

“Ten Years After the Authorization for Use of Military Force: Current Status of Legal Authorities, Detention, and Prosecution in the War on Terror”

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Chairman McKeon, Ranking Member Smith, and members of the committee, thank you for the opportunity to testify today. In the pages that follow I use a close review of the Warsame case to illustrate three points:

1. Civilian criminal prosecution in some instances is the most effective tool for ensuring the long-term detention of a terrorism suspect; Congress should not take this tool out of the President’s hands.
2. Other options that are lawful in certain circumstances include trial by military commission or the use of military detention consistent with the law of war—a position the administration already routinely defends in various legacy cases. In some contexts going forward, one or the other of these tools may be the most effective and appropriate long-term detention solution. When that is the case, the administration should be willing to use these tools, even if Guantanamo as a practical matter is the only viable location where this can be done. Of course, the administration will be more likely to do so if Congress would remove the existing transfer constraints (which effectively make it impossible to remove persons from Guantanamo without a court order).
3. The question of how best to detain someone over the long-term and the question of how best to acquire intelligence from a captured person are two different matters, and the answer to one does not dictate the answer to the other. Selecting civilian criminal prosecution as the best tool for long-term detention in a particular case, for example, by no means obliges the government to treat a terrorism suspect as a run-of-the-mill criminal whose questioning is designed merely to obtain admissible evidence of guilt. In any event, which framework to employ at a given point in time is a question that should be resolved with nuanced, case-specific judgment informed by the views of professionals from across the relevant agencies and departments—not with a one-size-fits-all solution.

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Background: The McRaven Testimony and the Warsame Case

In a hearing before the Senate Armed Services Committee on June 28, 2011, Senator Lindsey Graham (R-S.C.) asked Vice Admiral William McRaven, the commander of Joint Special Operations Command, where a detainee would be held if captured outside of Afghanistan in a location such as Yemen or Somalia.¹ Admiral McRaven replied that such a person might be held temporarily on a naval vessel pending a decision to “prosecute them in U.S. court” or to rely on some alternate disposition such as transfer “to a third-party country.”² Asked what would happen if neither of those alternatives were available, Admiral McRaven stated that “if we can’t do either one of those, then we will release that individual.”³ Senator Kelly Ayotte (R-N.H.) followed up by asking whether Guantanamo remained “off the table” for this scenario, and Admiral McRaven agreed that it was.⁴ Senator Ayotte then asked if such a person might instead be taken to the U.S. military’s detention facility in Afghanistan. Admiral McRaven explained that “we have looked a number of times at whether we would do that in Afghanistan, but owing to the nature of the sovereignty of Afghanistan and the concern about the potential backlash from the Afghan government, we have recommended not to do that.”⁵ Admiral McRaven agreed with Senator Ayotte that “it would be very helpful” to have a long-term detention facility available for this scenario.⁶

In the aftermath of this testimony, the Obama Administration came under fire from both the left and the right. Some focused on the reference to detention at sea, depicting this as an inappropriate extension of Guantanamo. Conversely, others focused on the failure to embrace detention at Guantanamo itself as an already-extant and judicially-approved long-term detention facility presenting no host-state sovereignty concerns. Then, as if on cue, news broke that the U.S. military in mid-April had captured a Somali man named Ahmed Abdulkadir Warsame in transit between Somalia and Yemen, had held him in military custody and interrogated him for two months on a U.S. Navy vessel, and now was transferring him to civilian custody in order to face prosecution in New York City.⁷ It was surely the actual scenario Admiral McRaven had in mind during his testimony.

Criticism came quickly. The *New York Times* editorial board, for example, applauded the decision to prosecute Warsame, but fiercely denounced the two-month period of military detention and interrogation.⁸ It asserted that the administration had “created yet another parallel system of unlimited detention and interrogation without rights,” calling it “troubling,” “extralegal,” and “tainted.”⁹ Others took the opposite view. Chairman McKeon, most notably, denounced the decision to bring Warsame into the United States as unwise,¹⁰ and in a letter to the President last

¹ The transcript of that hearing is available at

http://www.senate.gov/~armed_services/Transcripts/2011/06%20June/11-59%20-%206-28-11.pdf

² *Id.* at 36-37.

³ *Id.* at 37.

⁴ *Id.* at 44.

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., Charlie Savage and Eric Schmitt, “U.S. to Prosecute a Somali Suspect in Civilian Court,” *N.Y. Times* (July 5, 2011), available at http://www.nytimes.com/2011/07/06/world/africa/06detain.html?_r=1&ref=charliesavage.

⁸ See Editorial, “Terrorism and the Law,” *N.Y. Times* (July 16, 2011), available at http://www.nytimes.com/2011/07/17/opinion/sunday/17sun1.html?_r=2

⁹ *Id.*

¹⁰ See Savage & Schmitt, *supra* note 8.

week (co-signed by four other committee chairs) questioned the administration's refusal to use Guantanamo in such cases.¹¹

These are but the latest salvos, of course, in a larger and long-running debate over the options that the executive branch ought to have available in terrorism cases—a debate in which this Committee has played an important role. The President, supported by Ranking Minority Member Smith, objects that Congress has unwisely limited his capacity to pursue civilian criminal prosecutions of terrorism suspects captured overseas, as well as his capacity to remove individuals from Guantanamo subject to appropriate safeguards. Other members of Congress, including Chairman McKeon, have responded that “it is the Administration that has foreclosed options” by refusing to make use of Guantanamo for newly-captured individuals.¹²

Who is right? Both are. Civilian criminal prosecution in some circumstances is the best option for the long-term disposition of a terrorism suspect—better than military detention or trial by military commission—and Congress should not bar the executive branch from using it in such cases. Oversight, not unduly-restrictive prohibitions, is the solution for Congressional concerns that such choices might not be made wisely. By the same token, however, military detention may be both lawful and preferable in other circumstances, and where that is the case—and where other locations simply are not available—the administration should not rule out the use of Guantanamo. Likewise, the door should remain open to the use of military commissions in appropriate circumstances. And of course Congress should not itself deter the administration from using Guantanamo by imposing largely unsatisfiable limitations on subsequent transfers or releases of anyone sent to that location. A close review of the Warsame case helps to illustrate these points, while also shedding light on the ongoing debate over modification of the AUMF.

Warsame and the Scope of Military Detention Authority under the AUMF

Set aside for a moment the decision to shift Warsame into the civilian criminal justice system after two months of military detention. Was the use of military detention in his case unlawful, as the *Times* suggests? That turns out to be a difficult question to answer based on the information available to the public.

The AUMF expressly authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,” with the explicit aim of preventing further attacks. President Bush duly determined that al Qaeda was responsible for the 9/11 attacks and that the Taliban was harboring the bulk of al Qaeda's leadership and personnel in Afghanistan. This much is clear. But the substantive scope of the AUMF nonetheless remains incompletely defined at both the organizational and individual levels, and the Warsame situation, at least in light of the information available to the public, appears to fall within that grey zone.

Against which groups does the AUMF authorize detention?

¹¹ Letter to President Obama from Representatives McKeon, Rogers, Ros-Lehtinen, Smith, and King, July 19, 2011, available at http://armedservices.house.gov/index.cfm/files/serve?file_id=f30d329b-79bd-4f8b-a2dd-6b512018fa7c.

¹² *Id.* at 1.

As an initial matter, the AUMF is somewhat indeterminate at the *organizational* level, for two reasons. First, it is not obvious how to determine which entities are appropriately viewed as part-and-parcel of al Qaeda itself, such that the AUMF would directly apply to them. Second, it is not obvious how to identify those groups which are independent of al Qaeda and the Afghan Taliban but that nonetheless might fall within the AUMF's scope on the theory that the AUMF implicitly authorizes force against groups which take up arms "alongside" al Qaeda or the Afghan Taliban—i.e., "co-belligerents" or "associated forces."

The first problem—the difficulty of defining the scope of al Qaeda itself—arises because of the indeterminate structure of al Qaeda, including both its networked nature and especially its fuzzy (and varying) relationships with so-called "franchises"—i.e., the several regional groups that have branded themselves with al Qaeda's name and that have to varying degrees established or retained substantive connections with al Qaeda's core leadership.

Al Qaeda in the Arabian Peninsula ("AQAP") provides a case study of the difficulty of answering this question. I have written about this matter in substantial detail elsewhere,¹³ and will not repeat those arguments here other than to say that AQAP has substantial roots in the original al Qaeda's past operational presence in Saudi Arabia and Yemen, and maintains substantial ties to the core leadership to this day—yet it also has undergone substantial personnel changes that call into question its organizational continuity over time, and it is far from clear that it operates at the direction and control of al Qaeda's senior leadership. In short, though a plausible argument can be made that AQAP remains part-and-parcel of al Qaeda, and hence directly subject to the AUMF, reasonable counterarguments can be made as well. Without access to the best and most current intelligence on the subject—and without a thicker account of just what it takes in the abstract to show that two entities are one for purposes of the AUMF—it is simply not possible to definitively state an answer.

Is the situation any clearer with respect to al Shabab? Not really, though it probably is fair to say that the argument for treating it as part-and-parcel of al Qaeda is somewhat weaker than the argument for treating AQAP in that way.

Bear in mind that Al Qaeda has two distinct types of presence in Somalia, and they interact in a way that makes it hard to categorize the status of al Shabab. First, al Qaeda over time has frequently had actual members in Somalia, separate and apart from al Shabab's status, for the simple reason that Somalia is a largely ungoverned space that has proven useful as a haven. Second, of course, there is the evolving al Qaeda-al Shabab connection itself. Unlike AQAP, al Shabab does not trace its origins to a historic al Qaeda operational presence in the area, but rather appears to have emerged as one of several indigenous armed groups adhering to an extremist interpretation of Islam compatible with al Qaeda's vision. That said, it has had substantial contact with al Qaeda over time, and the trend appears to be toward greater integration. Historically al Shabab seemed focused on obtaining power locally, and there is reason to believe some of its leaders resisted closer ties to al Qaeda lest the group draw too much attention from Western governments. But al Shabab eventually developed ties to al Qaeda, in part thanks to the direct involvement in al Shabab of actual al Qaeda members in the region. The convergence between the organizations seems to have accelerated of late, moreover, as al Shabab's leadership recently proclaimed its allegiance to al Qaeda and its new leader, Ayman al

¹³ See Robert Chesney, *Who May Be Killed: Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, Yearbook of International Humanitarian Law (forthcoming 2011), available at <http://ssrn.com/abstract=1754223>.

Zawahiri.¹⁴ Adding to this sense of merger, a steady stream of statements from U.S. officials in recent weeks has emphasized that al Qaeda's senior leadership—including al-Zawahiri—has shown great interest in persuading al Shabab not only to more explicitly embrace a role as an al Qaeda franchise but also to follow the AQAP model in terms of planning operations against Western targets abroad, rather than focusing on Somalia or East African affairs.¹⁵ U.S. officials also indicate, moreover, that al Qaeda leaders have urged AQAP to work with al Shabab in this respect—and Warsame, notably, is said to have been a part of that liaison relationship.¹⁶ The fact that al Shabab has successfully recruited a substantial number of Somali-American young men from the Minneapolis area—and that at last one of these men went on to commit a suicide bombing in Somalia—no doubt has underscored the strategic significance of these trends.¹⁷

In any event, in light of all this, the case for categorizing al Shabab as part-and-parcel of al Qaeda is weaker than that for AQAP, but not unreasonable either. Again, absent a clear sense of what standards should govern such an inquiry, and what the best, current intelligence shows, it is not possible to render a more definitive opinion.

That said, even if the answer as to both AQAP and al Shabab were to be no, it would not automatically follow that either group is beyond the scope of the AUMF. The next question is whether the AUMF should be read to confer implicit authority to use force against entities that independently takes up arms against the United States in connection with al Qaeda, even if not as *part* of al Qaeda. That is, might some groups be akin to a co-belligerent or associated force of al Qaeda (or the Afghan Taliban, for that matter)?

It is hard to deny that *some* groups qualify under this heading. Consider the Haqqani Network, operating in Afghanistan from havens in Pakistan. It is independent of al Qaeda and the Afghan Taliban, but nonetheless takes a direct and substantial part in combat against United States and coalition forces across the border in Afghanistan.¹⁸ It seems unreasonable to construe the AUMF not to reach that circumstance.¹⁹

But what about groups not actually engaged in what amounts to active combat operations against U.S. soldiers? That is, should that form of engagement be the litmus test for recognition of something akin to co-belligerency status for purposes of defining the scope of the AUMF? Or can the idea of co-belligerent or associated forces extend to groups that instead conduct or at least attempt periodic terrorist attacks, as in the case of AQAP? How much operational activity of that kind must there be, if any? Once more, we do not have agreed-upon standards for addressing such

¹⁴ See Mark Mazzetti and Eric Schmitt, "U.S. Expands Its Drone War Into Somalia," *N.Y. Times* (July 1, 2011), available at <http://www.nytimes.com/2011/07/02/world/africa/02somalia.html?ref=alshabab>

¹⁵ See, e.g., *id.*

¹⁶ See, e.g. Brian Bennett, "Al Qaeda's Yemen Branch Has Aided Somalia Militants, U.S. Says," *L.A. Times* (July 18, 2011), available at <http://articles.latimes.com/2011/jul/18/world/la-fg-bin-laden-somalia-20110718>.

¹⁷ See Mazzetti & Schmitt, *supra* note 16 (describing concerns of a "senior law enforcement official").

¹⁸ See Jason Ukman, "The Haqqani Network: Al-Qaeda's Dangerous Patron," *Wash. Post* (July 18, 2011) (describing the Haqqani Network as "the most dangerous insurgent force fighting U.S. troops in eastern Afghanistan"), available at http://www.washingtonpost.com/blogs/checkpoint-washington/post/al-qaedas-dangerous-haqqani-patron-in-pakistan/2011/07/18/gIQAAtWmclL_blog.html?wprss=checkpoint-washington.

¹⁹ One could certainly argue that the Haqqani Network falls within the AUMF under its "harboring" provision. But what if intelligence indicated that the Haqqani Network had a falling out with al Qaeda and no longer harbored its members in Pakistan's FATA, yet remained as involved as ever in attacks on U.S. forces in Afghanistan? Again, it seems strange to suggest that the AUMF could not be construed to provide domestic legal authorization for responding in kind.

matters in the abstract, nor can we tell from the public record how those standards might actually apply in al Shabab's case.

Against which individuals does the AUMF authorize detention?

Having said all that, let us assume for the sake of argument that al Shabab either is part-and-parcel of al Qaeda or that it amounts to a co-belligerent or associated force within the scope of the AUMF. Next we confront the relative indeterminacy of the AUMF at the *individual* level. That is, we confront the problem of identifying which persons are sufficiently associated with the group, by virtue of their conduct or status, such that the AUMF can be said to authorize their detention.

The AUMF of course does not purport to answer such questions. Not that this is unusual. No prior AUMFs (or declarations of war, for that matter) have done this, and this was not generally thought problematic in the past. In traditional conflicts, after all, there typically was little dispute about whether there existed an underlying armed conflict implicating the law of war, and that body of law in turn provided relatively clear guidance regarding who may be held so long as the conflict involved the regular armed forces of sovereign states. Take those elements away, however, and matters become much less clear. This is precisely why the question of the individual scope of detention authority under the AUMF continues to be litigated today, despite the fact that almost all the Guantanamo habeas cases involve individuals allegedly linked to organizations (al Qaeda or the Taliban) that clearly are within the AUMF's scope.²⁰

For the time being, the courts have ironed out a somewhat uniform position, at least at a high level of generality. Specifically, the D.C. Circuit has now repeatedly stated that the AUMF provides detention authority both for members and non-member supporters of al Qaeda, the Taliban, and associated forces.²¹ But just what these terms mean in actual practice is another matter.

With respect to membership, the courts have emphasized that the test is functional rather than formal, but just what functions suffice to make one "part of" al Qaeda or the Taliban is not entirely clear. It is fair to say that this standard is satisfied if one actually bears arms or commands others in doing so, but personal involvement in violence or with the instruments of violence is not a necessary condition. The D.C. Circuit has stressed that merely attending an al Qaeda sponsored training camp may be sufficient on its own to prove membership, and that the same might even be true with respect to staying at certain types of guesthouses. All of which provides some degree of clarity, but not necessarily enough if one proceeds from the premise that the concept of membership should distinguish al Qaeda from the larger *jibadi* movement al Qaeda aspires to lead.

And then there is the support track, which permits detention based on the provision of material support to an AUMF-covered group by a non-member. This category, though cited with approval by the D.C. Circuit in *dicta* in several cases, has not yet been the basis for a D.C. Circuit decision, and it remains to be seen if any current GTMO detainee can be held solely on this basis rather than on a showing of membership. Nor has the concept of support been elaborated upon in any significant way. We do not know, most notably, what *mens rea* the courts ultimately may conclude is required

²⁰ For a discussion of a full decade's worth of litigation on this point, see Robert Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 Boston College Law Review 769 (2011).]

²¹ See Benjamin Wittes, Robert Chesney, and Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking* (2011), available at http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx.

for detention on this ground. Must the person intend to further some particular unlawful act, by analogy to the 1994 material support statute in criminal law (18 USC § 2339A)? Or would it be enough that a person naively but knowingly gave support to a group, hoping it would be put to legitimate uses, by analogy to the 1996 material support statute (18 USC § 2339B)? And would it matter *where* the support was rendered—for example, whether the individual was in some sense accompanying an armed force at the time of the support, as opposed to rendering aid in some remote fashion? On this last point, there is reason to believe the administration itself is undecided.²²

In light of all this, is Warsame within the scope of the AUMF?

In light of the analysis above, it is not possible to say with certainty that Warsame is within the scope of the AUMF, at least not based on the information available to the public.

If we assume for the sake of argument that both AQAP and al Shabab fall within the AUMF's scope at the organizational level, then the case for Warsame's detention likely would be strong. The government apparently is confident that it can prove beyond a reasonable doubt that Warsame received military-style training from one group or the other, and this alone might be sufficient to show him to be a functional member of whichever group provided the training. His other alleged conduct, characterized in the indictment as the provision of material support in various forms (including the provision of explosives training or knowledge to others in those groups), would likely reinforce the membership claim. Whether the provision of support independent of membership would suffice on its own as a detention predicate is, as noted above, less certain; certainly it would help the government's case that, in this instance, the nature of the support involved explosives training rather than something more innocuous.

But do AQAP and al Shabab actually fall within the AUMF's scope? As noted above, the relevant legal standard is decidedly indeterminate, and in any event it is not possible to say without access to the relevant intelligence whether that standard is met by either group. Which leads to a further consideration.

The government of course is free to consult its own intelligence and on that basis to make its own, internal judgment as to whether al Shabab or AQAP fall within the scope of the AUMF. If Warsame were able to contest his detention through a habeas petition, however, then the government would be faced with the question whether to come forward with its intelligence—in a manner to be shared with cleared counsel for Warsame, even if not Warsame himself—in order to prevail in the habeas litigation. It is not difficult to imagine that the intelligence at issue would be exceedingly sensitive, and it is not obvious that the agencies involved would be of one mind regarding whether the risk to sources and methods would be worth incurring in order to win in the habeas proceeding.

If that is the case, then it would matter quite a bit whether Warsame likely would have had the right to pursue habeas relief if detained longer. Certainly he would have that right if brought in military custody to Guantanamo or the United States. And if he were instead simply left on a ship, or even taken to our detention facility in Afghanistan (after an accommodation with the Afghan government)? More likely than not, he would have habeas in those circumstances as well. It is true

²² See Charlie Savage, "Obama Team Is Divided on Anti-Terror Tactics," *N.Y. Times* (Mar. 28, 2010), available at http://www.nytimes.com/2010/03/29/us/politics/29force.html?_r=1.

that the D.C. Circuit Court of Appeals in the *al Maqaleh* litigation has held that the petitioners in that instance had no right to seek habeas relief in connection with their detention in Afghanistan, and that appears to be the entrenched rule going forward for captures occurring in Afghanistan itself.²³ But the court showed concern for the scenario in which a person is captured elsewhere and then brought to Afghanistan at our discretion. Though it concluded that habeas would not lie for such transfers if conducted years ago, before the *Boumediene* ruling, the court went out of its way to leave the door open to a contrary result for future transfers. The issue now is percolating through the lower courts.

Were Warsame still in military detention, in short, he quite likely would contest that detention eventually in a federal court habeas proceeding. This in turn might oblige the government to come forward with evidence establishing that AQAP, al Shabab, or both either were part-and-parcel of al Qaeda, or at least co-belligerents or associated forces of al Qaeda. I am in no position to judge whether this would be a difficult showing to make, nor whether there would be undue costs in terms of the risk of exposing sources and methods that might accompany such a showing. It is certainly possible, however, that government officials might conclude that the detention would be unlikely to be upheld in litigation, and further that an adverse ruling on the organizational scope issue vis-a-vis AQAP or al Shabab would create legal problems for the ongoing uses of force in Yemen and Somalia. From this point of view, it is understandable that the government might wish to pursue other long-term detention options, even if it believed in good faith that it had the right to detain Warsame under the AUMF.

Would § 1034 of the NDAA FY12, as passed by the House, alter this analysis?

Only to a limited extent. Section 1034 would confirm in statute that providing substantial support to any AUMF-covered group would suffice at the individual level to warrant detention, which could be relevant in Warsame's situation (though as noted above this also appears to be the current position of the D.C. Circuit regarding the interpretation of the existing AUMF). Section 1034 also would confirm in statute that detention authority extends to "associated forces," thus ensuring that it would not be necessary to show that AQAP or al Shabab are part-and-parcel of al Qaeda itself.²⁴ Section 1034 does not define "associated forces," however, and hence this issue would remain as problematic under § 1034 as it does under the current AUMF. That is to say, we would still lack a clear metric as to when an affiliated or related entity becomes an "associated force" of al Qaeda, and the government would still have to ponder whether, if pressed in a habeas setting to demonstrate the relationships among AQAP, al Shabab, and al Qaeda, it would be worth doing so.

If Congress wishes to ensure that detention authority will extend to either AQAP or al Shabab, in short, it would do well to simply say so rather than leave the question to be decided by judges some

²³ *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. May 21, 2010).

²⁴ Section 1034(1) of the NDAA FY 12, as passed by the House, confirms that the government has authority to use force against al Qaeda, the Taliban, and associated forces, and § 1034(3) elaborates that "the current armed conflict includes nations, organizations, and persons who—

- (A) are part of, or substantially supporting, al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners; or
- (B) have engaged in hostilities or have directly supported hostilities in aid of a nation, organization, or person described in subparagraph (A)...

Section 1034(4) then adds that the AUMF is meant to convey detention authority against "belligerents, including persons described in paragraph (3), until the termination of hostilities."

years down the road at the tail end of a litigation process. Note, however, that this would leave open the question of how to apply the “associated forces” concept to other entities; one would not want to simultaneously foreclose the “associated forces” category, after all, lest there be an arguable gap in the domestic legal authority to use force in response to other groups that may engage in hostilities against the United States alongside those actually named in the AUMF. Fleshing out the associated forces concept is no simple task, unfortunately. At a minimum Congress should consider establishing a statutory reporting mechanism meant to ensure Congressional awareness of the executive branch’s ongoing applications of the concept.

Warsame and Interrogation

Warsame was interrogated for two months after his capture, not for purposes of gathering evidence for use against him at trial but in order to gather intelligence for national security purposes. During this initial phase, he was not read *Miranda* warnings. It appears that interrogations were conducted by personnel from a mix of agencies, at least in part under the auspices of the High-value Interrogation Group (“HIG”), which exists for just such occasions.²⁵ After approximately two months, this phase ended, and a new team of interrogators—this time just FBI criminal investigators—began questioning Warsame for prosecution-oriented purposes. They read Warsame *Miranda* warnings, and he then waived his rights and continued talking. At some point along the way, moreover, the International Committee of the Red Cross (“ICRC”) was notified of Warsame’s detention, and given access to him. Several questions arise from all this.

Was the initial phase of the interrogation “without rights” as some critics allege?

No. Interrogation of Warsame was subject to Common Article 3 of the Geneva Conventions of 1949, the War Crimes Act, the Torture Act, and the Detainee Treatment Act of 2005. In practical terms, that means a prohibition on both torture and cruel, inhuman, or degrading treatment. The interrogation also was governed by Executive Order 13491, which forbids the use of methods other than those authorized by Army Field Manual 2-22.3 (“Human Intelligence Collector Operations).

If ICRC notification and access occurred late in the two-month period, did this violate the law of war?

The publicly-available information does not make clear when ICRC notification and access occurred. But even if we assume for the sake of argument it only occurred at the end of the initial two-month phase, this would not amount to a violation of the law of war. “There is no specific treaty provision requiring access by the ICRC to detainees in non-international armed conflicts,” as the ICRC itself notes in its study of the customary laws of war.²⁶ Rather, the ICRC in such contexts simply asks for and generally receives such access based on agreements with the detaining power. In this case, Executive Order 13491 § 4(b) provides for ICRC notification and “timely access,” but specifies no particular number of days by which these must occur. It is worth noting that even in *international* armed conflict, where the law of war does impose an ICRC access obligation,²⁷ there is no specific date by which ICRC notification and access must occur. In that setting there is merely

²⁵ See Ken Dilanian, “Terrorism Suspect Secretly Held for Two Months,” *L.A. Times* (July 6, 2011).

²⁶ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* (Volume I: Rules) (2005) 443.

²⁷ See, e.g., Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949), art. 126.

the requirement that “[v]isits may not be prohibited except for reasons of imperative military necessity.”²⁸

Was it legal to hold him on a ship rather than on land?

Yes.

No one would deny that the use of ships to detain has a troubled history or that the practice presents special risks in terms of abusive conditions; infamous examples in which Americans suffered from the practice include the British prison “hulks” of the American Revolution and the Japanese “Hell Ships” of World War II. Indeed, as a result of such experiences, the drafters of the 1949 Geneva Conventions created a rule—Article 22 of the Third Geneva Convention—requiring that prisoners of war be held “only in premises located on land.”²⁹ By its own terms, however, Article 22 applies only in the context of an *international* armed conflict, and even then only in relation to persons who qualify for POW status. Neither of those conditions obtain as to Warsame.

Does the same rule apply in non-international armed conflict? It is not clear that it does. Neither Common Article 3 nor Additional Protocol II refer to the matter. The question, then, is whether the prohibition against ship-based detention has become part of the customary law of war applicable in non-international armed conflict. On one hand, there is no doubt that there is a customary rule requiring that detainees be held in safe locations and under hygienic conditions. The ICRC’s recent study of customary humanitarian law says as much, concluding that “[p]ersons deprived of their liberty must be held in premises which are removed from the combat zone and which safeguard their health and hygiene.”³⁰ But the study does not assert that a customary norm has emerged forbidding *ships* as such.

What about the U.S. military’s own position on the use of ships for detention? The matter is addressed in Army Regulation 190-8 (“Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees”), § 2-2(f)(2)(b) of which speaks to detention on naval vessels not just in international armed conflicts but also in other military operations including military operations other than war. In relevant part, it states that naval detention “will be limited,” that POWs captured at sea may be held on ships “temporarily...as operational needs dictate, pending a reasonable opportunity to transfer them to a shore facility...,” that temporary detention at sea also is permissible when transferring between land facilities, and that the Secretary of Defense must give approval if any such temporary naval detention is to take place on an “immobilized vessel.”³¹

Whether this captures customary international law as it relates to non-international armed conflict is not clear. But for what it is worth, it shows that the U.S. position—predating 9/11—accepts a reasonable period of *temporary* naval detention in accordance with operational needs, even in settings where Article 22 governs. Of course, not everyone will agree that two months of naval detention constitutes “temporary” detention. Yet absent any clearer guidance regarding the bounds of temporary naval detention—and absent clear evidence that the underlying prohibition actually

²⁸ *Id.*

²⁹ Geneva Convention (III) Relative to the Treatment of Prisoners of War (Aug. 12, 1949), art. 22.

³⁰ Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law (vol. I), Rule 121.

³¹ AR 190-8 § 2-1(f)(2)(B)(1), (2), (3), and (5).

applies as binding law in a *non*-international armed conflict—one cannot say that the detention of Warsame was illegal on this ground.

Does it matter that Warsame was not Mirandized during the initial phase?

The relationship between intelligence interrogation and *Miranda* is poorly understood. When *Miranda* warnings are not given, the primary consequence is that the person’s subsequent statement most likely would not be admissible if offered by the prosecution at trial. But that says nothing about the government’s ability to use such statements for *other* purposes such as gathering intelligence about the relationship among al Qaeda, AQAP, and al Shabab, developing time-sensitive information that could be used in operational planning, and so forth. Put simply, the government may pay a litigation price in terms of a lost opportunity to gather additional admissible evidence, but it is not hard to imagine circumstances in which that is a price well worth paying (because the intelligence-gathering interest is substantial, because the existing admissible evidence already is sufficient, or both).

In any event, it is not always the case that statements obtained without *Miranda* warnings will prove inadmissible at trial. There has been much talk as to the temporal and subject-matter boundaries of the *Quarles* public-safety exception, pursuant to which at least some amount of safety-oriented questioning is permitted—including for use at trial—despite the lack of *Miranda* warnings. No one can say with certainty how the *Quarles* concept would map on to a fact pattern such as Warsame’s, however. The answer ultimately would emerge only after post-capture, pre-*Miranda* statements were offered into evidence, and the appellate process ran its course.

But might this lead to dismissal of a subsequent indictment on grounds of “outrageous government conduct”?

That seems most unlikely. Bear in mind that the government held Jose Padilla (arrested at O’Hare airport in 2002 and soon taken into military custody as an “enemy combatant,” on the theory that he was an al Qaeda sleeper agent) in military custody for years before he was transferred into the civilian criminal justice system for prosecution. He brought such a motion, emphasizing allegations of torture and other forms of severe abuse. His motion was rejected. So too in connection with Ahmed Ghailani (held in CIA custody and then at Guantanamo for years, before being transferred to face civilian prosecution in New York in 2010). It is difficult to imagine a successful motion to dismiss on such grounds in Warsame’s case, which is considerably less compelling than those two.

What if the earlier phase of interrogation taints the subsequent, post-Miranda phase?

There always is litigation risk when prosecutors seek to admit evidence of statements made subsequent to a period of involuntary (or presumptively involuntary) interrogation. This is the “taint” issue. The general idea is that the judge will examine the totality of the circumstances in order to determine whether the taint of involuntariness from the earlier circumstances of interrogation has diminished sufficiently by the time of the subsequent statement, or if instead it renders the subsequent statement involuntary as well.

This is, necessarily, a somewhat subjective inquiry, but there are a few things we can say about it. Perhaps the most relevant body of caselaw exploring it has emerged over the past two years in the

Guantanamo habeas litigation. To be sure, the issue there has not been pre- and post-*Miranda* statements, but rather pre- and post-abuse statements. But the underlying test is the same; indeed, the judges in the habeas litigation have relied expressly on the taint principles established in ordinary criminal cases. In any event, the Guantanamo judges “have focused on quantitative factors, such as the amount time between coercion and later, un-coerced interrogation, as well as qualitative factors, such as the identity of the interrogators or the forum in which the statement is made.”³²

Taking that as a guide, one cannot be sure quite what will happen if and when prosecutors introduce Warsame’s post-*Miranda* statements. The fact that he received an ICRC visitation, followed by the arrival of a new set of interrogators (this time from the FBI), could in the circumstances combine to create a change in atmosphere adequate to vitiate any taint—particularly if the ICRC visited for the first time at this break point. The absence of persuasive allegations of abuse or undue coercion in the pre-*Miranda* phase would likely matter quite a bit as well.

What about speedy trial considerations?

It is unlikely that Warsame could prevail on a motion to dismiss based on speedy trial considerations, because of the relative brevity of his military custody and the emphasis during that period on intelligence collection rather than evidence-gathering.

In *United States v. Ghailani*, the court rejected a motion to dismiss the indictment based on alleged speedy trial violations in circumstances vastly more difficult than the Warsame case. Ghailani had been indicted in 1998, was captured in 2004, held in CIA custody for two years, held in military custody at Guantanamo another three years, and only then brought to trial. The judge emphasized that the government’s reasons for delay mattered a great deal, and distinguished between periods of custody during which the primary aim was to gather intelligence and periods in which the person was merely being incapacitated. The judge treated the former scenario as involving “compelling interests of national security” that weighed heavily against speedy trial concerns, and even in the latter case the delay did not matter because the “decisions that caused the delay were not made for the purpose of gaining any advantage over [the defendant] in the prosecution of the indictment.”³³

* * *

The Warsame case embodies an approach to the detention dilemma that all too often is overlooked, perhaps out of a misguided sense that one must commit from the outset either to just holding someone as a military detainee or just prosecuting them as a criminal. The fact of the matter, however, is that frequently both options will be available, and there is nothing wrong with blending them in a sensible way, mixing and matching them in order to maximize the benefits of intelligence-gathering at the front end and reliable long-term detention on the back end. This model won’t be available in all circumstances of course; not every terrorism suspect is within the scope of the AUMF, and not everyone within the scope of the AUMF is a viable candidate for criminal prosecution. When the combination is available, however, it can be highly-effective.

Civilian Trials and Military Commissions

³² Benjamin Wittes, Robert Chesney, and Larkin Reynolds, *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking* (2011) 94.

³³ *United States v. Ghailani*, 751 F. Supp.2d 515, 520 (S.D.N.Y. 2010).

The military commission system is a legitimate and lawful option in many circumstances, and in some circumstances it is the *most* suitable option. But it is not *always* superior to the civilian criminal justice option. Warsame’s case illustrates one reason why this is so, though others deserve mention.

Why choose civilian criminal prosecution over trial by military commission for Warsame?

Under the Military Commissions Act of 2009, a commission has personal jurisdiction over any “alien unprivileged enemy belligerent.”³⁴ The MCA defines “unprivileged enemy belligerent,” in turn, as a person who does not belong to any of the eight categories listed in Article 4 of the Third Geneva Convention—the categories defining eligibility for POW status in international armed conflict—and who:

- (A) has engaged in hostilities against the United States or its coalition partners;
- (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
- (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

I cannot see any serious argument that Warsame would fall within any of the Article 4 POW categories, and hence there is no obstacle as to that first part of the test. The more interesting question is whether the government can satisfy the second test. Or more specifically, the interesting question is whether the government would wish to come forward with evidence (which could not be presented *ex parte*) sufficient to show that Warsame was engaged in hostilities specific to the United States (or its coalition partners), that his support to others links back to hostilities against the United States (or its coalition partners), or that he might actually be a member of al Qaeda as such (not an associated force, but al Qaeda proper).

Consider these three alternatives one at a time. It seems likely from the indictment in this case that the government can prove that Warsame was directly involved in planning and training for violent activity to be undertaken by al Shabab, AQAP, or both. But those entities do not solely direct their violence against the United States or its coalition partners. Qualifying under this first option would require evidence of such a focus, evidence which, if it exists, might well be the sort of intelligence that the government would much prefer not to present in any form in a courtroom. And looming in the background, moreover, is the question of what is meant by “hostilities” in this setting. It is one thing to apply the term to firefights with U.S. forces in Afghanistan or direct involvement in plots to blow up U.S. naval vessels or government facilities. But would the term apply to episodic terrorist attacks directed at, say, a civilian airliner? The best answer might well be yes, but the issue is anything but clear—and the recent dispute regarding the meaning of the same word in connection with Libya and the War Powers Resolution, though not controlling here, does not help the matter.

The next alternative involves material support to hostilities. This is probably the best fit for Warsame’s circumstance, but note that there still is a need to come to grips with the meaning of hostilities in this setting and to confront possible reluctance to make use of intelligence that would help establish this line of argument.

The third alternative is to show that Warsame is a member of al Qaeda, and no more. This has the virtue of turning entirely on membership status, and hence requiring no showing of hostilities

³⁴ Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948c.

directed at the United States or its coalition partners. But it is far from clear this one applies in Warsame's case. The indictment suggests he can be linked to both al Shabab and AQAP. This *may* be enough to link him as well to al Qaeda, but as discussed in detail above, that is hardly a given, depending as it does both on the indeterminacy of the organizational boundaries of these entities and the question of what intelligence the United States is willing to use in court as evidence.

Again, none of this is meant to say that the showing could not be made. The point, rather, is that it is a showing required *only* if one selects the military commission option; none of the charges against Warsame in federal court require proof of his involvement in the matters mentioned above.³⁵ If the relevant government officials, with access to the relevant intelligence, view these obstacles as significant, this is an important point in favor of the civilian alternative.

Would choosing civilian prosecution over a military commission trial in effect give Warsame a set of rights he would not otherwise receive?

This argument arises often in the commissions debate. It depends on the premise that the constitutional rights enjoyed by a defendant in a civilian trial in New York—the Sixth Amendment Confrontation Clause, for example, or Fifth Amendment Due Process considerations such as the prohibition on involuntarily-obtained statements—would not equally apply to a defendant in a military commission proceeding. Yet it is far from obvious that this is correct.

When the Supreme Court decided *Boumediene v. Bush*, it addressed only the capacity of the Guantanamo detainees to object to an ostensible violation of the Suspension Clause, and did not also address their ability to advance other constitutional claims.³⁶ Even a brief review of the majority's rationale for allowing the invocation of the Suspension Clause, however, should be enough to give pause to anyone who argues that the same result will not follow for various trial-related rights. Justice Kennedy had previously endorsed the view that the extraterritorial effect of constitutional rights should turn on whether such an extension would be "impracticable and anomalous" in the particular circumstances at issue,³⁷ and he took this opportunity to give that test a prominent role in *Boumediene* as well.³⁸

One day, possibly beginning in the context of the slowly-percolating *Hamdan* or *al-Bahlul* military commission appeals, the Supreme Court or the D.C. Circuit will begin the process of sorting out which constitutional rights do apply to military commission proceedings at Guantanamo and, for those that do, whether the rights apply in the usual way or perhaps in a manner tailored to the commission setting.³⁹ Until then, we may only speculate—but informed speculation suggests that

³⁵ Warsame is charged with conspiring to provide and actually providing material support to al Shabab and AQAP, carrying firearms and destructive devices in connection with those offenses, teaching/demonstrating the making of explosives, and conspiring to and actually receiving military-style training from al Shabab and AQAP. See *United States v. Warsame* (S.D.N.Y.) (indictment), available at <http://www.lawfareblog.com/wp-content/uploads/2011/07/Warsame-Indictment.pdf>.

³⁶ 553 U.S. 723 (2008).

³⁷ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring).

³⁸ 553 U.S. at 759-60

³⁹ Appeals from a military commission decision run first to the Court of Military Commission Review, then to the D.C. Circuit Court of Appeals, and then finally to the Supreme Court of the United States (if the Supreme Court grants *certiorari*, that is).

there is a substantial possibility that the court ultimately will extend various trial-related rights to the commission setting, without substantial change.

What are the comparative prospects for conviction and a substantial sentence, as between the civilian and military trial options?

Many will recall that the prosecution of Ahmed Ghailani—a former Guantanamo detainee brought to New York for a civilian trial relating to the 1998 East African embassy bombings—resulted in a conviction on one (weighty) count and acquittals on all the others, including hundreds of murder counts. Does this somehow signify that civilian courts are not to be trusted with terrorism prosecutions, in comparison to military commissions? Not at all.

Consider whether there is any reason to believe the verdict would have been different had the case been tried by a military commission instead. That is quite doubtful. The burden of proof is the same in both settings, and there is no reason to assume that the typical military officer is more likely to convict than the typical civilian juror; indeed, one might expect military officers to be, if anything, *more* discerning in their assessment of the evidence. Recall that a military commission in the case of Salim Hamdan convicted him only on the lesser “material support” charges he faced while acquitting him of more serious charges, and then provided a sentence that practically amounted to time-served (whereas defendants in civilian court convicted on comparable material support cases routinely receive much longer sentences).⁴⁰ In light of this, we should probably not assume that simply having a military panel rather than a civilian jury would have made a difference in Ghailani’s case.

Is there some other distinction between the systems that might have made a difference in that case? Some have suggested that the government would have been allowed to use more inculpatory evidence against Ghailani had the case been tried by commission. The district court in the actual case, after all, had suppressed testimony from a key witness on the ground that the government only learned of that witness after what was concededly a coercive interrogation of Ghailani. Yet there is no particular reason to believe that the same result would not have obtained had the case been tried by commission. Setting aside whether the Constitution might directly impose the same voluntariness standard in a commission proceeding—a possibility that has certainly not been ruled out, as noted above—the statutory rules governing commissions largely duplicates those rules in any event. The Military Commissions Act of 2009 provides that an accused’s own statements may not be admitted into evidence unless they not only are reliable and probative in the totality of the circumstances, but also were “voluntarily given.” The only exception to the voluntariness requirement applies only to statements “made incident to lawful conduct during military operations *at the point of capture or during closely-related active combat engagement*” (and even then only so long as the interests of justice favor admission).⁴¹ That exception almost certainly would be matched in a civilian criminal trial by application of the *Quarles* public-safety exception. Nor would the word “voluntary” likely be construed differently in the two systems; the Military Commissions Act defines the considerations that go into the voluntariness determination in a commission proceeding, essentially adopting the civilian criminal law approach.⁴²

⁴⁰ Data on conviction rates and sentencing in civilian material support cases is available in Robert Chesney, *Federal Prosecution of Terrorism-Related Offenses: Conviction and Sentencing Data in Light of the “Soft-Sentence” and “Data-Reliability” Critiques*, 11 Lewis & Clark Law Review 851 (2007).

⁴¹ 10 U.S.C. §948r(c) (emphasis added).

⁴² 10 U.S.C. §948r(d).

Bear in mind, too, that the charges available in the civilian criminal justice system in some settings are more extensive than those available for trial by commission. Warsame illustrates the point, as he is charged with several counts—bearing arms in connection with a crime of violence, *receiving* military-style training from designated terrorist groups, and providing instruction on making explosives—that have no direct parallel in the commission system.⁴³

Further, the prospects for conviction in some instances may depend on having access to information held by other countries—and in some such instances, those countries may be willing to cooperate only if we commit to the civilian prosecution alternative. And the same may be true with respect to obtaining custody of some persons, when they have already been captured by another state.⁴⁴ For these reasons alone, it seems unwise to entirely eliminate the civilian prosecution option for persons captured outside the United States.

All that said, there are grounds to favor commissions over civilian trials in some circumstances. But these grounds are not largely about maximizing prosecutorial advantage. They concern, rather, the comparative equities of military and civilian authorities. All other things being equal, for example, commissions are a more appropriate forum in cases involving well-recognized violations of the law of war occurring in combat or occupation settings or where the military is itself the target of the offense.

* * *

Both the military commission system as it currently exists and the civilian criminal justice system are legitimate tools, and each can be highly effective.⁴⁵ Whether to use one or the other, once the decision to prosecute is made, is a complex judgments involving competing equities that are very difficult to assess. The situation does not call for a one-size-fits-all approach.

Removing Individuals from the United States

What about the post-sentence (or post-acquittal) endgame, when it becomes time to repatriate a person to his country of origin? Aren't we better off if that person is at Guantanamo at that point, rather than in the United States?

This is, I think, one of the most legitimate and difficult objections that have been lodged against bringing noncitizens captured abroad into the United States to face civilian criminal prosecution. It is not precisely a civilian-versus-military trial point, of course, but rather a question of geography that happens to track the civilian-military trial divide.

The basic concern is that at some point, whether after acquittal or after a convicted defendant has served his sentence, it may prove difficult to remove the individual back to his country of origin.

⁴³ Other offenses charged against Warsame—material support and conspiracy—may be charged in both systems, albeit with a caveat: the courts currently are grappling with the question of whether material support and conspiracy can legitimately be prosecuted in the commission setting. This probably would not be a problem as to Warsame given that the arguments against these charges are at their strongest with respect to conduct predating the Military Commissions Acts of 2006 and 2009, whereas Warsame's conduct postdates those statutes.

⁴⁴ See, e.g., David Kris, *Law Enforcement as a Counterterrorism Tool*, 5 *Journal of National Security Law & Policy* 1, 30 (2011).

⁴⁵ For more on the efficacy of civilian criminal prosecution, see *id.*

Specifically, the concern is that (i) the person cannot be removed either because his country of citizenship will not receive him or because repatriation poses an undue risk of torture or persecution, (ii) the government cannot find a third country to accept the person, and (iii) a court might eventually order the person released inside the United States rather than face indefinite detention. Why think this might occur? Because something like it did occur in 2001. That summer, the Supreme Court in *Zadvydas v. Davis* held that it would present a Fifth Amendment due process problem were the government to indefinitely detain a person who is subject to removal as a legal matter but cannot actually be removed as a practical matter.⁴⁶

This is indeed a significant consideration for situations such as the Warsame case, where the government captures an alien terrorism suspect overseas and brings the person into the United States for prosecution. But there are two reasons to be cautious before we assume that the *Zadvydas* rule would apply in such cases.

First, and most obviously, the Supreme Court actually said in *Zadvydas*—which was *not* a terrorism or national security-related case—that it was *not* deciding that its ruling would extend to cases involving “terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security.”⁴⁷ Second, *Zadvydas* involved a person who had entered the country legally as an initial matter, and thus had established ties to the United States with significant constitutional implications. And while it is true that the Supreme Court in the subsequent *Clark v. Martinez* case extended the *Zadvydas* rule to a person who had *not* entered the country legally in the first place, it did so only as a matter of statutory interpretation—and even then made explicit reference to the fact that immigration law contains an entirely separate track for the removal (and detention pending removal) of terrorism suspects.⁴⁸

How precisely a person like Warsame—i.e., a non-citizen associated with terrorism who is brought into the country involuntarily solely to be prosecuted and to serve any resulting sentence—would fit into the *Zadvydas/Martinez* framework is far from clear. And so I would not brush off the *Zadvydas* concern. But nor would I treat it as a dispositive consideration, let alone one that is more likely than not to materialize.

Conclusion

If there is any one lesson to take away from all this, it is the need for flexibility and nuance in detention policy. In practical terms, this means the following:

- Congress should not entirely foreclose civilian prosecution when it comes to non-citizens captured overseas—even if such persons in theory might be subject to military detention under the AUMF or prosecution by military commission. Nor should the President entirely foreclose the option of military detention, consistent with the AUMF and the law of war, when it comes to new captures—even if the person in issue might also be subject to prosecution under Title 18.

⁴⁶ 533 U.S. 678, 695 (2001).

⁴⁷ 533 U.S. at 696.

⁴⁸ See 543 U.S. 371 (2005); cf. 8 U.S.C. §§ 1531-37. See also 8 C.F.R. §§ 241.13, 241.14(c) and (d), 28 C.F.R. § 200.01.

- Which of these options to pursue—or whether to pursue an alternative such as trial by military commission, rendition to third-country custody, or surveillance—requires complex judgments that necessarily will vary from case to case.
 - In many instances, the right move may be a blend of the options. This will be the case, for example, where the imperatives of intelligence-gathering through interrogation counsel in favor of a period of military detention (when otherwise legally available, and subject to appropriate constraints as to the methods involved) yet the best strategy for ensuring long-term detention of a dangerous person turn out to be the civilian criminal justice system.
 - It is worth emphasizing, however, that a person need not be held in military custody in order to be interrogated in a manner focused on collecting intelligence for imperative reasons of national security (in contrast to collecting evidence for use in a trial). Such interrogation can take place in any setting, with any personnel, and we should not assume in advance that only certain personnel or certain institutional settings will work best. Rather, the goal should be to empower the executive branch with options that can be brought to bear in a manner that experts deem appropriate to particular fact patterns. Congress of course should conduct oversight in relation to such judgments, but should not predetermine them.
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**DISCLOSURE FORM FOR WITNESSES
CONCERNING FEDERAL CONTRACT AND GRANT INFORMATION**

INSTRUCTION TO WITNESSES: Rule 11, clause 2(g)(4), of the Rules of the U.S. House of Representatives for the 112th Congress requires nongovernmental witnesses appearing before House committees to include in their written statements a curriculum vitae and a disclosure of the amount and source of any federal contracts or grants (including subcontracts and subgrants) received during the current and two previous fiscal years either by the witness or by an entity represented by the witness. This form is intended to assist witnesses appearing before the House Armed Services Committee in complying with the House rule.

Witness name: Robert Chesney

Capacity in which appearing: (check one)

Individual

Representative

If appearing in a representative capacity, name of the company, association or other entity being represented: *n/a*

FISCAL YEAR 2011

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

FISCAL YEAR 2010

federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

FISCAL YEAR 2009

Federal grant(s) / contracts	federal agency	dollar value	subject(s) of contract or grant

Federal Contract Information: If you or the entity you represent before the Committee on Armed Services has contracts (including subcontracts) with the federal government, please provide the following information: *n/a*

Number of contracts (including subcontracts) with the federal government:

Current fiscal year (2011): _____;
 Fiscal year 2010: _____;
 Fiscal year 2009: _____.

Federal agencies with which federal contracts are held:

Current fiscal year (2011): _____;
 Fiscal year 2010: _____;
 Fiscal year 2009: _____.

List of subjects of federal contract(s) (for example, ship construction, aircraft parts manufacturing, software design, force structure consultant, architecture & engineering services, etc.):

Current fiscal year (2011): _____;
 Fiscal year 2010: _____;
 Fiscal year 2009: _____.

Aggregate dollar value of federal contracts held:

Current fiscal year (2011): _____;
 Fiscal year 2010: _____;
 Fiscal year 2009: _____.

Federal Grant Information: If you or the entity you represent before the Committee on Armed Services has grants (including subgrants) with the federal government, please provide the following information: *n/a*

Number of grants (including subgrants) with the federal government:

Current fiscal year (2011): _____;
Fiscal year 2010: _____;
Fiscal year 2009: _____.

Federal agencies with which federal grants are held:

Current fiscal year (2011): _____;
Fiscal year 2010: _____;
Fiscal year 2009: _____.

List of subjects of federal grants(s) (for example, materials research, sociological study, software design, etc.):

Current fiscal year (2011): _____;
Fiscal year 2010: _____;
Fiscal year 2009: _____.

Aggregate dollar value of federal grants held:

Current fiscal year (2011): _____;
Fiscal year 2010: _____;
Fiscal year 2009: _____.