

**HOW THE ADMINISTRATION'S FAILED DETAINEE
POLICIES HAVE HURT THE FIGHT AGAINST
TERRORISM: PUTTING THE FIGHT AGAINST
TERRORISM ON SOUND LEGAL FOUNDATIONS**

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

—————
JULY 16, 2008
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Serial No. J-110-107

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Printed for the use of the Committee on the Judiciary



U.S. GOVERNMENT PRINTING OFFICE

44-818 PDF

WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Cornyn, Hon. John, a U.S. Senator from the State of Texas, prepared statement	29
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin	4
Kyl, Hon. Jon, a U.S. Senator from the State of Arizona	5
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	1
prepared statement	82
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	3

WITNESSES

Gunn, Will A., Colonel, United States Air Force (retired), and former Chief Defense Counsel, Department of Defense, Office of Military Commissions, Fort Belvoir, Virginia	7
Martin, Kate, Director, Center for National Security Studies, Washington, D.C.	9
Rivkin, David B., Jr., Partner, Baker Hostetler, LLP, Washington, D.C.	10

SUBMISSIONS FOR THE RECORD

Denbeaux, Mark P., Professor of Law, Seton Hall University School of Law, Newark, New Jersey, statement and attachment	34
Gunn, Will A., Colonel, United States Air Force (retired), and Former Chief Defense Counsel, Department of Defense, Office of Military Commissions, Fort Belvoir, Virginia, statement	66
Kassem, Ramzi, Clinical Lecturer in Law and Robert M. Cover Clinical Teaching Fellow, Yale Law School, New Haven, Connecticut, statement	76
Martin, Kate, Director, Center for National Security Studies, Washington, D.C., statement	84
Rivkin, David B., Jr., Partner, Baker Hostetler, LLP, Washington, D.C., statement	96

HOW THE ADMINISTRATION'S FAILED DE-TAINEE POLICIES HAVE HURT THE FIGHT AGAINST TERRORISM: PUTTING THE FIGHT AGAINST TERRORISM ON SOUND LEGAL FOUNDATIONS

WEDNESDAY, JULY 16, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:10 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Cardin, Whitehouse, Specter, and Kyl.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Thank you all. I was just explaining to Senator Specter that the traffic gets worse all the time. I was at a couple of breakfast meetings downtown, so I do apologize, and to Senator Kyl, too, of course.

In the wake of the tragic attacks on September 11th and toward the end of President Bush's first year in office, this country had an opportunity to show that we could fight terrorism, secure our Nation, and bring the perpetrators of those heinous acts to justice, and do it in a way that was consistent with our history and our most deeply valued principles. You will recall we had virtually the whole world on our side at that time. A number of us reached out to the White House, both Republicans and Democrats alike, in an effort to craft a thoughtful, effective bipartisan way forward. The White House chose another path. They diverted our forces away from al Qaeda and capturing Osama bin Laden instead to go to war and occupation in Iraq—a country that had nothing to do with 9/11, and, of course, allowing Osama bin Laden to stay loose. And they chose to enhance the power of the President and to turn the Office of Legal Counsel at the Department of Justice into an apologist for White House orders—from the warrantless wiretapping of Americans to torture. Many of us feel, as I do, that that made our country less safe, not safer.

We are all too familiar now with the litany of disastrous actions by this administration: rejecting the Geneva Conventions, which the President's counsel, incidentally, referred to Geneva Conventions as "quaint"; and doing this against the advice of the Secretary

of State; establishing a system of detention at Guantanamo Bay in an effort to circumvent the law and accountability; attempting to eliminate the Great Writ, the writ of habeas corpus, for anyone designated by the President as an enemy combatant. They set up a flawed military commission process that, after 6 years, has not brought even a single one of these dangerous terrorists to trial; and permitting cruel interrogation practices that in the worst cases amount to officially sanctioned torture.

In her new book "The Dark Side," journalist Jane Mayer has offered a major contribution to reporting these matters. In addition to providing previously unknown details of U.S. treatment of detainees, Ms. Mayer writes of a 2007 report from the International Committee of the Red Cross, the ICRC—incidentally a committee that the United States has relied on over the years to demonstrate whether things are done right or wrong. That concluded that interrogation techniques used by the United States constituted torture. The ICRC, like retired Major General Taguba, who investigated detainee abuses for the Army, suggested that the conduct of these officials could amount to war crimes.

Another deeply troubling revelation in Ms. Mayer's book is that one-third to one-half of the detainees at Guantanamo have been known, almost since the beginning, to have no connection to terrorism at all. But the White House refused to allow any new review of their status because, according to the Vice President's chief of staff, David Addington, "The president has determined that they are ALL enemy combatants." And, of course, that was the end of the inquiry, even if it was erroneous.

Throughout all of this, the administration has been assisted by lawyers willing to give whatever answer the White House wanted and by a compliant Congress. The only real check on the administration, in fact, has been a 5–4 majority of the conservative U.S. Supreme Court. The Supreme Court has rightly rejected, time after time, backdoor efforts by the Bush administration and its congressional enablers' to re-write our Constitution in the name of the "war on terror."

From 2004 to 2008, the Supreme Court has rejected the administration's attempts to deprive citizens and non-citizens of their right to challenge their indefinite detention in Federal court. The Court has sought through the power of judicial review to provide a check and balance. Last month, in the *Boumediene* case, the Court reinforced our Constitution and our core American values in holding that the habeas-stripping provision in the Military Commissions Act is unconstitutional. That case brings the administration's record to 0 for 4. Four times the Supreme Court has repudiated the disastrous detainee policy.

You know, the policy is not only illegal and immoral. It has been harmful in the fight against terrorism. If it actually helped in the fight against terrorism, it would be one thing. It has not. It has harmed it. We cannot defeat terrorism by abandoning our basic American principles and values. Look what the pictures from Abu Ghraib and tales of unjustified detentions and torture have done. They have provided the real enemies of this country with a recruiting field day.

And I am not alone in saying that these policies have made us less safe. Former Secretary of State Colin Powell said last summer that "Guantanamo has become a major, major problem for...the way the world perceives America. And if it was up to me, I would close Guantanamo not tomorrow, but this afternoon." Then Secretary Powell added that Guantanamo had "shaken the belief the world had in America's justice system." When asked whether it is a problem for detainees to have habeas corpus rights he said "[s]o what? Let them. Isn't that what our system's all about?" General Powell is correct.

Even former Secretary of Defense Donald Rumsfeld questioned in a memo whether our tactics and policies are creating more terrorists than we are killing or capturing. And I think that is going to continue until we return to policies that reflect our values and uphold the rule of law which made our country great for 200 years.

Adopting a detainee policy that reflects our values would mean closing Guantanamo, giving detainees due process, and releasing those who never should have been there in a timely and responsible manner. Detainees that pose a danger to this country and the world should swiftly be brought to justice within either our military or civilian justice systems. These systems are strong, they are flexible; more importantly, they are up to the job.

Cleaning up this mess is not going to be easy. I think we have to join together in the months ahead to rethink the misconceived legal framework that has been devised and carried out by the administration. And I think we can do that. But let's find out what went wrong during the past 7 years, and let's figure out ways to put our legal system back on track.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Specter?

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman, and thank you for convening this important oversight hearing. Regrettably, the oversight function of the Congress is not carried out the way it ought to be, and that is because there are so many things to have oversight on. And, candidly, it is such a difficult process, even when we find problems in moving ahead for any answers.

The issues arising out of Guantanamo I fear are going to be with the United States for a long time. I made two trips to Guantanamo early on—the first in August of 2005—and I could see that there was a need for a determination as to whether there were people being detained there who should not have been detained. When we heard about the practices of taking people into custody, we were told that they would be rounded up on the battlefield with very little identification or specification as to who had done what. And that sort of a situation just cries out for some factual determination as to what is going on.

We now have a lot of material coming out. There have been a lot of books written. Some of the books say that as many as one-third of those held in Guantanamo should not have been there at all.

Well, somebody has to find that out, and that is an important oversight function for this Committee.

I saw a long time ago, as an assistant district attorney, the questionableness of a police report or of a citizen who initiates a criminal prosecution on a complaint once you have a hearing. Pennsylvania law requires a preliminary hearing before you are indicted. You do not have to do that in the Federal system. You can go to a grand jury without a hearing. Nothing like a hearing, because at a hearing, you hear. And there has to be a reason for detention, and that is why we struggled so hard to get the writ of habeas corpus applicable, and finally it is there. A long, tough battle. And that is what has to be done.

There is no doubt from many, many sources, including polls, which I usually don't pay a lot of attention to, but when they come in from all around the world about our popularity rating and our evaluation of our values being so low, you have to. And the United States has always been the leader. We have got to persuade a lot of people to do a lot of things that they do not want to do, like joining in the fight against terrorism, like helping out in Iraq, like helping out in Afghanistan. And if we do not have some moral ground to stand on, it is not possible to do that.

So I think it is important that I am not about to make any judgments. I want to have the hearing. I want to see what people have to say. I want to know what the facts are. Once we find out what the facts are, usually people of good will can come together on what ought to be done.

So I thank you, Mr. Chairman, for convening the hearing. As I said to you earlier, I am ranking on Health and Human Services. We are having a hearing on the National Institutes of Health, and that is one subject that is equally important to this one. So I am going to excuse myself.

Chairman LEAHY. Thank you. That goes for all of us, and I appreciate that. I should note that Senator Kyl is the Ranking Member on the Terrorism Subcommittee. He is also the Assistant Republican Leader, and Senator Feingold is the Chairman of the Constitution Subcommittee. I would yield first to Senator Feingold and then Senator Kyl for brief opening statements.

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Mr. Chairman, and I, too, want to thank you for holding this important hearing.

Since 9/11, America has faced a great challenge: responding aggressively to those infamous acts of terrorism and to the very real threat posed by al Qaeda without abandoning our freedoms and democratic values. Unfortunately, this administration has not successfully met that challenge, and its detention and interrogation policies are a major reason for that failure.

The administration has claimed the right to pick up anyone anywhere in the world, and by simply labeling him an "enemy combatant," lock him up for the rest of his life. Not only that, it has claimed the right to use abusive interrogation techniques on the people it detains—techniques that the U.S. Government has condemned other countries for employing.

Such violations of the rule of law can only diminish our credibility abroad and encourage the recruitment efforts of our enemies. In other words, these policies not only undermine the principles on which this country was founded, they are harmful to our national security today. But at last there may be some light at the end of the tunnel. Our legal system has long relied on review by an independent and neutral decisionmaker as a critical safeguard against wrongful detention. In particular, the writ of habeas corpus provides one of the most significant protections of human freedom against arbitrary government action that has ever been created.

The Supreme Court last month reiterated exactly that in its decision in *Boumediene v. Bush*. The Court struck down the provisions in the Military Commissions Act that tried to strip detainees of the longstanding right to challenge their detention via habeas corpus and reaffirmed that the Government does not have the power to detain people indefinitely and arbitrarily without adequate judicial review. "The laws and the Constitution are designed to survive and remain in force in extraordinary times," as Justice Kennedy said. "Liberty and security can be reconciled, and in our system they are reconciled within the framework of the law."

I could not agree more. There were undoubtedly difficult legal issues raised in the case, but the decision is fundamentally sound.

I am dismayed by those who attack this decision. Americans should all be grateful that the Supreme Court has again rejected the extreme arguments put forth by this administration. The decision represents the best of our Nation's legal system, and we should celebrate the Court's courage and independence in making it. I am pleased that the Committee is considering today how to best move past the destructive and counterproductive detention and interrogation policies of this administration. We can and must combat al Qaeda aggressively while maintaining our principles and our values.

And, Mr. Chairman, I too am sorry that I cannot stay for the rest of the hearing, but I appreciate the opportunity to make these remarks. Thank you.

Chairman LEAHY. Thank you very much.
Senator Kyl?

**STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE
STATE OF ARIZONA**

Senator KYL. Mr. Chairman, thank you. I will just make a brief remark.

First of all, I would like to ask unanimous consent that Senator Cornyn has a statement to be included in the record.

Chairman LEAHY. Of course, without objection.

Senator KYL. Thank you. Also, you know, I have chaired a lot of Committee hearings over the last 12 years, oversight hearings as Chairman of the Terrorism Subcommittee, and we usually tried to find out what the facts were from the witnesses, and then we would write a report. But I note that you have already decided what the answer is with the title of this: "How the Administration's Failed Detainee Policies Have Hurt the Fight Against Terrorism." Not a very objective way, I suggest, to characterize this hearing. It is kind of a "hang them and then we will try them" approach.

I know that everything about this is partisan, and that is really regrettable because the people who had to deal with this issue when it first arose in the aftermath of 9/11 had a very tough job. And there has been a lot of sniping from the sidelines, a lot of criticism, very little of it constructive. And too much of it has been put into purely partisan terms.

These are serious matters that we are seriously trying to deal with in order to defeat a serious enemy. And some of the suggestions or characterizations are most unfortunate. For example, Mr. Chairman, when you talk about the congressional enablers, I did not get each of the votes that we cast on those like the Detainee Treatment Act, but I remember one of them was 84–14. That suggests that there are a lot of Democrats and Republicans who are enablers.

I think that is an unfair and unfortunate characterization. Clearly, we are talking about failed detainee policies in the context of decisions that the Supreme Court has rendered. We are talking about acts of Congress that have been declared partially invalid or unconstitutional. I find that regrettable when the Congress by overwhelming, bipartisan majorities passes legislation to deal with this unique and new problem that we resort to the kind of language that you have to be so critical in such a partisan way.

I hope that our witnesses today—they are all distinguished observers here—can shed light on this in a way that suggests that these are not all easy answers, that the United States has a right to defend itself, and that no nation in the world can claim a higher moral ground in dealing with these issues than can the United States. It is uncontestable—I will give the witnesses a chance to respond if they would like—that the rights, even before the Supreme Court decisions, that we provided to detainees were far greater than any country on Earth has ever provided to enemy combatants.

So I suggest that we try to focus constructively on what we have tried to do as best we can, following our moral precepts and legal precepts, and not focus on the partisan aspects of this where we each hold our views strongly. But that does not get us very far in figuring out where to go in the future.

Chairman LEAHY. Thank you. I still agree in a bipartisan fashion with what General Powell and Secretary Rumsfeld said—and I quoted them—about the mistakes that have been made.

Colonel Will Gunn, Retired, United States Air Force, has a distinguished record of public service. His last military assignment was Chief Defense Counsel in the Department of Defense Office of Military Commissions. He oversaw legal defense of detainees brought before the military commissions at Guantanamo Bay, Cuba. Colonel Gunn held a variety of other positions in the military ranging from trial attorney to the Air Force General Litigation Division's Military Personnel Branch, to Executive Officer to the Air Force Judge Advocate General. In civilian life, Colonel Gunn served as Chief Executive Officer of the Boys and Girls Club of Greater Washington. He knows what support I and several members of both sides of the aisle have been to the Boys and Girls Club. He is now a private attorney in Northern Virginia, holds a Master of Laws degree in Environmental Law from George Washington

University, Master of Science degree from the Industrial College of the Armed Forces.

Colonel Gunn, please go ahead, sir.

STATEMENT OF WILL A. GUNN, COLONEL, UNITED STATES AIR FORCE (RETIRED), AND FORMER CHIEF DEFENSE COUNSEL, DEPARTMENT OF DEFENSE, OFFICE OF MILITARY COMMISSIONS, FORT BELVOIR, VIRGINIA

Colonel GUNN. Thank you very much, Senator Leahy and other members.

In 2003, former DOD General Counsel Jim Haynes named me as the first Chief Defense Counsel in the Office of Military Commissions. At that time I was given office space on the first floor of the Pentagon in the section next to the portion that has been seriously damaged on 9/11. Each day I had an opportunity to pass by a plaque, and that plaque included the words spoken by President George W. Bush on the night of September 11, 2001. And that plaque read: "Terrorists can shake the foundations of our biggest buildings, but they cannot touch the foundation of America."

Unfortunately, many of our detention policies and actions in creating the Guantanamo military commissions have seriously eroded the fundamental American principles of the rule of law in the eyes of Americans and in the eyes of the rest of the world.

As Chief Defense Counsel, I was responsible for screening prospective defense personnel, doing my utmost to promote a zealous defense for any detainees brought before a military commission, promoting "full and fair trials," and overseeing the entire defense function for the military commissions.

I am going to focus my attention on those military commissions. As has already been stated, one of the things that happened in the early days was that the administration President made a determination that all of the individuals that were captured in Afghanistan as well as throughout the global war on terrorism were unlawful enemy combatants. Therefore, they were not entitled to the protections of the Geneva Conventions. And another decision was made that Article 5 tribunals, as called for under the Geneva Conventions, would not be conducted. This was a major break with policy. During Operation Desert Storm, for instance, more than 1,100 such tribunals had been held in order to determine exactly how each and every prisoner should be treated.

With the military commissions system that I inherited and was asked to take part in, there have been several problems, and I would just like to bring a few to this Committee's attention.

First of all, the rules were created from scratch or, more accurately, if you looked at the rules that were created, they bore a great resemblance to the rules that President Roosevelt put into effect in 1941 to try German saboteurs that had landed on our shores. They bore very little resemblance to modern-day courts martial.

For instance, the system did not have a military judge, it did not allow for any type of independent judicial review, and there were other problems as well. Since then, the Military Commissions Act has been passed, and some of these problems have been corrected, but other remain.

One of the things that the system called for, one of the things that the system exemplified, was the lack of an independent chain of command for the Defense Counsel. As Chief Defense Counsel, I was supervised by a senior career attorney in the Office of the DOD General Counsel rather than having an independent chain, as was advocated by the various Judge Advocates General for the different services. That system remains in place today.

The rules allow for a civilian counsel and the accused to be excluded from the courtroom when classified information was being considered, leaving only military counsel in the courtroom. Again, there have been some reforms to this system. However, this is still problematic.

Use of hearsay and coerced testimony. The MCA still allows for the use of evidence that has been obtained by torture or evidence that is coerced, as long as it was obtained prior to the passage of the Detainee Treatment Act in 2005. Also, the Military Commissions Act shifts burden with respect to the use of hearsay to the party opposing such use. This is a fundamental shift in our system of justice and what we have done in the past.

The Military Commissions Act included rules that allowed for the monitoring of attorney-client communications, and these rules disregard Common Article 3 protections.

One of the things that is most disturbing, I believe, to our national prestige is that these rules, when taken together, encompass what one can barely say is secondhand justice. This was exemplified when our closest allies in the war on terror, the British, asked for the return of all of their citizens who were being detained at Guantanamo. Therefore, what they said was that this system was not good enough for their people.

Thomas Paine said, "He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself."

Senators, I would just suggest that we need to look strongly at revising these rules and revising the way that we treat the enemy combatants.

[The prepared statement of Colonel Gunn appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Colonel.

We will go through each of the witnesses and then open it up for questions. The next witness is Kate Martin. She has been the Director of the Center for National Security Studies in Washington since 1992. She has litigated and written about a broad range of national security and civil liberties issues, including Government secrecy, intelligence, terrorism, enemy combatant detentions, the author of several well-known publications. Ms. Martin also served as General Counsel for the National Security Archive from 1995 to 2001. In addition to teaching strategic intelligence and public policy at Georgetown University Law Center—I know that school well, having graduated from there—Kate Martin graduated from the University of Virginia Law School where she was a member of the Law Review, and cum laude from Pomona College.

Ms. Martin, go ahead, please.

**STATEMENT OF KATE MARTIN, DIRECTOR, CENTER FOR
NATIONAL SECURITY STUDIES, WASHINGTON, D.C.**

Ms. MARTIN. Thank you, Senator Leahy and Senator Kyl. I want to begin by agreeing with Senator Kyl that the United States does have a duty and an obligation to defend itself. I also agree that the United States Constitution and its respect for the rule of law is, in fact, the best system in the world. I spent a number of years in the 1990s in Eastern Europe and Russia helping to revise laws to deal with the leftover KGB and was amazed, but not that surprised, to find that individuals who had spent time in the Soviet gulags understood First Amendment and due process protections and the United States Constitution as well or better than many high school graduates in the United States. And that is why I think that the detention policy since 2001 is so disturbing and unfortunate for our country.

I think that the individuals who crafted that policy in secret, without consultation with the Congress, viewed the constitutional system of checks and balances and the rule of law as an obstacle to the United States ability to defend itself, and that they ignored the repeated challenges by and the views of the career military lawyers that respect for the rule of law, the Constitution, and the system of checks and balances is a source of strength for the United States.

Underlying all the claims, underlying all the detention actions, which this Committee is well aware of, the detentions and seizures in Afghanistan without following the standard rules of war requiring Article 5 hearings, underlying the seizures and kidnapping of individuals from the streets of Europe with no due process to be transported to secret prisons and abused, and underlying the claims that the President has the authority to seize U.S. citizens and anyone else in the United States and hold them secretly for years without access to any kind of process is the claim that because we are at war, actions are permitted and necessary.

In my limited time this morning I would like to suggest, a framework for answering the difficult questions about how to deal with detainees, people picked up on the battlefields of Afghanistan and Iraq, people who are suspected terrorists in Europe, and people who are suspected terrorists in the United States. The simplest answer is that there is a straightforward framework already available, and that is, to follow the law of war when military force is being used on the battlefield, in Afghanistan, and in Iraq, and to follow the criminal laws which have proven successful in the United States and in Europe for apprehending, detaining, and incapacitating individuals who are suspected of being al Qaeda terrorists. A return to this framework will restore U.S. credibility, it will strengthen our national security, and it will end the uncertainty that has been created as to what will happen to the detainees, the difficulties that have been created with regard to the United States relations with its allies, and most importantly, perhaps, end the national security harm that has been done by eroding the United States' ability to take the high ground and be the most moral country in the world.

Finally, the issue that is perhaps most complex because of the failure of this administration to follow either the laws of war or the

criminal law is what to do with the detainees in Guantanamo. I believe those detainees will now be afforded due process, as the Supreme Court has ruled. They will be entitled a writ of habeas corpus and a hearing, and that process will begin to sort out who can be detained, who should be released, restore the United States position in the world and strengthen our national security.

Thank you.

[The prepared statement of Ms. Martin appears as a submission for the record.]

Chairman LEAHY. I thank you very much.

Our next witness is David Rivkin, who is a partner in the Washington office of Baker Hostetler, a visiting fellow at the Nixon Center, contributing editor of the National Review magazine. He practices in the area of public international law, international arbitration, and policy advocacy, served on both President Reagan's and President George H.W. Bush's administrations with positions in the White House Counsel's Office, Office of the Vice President, and the Departments of Justice and Energy. Prior to his legal career, he served as a defense and policy analyst. Mr. Rivkin holds a law degree from Columbia University Law School—and we did not really try to stack the deck with Georgetown people, but a Master's degree in Soviet Affairs from Georgetown University. And he says in his statement he agrees with Senator Kyl that he does not agree with the title of the hearing.

Go ahead, Mr. Rivkin.

**STATEMENT OF DAVID B. RIVKIN, JR., PARTNER, BAKER
HOSTETLER, LLP, WASHINGTON, D.C.**

Mr. RIVKIN. Mr. Chairman Leahy, members of the Committee, I appreciate the opportunity to appear before you today. I certainly realize that many legal positions taken by this administration to deal with the post-September 11 national security challenges have not found favor with many critics. With considerable respect, I disagree with this sentiment.

I start from the premise that, both as a matter of law and policy, the tremendous challenge that this country had to confront after September 11 was how to prosecute successfully a war against al Qaeda, Taliban, and affiliated entities. That successful war prosecution required the choice of an appropriate legal paradigm. And as in all prior wars in American history, and consistent with both international and constitutional law requirements, this legal paradigm had to be rooted in the laws and customs of war. And how to deal with captured enemy combatants was certainly a key element of this paradigm.

In general, while I do not endorse each and every aspect of the administration's post-September 11 wartime policies, I would vigorously defend the overall exercise of asking difficult legal questions and trying to work through them. I also strongly defend the overarching legal framework featuring the traditional laws of war architecture that the administration chose.

I want to emphasize here that—and I know I have been somewhat preempted by Senator Kyl on this point—despite all of the criticisms of the procedural facets of the administration's detainee policy, detainees in U.S. custody today enjoy the most fulsome due

process procedures of any detainees or prisoners in any war in human history. Indeed, the much maligned Combatant Status Review Tribunals and Military Commissions, backed by what I consider to be appropriate judicial review procedures, are unprecedented in the history of warfare—and, by the way, much more protective and much lauded international criminal tribunals.

This, by the way, was the case even before the Supreme Court's recent decision in *Boumediene*, which further augmented the judicial review procedures. I will also submit to you that the administration's legal positions up until recently have been substantially upheld by the courts. I know that is not a common perception, and I certainly appreciate the point made by you, Mr. Chairman. But I think that in most cases, including *Hamdi*, even *Hamdan* and *Rasul*, the U.S. Supreme Court law, while tweaking various elements of the Government's positions, has upheld the key legal proposition. And indeed, the two political branches responded to the Court's decisions with changes in policies, promulgating two major pieces of legislation—the Detainee Treatment Act and the Military Commissions Act.

In my view, quite regrettably, in the just decided *Boumediene* case, the Supreme Court has abandoned this approach and effectively rendered non-viable a major portion of the administration's wartime legal architecture, and Congress's for that matter, even though it itself had helped to shape it for several years. The Court has now taken a central role in deciding who is an enemy combatant, ruling that detainees, akin to criminal defendants, are constitutionally entitled to challenge their confinement through habeas corpus proceedings in Federal courts.

With all due respect to Senator Feingold, I think the *Boumediene* decision is one of the most deplorable examples of judicial overreaching and is flatly inconsistent with the Constitution, historical practice, and case law.

But that aside, what I wanted to flag for you this morning is more important, that for years the administration critics have been saying that it is not a big deal to give detainees constitutional protection and additional rights, whether procedural or substantive in nature. It was only the administration's obstinacy that was the problem. Well, in my opinion, the critics could not have been more wrong, proving, once again, that balancing individual liberty and public safety is never a cost-free exercise. Granting detainees the right to the traditional district court style habeas is going to be a momentous decision with many consequences, all of which are not good. We can expect that habeas proceedings will result in overturning a number of enemy combatant classification decisions of people in Guantanamo. In many cases, it would not happen because they were innocent shepherds or aid workers, who should not have been detained in the first place, but because the Government simply lacks sufficiently fulsome evidence of their combatancy or even if they do, they are facing a Hobbesian dilemma that if they put this information in their return, augmented return, it would run the risk of having this evidence being disclosed, therefore jeopardizing the war efforts. In my opinion, presented with this dilemma, what we are going to do in the future, unfortunately, is what I call catch-and-release policy. The United States for the first

time in the history of warfare, in the history of mankind, would basically not be able to hold anybody on a long-term basis. We would capture people, and to the extent they have good evidence, they put them before—schedule them for trial before military commissions. If they do not, they would have to release them or turn them over to the host government. And I would submit to you that that is not a great way to fight the war.

Let me conclude by saying if there is a regular failure here, in my opinion it is the regular failure by the courts to abide by their constitutionally proper role, to conveniently change that position as to what constitutes an appropriate reach of the United States Constitution, and it is that situation that has created considerable problems for this country.

Thank you.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Mr. Rivkin.

Ms. Martin, you make the point that the administration's claims that the war on terror justifies its detention practices. But then it does not use the rules applicable to armed conflicts such as the Geneva Convention carrying out these policies. Because we are at war, they also say our criminal rules are inapplicable, so it is hard to see which rules they feel are applicable.

Of course, it did not work out that way. The Supreme Court has stepped in, and, Mr. Rivkin, I would disagree. I think they have rebuked them four times. I do agree the entire legal basis for the detention plan is somewhat in doubt, the military Commissions system in disarray. Six years later, we are waiting for the first trial in the military commission.

So I would ask you: What is the view—what is your view of the administration's insistence that the fight against terrorism, however defined, is too complex and difficult for our existing legal system to handle, and that it should have this sort of never-ending detainee policy?

Ms. MARTIN. I don't think there is any evidence at all to support that proposition. What the administration has done is basically make up law as it has gone along, and that has been the cause of most of the problems. One might think that the reason for doing so was to give them the opportunity to abuse prisoners. Whether or not that was the real reason behind the detention policy, I think that if you ask most career military officers, they would agree that in the case of people picked up on the battlefields of Afghanistan or Iraq, if they follow the traditional laws of war as to the detention and capture of such individuals, that those laws will be sufficient. They will be able to detain dangerous fighters and not allow them to return to the battlefield. They will not have to follow these criminal law procedures that Mr. Rivkin is worried about. On the other hand, when you find individuals in Europe or the United States who are suspected of aiding or planning terrorist attacks, the civilian criminal law has proved to be more than adequate to apprehend those individuals and to put them away usually for life.

Chairman LEAHY. And you feel that both our civilian criminal courts and our courts of military justice are adaptable enough to handle these situations?

Ms. MARTIN. I do, and I believe, as to the civilian courts, the Committee has heard testimony about the study done by Human Rights First on the hundred or so terrorism prosecutions. And military lawyers have been quite clear that the uniform courts martial rules would be adequate to handle those detainees who are charged with war crimes and who are subject to military jurisdiction.

Chairman LEAHY. Let me ask, Colonel Gunn, as you had mentioned being in the office next to Mr. Haynes, just let me tell you, I looked back in the book, the Mayer book. She talks about a letter that Jim Haynes sent to me in the summer of 2003. It was about the administration's treatment of detainees. There have been a lot of press reports that have come out about cruel treatment of detainees. So I wrote Condolleezza Rice, who was then our National Security Adviser, asking for a clearer statement of the administration policy, whatever it might be. And the response came from Mr. Haynes, and I will put a copy of that letter in the record. He told me the Pentagon's policy was never to engage in torture or in cruel, inhumane, and degrading treatment of detainees. This was a part of that letter, but the Pentagon released the letter to the press. And it was a great statement. I agreed with the statement. Unfortunately, it was not true. And it seemed almost like it was designed to silence critics like myself, and actually critics within the Department.

What is your reaction to stories like this one? Were career military officers being listened to? Or was the policy set in such a way that they were ignored?

Colonel GUNN. Senator, I believe it has previously been reported here before the Senate, the Judge Advocates General—at the time of—in 2002 I was Executive Officer to the then Air Force Judge Advocate General, so I was in the front office on the evening of the Pentagon at that particular time. I believe based upon what I saw at that particular point and based upon what had happened earlier and what was reported to me, there was not a great interest in what the senior military officers were saying.

When various components of the military commissions system were being coordinated, it was coordinated in such a fashion that very little time, for instance, was given to the Judge Advocates General to provide a response. It seems as though there was an interest in checking off and being able to say that they had an opportunity to coordinate. However, there was very little interest in their opinions.

It was not unusual, for instance, for a document of complex rules and measures to show up on a morning and being told that they had until that afternoon to return their feedback. So it did not seem as though there was a real interest in what they had to say.

Chairman LEAHY. Thank you.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Let me just ask all of the witnesses for very brief answers to some questions here, and I will just start with you, Colonel Gunn.

First of all, do you think that the D.C. Circuit appeals rights provided to detainees until the DTA review provide less process to detainees than does habeas review?

Colonel GUNN. I cannot say that I am familiar with those rules, so I am not comfortable responding to that.

Senator KYL. Ms. Martin?

Ms. MARTIN. Well, I believe the Supreme Court held that they provided less process.

Senator KYL. Thank you. Mr. Rivkin?

Mr. RIVKIN. The Supreme Court certainly held in a portion of Justice Kennedy's opinion talking about the lack of equivalence between the DTA/MCA process and the traditional habeas. I certainly do not like that opinion. I think it mangles at least the—

Senator KYL. It was upheld.

Mr. RIVKIN. Yes.

Senator KYL. In view of that—and I would just go back this way here—is there any reason to preserve the alternative system of DTA review now that the Supreme Court has granted the detainees a right to pursue habeas review? Mr. Rivkin, would there be any reason to retain DTA?

Mr. RIVKIN. I would consider this question carefully, and I would put it in two different parts. On the issue of DTA-style prescribed review for decisions or condensed as review tribunals is not only superfluous—in fact, I would volunteer my opinion that the entire CSRT system is dead and in part because there are not going to be CSRTs in the future because we are not going to be detaining people. So habeas certainly is all you are going to get there, and I think it is going to only apply to the Guantanamo population. I could be wrong, of course, but I don't think so.

On the military commissions side, my hope is that—and a fair reading of *Boumediene* says nothing about military commissions. Depending on what happens in the next couple days before Judge Robertson—by Judge Robertson in a case styled *Hamdan II*, if the military commission process gets going, which I hope it will, none of the—and habeas being a collateral entity, here you got people who are basically getting a fulsome criminal justice level process. For that segment of the cases, we might as well wait until the military process is complete, and then you would go through the D.C. Circuit and to the Supreme Court.

So my hope is habeas would be inapposite to this population, but these days you never know. It depends on what the courts would say.

Senator KYL. Ms. Martin, do you believe that there is a reason to preserve the DTA review in view of the Supreme Court's ruling?

Ms. MARTIN. I am not sure, Senator. I think that we have two problems before us. One is the future treatment of future detainees. I think that needs to be put back on a regularized footing. And the other problem is sorting out the detainees in Guantanamo, which habeas courts are beginning to do. There are many complicated questions, and both need to be played out. There are different kinds of detainees at Guantanamo, and the courts are now going to look at the law applicable to each of them.

Senator KYL. If you have just a bit to think about it and you have the time and are willing to share a view with us about that, after you have done that, would you be willing to just drop us a note on that?

Ms. MARTIN. Certainly.

Senator KYL. And, Colonel Gunn?

Colonel GUNN. I would just say what I am familiar with is the Combatant Status Review Tribunal process, and I believe that if those were changed in such a way to be deemed adequate, it is very likely that a court would give those substantial deference in the process. And the reason that I highlight the Article 5 problem with the Article 5 tribunals is that that said the fact that no Article 5 tribunals were ever established, that led to the creation of the Combatant Status Review Tribunals, which in turn led—I believe contributed to a decision that led to habeas.

So I believe just going back and having adequate procedures from the beginning is something that is desirable.

Senator KYL. Right. Well, OK. We are just trying to determine what we need to do with respect to the law at this point.

The point I was trying to make earlier was not to criticize anyone, but to make the point that a lot of people in this Government—and, Colonel, you are aware of this—have tried very hard to make this process work. And there was a statement that I made in my opening comments, and David Rivkin actually put it in his remarks. Let me just ask if any of you disagree with this: He said, “Despite all the criticisms of the various procedural facets of the administration’s detainee policy, detainees in U.S. custody today enjoy the most fulsome due process procedures of any detainees or prisoners of war in human history.” And he noted that that was even the case before the *Boumediene* decision.

Do either of you disagree with that proposition?

Ms. MARTIN. I would disagree with that proposition. I think it—

Senator KYL. Well, if you do, then tell me a country that had a procedure that was more fulsome in terms of constitutional protection.

Ms. MARTIN. I think that both the U.S. citizen and the legal resident of the United States who were seized and held incommunicado for a number of years as enemy combatants were not given the due process that is required by the Fifth and Sixth Amendments of the Constitution, and—

Senator KYL. The statement was that we enjoy the most—that detainees held by the United States enjoy more protections than those granted by any other country, and you disagreed. I am just wondering, OK, where is their greater protection than what the United States has provided?

Ms. MARTIN. The countries of Europe, when they prosecute people for crimes who are alleged to be in the same position as many of these detainees—I think that the problem, Senator, respectfully, is that many of the detainees are not enemy combatants. And so it doesn’t answer the question to say do they have the same process as prisoners of war. That is one question. But they are not being held as prisoners of war—

Senator KYL. OK. Let me—

Ms. MARTIN.—and they are not—you know, they are criminals, not POWs.

Senator KYL. My time is up. Think about that because in my second round I am going to ask you the question again. If there is somebody that does it better than we do, I would like to know. And

you say Europe, so I want you to be specific about that when we come back, and I will ask Mr. Rivkin, too.

Thank you, Mr. Chairman.

Chairman LEAHY. OK. We may be talking about different things. I am sure that we will consider Abu Ghraib as not being indicative of what we want to do, but I want to give Mr. Rivkin—

Senator KYL. No. I am talking about detainee policy. That clearly was not the policy of the United States. People were prosecuted for what they did in contravention of American policy there. I think we would all agree on that.

Chairman LEAHY. I will give Mr. Rivkin a copy of a recent column by Ruth Marcus that responds to his point. They characterize the rights given Guantanamo detainees as the greatest in the world. And I will put a copy of that in the record, and we can go on to that when we get back.

Senator Whitehouse, if you would take over, please? And then Senator Cardin.

Senator WHITEHOUSE.—[Presiding.] Thank you, Mr. Chairman.

It strikes me that one of the things that distinguished the United States of America in history is that previous countries, empires, regimes, that have amassed great power have ordinarily done so through what you might call the hard use of force and power; and that one of the things that makes us categorically a bit different than previous powerful nations in history has been that we have figured out or managed to figure out how to use what I would call “aspirational” power.

My sense is that, you know, as the Earth spins and dawn sweeps around its circumference and people wake up in the morning and go off to do their business in countries on many, many continents, their vision of what America offers and their perception that we offer a new kind of leadership and a new kind of Government and principles that adhere to individuals in unique ways is something that provides our country enormous strategic, diplomatic, economic, and other kinds of strength. And I wonder if—let me start with you, Mr. Rivkin, first of all, if you agree with that proposition; and if you do, if you would care to quantify the extent to which you think that you may have a better way of describing it. I describe it as sort of aspirational power, that power of example and attraction, as opposed to power of force and compulsion, how important that is to our national strength and our national destiny.

Mr. RIVKIN. Thank you, Senator. Of course, I give it a sentiment, and that sentiment is correct, but that to me is just the starting point of analysis. You have got to ask several questions then.

Question No. 1—

Senator WHITEHOUSE. Before you go off, if you don’t mind answering the quantification part of the question. How important in your own words do you think that part of our national character, reputation is?

Mr. RIVKIN. It is quite important, and I would be foolish to deny that we have suffered a considerable decline in what some people have called “soft power,” which is what you were talking about. The question you have to ask yourself, which we as lawyers always ask: But for. Is that attributable to Guantanamo? Is that attributable to some regrettable incidents like Abu Ghraib? Is it attrib-

utable to a particular legal paradigm at the sort of overarching level the administration chose? Or is it attributable—

Senator WHITEHOUSE. Is “All of the above” an option?

Mr. RIVKIN. Excuse me?

Senator WHITEHOUSE. Is “All of the above” an option in that checklist?

Mr. RIVKIN. Well, yes. But I would also submit to you, with all due respect, Senator, that our European allies in particular, if you accept the proposition I would advance, that they are not serious about warfare, just like my good friend Ms. Martin, they do not think it is, by and large, war. They do not like the robust use of force. They do not like our rules of engagement. They do not like our approach to surveillance. They do not like our approach to interrogations. The price, Senator, we have to pay to regain their respect is very high indeed. I don’t mind even paying the price as long as we clearly understand we are talking about a policy trade-off. The thing that bothers me the most is that we are talking about the administration’s policy, this country’s policy, as if it was some kind of a shameless breach of our constitutional verities. Let’s pay more and let’s accept additional risk, if that is what it takes to make the Europeans happy. But let’s be clear. It is a policy tradeoff.

Senator WHITEHOUSE. I am thinking less about, you know, European politicians than I am about the fellow waking up in an African village trying to figure out what his country and his community should look like with Islamic recruiters beginning to encroach and offering him a vision of the United States that is a hostile and unwelcome one. It is not so much elite European opinion that I am concerned about. It is the actual folks whose names we do not know on the ground in villages and towns and barrios we have never heard of, but who collectively hold the United States in a particular kind of respect, or at least always have, how powerful that force is. Elite opinion I am less concerned with.

Mr. RIVKIN. Very briefly, two answers to that.

Point No. 1, to some degree it is we ourselves—and, unfortunately, as a byproduct this vigorous discourse about what is right—have brought it upon ourselves, because if the entire American body polity spent the last several years basically feeling more positive about our policy and legal choices, it would not have been as difficult to demonize it. But perhaps it is inevitable in democracy.

And, second, I would say very frankly, here again there are so many problems that some individuals who are inclined to move toward this particular path have with us. Look at the Danish cartoons. I mean, again, you always ask but for. If we had no Guantanamo, if we didn’t detain anybody, these people have problems with our support for Israel, our position of supporting repressive regimes in a world—this is not this kind of hearing. It is not a foreign policy hearing. But I can spend an hour telling you what problems they have with us, and unless we are ready to beat them all, this rating on our entire detention policy would not make that much difference with that proverbial person waking up in the village.

Senator WHITEHOUSE. My time has now expired, and in the absence of the Chairman, I will recognize the distinguished Senator from Maryland, Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman.

Let me followup on this line of questioning. I understand that we have a real challenge in dealing with this new type of threat against our country. But it is clear to me that our Constitution and laws and our international commitments require a certain degree of conduct that we did not comply with in dealing with the detainees that we were able to apprehend after the attack on our country on September 11th.

Now, the 9/11 Commission made certain recommendations, one which I thought was an extremely important point dealing with this issue, and that is that we should seek international consensus as to how detainees in combat dealing with terrorism would be treated so that we establish a conduct that is recognized internationally and it is not just the United States determining what is the appropriate conduct.

So I guess my question to us is: Recognizing where we are today and the fact that we are going to have an election and there will be a new administration that will be coming into power in January, what advice would you give as far as whether our current international treaties are adequate, whether we need to negotiate new agreements, whether our current criminal statutes are adequate to deal with this issue, what can we learn from other countries. And in response to Senator Kyl's point, it is my understanding that the House of Lords in Great Britain has struck down indefinite detention, that you have to bring people to trial. And, of course, we are still contending that we can keep people indefinitely.

So what process would you recommend or do you think the current laws are adequate?

Ms. MARTIN. Well, I will take the first stab at that, Senator. I think that in general, the current framework is adequate, and I think that there is—although I think a lot of work is going to need to be done about working out the details of how to deal with the different kinds of detainees at Guantanamo and what to do about the military commissions that have started, I think that it is—there is a grave danger of trying to construct a new framework even in the context of international treaty making, because we start from behind, given where we are in the last 6 years. And as both you and Senator Whitehouse have mentioned, I think the key thing is for us to re-establish our position in the world and not be seen as constructing a framework that is only to detain suspected terrorists.

Senator CARDIN. Well, let me challenge you at least as to one part of that. Clearly, I cannot justify, nor do I want to try to justify, the detaining of the individuals at Guantanamo Bay for the length of time without being brought to trial, the length of time being unable to seek counsel, and I could go on with a whole list of things. But when a suspected terrorist is first apprehended, there is a need for interrogation, and I am not an intelligence officer, but I have been told that it is compromised, if that individual has outside contact with counsel.

So how do we reconcile the current need of interrogating suspected terrorists with, as I think you and I agree, the abuses of this administration? And how do we deal with moving forward in our efforts to protect the people of this country, but yet establish the

appropriate framework knowing what has happened during the past 5 years plus? Don't we need some clarification of our laws or at least some international sanction to the appropriate way to move forward?

Ms. MARTIN. Well, I think the details need to be worked out, but generally when individuals are picked up in Afghanistan or Iraq, they can be detained indefinitely until the end of hostilities in those countries. Second, the military has standard rules for interrogation, tried and true and good rules for interrogation; Third, that if you find a suspected al Qaeda member in Europe or the United States, he be arrested under the criminal law, criminal suspects have been interrogated for years quite successfully within the rules of the criminal justice system. Indeed the FBI agents who interrogated the al Qaeda individuals who were indicted and convicted before 9/11 have made a very convincing case that they were able to interrogate them within the law and obtain useful information. But the problem was that that information was not shared within the Government, not that the interrogation—and that there is no—

Senator CARDIN. But there is a question as to whether the—at least the United States has raised, our Government has raised the issue whether they are subject to the Geneva Convention.

Ms. MARTIN. If the individuals who were picked up in Europe and the United States had been picked up not as enemy combatants but as suspected criminals, they would be—

Senator CARDIN. But they changed—you know, right now they use the classification to meet their needs. The United States has done that.

Ms. MARTIN. Right, and that is the problem.

Senator CARDIN. So moving forward, how do you move forward without clarifying that? I am not sure I understand your position that the current laws are adequate. It seems to me that we do need to seek the support and understanding of the international community moving forward. We are going to have the opportunity with a new administration. I think we have got to be prepared to go forward on that to restore not only the point that Senator Whitehouse raised about the United States' ability to affect support internationally for our values, but also as a practical matter that these issues are going to be with us moving forward.

Ms. MARTIN. I do think that the use of the criminal laws, which is what our European allies use to detain and interrogate individuals would be adequate in the United States. There is one category of individuals which is difficult to figure out whether they may be detained under the law of war or the criminal law and that is Osama bin Laden. And I favor—my view is that he could be detained under the laws of war, even if not captured on the battlefield, but some disagree with that.

But that is a very small category of individuals, those who planned the 9/11 attacks.

Senator CARDIN. We will continue this. I guess my point is that the international community may very well want a little bit more definitive findings rather than leaving it to the judgment of the United States in its current law's interpretation.

Thank you, Mr. Chairman.

Chairman LEAHY.—[Presiding.] Let me go into a couple of things. Recently—and this is for you, Colonel—we read about military commission judges and defense lawyers, even prosecutors, being fired or replaced or being driven to resign, apparently because they gave rulings adverse to the Government or they were critical of the military commission process. And you had mentioned earlier the lack of a chain of command.

If you start firing key participants or replacing them or forcing resignations, doesn't this kind of give the impression to not only us here in the United States but to the rest of the world that somehow this thing is rigged? I am not trying to put words in your mouth, but it bothers me when I see it.

Colonel GUNN. No, Senator. I am actually comfortable with that terminology of saying that it gives the impression of a rigged or sham proceeding. And I am familiar with what you are referring to. My former Air Force colleague Colonel Morris Davis was the chief prosecutor. He felt motivated—compelled to resign from his position as chief prosecutor because the legal adviser to the appointing authority, a person who was supposed to have an impartial role, seemed to be more motivated by political considerations than by making sure that we had a system that was just and a system that functioned well. That individual seemed to be motivated by having trials in such a way that they might in some way influence the elections. And Colonel David, when Mr. Haynes sought to change his reporting chain, such that he reported directly to this person, he rejected that notion and submitted his resignation.

The thing that I am proud about with respect to the system is that when you looked at it individual by individual, there are many folks that have done courageous things under that system, both on the prosecution side as well as the defense side. I am extremely proud of that.

However, the arrangement, the fact that there is no independent chain for the defense counsel, the fact that that was a problem that was anticipated and it was not addressed, is quite disturbing.

Chairman LEAHY. Thank you. We actually have had several flag officers who have come in here and testified similarly, and I think courageously, because they know that that may not be what the Pentagon wanted to hear at the time.

I am reminded—which has nothing to do with this in way, but I am reminded that shortly after the break-up of the Soviet Union, a group of parliamentarians now from Russia came to visit me—and a number of other Senators, but they came to talk to me about judicial systems. And one of them said, “Is it true that in your country a lot of people can actually sue the Government?” And I said, “Yes. It happens all the time.” And he said, “And are we right in understanding that sometimes the Government loses?” I said, “Yes. Happens all the time.” And they said, “Well, didn't you replace the judge?” And I said, “No.” And I think it was almost like a light bulb going on that we are truly independent. And that is the way I feel we should be.

Now, I have been critical of aspects of the Military Commissions Act. There was an attempt to deny detainees, potentially others, from the habeas corpus rights. And Senator Specter and I worked hard to restore those rights through legislation. We got 56 votes in

the Senate. Unfortunately, we had a filibuster and we needed 60. I hailed the Supreme Court's decision, *Boumediene*, because it recognized the constitutional right to habeas. Mr. Rivkin is saying—and I will certainly give you time to respond, Mr. Rivkin. The courts assumed it was going to lead to chaos in the courtroom even worse than the battlefield.

Am I right, Ms. Martin, that the decision creates no new rights but simply restores what rights were there before the Congress unwisely, and now apparently unconstitutionally, tried to strip away habeas rights?

Ms. MARTIN. That is precisely true as you have noted, Mr. Chairman. The Court, this very conservative Court decided, said it was simply restoring the rights that existed there before.

Chairman LEAHY. And just for the people who may be watching this, habeas proceedings are not the same thing as a full trial by any means. I think there are thousands of habeas petitions heard every year through this country, and they are usually a fairly quick hearing, are they not?

Ms. MARTIN. Yes, and I think if you look at the reason why the Supreme Court, a conservative Supreme Court rebuffed the Government and restored the habeas right is because Guantanamo was set up to be a place beyond the reach of law. It was not set up as a POW camp. It was not set up as a camp for prisoners held as combatants under the traditional laws of war. It was set up as a place where the administration could warehouse people subject to no law. And the Supreme Court said that since the Magna Carta the President may not pick up anybody he chooses anywhere in the world and hold them indefinitely without any court looking at the legality of the detention.

Chairman LEAHY. My time is up. Senator Kyl, if you might, Mr. Rivkin obviously has a different view, and I wonder if you would have any objection to him giving his—

Senator KYL. Go ahead, Mr. Rivkin.

Mr. RIVKIN. Thank you very much, Mr. Chairman. I appreciate it. Several rejoinders to my good friend Kate.

First of all, it is a canard that the reason Guantanamo was chosen was solely because of what was believed at the time, quite reasonably, a lack of Article III core jurisdiction. The key reason Guantanamo was chosen is because it solved the Mindy problem, because it is dangerous—I don't think anybody would disagree—to hold several hundred enemy combatants. Remember all the history of the IRA trying to liberate their colleagues. And as a matter of fact, don't take my word for it. The last time I checked, there was a vote last year in the Senate 94–3 against moving any detainees here.

But leaving that aside, on the question of what is the cost of habeas, first of all, with all due respect, Mr. Chairman, to the extent that—and I was present during the *Boumediene* oral argument. I remember. Justice Scalia posed a question to the lawyers, to the counsel for Mr. Boumediene asking for one example, one example in American history, in wars that we engaged in where enemy combatants were given access by habeas to the judicial system, and the answer was none. That was not the case in the Revolutionary War—that was before the Constitution—not the case in the Civil

War, not the case in World War I or World War II. So whether it existed there or not is a different issue, but the thing that bothers me the most is, frankly, the perception that it is very easy. I can tell you, it is not very easy because the style of habeas review that would be exerted here is quite different from that in a normal criminal case. We are talking about hundreds of Justice Department attorneys, beginning with 50, working on returns. We are talking about not only 200 pending cases with the detainees now, but roughly 300 old cases that have been held in abeyance. We are talking about a flurry of motions. We are talking about disputes over discovery. The—

Chairman LEAHY. Mr. Rivkin, you were in the administration. Were you consulted on the choice of Guantanamo?

Mr. RIVKIN. No. I was obviously not consulted on the choice of Guantanamo.

Chairman LEAHY. I was just curious.

Mr. RIVKIN. But I recall at the time—and since I am not in the administration, I would not be consulted in such matters. But I do recall vividly at the time Guantanamo was chosen talking to people and asking them, just informally, what were the key policy drivers, and, yes, one of the policy drivers, as I understand it, was the view that, consistent with the then existing legal baseline, there would be no legal jurisdiction. But another key problem was nobody wanted to have in her or her district 200-plus enemy combatants. And I don't think that has changed today.

But the last thing I would say very briefly -and I appreciate the opportunity to let me explain this. We are talking about a very difficult situation. A number of people will be held not to be enemy combatants—I stipulate that, everybody agrees with that—because of restrictions on transferring people to deferred country where they might be mistreated. We cannot find a home for them. And under immigration laws, you basically can hold people for 6 months. So in the not too distant future, Mr. Chairman, we are going to face a spectacle of—unless you change the law, of giving some kind of a parole or asylum in the United States to a bunch of people who are not necessarily innocent shepherds and aid workers.

Chairman LEAHY. I won't go into the case of Mr. Arar, who was a Canadian citizen, because he just wanted to go back to Canada where he is a citizen. Instead, we sent him to Syria where he was tortured and eventually returned to Canada, and he got about a \$2 million settlement because of that. So it is not always quite as neat as you might suggest.

Senator KYL?

Senator KYL. Well, thanks. Let me just followup on this question, because I think it is obvious that there is a severe practical problem. Let me ask all of you, please, to keep your answer yes or no, if you could. Do you think that a Federal habeas court in the U.S. would have the authority to order that a detainee be released into the United States? Colonel Gunn?

Colonel GUNN. I believe that they would have such authority, but would not exercise it as a practical matter.

Senator KYL. OK. Interesting.

Ms. Martin?

Ms. MARTIN. The only court ruling I know of said it does not have authority. I think that ruling will be appealed, and I hope that the court does have the authority. I do not think they will have occasion to exercise that authority.

Senator KYL. Mr. Rivkin?

Mr. RIVKIN. I do not think they do have the authority, but I would bet you anything, Senator Kyl, that we will find a judge in months to come that would rule differently.

Senator KYL. Well, if they do—let's assume for the moment, take Ms. Martin's question, that they would not exercise that authority. Your postulate was that an individual could not be voluntarily returned to his country because of either, A, the fact that the country would not take him or, B, our concern that he would be tortured and mistreated in that country. What is the alternative if we cannot find a country to take such a person? I will turn to Ms. Martin first and then to you.

Ms. MARTIN. The alternative would be to allow him into the United States. But, of course, we are only talking about individuals whom the district court and the court of appeals have found are innocent and that—

Senator KYL. Excuse me. No, no. The question was not guilt or innocence. You are aware of that.

Ms. MARTIN. Well, they have found that the Government has no evidence and there is not a reasonable doubt standard to allow the Government to continue to hold him. My experience as a litigator for many years is that it is going to be extremely difficult to find three Federal judges—one district court judge and two appeals judges—who are going to sign, who are going to order the release of someone when the Government has real evidence that this person is a dangerous person. That just has not happened, and it is not going to happen.

Senator KYL. Under the procedures that the Government has utilized thus far, which try very hard to distinguish people that are dangerous and those that are not—and we have returned, I think, something like 300, close to 300 detainees from Guantanamo Bay, the latest statistic I have is that at least 35 of those detainees who have been released from Gitmo have returned to committing acts of terror and have ended up killing people from other countries. Just, for example, a few months ago, they released a Kuwaiti detainee who committed a suicide bombing in Mosul, Iraq, killing seven Iraqis. So even when we try to make the decision as to whether we think somebody is safe to release or not, it has been very clear that about 10 percent of them have not been safe at all. And that does not even get to the point of trying to figure out, since when they were captured there was not this standard that you have to have evidence to satisfy a habeas court to justify their detention, I do not know where that evidence is going to come from.

Mr. Rivkin, I did not give you a chance to answer.

Mr. RIVKIN. Very briefly, I cannot disagree with Kate more, precisely because I assume a district court and an appellate court judges are going to in good faith follow the teaching of the Supreme Court. If you look carefully at the *Boumediene* decision, it envisions a traditional habeas in an environment where, as you, Senator, correctly pointed out, the Government has not amassed a factual

record that would approach that in the criminal justice system, not because, again, the wonderful people—and, by the way, with all due respect, guilt or innocence is not at all an issue here. The narrow question in the habeas case is, Does the Government have evidence to hold the person? And you can have two situations. You can have a Government that is not able to prepare a sufficient return just because this is—a battlefield is not a CSI scene. Or you can have an even more Hobbesian problem where the Government does have such evidence but is afraid to put it in the return because, remember, if your return is sufficient, it is only a prima facie case. Then the burden shifts. Then the defense counsel would press for discovery. Can you imagine the silly spectacle of a country in the middle of a war having attorneys for an—this is where the return is sufficient, so you know the person is presumptively an enemy combatant. His lawyers are pressing for discovery about intelligence information?

So a lot of these people would be let go. I mean, we are a Government of laws, not man. The judges may feel terrible about it, but the table where Justice Kennedy sat, we all have to sup at. They will be released, and under the current law they can be held in immigration custody for 6 months. If you cannot find a country willing to take them or wanting to take them, it does not provide adequate assurances of your treatment. So some of these people, unless you change the immigration law, they will be released here.

Senator KYL. Let me just ask one last question. Ms. Martin, you made the distinction between a battlefield capture and a capture off of the battlefield, but the laws of war are adequate to deal the person captured on the battlefield, you said. Does that include habeas rights? Is there anything in the laws of war that entitle people to habeas protection?

Ms. MARTIN. The individuals captured on the battlefield and held in Afghanistan or Iraq under the laws of war may well not be entitled to habeas. The Supreme Court has not decided that. The problem in Guantanamo is quite different. Many of those were not captured on the battlefield, and those who were captured on the battlefield were not accorded the rights that they were due under the laws of war, and so now are being given habeas.

Senator KYL. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator—

Mr. RIVKIN. Just 30 seconds. I wish it were so. If you look at Justice Kennedy's opinion, he makes no such distinctions, and we have attempted habeas petitions with people held in Bagram and Tumbuka. The logic of a majority's position has nothing to do with where you were captured. So basically, the United States is out of the detention business, unfortunately, for good.

Senator KYL. All right. Let me thank all the panel. I am about half an hour late to get to the floor now myself, so I am going to have to run.

Thank you.

Chairman LEAHY. Thank you.

Ms. Martin, did you want to respond to that?

Ms. MARTIN. Well, yes. I read Justice Kennedy's decision as much more limited. It is completely tied to the facts of Guantanamo. I think the Supreme Court has been very clear about decid-

ing one issue at a time. At the moment, it has decided that the individuals being held at Guantanamo have the right to habeas corpus.

I think that if we have a new detention regime where individuals who are captured on the battlefield are treated according to the laws of war, they are not abused, they are given their Article 5 hearings, you will not have Federal district courts or the Supreme Court reaching out to say we need to have judicial review of detentions in Afghanistan or Iraq.

I know that people are seeking that, but I am doubtful that the courts will go in that direction.

Chairman LEAHY. Thank you.

Colonel GUNN. And, Senator, if I may, the Supreme Court decision does not overrule the *Eisentrager* decision from the 1950s, which held that German combatants that had been captured in China after World War II had ended, that they were not, in fact, entitled to habeas protections. And that decision was the fundamental reason why the detainees were being kept at Guantanamo. I think the lawyers and the administration that viewed that as a basis for saying that Guantanamo was a safe zone that would not be subject to habeas protections, even though it has been cut back, the Supreme Court and Justice Kennedy goes on to say in *Boumediene* that that decision does, in fact, remain intact and that you have to look at the facts and circumstances.

It is a fundamental law of war that a combatant—a nation can hold a combatant who is captured for the duration of hostilities. That remains in effect. And so Guantanamo is a unique situation.

Chairman LEAHY. Thank you very much.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Chairman. Just two quick responses to the debate that sort of swirled around me.

First of all, I read Justice Kennedy's decision exactly the same way, highly Guantanamo specific. So at least you have one supporter of that view on this panel. I am a little surprised, frankly, that Mr. Rivkin, given other views you share, sees this as such a broad mandate. I mean, it might not be a bad thing, but I certainly do not think it is where they went.

The second point is that I think this question of the release of detainees who have gone back to the battlefield frankly is not a helpful fact in arguing the question that we are arguing. As I understand it, all of those folks were released by the Bush administration, and it was an executive determination, and it proved to be significantly erroneous. And perhaps had their procedures been a little better and they felt they were up against the standards of following law of war and so forth, they would not have made those improvident releases. In many ways, you could actually -you could turn that argument either way. So I am not particularly impressed by that.

I would like to followup a little bit on Guantanamo, which I think at this point is pretty much conceded by all parties a stain on our national character. And I note with particular interest in the decision in *Parhat v. Gates*, the Court, at page 34, is addressing an argument by the Government seeking to designate as protected any names and/or identifying information of U.S. Government per-

sonnel. And they describe the argument in favor of this by the Government, by the Bush administration. It says—this is the Government's words, quoted in the opinion. "It is appropriate to protect from public disclosure unclassified information identifying Government personnel because the risks to the safety of those personnel, particularly those who often deploy to locations abroad, would be heightened if their involvement in the detention of enemy combatants at Guantanamo were made public."

That to me is kind of a high watermark. The Government of the United States is conceding in court that Guantanamo is such a blot on our national character and reputation that it now, as a matter of security, is important that we not disclose anybody who worked there because it has become so offensive that it is now a risk to their safety to be associated with our conduct of that episode. So given that, it seems to me to be a matter of particular importance that we close Guantanamo.

I am a fisherman, not a very good one, and I have had the experience that some problems you get into are very hard to unsnarl. You can spend hours trying to undo a knot in your line that took 30 seconds to get into. And I am afraid that this Guantanamo mistake is now going to be very, very difficult to unsnarl. I see it as having legal dimensions, military dimensions, intelligence dimensions, corrections dimensions, diplomatic dimensions, logistical dimensions, JAG—so assume, A, that Guantanamo is, in fact, something we need to put behind us as a country and we need to try to move on as quickly as possible. Would it not be important in unsnarling that particular mess to have some sort of body that drew from all of those different areas of expertise to advise Congress on how to do this right and in the most effective way, sort of a Guantanamo Base Closing Commission of some kind? And what would your thoughts be on that, and what skills sets do you think should be involved in that?

Since I spent all my time with Mr. Rivkin last time, let me start with Ms. Martin this time.

Ms. MARTIN. I totally agree that it is a terrible snarl of a problem. I think that the habeas courts will begin to unsnarl that problem. There are some 200 people, I think, still there. I assume no more people will be transferred there. I think about 60 of them have been cleared for release and that the Government presumably will find a place to send them sooner or later. So we are really only talking about 100 or so people.

Given the fact that they are entitled to habeas and those proceedings will go forward, the lawyer in me thinks, well, the courts will sort some of this out. There are some underlying issues about the definition of "enemy combatant" which are difficult. Perhaps a commission might be useful, and Congress needs to look at that question. But the initial question of are the wrong people being held—I think the habeas courts will do a good job sorting some of that out.

Senator WHITEHOUSE. It could take years, and in the meantime you still have to hold everybody at Guantanamo, and it remains—

Ms. MARTIN. I am not sure it will take years. I think the courts, once—I suppose the Government might try to delay it. It could take years.

Senator WHITEHOUSE. I am sorry. My time expired, and I went over. My apologies, Mr. Chairman.

Chairman LEAHY. That is OK. Did you have a further question, Senator?

Senator WHITEHOUSE. No. That was it. I am interested in how rapidly we can close Guantanamo and what the—

Chairman LEAHY. Because of the situation—

Senator WHITEHOUSE.—Government mechanism should be for overseeing it to make sure it is done right and rapidly.

Mr. RIVKIN. May I weigh in very briefly on just—

Chairman LEAHY. Very briefly, because we are going to have to go back to the floor. And, incidentally, I will keep the record open for each of you if you want to add to your testimony or put anything. Obviously, I do not want to cutoff any one of you on that, so you have that chance to add to it.

Mr. RIVKIN. Thank you, Mr. Chairman. The only thing I was going to say is there is actually not a whole lot to do on the purely legal side. I agree with Kate in this respect. Let the habeas process work its way.

A number of people will be determined not to be enemy combatants. At least the Government has been able to do that. You need to decide if you want to change immigration law to enable the U.S. to hold them in immigration custody or not. That is your decision.

The biggest issue is political. Where are you going to put those people? Surely it would not be fair for the President alone, this President or his successor, be it Republican or Democrat, unilaterally to decide to impose that burden on people around, you know, Charleston or in any other location. So that is the issue for you to decide. Where do you want them to go?

Senator WHITEHOUSE. Just for the record, maybe you can fill me in if it is not correct. I am not aware of a single human being who has ever escaped from a Federal correctional institution, ever.

Mr. RIVKIN. It is not so much escape, Senator, with all due respect. There is a very real possibility there will be an unsuccessful but very bloody effort to rescue them, just like all the efforts to rescue IRA terrorists, which were mostly unsuccessful. If I were living in close proximity to Fort Leavenworth, I would not be very happy about it. I would strongly suspect—I forget her name, the woman who represents the District where Fort Leavenworth is, if I am not mistaken, in the discussion of this issue basically said on the House floor, “Over my dead body.” And all of you voted 94–3 last year against the idea of transferring detainees here.

Ms. MARTIN. I just want to say I have more confidence than Mr. Rivkin in our intelligence agencies and FBI and that there will be no bloody attack on a Federal correctional institution in the next 10 years, no matter who is in prison there.

Chairman LEAHY. I also think that we would not have the kind of obvious cooperation that went on in other countries that terrorists had broken into prisons. I have a lot more confidence in our Federal corrections system.

I am going to enter into the hearing record the written testimony of Ramzi Kasseem, a clinical lecturer in law, Robert Cover Teaching Fellow at Yale Law School. He has represented seven detainees at the U.S. Naval Base in Guantanamo. At my request he provided

his thoughts to the Committee on the administration's detainee policies and he shares the changes he feels necessary, and I will put that in the record.

And both of the Senators who are going to be nominated to succeed the President—Senator McCain and Senator Obama—spoke yesterday about the current challenges we face in restoring America's leadership and making America safer in a dangerous world.

As part of America's new strategy, we have to restore a sound legal footing and respect for the rule of law in how we deal with detainees. If we are going to reclaim our leadership in the world, we have to return to the America whose ideals and practices were the beacon of hope and human rights for the world.

There will be no—pro or con, there will be no comments from the audience.

I think that great strength has been sacrificed to a great extent, certainly those of us who travel around the world and talk to those nations that were solidly behind us the day after 9/11. Even since then, today we know how much we have lost.

This Committee, with our newly created Subcommittee on Human Rights and the Law, our Subcommittees on Terrorism, Courts, Crime and the Constitution, can help. We will have other hearings on this. We will hear from both sides. It is not so much for legislation now. That will not occur. But for being able to give advice not only to the next President. The next President will be sending his Attorney General before this Committee, the Attorney General nominee, as well as many of the others in the Department of Justice for confirmation. I want to make sure that the questions asked by both Republicans and Democrats reflect what is going on.

There was a suggestion we have not had oversight on this up until last year. To a large extent, that is true. I do recall, in due respect to the Republican Chairman of the Committee, he was prepared to hold those hearings, had subpoenas prepared to go out. It was blocked by the Vice President who said we should not be asking questions. Frankly, in a free Nation, a free country, we should never be afraid of asking question.

With that, we will stand in recess.

[Whereupon, at 11:43 a.m., the Committee was adjourned.]

Questions and answers and submissions for the record follow.]

SUBMISSIONS FOR THE RECORD

Senate Committee on the Judiciary

Hearing on

**“How the Administration’s Failed Detainee Policies Have Hurt
the Fight Against Terrorism: Putting the Fight Against Terrorism on
Sound Legal Foundations”**

Statement of Senator John Cornyn

July 16, 2008

Mr. Chairman, I believe that this hearing is premised on two false assumptions: that the Bush Administration’s detainee policies have irreparably harmed our international standing and that those policies have made this nation less safe. The facts show that the Administration has had great success in conducting international diplomacy to advance American and collective security against the terrorist threat, and that if anything is putting our national security at risk, it is the unilateral dismantling by the Supreme Court of the bipartisan detainee policy established by the two elected branches of the federal government.

It is important that we acknowledge the successes in international diplomacy over the last 7 years that have made America safer. In today’s highly politicized environment, it is no surprise that many overlook any good news in our war on terror. It is particularly unsurprising that the Administration’s diplomatic success in forging successful relationships with our European allies to build up our counterterrorism capabilities is practically unmentioned. These alliances contradict two of the most popular pieces of conventional wisdom: that there is no good news in the war on terror and that the Administration is a diplomatic failure. But these alliances are real, and they have proven successful.

Since the tragic events of 9/11, European and U.S. diplomatic and intelligence agencies have worked hand-in-hand to gather and share information on Al Qaeda and the global terrorist threat. This cooperation has led directly to intelligence that has kept America safe. Simply stated, the Administration’s European diplomacy has helped prevent terrorist attacks on our homeland.

European support for America’s War on Terror began when, just months after the terrorist attacks of 9/11, Spain entered into an agreement with the United States to exchange information on suspected terrorists. Since then, the Bush Administration has negotiated with other nations, including Italy, Poland and Switzerland, and entered into bilateral agreements that provide access to biometric data of known and suspected terrorists. The latest nation to enter into such an agreement was Germany, which has proven a steadfast ally committed to increased cooperation in our fight against terror.

Due to the partnerships forged by the Bush Administration, European nations have also made great contributions in our war on terror by sharing information on the assets of known and suspected terrorists. Danish officials, for example, have worked closely with the United States through the Financial Action Task Force (FATF). This relationship has resulted in freezing the assets of suspected terrorists and has helped shut off terrorist financing.

America has also forged informal intelligence relationships with nations such as Bosnia-Herzegovina, Bulgaria, and Switzerland. The sharing of information with these nations has established a network of intelligence that supports our efforts to defeat radical extremists and, ultimately, to secure our nation.

But in spite of these diplomatic, collective security successes, we frequently hear of European animosity toward the United States. We hear over and over that the influence and reputation of the United States abroad has suffered because of the policies of the Bush Administration in prosecuting the war on terror. One would think that America's relationship with Europe has been irreparably damaged—because of the detainee policies of the Administration. But these statements are at best overstated, and primarily fueled by partisan sentiments.

Setting aside the criticisms, we should give credit where credit is due: since 9/11, the United States has successfully increased its international intelligence gathering capabilities. Though some may fail to acknowledge the Administration's accomplishments, we cannot deny the strong, fruitful partnership between America and Europe that has successfully bolstered counterterrorism capacities. These diplomatic efforts have made America safer and helped to prevent another domestic terrorist attack for close to seven years. The international sharing of intelligence relating to terrorism today is much stronger than it was in the late '90s.

In short, the Bush Administration's successful diplomatic efforts, particularly with European nations, have made America safer. It is not a headline you will see on the front page of the *New York Times*, but it is a fact.

Equally important, I think that we should acknowledge how the Supreme Court has hurt the fight against terrorism by dismantling the sound legal foundations established by the Congress and the President. When it comes to fighting the war on terror, many on the other side of the aisle seem to have more faith in the decisions of judges and lawyers than they have in America's generals, soldiers, and elected representatives.

At best, this hearing is moot. The policies that this hearing attacks have already been dismantled by the Supreme Court in the *Boumediene* case. The challenge before Congress now is to reassert the primacy of the elected branches of the federal government in war making policy by crafting a new set of appropriate legal procedures that appropriately balance the national security of the United States with the necessity of protecting human rights and conducting successful diplomacy. That is the hearing we should be having today. Unfortunately, the majority would rather continue to rail against the Bush Administration than take on the much more difficult task of crafting a new detainee policy.

In the *Boumediene* decision, the Supreme Court granted, for the first time in the history of warfare, a nation's wartime enemies the right to contest their detention through the writ of habeas corpus in civil courts. In so holding, the Supreme Court rejected the considered wartime judgment of the people's elected representatives. In fact, the *Boumediene* decision raises the fundamental question of whether America's response to the threat posed by international terrorism will be directed by the people, through their elected representatives, or by politically unaccountable judges who lack expertise and experience in national security decision making.

The two laws the Court struck down in *Boumediene*, the Detainee Treatment Act of 2005 (the “DTA”) and the Military Commissions Act of 2006 (the “MCA”), were broadly bipartisan bills passed by wide margins in Congress. The DTA ultimately passed the Senate by a unanimous 93-0 vote, with the support of many of those now praising the Court’s ruling.

Together, the DTA and MCA provided a more-than-adequate review process for enemy combatants, including an appeal to the D.C. Circuit Court of Appeals. Chief Justice Roberts correctly described the detention review process established by these laws as “the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants.” The Chief Justice pointed out that the laws struck down by the Court provided “more opportunity and more process . . . than that afforded prisoners of war or any other alleged enemy combatants in history.”

These generous procedures proved insufficient for five Justices on the Supreme Court, who held, for the first time, that alien enemy combatants detained during wartime by the United States military possess the constitutional privilege of habeas corpus. Never, from the birth of America until last month, have the captured enemies of the United States had a right to a habeas petition in the U.S. civil courts demanding their release.

Not only is it impossible to imagine the Supreme Court granting habeas corpus review to the hundreds of thousands of German or Italian or Japanese prisoners of war in World War II, but, in fact, the Court rejected just such an attempt in the well-known *Eisentrager* case. Despite the fact that the *Eisentrager* decision was directly applicable, the Court’s majority ignored it—along with the fact that in the 700-year history of habeas corpus, the writ has never applied to foreign enemies captured during wartime.

Mr. Chairman, I must also stress that the Court’s holding is contrary to the Constitutional order of our government. Even though the Constitution clearly places matters of war, peace, and international relations in the hands of Congress and the President, the Court grabbed for the Judiciary alone the power to decide how terrorists captured abroad should be treated. The Chief Justice correctly observed in his dissenting opinion that the *Boumediene* decision was “not really about the detainees at all, but about control of federal policy regarding enemy combatants.”

The holding defies common sense. By the majority’s admission, judges are ill-prepared to handle national security matters. Justice Kennedy wrote that “[u]nlike the President and some designated Members of Congress, neither the members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation’s security.” This is exactly why Congress and the Executive Branch—and not the Courts—should set the Nation’s terrorist detention policies.

The Supreme Court’s ruling puts this nation squarely on a backward path toward treating terrorists like common criminals—the misguided strategy that, in many ways, contributed to the attacks of September 11, 2001.

Unfortunately, many members of Congress seem to endorse the Court's usurpation of war powers, and with it the reversion to the pre-9/11 law enforcement model of combating terrorism. This would mean once again treating terrorists like common criminals and trying them in federal criminal courts rather than engaging them militarily, on the battlefield. We tried that approach in the wake of the first World Trade Center bombing in 1993—and it proved a failure.

Yes, there were some convictions. But, as the current Attorney General of the United States testified before Congress earlier this year, there are too many dangers inherent in criminal trials—most importantly with leaks of classified information and the inability to effectively gather intelligence through interrogation. Attorney General Mukasey speaks with authority on these problems inherent in criminal prosecutions of those who are waging war against us. That's because when he served as a federal district judge in New York City, he presided over the trial of the original bombers of the World Trade Center.

The Democrats would have you believe that granting terrorists the rights afforded common criminals has no consequence. But, as I and others have explained, there are dire consequences to our national security that flow from the Supreme Court's *Boumediene* decision. Despite that our military has removed these terrorists from the battlefield, the Court's ruling allows them to continue to (figuratively) wage war against the United States from inside our own civil court system.

Two of the other side's most prominent foreign policy voices have explicitly said that, if captured and transferred to Guantanamo Bay, Osama bin Laden is entitled to challenge his detention through the writ of habeas corpus in U.S. civilian courts. This is highly revealing of a continued lack of understanding of the nature of the terrorist threat and the goals of our enemies. Granting Osama bin Laden the same rights and protections under our Constitution as common criminals does nothing to make America safer—and does everything to embolden our enemies.

Other than choosing not to detain the terrorists at all, could there be a more effective way to encourage our enemies to violate the laws of war than by granting them access to our civil court system? To understand the danger posed by this ruling in this age of terrorism you need only understand one thing: this ruling guarantees more rights and protections to terrorists who hide among civilian populations and kill innocents than the Geneva Conventions and laws of war afford U.S. soldiers who wear uniforms and bear arms openly.

When illegal combatants get more rights than legal combatants, the incentive to America's enemies is clear. Not only will conducting your war illegally through terrorism not be punished, it will increase your legal rights. The message to Osama bin Laden is plain: America doesn't have the sense to treat the war on terror like a war at all. Terrorists will only benefit in continuing to attack and hide among civilian populations in violation of the laws of war.

Osama bin Laden has declared war on the United States of America. And, in return, the Supreme Court has guaranteed that America will give bin Laden his day in court.

The argument that America's pre-*Boumediene* detainee policy has harmed the war on terror relies on an attenuated chain of reasoning: that our policy has so harmed our international

standing that it has made international cooperation in fighting the war on terror impossible. This argument is belied by the facts—America has had many diplomatic successes in the war on terror that were achieved with the pre-*Boumediene* detainee policy intact.

The argument that the *Boumediene* case has harmed the war on terror is more direct and more plausible: that giving terrorists unprecedented rights and civil trials will return us to the failed, pre-9/11 law-enforcement model of fighting terrorism. This argument comports with the facts—the law enforcement approach failed to prevent 9/11, while no domestic attacks occurred during the pre-*Boumediene* detainee policy.

It is hard to understand how the *Boumediene* case will make America safer. I fear that it puts America at greater risk.

SETON HALL LAW

PROFILE OF RELEASED GUANTÁNAMO DETAINEES: THE GOVERNMENT'S STORY THEN AND NOW August 4, 2008

Statement by Mark P. Denbeaux, Professor of Law

The attached report is the culmination of two-and-a-half years' analysis of the government's unclassified documents pertaining to detainee and operations information at the United States Guantánamo Bay Detention Facility. Specifically, Seton Hall Law's Center for Policy and Research analyzed the criteria used by the Department of Defense (DoD) to determine when to release each Guantánamo detainee. Through a painstaking process, the Center was able to name the detainees who were released and their date of release, and correlate that release date against the DoD's classification of detainees as fighters, members, or associates of Al-Qaeda and the Taliban.

In short, the Center sought to determine how evidence gathered against any given detainee influenced the decision whether to release him. Center researchers expected to find that the detainees who presented the greatest threat would have been released last, or would still be held at Guantánamo.

Center analysis shows that was not the case. The only significant correlation to one's being released, the date of his release, and status upon release, is the nationality of the detainee. Those from Afghanistan, Pakistan, or Saudi Arabia were more likely to be released, and more quickly.

Until this point such information has been unknown because the DoD withholds detainee identification from its release announcements. The study strongly suggests that the DoD purposefully hid the identify of released detainees so they could obscure the insufficiency of evidence for their detainment. This may explain the Executive Branch's reluctance to try detainees in a court of law.

The documentation of detainee releases from Guantanamo Bay leaves the DoD in a predicament: either it has been releasing detainees with complete disregard for the findings of officer reports, and commissions designating detainees as having relations with Al-Qaeda and the Taliban; or the DoD has never found the designations to be reliable.

If one is to believe the evidence presented by the government, the pattern of releases is irrational. Take, for example, a comparison of detainee ISN95 and ISN681. Saudi detainee ISN95 was released in May 2006 despite allegedly being a fighter for the Taliban and associate of Al-Qaeda. Yemeni detainee ISN 681, on the other hand, remains in detention as of 2007 despite having no allegations of hostile activity or association with terrorist organizations.

SETON HALL LAW

Meanwhile, the destination of many released detainees is unclear—they may not have been released to freedom. While many detainees are literally freed, a substantial number are transferred—to the control of foreign governments, for further detainment, or for prosecution. As for those transferred to foreign governments, their fate and whereabouts remain unknown. It is possible that they have been freed, tortured, imprisoned, or killed.

These findings raise several important questions:

- Why, and on what basis, was it determined which detainees were to be freed, transferred to foreign governments, transferred for prosecution, or transferred for further detainment?
- What role does nationality play in the government's decision-making process?
- Why were fighters released earlier than detainees, who were mere associates of terrorist organizations?

Until these questions are answered candidly, the American public will continue to wonder whether the “worst of the worst” have been gaining release, or if their classification as such was a complete sham. Assuming many of the “worst” are now at large, released despite the government's own evidence against these alleged terrorists, America is not safer.

**PROFILE OF RELEASED GUANTÁNAMO DETAINEES:
THE GOVERNMENT'S STORY THEN AND NOW**

By

Mark Denbeaux

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EXECUTIVE SUMMARY

THE DEPARTMENT OF DEFENSE RELEASES DETAINEES WITHOUT REGARD TO ANYTHING EXCEPT THEIR NATIONALITY.

1. By November 2006, 45% of all detainees ever held at Guantánamo Bay were released from the prison.
2. A previous profile based upon the Government summary of classified evidence revealed that more than 55% of those ever detained in Guantánamo were never alleged to have committed hostile acts against US or Coalition forces; 60% of all detainees were nothing more than associated with al Qaeda or the Taliban and no more than 8% of those were accused of being fighters.
3. The releases of prisoners from Guantánamo before 2007 show a clear pattern in terms of nationality and no pattern at all with respect to other presumably relevant factors.

THERE IS NO EVIDENCE THAT DETAINEES WERE RELEASED AFTER AN ASSESSMENT OF THE DEPARTMENT OF DEFENSE'S EVIDENCE UPON WHICH THEIR DETENTION WAS BASED.

4. One would expect that detainees who were merely "associated with" a group would be released before "members of" that group and both would be released before "fighters for" that group. It should also be expected that non-al Qaeda would be released before al Qaeda.
5. The 8% alleged to be fighters were released at the same rate as the 60% alleged to be merely associated with terrorist groups.
6. The 34% which were referred to as al Qaeda were released at the same rate as those who were Taliban or neither Taliban nor al Qaeda.
7. In fact, according to the Department of Defense's own data, slightly more "fighters for" were released than "members of" or those "associated with" al Qaeda or the Taliban. 75 of 156 released detainees whose profile are available were released even though the Government has previously alleged that they are al Qaeda.
8. Almost 60% of the detainees released from Guantánamo, among those with a CSRT, are alleged to be at least associated with al Qaeda.
9. 28.8% of released detainees are alleged members of Al Qaeda, the Taliban or both.
10. 29% of the 321 released detainees who are said to have been associated with al Qaeda or the Taliban have been released to freedom and an additional 52% were transferred to the custody of a foreign government, the meaning of which is not clear.
11. Alleged *fighters* have been released at a rate **greater than** that for alleged *members* and *associates*.
12. *Fighters* were released an average of 43 days earlier than detainees merely *associated* with a terrorist organization, and 57 days earlier than those who were *members* of a terrorist organization.
13. Those alleged to be merely associated with a terrorist organization comprise 57.6% of all those with a CSRT, and 56.4% of those released.

WEST POINT AND DANGEROUSNESS.

14. If there is any correlation of release date to West Point's criteria evaluating dangerousness of detainee, it is that the more dangerous the detainee the earlier the release.

THE CORRELATION OF DETAINEES' RELEASE TO THEIR NATIONALITY IS VERY STRONG.

15. Detainees were released based solely upon their nationalities.

INDIVIDUAL COUNTRIES.

16. Pakistani, Afghani and Saudi detainees were released first, without regard to the classified evidence.
17. Yemeni, Algerian and Chinese detainees were released last, if at all, without regard to the purported classified evidence.
18. Detainees from Afghanistan, Pakistan, and Saudi Arabia have been released without apparent regard to the evidence alleged against them; conversely detainees from Yemen, Algeria, and China have been held without apparent regard to the strength or weakness of the evidence against them.

NATIONALITIES.

19. Detainees at Guantánamo Bay come from 44 countries; however 75% of the detainees are from only 6 countries: Afghanistan, Algeria, China Pakistan, Saudi Arabia, and Yemen.
20. 60% of detainees from Afghanistan, Pakistan, and Saudi Arabia have been released, constituting over 71% of all detainees released from Guantánamo.
21. 9.7% of detainees from Algeria, China, and Yemen have been released, constituting 4.2% of all detainees released.
22. 69% of detainees from Afghanistan, which is the largest group of detainees by nationality, have been released from Guantánamo. Of those released 42% have been granted freedom and none have been released for prosecution.
23. Pakistani detainees have been released at a rate of 92.4%.
24. Nearly half of the Pakistani detainees are alleged to have performed a hostile act against the US or its allies.
25. 30.7% of those detainees from Saudi Arabia have been released. 44% of these are associated with Al Qaeda while an additional 28% are associated with both Taliban and al Qaeda.
26. Less than 8% of the 108 detainees from Yemen have been released from Guantánamo
27. Only 4% of the detainees from Algeria have been released from Guantánamo.
28. On average, detainees alleged to be fighters for terrorist organizations were released earlier than those who were merely associates of the organizations.

NATIONALITY GROUPS.

29. Detainees from Arabic-speaking nations have been released on average 10 months later than those from post-Soviet nations, and 21 months later than those from nations which are traditional US allies.

RETURNED TO THE FIGHT AND AFGHANISTAN.

30. The nationality with the largest number of detainees is Afghanistan. Afghans are also the largest number released; Afghans are the detainees who are most likely to be released to freedom upon their return to their home country and Afghans comprise the largest number of detainees who purportedly returned to the fight.
31. According to the Department of Defense, as of June 13, 2008 of the 8 former Guantánamo detainees who were alleged to have returned to the battlefield, 6 were from Afghanistan, 1 was from Russia and 1 was from Kuwait.

There is no evidence that detainees were released based upon the evidence against them. If the Government had in fact believed its own evidence, and had not subsequently disregarded it in favor of distinctions based upon nationality alone, those with the least and weakest evidence against them would have been released first, and those with the most and strongest evidence against them would never have been released at all. In fact, the opposite is true, as the example of ISNs 95 and 681 illustrate.

ISN: 95:	ABDUL RAHMAN UTHMAN AHMED, Saudi Arabia Released 5/18/2006
3a.	The detainee is associated with al Qaida and is a Taliban fighter: <ol style="list-style-type: none"> 1. The detainee accepted a fatwa from the Saad Bin Moad Mosque in Riyadh, Saudi Arabia to fight for the Taliban against the Northern Alliance. 2. The detainee traveled from Saudi Arabia to Afghanistan via Pakistan during Summer 2001. 3. The detainee received weapons training on the Kalishnikov rifle at a Kandahar guesthouse. 4. The detainee's name is on a computer list of al Qaida mujahidin seized during raids of al Qaida safehouses in Pakistan.
3b.	The detainee participated in military operations against the coalition. <ol style="list-style-type: none"> 1. The detainee carried a Kalishnikov while on the front lines in the Konduz area. 2. The detainee fought on the Konduz front lines with an Arab unit led by Abu Moazh. 3. The detainee was on the battlefield on 11 September 01. 4. The detainee surrendered to General Dostum, along with 450-600 other Taliban fighters. 5. The detainee was sent to the Al-Janki prison in Mazar-e-Sharif, where he was present during the prison uprisings.

ISN: 681	MOHAMMED MOHAMMED HASSEN, Yemen Not Released as of 2007
3a.	The detainee is an al Qaida associate. <ol style="list-style-type: none"> 1. Detainee, a Yemen citizen who traveled to Pakistan in early 2001, was captured at the 'Crescent Mill' guesthouse in Faisalbad, Pakistan and was identified by a senior al Qaida lieutenant 2. A senior al Qaida Lieutenant identified detainee in a photo as having possibly seen him in Afghanistan.

Table of Contents

I. Profiling the Released Detainees	6
A. The Data Sources	6
II. Methodology of Report	9
III. The Release of Detainees from the Guantánamo Bay Detention Facility: By the Numbers	10
A. Summary	10
B. Association and Nexus	11
1. Little correlation to nexus to terrorist activity and date of release	14
2. Little correlation between association to al Qaeda and/or Taliban and date of release	15
C. Allegations of Hostile Acts Has Inverse Impact on Date of Release	16
1. Number of 3a / 3b counts reveal detainees with more counts released sooner than those with fewer counts	16
D. CTC Factors Not Consistently Applied	18
1. “Medium” and “High” risk detainees held for less time than “Low” risk detainees	18
IV. Pattern of Release Explained by Nationality	19
A. Nations with High Numbers of Released Detainees	20
1. Afghanistan	20
2. Pakistan	21
3. Saudi Arabia	22
A. Nations with Low Numbers of Released Detainees	23
1. Yemen	23
2. Algeria	24
3. China	25
B. Nationality Groups Confirm that Political Distinctions Drive the Release Decisions	26
C. The Special Case of Afghanistan	27
D. Nationality Determines Chance of Release, Not Alleged Level of Danger	28
V. Any Correlation between Release Date and Government Evidence is a Result of the Government’s Decision to Release Based upon Nationality	28
VI. Conclusion—Evidence against Detainees Not Used to Justify Continued Detention	30

I. Profiling the Released Detainees

The Center undertook to ascertain release data for detainees at Guantánamo Bay, Cuba and to compare that data to other variables in a search for correlations. This effort required analysis of numerous governmental sources. As documented in the Center's first report, *A Profile of 517 Detainees through Analysis of Department of Defense Data*, the majority of detainees in Guantánamo Bay were never alleged to have committed hostile acts against U.S. or Coalition forces and 60% of all detainees were merely "associated" with al Qaeda or the Taliban. The determination of which detainees were released and when they were released is the culmination of over two years of gathering and reviewing data released by the Department of Defense.¹ This data, which was produced either voluntarily or as the result of litigation and Freedom of Information Act requests by the media and other public interest groups, has enabled the Center to uncover the connection between the nationality of detainees, the allegations against them, and their release dates. At this point, enough information has been produced to compile a reliable profile of those detainees who have been released from Guantánamo Bay.

A. The Data Sources

The Center started with a review of an Associated Press Freedom of Information Act request, which obtained a summary of classified evidence regarding the status of detainees at Guantánamo Bay from their CSRT hearings. Later, on April 19, 2006, the Government released documents showing the Internment Serial Numbers (ISN) along with the names of the 558 detainees who had Combat Status Review Tribunals (CSRT). On May 15, 2006, the Government

¹ Because the method used to create the release model uses the date of the last recorded weight as a criterion of release before November 2006, the three detainees who committed suicide in June 2006 are included among those released. Because this is a small percentage of those listed as released, the effect on any findings is minimal.

published the names of all 759 men who had ever been detained at Guantánamo. This latter list allows an inference of the number of detainees who never had a CSRT, and were therefore presumed released or transferred at some point before the CSRT process began.

In addition, the Government released Administrative Review Board (ARB) data. The ARB determines whether detainees should *continue* to be detained, taking into account the findings of a detainee's CSRT. This information was combined with "R1" data, that is, the unclassified summary of the evidence for each detainee. In turn, this information was cross-correlated with the dates and put together with ISN, nationality, and the "profile" of the 558 detainees who received CSRT hearings. For the R1 data, the report takes the Government at its word that the R1 presents a fair and accurate summary of the classified evidence as required by the Freedom of Information Act. Finally, the analysis also included prior Center analysis breaking down the allegations against the detainees in terms of hostile acts committed against U.S. or Coalition forces.²

Complicating this effort was the failure of the Department of Defense to specify the release of detainees by ISN. However, the Detention Hospital Guantánamo Bay Cuba Standard Operating Procedures ("Operating Procedures") for the hospital at Guantánamo require that detainees in the camp are to be weighed once every thirty-days. Each weighing for a given individual was recorded by ISN. When weight data for a particular detainee stopped, the Center inferred that the detainee had been released.

However, the weight data, which includes the ISN of the detainees, does not include the nationality. Therefore, to determine the nationality of a given detainee, the Center cross-referenced the ISN with data released separately by the Department of Defense. Together, this

² Though 516 detainees R1 records were reviewed initially, another 42 records were produced by DOD subsequent to The Center's initial report. As a result, the original numbers from the first report have changed slightly.

information yielded a picture of those being released and when they were released. Trends pertaining to individual nationality emerged showing that certain detainees were more likely than others to be released to particular countries. In addition, the Department of Defense published reports on the times, dates and descriptions of disciplinary violations. This additional information helped correlate the ISN and nationality information with the weight data.

After a thorough review of the weight data, additional information was obtained by a review of press releases by the Department of Defense itself.³ These announcements, which are freely available to the public on the Department of Defense DefenseLink website, contain information regarding the number of people released to each nation, and in many cases, the basis for the release or transfer (CSRT, ARB, R1, etc).

This information was useful in two ways. First, Department of Defense announcements for 2005 and 2006 helped confirm release dates by last available weight data for many detainees. The number of detainees released or transferred to a particular nation as announced by the Department of Defense could then be compared with the weight data estimates of releases.

Second, weight data for a period beyond early 2007 is not available, and even the data for late 2006 is not a wholly reliable indicator of release dates. As mentioned above, the Operating Procedures mandate that detainees should be weighed at least once every thirty days. However, the data showed gaps in the weights for some detainees that, in some cases, greatly exceeded this thirty-day period. The number of detainees released to specific countries in 2007 and early 2008 provided more of the overall picture of how nationality was related to the release or transfer of individuals held in Guantánamo. In addition, the weight data was also compared to variables that included the number of paragraphs in the charges against specific detainees in their R1 documents, along with the alleged association and nexus alleged of each detainee and whether

³ See Appendix D.

the detainee was charged with a hostile or non-hostile act. This comparison led to the finding that whether a detainee is alleged to be a fighter for, member of, or associated with either the Taliban or al Qaeda has little correlation to the likelihood that the detainee is transferred or released.

After comparing the alleged association and nexus of the detainees in R1 documents to their corresponding release dates, the Center juxtaposed this with variables indicating the alleged level of danger based on the Pentagon-commissioned West Point study. This study evaluated the level of danger of each detainee, based on reviewing the unclassified CSRT hearing summaries. A graphical comparison of the data makes evident that there was no correlation between a given detainee's dangerousness and the likelihood that he would be released or transferred to another nation.

The Center analysis reveals that the continued detention of some in Guantánamo and the release of other detainees was without regard to purported evidence and without regard to the factors identified in the Pentagon-commissioned West Point. Instead, the constant was nationality. Decisions correlating only with nationality suggest that political considerations were at work, rather than individual assessments of the evidence against each detainee.

II. Methodology of Report

To estimate the release dates of detainees, the Center employed a model that combined information from the Department of Defense weight data, the Department of Defense press releases that listed detainee releases and transfers, and CSRT and ARB information.⁴

Specifically, the date of a detainee's final weighing (*MaxDate*), along with the CSRT dates and

⁴ For the purposes of analysis, this report accepts all government statements as true and complete, and that R1s accurately represent a summary of the classified evidence against the detainee.

ARBs, provided the information necessary to determine an initial approximate date of release. This initial date, along with a detainee's nationality, was compared to the information published in the Department of Defense press releases to match ISN information to the probable date of release. Since the Department of Defense does not usually provide the nationality of released detainees, the nation to which individuals were sent was used in lieu of nationality, and compared to the known nation of origin of the detainees. The data revealed that, on average, 51 days passed from the date of a detainee's last weighing to the date of his release. The Department of Defense does not always publicize the release of detainees. Therefore, for those detainees not matched to a press release, the release date used was that date 51 days after their final weighing.⁵

III. The Release of Detainees from the Guantánamo Bay Detention Facility: By the Numbers

A. Summary

Department of Defense documents show that the Detention Facility at Guantánamo Bay, Cuba has held a total of 773 prisoners since early 2002. These prisoners have nationalities representing 44 countries. However 75% of the detainees are from six countries: Afghanistan, Algeria, China, Pakistan, Saudi Arabia, and Yemen. No other country contributes more than 2% of the total population. Prior to the end of 2006, 45% (354) of all detainees were released from Guantánamo. In addition, there are 201 detainees who have not undergone a CSRT review. The Government has not provided meaningful information regarding these 201 detainees, but all were released from Guantánamo Bay by November 2006. In addition, there are 14 more recent arrivals from CIA "black sites" for whom the Center does not have R1 summaries. For each of

⁵ The methodology of this report is more fully explained in Appendix C.

the remaining 578 detainees who have undergone the CSRT process, substantial information is available regarding their alleged association with terrorist organizations, alleged hostile acts undertaken, weight data, and release information.⁶ The available data suggests that there is little correlation between release dates for detainees and their alleged hostile acts or association with al Qaeda or the Taliban.

Of the 577 detainees for whom there are available profiles, those who were determined to have a relationship with a terrorist group were placed in one of the following classifications: al Qaeda, Taliban, al Qaeda & Taliban, al Qaeda or Taliban, none alleged, and unidentified. The nexus, or type of relationship the detainees are alleged to have with the above organizations, is further categorized as "associated with," "fighter for," "member of," and none alleged.

Of the detainees released, documents verify that 31 have been released for further detainment abroad, 104 have been released to foreign governments, 95 were released for freedom, and 3 were released for further prosecution.

Where detainees were released to foreign governments there is no specification as to their status following transfer. For those released to a foreign government, their fate and whereabouts presumably remain unknown to the Government and have been placed in the control of nations such as Pakistan and Afghanistan.

B. Association and Nexus

There have been a total of 184 detainees whom the US found to be *associated with* al Qaeda. Of these detainees, 43, or 12% of all detainees released from Guantánamo, have been *associated with* al Qaeda (27.6% of all who had CSRTs). The overwhelming majority of al

⁶ In the newly released records, the DoD produced the same R1 for two different detainees. Thus, the DoD has produced R1s for 557 of the 558 detainees that had CSRTs. The detainee whose R1 is missing is ISN 271, a Saudi national named Ibrahim Muhammed Ibrahim Al Nasir who was likely released on 18 May 2006.

Qaeda associates released from Guantánamo (25 detainees) have been transferred to the control of a foreign government.

This means that the US has relinquished control over these detainees and has left a foreign entity to determine their fate.

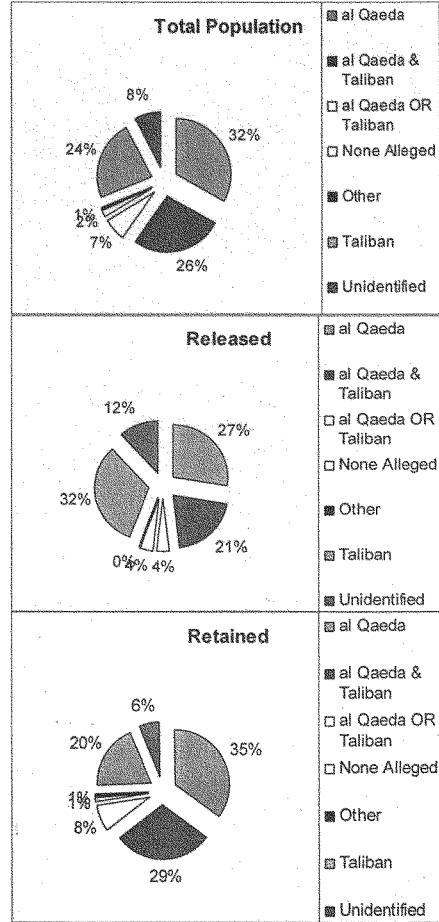
Of the 131 detainees allegedly associated with the Taliban, 39% (51) have been released.

Among these, 22% have been released to freedom while 59% have been transferred to the control of a foreign government.

There are a total of 148 detainees associated with both al Qaeda and Taliban, 22% of which have been released from Guantánamo.

Finally, of those classified as associated with al Qaeda or Taliban, 15% of the 39 have been released from Guantánamo.

Thus, detainees who were found to have a relationship with either al Qaeda or the Taliban, but for whom the CSRT did not reach a conclusive determination of which group they were associated with, were released at a substantially greater rate than those who were found conclusively associated with al Qaeda.



Association	Total	Released	% Released
<i>Al Qaeda</i>	184	43	23%
<i>Taliban</i>	131	51	39%
<i>Al Qaeda & Taliban</i>	148	32	22%
<i>Al Qaeda or Taliban</i>	39	6	15%

Nearly 25% of the 321 detainees *associated with* one of these terrorist groups were released to freedom, while 52% were transferred to a foreign government. There have been 49 detainees who were classified as having fought for the terrorists. Of these 49, either 2 or 3 were transferred to a foreign government for further detainment; 10 or 11 were transferred to foreign governments without specified conditions for their treatment; and 2 were released to freedom.

With respect to *members* of the terrorist organization, 45 detainees (28.8% of all detainees released from Guantánamo who had a CSRT) were found to be members of al Qaeda, the Taliban or both. 20% of these members were released to freedom and 69% were transferred to a foreign government. There are 10 detainees who have been found to have a relationship with a terrorist group, but who have no nexus alleged. Of these 10 detainees, 9 are from Afghanistan.

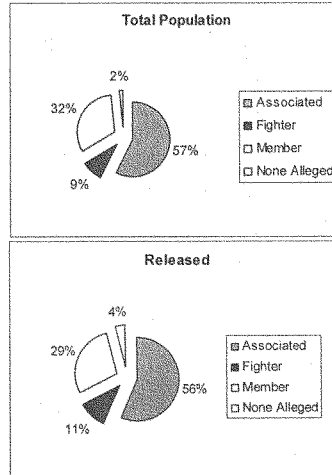
Of the 17 *fighters* released from Guantánamo only one was released for prosecution.

1. Little correlation to nexus to terrorist activity and date of release

Detainment periods show minimal correlation to the alleged terrorist activity of detainees.⁷ The median dates of those detainees alleged to be fighters, associates, or members of a terrorist group varied by a single calendar day. Surprisingly, of those detainees for whom there was no allegations of nexus or association, 50% were never released, thus receiving treatment no different than those who were found to be members of the Taliban or al Qaeda. The mean release dates show greater variation. The 17 alleged *fighters* were released an average of 43 days earlier than detainees merely *associated with* a terrorist organization, and 57 days earlier than those who were only members. These numbers contradict the common perception that a fighter poses a greater danger to the war on terror than does an associate or member.⁸

Even as fighters are being released at a greater rate than members or those simply associated with terrorist organizations, this increased rate of release has little demographic impact on the population held at Guantánamo.

The proportion of alleged fighters has dropped from only 9% of all ever held at Guantánamo to 8% of those remaining. Likewise, the percentage of *members* and *associates* does not change by more than a single percent. Based on this data, a detainee's



⁷ See Paragraph 3a Allegations, Graphical Appendix A, pp. 14, 15 and 17.
⁸ The Combating Terrorism Center at West Point (CTC) agrees with the assessment that fighters represent the most dangerous class of detainees. A CTC study requested by the DoD found that “[e]vidence of performing the role of a fighter was—as expected—the most statistically and substantively significant predictor of ... hostilities against the United States or Coalition Allies.” JOSEPH FELTER & JARRET BRACHMAN, COMBATING TERRORISM CTR., AN ASSESSMENT OF 516 COMBATANT STATUS REVIEW TRIBUNAL (CSRT) UNCLASSIFIED SUMMARIES 34 (25 July 2007), available at <http://www.ctc.usma.edu/csrt/CTC-CSRT-Report-072407.pdf>. The study also found that “[e]vidence of being a fighter boosts the chances of ... commitment to jihad by 16%.” *Id.* at 35.

nexus to a terrorist organization does not appear to have been a serious consideration in the decision to release or continue detention.

2. Little correlation between association to al Qaeda and/or Taliban and date of release

There is surprisingly little correlation between association with a terrorist group and a detainee's release date from Guantánamo.⁹ On average, persons associated with al Qaeda were detained approximately two months longer than those associated with the Taliban. Persons associated with both al Qaeda and the Taliban were detained for almost identical periods of time as were those merely associated with al Qaeda. The persons detained the longest at Guantánamo were the 39 detainees alleged to be associated with *either* al Qaeda or the Taliban. For this last group, the Government data suggests that there was uncertainty as to which group the detainees were associated but that once a detainee's association was determined that detainee's release followed shortly thereafter. For each of these groups, the median date of release lies on either the 19th or the 24th of November 2006. In other words, of those associated with *any* terrorist organization, 50% were never released.¹⁰ Viewing the data as demographic compositions of the yearly population provides a different perspective of the same picture: little or no distinction between groups.¹¹ The data shows that detainees were not treated according to varying degrees of seriousness or level of potential danger depending on the terrorist organization with which they were allegedly associated.

⁹ See Paragraph 3a Allegations, Graphical Appendix A, pp. 14, 15 and 17.

¹⁰ See Appendix C.

¹¹ See Appendix A, p. 13.

C. Allegations of Hostile Acts Has Inverse Impact on Date of Release

Of the 558 detainees who received CSRTs, 47% have been accused of hostile acts. Those accused of hostile acts have been released slightly *later* on average than those not accused of any hostile acts. This conclusion is supported by the 59-day difference in the mean *MaxDate*, and a 16-day difference in mean release date. The larger difference in mean *MaxDate* is due to the fact that proportionally more of those not alleged to have committed hostile acts have been released. This issue is addressed later in this report.

1. Number of 3a / 3b counts reveal detainees with more counts released sooner than those with fewer counts

As part of the CSRT process, detainees received a summary of the classified evidence (an “R1”) against them. This document included two paragraphs of allegations supporting their alleged association and nexus with al Qaeda, the Taliban, or both, and any alleged hostile acts. Detainees receiving a Paragraph 3a, noting their association with a terrorist organization, received anywhere from 0-23 counts supporting the claim of association. Any alleged hostile acts were noted separately, in Paragraph 3b of the R1. At first, there appears to be a correlation between the number of 3a allegations made and the date of release, where those with fewer allegations are released earlier. However, this correlation is not significant: the number of allegations is normally distributed around 5.5. This means that those with 14, 15, 16, 23, and 0 allegations are not statistically significant because they are outliers. When these points are omitted, the apparent correlation falls apart. In fact, it appears that any correlation that does exist is inverse, with the detainees with the most charges against them, and therefore presumably the most dangerous or at least the most likely to have been guilty, being released the earliest. The most common number of 3a allegations was 4, totaling 17% of the 557 detainees who underwent the CSRT process. However, there were 35 detainees who received 10-13 allegations in their

paragraph 3a. Those detainees with the high number of counts were, on average, released prior to those receiving only 4 counts. It appears that, in many instances, where more evidence existed to confirm the detainee's alleged association and nexus, the release rate was higher and occurred more quickly. Based on this finding, it appears that the Government's evidentiary support for its allegations of a detainee's connection to a terrorist organization has not been a serious or consistent consideration when determining whether to release or continue to detain detainees.¹²

The 3b data presents a similar scenario. Initially, it may appear that detainees are detained longer than others when their R1's list more allegations that support claims of hostile acts, but this apparent correlation does not survive closer inspection. Of the 557 detainees for whom an R1 is available, 295 are not alleged to have committed any hostile acts. Of those who are alleged to have committed a hostile act, the number of allegations is normally distributed around 2.8. Those categories farthest from the mean number of allegations, which represent a very small proportion of the population, are not significant. When those categories are removed from consideration—namely, those with 6 or more 3b allegations—the apparent correlation between fewer allegations and earlier release vanishes, and may in fact reverse.¹³

This reverse correlation is clear in that those detainees with 2 to 5 allegations of hostile activity were on average released between 1 and 3 months earlier than those who had only 1 allegation of hostile activity. Likewise, those with 4 and 5 allegations were released on average more than 2 months earlier than those with only 1, 2, or 3 allegations against them. These findings make clear that, here as well, the Government's own evidentiary support for its allegations of a detainee's hostile acts has never been a factor seriously or consistently considered in the decision to release or continue detention of such detainee.

¹² See *Id.* at 17.

¹³ See *Id.* at 18.

D. CTC Factors Not Consistently Applied

According to West Point's Combating Terror Center ("CTC"), detainees can be further categorized by a series of factors measuring the risk they pose in the war on terror.¹⁴ The twelve factors are divided into three categories, with four factors in each: 1) "Low Risk" representing characteristics demonstrating that a detainee is acquainted with dangerous persons, 2) "Medium Risk" suggesting that the detainee poses a probable risk, and 3) "High Risk" representing characteristics that the specified detainee poses a demonstrated risk. The CTC categorized 516 detainees based on the number of factors they held at each risk level. As with the Government's evidentiary factors, there appears to be a slight correlation between the CTC factors met by a detainee and their release date. However, the significance of this correlation is very low.¹⁵

1. "Medium" and "High" risk detainees held for less time than "Low" risk detainees

In fact, as with the number of 3a and 3b allegations, there appears to be an inverse correlation with release date. Of those having two of the four risk factors, there were 123 in the High Risk group, 142 in the Medium Risk group and 120 at the Low Risk group. The mean release date for detainees having two risk factors was nearly identical at the Medium and High risk levels. These detainees were released on average 36 days earlier than those with two risk factors in the Low category. Detainees with only two out of four risk factors at the Medium and High risk levels were also released on average before persons with three and four risk factors at the Low level. The release data for those having three of the four risk factors mirrors the above

¹⁴ While the CTC factors are not an officially recognized evidentiary basis for detention, they were a system of analyzing the officially recognized R1s, and was created at the behest of the DoD. If the R1s contain information which is used in the decision to release or continue detention, correlation between the CTC factors and the date of release is to be expected.

¹⁵ See Appendix B.

finding. Detainees with three risk factors at the High and Medium threat level were released approximately three weeks prior to those having three factors of Low risk. In other words, those detainees of “lower risk” were released on same date and later than those with more factors. Among those detainees who West Point finds have the most evidence against them, the more dangerous are released first. If the Medium and High risk levels represent the likelihood that a detainee poses a threat, one would think that such detainees would also satisfy categories in the Low threat status, since the later merely represents that a detainee knows dangerous persons. On the contrary, there appears to be little correlation between West Point risk factors met by a detainee and their date of release. However, there is a correlation demonstrating that the more factors a detainee has and the greater danger he represents, the sooner and more likely he is released from Guantánamo.

IV. Pattern of Release Explained by Nationality

While the data demonstrates little or no correlation between the severity of the accusations against the detainees and their release date, one characteristic has shown a significant correlation: country of origin. It is important to define “release” prior to discussing the release data for detainees by country. While the definition of release might seem clear, the Department of Defense’s data constructs a rather mottled definition. Of the detainees released up to November 2006, only 27% have been officially “released to freedom.” Another 29% of detainees have been “released to foreign governments.” A further 9% have been released for detention abroad and 1% have been released for prosecution. Strikingly, 34% have no

documented release category. The following charts and descriptions review the breakdown of releases from those nations with the most detainees in Guantánamo.¹⁶

A. Nations with High Numbers of Released Detainees

1. Afghanistan

The data demonstrates what is expected—the country with the largest number of detainees is Afghanistan. Surprisingly, however, nearly 70% of those detained from Afghanistan were released by November of 2006. As indicated by the mean release date of March 30, 2005, the release of

Total	Released	% Released
216	149	69.3

Afghanistan detainees has been steady from the beginning of 2003. Of those Afghani's released, 57 detainees had a CSRT, 32% were alleged to have committed hostile acts and 65% were alleged to be connected with al Qaeda, the Taliban or both.

Release Date		
	Model	MaxDate
Mean	09/05/2004	03/30/2005
Median	03/15/2004	04/01/2005

Only 1% of Afghanistan detainees who were released were sent for continued detention in Afghanistan. In addition, almost 70% of all Afghani detainees were released. However, the majority (42%) were not released for continued detention, but for freedom.

Fighter	Member	Associated	Alleged Hostile Act	Al-Qaeda	Taliban	Al Qaeda & Taliban	Al Qaeda or Taliban
2.8%	23.5%	27.2%	42%	2.8%	23.5%	13.4%	2.8%

¹⁶ For group and individual charts see Appendix A, pp. 3-7.

2. Pakistan

Of the six countries representing more than 2% of the population in Guantánamo, the one with the most released detainees is Pakistan, with 61 of 66 detainees released. However, over 67% of Pakistanis released who had a CSRT were alleged to have committed a hostile act. Furthermore, over 40% of all those released were sent back to Pakistan for continued detention. As we have seen, in contrast, only 1% of Afghanistan detainees who were released were sent for continued detention in Afghanistan. In addition, almost 70% of Afghanistan detainees were released not for continued detention, but the majority for freedom (42%). The majority of Pakistani detainees were released relatively quickly, with a mean release date in July of 2004.

Total	Released	% Released
66	61	94%
Release Date		
	Model	MaxDate
Mean	06/30/2004	07/13/2004
Median	09/18/2004	08/15/2004

Fighter	Member	Associated	Alleged Hostile Act	Al Qaeda	Taliban	Al Qaeda & Taliban	Al Qaeda or Taliban
4.5%	10.6%	4.5%	46%	6.1%	10.6%	3%	0%

1. Saudi Arabia

Saudi Arabia is unique among the top six countries in that it is the only one with a high release rate that has not seen 50% of its population released as of November 2006. In 2007, 63 additional detainees were released to Saudi Arabia.¹⁷ Assuming that a majority of these are Saudi nationals, more than half of Saudi detainees have been released as of the end of 2007. However, the data set depicted in this report is current as of November of 2006.¹⁸

Total	Released	% Released
137	42	31%

Release Date		
	Model	MaxDate
Mean	12/16/2005	08/03/2006
Median	05/18/2006	11/19/2006

Fighter	Member	Associated	Alleged Hostile Act	Al Qaeda	Taliban	Al Qaeda & Taliban	Al Qaeda or Taliban
11.7%	27%	56.9%	52%	40.9%	20.4%	29.2%	3.6%

¹⁷ See DoD press releases 11591, 11477, 11301, 11130, and 10536.
¹⁸ See Appendix C.

A. Nations with Low Numbers of Released Detainees

The Department of Defense data reveals that certain nations' detainees are less likely than others to be released from Guantánamo. This is most clearly delineated by the release rates of Yemeni and Algerian detainees.

I. Yemen

A total of 8 out of 108 Yemeni detainees have been released. Compare this to a release rate of 94% of Pakistani detainees. Additionally, only 2 of 108 Yemeni detainees have been released for freedom. 1.8% of Yemeni detainees have attained freedom from Guantánamo compared to 42% of Afghani detainees. The reason for the disparate treatment is not clear since there is no significant difference in accusations against the two groups. One theory is that the higher percentage of hostile acts alleged against Yemeni detainees—62% compared to a total population average of 47%—causes their continued detention. This is disproven, however, by the counterexample of Algeria, with its 36% hostile acts alleged.

Total	Released	% Released
108	8	7%

Release Date		
	Model	MaxDate
Mean	05/13/2006	11/04/2006
Median	12/17/2006	11/24/2006

Fighter	Member	Associated	Alleged Hostile Act	Al Qaeda	Taliban	Al Qaeda & Taliban	Al Qaeda or Taliban
6.5%	33.3%	58.3%	62%	38%	16.7%	30.6%	10.2%

2. Algeria

Similar to Yemeni detainees, only 4% of Algerian detainees have been released. However,

Total	Released	% Released
25	1	4%

Algerian detainees have the lowest percentage of

Release Date		
	Model	MaxDate
Mean	10/22/2005	11/18/2006
Median	10/22/2005	11/25/2006

alleged hostile acts among the groups in

Guantánamo. Despite this, an Algerian detainee is

24 times less likely to be released than a Pakistani detainee. In addition, unlike detainees from

countries such as Saudi Arabia, Algerian detainees' condition of release is not documented.

Fighter	Member	Associated	Alleged Hostile Act	Al Qaeda	Taliban	Al Qaeda & Taliban	Al Qaeda or Taliban
4%	36%	60%	36%	72%	4%	16%	4%

3. China

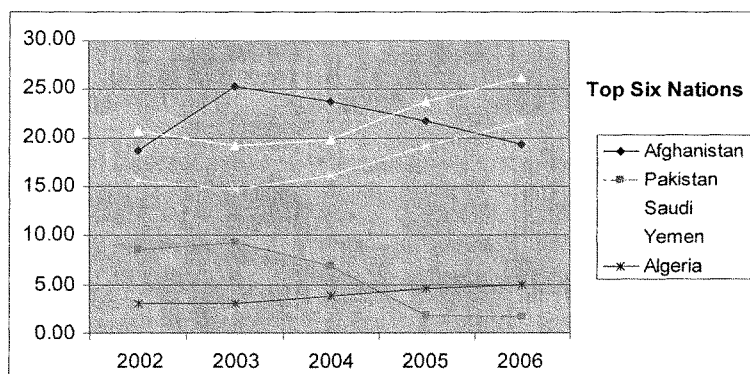
The Chinese detainees present a special case. All detainees of Chinese nationality are ethnic Uighurs, an Islamic minority from western China. The Department of Defense has admitted that the Uighurs are not, and never were, a threat to the US or its Coalition partners in Afghanistan. However, they cannot be returned to China because of their suspected secessionist aims. Thus, 6 of the 22 Uighurs were released to Albania. However, the other 16 remain detained at Guantánamo, despite the lack of any basis for such detention. Indeed, while 45% of all detainees have been released, 73% of the Uighurs remain confined.

Total	Released	% Released
22	6	27%

Release Date		
	Model	MaxDate
Mean	03/21/2006	09/04/2006
Median	02/23/2006	11/24/2006

Fighter	Member	Associated	Alleged Hostile Act	Al Qaeda	Taliban	Al Qaeda and Taliban	Al Qaeda or Taliban
13.6%	13.6%	72.7%	41%	18.2%	22.7%	13.6%	13.6%

Comparing release rates of these nations strongly indicates that many detainees are being released on the basis of nationality alone. Conversely, many detainees for whom little or no evidence exists are still being held after five years of detention. This disparity of treatment is evident in the demographic makeup of the Guantánamo population when viewed on an annual basis.¹⁹



B. Nationality Groups Confirm that Political Distinctions Drive the Release Decisions

Of the 381 detainees from nations where Arabic is an official language, only 89 detainees (23.4%) have been released as of the end of 2006. This is significantly lower than the 45.8% of all combined detainees who were released in the same period. This late release is also in stark contrast to other major nationality groups. Of the 33 detainees from post-Soviet nations, 15 (45.5%) have been released as of the beginning of 2007. In fact, all but one of these detainees was released prior to the CSRT process. Meanwhile, of the 24 detainees who are citizens of

¹⁹ See Appendix A, p. 21.

traditional US allies, all but 3 have been released as of 2007. Comparing the mean release dates of these three groups cements this picture: on average, citizens of traditional US allies are released one year earlier than citizens of post-Soviet nations, who are in turn released 10 months prior to Arab nationals.²⁰

The post-Soviet group itself represents a microcosm of the entire population. Of the 33 detainees in this group, only the Russians and Tajiks have been released in any bulk. While 70% of the Russians and Tajiks have been released, only 1 of the 8 Uzbeks have been released, and none of the Azerbaijanis, Kazakhs, or Turkmen have been released. Once again, stark differences in treatment can be seen between nationalities, which far outweigh those differences between individualized evidentiary factors.

C. The Special Case of Afghanistan

The data indicates that detainees from Afghanistan are released the earliest and most frequently of all those held in Guantánamo. Well over two-thirds of all detainees from Afghanistan were transferred or released by late 2006. Of this number, over 42% were released to freedom. The proportion of Afghans released to freedom or transferred, compared to detainees from all other nations, shows that the best chance a detainee had of being released was to be an Afghan national. This discovery is interesting in light of the “Fact Sheet” published by the Department of Defense dated June 13, 2008. This publication claims that those “known or suspected of returning to terrorist activities” those transferred to Afghanistan and Pakistan generally have reengaged in local, anti-coalition activity.²¹ Of the ten people listed in this release, six are from Afghanistan. However, despite this claimed recidivism on the part of

²⁰ *Id.*

²¹ Document can be found at <http://www.defenselink.mil/news/d20080613Returntothefightfactsheet.pdf>.

Afghanis formerly detained at Guantánamo, Afghanis represent the greatest number of those released to freedom.

D. Nationality Determines Chance of Release, Not Alleged Level of Danger

Although there may be other explanations, the Department of Defense has yet to offer them. Absent such an explanation, the conclusion seems inescapable that the detainees' country of origin determines their chance of release, not their alleged degree of danger.

V. Any Correlation between Release Date and Government Evidence is a Result of the Government's Decision to Release Based upon Nationality.

The slight correlations between release date and nexus, association, and hostile acts can be explained by reviewing the composition of those factors by nationality. The mean release dates show that fighters are released slightly earlier than members or associates, while those with no alleged nexus are released significantly earlier. However, of the 10 detainees not alleged to have any nexus, 9 were Afghani. Afghanis overall are released much earlier than other nationalities. Because Afghanis make up only 28% of the total population, the early release of the "none alleged" category is a result of their being predominantly Afghani. For it to be otherwise, the Afghani population in Guantánamo would have to be proportional to their percentage of detainees without any nexus alleged: 90%. In comparison, of the 49 detainees alleged to be fighters, more than 50% are Afghanis, Pakistanis, and Saudis, who were released much earlier than the other top 6 nationalities. Meanwhile, Yemen and Algeria contribute only 16% of the "fighter" category, while contributing 24% and 26% of the "associated with" and "member" categories, respectively.²²

²² See Appendix A, p. 23.

Yemen and Algeria, who combined have 133 detainees in Guantánamo, have only seen a total of 9 releases. This implies that the slight correlation between nexus and release date is likely a product of random sampling within nationalities, rather than a secondary criterion of release. In addition, the slight correlation between association and release date is similarly a product of nationality. As with nexus, the 10 detainees not alleged to be associated with any organization are 90% Afghani. Thus, their earlier release is not a product of a lack of association, but is rather a product of their nationality.

The slightly earlier release of Taliban, relative to the “al Qaeda,” “al Qaeda & Taliban,” and “al Qaeda or Taliban” categories, is also explained by national composition. Yemen and Algeria combined are only 17% of the “Taliban” category, while together composing 31%, 25%, and 35% of “al Qaeda,” “al Qaeda & Taliban,” and “al Qaeda or Taliban” categories, respectively. Meanwhile, Afghanistan contributes 38% of the “Taliban” category, compared to 3%, 20%, and 15% of the other categories. Thus, the relatively early release of Taliban is likely a product of the distinct treatment of Afghans versus Yemenis and Algerians. In fact, the slight correlation between association and release date would likely be much stronger, if it were not for the contribution of the Saudis. Saudis make up 22% of the “Taliban” category, just over 30% of “al Qaeda,” and 27% of “al Qaeda & Taliban,” but only 13% of “al Qaeda or Taliban.” Though Saudis are released earlier than Yemenis and Algerians, they still have a median *MaxDate* of Nov. 19, 2006. This date, later than that of the Afghans, mitigates the average release dates.²³

The 59-day difference in mean *MaxDate* between those who were and were not alleged to have committed hostile acts is also likely a product of nationality. The proportion of Yemeni in each category is most salient here: Yemenis make up 25% of those alleged to have committed

²³ See *Id.* at 24.

hostile acts, but only 14% of those who were not. Conversely, Afghans make up 24.5% of those who were not alleged to have committed hostile acts, and only 20% of those who were. Saudis again play a mitigating role, contributing 26% of those alleged to have committed a hostile act, and 21.5% of those who were not.²⁴

Because the correlation between average release date and each of these factors is explainable as a product of the national composition of their categories, these correlations are not causal in nature. Therefore, this leaves nationality as the only known causal factor that determines the date of release.

VI. Conclusion—Evidence against Detainees was Not Used to Justify Continued Detention

A review of the Department of Defense's own data reveals that there is not a consistent practice of releasing detainees based on their alleged association to al Qaeda and/or the Taliban. In addition, the number of charges against any given detainee does not seem to affect his release date. Instead, the only constant correlation to detainees who are released earlier than others is the nationality of those released. A finding that the only causal relation to release date is nationality shows that either the Department of Defense never believed their own allegations for the basis of detention, or that they knowingly released individuals they believed to be dangerous.

²⁴ See *Id.* at 25.

**Testimony of
Will A. Gunn
Colonel, United States Air Force (Retired)
Former Chief Defense Counsel
Department of Defense Office of Military Commissions
Senate Judiciary Committee
July 16, 2008**

INTRODUCTION

Disclaimer: Thank you, Chairman Leahy and Members of the Judiciary Committee, for inviting me to speak to you today. My testimony is given in my capacity as a private citizen who formerly served as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. My testimony does not represent the opinions of either the Department of the Air Force, the Department of Defense or any other entity.

“Terrorists can shake the foundations of our biggest buildings but they cannot touch the foundation of America.” President George W. Bush, Sep 11, 2001

When former DoD General Counsel, William Haynes, appointed me Acting Chief Defense Counsel in the Office of Military Commissions in February 2003, I was assigned Pentagon office space in an area near the section that had been damaged during the attack of September 11, 2001. A plaque hangs in that section with the above words that President George W. Bush spoke on the night of September 11th. I view the rule of law as the cornerstone of the foundation of America. Unfortunately, many of our detention policies and actions in creating the Guantanamo military commissions have seriously eroded fundamental American principles of the rule of law in the eyes of Americans and in the eyes of the rest of the world.

I served 25 years as an active duty Air Force officer prior to my retirement as a colonel in 2005. I spent more than 19 years of that time as a judge advocate with the last two and a half years spent serving as the first Chief Defense Counsel in the Department of Defense Office of Military Commissions. As Chief Defense Counsel, I was responsible for screening prospective defense personnel, doing my utmost to promote a zealous defense for any detainees brought

before a military commission, promoting “full and fair trials,” and overseeing the entire defense function for the military commissions.

While I will focus my attention on the military commissions, the United States government has taken several actions with respect to detainee policy in the post 9/11 era that have significantly eroded this nation’s standing in terms of respect for human rights. Some of these actions are described below.

Article 5 Tribunals: Upon launching hostilities in Afghanistan, the President determined that all prisoners captured pursuant to that conflict (and the Global War on Terrorism) were unlawful enemy combatants who were not entitled to the protections of the Geneva Conventions. This was a major break with past law and policy as outlined in the Army Field Manual which called for all prisoners to be initially treated as enemy prisoners of war until a determination as to their status could be made. As a result of this decision, the Administration chose to forgo Article 5 tribunals, which are called for under the Geneva Conventions, whenever there is any doubt as to whether a person should be treated as a prisoner of war.¹ According to a DOD report, over 1,100 Article 5 tribunals were successfully conducted in Operation Desert Storm.²

Hidden Prisoners: For years the United States hid certain detainees from the International Committee of the Red Cross, operated undisclosed prisons, and transferred prisoners to third countries for questioning. (The Wall Street Journal, 5 April 2005).

Coercive Interrogations: While there has been a great deal of debate regarding what constitutes torture, there is no doubt that at least some detainees were exposed to interrogation methods that the U.S. has publicly decried when carried out by other nations. For example, while undergoing Survival Evasion, Resistance and Escape (SERE) training as an Air Force

¹ Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

² DOD Persian Gulf Report, at 578.

Academy cadet in the 1970s, my classmates and I received instruction on what was then described as the inhumane practice of water boarding. This is a practice the Chinese employed against captured American soldiers during the Korean Conflict to coerce false confessions and a practice which the U.S. government has heretofore considered unacceptable. Remarkably, the U.S. government has used this technique in at least some cases in the aftermath of 9/11.

Overall Policy Shift on Geneva Conventions: While one can argue to what extent al Qaeda and Taliban prisoners were entitled to the protections of various aspects of the Geneva Conventions, the Administration decided to abandon policies used in Vietnam and elsewhere to treat enemy detainees in accordance with the Geneva Conventions regardless of their legal status. Deciding that al Qaeda and Taliban prisoners were not entitled to the legal protections afforded by the Geneva Conventions led to subsequent decisions that it was permissible to use coercive methods in an effort to obtain intelligence.

MILITARY COMMISSION CHALLENGES

When I became Chief Defense Counsel for the Military Commissions in 2003, one of my duties involved seeing to it that military commissions were “full and fair” in accordance with the Executive Order that created them after 9/11. After studying the military commissions system created by the Administration, I could conceive of only one fundamental way to conduct a fair military commission. Achieving a full and fair military commission would require prosecutors and other government personnel to exercise great restraint and not utilize many of the tools afforded them under the commission rules. This was the case because several of the rules and procedures constituting the military commissions system ran afoul of what we as Americans consider critical to having a fair legal system. While I had great respect for my military colleagues who were working to put together prosecutions, the rule of law and its perceived

fairness primarily relies on the soundness and inherent justice embedded in the laws being enforced as opposed to the discretion and restraint of individuals enforcing them.

The system I encountered had several drawbacks which generated controversy, diminished the U.S.'s prestige at home and abroad, and fueled widespread perceptions that the system was unfair. Some of these challenges have been addressed by subsequent events, including three Supreme Court decisions, but many problems remain. These problems include:

Creating Rules and Procedures From Scratch: Rather than using rules and procedures for courts martial found in the Manual for Courts Martial and Uniform Code of Military Justice, Administration officials sought to establish a new and distinct system for military commissions. Establishing new rules and procedures has contributed to delay and confusion such that only one military commission has been completed in the nearly seven years since military commissions were authorized. That lone commission, United States v. David Hicks, was only completed as a result of a plea agreement that allowed the Australian detainee to be released before he ever would have seen a trial under the ever-evolving commissions system.

Use of an Untested System Based on an Outdated Model: The United States last conducted military commissions more than 60 years ago in the period immediately following World War II. The commissions conducted at that time followed procedures that closely tracked the military justice system of that period. When the President authorized military commissions for detainees in November 2001 and the Secretary of Defense issued his initial procedural guidance in early 2002, the system that was announced more closely resembled the military commissions of the 1940's as opposed to 21st century courts martial. For example, neither the military commission system of the 1940s nor the pre-MCA (Military Commissions Act of 2006) military commissions system featured a military judge, neither system permitted independent

judicial review of commission results, and both systems sought to preclude such review. The MCA adds a military judge to the commissions and creates a military commissions appellate court but the Act has other problems and falls short of courts martial protections. Accordingly, besides the challenge to the denial of habeas corpus presented in Boumediene v. Bush, several of the MCA's provisions will undoubtedly be further challenged in Federal Court and additional delays can be expected.

Lack of an Independent Chain of Command for Defense Counsel: The military commission system has been criticized because the defense counsel in the system did not have an independent reporting chain. As Chief Defense Counsel, I reported to a senior career civilian attorney in the DOD Office of General Counsel, who in turn reported to the DOD General Counsel. While defense counsel have repeatedly shown a willingness to zealously represent their clients and to do what they deemed to be in the interests of justice to pursue their clients' interests, the failure to create an independent supervisory structure for defense counsel made it more difficult to win the confidence of detainees and created the perception among many that the system was a sham. This same reporting structure remains in place.

Ability to Exclude Civilian Counsel and the Accused: One of the most glaring shortcomings in the original military commissions system was the possibility of excluding the accused and civilian defense counsel, who lacked required security clearances, from the proceedings when they concern classified information. The MCA attempts to deal with this problem such that now a civilian counsel must receive the necessary security clearance level before being allowed to take the case and the military judge must seek alternatives to classified information. The MCA does not expressly permit the accused to be excluded due to the handling of classified information. However, as described below, the accused can still be denied the

opportunity to confront evidence against him and the option of excluding the accused presumably remains open if the military justice cannot find a suitable alternative. Under generally accepted principles, the ability to confront witnesses and participate in one's own defense are considered critical elements of fair proceedings. Ironically, courts martial and federal court proceedings have long dealt successfully and fairly with the issue of handling classified information by using the provisions of the Classified Information Procedures Act (CIPA).

Use of Hearsay and Coerced Testimony: In normal jurisprudence, hearsay evidence is not admitted unless its proponent demonstrates that it fits within certain defined exceptions considered reliable. Coerced testimony is never admissible. However, under the MCA, the prosecution is allowed to present hearsay evidence which denies the accused the ability to cross-examine and confront the witnesses against him. The MCA shifts the burden with respect to the use of hearsay to the party opposing such use. See Section 949a of the MCA. The rules go further to make it possible for evidence that is the fruit of coercion to be admitted. See Section 948r of the MCA. Thus, the government can introduce coerced statements made by the accused, as long as they are considered probative, without ever allowing the accused the opportunity to confront the person to whom the statement was made. Even if the detainee's statements were obtained by torture--cruel, inhuman, or degrading treatment—they can still be admitted providing they were obtained prior to the passage of the Detainee Treatment Act in 2005, a time long after most Guantanamo detainees were in custody. These provisions are a long way from traditional American notions of fairness and justice.

Government Monitoring of Attorney Client Communications: The initial rules permitted the government to monitor attorney-client communications. This provision was later narrowed

to require that defense counsel be informed prior to any monitoring by the government and to establish a wall between the prosecution function and the intelligence function conducting the monitoring. During my tenure none of the defense counsel assigned to the Office of the Chief Defense Counsel were ever informed that the government was listening in on their client meetings. However, the fact that the Government held out the possibility of doing so fueled the view among many that the system was rigged and patently unfair.

Disregarding Common Article 3 of the Geneva Conventions: Common Article 3 of the Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Section 948b (f) of the MCA states that the military commissions created by the Act are regularly constituted courts “affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.” However, simply saying it does not make it so.

The original military commissions as envisioned by the Administration and the commissions authorized by the MCA seek to eliminate the protections of Common Article 3. Specifically, Section 948b (g) of the MCA states that “no alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.” While this section is designed to prevent a detainee from using the Geneva Conventions as a sword, it also purports to strip a detainee of the ability to claim a violation of Common Article 3 as a basis for defending himself in a commission. The legality of this section will certainly be tested because a plurality of the Supreme Court took the position in Hamdan v. Rumsfeld that Common Article 3 “must be understood to incorporate at least the barest of those

trial protections that have been recognized by customary international law.” 126 S.Ct. at 2797. Furthermore, several of the MCA’s provisions depart from the requirements of Common Article 3. These provisions include a denial of equal protection by singling out aliens as the only individuals eligible to face a military commission and allowing coerced testimony to be presented.

Logistical Obstacles Hindering Full And Fair Proceedings: Many of the logistical obstacles I first encountered over five years ago still remain in place and present substantial barriers to ever having full and fair military commission hearings at Guantanamo. These challenges include transportation difficulties, inadequate access to clients, and the legal difficulty of not being able to subpoena civilian witnesses and require that they attend a military commission hearing at Guantanamo. As for transportation, it is difficult to get to Guantanamo; therefore, an attorney often has to set aside several days in order to conduct a single client meeting at Guantanamo, due to limited military flights in and out of the base. This problem is exacerbated by the fact that defense counsel have not been afforded the opportunity to communicate with clients via telephone. In addition to being limited to face-to-face contact with clients, defense attorneys face limitations on the unclassified information they can share with their clients. Joint Task Force Guantanamo (JTFGTMO) officials limit what defense attorneys can share with their clients. For example, current defense counsel report that JTFGTMO officials have prevented them from sharing evidence with clients that the prosecutors have provided. This makes it impossible to adequately prepare for trial.

ESTABLISHING PRECEDENTS

“He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.” Thomas Paine

The Guantanamo detentions along with the fits and starts of the military commissions have seriously undermined our nation's standing as a beacon for the rule of law. The danger associated with the Administration's detainee policies in the wake of September 11th lies in the fact that our actions will serve as precedent in at least two ways. First, there are those in other nations who will look to our actions to justify their own. This diminishes our credibility as a serious promoter of human rights. Second, our soldiers who traverse future battlefields could find themselves subject to the same type of treatment in which we have engaged. We would find such a turn of events to be deplorable.

THE FUTURE

There now seems to be widespread consensus in this country among opinion leaders, including both major Presidential candidates, that Guantanamo should be closed. This consensus springs from recognition that our policies have cast a stain on how we are viewed in the world. While a much needed symbolic measure, closing the facility is not enough. The military commission rules and procedures that have been put forth over the last several years have had a synergistic effect that continues to deprive the proceedings and this nation of legitimacy. As pointed out in the report released last month by the Center for American Progress called "How to Close Guantanamo," closing the detention facility and moving the detainees will not solve our credibility problem. The MCA, while an improvement over the initial military commissions system, still has substantial shortcomings and falls short of Common Article 3 requirements. Rather than seeking to tinker with the MCA, I strongly recommend using the courts martial system and/or federal courts to dispose of the cases of detainees that should be tried in a court of law.

Both the military justice system and our federal court system have substantial advantages over the existing military commission system. Both systems are “battle” tested, have existing procedures for dealing with classified information, and both systems enjoy domestic and international legitimacy. The Global War on Terrorism is a battle for security that challenges us to adhere to our fundamental principles. Respect for law, including international human rights norms and the law of war, is critical to this battle.

**Statement of Ramzi Kassem
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before the

Senate Committee on the Judiciary

concerning

**“How the Administration’s Failed Detainee Policies Have Hurt the Fight Against
Terrorism: Putting the Fight Against Terrorism on Sound Legal Foundations”**

July 16, 2008

Chairman Leahy, Senator Specter and members of the Senate Committee on the Judiciary:

Thank you for offering me the opportunity to submit written testimony addressing some of the failures of the Bush Administration’s detainee policy. As you know, that policy intersects with the defining themes of our time—terrorism, national security, the separation of powers and the rule of law. The U.S. prison camp at Guantanamo Bay, Cuba has become and will likely remain the enduring symbol of this era and of the Administration’s failed policy response to the challenges it raised. Any attempt at rectifying that broken policy must first deal with Guantanamo.

The approach adopted and defended by this Administration has wrought incalculable damage on our foreign policy and on a host of national interests. It has harmed our reputation internationally and hampered our ability to lead effectively on global issues ranging from security to human rights. Putting the fight against terrorism on solid legal footing will require both recognition that extant, legitimate tools can be deployed more effectively and a significant reversal of the disastrous policies of the past seven years.

In so stating, I should make clear that I submit this with no partisan agenda, offering my written testimony solely as a clinical law teacher and a pro bono lawyer. I make this statement in my personal capacity as a Clinical Lecturer in Law and Robert M. Cover Clinical Teaching Fellow at the Yale Law School. Over the past 3 years, I have represented 7 detainees at the U.S. Naval Base in Guantanamo Bay.

It might be unrealistic to expect a change of course by the instant Administration. But the next administration, Republican or Democratic, will come into power with considerable good will capital that it could shore up by demonstrating its resolve to turn away from past errors. Using that capital to make a public commitment to fairness on the Guantanamo detainee issue would both demonstrate a genuine determination to effect

positive change in the eyes of the world and help to restore our commitment to the rule of law domestically. It would help replenish our diminished image in the hearts and minds of people here and abroad who have watched our institutions facilitate or turn a blind eye to all manner of cruelty and humiliation perpetrated in the name of national security.

Let me suggest six concrete ways to heal “the Guantanamo problem,” as well as a strategy for how to humanely and lawfully treat remaining Guantanamo detainees.

Six Ways to Heal Guantanamo

Contrary to popular perception, there is no unitary, monolithic Guantanamo problem, no more than there is a single type of individual imprisoned at Guantanamo. There are many different Guantanamo problems, calling for a variety of policy answers. Let me suggest, however, six common undertakings, upon which this committee should agree, that would form part of a renewed, bipartisan commitment to reestablishing the rule of law on Guantanamo. While the following prescriptions should apply across the board to restore faith in our commitment to fairness and the law, responsible resolution of the Guantanamo problem in its more concrete details will require a multi-layered approach on the part of the next administration.

First, habeas corpus review should remain available to all Guantanamo detainees, irrespective of how they are categorized. The men held in Cuba and their families have suffered for years, in large part because the Bush Administration has succeeded at shutting them out of court, in its bid to dehumanize and render them essentially voiceless, faceless and nameless. In *Boumediene v. Bush*, the Supreme Court has now recognized Guantanamo detainees’ constitutional entitlement to prompt judicial review of the grounds for their imprisonment. The next administration should not attempt to curtail that entitlement in any way—every prisoner should get his day in court if he so chooses.

Second, the next administration should renounce the practice of extraordinary rendition and rendition to torture. Only extradition, with process afforded at the originating and destination points, and rendition to justice, with process in the receiving country, are acceptable methods for a nation committed to the rule of law and respectful of its international legal obligations. Most if not all of the men at Guantanamo have borne the brunt of the Bush Administration’s irregular rendition practices and some remain at risk today.

Third, for the remainder of Guantanamo’s existence as a prison camp, detention conditions should conform to internationally accepted norms and standards. Torture, abusive interrogation, psychological and environmental manipulation, sleep and sensory deprivation, retaliatory denial of needed medical care to break hunger strikes, brutal force-feeding methods, and countless other equally abject and barbaric methods of debasement and subjugation should be unequivocally abandoned. Telephone communication with family and counsel should be made possible on a reasonably regular basis. Communal meals, exercise and prayers should be permitted in all parts of the

prison camps; permanent lockdown, solitary confinement and absolute isolation should become the exception rather than the rule.

Fourth, under the next administration, no detention should be initiated or extended for intelligence gathering purposes. Many at Guantanamo continue to be held unlawfully based not on past acts or purported threat value but solely on the intelligence value they are deemed to possess. Our intelligence agencies are among the best trained and most competent in the world. They should revert to their tried and true methods—cultivating human assets and gathering human, electronic, and other forms of intelligence in the field.

Fifth, rolling back Guantanamo's legacy and repairing our image while effectively countering the terrorist threat will require more than a recombination of traditional law enforcement and intelligence with military might. It will have to draw on all the nation's resources, economic, intellectual, cultural and diplomatic. A genuine commitment to healing the scars and erasing the stain of Guantanamo will necessarily mean keeping an open mind to approaches other than detention, such as induced cooperation or a sober assessment of terrorism's root causes coupled with efforts to address those factors.

Sixth and finally, recognizing that a measure of redress for past wrongs is appropriate would also help confirm that the new administration intends to follow a different strategy from its predecessor. Compensation for accidental civilian death, injury and property damage during U.S. troop operations is already routinely paid out in Iraq and Afghanistan. A compensation scheme for those wrongly imprisoned at Guantanamo would be no less effective a way to acknowledge fault, make affected individuals whole, and restore our reputation.

This could be accomplished with the formation of a standing commission tasked with the review of applications for compensation by former detainees. The commission would reach its determination based on an independent assessment of the record relied upon by the Administration to justify the detention or on the proceedings and findings of the court that reviewed a former prisoner's habeas corpus petition. It would then issue payment according to a pre-established scale. This may well be the least costly way of achieving the aforementioned objectives.

A Roadmap Beyond Guantanamo

The Department of Defense (DoD) states that there are "approximately 265 detainees currently at Guantanamo." Those prisoners can be divided into three rough categories: (I) men approved by DoD's Administrative Review Board (ARB) for release or transfer out of Guantanamo; (II) men who have been charged and referred for trial by military commission; and (III) men who have been neither charged nor deemed eligible for release. These varied situations call for different measures by the next administration.

I. Guantanamo Prisoners Cleared for Release or Transfer

According to statements made on the record by Government attorneys in recent court appearances, there are currently some 54 prisoners held at the base who are ARB-approved for release or transfer out of Guantanamo and into the custody of their home country or a third receiving government. To understand how inconsequential this designation has been thus far, note that most of the cleared prisoners have been held for years since the date of their clearance and that most of the prisoners who have been transferred or released from Guantanamo were never ARB-cleared.

The principal reasons these 54 men remain at Guantanamo include (1) unexplained delay by the U.S. Government to effect transfer to countries that are willing to receive their nationals; (2) refusal by countries to receive their nationals from Guantanamo; and (3) individual prisoners' fear of persecution upon repatriation combined with the lack of a third country to accept them as refugees.

Delay in transferring cleared prisoners to willing countries is tied to the categorical refusal of some countries to accept returnees insofar as the Bush Administration, in its dealings with both sets of countries, has aggressively sought to impose conditions on repatriation. Such conditions reportedly include continued detention, interrogation and trial by receiving authorities, intelligence sharing, passport confiscation, restrictions on freedom of movement, surveillance, and periodic reporting requirements.

The Bush Administration apparently devised these conditions as a face-saving measure to avoid admitting error by releasing outright detainees it once claimed—but could not prove—were “the worst of the worst.” Yet, these conditions have been perceived by many nations as attempts to impinge on their sovereignty, alienating some countries to the point of refusing to accept any detainees, while prompting rejection of the terms by other, more willing states, resulting in a suspension of transfers by the Administration.

The next administration will be in a position to turn a fresh page on those fraught bilateral negotiations. Many countries, including ones whose nationals are held there, view Guantanamo as America's problem, one we've created for ourselves. But they will be eager to demonstrate their good will to the new administration. Provided discussions are conducted in good faith, showing due respect for national sovereignty while remaining mindful of our obligations under the Convention Against Torture and other treaties, the next administration should be able to secure the prompt repatriation of remaining cleared detainees.

The remaining cleared detainees, those who fear maltreatment upon repatriation, must be resettled elsewhere. The U.S. will have to break with the Bush Administration's practice and grant some of those few men parolee or asylee status, on a temporary or permanent basis. This would encourage other countries to follow suit. Also, the Combatant Status Review Tribunal's notoriously unreliable finding that these men were “enemy combatants” is a veritable scarlet letter in the view of many countries, including

sometimes the men's own. The ARB clearance does not unring that bell. Indeed, according to the Bush Administration, "once an enemy combatant, always an enemy combatant." The opportunity to challenge that designation on habeas review as a collateral consequence of detention or via the more limited Detainee Treatment Act process could pave the way for these men to find permanent resettlement.

II. Guantanamo Prisoners Charged and Referred for Trial by Military Commission

There are presently 21 men at Guantanamo who have been charged and referred before a military commission. DoD states that "approximately 80 are expected to face trial by military commission."

The deliberately built-in biases and other incurable structural flaws of the system created by the Military Commissions Act have been well-publicized and require no repetition here. Simply put, there is no way to salvage the Bush Administration's military commissions. They are totally bankrupt and, perhaps of equal importance, almost universally regarded as such. The next administration should move quickly to disavow, dissolve and abandon them.

Viable prosecutions among the 21 to 80 currently pending or planned should now be brought before civilian federal courts. The defendants should be held in suitable facilities near the forum of their trial, in accordance with standard procedures for similar cases. Our criminal justice system—albeit imperfect—is well-equipped to handle terrorism cases reliably and has risen to the occasion over a hundred times in recent history, mostly producing fair outcomes that did not compromise national security. The Bush Administration has wrongly claimed that the entire world is a battlefield and that, by extension, any capture necessarily constitutes a battlefield capture. Though courts martial may be conceivable in cases arising from genuine battlefield capture, the next administration would plainly benefit from trying even those cases transparently in civilian courts.

III. Guantanamo Prisoners Neither Charged Nor Cleared

The remaining category of prisoners comprises roughly 130 to 190 men, depending on the number of prisoners ultimately charged for trial by military commission, and assuming none of these men are released or cleared for release by an ARB.

The overwhelming majority of those men have already filed petitions for writs of habeas corpus and the rest will likely do so in the near future. The courts reviewing their petitions will determine what if any basis exists for holding these men under the Authorization for Use of Military Force, other U.S. statutes, or international humanitarian law. Those courts will then order release or rule the detention proper. In the latter scenario, imprisonment can continue in a suitable U.S. facility of the next administration's choice, so long as it comports with the above prescriptions relating to

conditions, with the Constitution and laws of the United States, and with applicable international norms.

In sum, putting the fight against terrorism on a sound legal foundation will require the next administration to adhere strictly to a set of principles that should have been applied on Guantanamo, but were not, and to follow a path beyond Guantanamo that comports, far better than our failed detention policies have, with American and international legal values.

Thank you.

Statement Of Chairman Patrick Leahy,
Senate Judiciary Committee,
Hearing On "How the Administration's Failed Detainee Policies Have Hurt
the Fight Against Terrorism: Putting the Fight Against Terrorism on a Sound
Legal Foundation"
July 16, 2008

In the wake of the tragic attacks on September 11, 2001, and toward the end of President Bush's first year in office, this country had an opportunity to show that we could fight terrorism, secure our nation, and bring the perpetrators of those heinous acts to justice, all in a way that was consistent with our history and our most deeply valued principles. A number of us reached out to the White House in an effort to craft a thoughtful, effective bipartisan way forward. The White House, supported by the Republican leadership in Congress, chose another path. They diverted our focus from al Qaeda and capturing Osama bin Laden to war and occupation in Iraq. They chose to enhance the power of the President and to turn the Office of Legal Counsel at the Department of Justice into an apologist for White House orders—from the warrantless wiretapping of Americans to torture. In my view, that approach has made our country less safe.

We are all too familiar now with the litany of disastrous actions by this administration: rejecting the Geneva Conventions – which the President's Counsel referred to as "quaint" – against the advice of the Secretary of State; establishing a system of detention at Guantanamo Bay in an effort to circumvent the law and accountability; attempting to eliminate the Great Writ of habeas corpus for anyone designated by the President as an enemy combatant; setting up a flawed military commission process that, after six years, has not brought even a single one of these dangerous terrorists to trial; and permitting cruel interrogation practices that in the worst cases amount to officially sanctioned torture.

In her new book *The Dark Side*, journalist Jane Mayer has offered a major contribution to reporting these matters. In addition to providing previously unknown details of U.S. treatment of detainees, Ms. Mayer writes of a 2007 report from the International Committee of the Red Cross (ICRC), which concluded that interrogation techniques used by the United States constituted torture. The ICRC, like retired Major General Taguba, who investigated detainee abuses for the Army, suggested that the conduct of Bush administration officials could amount to war crimes.

Another deeply troubling revelation in Ms. Mayer's book is that one-third to one-half of the detainees at Guantanamo have been known, almost since the beginning, to have no connection to terrorism at all. But the White House refused to allow any new review of their status because, according to the Vice President's chief of staff, David Addington, "The president has determined that they are ALL enemy combatants." That was the end of the inquiry.

Throughout all of this, the administration has been assisted by lawyers willing to give whatever answer the White House wanted, and by a compliant Congress. The only real check on the administration, in fact, has been a 5-4 majority of the conservative United States Supreme Court. The Supreme Court has rightly rejected, time after time, backdoor efforts by the Bush administration and its congressional enablers' to re-write our Constitution in the name of the "war on terror."

From 2004 to 2008, the Supreme Court has rejected the Bush administration's attempts to deprive citizens and non-citizens of their right to challenge their indefinite detention in Federal court. The Court has sought through the power of judicial review to provide a check and balance. Last month, in the Boumediene case, the Court reinforced our Constitution and our core American values in holding that the habeas-stripping provision in the Military Commissions Act is unconstitutional. The Boumediene case brings the administration's record to 0 for 4. Four times the Supreme Court has repudiated the administration's disastrous detainee policy.

The detainee policy is not only illegal and immoral. It has also been harmful in the fight against terrorism. We cannot defeat terrorism by abandoning our basic American principles and values. With the pictures from Abu Ghraib and tales of unjustified detentions and torture, we have provided our enemies with a recruiting field day

I am not alone in saying that our policies have made us less safe. Former Secretary of State Colin Powell said last summer that "Guantanamo has become a major, major problem for . . . the way the world perceives America. And if it was up to me, I would close Guantanamo not tomorrow, but this afternoon." Secretary Powell said that Guantanamo had "shaken the belief the world had in America's justice system." When asked whether it is a problem for detainees to have habeas corpus rights he said "[s]o what? Let them. Isn't that what our system's all about?" Even former Secretary of Defense Donald Rumsfeld questioned in a memo whether our tactics and policies are creating more terrorists than we are killing and capturing. This will continue until we return to policies that reflect our values and uphold the rule of law. That is ultimately our greatest strength and what has distinguished America from other powers for more than 200 years.

Adopting a detainee policy that reflects our values would mean closing Guantanamo, giving detainees due process and releasing those who should never have been there in a timely and responsible manner. Detainees that pose a danger to this country and the world should swiftly be brought to justice within our existing military and civilian justice systems. These systems are strong, flexible, and up to the job.

Cleaning up this mess and getting back to the right policy will not be easy. We will need to join together in the months ahead to rethink the misconceived legal framework that has been devised and carried out by this administration. I look forward to hearing from our witnesses on how, mindful of the terrible mistakes of the past seven years, we can start over and put our detainee policy on a firm legal footing.

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**Statement of Kate Martin
Director,
Center for National Security Studies**

**Before the Judiciary Committee of the United States Senate
on
How the Administration's Failed Detainee Policies
Have Hurt the Fight Against Terrorism:
Putting the Fight Against Terrorism
on Sound Legal Foundations**

Wednesday, July 16, 2008

Thank you, Mr. Chairman for the honor and opportunity to testify today on behalf of the Center for National Security Studies. The Center is a civil liberties organization, which for more than 30 years has worked to ensure that civil liberties and human rights are not eroded in the name of national security. The Center is guided by the conviction that our national security must and can be protected without undermining the fundamental rights of individuals guaranteed by the Bill of Rights. In our work on matters ranging from national security surveillance to intelligence oversight, we begin with the premise that both national security interests and civil liberties protections must be taken seriously and that by doing so, solutions to apparent conflicts can often be found without compromising either.

Introduction

After the terrible attacks of September 11, the international community was united in its support for the United States and condemnation of the attacks. Since then, however, the United States has lost much of the good will and cooperation of the international community as a result of its flawed detention policies. We welcome this Committee's examination of how these failed detention policies have hurt, rather than advanced the national security and what needs to be done now to put detention policy on a sound legal footing consistent with national security interests.

As this Committee is well aware, since 2001, the Executive Branch has advanced extraordinary and unsupportable claims that the President is free to ignore and even

violate established law in order to conduct the “war against terror.” These claims underlie the detention policies and the administration’s posture that neither Congress nor the judiciary have any role in legislating or overseeing detentions. While the Supreme Court has rejected that view on four occasions and Congress has since legislated, the administration continues to claim unprecedented authority to create new forms of detention and decide who may be detained without regard to established law or constitutional limits.

On November 13, 2001, the President publicly instituted these policies with the issuance of Military Order No. 1. In addition to establishing military commissions, the Order authorized the military detention of any non-citizen found in the United States without charge solely on suspicion of being involved in terrorist activities. In May 2002, the President directed the military to seize a U.S. citizen in Chicago, who was then held for more than three years incommunicado without charge or access to a lawyer, solely on the say-so of the President. The administration also directed the military to ignore the Geneva Conventions and established military law and regulations when detaining individuals fighting in Afghanistan. It seized individuals in Bosnia, Europe and elsewhere and held them in secret prisons. It built a detention facility at Guantanamo in order to put detainees outside the reach of the law.

The administration still claims the right to seize any individual anywhere in the world, hold him incommunicado in a secret prison indefinitely without trial. It is now clear that its core reason for doing so was to be able to use “enhanced interrogation techniques” that are internationally recognized and outlawed as torture. (In the case of U.S. citizen Jose Padilla who was held incommunicado for more than three years, the government confessed that it did so in order to interrogate him.¹)

The result of this approach is the international view that the United States is not following the law, but is instead making up rules for detentions and interrogations. Most significantly, the argument that the United States is engaged in a “global war on terror” has been used to justify detentions that violate human rights and constitutional

¹ Declaration of Vice Admiral Lowell E. Jacoby in the matter of Jose Padilla v. George W. Bush et al., Case No. 02 Civ. 4445, January 9, 2003, available at: http://www.pegc.us/archive/Padilla_vs_Rumsfeld/Jacoby_declaration_20030109.pdf

protections. Guantanamo Bay in particular, has come to be seen by the world as a symbol for lawlessness and abuse.

These detention policies have undermined rather than strengthened U.S. power. They have discouraged and interfered with, rather than advancing international cooperation and have provided fuel to al Qaeda efforts to recruit foreign terrorists. The universal calls to close Guantanamo reflect the recognition that these detention policies that are inconsistent with the U.S. commitment to the rule of law and human rights have also harmed our national security.

This Committee's examination of how to replace these failed policies and undo the damage done to the rule of law and to U.S. standing in the world is most timely and welcome. A new President and a new Congress will have the opportunity to work together to move forward. The Supreme Court's decision in *Boumediene* provides the first step towards restoring the rule of law regarding the detainees held at Guantanamo. While the details of closing Guantanamo and replacing current detention policies will be complex, the established law of war in conjunction with established criminal law provide a straightforward framework for doing so. Using this established framework of military and criminal law side-by-side will enable suspected terrorists to be detained and tried in a way that will advance rather than undercut the effort to win hearts and minds around the world.

War or Crime?

Much of the public debate about treatment of detainees in Guantanamo and elsewhere has turned on questions of whether the law of war or criminal justice rules should apply to counterterrorism operations. But the absolutist positions adopted in this debate obscure more than they clarify.

The Bush Administration has argued that the threat from al Qaeda is unprecedented in magnitude and nature. Accordingly it has claimed a plenary right to use military force without, however, acknowledging any obligation to follow the rules of war as traditionally understood and articulated by the U.S. military.² Thus, while the administration claims that being at war justifies its extraordinary and unprecedented

² See Geoffrey S. Corn & Eric Talbot Jensen, "Untying the Gordian Knot: A Proposal for Determining Applicability of the Laws of War to the War on Terror," (January 14, 2008).

detention practices, its adherence to the rules universally acknowledged to be applicable to military conflicts has been at best ad hoc and inconsistent. For example, the administration claimed that the Geneva Conventions had little or no applicability to the fighting in Afghanistan. (That claim was rejected by the Supreme Court in *Hamdan v. Rumsfeld*, when it held that Common Article 3 of the Geneva Conventions applies to all detainees.³)

At the same time, policy-makers have been reluctant to adopt the stance that the threat posed by al Qaeda terrorists to the United States and its allies can be addressed by criminal law enforcement alone. This perspective is sometimes articulated as the proposition that all current detainees must either be charged with a crime or released.

Yet, in reality, since September 11, the United States has employed both congressionally authorized military force, including consequent military detention, in foreign armed conflicts such as Afghanistan and Iraq, and also criminal law enforcement tools against alleged al Qaeda terrorists, including prosecutions of Zacharias Moussaoui, the “American Taliban,” John Walker Lindh and Richard Reid, the British “shoe bomber.”

In particular, there is general agreement that the attacks of September 11, 2001 by al Qaeda rank as an act of war. Congress responded with the Authorization to Use Military Force “as necessary and appropriate” against al Qaeda and the Taliban in Afghanistan as well as those individuals, who “planned, authorized, committed or aided” the 9/11 attacks.⁴ The United Nations Security Council recognized the attacks as threats to the peace and security justifying the international use of force in Afghanistan under the United Nations charter.⁵ And since 2003, Al Qaeda fighters have attacked U.S. and allied troops in Iraq.

³ *Hamdan v. Rumsfeld*, 548 U. S. 557 (2006).

⁴ Joint Resolution to Authorize the Use of United States Armed Forces Against those Responsible for the Recent Attacks Launched Against the United States (AUMF), S.J. Res. 23, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁵ United Nations Security Council Resolution 1378 (2001) on the situation in Afghanistan.

At the same time, many individuals suspected of involvement with al Qaeda, who have been seized in the United States, Europe or elsewhere, have been charged with crimes, prosecuted, convicted and sentenced to long imprisonments.

In sum, even this administration has used both military force and criminal law enforcement in the fight against terrorism. As a matter of both common sense and law, detention policy should reflect this complex reality. Not even the most aggressive advocate of the war model claims that we can persuade our allies to abandon their criminal law traditions, to extradite suspects to us for military detention, or to allow open-ended military operations on their soil. Simply put, it is not realistic to claim that the “war on terror” is only, or even mostly, a matter of military force.

Moreover, when Congress authorized the use of military force as “necessary and appropriate,” it did not replace the time-tested constitutional requirements of the criminal justice system, due process or military detention authority. Whatever the extent and nature of the “armed conflict with al Qaeda,”⁶ it differs fundamentally from the traditional wars of the past. Outside the battlefields of Afghanistan and Iraq, apart from the known al Qaeda leaders who have publicly boasted of their participation in these war crimes, there are no enemy soldiers, indisputably identifiable by uniform or nationality, who may be targeted and detained by the military as combatants under the law of war.

New detention policies are needed that recognize that law enforcement and military force are both important tools for counterterrorism. Respect for the rule of law and individual rights is critical to a successful counterterrorism policy by the United States with its commitment to democracy, freedom and the rule of law. The following recommendations take into account the ongoing military operations in Afghanistan and Iraq. They are based on and consistent with the relevant rulings by the Supreme Court in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* concerning the law of war and the scope of the Authorization to Use Military Force adopted by Congress in September 2001. These recommendations focus on the threat of terrorism posed by al Qaeda because to whatever

⁶ See *Hamdan*, 548 U. S. 557, 623 (2006).

extent al Qaeda terrorism poses an existential threat to the United States, no other terrorist group does so.⁷

Recommendations

These recommendations and supporting analysis embody the analysis and conclusions of a Working Paper by the Center for National Security Studies being written with the Brennan Center for Justice. The final form of the Working Paper will be available shortly on our websites www.cnss.org and <http://www.brennancenter.org>.

A. Application of the Law of War or Criminal Law:

- **When military force is used consistent with constitutional authorization and international obligations the United States shall follow the traditional understanding of the law of war, including the Geneva Conventions. Individuals seized in a theater of active hostilities are subject to military detention and trial pursuant to the law of war.**
- **When suspected terrorists are apprehended and seized outside a theater of active hostilities, the criminal law shall be used for detention and trial.**

A new detention policy based on these principles would result in a stronger and more effective counterterrorism effort. It would ensure the detention and trial of fighters and terrorists in accordance with recognized bodies of law and fundamental notions of fairness and justice. It would ensure cooperation by key allies in Europe and elsewhere who have insisted that military detention be limited. It would begin to restore the reputation of the U.S. military, damaged by the international condemnation of the abuses of this administration. And it would deprive al Qaeda of the propaganda and recruiting opportunities created by current policies.

The Supreme Court has reaffirmed that under the law of war, when the U.S. military is engaged in active combat, it has the authority to seize fighters on the

⁷ See Glenn L. Carl, *Overstating Our Fears*, N.Y. TIMES, July 13, 2008 at B07 (member of the CIA's Clandestine Service for 23 years, retired in March 2007 as deputy national intelligence officer for transnational threats outlining the limited threat posed by al Qaeda.)

battlefield and detain them as combatants under the law of war.⁸ The traditional law of war, including the Geneva Conventions and Army Regulation 190-8,⁹ should be followed when capturing and detaining individuals seized on a battlefield/in a theater of armed conflict/during active hostilities, such as Afghanistan or Iraq. Of course, following the traditional rules for detaining battlefield captives would in no way require “Miranda” warnings or other “Crime Scene Investigation” techniques. Nevertheless, the Bush administration deliberately ignored these military rules – including the requirement for a hearing under Article 5 of the Geneva Conventions -- when it seized individuals in Afghanistan who are now held at Guantanamo.¹⁰

(While some have claimed that the “battlefield” in the “war against terror” is the entire world, that claim is inconsistent with traditional understandings in the law. For example, one characteristic of a battlefield is the existence of Rules of Engagement, which permit the military to use force offensively against an enemy.¹¹ Military Rules of Engagement for the armed forces stationed in Germany or the United States for example, are quite different from those applicable to troops in Afghanistan or Iraq. Troops in the United States or Germany are not entitled to use deadly force offensively.)

Outside these battlefields, in countries where there is a functioning domestic judiciary and criminal justice system, criminal laws should be used to arrest, detain and try individuals accused of plotting with al Qaeda or associated terrorist organizations. Outside the war theater, criminal law has proved to be successful at preventing and punishing would-be terrorists, protecting national security interests and ensuring due process. Richard B. Zabel and James J. Benjamin, Jr., *In Pursuit of Justice, Human Rights First*, May 2008, available at: <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>.

⁸ See *Hamdi v. Rumsfeld*, 542 U. S. 507 (2004).

⁹ Enemy Prisoners of War, Retained Persons, Civilian Internees and Other Detainees, Army Regulation 190-8, § 1-6 (1997).

¹⁰ Article 5 requires that captives be given a hearing to determine whether they are prisoners of war.

¹¹ Corn and Jensen, *supra* note 1.

B. The government must distinguish between the different categories of detainees, who are subject to different rules.

One of the key sources of confusion in the debates to date about detention policy has been to speak about “terrorism detainees” in general as if they are all subject to the same legal regime. Recognizing that the law of war must be followed when seizing individuals on the battlefield and that criminal law must be followed when arresting suspects in Chicago or Italy, makes it clear that there are different categories of detainees.

- The first category includes fighters in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future); the second category is Osama bin Laden and the other self-proclaimed planners and organizers of the 9/11 attacks. Pursuant to the congressional authorization, individuals in the first or second categories may be targeted, captured and tried under the law of war.
- The third category includes suspected al Qaeda terrorists seized in the United States or elsewhere, other than Afghanistan or Iraq, who must be treated as suspects under criminal law.
- The last category is current detainees at Guantanamo, which includes individuals alleged to fall within all three categories listed above. The detainees in Guantanamo are *sui generis* for a number of reasons, including that their treatment has violated military law and traditions and that it has become an international symbol of injustice.

Fighters captured in Afghanistan or Iraq (or other countries where U.S. military forces are engaged in active hostilities in the future) subject to military detention and/or trial:

Pursuant to the Supreme Court’s ruling in *Hamdi*, individuals fighting in the Afghanistan or Iraq hostilities may be captured and detained pursuant to the law of war and may be held until the end of hostilities in the country in which they were captured.

All such individuals, immediately upon capture, shall be provided a hearing pursuant to Article 5 of the Geneva Conventions and military regulations to determine whether they are entitled to be treated as prisoners of war, should be released as innocent

civilians, or may be held as combatants pursuant to the Supreme Court's decision in *Hamdi*.

Any such individuals who are accused of violations of the law of war shall be subject to trial by a regularly constituted military tribunal following the rules of the Uniform Code of Military Justice as outlined below.

Osama bin Laden and the other planners and organizers of the 9/11 attacks:

In the September 2001 Authorization for the Use of Military Force, Congress specifically authorized the use of military force as "necessary and appropriate" against those individuals who "planned, authorized, committed or aided" the 9/11 attacks. The administration has identified approximately six individuals detained at Guantanamo as planners of the attacks and a limited number of others, including bin Laden, remain at large.

If such individuals are captured rather than killed, they shall be treated humanely and protected from torture and cruel, inhumane or degrading treatment.

They may be held by the military until they are tried by a military tribunal or the end of the conflict with al Qaeda.

They may be tried by a regularly constituted military tribunal as outlined below.

Such individuals may also be tried in the federal district courts on criminal charges.

The best course from the standpoint of discrediting and opposing al Qaeda, may be to conduct a fair public trial of these individuals, rather than detain them without trial.

Suspected al Qaeda terrorists seized in the United States or elsewhere other than Afghanistan or Iraq:

Individuals found in the United States or in other countries with a functioning judicial system (other than Afghanistan and Iraq) who are suspected of terrorist plans or activities, must be detained and charged pursuant to the criminal justice system and/or deported in accordance with due process.

Any such individuals may be transferred to other countries only in accordance with the rules outlined below. They must be protected against the danger of torture and may only be transferred in accordance with due process and to stand trial on criminal charges.

Individuals suspected of terrorist plotting may be subject to surveillance in accordance with domestic laws.

Individuals currently held at Guantanamo:

The United States should begin a process to close the Guantanamo detention facility. There are many difficult questions about how to accomplish this arising in part from the administration's failure to follow the law in detaining and seizing these individuals. The Center for American Progress has recently issued a report detailing an approach in line with these recommendations.¹²

The government shall expeditiously transfer all those detainees it has determined are eligible for release to their home country or to some other country where they will not be subjected to abuse or torture.

Those individuals in Guantanamo who are not alleged to have been captured on the battlefields of Afghanistan or Iraq or fleeing therefrom may not be held by the military as combatants, but must be either charged with a crime, transferred to another country for prosecution on criminal charges, or released.

As recognized in *Boumediene*, all detainees at Guantanamo are also entitled to habeas corpus.

Those Guantanamo detainees who are alleged to have been captured in Afghanistan or Iraq and been part of al Qaeda or Taliban forces may be detained until the end of hostilities in those countries if the government sustains its burden of proof in a habeas corpus proceeding.¹³ Such detentions without charge for the duration of hostilities were approved by the Supreme Court under *Hamdi* as having been authorized by the AUMF. At the same time, there are likely to be counterterrorism benefits to choosing to bring charges against such individuals and providing them with a fair trial.

Those detainees who are alleged to be planners or organizers of the 9/11 attacks may be detained until the end of the conflict with al Qaeda if the government sustains its

¹² See Ken Gude, *How to Close Guantanamo*, Center for American Progress, June 2008, available at: <http://www.americanprogress.org/issues/2008/06/pdf/guantanamo.pdf>.

¹³ Whether al Qaeda fighters may be detained beyond the end of hostilities in Afghanistan need not be addressed, because peace in Afghanistan does not appear likely in the near future.

burden of proof in a habeas corpus proceeding that they personally participated in the planning of the attacks.

Those detainees who are subject to military detention as described above and who are also charged with violations of the law of war may be tried by a regularly constituted military tribunal as outlined below.

C. Military tribunals for individuals who are properly held as combatants, either having been captured on the battlefield or having planned or organized the 9/11 attacks:

As recognized by the Supreme Court in *Hamdan*, combatants may be tried by military tribunals for offenses properly triable by such tribunals. Such tribunals must accord due process and be “regularly constituted courts.” In addition, such tribunals must be seen by the world as fair and be consistent with the proud history of U.S. military justice in the past 50 years. The military commission system created for Guantanamo will never be seen as legitimate and thus should no longer be used to try detainees.

If military trials are sought for combatant detainees at Guantanamo, they should be conducted pursuant to the United States Uniform Code of Military Justice courts martial rules to the greatest extent possible.

D. End torture and cruel, inhumane and degrading treatment.

As the Supreme Court has made clear, all of these detainees are protected by Common Article 3 of the Geneva Convention and must be treated humanely. In particular:

All detainees shall be treated humanely and shall be protected from torture and cruel, inhumane or degrading treatment.¹⁴

No individual may be detained in secret.

¹⁴ For more specific recommendations about insuring humane treatment and ending torture, see, e.g., *Declaration of Principles for a Presidential Executive Order On Prisoner Treatment, Torture and Cruelty, National Religious Campaign Against Torture, Evangelicals for Human Rights, and the Center for Victims of Torture*, released June 25, 2008, available at: http://www.evangelicalsforhumanrights.org/storage/mhead/documents/declaration_of_principles_final.pdf, among others.

The government must institute new mechanisms to ensure that no person is transferred to a country where it is reasonably likely that he would be in danger of torture.

Individuals may only be seized and transferred to other countries in order to stand trial on criminal charges in accordance with due process and the domestic laws of the country they are transferred to.

The CIA program of secret detention and interrogation of suspected terrorists shall be ended.

The administration shall consider whether any overriding national security reason exists for CIA involvement in terrorism detentions and interrogations, which outweighs the demonstrated harm these activities have caused to the national security. Before determining that the CIA shall again participate in any detention or interrogation activity, the administration shall report to the Congress concerning the national security interests at stake and specifically outline how, if such participation is authorized, it would be conducted with adequate checks to ensure that its operation conforms to law and is fully consistent with the United States' commitment to human rights.

Conclusion

The administration ignored both the law of war and constitutional requirements and established a new detention regime, largely in order to conduct illegal and abusive interrogations. The results have been disastrous. "Guantanamo" has become a symbol throughout the world of U.S. disregard for the rule of law, even though the Afghanistan invasion itself was widely supported as justified and legal, and even though the taking of prisoners is a natural (and humane) consequence of such an invasion. Detention policies have strained relations with allies and may help terrorist recruiting efforts for years to come. Disrespect for the law has harmed, not enhanced, our national security.

The Supreme Court has now taken the first steps in restoring constitutional limits and the rule of law and the lower courts will continue that task in considering the habeas petitions from Guantanamo detainees. A new administration should pledge a return to respect for the rule of law and commit to following the law of war on the battlefield and the criminal law when plotters are found in the United States or elsewhere. Doing so will serve the national security and help restore basic human rights.

96

Statement by

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Before the

Senate Committee on the Judiciary

“How the Administration’s Failed Detainee Policies Have Hurt
the Fight Against Terrorism: Putting the Fight Against Terrorism on
Sound Legal Foundations”

July 16, 2008

Chairman Leahy and Members of the Judiciary Committee. I appreciate the opportunity to appear before you today. I realize that many legal positions taken by the Administration to deal with the post-September 11 national security challenges, laying the fundamental legal architecture of the war on terror, have not found favor with many critics. Indeed, the title of this hearing, referring as it does to the "failed Administration's detainee policies," certainly reflects this critical sentiment. With respect, I disagree with this position. As I elaborate on this point, I will also make a few recommendations for going forward.

I start from the premise that, both as a matter of law and policy, the challenge that confronted the Bush Administration and, indeed the country, after September 11, was to determine how to prosecute successfully a war against al Qaeda, Taliban, and affiliated entities. The successful war prosecution required the choice of an appropriate legal paradigm. And, as in all prior wars in American history, and consistent with both international and constitutional law requirements, this legal paradigm had to be rooted in the laws and customs of war. Moreover, while this paradigm covered a broad range of legal issues, governing the use of force against the enemy – for example, target selection, choice of the rules of engagement – how to deal with captured enemy combatants was a key element.

Behind this fact is a stark reality. In this war against shadowy pan-national terrorist entities, the U.S. must not only attack and defeat enemy forces. It must also anticipate and prevent their deliberate attacks on its civilian population – al Qaeda's preferred target. International law gives the civilian population an indisputable right to that protection. Furthermore, ascertaining whether enemy personnel captured in this

conflict ought to be classified as lawful or unlawful combatants, being able to hold them for the duration of hostilities and being able to elicit intelligence information from them, while utilizing legally appropriate and effective procedures, is indispensable in carrying out the key war-related strategic missions, including protecting our civilian population.

To be sure, the questions that the Administration's lawyers have sought to address, particularly those dealing with the interrogation of captured enemy combatants, are uncomfortable ones that do not mesh well with our 21st Century sensibilities. Many of the legal conclusions reached have struck critics as being excessively harsh. Some, of course, have since been watered down as a result of internal debates, political and public pressure brought to bear upon the Administration, and by the results of relentless litigation. Though I would not endorse each and every aspect of the Administration's post-September 11 wartime policies, I would vigorously defend the overall exercise of asking difficult legal questions and trying to work through them. To me, the fact that this exercise was undertaken so thoroughly attests to the vigor and strength of our democracy and of the Administration's commitment to the rule of law, even in the most difficult of circumstances.

In this regard, I point out that few of our democratic allies have ever engaged in so probing and searching a legal exegesis in wartime. I also strongly defend the overarching legal framework, featuring the traditional laws of war architecture, chosen by the Administration. I want to emphasize here that, despite all of the criticisms of the various procedural facets of the Administration's detainee policy, detainees in U.S. custody today enjoy the most fulsome due process procedures of any detainees or prisoners of war in human history. Indeed, the much maligned Combatant Status

Review Tribunals and Military Commissions, backed up by statutorily-driven judicial review procedures, are unprecedented in the history of warfare.

This, by the way, was the case even before the Supreme Court's recent *Boumediene* decision, which further augmented the judicial review opportunities, available to detainees in U.S. custody. Meanwhile, the fact that the U.S. has released hundreds of captured enemy combatants from detention, instead of holding them for the duration of hostilities as allowed by international and constitutional law and fully consistent with past state practice, further underscores the extent of moderation of our detainee policy. We also paid a price for this moderation, as dozens of individuals so released have gone back to combat and killed again.

I recognize, of course, that, unfortunately, this is not the way how much of the world sees America's detainee policies in this war. I happen to believe, however, that it is the critics' rejection of the overall laws of war-rooted legal framework, reflecting their underlying view that this is not a real war, that animates most of their criticisms of the Administration's specific legal decisions. Most controversial, of course, was the Bush Administration's insistence that the 1949 Geneva Conventions have limited, if any, application to al Qaeda and its allies (who themselves reject the "Western" concepts behind those treaties); and the Administration's authorization of aggressive interrogation methods, including, in at least three cases, waterboarding or simulated drowning.

Several legal memoranda, particularly 2002 and 2003 opinions written by the Office of Legal Counsel, considered whether such methods can lawfully be used. These memoranda, some of which remain classified, explore the limits imposed on the United States by statute, treaties, and customary international law. The goal clearly

was to find a legal means to give U.S. interrogators the maximum flexibility, while defining the point at which lawful interrogation ended and unlawful torture began.

In truth, the critics' fundamental complaint is that the Bush Administration's lawyers measured international law against the U.S. Constitution and domestic statutes. They interpreted the Geneva Conventions, the U.N. Convention forbidding torture, and customary international law, in ways that were often at odds with the prevailing view of international law professors and various activist groups. In doing so, however, they did no more than assert the right of this Nation – as is the right of any sovereign nation – to interpret its own international obligations. But that right is exactly what is denied by many international lawyers inside and outside the academy.

To the extent that international law can be made, it is made through actual state practice – whether in the form of custom, or in the manner states implement treaty obligations. In the areas relevant to the war on terror, there is precious little state practice against the U.S. position, but a very great deal of academic orthodoxy.

For more than 40 years, as part of the post World War II decolonization process, a legal orthodoxy has arisen that supports limiting the ability of nations to use robust armed force against irregular or guerilla fighters. It has also attempted to privilege such guerillas with the rights traditionally reserved to sovereign states. The U.S. has always been skeptical of these notions, and at critical points has flatly refused to be bound by these new rules. Most especially, it refused to join the 1977 Protocol I Additional to the Geneva Conventions, involving the treatment of guerillas, from which many of the "norms" the U.S. has supposedly violated, are drawn.

I would also submit to you that, until very recently, the Administration's legal positions have been substantially upheld by the courts. I know that this flies in the face of public and even elite perceptions that the Administration has been lurching from one legal defeat to another. Yet, in a series of cases beginning with *Hamdi v. Rumsfeld* (2004), the U.S. Supreme Court, while tweaking various elements of the government's legal policies, has upheld many of the Administration's key positions: that the country is engaged in a legally cognizable armed conflict; that captured enemy combatants can be detained without criminal trial during these hostilities; and that (when the time comes) they may be punished through the military, rather than the civilian, justice system.

The Court has also required that detainees be given an administrative hearing to challenge their enemy-combatant classification, ruled that Congress (not the President alone) must establish any military commission system, and made clear that it will in the future exercise some level of judicial scrutiny over the treatment of detainees held at Guantanamo Bay. Overall, the Administration has won the critical points necessary to continue the war against al Qaeda. Indeed, the two political branches – the Executive and Congress – have responded to the Court's decisions with changes in policies, promulgating two major pieces of legislation, the Detainee Treatment Act and the Military Commissions Act.

Regrettably, in the just-decided *Boumediene v. Bush* case, the Supreme Court has abandoned this approach. It has effectively rendered non-viable a major portion of the Administration's wartime legal architecture, even though it itself has helped to shape it for the last several years. Now, the Court has taken a central role in deciding who may be captured and detained as an enemy combatant, ruling that detainees, akin to

criminal defendants, are constitutionally entitled to challenge their confinement through "habeas corpus" proceedings in federal district courts. The Court's reasoning extends far beyond how "unlawful enemy combatants" like the Guantanamo detainees are treated. Legitimate prisoners of war in a future conventional conflict – who now receive less legal process than the detainees at Guantanamo – also can demand habeas proceedings. In my view, the *Boumediene* decision is one of the most deplorable examples of judicial overreaching in our history and is inconsistent with the Constitution, historical practice, and settled case law.

However, what is even more important for the purposes of our discussion today is *Boumediene*'s operational consequences. The reason I want to stress this point is because for years the Administration's critics have been arguing that there was no real cost to giving additional legal rights, whether procedural or substantive in nature, to the detainees, that it was only the Administration's obstinacy that was the problem. Well, the critics could not have been more wrong, proving, once again, that balancing individual liberty and public safety is never a cost-free exercise, and particularly so in wartime. Granting detainees the right to the traditional style habeas is going to have momentous and grave consequences across a number of fronts.

The most obvious consequence is that, according to the published reports, the Department of Justice is going to dedicate at least fifty and most likely more attorneys full-time to handle the habeas petitions, filed by Guantanamo-based detainees, spending months and months of time preparing the record for the district court, in an effort to develop acceptable "returns." Contrary to what many believe, they would have to deal not only with the basic question of whether the government has sufficient basis

to hold individual detainees as enemy combatants, but would also have to handle literally hundreds and hundreds of lawsuits, dealing with numerous collateral issues, including conditions of confinement, whether given detainees can be transferred to a particular country, and such. Discovery would also be a huge issue, since, in the context of a habeas proceeding, once an acceptable return has been filed by the government, the burden shifts and the detainee is entitled to discovery.

To put it mildly, this flurry of litigation, and particularly the opportunity for captured enemy operatives to press discovery against the country that has taken them into custody, is unprecedented in the history of warfare. We can also expect that the habeas proceedings would result in overturning the enemy combatant status classification of at least some of the Guantanamo-based detainees. To emphasize, in at least some cases this would not happen because they were innocent shepherds or aid workers, who should not have been detained in the first place, but rather because the government simply lacks sufficiently fulsome evidence of their combatancy or even if it does have such evidence, it cannot run the risk of disclosing evidence without jeopardizing the war effort. The consequences of such habeas proceedings are a little unclear, but none of them are particularly good. Indeed, the possibility that some of the dangerous detainees would be released into the United States cannot be ruled out, especially since we can expect the courts to block their repatriation to those foreign countries that may be interested in receiving them.

Presented with this habeas-driven detention policy, on a going forward basis, American forces, if they wish to be sufficiently certain of holding enemy prisoners anywhere in the world, must set about securing CSI-style evidence to satisfy the judges

that their captives are indeed what they seem to be – enemies in arms against the United States. Collecting this evidence on the battlefield will cost lives and impair combat effectiveness. Moreover, the need to litigate habeas proceedings, particularly when applied to a large body of prisoners, will impose great additional burdens on the U.S. military, which is already stretched thin by the demands of global operations. One example: Operations in Guantanamo had to be fundamentally recast to accommodate hundreds of detainee lawyers and their support personnel. Expanding this approach worldwide is simply untenable.

In my view, it is unprecedented and deplorable that American forces can no longer detain captured enemy combatants without a burdensome judicial process. Until the Supreme Court's balance changes and *Boumediene* is overruled, the U.S. armed forces will likely be driven to a tragic "catch and release" policy. The most senior enemy operatives, assuming enough evidence can be collected, will be tried for war crimes before military commissions. Others will be taken into custody, interrogated, and then transferred to the custody of allied governments – or even set free in the theater of action after they have been disarmed.

With respect to the 270 or so Guantanamo detainees, some are being, or will be, tried by military commissions for war crimes. The Court's *Boumediene* decision should not prevent those trials from going forward. Indeed, they should be accelerated, and all enemy combatants in U.S. custody, against whom sufficient evidence of war crimes exists, should be brought expeditiously to trial. But for many of those not slated for these trials, habeas proceedings may well result in a release order if the government

does not have sufficient evidence to satisfy a civilian judge as to their enemy combatant status.

This is the only area where Congress should promptly act. It may be that a handful of detainees deserve "parole" into the United States on humanitarian grounds, but none of them have a right to enter, even if a federal court does order their release. Where such parole is inappropriate, Congress should establish a category of detention that permits aliens not otherwise lawfully admitted to this country to be held until a suitable foreign government can be found to accept them, however long that may be. Under current law, aliens in the U.S. without a lawful basis for being here, and for whom no receiving country can be found, can only be held up to six months. The Constitution grants Congress plenary authority over questions of immigration and nationality and the Supreme Court has – so far – respected that authority.

That leaves the problem of what to do with those Guantanamo detainees who cannot be repatriated, but who a habeas court determines can be properly detained. For all of the real diplomatic costs incurred over Guantanamo, that base was admirably suited to house captured enemy combatants. It is under complete U.S. control, far from any active battlefield, and it is isolated from nearby civilian populations – largely thanks to the surrounding "workers paradise" run by the Castro brothers. In short, the base is easily secured and presents no "host nation" or "not in my backyard" issues. It is those issues that make Guantanamo's prompt closure a bigger problem than almost anyone imagines.

Although many members of Congress have decried the detainees' fate at Gitmo, few have offered their states or districts as a suitable alternative, and chances are none will. For example, last July, a Senate resolution opposing transfer of Gitmo detainees "stateside into facilities in American neighborhoods" passed 94-3. Transferring the Guantanamo detainees to the U.S. would create a security problem of unrivaled character. The new location would immediately become a particular target for al Qaeda and other jihadist groups.

The logical place to hold them, of course, would be the Military Disciplinary Barracks at Fort Leavenworth, Kan. But, unlike Guantanamo Bay, Fort Leavenworth is not isolated from the surrounding civilian population. It is very much a part of the communities of eastern Kansas and western Missouri. Other alternatives, such as the old federal prison on Alcatraz Island, are also surrounded by population centers.

For that very reason it is Congress that must make the decision where to put the detainees. If that is to be Fort Leavenworth, then the Kansas and Missouri delegations must have the opportunity to speak on the subject in the House of Representatives and the Senate. Neither President Bush nor his successor, Democrat or Republican, should act without a full and complete congressional debate on the subject, and legislation establishing the new locus for detainee operations.

I look forward to your questions.

