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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

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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 Moussaiou, 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.

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[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.

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[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 samelegal 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

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[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.

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[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.