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Before the

COMMITTEE ON

ARMED SERVICES

UNITED STATES SENATE

To receive testimony on the Guantanamo Detention Facility and the future of U.S. Detention
Policy

Thursday, February 5, 2015

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HEARING TO RECEIVING TESTIMONY ON
THE GUANTANAMO DETENTION FACILITY AND
THE FUTURE OF U.S. DETENTION POLICY

Thursday, February 5, 2015

U.S. Senate
Committee on Armed Services
Washington, D.C.

The committee met, pursuant to notice, at 9:50 a.m. in Room SD-G50, Dirksen Senate Office Building, Hon. John McCain, chairman of the committee, presiding.

Committee Members Present: Senators McCain [presiding], Sessions, Ayotte, Cotton, Rounds, Ernst, Tillis, Sullivan, Graham, Reed, Manchin, Shaheen, Gillibrand, Blumenthal, Donnelly, Kaine, King, and Heinrich.

1 OPENING STATEMENT OF HON. JACK REED, U.S. SENATOR FROM
2 RHODE ISLAND

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

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

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

14 [COMMITTEE INSERT]

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

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

Mr. Rasmussen: I believe it's --

Mr. McKeon: It's up to you, sir.

Senator Reed: Secretary McKeon, please. You go right ahead, Mr. Secretary.

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STATEMENT OF HON. BRIAN P. McKEON, PRINCIPAL DEPUTY
UNDER SECRETARY OF DEFENSE FOR POLICY, DEPARTMENT OF DEFENSE

Mr. McKeon: Okay. Thank you very much, Senator Reed.

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

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

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

1 entered.

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

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

15 Mr. Chairman, members of the committee, I want to make
16 a fundamental point regarding the Detention Facility at
17 Guantanamo. The President has determined that closing it is
18 a national security imperative. The President and his
19 national security team believe that the continued operation
20 of the facility weakens our national security by draining
21 resources, damaging our relationships with key allies, and
22 is used by violent extremists to incite local populations.
23 It is no coincidence that the recent ISIS videos showing the
24 barbaric burning of a Jordanian pilot and the savage
25 execution of a Japanese hostage each showed the victims

1 clothed in an orange jumpsuit believed by many to be the
2 symbol of the Guantanamo Detention Facility.

3 Forty retired military leaders, all retired general or
4 flag officers, wrote this committee last week and stated,
5 "It is hard to overstate how damaging the continued
6 existence of the Detention Facility at Guantanamo has been
7 and continues to be. It is a critical national security
8 issue. Many of us have been told on repeated occasions by
9 our friends and countries around the world that the greatest
10 single action the United States can take to fight terrorism
11 is to close Guantanamo."

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

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

25 Senior figures across the political spectrum have made

1 clear that Guantanamo poses risks to our national security
2 and should be closed. Former Secretaries Gates and Panetta,
3 and the current Secretary, Secretary Hagel, all support
4 closure of Guantanamo.

5 Finally, President George W. Bush concluded that the
6 Guantanamo Detention Facility was, quote, "a propaganda tool
7 for our enemies and a distraction for our allies," end
8 quote.

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

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

22 Next, any transfer decision requires an assessment by
23 the special envoys of the security situation in the
24 receiving country, and the willingness and capability of
25 that country to comply with security assurances. We also

1 have the IC look at that issue.

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

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

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

24 The Office of the Director of National Intelligence
25 categorizes the figures in three ways: the totals, the

1 totals for before 22nd January 2009, when President Obama
2 signed the Executive Order, and the total after 22nd January
3 2009, which refers to former detainees who departed
4 Guantanamo after that date.

5 This is how the data break down:

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

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

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

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

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

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

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

20 Let me talk about the Periodic Review Board process
21 briefly. The PRB process is an interagency process
22 established to review whether continued detention of
23 detainees at Guantanamo remains necessary to protect against
24 a continuing significant threat to U.S. national security.
25 We will provide your staff more information about the

1 process and the PRB conduct of detainee risk assessments.

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

11 You have asked us to address the legislation, recently
12 introduced by Senator Ayotte and several members, which I
13 understand may be marked up by the committee next week. In
14 our view, this legislation would effectively ban most
15 transfers from Guantanamo for 2 years. It reverts to the
16 previous certification regime under the NDAA for fiscals '13
17 and '14 -- excuse me -- fiscal '12 and '13 -- which resulted
18 only in court-ordered transfers, transfers pursuant to plea
19 agreements, and the use of only a few national security
20 waivers. In addition, it adds a proposal to limit transfers
21 based on JTF-GTMO threat assessments that may be outdated or
22 not include all available information. We believe that any
23 decisions on transfers should be based on current
24 information and individual assessments of detainees.
25 Because this legislation, if enacted, would effectively

1 block progress toward the goal of closing the Guantanamo Bay
2 Detention Center, the administration will oppose it.

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

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

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

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

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

1 Third, we will continue and expedite the PRB process.

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

6 Ultimately, closing the Detention Center at Guantanamo
7 Bay will require us to consider additional options,
8 including the possibility of transferring some detainees to
9 a secure facility in the United States. The Department of
10 Justice has concluded that, in the event detainees are
11 located to the United States, existing statutory safeguards
12 and executive and congressional authorities provide robust
13 protection of national security. We understand that such
14 transfers are currently barred by statute. As a result, the
15 Government is prohibited from prosecuting any detainees in
16 the United States, even if it represents the best or only
17 option for bringing the detainee to justice. The President
18 has consistently opposed these restrictions, which curtail
19 options for reducing the detainee population.

20 You asked us to address what happens if someone is
21 captured on the battlefield. The disposition of an
22 individual captured in the future will be handled on a case-
23 by-case basis and by a process that is principled, credible,
24 and sustainable. When a nation is engaged in hostilities,
25 as we are, detaining the enemy to keep them off the

1 battlefield is permissible and is the humanitarian
2 alternative to lethal action. In some cases, those detained
3 will be transferred to third countries. In others, they
4 will be transferred to the United States for Federal
5 prosecution after appropriate interrogation, as occurred in
6 the case of Ahmed Warsame. Some cases may be appropriate
7 for Law of War detention. The President has made clear we
8 will not add to the population of the Detention Center at
9 Guantanamo Bay.

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

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

25 [The prepared statement of Mr. McKeon follows:]

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Senator Reed: Well, thank you very much, Mr. Secretary.

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

Secretary McKeon, who just presented testimony, is Principal Deputy Under Secretary of Defense for Policy, Department of Defense. Mr. Nicholas Rasmussen is the Director of the National Counterintelligence Center, Office of the Director of National Intelligence; and Admiral Ross

1 Myers is the Vice Deputy Director for Nuclear, Homeland
2 Defense, and Current Operations, Joint Staff.

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

5 Mr. Rasmussen: I believe I'm next --

6 Senator Reed: Mr. Rasmussen, please.

7 Mr. Rasmussen: -- Mr. Ranking Member.

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

21 Mr. Rasmussen: And thank you for the opportunity to
22 appear before the committee today for this discussion
23 concerning Guantanamo detainees.

24 And I'll begin by discussing the intelligence
25 community's support to the transfer process that Brian

1 outlined in some detail; specifically, the analysis that the
2 intelligence community provides.

3 The community provides a range of tailored intelligence
4 assessments aimed at helping policymakers --

5 Senator Reed: Could you adjust your mic, Mr.
6 Rasmussen?

7 Mr. Rasmussen: I'm sorry.

8 Senator Reed: Thank you.

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

21 As you know, we continue to face threats from a wide
22 range of actors, from al-Qaeda and its affiliates, as well
23 as from ISIL and those inspired by violent extremist
24 messaging. The full force of brutality of these groups,
25 such as ISIL, and ISIL in particular, is felt most acutely

1 in Iraq, in Syria, and regionally in the Middle East and
2 North Africa. Today's threat environment in Western
3 countries is largely characterized by smaller-scale attacks.

4 It's noteworthy that the majority of attacks conducted in
5 the West in the last 8 months were, in fact, conducted by
6 individual terrorists.

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

19 Intelligence community products do not state whether a
20 detainee poses a high, medium, or low risk of reengagement,
21 because we assess that the likelihood for a detainee to
22 reengage is shaped by a combination or a synthesis of a
23 number of personal and environmental factors. And, in
24 addition to this individually focused analysis, the IC also
25 provides assessments about potential destination countries,

1 their capabilities, and their willingness to mitigate the
2 potential detainee's threat.

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

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

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

23 But, it's important to note, for the purpose of these
24 definitions, engagement in anti-U.S. statements or
25 engagement in propaganda activities does not, by itself,

1 qualify as terrorist or insurgent activity. And it's also
2 the case that some former detainees have been added to this
3 list of suspected reengagement candidates and then later
4 removed after information came to light suggesting that the
5 individual had not, after all, reengaged.

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

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

25 And I'll stop there, Senator Reed, and I look forward

1 to your questions.

2 [The prepared statement of Mr. Rasmussen follows:]

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23 Senator Reed: Thank you very much.

24 Admiral Myers, do you have comments?

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

1 Admiral Myers: Ranking Member Reed, distinguished
2 members of the committee, thank you for having me here today
3 to discuss this important topic.

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

9 I look forward to answering your questions.

10 Thank you very much.

11 Senator Reed: Thank you for your statement, Admiral.
12 It was succinct and to the point.

13 Let me first ask -- there was a letter reference from
14 42 general officers addressed to Senator McCain and myself,
15 and I would ask unanimous consent that it be made part of
16 the record. And, hearing no objections, so ordered.

17 [The information referred to follows:]

18 [COMMITTEE INSERT]

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

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

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

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

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

1 Senator Reed: And there is a check on the assurances
2 that are given by these various countries so that we are
3 confident that they have the -- both the capacity and the
4 will, and are actually keeping up their end of the bargain.
5 Is that accurate?

6 Mr. McKeon: We continue to monitor compliance with
7 agreements, through various means, including the U.S.
8 Embassy and, where appropriate, liaison services, and our
9 own capabilities.

10 Senator Reed: Let me go to one of the major points
11 that you made, that is the -- and specifically to Mr.
12 Rasmussen -- that the continued operation of Guantanamo
13 gives some of our adversaries a -- propaganda points with
14 respect to recruitment, retention, magnifying their
15 operations. Is that your -- the assessment of the
16 intelligence community?

17 Mr. Rasmussen: Yes, Senator. From the Director of
18 National Intelligence's perspective, who is asked to weigh
19 in on these transfer decisions from the perspective of
20 intelligence, what underpins all of his decisionmaking in
21 this regard is an analytical judgment that he has made, that
22 the community has made, that the benefits to national
23 security from closing Guantanamo, in some cases, in many
24 cases, outweigh the risks that are incurred by releasing
25 individual detainees. And it's precisely because of that

1 continued featuring of Guantanamo in the terrorist narrative
2 that he's made that calculation, the fact that Guantanamo
3 features in terrorist propaganda, it features in terrorist
4 recruitment, and we assess that it has continued significant
5 resonance in the population that our terrorist adversaries
6 are trying to recruit among. ISIL has used Guantanamo in
7 its English-language propaganda, including their online
8 English-language magazine. AQAP, al-Qaeda in the Arabian
9 Peninsula, the al-Qaeda affiliate operating in Yemen, has
10 used Guantanamo in their propaganda. And it's also
11 noteworthy that the al-Qaeda's senior leader, Ayman al-
12 Zawahiri, continues to reference Guantanamo in his
13 communications with al-Qaeda members around the world. So,
14 yes, Senator.

15 Senator Reed: Thank you.

16 This is a specific issue which we're going to have to
17 face. General Kelly, who is the Commander of U.S. South
18 Command, has voiced concern about the medical facilities
19 there. You have an aging population of individuals. And
20 last year, in the Senate version of the defense
21 authorization bill, we put in language that will allow for a
22 temporary transfer, because of a medical condition, of an
23 individual to a more appropriate facility for care, on a
24 temporary basis, in the United States. This was not
25 ultimately adopted. But, is that something that concerns

1 you, going forward, just in terms of a population that
2 obviously is going to be in -- if this closure is delayed,
3 more and more in need of socialized care?

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

15 Senator Reed: Thank you very much.

16 Senator Tillis, please.

17 Senator Tillis: Thank you, Senator Reed.

18 Gentlemen, thank you for being here today.

19 I have a question about the five Talibanis who were
20 released. I think we got notified through the press, back
21 in May of last year. And my question for anyone on the
22 panel would be, Would the -- were the five Talibanis who
23 were released subject to a PB- -- or the periodic review?

24 Mr. McKeon: They were not, sir.

25 Senator Tillis: They were not. And if not, why?

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

4 Senator Tillis: So, the assessment of their risk level
5 didn't go through the processes that were established?

6 Mr. McKeon: No, I didn't want to leave you with that
7 impression. The -- so, the Periodic Review Board process
8 makes a determination of whether Law of War detention of the
9 individual is still permissible. The statute that you have
10 given us requires the Secretary still to make the
11 determination, prior to any transfer, of the national
12 security interests and the substantial mitigation of the
13 risk. And that, sir, was -- that was undertaken.

14 Senator Tillis: I know -- I don't believe you were
15 there at the time, but why do you think the Department
16 decided not to notify Congress, as per the statutes?

17 Mr. McKeon: Sir, I believe the Secretary --

18 Senator Tillis: And perhaps, what's the legal basis
19 for that, as well?

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

25 What -- my understanding is, the Department of Justice

1 and Mr. Preston, the general counsel of the Department,
2 interpreted the President's powers, because of the security
3 risk and safety of Sergeant Bergdahl, necessitated
4 proceeding without the 30-day notice. But, I -- I'm happy
5 to get you the more refined legal answer, because I'm not
6 the person to do that for the Department.

7 [INFORMATION]

8 Senator Tillis: Thank you.

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

12 Mr. McKeon: Sir, these individuals had been, I
13 believe, cleared for transfer, back in -- approved for
14 transfer in 2009 by --

15 Senator Tillis: Did they go through the Periodic
16 Review --

17 Mr. McKeon: -- by the task force.

18 Senator Tillis: Did they go --

19 Mr. McKeon: No, they were already cleared -- approved
20 for transfer by the 2009 task force, sir.

21 Senator Tillis: Another question I had is with respect
22 to the process. The -- I noted that the -- a detainee is
23 entitled to having counsel, which presumably means that the
24 information that the Periodic Review Board uses to determine
25 -- or to make a determination is available to that counsel.

1 Is that same information available to the public or to the
2 Congress, on the Periodic Review cases that have gone
3 through?

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

13 Senator Tillis: Thank you.

14 Thank you, Senator Reed.

15 Senator Reed: Thank you very much.

16 Senator King, please.

17 Senator King: Thank you.

18 Mr. Rasmussen, it seems to me the key question here is
19 weighing the risk of individual recidivism versus what I
20 would call a reputational risk, or the recruiting risk, of
21 the facility itself. Could you elaborate on what the
22 Director of National Intelligence -- I mean, that's what's
23 -- that's what this is all about, it seems to me. Is it
24 more dangerous for the national interest to keep Guantanamo
25 open, because of its use as recruiting tool, or is there a

1 greater risk of the people being released reengaging? Give
2 me your thinking on that. Is that the question?

3 Mr. Rasmussen: Sure. Happy to answer that, Senator
4 King.

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

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

20 So, I -- so, the weighing process that he goes through
21 looks at both factors. That does not mean, in all cases, he
22 will look at detainees and say, "Ah, operating -- continuing
23 to operating Guantanamo creates too big an obstacle for him
24 to oppose a transfer." It is still the case that there are
25 some detainees that he would consider too dangerous to

1 return in a transfer, almost -- unless there were
2 extraordinary arrangements made for their monitoring and
3 disposition overseas.

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

7 Senator King: Well --

8 Mr. Rasmussen: -- about the continued --

9 Senator King: -- if this is the -- one of the key
10 questions -- and it sounds like that it is -- I would
11 appreciate it if you or some of the witnesses could supply
12 to this committee data supporting evidence of this
13 recruiting factor, just -- rather than a reference to what
14 al-Baghdadi said or something, but a real set of materials
15 -- written materials, the way it's being used. Because it
16 seems to me that's one of the most important questions we
17 have. And if we're going to decide to close the facility
18 and -- or if, collectively, the United States Government's
19 going to decide to close the facility based upon that, we'd
20 better know that it's real, and not just a perceived threat.

21 [INFORMATION]

22 Senator King: Mr. McKeon, is the administration
23 contemplating a further executive order to close the
24 facility, beyond what the current process is -- how the
25 current process operates?

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

6 Senator King: But, there's no further -- you don't
7 know of any other contemplation of additional executive --
8 exercise of executive authority to simply close the
9 facility.

10 Mr. McKeon: I am not, sir. We are operating under the
11 President's executive order from 2009.

12 Senator King: The question that bothers me is, okay,
13 if we decide it's been in the national interest to close it,
14 there still are some people there that are very dangerous.
15 Can we hold these people in the United States, under the Law
16 of War? And the second question is, How does the Law of War
17 analysis work if the war, which was the war in Afghanistan,
18 is officially over? Does that undermine the legal analysis?

19 In other words, we could bring some very bad guys here, put
20 them in maximum security prisons, on the assumption that
21 they're Law of War detainees, and then suddenly find that
22 they're subject to habeas and we don't have enough evidence
23 to convict them in a Federal court. In other words, that --
24 you understand where I'm going with the legal question.

25 Mr. McKeon: I do, sir. On your second question, the

1 detainees are already subject to habeas, or they can file
2 habeas petitions, in the D.C. Circuit, pursuant to Supreme
3 Court rulings, so that wouldn't be a --

4 Senator King: So, there's no difference between --

5 Mr. McKeon: -- that would not be a change.

6 Senator King: -- between Guantanamo and someplace in
7 the United States, in that regard -- in that legal regard.

8 Mr. McKeon: That's correct.

9 As to the question of the legal authority to continue
10 to hold them, the -- we are relying on the 2001 AUMF, and
11 it's informed by the Law of War. So, if we did reach a
12 point where the 2001 AUMF is either repealed by the Congress
13 or we've decided it was no longer sustainable, based on the
14 situation in Afghanistan, then we would have an authority
15 issue to wrestle with. There's no question about that.

16 Senator King: Thank you, gentlemen. Thank you for
17 your testimony.

18 Thank you.

19 Mr. Chair, welcome back.

20 Chairman McCain [presiding]: Thank you. The -- your
21 other members that were in attendance at the National Prayer
22 Day Breakfast will be coming in, and that obviously is the
23 reason for me being late.

24 I want to thank the witnesses.

25 Thank you, Senator Reed, for proceeding.

1 And I'll withhold my questioning until Senator --
2 Senator Sullivan.

3 Senator Sullivan: Thank you, Mr. Chair.

4 And thank you, gentlemen.

5 Mr. Rasmussen, congratulations on your recent
6 appointment.

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

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

20 Mr. McKeon: Senator, I don't have those numbers at my
21 fingertips. And if you're referring to the assessments that
22 were done by JTF-GTMO, back in the last decade, my
23 impression is, knowing the population of that which we've
24 already transferred using those categories, I think we have
25 transferred most of those who were low-risk, but I don't

1 know the precise data. We'll have to get that to you, sir.

2 [INFORMATION]

3 Senator Sullivan: But, I mean, of the current
4 remaining detainees, we don't have a handle on what's --
5 who's high- or medium-risk right now?

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

13 Chairman McCain: Mr. Secretary, you're not answering
14 the question. If you don't have the information, then
15 submit it. It's important to this committee to know who's
16 low-risk, medium-risk, and high-risk. I would have expected
17 you to come to this hearing with that information.

18 Mr. McKeon: Yes, Mr. Chairman.

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

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

25 Senator Sullivan: Well, it would be very important for

1 us to know that as we move forward.

2 Mr. McKeon: Yes, sir.

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

11 [INFORMATION]

12 Senator Sullivan: Because I think one of the things
13 that is troubling is, there's a lack of trust, here.
14 There's a lack of trust on the numbers, there's not
15 certainty on what the end game is. And when a simple
16 request -- it's not a request, it's the law. And one of the
17 things that I'm -- been concerned, more broadly with the
18 administration, is, they've used certain statutes as
19 advisory. Maybe they need to do them, maybe they don't.
20 This was a clear directive, from the Congress, in the law,
21 that this administration violated. And, as far as I can
22 tell, there's been no good explanation. I read about them
23 in the press, they seem to change. It would be very
24 important to get a definitive explanation from this
25 administration on why they violated that statute. To me, it

1 seems like a clear violation of that statute. Can we get
2 that?

3 Mr. McKeon: Certainly. And you may already have it,
4 sir. I believe the GAO did a review on the legal issue, in
5 the Department. And probably the Department of Justice
6 provided a detailed explanation of our position. And I
7 think we have provided it to the committee, but, if we have
8 not, we will submit it.

9 [INFORMATION]

10 Senator Sullivan: And one other thing. I know that --
11 I understand there was an MOU between -- with -- regarding
12 the Taliban five, that they have a -- my understanding is, a
13 1-year restriction with regard to their activities and
14 movements. After a year, are they free to go and do
15 whatever they want, return back to Afghanistan? I think,
16 again, that's a concern, not only for this committee, but
17 for the American people.

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

24 Senator Sullivan: Okay.

25 Thank you, Mr. Chairman.

1 Chairman McCain: Senator Donnelly.

2 Senator Donnelly: Thank you, Mr. Chairman.

3 A recent Department of Justice report noted there are a
4 number of statutory provisions that should render Guantanamo
5 detainees relocated to the U.S. inadmissible under
6 immigration laws, but one of the most difficult scenarios
7 hinted at in the report involves what happens if a judge
8 orders the release of a detainee because the Laws of War no
9 longer permit their detention. In that case, if a detainee
10 cannot be repatriated to their home country or a third
11 country, the U.S. could face the need to keep that detainee
12 in the U.S. So, where does that individual go?

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

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

24 Mr. McKeon: If we were to bring them to the United
25 States, we would make sure that we had some continuing

1 authority to keep them. I don't think we would roll the
2 dice on losing the authority to detain them.

3 Senator Donnelly: And then, additionally, what's your
4 assessment of the risks involved in this situation? I mean,
5 that's, I think -- you know, as we look through this whole
6 process, this is one of those conundrums that we have to
7 have an answer to. What's your assessment of the risks on
8 that, sir?

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

15 Senator Donnelly: No, I understand. But, if they do
16 --

17 Mr. McKeon: So, we are not --

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

24 Mr. McKeon: Yeah, I understand. And if -- if and when
25 we get to that point, where we propose an option to bring

1 them to the United States, we will have an answer.

2 Senator Donnelly: I think we need an answer at that
3 point, thank you.

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

8 Mr. McKeon: I don't know the number. All other cases,
9 the 30-day notification was provided.

10 Senator Donnelly: Okay.

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

19 Mr. McKeon: Sir, I want to separate two things, here,
20 sir.

21 Senator Donnelly: Okay.

22 Mr. McKeon: If somebody has already been cleared by
23 the 2009 task force, and we find a place to which we can
24 transfer them, and a package is brought to the Secretary to
25 make the determination, we have an updated assessment on the

1 individual. We're not relying solely on the 2009 task force
2 work.

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

9 Senator Donnelly: Okay.

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

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

19 Thank you, Mr. Chairman.

20 Chairman McCain: Senator Graham.

21 Senator Graham: Thank you.

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

1 understanding.

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

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

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

1 [A disturbance in the audience.]

2 Senator Graham: I think he may get his wish.

3 I'm a military lawyer, served with this man behind you.

4 I really want to conduct the war within the values of our
5 country. I want to be tough on the enemy, but also follow
6 principles that have guided us well, like the Geneva
7 Convention and treating people under the Law of War
8 consistent with the requirements of the Law of War.

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

16 Mr. McKeon: I would agree that all of them in -- pose
17 some risk. There are, however, many --

18 Senator Graham: No, no, I'm not talking about some
19 risk, I'm talking about obvious common sense, here.

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

23 Senator Graham: Well, is that the -- what percentage
24 of the population falls in that category?

25 Mr. McKeon: It's around --

1 Senator Graham: Previously cleared.

2 Mr. McKeon: It's around 50.

3 Senator Graham: Okay, so what percentage -- they were
4 cleared 6 years ago.

5 Mr. McKeon: There's --

6 Senator Graham: We're holding 50 people --

7 Mr. McKeon: It's 54 --

8 Senator Graham: -- because we can't find a place to
9 put them.

10 Mr. McKeon: It's 54, sir.

11 Senator Graham: Fifty-four out of how many?

12 Mr. McKeon: 122 remain.

13 Senator Graham: Okay. So, the rest of them, would you
14 agree that they are high-risk?

15 Mr. McKeon: Well, several of them are under
16 prosecution, so definitely in those cases --

17 Senator Graham: Okay, so take them off the table.
18 Right?

19 Mr. McKeon: And the remainder are -- have previously
20 been determined to be held, and should be held, under Law of
21 War detention, and we didn't have a prosecution option.

22 Senator Graham: Right.

23 Mr. McKeon: But, those are going through the PRB
24 process --

25 Senator Graham: Right.

1 Mr. McKeon: -- to take another look.

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

6 Mr. McKeon: Well, as I said, we're taking a new look,
7 through the PRB process at the --

8 Senator Graham: The previous PRBs --

9 Mr. McKeon: -- group that was in Law of War --

10 Senator Graham: -- concluded they had a high risk,
11 right? They wouldn't still be there.

12 Mr. McKeon: The --

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

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

21 Mr. McKeon: We're not at the end of hostilities in
22 Afghanistan.

23 Senator Graham: Well, they said that the reason we
24 transferred the Taliban five is because you traditionally
25 swap prisoners when hostilities are over. Therefore, we get

1 our guy back, because the war is basically over, and we
2 release five of the commanders of the Taliban.

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

7 Mr. McKeon: Well, I said -- I agree with you, sir,
8 that hostilities are not over. I didn't --

9 Senator Graham: Or -- great.

10 Mr. McKeon: -- agree with your other --

11 Senator Graham: So, let's just --

12 Mr. McKeon: -- assertion.

13 Senator Graham: Okay, let's go forward as a committee.
14 No one should be transferred because of the concept of end
15 of hostilities.

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

20 Mr. McKeon: Yes.

21 Senator Graham: Do you feel like you have a deficiency
22 today?

23 Mr. McKeon: Not today.

24 Senator Graham: Okay. Do you feel like you will have
25 a deficiency in the near future?

1 Mr. McKeon: In Afghanistan, not in the near future.
2 In a couple of years, we may.

3 Senator Graham: Well, the couple of years is in the
4 near future. So, I challenge --

5 Mr. McKeon: Oh.

6 Senator Graham: -- you to send to us legislation that
7 would deal with a problem that's 2 years away, because I
8 finally want to get ahead of the war on terror and not
9 always play catchup.

10 Thank you very much for your service.

11 Chairman McCain: Senator Heinrich.

12 Senator Heinrich: Thank you, Chairman.

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

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

1 have to deal with that situation.

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

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

16 Senator Heinrich: Mr. Rasmussen.

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

25 Senator Heinrich: Right.

1 Mr. Rasmussen: Another 12 percent, a little over 12
2 percent --

3 Senator Heinrich: Suspected.

4 Mr. Rasmussen: -- fall into the "suspected of
5 reengagement" category that I mentioned earlier. So, in
6 aggregate --

7 Senator Heinrich: And --

8 Mr. Rasmussen: -- that would be 30 percent of the
9 total population --

10 Senator Heinrich: Okay.

11 Mr. Rasmussen: -- of folks who have --

12 Senator Heinrich: And if you just look at --

13 Mr. Rasmussen: -- became --

14 Senator Heinrich: -- post-interagency review --

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

23 Senator Heinrich: We very much look forward to that.
24 Obviously, any level of recidivism is unacceptable, but that
25 is immense progress.

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

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

15 Mr. Rasmussen: I think I'm probably better deferring
16 to my Defense Department colleagues on that, because it --
17 again, in terms of operation of the facility and the costs
18 associated, that falls squarely in DOD's budget lane.

19 Senator Heinrich: I mean, it goes back to the relative
20 risks that we were talking about before, that Senator King
21 brought up.

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

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

7 Senator Heinrich: Okay.

8 Thank you.

9 Chairman McCain: Senator Cotton.

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

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

23 Senator Cotton: Okay.

24 Mr. Rasmussen, you said, in your opening statement,
25 that anti-American incitement or statements does not

1 necessarily equal recidivism or reengagement. Does it
2 violate the memorandum of understandings, however, that we
3 have with the receiving countries?

4 Mr. Rasmussen: I can't speak, in this session, about
5 the specific understandings we have with our -- with the
6 partners with whom -- the countries with whom we have worked
7 to transfer detainees. But, one of the key features of any
8 of those agreements is, of course, monitoring ongoing
9 activity by the detainees, which covers a wide range of
10 factors and would certainly include, you know, all manner of
11 their activities. My comments in my prepared statement just
12 spoke to kind of a definitional threshold for what would
13 constitute reengagement, for the purposes of an -- of a
14 threat assessment.

15 Senator Cotton: We consider anti-American incitement
16 by Islamic terrorists pretty serious business, don't we?

17 Mr. Rasmussen: Absolutely. And I --

18 Senator Cotton: Anwar al-Awlaki would say that we
19 consider it very serious business, wouldn't he?

20 Mr. Rasmussen: Absolutely.

21 Senator Cotton: Mr. McKeon, you said, earlier to
22 Senator Graham, that the United States -- the administration
23 is barred from bringing Guantanamo detainees to the United
24 States mainland. It's also barred from releasing detainees
25 without 30 days' congressional notification. Why should the

1 American people believe that that obligation will be any
2 more respected than the prior notification obligation was
3 last year?

4 Mr. McKeon: Sir, the lack of notification in the
5 Bergdahl case has not been repeated. I don't expect it to
6 be repeated. And --

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

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

19 [INFORMATION]

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

23 Senator Cotton: Okay. Now I want to explore the so-
24 called risk balance between recidivism of released
25 terrorists and the propaganda value that terrorists get from

1 Guantanamo Bay. How many recidivists are there at
2 Guantanamo Bay right now?

3 Mr. McKeon: I'm not sure I follow the question. We
4 think we -- we don't have any --

5 Senator Cotton: How many detainees at Guantanamo Bay
6 are engaging in terrorism or anti-American excitement?

7 Mr. McKeon: They're pretty locked down.

8 Senator Cotton: There are none --

9 Mr. McKeon: I don't think there --

10 Senator Cotton: -- because they're detained, because
11 they only engage in that kind of recidivism overseas.

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

14 Mr. McKeon: Zero.

15 Senator Cotton: How many were there in October of
16 2000, when al-Qaeda bombed the U.S.S. Cole?

17 Mr. McKeon: Zero.

18 Senator Cotton: What about in 1998, when they bombed
19 our embassies?

20 Mr. McKeon: The facility was not opened before 2002,
21 Senator.

22 Senator Cotton: 1993 and the first World Trade Center
23 bombing?

24 Mr. McKeon: Same answer.

25 Senator Cotton: 1979, when Iran took over our embassy?

1 1983, when Hezbollah bombed our embassy and our marine
2 barracks in Lebanon? The answer is zero.

3 Mr. McKeon: Correct.

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

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

19 Chairman McCain: Senator Manchin.

20 Senator Manchin: Thank you, Mr. Chairman.

21 And, on that happy note --

22 [Laughter.]

23 Senator Manchin: -- let's -- I had, really, the same
24 feeling that Senator Cotton had, for a lot, a lot of years.
25 Then I went to Guantanamo with some other Senators. And I

1 came back changed. And I asked my Chairman, here, and he
2 gave me some insight that he had. And I know everybody's
3 trying to form their own direction and their own thought
4 process on this. I can only tell you what I saw, I would
5 not ask -- if your child was in the military and a guard in
6 that detail, I would not ask anybody's children to be in
7 that position, guarding in that type of a condition there,
8 because I'm seeing the abuse that the prisoners have on our
9 guards. I couldn't believe it. And I'd like to see a few
10 of them in a United States hardened prison, to see if they
11 changed their attitude just a little bit. I know we could
12 do a little different job on them here than they're doing
13 over there.

14 So, all I've heard about propaganda, I have to agree
15 with Senator Cotton on that -- I don't think they need an
16 excuse to attack America. That's -- to me, that doesn't
17 hold water. What does is \$3 million per detainee and
18 \$80,000 to the hardened prisons we have. We have nobody
19 escaping, we don't have any ones who have escaped from
20 America.

21 I'm understanding -- and you all maybe can help me with
22 this, because I'm -- I have to from my own opinion of where
23 I would be on this if we had a vote. Do you close it? Do
24 you keep it? What do you do with the prisoners? What do
25 you do with the detainees? What do you do with the ones who

1 are held for crimes and trials and things of this sort? I
2 know there's a lot of legal things that are making --
3 formulating these decisions. But, there's got to be a way
4 to do it to where you don't have them all in a cluster, to
5 where they can scheme and talk and plan and plot and then go
6 right back into the fight.

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

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

1 So, any comment on that?

2 [Disturbance in the audience.]

3 Senator Manchin: We're going to give you your time to
4 speak, too, honey. We're just -- I've got to get to this
5 first. If you can --

6 Admiral Myers or -- I'm sorry --

7 Mr. McKeon: Senator --

8 Senator Manchin: -- McKeon?

9 Mr. McKeon: Senator, I'm happy to respond, first on
10 the guard force, as I've seen them in action, as well, and I
11 just --

12 Senator Manchin: I just want to say that I think their
13 attack on this country, they lost their rights, as far as
14 their attacking this country. So, with that being said, I
15 would -- that's how I feel about it.

16 Mr. McKeon: -- the men and women of the guard force,
17 who, as you know, many of them are National Guard MP
18 specialists, do a terrific job under very difficult and
19 challenging --

20 Senator Manchin: Horrible conditions.

21 Mr. McKeon: -- conditions.

22 On the issue of "could we do it in the United States,"
23 yes, we could. In the first term -- Senator Graham made
24 some reference to it -- there was an effort underway to
25 explore the possibility of the Government purchasing a State

1 prison in Illinois that was underutilized, and using one
2 part of it for the Bureau of Prisons and another part for
3 detainees that the United States military would hold. We
4 would still have military guards, because we are holding
5 them under Law of War detention --

6 Senator Manchin: That's the --

7 Mr. McKeon: -- authority, not --

8 Senator Manchin: That's the detainees.

9 Mr. McKeon: Yes, sir. So, we would still hold them
10 under some kind of military guard, were we to bring them in
11 the United States, unless we were able to prosecute all of
12 them in Federal court and put them into the Bureau of
13 Prisons system. But, there are a number of detainees that
14 we've already determined we will not be able -- very
15 unlikely we will be able to prosecute in Federal court.

16 Senator Manchin: How about the ones that are waiting
17 for -- or that we have charges against, waiting for
18 prosecution? Could they be dispersed in the prison systems
19 that we have, our maximum security prison systems?

20 Mr. McKeon: Well, sir, the ones that are currently
21 facing charges and trial are in the Office of Military
22 Commission system, which we have a courtroom set up there in
23 --

24 Senator Manchin: I saw it.

25 Mr. McKeon: -- Guantanamo that you --

1 Senator Manchin: I saw that.

2 Mr. McKeon: -- when you were there. So, it would be
3 the same situation, in the sense that, if they were still on
4 trial and that's --

5 Senator Manchin: But, it's been 13 years, the
6 Guantanamo five haven't been.

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

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

13 Senator Manchin: My time has expired. Thank you very
14 much.

15 Chairman McCain: Senator Ayotte.

16 Senator Ayotte: Thank you, Chairman.

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

21 Mr. McKeon: Senator, I don't know the data by heart of
22 all the -- those who have reengaged, of -- there are over
23 100. We'll have to get you that answer.

24 [INFORMATION]

25 Senator Ayotte: Well, I think that's very important

1 for people to understand. If any of these detainees have
2 been -- are suspected or confirmed for having been involved
3 in killing us, our NATO allies, or a coalition
4 servicemember, I -- I'm actually surprised you don't know
5 the answer to that.

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

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

17 Mr. Rasmussen: The number you're referring to,
18 Senator, the 6.8-percent number, predates any consideration
19 of the reengagement status of the Taliban members you're
20 talking about. As I mentioned, the next report due out on
21 that, updating the numbers on this, is due out in early
22 March. We should be in a position then to assess, as an
23 intelligence matter, whether reengagement has, in fact,
24 taken place.

25 Senator Ayotte: Well -- and, of course, on May 31st,

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

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

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

23 So, on November 5th of 2014, one of the detainees was
24 transferred to Kuwait. What we know about him publicly that
25 I can speak about is that he was arrested in 2002 for being

1 a member of al-Qaeda, accused of participating in several
2 militant trainings, and of being an affiliate of Abu Qatada,
3 who was the most infamous jihadi recruiter in the U.K. He
4 was a member of al-Qaeda, a recruiter, and a courier. Were
5 there any conditions put on this individual's release? In
6 other words, was he transferred to Kuwait to another prison,
7 or was he let go?

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

12 Senator Ayotte: I think the American people have a
13 right to know --

14 Chairman McCain: Why is it --

15 Senator Ayotte: -- whether someone --

16 Chairman McCain: Why is this information classified,
17 Mr. Secretary? Why shouldn't the American people know the
18 conditions under which people are released?

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

24 And I'm going to go -- I won't go -- my time will go
25 through on all this, but if I went through, again in

1 November, four transfers to Georgia, and just some of the
2 background, publicly, of these individuals that have been
3 transferred, one was assessed as a "likely pose threat to
4 the United States," one was assessed to be -- have involved
5 in IED attacks against the U.S. and coalition forces, one is
6 believed to have been affiliated with al-Qaeda at a high
7 level, and, in fact, one is described, by the DIA
8 previously, as among the top 52 enemy combatants at JTF-GTMO
9 who posed the most significant threat of reengagement in
10 acts of terrorism if released.

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

23 Mr. McKeon: Senator, on your question and the
24 Chairman's question, many of the agreements that we have
25 with foreign governments are classified. So, that's the

1 short answer, sir, on why we can't get into details in this
2 session, although we can certainly brief you on --

3 Senator Ayotte: Well --

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

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

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

1 Thank you.

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

9 Senator Kaine.

10 Senator Kaine: Thank you, Mr. Chairman.

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

13 This is a balancing-act question. I take seriously the
14 recidivism danger. And I'm going to get to that in a
15 minute. But, I think to say that the concern about the
16 propaganda value of Guantanamo is just a political argument
17 that the President has cooked up ignores an awful lot of
18 facts and an awful lot of opinions by very talented national
19 security individuals. A CIA Open Source Center study in
20 January -- released in January, says that there have been at
21 least 30 occasions since 2010 in which al-Qaeda and
22 affiliates have referred to GTMO as justification for
23 recruitment and violent jihad. DNI Clapper sent us a note,
24 to the Intelligence Committee, November 2013, arguing that
25 closing GTMO would, quote, "deny al-Qaeda leaders of the

1 ability to use the alleged ongoing mistreatment of detainees
2 to further their global jihadist narrative." And he cited
3 the al-Qaeda magazine's Inspire promoting the Boston bombing
4 and highlighting the ongoing detention of prisoners at GTMO
5 as a reason to engage in jihad. Forty-two former generals
6 and admirals signed a letter, on January 29 to this
7 committee, stating that the abuses that occurred at
8 Guantanamo have made the facility a symbol to the world of
9 the United States that is unconstrained by constitutional
10 values.

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

17 On recidivism, let me ask you this. Federal courts
18 have convicted 556 people on terrorism or terrorism-related
19 charges from September '01 to December of '13. Forty-four
20 of those cases were tried in my State. Has anyone convicted
21 of a terrorism charge in a Federal court in the United
22 States ever escaped?

23 Mr. McKeon: Sir, I'm not the expert on that, but I do
24 believe nobody ever escapes from supermax prisons.

25 Senator Kaine: Let me submit that to the question. If

1 we're concerned about recidivism, I would like to know, for
2 the record, whether anyone convicted -- of the 556 terrorism
3 convictions since 9/11 that have been done in the Federal
4 court system of the United States, has anyone ever escaped?
5 I'll submit that one for the record.

6 [The information referred to follows:]

7 [COMMITTEE INSERT]

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1 Senator Kaine: Let me ask another question. There's
2 been --

3 Mr. McKeon: Senator Kaine, I'm told by somebody with
4 more knowledge, the answer is no.

5 Senator Kaine: Okay. But, I want it for the record,
6 because I want it answered in writing, and I want all
7 committee members to have it.

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

16 Secretary Hagel has said that there is no -- do you
17 know, Secretary McKeon?

18 Mr. McKeon: Not while they were at Guantanamo. No,
19 sir.

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

24 Mr. McKeon: Sir, I'm told that information on this --
25 classified, and we'd have to talk to you about it in that

1 setting or provide you a classified answer.

2 Senator Kaine: Well, I -- I'm upset about this, for
3 the same reason the Chairman said. We need information. I
4 was told this in a setting that was classified, and then I
5 saw Secretary Hagel talking about it publicly. So, I'm
6 assuming him talking about it publicly means it's no longer
7 classified. But, I want to submit that question for the
8 record.

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

11 [The information referred to follows:]

12 [COMMITTEE INSERT]

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

12 Mr. McKeon: That's correct.

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

17 The last thing, I just want to -- on the numbers. I
18 mentioned that 556 people had been tried on terrorism or
19 terrorism-related charges in the Federal courts of this
20 country since September of '01. And not a single individual
21 so convicted has escaped. Am I correct that the military
22 commissions have only conducted eight trials since '01?

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

25 [INFORMATION]

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

6 Thank you, Mr. Chairman.

7 Chairman McCain: Senator Ernst.

8 Senator Ernst: Thank you, Mr. Chairman.

9 Thank you, gentlemen, for being here today.

10 This is a very, very tough issue, and I would like to
11 commend Senator Cotton for his passion on this subject.
12 There are a number of members of this committee that have
13 served this Nation, as you do. And Senator Cotton has been
14 a warrior. He has been a warrior on the ground in Iraq. I
15 have been a logistician on the ground in Iraq. And all of
16 us face uncertainty when we serve our country. Senator
17 Cotton, most certainly, deserves kudos for serving his
18 Nation in a very difficult time and in a very difficult
19 situation, when we are looking at terrorists. So, his
20 perspective is slightly different than my own, but I think
21 we feel the same way, that, whether it's someone who is
22 kicking in doors and looking for terrorists, and facing the
23 threat of the enemy at close range or whether it's somebody
24 that's driving trucks up and down the roads, delivering
25 supplies and worrying about IEDs that are planted by these

1 terrorists -- drivers just driving by, doing what they can
2 do to support our warriors, taken out by terrorists --
3 whether it's innocent civilians here in the United States.

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

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

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

25 And anybody, please.

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

13 Nick may have more detail.

14 Mr. Rasmussen: I think Brian characterized it just
15 right. It runs the gamut from known senior-leader terrorist
16 figures exercising leadership positions in terrorist
17 organizations -- some of the names, Under Secretary McKeon
18 mentioned -- but, then also including the full range of
19 individuals who have played a role in al-Qaeda plotting or
20 in providing support activities or in providing support to
21 the Taliban, as well.

22 Senator Ernst: So, these are individuals who have
23 murdered thousands of Americans, been involved with the
24 planning of murdering of thousands of American
25 servicemembers, whether they're here on United States soil,

1 as with the 9/11 attacks, the U.S.S. Cole, where they killed
2 many of our servicemembers, whether it's innocent civilians
3 in Syria and Iraq. They did not need Guantanamo Bay to be
4 emboldened to do those activities.

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

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

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

25 Senator Ernst: Well, I -- that is the administration's

1 point of view. I would beg to differ. I think they are
2 going to do what they are going to do, regardless of
3 Guantanamo Bay and their imprisonment there.

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

5 Thank you, Mr. Chairman.

6 Chairman McCain: Senator Reed.

7 Senator Reed: Three quick questions.

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

14 Mr. Rasmussen: Well, we certainly just -- purely just
15 judging by anecdotal evidence and looking at the material
16 that the terrorist organizations put out, much of it in
17 English language, which, when we see something in English
18 language, we assess that they are trying to reach potential
19 terrorists or extremists here in the United States or in
20 Western Europe -- or Western European countries. And we
21 certainly see the issue of Guantanamo feature in that
22 propaganda.

23 Senator King asked a very good question, though. We
24 need to draw the line a little more tightly and a little
25 more concretely between anecdotal evidence of the way

1 terrorists use this information and what we can say with
2 more precision about recruitment efforts.

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

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

24 Mr. McKeon: That's a fair statement, yes, sir.

25 Senator Reed: Thank you.

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

10 Mr. McKeon: That's correct.

11 Senator Reed: Thank you.

12 Chairman McCain: Senator Rounds.

13 Senator Rounds: Thank you, Mr. Chairman.

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

23 Mr. McKeon: What we're working on now, Senator, as I
24 went through in my opening statement, but you all were still
25 at the Prayer Breakfast, is to try to transfer those who

1 have already been approved for transfer. It's about 50 or
2 so. We have a number of prosecutions underway in the
3 military commissions. Those will take some time. And we
4 have a Periodic Review Board process that is reexamining
5 several who were first looked at and determined to be held
6 under Law of War detention authority.

7 There is some number -- I can't tell you what that will
8 be -- that we are unlikely to be able to release, at the end
9 of the day, as we run through this process. And, following
10 the President's charge that he wants to close Guantanamo,
11 we've got to look at all options. One of the options would
12 be possibility of bringing the remaining detainees back to
13 the United States. We can't do that now, because of the
14 statutory ban. So, we would have to come to the Congress to
15 talk to you about that, and repeal that statutory ban. And
16 if we were at the end of hostilities and the question of our
17 authority -- our ability to hold them was in question, we
18 would -- part of that conversation would be, What is the
19 authority we need from the Congress to continue to hold
20 those people?

21 Senator Rounds: Can you give us some kind of a
22 timeframe as to when you would be making those requests?

23 Mr. McKeon: I cannot give you a timeframe right now,
24 sir, no.

25 Senator Rounds: Thank you.

1 That's all I have, Mr. Chairman.

2 Chairman McCain: I thank the witnesses for being here
3 today.

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

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

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

16 I thank the witnesses for being here today.

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

19 Senator Ayotte: Mr. Chairman, with permission, can I
20 have a -- followup questions? I don't know if anyone else
21 is, but I'm happy to direct that if you -- I know you have
22 to go.

23 Chairman McCain: Oh, I'm --

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

25 Senator Manchin: Go ahead, Senator. I'll go after

1 Senator Ayotte.

2 Chairman McCain: Go ahead.

3 Senator Ayotte: Oh, thank you.

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

20 I would like to ask Admiral Myers -- we had General
21 Mattis before the committee the other day, former Commander
22 of CENTCOM. I'm sure you know the general. And one thing
23 he said, when he talked about our detention policy, and he
24 said that he did not understand -- he was perplexed by our
25 lack of detention policy. And, in fact, when I asked him

1 about it, he said that, "Ma'am, first and foremost, I
2 believe this. We go into a fight we've not seemed certain
3 of, ourselves, enough to hold prisoners. The people who
4 we've taken in the fight -- for example, in 1944, did we
5 take Rommel's troops who were in POW camps in Texas and let
6 them go back and get another shot at us at Normandy? We
7 kept them until the war was over. We didn't start this war.
8 And if an enemy wants to fight or be a truckdriver, we
9 didn't say to -- his radio operators could be released
10 because they didn't have a significant role. If you sign up
11 with the enemy, they should know, we're coming after you.
12 If the President, the Commander in Chief, sends us out
13 there, and if you're taken prisoner, you'll be prisoner
14 until the war is over. I mean, this is pretty much
15 warfighting 301 or advanced warfight -- this is not advanced
16 warfighting, not warfighting 301 or advanced warfare, this
17 is kind of 101, ma'am. And my biggest concern I have, then,
18 having been in the infantry for years, is, if our troops
19 find that they are taking someone prisoner a second time,
20 they will just -- and they have just scraped one of their
21 buddies off the pavement and zipped him into a bag, the
22 potential for maintaining the ethical imperative we expect
23 of our Armed Forces is going to be undercut if, in fact, the
24 integrity of our war effort does not take these people off
25 the battlefield permanently if taken prisoner. In other

1 words, they will take things into their own hands and under
2 the pressures of warfare."

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

10 Admiral Myers: Well, Senator, I do have the utmost
11 respect for General Mattis. I do not believe that the
12 current policy, which I cannot necessarily speak to the
13 policy, but I do not believe the morale of the men and women
14 of the Armed Forces on the combat field have any impact --
15 whether it's the same person the first time, second time,
16 whatever. A combatant is a combatant. I do not believe it
17 is impacting the morale, as far as those actually engaging
18 in combat operations.

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

25 Admiral Myers: I do not believe anyone should ever

1 have to confront them. However, as you have seen through
2 history, through various reasons, that's not always the
3 case, and people have reentered the battlefield through the
4 history of time.

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

16 And the other question I would like to ask Secretary
17 McKeon. If we get Ayman al-Zawahiri tomorrow, the head of
18 al-Qaeda, or al-Baghdadi, the head of ISIS, where -- what
19 will we do with them? Where will we put them? I understand
20 what my colleague from Virginia said about Article 3 courts.

21 Will they be told they have a right to remain silent? Will
22 they be Mirandized? Or will we interrogate them and find
23 out what they're planning, in terms of killing us and our
24 allies?

25 Mr. McKeon: Senator Ayotte, our policy, if we detain

1 new people on the battlefield, is to examine them on a --
2 and follow a case-by-case basis, depending on all the
3 circumstances. We would certainly interrogate them. If we
4 had an Article 3 case that we could build against them, we
5 would pursue that.

6 Senator Ayotte: So --

7 Mr. McKeon: We --

8 Senator Ayotte: So, I guess where -- where -- where
9 would you put al-Baghdadi? Where would you put Ayman al-
10 Zawahiri? Do you know the answer to that --

11 Mr. McKeon: In the first --

12 Senator Ayotte: -- Secretary McKeon? Do you know --

13 Mr. McKeon: In the first --

14 Senator Ayotte: -- where we would put them?

15 Mr. McKeon: In the first instance, we would
16 interrogate them --

17 Senator Ayotte: Where would you interrogate them?

18 Mr. McKeon: -- in situ, where we pick them up. If we
19 pick up --

20 Senator Ayotte: Okay. But, after that --

21 Mr. McKeon: -- or we could do it in another place.
22 We've done it with Mr. Warsame on a U.S. ship.

23 Senator Ayotte: Right. So, ship. And you can only
24 keep someone on a ship for so long, because it's temporary.
25 When we get the leaders of these terrorist groups -- this is

1 the problem I've been asking since I got in this Senate, and
2 I've been asking top levels of this administration for years
3 -- if we catch the head of al-Qaeda tomorrow, what do we do
4 with them? And you know what I've heard, time and time and
5 again? "We're working on our detention policy. We'll get
6 back to you." It's been years. And what worries me is, as
7 we sit here, to the Chairman's point, so many questions
8 remain unanswered, including -- having Baghdadi or Zawahiri
9 on a ship for a temporary basis is not long enough to
10 interrogate them to find out what they know about al-Qaeda,
11 about ISIS, to protect Americans. And there seems to be no
12 plan for that.

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

23 Senator Ayotte: Well, except you know, of course, once
24 they go into an Article 3 court, they're entitled to
25 Miranda, they're told they have the right to remain silent,

1 they're entitled to rights to speedy trial. And so, we, at
2 that point, aren't going to get a chance to fully
3 interrogate someone.

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

13 Senator Ayotte: How long would you hold --

14 Mr. McKeon: -- which we did in the case of Mr.
15 Warsame, we did it in the case of Mr. al-Libi.

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

1 Mr. McKeon: Senator --

2 Chairman McCain: Go ahead, please answer.

3 Mr. McKeon: Yes.

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

10 [INFORMATION]

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

15 Senator Ayotte: So, Mr. --

16 Chairman McCain: The Senator's time really has
17 expired.

18 Senator Ayotte: Thank you.

19 Chairman McCain: Senator Sessions. And if you'll
20 close it down, Senator Sessions, thank you.

21 Senator Sessions: All right, thank you.

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

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

1 Mr. Rasmussen: That's correct.

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

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

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

14 Senator Sessions: Well, thank you.

15 Mr. Rasmussen: -- was associated --

16 Senator Sessions: And I think that's why we put our
17 people at risk to capture him.

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

23 Mr. McKeon: If they meet the standard for Law of War
24 detention under the AUMF and Laws of War, yes, sir.

25 Senator Sessions: And certainly, Mr. al-Libi would

1 have qualified. Is that -- we've issued authorization of --
2 of force against al-Qaeda.

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

7 Senator Sessions: Well, I know --

8 Mr. McKeon: -- our military colleagues, of whether
9 that is feasible. And if it's --

10 Senator Sessions: I'm just trying to wrap up.

11 Mr. McKeon: No, I understand, sir. I just wanted to
12 give you the whole picture --

13 Senator Sessions: I understand what the --

14 Mr. McKeon: Yeah.

15 Senator Sessions: We all know that.

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

20 Mr. McKeon: Technically, sir, they're unlawful enemy
21 combatants, typically, if they're not considered POWs, at
22 Guantanamo.

23 Senator Sessions: Well, they could be both, could they
24 not?

25 Mr. McKeon: Conceivably.

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

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

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

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

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

21 Senator Sessions: Well, you almost --

22 Mr. McKeon: With some --

23 Senator Sessions: -- repeated what you said before --

24 Mr. McKeon: With --

25 Senator Sessions: -- which was, if we can prosecute

1 them in Article 3 court, we will. And that is what you are
2 doing today, in reality, is it not?

3 Mr. McKeon: Well, we have done it in some of the
4 select cases, and we've done it with considerable success
5 and a lot faster pace than the military commissions. So, I
6 --

7 Senator Sessions: If -- and I've prosecuted in Federal
8 court --

9 Mr. McKeon: Yes, I'm aware of that, sir.

10 Senator Sessions: -- civilian court. Senator Ayotte
11 is correct, a person is brought into Federal civilian court,
12 they are immediately appointed a lawyer, or, if they or
13 their allies or conspirators have money, they can hire their
14 own lawyer. Isn't that correct?

15 Mr. McKeon: That's correct.

16 Senator Sessions: And, before they can be asked any
17 questions, they are given their Miranda rights and told not
18 to answer questions, correct? And --

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

22 Senator Sessions: And if they --

23 Mr. McKeon: And they're not --

24 Senator Sessions: -- have a --

25 Mr. McKeon: -- they are not Mirandized in that

1 context.

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

6 Mr. McKeon: That's what good --

7 Senator Sessions: "Don't talk to the police until I --
8 you and I talk and I approve of it."

9 Mr. McKeon: That's what a good lawyer would do --

10 Senator Sessions: That's what goes on --

11 Mr. McKeon: -- that's correct.

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

22 Mr. McKeon: Well, we --

23 Senator Sessions: -- we don't want to give up.

24 Mr. McKeon: He's deceased, sir. He died before trial.

25 Senator Sessions: He was taken from the ship after how

1 many days?

2 Mr. McKeon: I don't know how long he was on the ship.

3 Senator Sessions: Mr. Rasmussen, how many days?

4 Mr. Rasmussen: I think it was a small number of days,
5 but it -- driven, in this particular case, by his rapidly
6 deteriorating health status --

7 Senator Sessions: And -- well, he could have been
8 taken to any doctor, or any doctor could have been flown to
9 Guantanamo to treat him. But, instead, when he was taken to
10 a doctor, he didn't -- in Maryland, as I recall -- he didn't
11 have to be put in civilian court; he could still be
12 maintained in military custody.

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

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

21 Mr. McKeon: Well, if we put them in the military
22 commissions process, they would have a lawyer.

23 Senator Sessions: If you'd move them to a trial, I
24 understand that. If you move them to a trial, and actually
25 put them in a status of being an -- prosecuting for unlawful

1 acts against the laws of war, then they do have to have a --
2 an attorney. But, you can hold them for months, could you
3 not, and gradually build up a relationship with them in an
4 attempt to obtain more information over time?

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

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

15 Mr. McKeon: I'm --

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

1 try them in military court.

2 Mr. McKeon: Well, sir, I think we would look at all
3 options. And if I -- I didn't --

4 Senator Sessions: Have you -- in the last number of
5 years, how many have been sent for trial in military
6 commission?

7 Mr. McKeon: Well, we have military commissions ongoing
8 at Guantanamo. And what I would say, in terms of --

9 Senator Sessions: Well, under this President, in the
10 recent months, the years that people have been captured,
11 have any been sent to trial there?

12 Mr. McKeon: We have not added --

13 Senator Sessions: If so, how --

14 Mr. McKeon: We have not added to the population at
15 Guantanamo Bay, that's correct.

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

24 Senator Sessions: Well, they can be done that way in
25 military commissions. The problems will be worked out. The

1 judge is taking everything as a first impression, so I'm
2 sure they take a little more time at it. But, had we been
3 moving these cases forward for a long time, those issues
4 would have been decided, I'm sure, by now, and the cases
5 could probably move faster. And they have different issues.

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

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

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

24 Thank you all.

25 And the meeting is adjourned.

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