

**Prepared Statement of  
William J. Lynn, Deputy Secretary of Defense, and  
Jeh Charles Johnson, General Counsel of the Department of Defense  
for the House Armed Services Committee  
March 17, 2011**

Chairman McKeon and Congressman Smith, thank you for the opportunity to testify here today.

On March 7, 2011, the President announced several initiatives related to the detainees at Guantanamo Bay. We are here today to discuss those initiatives in greater detail and answer any questions you may have about them.

As a preliminary matter, we note that the Obama Administration remains committed to closing the detention facility at Guantanamo Bay, and we would be moving forward with the initiatives announced last week no matter where the detainees are located. Like the President, we in the Department of Defense believe these developments will strengthen our national security and, at the same time, promote the rule of law. Our goal is to ensure a system of detention that is balanced and fair with respect to the detainees and is sustainable and credible with the U.S. courts, the Congress, the American public and our allies and coalition partners in the current conflict.

*First*, Secretary Gates lifted the suspension on new charges in military commissions for cases that have been evaluated pursuant to the prosecution protocol between the Departments of Defense and Justice. The suspension was issued by the Secretary in January 2009 to permit the new Administration time to review the status of each detainee at Guantanamo, pursuant to Executive Order 13492. That review is now complete. In addition, as the President called for in his National Archives address in May 2009, we have worked with the Congress to reform military commissions. And, the Military Commissions Act of 2009, which was passed with bipartisan congressional support and the support of our JAG leadership, incorporated a number of reforms, including a ban on the use in commissions prosecutions of statements obtained through cruel, inhuman and degrading treatment, and an enhanced system for the handling of classified information in commissions cases. In the last two years we also issued a new Manual for Military Commissions, appointed retired Navy Judge Advocate General Bruce MacDonald to be the Convening Authority, and rewrote the rules for press access to commissions proceedings. With these reforms, we believe that

[REDACTED]

military commissions, along with federal civilian courts, are an available and important tool for the U.S. to bring international terrorists to justice.

Like the President and Secretary Gates, we also respectfully disagree with the restrictions that the Congress has imposed on transferring Guantanamo detainees to the United States for the purpose of prosecuting them in federal court. We repeat here what Secretary Gates has said publicly about that:

"In addition to bringing detainees to justice in reformed military commissions, I believe that it is important that we maintain the option of prosecuting alleged terrorists in federal courts in the United States. For reasons of national security, we must have available to us all the tools that exist for preventing and combating international terrorist activity, and protecting our Nation. For years, our federal courts have proven to be a secure and effective means for bringing terrorists to justice. To completely foreclose this option is unwise and unnecessary."

*Second*, the President signed Executive Order 13567, providing for periodic review of those Guantanamo detainees who will be held long term in detention under the law of war. In his National Archives address, the President recognized that there are certain Guantanamo detainees who remain at war with the United States but have not been charged, convicted or designated for transfer. For this group, "[w]e must have a through process of periodic review, so that any prolonged detention is carefully evaluated and justified." The new periodic review process announced last week meets this directive, and strengthens our national security by providing a solid and sustainable system for law of war detention.


It is important to note that this system of periodic review established by the Executive Order is not a new concept; it replaces a system of review put in place by the prior Administration. From 2002 until January 20, 2009, about 540 detainees were transferred out of Guantanamo. In this Administration, as mandated by Executive Order 13492, senior officials at Defense, State, Homeland Security, Justice and from the intelligence community conducted a thorough review of the Guantanamo detainees' cases. Over the last two years, as a result of that review process, 67 detainees have been transferred from Guantanamo (including 11 as a result of court orders in habeas litigation). In addition, 48 detainees were designated for continued law of war detention, and 36 were referred for prosecution in either federal court or by military commission.

[REDACTED]

The periodic review established by Executive Order 13567 will apply to those designated for law of war detention, and to those who have been designated for prosecution, but against whom no charges have yet been brought. Each of these detainees has the right to challenge the legality of their detention in federal court, and most have in fact done so. The periodic review process is intended to assess whether continued detention of each of these individuals is "necessary to protect against a significant threat to the security of the United States." In making these assessments, we must be mindful that these detainees are those who we believe, "in effect, remain at war with the United States," as the President stated in his National Archives address. And, as the Executive Order itself makes clear, no detainee at Guantanamo will be released in to the United States. Finally, any transfer or release is subject to the legal restrictions and requirements imposed by the National Defense Authorization Act of 2011.

*Third*, the President also announced that the Administration strongly supports Additional Protocol II to the 1949 Geneva Conventions, and will seek Senate advice and consent to ratification of this important treaty. This protocol contains detailed humane treatment standards and fair trial guarantees that apply in non-international armed conflicts. Additional Protocol II was originally submitted to the Senate for advice and consent by the Reagan Administration in 1987, but in the almost 25 years since, the Senate has not acted on it. As a related matter, the Administration has also determined that we will choose to follow Article 75 of Additional Protocol I of the Geneva Conventions "out of a sense of legal obligation." Article 75 contains basic humane treatment standards for those captured in international armed conflicts. The Administration is not seeking Senate advice and consent to ratification of Additional Protocol I. Like prior Administrations, we continue to have concerns about other aspects of Additional Protocol I.

Over the years, international legal experts from across the political spectrum have called upon our government to embrace Additional Protocol II and Article 75. And, after careful interagency analysis, we have concluded that the practices of our military are already consistent with these two sets of standards. Further, since the Vietnam War, our military has supported Article 75 for the protection of our own captured personnel. By embracing these two sets of safeguards, we promote the international law of armed conflict in our current conflict against al Qaeda and its affiliates, and we send the message that we expect other nations to adhere to these same standards.



Overall, we believe these initiatives will promote clear, credible and lawful standards for the detention and prosecution of those who remain at Guantanamo. This, in turn, benefits our national security and the safety of the American people.

Two final notes: in the habeas litigation brought by Guantanamo detainees, the government has recently prevailed in seven separate cases at the District Court level, and we have been successful in several more cases at the circuit court level. We work hard to present careful and reasoned legal and factual defenses in these cases, and we believe our efforts are reflected in these decisions of the courts.

We also believe that the Department's working relationship with the International Committee for the Red Cross is as good as it has been in recent times. We meet regularly with the ICRC to discuss their concerns and reports. It is also the case that the ICRC is promptly notified of every detainee of the Department, and the ICRC has access to all the Department's detention facilities.

We look forward to your questions.