Testimony
United States 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
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David Rivkin
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Statement by

David B. Rivkin, Jr.
Partner, Baker Hostetler, LLP

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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 forard to your questions.