy of the Supreme Court of the United States and now-Chief Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. Mr. Engel appears in his personal capacity, and not on behalf of the law firm or any of its clients.

nature of Al Qaeda itself has changed, as the group has shifted, fragmented, and associated with regional groups outside of the Afghanistan and Pakistan region.

The War on Terror, as this armed conflict has been described, is thus a very different kind of conflict from ones we have seen in the past. And the nature of that conflict—with an ill-defined enemy, operating covertly and opportunistically—has itself raised special issues when it comes to defining the laws of war that govern this conflicts. The traditional laws of war are premised upon a conventional armed conflict or, in some cases, civil wars. The established legal framework provides clear answers to who may be detained, how they must be treated, and where they should be prosecuted. None of these questions is self-evident when it comes to the War on Terror.

The War on Terror poses special issues as well when it comes to the rights secured to United States citizens under our Constitution. With the nature of the enemy less defined, and the enemy set on attacking our homeland, the War on Terror requires that the Government work to detect and stop terrorist plots at home. The means by which we seek to stop such threats, and the rights of those, including American citizens, detained on our soil pose special challenges to ensure that we protect the constitutional rights of Americans at the same time as we protect their lives.

Indeed, the topic of today's hearing is hardly theoretical. Just one month ago, we saw that the domestic threat posed by Al Qaeda and its ideological adherents remains very real. On April 15, 2013, two American citizens committed a heinous terrorist attack that claimed the lives of three people and seriously injured another 264. In the manhunt that followed, those same individuals murdered a police officer, critically injured another, and apparently, were planning to commit another terrorist attack, had they not been

stopped. The city of Boston was paralyzed for nearly 48 hours. And the apprehension of the second bomber raised questions about how he should be detained, what rights he had as an American citizen, and whether our Government had done all that it could to ensure that we had obtained the intelligence available to prevent another attack.

These issues make the topic of today's hearing quite timely. In fighting the War on Terror, and in protecting our citizens, the United States must have the flexibility to use all of the tools at its disposal, including both its military and civilian capabilities. We have been successful over the past ten years precisely because we have recognized that the terrorist problem is a problem to be dealt with both by civilian law enforcement and our military/intelligence services. It would be a mistake for us to tie one of our hands behind our back in the face of these threats.

At the same time, when it comes to civil liberties, we must recognize that the choice between civilian and military means is not a choice between whether or not our Government will fight this conflict with the limits of the law. The rights secured by the Constitution are fixed and do not bend with the demands of the time. And the Supreme Court has made clear that the Constitution applies to constrain the actions both of civilian and military personnel.

Let's take the example of the Dzohkar Tsarnaev, the Boston marathon bomber, who was captured after a citywide manhunt. According to press reports, Tsarnaev was apprehended by law enforcement, and then questioned by the Federal Bureau of Investigation for sixteen hours in his hospital bed based upon the public safety exemption to the *Miranda* warnings. It is unclear from press reports precisely who decided to end the questioning. What is clear, however, is that after those sixteen hours, Mr. Tsarnaev

was read his *Miranda* rights, a lawyer was appointed for him, and he immediately stopped cooperating with the Government.

The Boston Marathon case raises a number of questions when it comes to the detention and interrogation of enemy combatants in the present conflict. First, should Mr. Tsarnaev have been detained by civilian law enforcement at all, or should he have been declared an enemy combatant and transferred to military custody for detention and interrogation? Second, even if Mr. Tsarnaev was properly kept in civilian custody, were law enforcement officials obliged to read him his *Miranda* rights at the end of the sixteen-hour period? Let me try a few answers to those questions.

Military v. Civilian Detention

With respect to Mr. Tsarnaev's detention, the Supreme Court has made clear that a U.S. citizen who takes up arms against this country may be detained in military custody for the duration of wartime hostilities. Whether Mr. Tsarnaev was in fact associated with an enemy force, of course, is a separate question. But in connection with the War on Terror, the Supreme Court has specifically upheld the military detention of a U.S. citizen who fought with the Taliban and was captured in Afghanistan. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). During World War II, the Court went one step further and held that an American citizen arrested within our borders could likewise be transferred to military custody for detention and prosecution. *See Ex parte Quirin*, 317 U.S. 1 (1942). The fact that the enemy combatant could also be prosecuted in the civilian justice system is not a legal reason why he may not be detained by the military.

While the Constitution permits the military detention of a U.S. citizen who takes up arms against the country, the Supreme Court in *Hamdi* made equally clear that the writ

of habeas corpus permits American citizens to test the lawfulness of such detention. Accordingly, the controlling opinion in *Hamdi* held that the Due Process Clause of the Fifth Amendment guaranteed Hamdi the right to receive notice of the factual basis for his classification, a fair opportunity to rebut the government's factual assertions before an impartial federal judge. *Hamdi*, 542 U.S. at 532-33. Thus, even though the Constitution permits the military detention of a citizen enemy combatant, it guarantees that the individual would have meaningful process to challenge that determination.

It should also be emphasized that if an American citizen were captured in the United States as an enemy combatant, the President would be strongly inclined to bring criminal charges against that person and to try him for his crimes in an Article III federal court. Indeed, during the early years following September 11th, when the Nation's fear of the next attack was at its height, the United States detained only two American citizens in military custody (Yaser Hamdi and Jose Padilla), as well as one lawful permanent resident (Ali Al-Marri). Two of those individuals were ultimately transferred into civilian custody and prosecuted before an Article III court. President Obama appears to have taken an even narrower view, apparently ruling out any military detentions for U.S. citizens. Accordingly, as a matter of sound public policy, the occasions for military detention of a U.S. citizen are likely to be exceedingly rare.

In the case of Mr. Tsarnaev, I would caveat the analysis by noting that those of us outside the Government are somewhat hampered because we are limited to the facts, as recounted by the press. Taking that limitation as a given, however, the United States does appear to have acted appropriately in keeping Mr. Tsarnaev in civilian custody, rather than transferring him to military custody. For purposes of military detention, the

question is whether Mr. Tsarnaev in fact was part of, or substantially supporting, Al Qaeda, the Taliban or associated forces, who were engaged in hostilities against the United States. The publicly available facts leave reason to doubt whether the Tsarnaev brothers in fact were working with such an enemy force, as opposed simply to having been inspired by Al Qaeda and its ideological adherents.

It is true that Mr. Tsarnaev's brother went abroad prior to the attacks, and his brother's travel certainly raises a question as to whether the Tsarnaevs had managed to link up with forces associated with Al Qaeda. Yet when it comes to justifying the military detention of an American citizen, the burden must be on the Government, and the questions raised by such travel do not themselves rise to the level of evidence. Again, based on the public reports, the evidence appears to suggest that while the Tsarnaevs were inspired by jihadist ideology, they in fact developed and carried out their terrorist plot on their own, rather than in coordination with, or at the direction of, the enemies of our country.

While Mr. Tsarnaev may appropriately have been treated as a criminal suspect, rather than an enemy combatant, the Boston Marathon case is instructive, because the facts would not have to change much to lead to a different conclusion. If, in fact, Mr. Tsarnaev and his brother had left the United States to join up with Al Qaeda or its allies, and if they had returned to our country for the express purpose of committing a terrorist act of war against the United States, then the President might well have been justified in transferring Mr. Tsarnaev to military detention.

We also would not have to posit too many additional facts before such a determination would appear to be a prudent choice. What if the Tsarnaev brothers were

members of a larger terrorist cell, whose other members remained at large? What if the Government suspected that Mr. Tsarnaev knew of their next plot but needed more time to interrogate him? What if the Government did not want to disclose to Mr. Tsarnaev, or to his confederates, the information that they had relied upon in support of his arrest for fear of tipping off the enemy? Under those circumstances, the President might well determine that it is both lawful and necessary to transfer a terrorist to military custody. Such instances may thankfully rare, but it is equally important that the United States should maintain the flexibility to deal with such extraordinary circumstances as they arise.

Miranda and Terrorist Interrogations

The Boston Marathon case also raises a question as to whether the FBI acted appropriately in questioning Mr. Tsarnaev for sixteen hours and then reading him his *Miranda* rights. Some have contended that the FBI should have not questioned Mr. Tsarnaev at all, without reading him his *Miranda* rights. Others have suggested that the sixteen-hour cutoff was too short, and that terminating the interrogation ran the risk of losing valuable intelligence, including information related to any foreign terrorist groups with whom the Tsarnaevs may have had contact, and the role of any confederates within the United States.

In answering these questions, we need to distinguish between the FBI's ability to question Mr. Tsarnaev and the use to which his answers may be put in a future criminal trial. The *Miranda* rule is not an independent requirement of our Constitution. Rather, it is an evidentiary rule that governs how statements may be used in a criminal trial. Under *Miranda*, the Government may only use custodial statements in a criminal trial, if the *Miranda* warnings were provided in advance of the interrogation. If, however, the FBI

wished to interrogate Mr. Tsarnaev solely for the purpose of obtaining actionable intelligence about future terrorist attacks, then there was no duty to *Mirandize* him.

Based on press reports, the Government appears to believe that it could interrogate Mr. Tsarnaev without providing him with the warnings, and still use his statements at trial, based upon the "public safety" exception to *Miranda*, which the Supreme Court recognized in *New York v. Quarles*, 467 U.S. 649 (1984). In *Quarles*, the police apprehended an armed suspect in a grocery store, but discovered that his gun was no longer in its holster. The police asked the suspect, "where is the gun?" and he told them where he had stashed it. The Supreme Court held that the prosecutors could use Quarles's statement at all—even though he had not received *Miranda* warnings—the Supreme Court recognized a limited "public safety" exception that would allow the government to use custodial statements at trial, where the police's questions were "necessary to secure their own safety or the safety of the public," and were not "designed solely to elicit testimonial evidence from a suspect." *Id.* at 658.

The custodial interrogation in *Quarles* was fleeting in time, and it was limited to the single question of the location of a loaded gun. Nonetheless, the Department of Justice has argued in recent years that *Quarles* may support the lengthier interrogation of terrorism suspects, where the questions go beyond simply an immediate threat, but are more generally motivated by the law enforcement interest in obtaining actionable intelligence in future terrorist plots. While the Department of Justice's position is not unreasonable, the argument has not been thoroughly tested in the courts, and it is an open question whether the *Quarles* exception may bear the weight that the Government wishes to place upon it.

Whether the Government is right about *Quarles* or not, it is important to emphasize that the sole issue is not whether the Government may interrogate a terrorism suspect about terrorist networks and future plots, but whether the Government may use those statements at a future trial. Neither *Miranda* nor *Quarles* places any limits upon police questioning when the sole interest is obtaining intelligence information, and the Government does not need to use the statements at issue at the criminal trial.

In the Boston Marathon case, it appears that the Department of Justice did not need much, if any, information for Mr. Tsarnaev's criminal trial. Mr. Tsarnaev was caught on video at the scene of the crime, he had confessed to at least one witness, his apartment apparently contained incriminating evidence, and he may even have left a written confession in the boat where he was apprehended. Thus, the purpose of the FBI's interrogation should have been to determine whether he had additional intelligence to provide as a means of preventing a future attack. In deciding whether the duration of his interrogation was appropriate, the appropriate measure should be whether law enforcement had determined that, in their best judgment, they had obtained the information needed from him, and not rules of criminal procedure designed solely for courtroom evidence. It remains unclear from the public account whether in fact the Department of Justice applied that rule to measure the duration of the interrogation in Mr. Tsarnaev's case. If they did not, there is a risk that valuable intelligence was lost.

* * *

The Constitution gives the federal Government the power to protect American citizens, at the same time as it secures out most important civil liberties. Those rights apply during times of both war and peace. Ensuring that the Government has struck the

appropriate balance is certainly a topic worthy of this Committee's attention. Thank you Chairman Goodlatte and Ranking Member Conyers for the opportunity to appear here today and I look forward to the Committee's questions.

Mr. GOODLATTE. Ms. O'Connell.

Ms. O'CONNELL. Thank you, Chairman Goodlatte, Ranking Member Conyers.

TESTIMONY OF MARY ELLEN O'CONNELL, ROBERT AND MARION SHORT PROFESSOR OF LAW, UNIVERSITY OF NOTRE DAME LAW SCHOOL

Mr. GOODLATTE. You may want to press that button on your phone—on your speaker there.

Ms. O'CONNELL. You'd think a professor could learn the lesson you just taught my colleague.

Anyway, Chairman Goodlatte and Ranking Member Conyers and Members of the Committee, thank you sincerely for this invitation to testify today on this critical issue of basic rights during armed conflict.

I have been a student of this very topic since the 1981-1982 academic year in Cambridge, England, where I was a student earning my LLB in international law. I studied under the great judge, Sir Christopher of Greenwood, truly one of the leading experts on this topic, and I went on to spend the next 30 years studying exactly what the law of armed conflict requires and when it applies.

It is true, as we have just heard, that the extraordinary situation of real armed conflict hostilities does change the rights to which people are entitled. Most importantly, with respect to our very lives, to our liberty and to the process which we are owed. These rights change according to the law of armed conflict, but the law of armed conflict also severely limits the situations in which these changes apply. The law of armed conflict applies in armed conflict, and the law, of course, has a definition of what counts as armed conflict so that we know when it is appropriate to shift these fundamental rights.

The definition is a commonsense understanding that works very well in our system of nation states, which is only loosely organized and really depends on open and obvious rules that all can see and can mutually re-enforce within the community of states.

So the definition of armed conflict within international law relies on two fundamental fact situations: There must be the presence of organized armed groups, and those armed groups must be engaged in situations of real fighting, of intense armed fighting. These facts are plain to see and they are plain to see with respect to Afghanistan today. That is where our serving men and women are actually engaged in encounters with armed insurgents seeking to overthrow President Karzai. In Afghanistan, our forces may kill enemy fighters without first attempting to detain them. Our soldiers may arrest or detain persons until the end of the hostilities in Afghanistan, and those persons may be held without trial. If they are accused of a crime, they may be put before military commissions.

But ladies and gentlemen, the hostilities in Afghanistan for the United States will come to an end in 2014, and it is at that time that our right to pursue these particular privileges of armed conflict will also come to an end. How ironic, therefore, that certain people believe that these very rights apply within the United States and may even apply beyond 2014, and yet we see in the

United States the serious contrast with the situation in Afghanistan.

We are not experiencing intense armed fighting on our streets among organized armed groups. No, we are experiencing something else that is also extremely challenging. We see, on our streets and in our cities, the challenge of terrorism, whether of the Timothy McVeigh and Tsarnaev brothers type or of the Richard Reid and Abdulmutallab type, but FBI, local police, Federal and State prosecutors, Article III and State courts are as a matter of law and practice the right bodies to respond to this ongoing threat.

I see in Professor Chesney's and Mr. Wittes' proposal and the in the comments of Mr. Engel a movement generally away from this wartime attempt or this attempt to pursue the privileges of armed conflict on the territory of the United States. We see this in other indications as well.

Today's New York Times reports that drone strikes outside of armed conflict zones are declining dramatically. We are also seeing no further prisoners being sent to Guantanamo. The vast amount of trials against terror suspects, 200-plus trials, have been in the United States in regular courts since 9/11. Indeed, the very first asserted wartime privilege after 9/11 to come to an end came to an end already in 2003, and that, Mr. Chairman, was the attempt to do search and seizure of cargo ships on the high seas. Yes, during wartime, such search and seizure may continue, but not in peacetime, and the U.S. gave that up in 2003, persuaded by our closest ally in so many of these situations, the United Kingdom.

In conclusion, I would emphasize that the United Kingdom and our other close allies have never accepted this global war on terror. We need to get right on the law so that we can again have the close cooperation with these allies. That's how we will overcome terrorism in the world today. Thank you.

Mr. GOODLATTE. Well, thank you, Ms. O'Connell.

[The prepared statement of Ms. O'Connell follows:]

The Constitutional and Human Right to Life

in War and Peace

Testimony of

Mary Ellen O'Connell

Robert and Marion Short Professor of Law and Research Professor of International Dispute Resolution—Kroc Institute

University of Notre Dame

for the

House Judiciary Committee

Hearing on Protecting U.S. Citizens' Constitutional Rights
During the War on Terrorism

May 22, 2013

Introduction

Members of Congress, ladies and gentlemen, thank you for this opportunity to help clarify the law regarding fundamental rights in the war on terror. The basic Constitutional and human rights to life, to liberty, and to a fair trial have all been implicated by America's response to 9/11. My focus today is on the first of these basic rights, the right to life and on the use of armed unmanned aerial vehicles, known as drones, to launch missile attacks and to drop bombs far from the field of battle.

I am Professor Mary Ellen O'Connell of the University of Notre Dame. I hold degrees in history, international relations, and law from institutions including Northwestern University, Columbia, the London School of Economics, and Cambridge University. I have also served as a civilian employee of the United States Department of Defense, teaching at the George C. Marshall Center in Southern Germany for a number of years. I have taught, written, and chaired committees on the subject of this hearing for almost 25 years. Work in this area requires extensive education not just in U.S. law but also in the international law on the use of force, international human rights law and international law generally. Unfortunately, very few persons have these qualifications in the United States today. Even fewer are able to speak from the privileged position of an independent scholar.

I hold such a position thanks in large part to the longtime president of the University of Notre Dame, Father Theodore Hesburgh. I find it auspicious that I will present testimony today, on the very day that Father Ted will be honored at a reception this afternoon in the Rayburn Room. Father Ted has been a pillar of civil and human rights for well over a half century, and I have been honored to use him as a sounding

board myself on complex issues implicating law, morality and the efficient use of military force, including drone use.

The Right to Life

All human beings possess the right to life, which is protected in the Fifth Amendment to the United States Constitution: "No person shall be ... deprived of life, liberty, or property, without due process of law." It is also protected in Article 6 to the International Civil and Political Rights Covenant (ICCPR) to which the United States is a party: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." As both the Fifth Amendment and Article 6 indicate, some deprivation of life may be justified under the law. The justifications are found in two different legal categories: one category pertains to the ordinary situation of peacetime and the other to the exceptional and extraordinary situation of war or armed conflict.

In peacetime, the state may only take a human life when "absolutely necessary in the defence of persons from unlawful violence."[1] Police and other authorized agents of the state may resort to lethal force to save a life immediately or to apprehend a highly dangerous individual who resists arrest. The United Nations Basic Principles for the Use of Force and Firearms by Law Enforcement Officials (*UN Basic Principles*), which are widely adopted by police throughout the world, provide in Article 9:

> Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any

[1] *McCann & Others v United Kingdom*, Series A no 324, App no 18984/91 (1995).

> event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.[2]

On the battlefield, the rules are different. The members of the regular armed forces of a state and certain militias are defined by the 1949 Geneva Conventions as having the "combatant's privilege." During an armed conflict, troops will not face criminal charges for the taking of the lives of enemy fighters so long as they respect the law of armed conflict, in particular, that they respect the principles of distinction, necessity, proportionality and humanity. Distinction may be the most important of these principles. It requires that civilians never be intentionally targeted, unless and only for such time as the civilian takes direct part in armed conflict hostilities. The International Committee of the Red Cross has introduced a new category of persons involved in armed conflict, someone who is in a "continuous combat function." Such a person may be targeted even when not directly participating in hostilities so long as targeting the person is consistent with the principle of necessity. Again, attacking persons in a continuous combat function is lawful only during armed conflict.

The critical concepts to the proper functioning of the rule respecting the right to life are, therefore, either 1.) the existence of armed conflict or 2.) the right to resort to military force. In all other situations, peacetime policing rules prevail, as described above.

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[2] Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, <http://www2ohchr.org/english/law/firearms.htm>.

Armed Conflict[3]

We must look to international law for the definition of armed conflict, given that the concept refers to the use of major military force either among states or within a state such that the Geneva Conventions and other international law governing the conduct of armed conflict applies. The definition of armed conflict is found in customary international law. It is based on the objective facts of fighting, not declarations. The legal significance in international law of declarations faded away with the adoption of the United Nations Charter in 1945. "War" as a technical, legal term fell out of use. It was replaced by a broader term, "armed conflict." The Charter in Article 2(4) prohibits all uses of force—war and lesser actions—except in self-defense to an armed attack or as mandated by the Security Council. Following the adoption of the Charter, treaties relevant to war, such as the Geneva Conventions of 1949 substituted the term "armed conflict" for "war." "War" ministries became "defense" ministries. States engaging in armed conflict rarely declared war. What mattered after 1945 was actual fighting, not 19th century formalities that recognized a legal state of war in the absence of any use of military force. We still use the term "war" to refer to any serious armed conflict. But indicative of the fact that "war" is no longer the significant legal term it once was, the United States fought a war on poverty and a war on drugs.

According to a study by the International Law Association's Committee on the Use of Force that I chaired for five years, international law defines armed conflict as always having at least two minimum characteristics: 1.) the presence of organized armed

[3] This section draws from the article, Mary Ellen O'Connell, *The Choice of Law Against Terrorism*, 4 J. NAT'L SEC. L. & POL'Y 343 (2010).

groups that are 2.) engaged in intense inter-group fighting.[4] The fighting or hostilities of an armed conflict occurs within limited zones, referred to as combat zones, theaters of operation, or similar terms. It is only in such zones that killing enemy combatants or those taking a direct part in hostilities is permissible.

Because armed conflict requires a certain intensity of fighting, the isolated terrorist attack, regardless of how serious the consequences, is not an armed conflict. It may amount to an armed attack that justifies the right to resort to armed force in self-defense. This possibility is discussed in the next section. Terrorism is, therefore, generally categorized as a crime, although in some circumstances it may be carried out so continuously as to be the equivalent of the fighting of an armed conflict. Terrorism is widely defined as the use of politically motivated violence against the civilian population to intimidate or cause fear.[5] The Supreme Court of Israel found in 2006 that Israel was engaged in a "continuous state of armed conflict" with various "terrorist organizations" due to the "unceasing, continuous, and murderous barrage of attacks."[6] The Court described a situation that meets the definition of organized armed groups engaged in intense fighting—the attacks and responses are direct and constant enough to constitute fighting. The single, isolated act of terrorism, however, is consistently treated by states as crime, not armed conflict. Members of al Qaeda or other terrorist groups are active in Canada, France, Germany, Indonesia, Mali, Morocco, Saudi Arabia, Spain, the United

[4] International Law Association, *Final Report of the Use of Force Committee, The Meaning of Armed Conflict in International Law* (August 2010), available online at http://www.ila-hq.org/en/committees/index.cfm/cid/1022.
[5] *See generally*, SETH G. JONES AND MARTIN C. LIBICKI, HOW TERRORIST GROUPS END, LESSONS FOR COUNTERING AL QA'IDA (2008), *available at* http://www.rand.org/pubs/monographs/2008/RAND_MG741-1.pdf.
[6] HCJ 769/02, The Public Committee Against Torture in Israel v. Israel, [2006] (2) IsrLR 459, ¶ 16 (Dec. 14, 2006). *See also* The Wall Case, *supra* note 45.

Kingdom, Yemen, Kenya, Uganda, and elsewhere. Still, these countries do not consider themselves in an armed conflict with al Qaeda. As Judge Christopher Greenwood of the International Court of Justice has concluded:

> In the language of international law there is no basis for speaking of a war on Al-Qaeda or any other terrorist group, for such a group cannot be a belligerent, it is merely a band of criminals, and to treat it as anything else risks distorting the law while giving that group a status which to some implies a degree of legitimacy.[7]

One U.S. Supreme Court decision seems to be commonly misread as supporting the possibility of a worldwide "armed conflict against al Qaeda" or other terrorist organizations even in the absence of continuous attacks. In *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Supreme Court found the Bush Administration's special military commissions for trials at Guantánamo Bay unconstitutional. The Court ruled that while the president had the right to create military commissions, they had to comply with a federal statute governing the matter. The federal statute in question permitted the creation of military commissions that complied with the laws of war. For purposes of testing the compliance of the Guantánamo commissions with the law of war, the Court accepted the Bush administration's characterization of being in a "non-international armed conflict with al-Qaeda." The Court found that Common Article 3 of the 1949 Geneva Conventions covers even that purported conflict. It further found that the Guantánamo commissions did not comply with Common Article 3. The Supreme Court had only to find one plausible example of a violation of the laws of war to strike down

[7] Christopher Greenwood, *War, Terrorism and International Law*, 56 CURR. LEG. PROBS. 505, 529 (2004).

the commissions. It did not find that the United States actually *is* in a worldwide-armed conflict with al Qaeda. It could not make such a finding, as there is no such conflict.[8]

The Hamdan decision, as well as many other decisions of the United States Supreme Court, the Israeli Supreme Court, and courts around the world have had to deal with the legal question of what constitutes an armed conflict. They deal with facts and law, not the assertions of political branches of government.

Self-Defense

If drone attacks are not being carried out in the context of armed conflict hostilities, the president's lawyers have suggested that the killings are nevertheless in lawful self-defense. The Bush administration never developed a persuasive argument as to why the U.S. could use force on the basis of self-defense far from the state legally responsible for the 9/11 attacks, namely, Afghanistan. In October 2001, the U.S. and U.K. took the position that the Taliban government of Afghanistan was responsible for al Qaeda so that under the law governing resort to armed force (the *jus ad bellum*) they had the right to use force against that sovereign state. The U.S. never argued that other states might also be responsible for the 9/11 attacks and has no right under the *jus ad bellum* to use force against them as was used against Afghanistan.

The armed conflict in self-defense in Afghanistan ended in 2002 when Hamid Karzai became Afghanistan's leader following a *loya jurga* of prominent Afghans who selected him.[9] Today, the U.S. and other international forces are in Afghanistan at the invitation of President Karzai in the attempt to repress an insurrection. Thus, attacking or

[8] *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-31 (2006).

[9] *See President Hamid Karzai*, THE EMBASSY OF AFGHANISTAN, WASHINGTON D.C., http://www.embassyofafghanistan.org/president.html (last visited July 20, 2010).

detaining members of al Qaeda or associates as a matter of the law of armed conflict must be connected with the Afghan insurgency.

References by Bush and Obama administration officials to the right of self-defense offer no justification for using force or exercising wartime privileges beyond Afghanistan. The former legal adviser to the State Department, Harold Koh in his now famous speech in March 2010 to the American Society of International Law setting out the Obama administration's legal justification for the use of force in self-defense began in the right place, the United Nations Charter. He then, however, mischaracterized what the law of self-defense permits.[10]

The right to use force in self-defense applies to inter-state uses of force. The law of self-defense was designed to allow a state to take necessary action against another state responsible for attacking the defending state, as in the case of the U.S. and U.K. attacking Afghanistan in response to 9/11. The law of self-defense is not designed for responding to the violent criminal actions of individuals or small groups. Article 51 of the Charter permits the use of force in self-defense if an armed attack occurs and permits collective self-defense if the state that has been attacked requests it. The Security Council may also authorize force in self-defense.

Little or no authority exists for the right to exercise self-defense against an individual or a non-state actor with no ties to a state. United Nations Charter Article 51 permits self-defense if an armed attack occurs, but, even then, only until the Security Council takes "measures necessary to maintain international peace and security."[11] The

[10] Harold Hongju Koh, *The Obama Administration and International Law*, Annual Meeting ASIL, U.S. DEPARTMENT OF STATE (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.
[11] U.N. Charter art. 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security

International Court of Justice (ICJ), the chief judicial organ of the United Nations and the only court with general jurisdiction over states on matters of international law, has found that the Article 51 right of self-defense may only be exercised against a significant attack. The ICJ has not ruled on anticipatory self-defense but by requiring a significant attack, the evidence of the nature of the attack must necessarily be of an attack that is at least underway if not completed. Moreover, the response in terms of a counter-attack may only be against the territory, planes, or ships of a state responsible for the initial significant attack. If the non-state actor's attack is not attributable to a state, force in self-defense may not be exercised on any state's territory.

Where a state is responsible for attacks, the ICJ said in *Nicaragua*[12] and *Oil Platforms*[13] that low level attacks or border incidents do not give rise to the right to use force in self-defense on the territory of the responsible state. The Ethiopia-Eritrea Arbitral Tribunal said much the same in the *Jus Ad Bellum* award.[14] Additionally, in the *Nicaragua* case and the *Nuclear Weapons* case, the ICJ held that even where a state is responsible for a significant attack, there is no right to use force in self-defense if the use of force is not necessary to accomplish the purpose of defense and/or the purpose cannot be accomplished without a disproportionate cost in civilian lives and property. Necessity and proportionality are not expressly mentioned in the Charter, but according to the ICJ "there is a 'specific rule whereby self-defence would warrant only measures which are

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Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

[12] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, ¶ 195, 230 (June 27) [hereinafter

[13] Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 61-64 (Nov. 6).

[14] Jus Ad Bellum (Eth. v. Eri.), Ethiopia Claims 1-8, Partial Award, ¶ 9-12 (Eri. Eth. Claims Comm'n 2005), http://www.pca-cpa.org/upload/files/FINAL%20ET%20JAB.pdf.

proportional to the armed attack and necessary to respond to it, a rule well established in customary international law.' This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed."[15]

Under these treaties, as well as customary international law rules and general principles, the United States has virtually no support for its claim to a right to detain or target persons not fighting in Afghanistan. The UN Special Rapporteur on extrajudicial, summary, or arbitrary executions found the 2002 strike in Yemen that killed six persons alleged to be associated with al Qaeda was an unlawful, extrajudicial killing.[16] This is the correct finding in the view of most states that simply do not accept targeted killing as justifiable under Article 51 in particular or international law in general.

The current rules on the use of force have developed over time in the light of the threat of terrorism and other significant violence in our world. The ICJ has not indicated that the law is unclear. Most importantly, the current law on the use of force was thoroughly reviewed in 2003–05, following 9/11 and the 2003 invasion of Iraq. United Nations members committed in September 2005 at the World Summit in New York to "strictly" abide by the UN Charter and agreed, "that the relevant provisions of the Charter are sufficient to address the full range of threats to international peace and security."[17]

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[15] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶41 (July 8). *See also* Nicaragua, *supra* note 25, ¶ 176; Oil Platforms, *supra* note 82, ¶ 76.

[16] Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, *Report of the Special Rapporteur, Asma Jahangir, Civil and Political Rights, Including the Questions of Disappearances and Summary Executions*, UN Doc. E/CN.4/2003/3, ¶ 37 – 39 (Jan. 13, 2003) [hereinafter *Report on Extrajudicial, Summary, or Arbitrary Executions*].

[17] 2005 World Summit Outcome, GA Res. A/60/L.1, paras. 78–79 (Sept. 15, 2005), *available at* http://www.globalr2p.org/media/files/wsod_2005.pdf. This important document and other evidence of the current status of the law on self-defense are omitted in Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AJIL 244 (2011). For an overview and assessment of the principal literature in English on the law of self-defense, see Mary Ellen O'Connell, *The Right of Self-Defense*, OXFORD BIBLIOGRAPHIES (Mar. 2012), *at* http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0028.xml.

No change was found to be necessary or desired, including by the United States under the leadership of our UN Ambassador, John Bolton.

Killing Americans

The first targeted killing beyond a battlefield was in November 2002 in Yemen. Agents of the U.S. Central Intelligence Agency, not the U.S. military, conducted the operation. The agents were based in the tiny former French colony of Djibouti and apparently had that state's consent to conduct lethal operations from its territory. Yemen's authoritarian ruler Ali Abdullah Saleh was informed or consented as well. The operation consisted of an attack with Hellfire missiles on a passenger vehicle driving in a remote part of Yemen. The attack killed all six passengers in the vehicle, including a 23-year old American from Lakawana, New York.[18] We know this because CIA agents flew to the scene by helicopter within moments of the killing, repelled down to the ground, and took DNA samples from the persons killed.[19]

Targeted killings continued in Yemen but Saleh wanted them carried out with cruise missiles launched from ships or piloted jet aircraft—he wanted to be able to deny the U.S. was using military force in Yemen, that Yemen was doing this killing itself. Yemen at the time, however, had no drones. As soon as pro-democracy groups challenged Saleh in 2010-2011, the U.S. returned to attacking with drones. The U.S. attacked multiple times in the first half of 2011 hoping to kill Anwar Al-Awlaki. Awlaki's father, represented by the ACLU and CCR, had petitioned a U.S. court to issue

[18] Doyle McManus, *A U.S. License to Kill, a New Policy Permits the C.I.A. to Assassinate Terrorists, and Officials Say a Yemen Hit Went Perfectly. Others Worry About Next Time*, L.A. TIMES, Jan. 11, 2003, at A1.

[19] DINA TEMPLE-RASTON, THE JIHAD NEXT DOOR: THE LACKAWANNA SIX AND ROUGH JUSTICE IN THE AGE OF TERROR 196-97 (Public Affairs, 2007).

a restraining order against the killing of his son. The court ruled the father did not have standing. In September 2011, the son was killed along with another American and two other men. Two weeks later, Awlaki's 16-year old son, 17-year old nephew, and a number other people were killed in another drone attack at a restaurant in Yemen. By now, the U.S. has killed more than 200 people in Yemen, including four more on May 18.

Conclusion

President Obama will speak on May 23 at the National Defense University on the rules his administration has developed respecting killing with drones. As this testimony demonstrates, however, the United States and the world have rules with respect to the fundamental right to life firmly in place. They are the rules found in our Constitution of 1789; in the United Nations Charter of 1945 and 2005, and in the Geneva Conventions of 1949 and 1977.

Mr. GOODLATTE. And I want to thank all of you for excellent testimony and raising several thought provoking issues here.

I will say in recognition of the remarks of the Ranking Member and the gentleman from New York that I am very interested in this subject of to whom we should be guaranteeing constitutional rights, protections under our Bill of Rights. I'm glad we all agree that relates to United States citizens. I also would say that we might be closer together on the issue of permanent—lawful permanent residents in the United States.

I would have to also say, however, that Mr. Engel makes a valid point with regard to the issue of incursions by people either illegally entering the United States as agents of al-Qaeda to exercise a military-like terrorist attack or even lawfully entering on a temporary basis for the purpose of doing that, similar to the original 9/11 hijackers and the cause of that tragedy.

And therefore, even though Ms. O'Connell makes a very good point that we are now more than 12 years after that attack, I share that concern.

So, obviously, one of the issues that is probably beyond the scope of this hearing is, do we need a new authorization for use of military force? That would make an excellent discussion in its own right and some Members may choose to ask questions related to that.

And also, if time permits, I'll come back to talk about, with the witnesses, about the issue related to how wide this scope should be. But I do believe that, under certain circumstances, people who are not citizens of the United States would not enjoy these same types of constitutional protections, certainly not the full extent of them, in virtually any other country in the world because no country has as strong of protections for civil liberties as we have in this country. I would be concerned about a blanket provision for anybody apprehended in the United States, regardless of their status in the country.

But I'd like to use my time now to focus on the issue that some of you raised with regard to the Boston Marathon bombing and particularly with the arrest of Dzohkar Tsarnaev, who, unlike his brother, was a naturalized United States citizen and was treated by the Administration through the Article III court system. I think that was the correct decision, but it also raised a problem that we see with the collision of two or three different Supreme Court decisions; one, obviously, the Miranda decision, providing for advising criminal suspects of their right to certain things, including counsel; secondly, decision of the courts that requires presentment of the charges within 48 hours; and thirdly, a decision that says that there are exigent circumstances under which the individual can be questioned by the FBI or other law enforcement in order to determine some of the emergency type things that Mr. Engel identified in his testimony, namely, are there other participants in the conspiracy? Are there other targets that are imminent? Are there other bombs out there to be located? And obviously, that process was ongoing. The FBI was questioning the individual without his Miranda warnings prior to the presentment, and then we had a situation develop where the judge, magistrate judge showed up. He was given not only the presentment of the charges but also his Mi-

randa warnings and received an attorney and that questioning was cut off, and it may have been cut off prematurely, as they were gathering valuable information.

So, let me ask each of you, as time allows here, what options does the Federal Government have to gather intelligence for a period of time before issuing a Miranda warning? Are those options sufficient enough to strike the appropriate balance between keeping us safe and ensuring that our constitutional rights are preserved? And what other options should we be exploring to help achieve that important balance?

Some have suggested, including myself, that we may need to have a statutory definition of under what circumstances and what narrowed scope of questioning can occur after the presentment but before the Miranda warning reading that would allow for a reasonable period of time for law enforcement to ask the necessary questions to make sure there is not something imminent that is a danger to all.

So we'll start with you, Mr. Chesney, and you can address that general subject matter of, what went right or what went wrong with the questioning of Mr. Tsarnaev and what should we do about it?

Mr. CHESNEY. Thank you, Mr. Chairman.

Incredibly important topic. We started off there on the right foot when the High-Value Interrogation Group, or the HIG, as it is known, was brought in. These are the people that you want interrogating someone in that situation, and that illustrates that you didn't need it to be military detention in order for them to be involved in that interrogation. The problem arose after, I believe, about 16 hours' worth of interrogation by the HIG had been accomplished, when, at that point, there was presentment with the magistrate, but more important than that, the Federal public defender assigned to represent Tsarnaev was present.

Now, I don't claim to have any knowledge of what the lawyer may have said to him. We can assume, Tsarnaev, though not prior to that point, read his rights, having essentially grown up in the United States, understood that he had a right to remain silent. He didn't need to be—none of us, for the most part, when you grow up in the United States, need to be read your rights to know that that's there.

What really matters, I think, is when defense counsel sits down for a moment and says, listen, you should stop talking because a plea agreement is probably the best route out of here, and you should be silent because you need to save your comments for leverage.

Now, at that point, the government has a choice. It could, as it did, as I understand it, stop interrogating the person because he then says, all right, I don't want to talk anymore, and you could let that go and you can send the HIG on its way. That, I think, is where a mistake may have been made. I don't think that the government has to stop at that point. It can, and I think in a circumstance like this, should continue with the HIG right there, continuing to talk to the person. He may say he doesn't want to answer questions, and he may give the silent treatment in response, but the interrogation should continue nonetheless.

It may be that there's space for a statute here that would clarify that this is—I think it is a proper action by the executive branch. It may have consequences for the admissibility of the resulting statements, but in a case like Tsarnaev's, that's not really central. That's not the most important thing. A statute might help there.

Mr. GOODLATTE. Mr. Wittes.

Mr. WITTES. I don't have a lot to add to that. I will say that, well, one of the consequences when people have rights is that sometimes they will invoke them, and you know, there is ultimately no way around that reality, and you know, the rights we have do have consequences and sometimes that consequences will include intelligence loss.

I do think, if you read the Quarles opinion, which is you know, about a mundane street crime and the location of a gun, the idea that Congress could come in and say what public safety means in the context of a high-value interrogation of a major terrorist figure is not altogether implausible and that Congress could add some texture and add some flexibility.

Mr. GOODLATTE. "Not altogether implausible" is not a big endorsement of the idea either.

Mr. WITTES. Well, I mean, you know, there's a Supreme Court opinion that addresses this point and that does impose constraints.

Mr. GOODLATTE. But there is another Supreme Court decision that seemed to collide with it.

Mr. WITTES. Well, so—I mean, I think Congress has more latitude in the presentment area where, you know, County of Riverside creates a presumption on 48 hours, and I think Congress could probably craft a legislation—a piece of legislation that would, you know, create latitude to delay presentment in these cases with an appropriate certification by the Attorney General.

In other words, I think there are things that Congress could do to add flexibility to that situation, but at the end of the day, you are dealing with people's constitutional rights, and sometimes if people have the right to remain silent, they're going to remain silent.

Mr. GOODLATTE. Right. And we certainly respect that.

On the other hand, in the example given, for some of the time that he was held prior to presentment, he was unconscious. There was questioning that went on. That questioning seemed to actually yield quite a bit of fruitful information with regard to what was intended. As it turns out, nobody had the ability to carry it out because I don't—we so far haven't identified other people who were involved in trying to carry it out, but adding one or two more ingredients to that, what information he gave was useful information and could have yielded some real lifesaving information if it had been allowed to carry on and there was that additional component.

Mr. WITTES. I think that's right. I think there's—look, I think it is an area where in a series of very important arrests, there has been, you know, a tension between the desire to, you know, comply with the rules of the criminal justice system and that exigent need to get information as quickly as you can, and I think there is—this is an area where Congress could probably give the Administration a little bit of breathing space or the FBI a little bit of breathing space. How much is less clear.

Mr. GOODLATTE. Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman. I think we've identified here a real issue in which there are costs to a proposal that requires Mr. Tsarnaev or others—not Mr. Tsarnaev, but others who would qualify to remain in the civilian justice system. We can talk about how one could tweak the fundamental circumstances in which the FBI and Department of Justice found themselves with respect to Mr. Tsarnaev. And again, I'm not saying that he could have, under these facts, been put into military custody. But the reason that Jose Padilla was put into military custody was specifically for purposes of detention and for creating a scenario in which he did not have to have an attorney at his side in very short order.

So, you know, what we are—to the extent as I believe and as I believe precedent confirms, not predictions of vote counting, you know, or the like, but precedent confirms that enemy combatants, including American citizens, may be held in military custody, maintaining that has an option for extraordinary circumstances where lifesaving intelligence is available is a prudent course rather than suggesting that we want a blanket rule that would take that option off of the table.

Mr. GOODLATTE. Not to prolong this because I way exceeded my time and I do want to give Ms. O'Connell and opportunity to speak, but the problem with that is that we have many types of terrorist attacks that are not going to take place without an authorization for use of military force, and without that AUMF, the President would have no authority to do that with regard to a United States citizen. So, for example, the Timothy McVeigh bombing in Oklahoma City, for example, we would not think of saying that a particular type of crime perpetrated by the United States citizen in the United States, a suspect of that could be held in one circumstance indefinitely and not in another, so it that really narrows that down to the AUMF. And here 12 years after 9/11, as we have left Iraq and are reducing our presence in Afghanistan, it is harder and harder to defend that deprivation of rights to U.S. citizens.

So, I definitely understand your concern, but I think the exception to ask those questions, because they are important questions and could be lifesaving questions, needs to be narrower than to say that a certain type of person can be held indefinitely for questioning.

Ms. O'Connell.

Ms. O'CONNELL. Mr. Chairman—Mr. Chairman, my husband was a military interrogator for 11 years, and so I'm very well informed about the difference between FBI interrogations, civilian interrogation and military interrogation, and sad to say, I think this issue has just been overblown and misunderstood by people.

Excellent FBI interrogators, as I think Professor Chesney indicated, can do an extremely good job, just as good as military interrogators, within civilian system. It is—I'm not quite sure how we've gotten on this wrong track, but remember when Abdulmutallab was arrested in Detroit, he was interrogated by excellent interrogators who had the training, the skills, the background knowledge, the language, et cetera, to get a great deal of information about the motivations, the connections, et cetera of Mr. Abdulmutallab. So, instead of focussing on, well, shouldn't we do this experimental

thing and for people arrested within the United States, where there is no ongoing armed conflict, into the military system, let's focus on doing the best we can to make sure that our civilian law enforcement authorities have the skills and access that they need to have.

And in this case, with Mr. Tsarnaev, I really think we should be looking at what happened before the Boston bombing. Why didn't the FBI have good contacts with Russia so that we had better information about these individuals before the tragedy? And that's where I think we should be focussing. Sadly, I believe we've been distracted by thinking about Guantanamo Bay and military custody and so forth. We've taken our eyes off the prize of really doing what will succeed in preventing these kinds of tragedies, and that's good international police cooperation with the best people, best skills, knowledge, language, et cetera

Mr. GOODLATTE. Thank you very much. My time is way past expired.

The Chair now recognizes the gentleman from Michigan. Before I do, I'll have to step out for awhile, but I do hope to return to the hearing, and I recognize Mr. Conyers for his questions.

Mr. CONYERS. Thank you. If I could have given you more time, I was—would have been happy to do it.

This is a very interesting panel. And I am going to make a broad series of assertions and ask all of you to comment on it. One is that the global war on terror implies war without end, a concept that, as you can guess, I vigorously oppose. And then we have coming up the National Defense Authorization Act very soon in the Congress. And our colleague, the Ranking Member, Adam Smith, will be offering again his amendment to prohibit indefinite detention for anyone captured in the United States, even noncitizens, a measure I supported and perhaps a majority of my colleagues on this Committee may not have supported.

And so it seems to me that we're considering the analysis to prevent the government from treating all persons captured on U.S. soil as enemy combatants, regardless of their citizenship. And so and so trying to remember Madison and Justice Stevens, and the whole concept of fairness in matters that bleed into war, I'd like to get your views on these several subjects. And I'm going to start with the lady professor on the panel first.

Ms. O'CONNELL. Well, Mr. Conyers, I agree with every comment that you just made. Let me focus on the first point, indefinite detention. As I mentioned in my comments, the armed conflict hostilities in Afghanistan will come to an end for the United States in 2014. We will no longer be holding persons who are fighting in those hostilities in Afghanistan after that point. And yet we will still have people at Guantanamo Bay arrested in those hostilities, but, even more alarmingly, persons not detained in those hostilities, without any understanding about when they may be released; no trial, et cetera. The law of armed conflict does not permit that. Persons——

Mr. CONYERS. There's 166 of them now, 86 of whom are cleared for transfer already but prevented by congressional mandate.

Ms. O'CONNELL. So the only law that can justify these ongoing detentions is law that has been cooked up, not law that has come

through any type of appropriate process. We have the law of armed conflict that is binding on the United States as party to the Geneva Conventions. We have our own constitutional law, which plainly has limits on detention, according to law. The *Hamdan* case told our President that we have to be acting consistently with the Geneva Conventions in our detention processes of people in military detention. After the end hostilities in 2014 in Afghanistan, there won't even be a shred of reason under the law to hold any of the detainees at Guantanamo Bay.

Mr. CONYERS. Thank you so much.

Let me now switch to Mr. Chesney, and let's see where he goes from this discussion.

Mr. CHESNEY. Thank you, Ranking Member Conyers.

I'll take those in reverse order. I'm going to start with the noncitizens question. I do agree, as I said, before that we should not draw distinction here between the citizens and the noncitizens captured within the United States, a few reasons for that. One is, I'll begin with the idea that part of why we would want to resist as a general proposition military detention for domestic captures is a deep tradition of not having the military be in the lead when it comes to domestic security when that can be avoided. There are some circumstances, obviously, the Civil War and a few other examples, where that's not the case. But, generally speaking, we have this tradition.

Insofar as having a lead role for military detention when some terrorists may be captured within the United States is possible, well, that is going to have consequences for other things the military may need to do to be prepared to execute of role. And they will be in that position and incentivized to take on certain activities as long as they've got some lead role. And if noncitizens are that lead roll, there you have it.

Secondly, when we distinguish between citizens and noncitizens, it's alarming to our allies. Now, here I'm not talking about international law professors, people who do what I do in other countries, and so forth; I'm talking about the security officials in the U.K. and elsewhere who become greatly alarmed and have difficulty and more friction in their cooperation with us insofar as we claim authorities that are differential between our citizens and theirs. It's not a dispositive point, but it's a consideration that has security implications.

Most importantly, the legal uncertainty that I described and the policy considerations that my colleague Mr. Wittes described, they are applicable on the citizens and the noncitizens capture fronts. Now, the legal uncertainty is less dramatic with respect to noncitizen captures, but if I'd had time, I would have explained how greatly divided the courts were in the case of Ali al-Marri, who was your prototypical noncitizen al-Qaeda sleeper agent. The courts were very torn up about that.

So why don't I stop there and just say one quick thing, which is that I don't agree that the armed conflict with al-Qaeda ends when we leave Afghanistan in terms of an overt, big-footprint deployment. We've made clear in the papers and elsewhere, we're going to continue to exercise force in support of counterinsurgency and other and other efforts and counterterrorism in Afghanistan beyond

2014. That doesn't make it an endless war. It's a war with defined enemies; it's not a war with terrorism, as the Administration for both parties have is said in the past. It's a conflict with al-Qaeda and its associated forces.

Mr. CONYERS. Yes, sir.

Mr. Wittes, the Chair has permitted me to have both of you make responses to the same question.

Mr. WITTES. I'll just add very briefly to what Professor Chesney said. I mean, the same operational improvements that have enabled us over the last 10-plus years not to have another Padilla case have also enabled us not to have another al-Marri case. And so, you know, in addition to the philosophical and legal and diplomatic reasons not to distinguish between citizens and noncitizens here, there is also the fact that, you know, when I said in my prepared statement, that we had just gotten a lot better at these cases, and we're really not creating situations anymore in which it is necessary to move people out of the criminal justice system and into military detention, that claim applies with equal force to citizens and noncitizens.

A brief word on the global war on terrorism. You know, I think if you—the Administration does not use language like the "global war on terrorism." It talks about the NDAA. And the last Administration in its latter years was very careful about this as well. It talks about a war against al-Qaeda, the Taliban, and associated forces. And I think that when you frame it that way, it is not implausible to think to imagine the end of a conflict in—at—you know, and Jay Johnson, the then General Counsel of the Defense Department actually gave a speech at the Oxford Union back in December, in which he sort of talked very explicitly about what the end of conflict will look like. So I actually don't agree that the global war on terror, to use your words, reflects a war without end. I think it is possible to imagine an end.

Mr. CONYERS. Your comments, sir.

Mr. ENGEL. Thank you.

Mr. CONYERS. The Chair has permitted me to finish this up.

Mr. ENGEL. I would just be brief. I think I have significant agreement with Mr. Wittes and Professor Chesney. I think the "global war on terror" is a phrase which has had uses; it's had detriments. But it refers to a specific armed conflict against specific enemies, against whom we've made much headway; on the other hand, against whom we continue to engage in military operations in Afghanistan and Pakistan and, you know, throughout the Middle East and the Horn of Africa.

It is possible to imagine a situation in which it would be safe for our country to, you know, release some of the folks at Guantanamo Bay. On the other hand, we're not there yet. And there's not necessarily a correlation between the end of major combat operations in Afghanistan and the end to the hostilities. But we will talk about that and the lawyers talk about that when we get to these positions, of course.

Mr. CONYERS. Thank you.

Could I just ask, Professor O'Connell, was shaking her head vigorously. I don't know what Mr. Chesney said that set her off. But could you briefly explain this before my time is taken.

Ms. O'CONNELL. Well, Professor Chesney started out well when he said that the armed conflict would end in Afghanistan in 2014. But then he slipped further and said something about there being an armed conflict against al-Qaeda, the Taliban, and associated forces. And Mr. Engel just said that now. It's important for the Committee to understand that this is a very internal-to-the-U.S. view; that out in the world where we're actually operating with drones and with detention, et cetera, there may be only one other sovereign state that agrees with this position. That's not a good place to be if you need cooperation with respect to these kinds of armed conflict groups. Certainly, the United Kingdom does not share our view that we are——

Mr. CONYERS. Which position?

Ms. O'CONNELL. That there is actually a worldwide armed conflict against al-Qaeda, the Taliban, and associated forces. We are involved in pursuing criminal wrongdoing using peacetime criminal law enforcement under international criminal law. That's the way the rest of the world views it. That's the way Pakistan views it. Afghanistan will view it that way as soon as we're gone in 2014. We're not going to be allowed to just drop bombs on people in that country without their permission. That's the way the African nations view it. That's the way South America sees it. We need the help of all these countries. And that means viewing these issues from the way the rest of the world views it.

Mr. CONYERS. Thank you very much.

Please listen to President Obama tomorrow night when he talks about drones.

Mr. KING. [Presiding.] The gentleman's time has expired.

And I would now recognize the gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the Chairman.

Good to have you all with us today.

Mr. Engel, in your testimony, you discuss at length the public safety exception to Miranda. As you point out, the only definitive case law concerning the public safety exception is Quarles. In your opinion, what is a reasonable amount of time that law enforcement should be able to detain a suspect without issuing a Miranda warning in order to obtain intelligence to protect the public safety?

Mr. ENGEL. Thank you. You know, the question of how long law enforcement may detain an individual is—can be somewhat separate from the question of when they must read the Miranda warning.

Mr. COBLE. Correct.

Mr. ENGEL. What I tried to emphasize in my testimony is Miranda is a rule of criminal procedure. It governs when evidence may be admitted in a criminal case. If the police or the FBI, or whomever, seek to collect information for intelligence purposes and the goal is not to take that information and use it in a criminal case, they never need to read the Miranda warnings. Not providing Miranda is not a violation of the Constitution in the way that indefinite detention without due process or the like would—you know, could be a violation of the Constitution. And so in terms of the duration, the pressure that law enforcement is on comes from other provisions in the Constitution, those like presentment, that

we discussed, as well as the requirements of arraignment, which is actually separate from presentment when there's an arrest warrant in place.

So, you know, what I would seek is the flexibility or what I think the law permits is the flexibility for a longer detention when necessary for intelligence purposes, even recognizing that law enforcement may not be able to use those resulting statements in a criminal—in a criminal proceeding.

Mr. COBLE. I got you. Thank you, sir.

Let me ask you this, Mr. Engel. Should the public safety exception apply to threats that are imminent in nature, or should they apply to threats that may be months away?

Mr. ENGEL. I think that's—if that is an issue—I support the government's efforts to read the public safety exception as broadly as they can. When the law enforcement is asking questions designed to, you know, to be directed at the public safety imminent threats and the like, I think there's a basis, and the Department of Justice has taken a basis for arguing that the public safety exception would apply. I would note, though, I think as Congressman's question suggests, that Quarles is a very different case. Quarles, they arrested the man. They said, where is the gun? He said, the gun's over there in the refrigerator. They said, okay, that statement can come in because the police wanted to find the gun.

When you talk about non-imminent threats, when you talk about something more than are there any other bombs out there, and you seek to collect information on, you know, Mr. Tsarnaev, what have you and your brother been up to over the last several years, and who do you know in Dagestan or in Russia, or the like, it's difficult to see that the public safety excepting is truly implicated. While I support the government's attempts to read that broadly, there's a real litigation risk that those statements would not be admitted.

Mr. COBLE. Thank you, Mr. Engel.

Let me put this question to all the witnesses, starting with Professor Chesney. How would you determine—define the term "associated forces" as it's used in AUMF, and—A. And, B, should having sympathetic view on being inspired by al-Qaeda qualify as associated forces?

Mr. CHESNEY. Thank you, Representative Coble.

Taking them in reverse order, I do not think having a sympathetic view can alone can make one an associated force. An associated force should have—well, to turn your second question, how do you define it? That's sort of the big mystery. I think this is an issue that Congress rightly has begun to focus on, especially after last week's Senate Armed Services Committee hearing, when it became clear that there is truly a lack of understanding, in this building and the ones around it, as to how the executive branch currently understands at the granular level, what is the test that makes some groups, some fellow traveling group, maybe, or subordinate group of al-Qaeda, what makes for an associated force?

Over the years—the standard's been around a long time. And in some applications, it makes perfect sense. But what the boundaries are is an incredibly important question that those of us who follow the stuff closely don't know the answer to. For my part, I think you

should certainly be looking for some element of direction and control, not simply, you know, sympathy and ideological compatibility.

Mr. COBLE. I thank you, sir.

Mr. WITTES. So I agree entirely that ideological sympathy is not adequate to consider somebody an associated force or consider a group an associated force. There are actually some rather tragic examples of that principle at work, though I agree with the principle. For example, there was a long time in which the United States did not—felt like it could not take action against Anwar Al-Awlaki because he did not—hadn't—you know, there was sort of some level at which he was not an operational figure, and it wasn't quite clear how far associated the force was. Eventually, that changed. Right?

So, on the question of what constitutes an associated force, I think the relevant concept in one way or another is co-belligerency. And, you know, the question is whether the group in question has entered the fight on the other side.

Now, that begs all the questions that Professor Chesney just asked, which is, you know, what constitutes actually having entered the fight. But I think if you ask yourself the question, is the—is the relevant group co-belligerent for purposes of international law? Has it stepped into an existing armed conflict on the opposite side of the United States? That gives you a sense of how associated forces should be understood.

One further note on that question, the D.C. Circuit in some of the habeas cases from Guantanamo has had to treat the question of whether somebody who's an associated force, alleged to be a member of an associated force, is properly detained. And they've had some occasion in that context to answer questions of whether given groups are or are not associated forces. And so there's some texture to the definition that comes out of those cases.

Mr. COBLE. I thank you.

Mr. Chairman, my time has expired. May I hear from Ms. O'Connell?

Very briefly, Ms. O'Connell, if you will.

Ms. O'CONNELL. Thank you, Mr. Coble.

Well, I would look to the law of armed conflict to define—to find any of these important definitions. And the law of armed conflict does not have a definition of "associated force." The law of armed conflict defines who the combatant, who is a civilian, and we have a new term, who is in a continuous combat function? Those are the important terms of art. Individuals in those categories during actual armed conflict may be targeted and killed, detained without trial, subjected to military commissions. There is no such term as "associated force."

Mr. COBLE. I thank you.

Thank you, Mr. Chairman. I yield back.

Mr. KING. The gentleman has yielded back.

Chair now recognized the gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

I have three questions for the panel. First, we've established the standards for determining if someone is an enemy combatant. If someone is under the operational control of a belligerent power, he may be an unlawful enemy combatant if he's not in uniform, et cetera, et cetera, et cetera. All right. So we know the standards.

But who applies the fact to the situation? Who determines the fact that Joe is an enemy combatant or not? Joe is captured in the United States or abroad. We claim he's an enemy combatant. What is the proper methodology and standard for determining—he claims he's not—for determining that question?

First Mr. Chesney or Mr. Wittes and then Ms. O'Connell.

Mr. CHESNEY. The question of who the proper fact finer is for the individual level determination of whether you're subject either to detention or targeting may differ on those two dimensions. If it's a detention question and the person is held outside of Afghanistan, then—certainly, if it's at Guantanamo, we know what the process is going to be. There be an executive branch process on the front end by definition, but there will be habeas review on the back end for citizens——

Mr. NADLER. Since habeas review has been rendered completely meaningless by the D.C. Circuit by saying the court must accept as factual every assertion by the government.

Mr. CHESNEY. I don't agree with that description, respectfully, as to what the D.C. Circuit has held. The Latif did great he alarm people because it has language in there about presumptions of the reliability and the—when there's hearsay and so forth, there's a presumption that this is, in fact, what it purports to be. I don't think it's properly read——

Mr. NADLER. Let's get back to the question.

Mr. CHESNEY. So the question is detention. There's habeas for nonbattlefield captures. It's clear that would extend——

Mr. NADLER. Okay.

Mr. CHESNEY [continuing]. To one captured elsewhere.

For targeting right now the process——

Mr. NADLER. I'm interested in detention, not targeting.

Ms. O'Connell.

Ms. O'CONNELL. Yes. First, again, you have to see—the easy part is you only have to make these determinations with respect to people who are actually in situations of armed conflict, where there's real fighting. That makes it much easier for you. You don't have to worry about people like Mr. Padilla, who was arrested in Chicago, where there were no armed conflict hostilities going on. So leave that out. And of course——

Mr. NADLER. Anyone arrested in a nonconflict area or situation cannot be an enemy combatant?

Ms. O'CONNELL. That's correct. They can be—certainly, people who have not engaged in any armed conflict fighting, which was the case of Mr. Padilla in——

Mr. NADLER. But that would make Ex parte Quirin noncombatants.

Ms. O'CONNELL. Ex parte Quirin took place during the Second World War, when there actually were worldwide armed conflict——

Mr. NADLER. But there wasn't armed conflict in Long Island.

Ms. O'CONNELL. There were members of the regular armed forces of—so—but they were members of the regular armed forces of Germany.

Mr. NADLER. Okay.

Ms. O'CONNELL. And of course, Ex parte Quirin is terribly overstated. Remember, the Supreme Court only looked to see if it was

appropriate and lawful to try these individuals in a military commission, not what their status was.

Mr. NADLER. Okay.

Ms. O'CONNELL. And we're also talking about law that's Post-World War II; the Geneva Conventions are 1949.

Mr. NADLER. Okay.

Ms. O'CONNELL. So it really shouldn't be as hard. And when we make mistakes about who might be arrestable because they were fighting in Afghanistan, we have an international community that is very——

Mr. NADLER. So what is the proper way so the Whatchamacallit clan in Afghanistan delivers an individual to us and says, we're the Hatfield's; here's Mr. McCoy. We're telling you he's an enemy combatant; he's an ally of the Taliban. Give us the $5,000 bounty. Fine. Here he is. What should our procedure be at that point?

Ms. O'CONNELL. We should have used Article 5 hearings under the Geneva Conventions to get to the facts as to whether that person is or is not an enemy combatant.

Mr. NADLER. Article 5.

Ms. O'CONNELL. That's what we did in the Gulf War.

Mr. NADLER. Okay. Second question. Thank you.

Second question. Ms. O'Connell, your position, as I gather, is that we cannot be at war with al-Qaeda because we can only be at war with a state actor.

Ms. O'CONNELL. We can only be at war with—we only—we only participate in war in actual sovereign territory. We only participate in wars in real places. So if there is not—right now, we're at war. It's true we can be at war with—for example, in 2001, we went to war in Afghanistan, with the regular government of Afghanistan, the Taliban, and the al-Qaeda forces who were joined with them. So in fighting with the Taliban and Afghanistan. We——

Mr. NADLER. But let's assume the Taliban were defeated. We cannot be at war with al-Qaeda because they are a nonstate actor?

Ms. O'CONNELL. We continue to be at war with al-Qaeda to the extent that they're fighting with the Taliban in Afghanistan. But today we're fighting a civil war on behalf of Afghanistan.

Mr. NADLER. And once that is over, we cannot be at war with al-Qaeda?

Ms. O'CONNELL. That's right.

Mr. NADLER. We can only be at war with al-Qaeda through the agency of the Taliban, in effect?

Ms. O'CONNELL. Right.

Mr. NADLER. And the fact that al-Qaeda attacked us simply means that that's a criminal action, and that's the only way we can deal with it?

Ms. O'CONNELL. We fought and won the war with al-Qaeda in Afghanistan; 9/11 led to the lawful war of self-defense in Afghanistan.

Mr. NADLER. Okay. Let me ask you the next question. And I'd ask Ms. O'Connell and Mr. Chesney or Mr. Wittes. I gather your position is there is no legal authority for our holding people in Guantanamo.

Ms. O'CONNELL. That's correct.

Mr. NADLER. So let me ask you the following question. Let's assume that people in—that Guantanamo detainees organized an escape attempt. Let's assume that in so doing and attempting the escape, they killed American soldiers. Let's assume that we capture them and put them on trial for murder. Let's assume their defense was, it's not murder; you're a bunch of kidnappers. The United States kidnapped us with no claim of right and no legal right, and we're simply attempting to escape from our kidnappers and have every right to use whatever force is necessary to escape from our kidnappers. How would the United States respond to that legally?

Ms. O'CONNELL. Well, I would hope from this day forward after these hearings, the U.S. will start getting in compliance with international law, and then it could charge those individuals with murder.

Mr. NADLER. But as of now, we could not—as of now, there would be no defense?

Ms. O'CONNELL. Well, if we're going to be consistent with our own strange world of law that we've built up after 9/11, it would be hard for us with a straight face to say that these are not persons who have committed an act of lawful war. But it would be possible—but under the real world of law, we're in a situation of pursuing these individuals as criminal—as criminal suspects if they killed any American anywhere——

Mr. NADLER. But if their defense were that we're victims of kidnapping, we had a right to do it, we have no defense against that?

Ms. O'CONNELL. They—we do have a defense against it. I mean, I'm not trying to argue for—I would like us to say, yes, they committed a crime of murder.

Mr. NADLER. But their crime of murder is justified if the victims of the murder are kidnappers.

Ms. O'CONNELL. Mr. Nadler, I can't get into the strange, Kafkaesque world how the global war on terror law works.

Mr. NADLER. Let me ask Mr. Chesney to answer the same question.

Mr. CHESNEY. I don't think that they are kidnap victims. I don't think that—even if they were, however, I don't think that prisoners in any situation like that have a right to use lethal force against the guards to escape. But more importantly, though, I don't accept the premise that they have that type of position to invoke in the first place.

Mr. NADLER. Because we have a legal right to hold them there indefinitely?

Mr. CHESNEY. I think so. And I think our court system has, after years and years of battle, to have the courts weigh in on this, they have sided with the government's position, that in fact we do have a legal right to hold these people.

Mr. NADLER. Deriving from the fact they are enemy combatants?

Mr. CHESNEY. I'm sorry.

Mr. NADLER. Deriving from the fact they are enemy combatants?

Mr. CHESNEY. Yes.

Mr. NADLER. Okay. Thank you.

Mr. WITTES. May I just add something?

Mr. KING. Gentleman's time has expired. Yield back.

Do you want to go ahead and answer the question, Mr. Wittes?

Mr. WITTES. I think the point that Professor Chesney makes that he does not accept the premise and that the courts do not necessarily accept the premise——

Mr. NADLER. Which premise?

Mr. WITTES. That these are not lawfully detained people and, you know, we're not entitled to be holding them, it's important to emphasize that all three branches of government institutionally in the United States are on the same page about this.

Congress, in the 2012 NDAA, reaffirmed detention authority specifically for those who are part of or substantially supporting al-Qaeda, the Taliban, or associated forces. That has long been the litigating position of the Administration under—in substantial part both parties as to the scope of the lawfully detained—the scope of its detention authority vis—vis individuals. And the courts have—the D.C. Circuit has repeatedly accepted that definition of, or something very close to it, of the detainable class. Supreme Court has repeatedly denied cert in those cases. So, you know, when we talk about, you know, these people regarding themselves as kidnap victims and attacking their guards, that is not the institutional position of any branch of the United States Government.

Mr. NADLER. Thank you. I yield back.

Mr. KING. Thank the gentleman. Has yielded back.

Now the Chair recognizes himself for 5 minutes. And I would turn first to Ms. O'Connell. And you referenced Article 5 of the Geneva Convention. And I would just ask the unlawful combatants, would they be subject to execution under that particular provision that you referenced?

Ms. O'CONNELL. No. Once individuals are in the control of another power, they are no longer subject to killing without—unless they have a trial.

Mr. KING. But that's subject to—that is exactly what I'm referencing, to put them through a trial.

Ms. O'CONNELL. Yes.

Mr. KING. And then they are subject to the potential death penalty or incarceration.

Ms. O'CONNELL. Yes.

Mr. KING. But didn't you tell us that you don't believe there's authority to detain enemy combatants?

So my follow-up question would be, then, if they are subject to a death penalty under proper adjudication, but they are unlawfully detained at Gitmo, that doesn't seem consistent to me with your testimony.

Ms. O'CONNELL. I believe there are a number of people at Guantanamo Bay who should be subjected criminal trials. But those would be Article III trials, not military commission. So everyone at——

Mr. KING. I heard that.

Ms. O'CONNELL.—Guantanamo Bay is there unlawfully, in my view. Persons——

Mr. KING. How about if there were there unlawfully, then, then they would be subject potentially to the death penalty?

Ms. O'CONNELL. They could be transferred to——

Mr. KING. Okay. Thank you. I'd like to explore a little bit different line of questioning here than has been—as I listened to the

testimony—I think it's excellent witnesses in every single seat here, with obviously different perspectives.

One of them, yours seems to be retrospective, Ms. O'Connell and just to some extent prospective in that anticipating that the conflict winds down in Afghanistan and then predicting that our legal authority also winds down, gentlemen on this side don't agree that it winds down because the conflicts looks like it's going to exist, regardless of the President's announcement that there will be a date certain that the war will be over.

I reflect instead back on let's say 1968, the Tet Offensive. And I recall the infiltration of enemy troops and also the local South Vietnamese enemy troops. We saw them. They infiltrated into the south and struck at will all over the country simultaneously. That was—that's a scenario that I think of here in the United States when I see reports of potentially—potential enemy combatants infiltrating into the United States across our southern border has been referred to by Robert Mueller, our Director of the FBI. And also those who came in here on visas, whether they were tourist visas, student visas, whatever means, and overstayed their visas.

But we have reports of significant numbers of people who are persons of interest from Nations of interest. I don't know that number. I could speculate on a number, but I don't think we know that number.

But I'm not as concerned about an individual bombing. And I was relieved in a way that—I expected the Boston bombing, not in Boston. I didn't know the location. But I expected we would face another terrorist attack, having lost three lives and scores of people wounded, could have been far worse than that, was intended to be far worse than that.

But what about this scenario that's not retrospective but prospective to this extent. What if these infiltrators that we know are in this country today that are persons of interest from Nations of interest that are inclined to have the kind of affiliations that would—they are far more likely to be part of an enemy al-Qaeda cell. What do we have prepared for that? We don't have ex post facto in this country.

So for us to be adjusting our laws believing that a conflict is winding down, as opposed to preparing ourselves so that we could deal with a scenario that I've described here as a broader and a very, very much a terrorist all-out attack within the United States and multiple locations.

And if you remember on September 11th, we didn't know how broad that was going to be. We didn't know it was going to end up being four locations. All the planes were grounded. We shut down weddings and football games. A lot of American life was shut down because we didn't know how pervasive it was.

So I'd suggest instead—and I go first to Mr. Engel—what do we do to prepare for a scenario like that, rather than how do we look backwards on this thing and try to wind something down?

Mr. ENGEL. I think you raise, you know, a very good and important question. What we need to do is maintain the maximum flexibility within the law. No one is saying that the United States needs to bend the laws or bend the constitution. But when you have techniques and tools within the Nation's arsenal that have been

deemed to be lawful by the courts, I think the wise choice to do is to preserve that flexibility and to keep those options open.

And we should not unilaterally be tying our arms behind our back by deciding that a particular threat seems to have waned, and so we should have a statute that says, regardless of circumstance, the President may not, you know, pursue these options. And I think we have been very successful over the last 10 years, because we've recognized, since 9/11, that the war on terror is a military problem and it's a law enforcement problem. And we have used all of our repertoire in many, many departments of the U.S. Government. And I would—I would just counsel against taking options off the table based upon, as you suggested, assumptions about where things are now or where the threat is now. Because we weren't prepared on 9/11, and we have to continue to be prepared going forward.

Mr. KING. Would you advocate for setting up a structure of adjudication that could quickly process some of these individuals into a military detainee category that would allow for enhanced interrogation so that we didn't get them Mirandized and taken out of the information source so that we could quickly identify the source of the attacks and perhaps prevent others?

Mr. ENGEL. I think if we needed—if we thought that there were gaps in the law that needed to be remedied, if there were new structures. And one of those structures, I think, the gap that I see now is with respect to some of the ambiguities about who is in the conflict. Who can we detain? Who are these associated forces? That kind of proposal, as well potentially as an Article III court to evaluate detention decisions, you know, separate from what we—the process we've——

Mr. KING. But aren't some of the ambiguities also the doubt on where the jurisdiction lies and the political question that's been part of this dialogue, too? Couldn't this Congress provide a definitive course that could be decisive and perhaps lifesaving?

Mr. ENGEL. Sure. When I was in the government, I was part of an initiative that Attorney General Mukasey spearheaded to come up with a robust statutory procedure to deal with detention in the armed conflict against al-Qaeda. It don't move very far in 2008. We haven't really seen it revived in the new Administration. But certainly some kind of regularized statutory process to deal with these issues going forward would certainly be a, you know, would seem to be a prudent course. The courts have essentially muddled through been the DDC, the District Court in Washington D.C., and the D.C. Circuit over the last several years. And they've made some law that establishes these procedures. But certainly the people who are supposed to make law in this country are here in Congress, and, you know, Congress taking up this issue would certainly—I would certainly support that.

Mr. KING. I thank you. I just quickly, as I've used my time, I go to Mr. Chesney, if you could keep it short.

And then perhaps to Mr. Wittes for your comment on that.

Mr. CHESNEY. Will do. On the process, I guess I would say that I was completely in agreement several years back with Mr. Engel on the need for Congress to step in and craft that process. Truth is, over time, the D.C. Circuit and the D.C. District Courts have

ironed out a process that it's hard to imagine that Congress would create something that would be much different than what they've already created. So could be good to entrench it in statute, but I think it's already there.

As to the Tet-like scenario you described, it certainly puts the spotlight on the need for serious attention to the immigration side to things, in the intelligence collection side of things. As to this question of detention, this kind of comes back to the question of, does one think that military detention is going to get us something real and valuable that the current structure of the criminal process with the high-value interrogation group involved wouldn't get you? And I guess I've stated my views on that.

Mr. KING. Thank you.

Mr. Wittes.

Mr. WITTES. I have very little to add to that except for the following. You know, I do think the one thing that could fundamentally change the way I regard what the appropriate detention authority is domestically is if you had a sudden very large influx of numbers into the system. And so if you imagine the scenario that you describe, in which, you know, a very large number of people are suddenly—you know, have to be detained, that could really fundamentally change the calculations that I have in my recommendations with Professor Chesney today. On the other hand, that is also a situation in which I think this body would step up very quickly and pass whatever authorization the executive felt it needed to deal with that situation.

So when I think about the situation that we face today, I'm less concerned about the dramatic changed facts, which I think this body would turn around and address pretty quickly, than I am about the next time we arrest somebody and have to decide exactly how to process him, and we have to go through a, you know, very wrenching sort of public argument to figure that out.

Mr. KING. I thank you. I thank all the witnesses. And my time has expired.

The Chair now recognizes the gentleman from the Commonwealth of Virginia, Mr. Scott.

Mr. SCOTT. Thank you.

And I thank the witnesses. It's been very informative. I want to follow through on some of the questions that the gentleman from New York asked about the process of declaring someone an enemy combatant. And who makes it, where it's made and how it's reviewable. I asked the Attorney General Ashcroft, when we were doing this—when this issue first came, if you are factually innocent of the charge, wouldn't you get to present that evidence? And his response, as I remember it was, at the end of the conflict, that at the end of war on terrorism, whatever that means, you can—after you've been in jail all that time, you can present evidence that it wasn't you.

So my question is, exactly who makes the determination that someone is an enemy combatant, and what is the standard of proof? Is it preponderance of the evidence? More likely than not? Not clearly erroneous? Beyond a reasonable doubt? What is the standard by which you are designated an enemy combatant? And then when do you get to review that determination?

Ms. O'Connell.

Ms. O'CONNELL. Mr. Scott, I'd love to answer that question. And I'd also like to comment on Mr. King's last question to the other witnesses that I didn't get to respond to. Because I think it's an essential question that we're really talking about today. How should we prepare this country to defend our people from the next terrorist strike? Should we recreate the law, create greater flexibility to declare people enemy combatants, as Mr. Scott inquired, or should we stick with the law that we have now and say to the world, this is a law-abiding country? We do things by the book.

We found out that, in fact, successful counterterrorism is based on following the letter of the law as it currently exists. There was no greater recruiting tool to militant groups, terrorist organizations, than Abu Ghraib, which was a demonstration of our failure to follow the law of armed conflict. Today, the number one recruiting tool to terrorist organizations, to making people dangerous to this country, is the drone policy—killing people beyond armed conflict zones in clear violation of the law of armed conflict.

We have heard, Mr. King, from Admiral Blair, from General Cartwright, from so many people—the Rand Corporation—that the way to deal with the next terrorist threat to this country is by making it clear to the world that we believe in the rule of law in this country, and we're going to follow it. We're not going to make up new rules, create new categories of persons—these enemy combatants in the war on terror that may or may not ever end, that says to the world, we don't care about the law. And that makes this country—puts this country in greater danger than if we say the Geneva Conventions determine who is an enemy combatant. We're not going to make up a new rule. We know who is a criminal suspect accused of terrorist planning and plotting. Those people should be subject to arrest and trial. If they resist arrest, then police, of course, are authorized to kill known dangerous persons, very much the way Osama bin Laden was captured. That's the way forward.

Mr. SCOTT. The *Hamdi* decision put a limit on some of this. You have some kind of—you have to have some kind of procedure. What is the burden of proof that the government has to establish to declare someone an enemy combatant? Mr.——

Mr. WITTES. So, first of all, there's an internal executive judgment, and depending on where that person is held, those procedures differ.

But for the Guantanamo detainees, they then have access to U.S. courts to challenge whatever judgment the executive made that they are detainable. Those cases, there have been a lot of them, of.

Mr. SCOTT. If you're held in Guantanamo——

Mr. WITTES. Evidence proves——

Mr. SCOTT. If you are held in Guantanamo, you have access to courts.

Mr. WITTES. You have access to the District Court in Washington and, through there, the D.C. Circuit and the Supreme Court.

I believe—I—my numbers may be wrong. I believe there were 14 detainees who won their cases in the District Court on habeas and were released as a result of that.

Mr. SCOTT. What is the standard of proof?

Mr. WITTES. Standard of proof is preponderance of the evidence.

Mr. SCOTT. So, you know, more likely than not, you're an enemy combatant.

Mr. WITTES. Correct.

Mr. SCOTT. And that's the standard that you're held on. And if they show that you're more likely than not an enemy combatant, you get to be held till when?

Mr. WITTES. Till the termination of hostilities.

Mr. SCOTT. And do you get——

Mr. WITTES. Or till the termination of hostilities or, as in—as in a great number of the cases, until there's a prudential judgment that your detention is no longer necessary. And, you know, a lot of people at Guantanamo have——

Mr. SCOTT. More likely than not isn't a real——

Mr. WITTES. I'm sorry?

Mr. SCOTT. More likely than not, preponderance of the evidence, isn't much of a standard to hold someone. And then they would have to prove their innocence at that point?

Mr. WITTES. There is—look, there's no question that this is not a criminal proceeding. It is a detention on significantly less than criminal standards.

Mr. SCOTT. Let me ask one other question. And that is, wiretapping for terrorism. We have a constitutional right to be free from unreasonable search and seizures. And there are procedures of wiretapping some people's phone conversations. That standard is a lot less if it's an investigation for terrorism. You go into FISA court and get warrants based on a much lower standard. One of the problems occurred in the USA Patriot Act where we started sharing information from terrorism to law enforcement. And then reduced the purpose of the wiretap from primarily terrorism to terrorism being a significant purpose. I asked the Attorney General Gonzales, if it's not the primary purpose, what could be the purpose of a terrorism warrant? And he blurted out "criminal prosecution." Which is exactly the problem. Because you'll be running a criminal prosecution without all of the probable cause and other things you need to get warrants.

Can some of the witnesses comment on the problems of wiretap and other invasions in the privacy under the guise of terrorism when you're really running an ordinary criminal prosecution?

Mr. ENGEL. Sure. You know, I take—Congress spent a lot of time modernizing the FISA statute several years ago. And that—you know, statute has been authorized and reauthorized at times. From my point of view, I confess 30 days after the Boston Marathon bombing, my concern is not that too much of terrorists—of what the intelligence services are able to pick up under their lawful authorities is shared with law enforcement for prosecutions, but that there are still barriers and obstacles to information sharing between our intelligence services and the FBI. And, you know, so, again, I think there are certainly important constitutional concerns that are at work here. There is a very articulated statutory requirement which involves Article III judges being involved with these warrants. But there is a balance on both sides. We must——

Mr. SCOTT. The balance is—you're exactly right. If you're investigating terrorism, you've got an easy way. All you've got do is declare terrorism, and you get all the warrants you want. The check

on that has been that you can only use these for terrorism. When you start running criminal investigations pretending to use terrorism as a significant but not primary purpose, your primary purpose is running a criminal investigation when you don't have probable cause, then that's when you start getting into problems. I don't think there's much discussion in the ability to get warrants if you're investigating terrorism. That's okay. But if you're running a run-of-the-mill criminal investigation, you shouldn't be able to use terrorism as an excuse to violate the Constitution.

Mr. ENGEL. If we believed that the Department of Justice and the FBI were misusing the FISA procedures to pursue nonterrorism investigations, that would be certainly a cause for concern. I am not personally aware of that going on. But, you know, I don't have oversight capabilities over the Department of Justice.

Mr. SCOTT. Ms. O'Connell, you want to make a comment on that?

Ms. O'CONNELL. Mr. Scott, I am not an expert on the FISA laws or wiretapping, and I really try to limit my commentary to where I am expert, which is law of war.

Mr. SCOTT. Mr. Chairman, I think we created the problem by reducing the standard from primary purpose of the warrant being terrorism to a significant purpose, which invites the inquiry, what is the primary purpose? And when the Attorney General blurted out "criminal investigation," I mean, I think that let the cat out of the bag.

I yield back.

Mr. KING. I recognize the gentleman from Virginia's point. And then the gentleman has yielded back.

And recognize the judge from Texas, Mr. Poe, for 5 minutes.

Mr. GOHMERT. Mr. Poe is not here.

Mr. KING. Excuse me. Mr. Gohmert for 5 minutes.

Mr. GOHMERT. I'm here at your far left. If you want to make that note.

Mr. ENGEL. But your right.

Mr. GOHMERT. But I agree with my friend from Virginia on everything he said, except that apparently it may be easier to get warrants if you are allegedly involved in terrorism or if you've written an article critical of this Administration, either way opens the doors, apparently, to warrants.

But let's go back to the interrogation of the Boston bombers, Dzhohkhar Tsarnaev.

What would have happened had he not been given his Miranda rights for after—until after 72 hours of interrogation? What would have happened to the criminal proceeding whenever that occurs?

Mr. ENGEL. Again, there—you know, there is—I think the short—the short answer is probably the result of his criminal trial would be no different, frankly. There is a risk——

Mr. GOHMERT. But they wouldn't have been able—the difference, isn't it, that they wouldn't have been able to use anything he said after the time at which he should have been arrived—advised of his Miranda rights. Correct?

Mr. ENGEL. That's right.

Mr. GOHMERT. It would not have prevented his being prosecuted, it would just have changed some of the things being admissible that he said after that point. Correct?

Mr. ENGEL. Exactly. The government would run the risk not being able to admit those statements.

Mr. GOHMERT. And so——

Ms. O'CONNELL. Unless, of course, they corroborated what he said through other means.

Mr. GOHMERT. Right. Exactly. They had a pretty solid case before.

Ms. O'CONNELL. Exactly.

Mr. GOHMERT. And you add admissions against interest to the person whose car was highjacked. They had a pretty solid case even without anything he said. That was my point. There was all this concern and fear expressed publicly about, gee, they've got to advise him of his Miranda rights. Should they? Really, it wouldn't have made much difference at all, if any. That was my point.

And, Ms. O'Connell, you pointed out the good job of interrogation that was done, I believe, the Underwear Bomber. But that was in December of 2009. And that was before we learned of the purging of training materials for FBI and for intelligence. And we found out about this Administration's weighing in and stopping career individuals who taught about radical Islam being prevented from teaching about radical Islam. And I was, frankly, shocked when our Attorney General was sitting at this table last week how little he apparently knows about the purge of the materials.

There are a couple of us that have been through purged materials. I think it's ridiculous that they classified those. I think people ought to know how absurd the things are that they have classified and purged from people being taught. There are things that have been made public that have been eliminated because of concerns that it might offend, apparently, radical Islamists.

But I want to take your attention to a December 8 New York Times article—of course, The New York Times is not usually kind to me, but they did a good job reporting December 8th of 2008, "Five Charged in 9/11 Attacks Seek to Plead Guilty." And they went through and they talked about Khalid Shaikh Mohammed and the other four. And actually, he prepared the pleading that all five of them signed and agreed to. And in that pleading, he said such things—and this was declassified—"So if our act of jihad and our fighting with you caused fear and terror, then many thanks to God because it's Him that has thrown fear into your hearts which has resulted in your infidelity, paganism, and your statement that God had a son and your Trinity beliefs." Also said, "We fight you and destroy you and terrorize you. The jihad is God's cause and a great duty in our religion. We have news for you. The news is you will be greatly defeated in Afghanistan, Iraq, and that America will fall politically, militarily, economically. Your end is very near, and your fall will be just as the fall of the Towers on the blessed 9/11 day."

Now, I understand that there are being recruiting tools used around the world. Ms. O'Connell, I know you were talking about that. But I would submit to you the Muslims I've talked to in Afghanistan that have fought the Taliban successfully, until we began to occupy Afghanistan and let them come back, but they say the best recruiting tool—and it's not only them. People I've talked to in Iraq and in China and in the continent of Africa, South Amer-

ica, they said one of the best recruiting tools they've got that they use, and we found it in their material, the way you fled South Vietnam, the way you left Beirut after you were attacked, the way you did nothing in 1979 when you were attacked, the way you have now left Iraq under the influence of Iran, how you are leaving Afghanistan as a leader that we released from Guantanamo—and Mr. Masood told me that he had been on—that this terrorist who was released for humanitarian purposes now on television nationally in Afghanistan saying, "We all know now the United States has been defeated. They are begging us to come talk to them at the negotiating table. But we don't care. You know, we'll be back in charge so you better come beg our forgiveness, join our forces." And they are getting people to come back and join the Taliban because of the fear, because the recruiting tool is, America's been defeated again.

And I would just hope that the message will not be after this hearing that America will no longer be at war with al-Qaeda and radical Islam. That we will not give in to that.

Ms. O'Connell, I've talked to people in England and other places that say, we hope and begging you, please don't give up the fight, because they are scared of what happens in America gives up the fight.

So does anybody know—just time has expired—but I'm just curious, does anybody know why the guys that wanted to plead guilty, that were ready to plead guilty, that went through a lengthy plea hearing where Khalid Shaikh Mohammed admitted all of these things that he had done, does anybody know why they have not yet been convicted? Why they have not had their conclusion to the guilty plea and the admissions they've made?

Mr. CHESNEY. I will—if someone knows better, I'm going to speculate a little here. But my recollection is that in military criminal justice proceedings, whether it's a military commission or courts-martial, in contrast to how we do it in the civilian Federal courts, if it's death penalty, I believe there's either in the court-martial system an outright ban on just pleading guilty and getting the death penalty. There has to nonetheless be a proceedings. Or at least there's a disposition against that. Maybe Professor O'Connell might know more about this.

Ms. O'CONNELL. Basically, that's correct. You can't just plead to be executed. And I would point out, Mr. Gohmert, that in fact KSM wanted to be a martyr in order to help this very process that you just indicated, that if there were—if he was martyred, executed by the United States without any kind of fair trial, that would lead more people to join.

Really, I'm the wife of a proud United States Army soldier. And I believe in the strong defense of this country and support our serving men and women just as much as I can. Many of our students are currently in Afghanistan fighting under orders of our President. And what I—what I know——

Mr. GOHMERT. They maybe some of the ones that begged us to change the rule of engagement so they don't have to get shot before they can defend themselves. I talk to them, too.

Ms. O'CONNELL. I know that those young men and women fight right. They fight under our Constitution. They do what the law re-

quires. And they know that that's the sure way to succeed in any venture that this country undertakes in the world.

Mr. GOHMERT. So you say we are succeeding in Afghanistan, that's your position?

Ms. O'CONNELL. The current war in Afghanistan is a war to keep Mr. Karzai in power. It's an anti-insurgency war. And we have succeeded so far in keeping Mr. Karzai in power. I think Mr. Karzai's long-term stability is dependent more on his creating a rule of law system, a political system that works for all the people of Afghanistan and not an unending civil——

Mr. GOHMERT. You know that's not going to happen, though, from Karzai.

Ms. O'CONNELL. Mr. Gohmert, like you, I'm a person of prayer and of faith. And I pray every day that that will happen. And I actually believe very strongly that—that this country is in a position to support Mr. Karzai and all Afghans to move toward a rule of law system and the protection of human rights.

Mr. GOHMERT. Let me put something else on your radar, then, that we can both pray for. What the Muslims in the northern area have told me is, If you will just allow us to elect our governors, our mayors, select our own police chiefs instead of having the president of this country appoint all of those people, we've got a better chance of fighting the Taliban after you're gone, than if you leave this stovepipe system where the Taliban can knock off the central character and then be back in charge.

So I'm hoping that we give them more of a federalist system on our way out. It will help them and us. So thank you for being here today.

Mr. GOODLATTE. [Presiding.] I thank the gentleman.

The Chair recognizes gentlewoman from Texas, Ms. Jackson Lee, for 5 minutes.

Ms. JACKSON LEE. Thank you very much. To the witnesses, let me thank you all for your testimony. I was detained as a counterterrorism hearing that indicated to me, first of all, I will not disagree with my good friend, but I will say that America has suffered few defeats. And, frankly, Afghanistan and the treasure that we have lost, even the treasure we've lost in Iraq, despite its conflictedness, I will never accept defeat by this Nation. Frankly, I believe that we have evidenced, if you will, if it is not where we would like it to be, we have certainly evidenced some strides. It will be up to many of the good men and women ultimately of Iraq and ultimately of Afghanistan to preserve the democratic principles that we have.

I do think it is worth noting in the previous hearing, since it was a public hearing, of those witnesses' enormous concern about al-Qaeda and its pervasiveness and its worldwideness and its presence. And I think it is important to be in this hearing—and I'm going to be very brief because I am moving to another meeting that I have to be at. But it's important to have these juxtaposed hearings—because what it says about America is that we are aware of the worldwide threat of terrorism, but we hold dear and we cherish our constitutional values as well as our constitutional process. And I think—I think it is evident that none of us will give up that constitutional process.

So I'm going to be very brief. I'm going to ask the Chairman to allow me to put into the record, March 7, 2013, a letter addressed to Senator Rand Paul. And the simple question to the Attorney General was, does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil? The answer to that question is no, signed Eric Holder, Jr.; ask unanimous consent, Mr. Chairman, to put this into the record.

Mr. GOODLATTE. Without objection, it will be made a part of the record.

[The information referred to follows:]

holderletter.pdf http://big.assets.huffingtonpost.com/holderletter.pdf

The Attorney General
Washington, D.C.

March 7, 2013

The Honorable Rand Paul
United States Senate
Washington, DC 20510

Dear Senator Paul:

It has come to my attention that you have now asked an additional question: "Does the President have the authority to use a weaponized drone to kill an American not engaged in combat on American soil?" The answer to that question is no.

Sincerely,

Eric H. Holder, Jr.

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Ms. JACKSON LEE. I think that also speaks to a clear firewall as it relates to some of the issues we are talking about.

Just to Mr. Chesney. And let me acknowledge your affiliation with the University of Texas School of Law. I love the sign. And thank you, Texan. And to the Brookings Institute and to all of you, we respect your respective affiliations as well.

But let me just ask Mr. Chesney, is it appropriate for bomber number two out of Boston Marathon to be tried in a civilian Federal court? And I would ask all of you just a yes-or-no answer, or quick sentence.

Mr. Chesney.

Mr. CHESNEY. Yes.

Mr. WITTES. Yeah, that's the only appropriate disposition.

Mr. ENGEL. No disagreement, yes.

Ms. O'CONNELL. Emphatic yes.

Ms. JACKSON LEE. And I think that sets a marker because as the investigation grows, he is a terrorist or alleged terrorist or perpetrator against the United States, but it is important to have that fine line of how we draw and whether or not we have the provisions to be able to try that case as well.

To Mr. Engel, the FBI instructs that after any and all applicable public safety questions have been exhausted, agents should advise the arrestee of his Miranda rights, seek a waiver of those rights before any further interrogation occurs absent exceptional circumstances.

Boston Marathon was an example that where the public actually got to see something other than television, which was, where are the Miranda rights? What's your take on that?

Mr. ENGEL. Well, I think you correctly identified exceptional circumstances in the policy and I think that the agents determined or the Department of Justice, this was done at high levels, determined that it was appropriate to question Mr. Tsarnaev without giving the Miranda warnings for as long as they were able, you know, prior to the termination of the interrogation. I have some concerns that it could have been terminated too early, but, you know, I wasn't there and I don't have the information there. So, the FBI does have that flexibility, but they also have constraints to bring the individual before a judge and to provide him with a defense counsel.

Ms. JACKSON LEE. Let me not ignore any of the other witnesses. I indicated that I'm going to yield back my time because of another engagement, but what I would offer to say is, I want to look further into the safety exemptions, exceptions. I find that it was constructive. I want to be right on it. I want to see whether we need to look further into it, and I also want to make sure that we continue to have this fine infrastructure that protects our constitutional process but yet does not let us take one step back on fighting against the dastardly actions of terrorists against the United States or elsewhere.

I yield back.

Mr. GOODLATTE. The Chair thanks the gentlewoman and recognizes the gentlemen from Georgia for his questions for 5 minutes.

Mr. JOHNSON. Thank you. I would—I would point out the fact that as conditions change, then our constitution, which is the foundation of our laws, must grow and must look at our rights and liberties under the constitution in light of today's reality, and so I think when we have strict construction of the United States constitution by anyone, be it on the left or the right, I think that's action that is misguided or thinking that's misguided. I believe that the constitution grows and interpretations have to be rendered in accordance with the times that we are living in.

And that being the case, I mean, that's how it grows is by actions being taken and then those actions being taken to court and challenged, and the U.S. Supreme Court being the final arbiter of

whether or not a particular action is constitutional or not. And we've had instances throughout the history of the Nation that have required the rights and liberties that we enjoy under the constitution to be limited or expanded. I point to Ex parte Milligan back in 1862 during the civil war or at the time of the civil war, where President Lincoln suspended habeas corpus to all persons in military custody, and he further proclaimed that rebels and insurgents, their aiders and abettors within the U.S. and all persons discouraging volunteer enlistments or guilty of any disloyal practice, affording aid and comfort to rebels against the authority of the United States shall be subject to marshal law and liable to trial and punishment by court marshals or military commission.

Congress subsequently authorized the suspicion of habeas corpus wherever—whenever the President judged it necessary in the public safety. And so, under that declaration by the President and the act of Congress, a citizen from the State of Indiana alleged to be a senior commanding general of the Sons of Liberty, a group with links to the Confederacy, was arrested and charged with planning to commit acts of sabotage against the union, and the government argued that Milligan could be tried by military commission or that if the military commissions lacked jurisdiction over the case, the military could hold Milligan as a prisoner of war until the end of hostilities, at which time he would be remanded to civil authorities. And the case went to the U.S. Supreme Court and the court found that such actions can never be applied to citizens in States which have upheld the authority of the government where the courts are open and their process unobstructed. So, in other words, that the fact that you're going to charge a United States citizen with an act, you know, you still, that citizen was not deprived of their right to habeas corpus and all other Constitutional rights that easily, and so—and so then you had the case of Ex parte Quirin. In the summer of 1942, eight German nationals attempted to enter the U.S. by submarine, and then landed in Nazi uniform to ensure that they would have prisoner of war status. Eight of the men were—all eight were born in Germany but had lived in the U.S. for extended periods of time, and one of those eight actually proclaimed himself to be a U.S. citizen, that being, Mr. Quirin. And the conspirators who were going to commit acts of terrorism in the U.S. were apprehended, and they were charged and convicted in a military tribunal and sentenced to death.

And now the defendants in that case argued that—or the appellants argued that the President exceeded his power in ordering military commission and Fifth and Sixth Amendment protections. The President had ordered that these people not have those constitutional rights, and the court ruled that that was improper, Ex Parte Quirin, and the court found that the citizenship of the saboteurs was irrelevant to the determination of whether they were enemy belligerents or not. So excuse me, I misspoke. The court ruled in that case that these men could be deprived of those constitutional rights. But the thing was, when you read those two cases together, because Quirin did not overrule Milligan, so, therefore, you have to read those two together, and when you do, there has got to be a showing of an association with enemy forces.

So, if you can show an association with enemy forces to a citizen of the United States of America applied to an act within the United States of America, an act of terror or an act of crime, because crime and terror are matters of degrees but both are crimes, especially when someone has been hurt. So I put all of that out there to say that, isn't it prudent that with the recent bombing taking place in Boston, involving a United States citizen, who was questioned for 16 hours by—in addition to civilian law enforcement, military interrogation, without having been read Miranda warnings, and then, within the 48 hours that the law requires that a person arrested in civilian population or for a civilian crime, be brought before a magistrate, at which time they have to be read their Miranda warnings, wouldn't you say that in this particular instance the government has proceeded carefully and within the boundaries of current law? Would each of you all say that?

Mr. CHESNEY. Representative Johnson, I very much agree that the government proceeded carefully and within the bounds of law here in the Tsarnaev case.

Mr. JOHNSON. All right.

Mr. WITTES. I agree with that as well.

Mr. ENGEL. Based on what I know, it sounds like the government proceeded appropriately. I have some concern as to whether the interrogation of Mr. Tsarnaev was ended early than it needs to be done, but certainly with respect to civilian custody and prosecution in an Article III court and the like, that seems, you know, it's done appropriately.

Mr. JOHNSON. Well, assuming that law enforcement and military interrogators were satisfied that there was no association with enemy forces, then would you agree that the government proceeded lawfully and within the bounds of the constitution?

Mr. ENGEL. Clearly the government proceed lawfully, and my comments are solely within regard to the civilian law enforcement system. In other words, I'm aware of no fact that suggests that Mr. Tsarnaev should have been declared an enemy combatant and put into the military justice system. The question within the boundaries of the civilian justice system is, were the interrogators, law enforcement interrogators confident that they have obtained all of the information on future terrorist plots or terrorist organizations that was available at the time that Mr. Tsarnaev was read his Miranda warnings or was——

Mr. JOHNSON. Well, there is——

Mr. ENGEL [continuing]. There some lawyer who——

Mr. JOHNSON. There is no evidence that they had not convinced themselves that he was not associated with foreign enemy forces.

Mr. ENGEL. That's right. I don't believe that that was at issue.

Mr. JOHNSON. All right. Thank you.

Ms. O'CONNELL. Mr. Johnson, the government proceeded lawfully, I agree with my copanelists, but I believe the correct precedence to look at are not Ex parte Milligan and Quirin but rather the hundreds of successful terrorism prosecutions that this country has held, including such prosecutions as that of Timothy McVeigh but also the Blind Sheikh associated with the embassy bombings, and of course, the many, many successful Abdulmutallab——

Mr. JOHNSON. Yeah.

Ms. O'CONNELL. Et cetera, et cetera. Those are the right precedents.

Mr. JOHNSON. I agree that our civilian justice system has been quite effective in dealing with internal cases of terrorism, but I would challenge you, because you seem to not want to construe the constitution or our constitutional liberties in accordance with the realities of the time that we are living in, and perhaps that's too strong a statement for me to make, but would you agree that as America encounters new challenges, such as home grown terrorists, who are associated with enemy forces, do we need——

Mr. GOODLATTE. I think this is the last question.

Mr. JOHNSON. Yes. Do we need more—do we need a Constitutional amendment or do we need legislation in accordance with our constitution that would apply to a situation, such as the one we faced in Boston? Do we need to take some legislative action or amend our constitution in some way to protect our citizens?

Ms. O'CONNELL. No, Mr. Johnson, I think our constitution has served us extremely well when we have complied with it. The Fifth Amendment to the constitution protects the right to life of all persons, and that right to life——

Mr. JOHNSON. And not just citizens but persons.

Ms. O'CONNELL. Not just to citizens. No person shall be deprived of their right to life without due process of law, and that due process depends on whether the person is in a situation of war, armed conflict or peace. That's very current law. That is law that we are constantly involved in participating and making.

The area of customary international law, where we get our definition of "armed conflict" is up-to-date, up to the minute. It is reflecting the problem of terrorism faced, not just by the United States but our close allies, the United Kingdom, Germany, India, et cetera, et cetera. We are up to the minute on this. We are—our law is up-to-date, and we are being distracted by those who tell us all these terrible and difficult problems of society have to be run through the military.

Mr. JOHNSON. Okay.

Mr. GOODLATTE. I want to——

Mr. JOHNSON. Yes. Can I ask the others to just say "yes" or "no" whether or not——

Mr. GOODLATTE. Very, very briefly. I know that Ms. O'Connell has to get to my alma mater to attend a graduation, and I am all in favor of people attending Washington and Lee graduation, so if you'll be brief.

Ms. O'CONNELL. I would love to pass on to my nephew your good wishes. Thank you, Mr. Chairman.

Mr. GOODLATTE. You may do so.

Ms. O'CONNELL. Washington and Lee.

Mr. ENGEL. I think our Constitution has served us well. I don't think there is an amendment necessary in this area. I think, with respect to the case of the Boston Marathon bomber, I don't see any statutory amendments or new statutes that are needed to deal with that problem.

Mr. JOHNSON. Thank you.

Mr. WITTES. I agree with that, with the caveat that, as my earlier exchange with Chairman Goodlatte reflects, I do think it is

well worth Congress looking at the question of what it can do around the public safety exception and what it can do around the possibility of a delay in presentment.

Mr. CHESNEY. I agree with what Mr. Wittes just said.

Mr. JOHNSON. Thank you.

Mr. GOODLATTE. I thank you all. I thank the gentlemen from Georgia and the gentlemen from Virginia. This has been a very thoughtful and good discussion, and I think there are some actions that will possibly come out of this, but it has definitely been a good review of the circumstances that we are in. And with that, we will conclude today's hearing and thank all of our witnesses for attending, and without objection, all Members will have 5 legislative days to submitted additional written questions for the witnesses or additional materials for the record, and those additional written questions, we hope you will answer those as promptly as possible.

And this hearing is adjourned.

[Whereupon, at 12:25 p.m., the Committee was adjourned.]