Testimony of

# Stephen Schulhofer, Esq.

Professor
new York University School of Law
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Senator Specter, Senator Leahy, Committee Members:

My name is Stephen Schulhofer. I am a Professor at New York University School of Law and a founder of the Liberty and National Security Project at the Brennan Center for Justice. Thank you for this opportunity to contribute to your deliberations. Thank you especially for scheduling these extremely important hearings.

The issues arising out of the detentions at Guantánamo Bay and elsewhere are of utmost importance to our national security. It is essential that we find out whether captured fighters have useful intelligence, and it is essential that we prevent them from returning to the battlefield.

It is also essential to convince the world that America is fighting for freedom, for democracy and for the human dignity of all peoples. We know that we are, but the sad truth is that much of the world does not automatically see it that way. Millions of people around the globe begin with great skepticism about our good intentions. And we cannot defeat terrorism if we win battles at Tora Bora and Falluja but lose the battle for the cooperation and respect of the world's one billion law-abiding Muslim citizens.

Guantánamo is now hurting us - - hurting us very badly. Some of the prisoner abuse allegations are disputed, but far too many have been confirmed by our own officials. And in some instances, our legalistic defenses, taking refuge in definitional technicalities, have made us look even worse.

In any case, no one disputes that more than 500 prisoners now held at Guantánamo have been there for years, with no access to the courts or to any independent tribunal. No one disputes that we hold alleged terrorists at Bagram and at undisclosed locations around the world, without ever saying who they are or where they are, without filing any accusations against them, and without making public any of the supposedly damning evidence we have of their crimes.

Our armed forces have done a superlative job, responding to an unprecedented challenge. And right after September 11th, many decisions had to be made quickly, under enormous pressure. Today's agenda must not be to point fingers or to cast blame. But we have to face the facts of where we are today and the price we are paying every minute, throughout the world, for the predicament in which we now find ourselves.

Guantánamo, Abu Ghraib and what they represent have become potent recruiting tools for extremists. Al Qaeda has been disrupted and much of its pre-September 11th leadership has been captured or killed. But from all the evidence, new leaders are coming forward, and new jihadists are lining up to join. Our own Army has missed its recruiting goals for many months now. But the enemy apparently continues to replenish its ranks.

Beyond its effect as a recruiting tool for al Qaeda, Guantánamo poses other serious problems. In the United States, Western Europe and around the world there are millions of decent Muslims who would never consider becoming terrorists, no matter what we do at Guantánamo. But these good, law-abiding citizens now mistrust the United States. Many of them live in fear that they could be framed by enemies or accidentally caught in the wrong place at the wrong time. Some fear that they or their children could even wind up at Guantánamo. Immigrants in the United States know that they must keep their distance from federal authorities, and many are now even afraid to cooperate with their local police. They worry that if they report a suspicious new person in their community or if they admit to knowing him, they themselves could come under suspicion or even be deported.

For half a century, the United States has exported democracy and human rights to the whole world, but Guantánamo

has tarnished America's name and poisoned our reputation. We don't yet know all the missteps or how they occurred, but for now that doesn't matter. We have a "tylenol" problem. What we stand for has been contaminated. Whatever the cause, we have to let the world know that we are committed to restoring the integrity of our most important product and that we are taking immediate steps to make it tamper-proof from now on. We can begin to limit the damage, but only if we act forthrightly and quickly.
The solutions are not all that difficult. I would suggest two guiding principles. First, we should hew closely, wherever possible, to previously established institutions and procedures. This approach avoids confusion, minimizes start-up costs and above all carries the presumption of consistency and legitimacy that has been so disastrously missing from our actions at Guantánamo Bay. Second, our preoccupation should not be to see how many safeguards we can avoid or how little in the way of due process the Constitution will tolerate. That's the thinking that has brought us to where we are today. Instead, we must ensure that detention conditions and review procedures provide maximum feasible transparency and accountability, subject only to substantial national security imperatives.

National Security Imperatives - - the Three Hardest Questions

Reservations about relying on existing military and criminal justice procedures center on three concerns - - that ordinary civilian and military courts cannot protect sensitive information, that traditional procedures foreclose opportunities for effective interrogation, and that the potential devastation of a successful terrorist attack requires us to err on the side of security rather than liberty - - that we simply cannot afford to take chances. These are understandable concerns, but on examination, they do not hold up.

Sensitive information. Ordinary civilian courts and courts-martial have extensive experience handling cases that involve top-secret documents and other sensitive material. Building on the Classified Information Procedures Act (CIPA), both court systems have developed detailed mechanisms for protecting confidential information. CIPA permits courts to filter out the classified portions of relevant evidence, to provide substitutions that convey equivalent information without compromising sensitive sources, and to insure that access to classified material is strictly limited to personnel who have appropriate security clearances.
Misinformed media commentators often ridicule the capacity of the ordinary courts to try sensitive cases expeditiously and effectively, but experience demonstrates very clearly that complex federal prosecutions can proceed successfully - - and have proceeded successfully, consistently so. As shown in a thorough report just released by the Brennan Center for Justice, CIPA procedures have permitted terrorism cases, espionage cases and other prosecutions involving confidential material to go forward smoothly while preserving the essentials of a fair and accurate trial and without a single incident of compromising sensitive information.
As novel situations have arisen, the federal courts have demonstrated notable flexibility in developing new procedures to preserve secrecy while protecting the adversary process. Congress could facilitate these accommodations by enacting appropriate refinements to CIPA. Although legislation would be helpful, courts retain the ability to fill in gaps when unanticipated situations arise. There is simply no evidence - - none - - that federal courts and conventional courts-martial are unable to protect sensitive evidence while at the same time affording an effective adversarial trial in keeping with high standards of fairness.

Interrogation. The notion that criminal justice rules preclude all interrogation, require the presence of an attorney or pose an insuperable barrier to getting essential information is wildly misinformed. Neither Miranda v. Arizona nor even the Fifth Amendment itself imposes any restriction whatsoever on F.B.I. investigators, much less on military intelligence personnel, when they question detainees for information to guide preventive counter-measures, or to provide battlefield intelligence, or even to serve as admissible evidence supporting the arrest and prosecution of others. Regardless of the detention time-limits and procedures that Congress or the courts may ultimately establish, the core prohibitions on torture and other highly coercive interrogation methods will apply to intelligence interrogations in any event, and the more restrictive limitations of Miranda and the Fifth Amendment will not.
A different objection to affording prompt judicial hearings is the concern that successful interrogation may require that terrorism suspects be kept in prolonged isolation. Let us acknowledge the possibility that after months or (as is now the case) years of detention incommunicado, a suspect may eventually crack and yield information, not yet stale, that might not have been obtained otherwise. But if that prospect can suffice to foreclose access to any independent oversight or review for years on end, then individual liberty can be erased, for periods without limit, at the unchecked discretion of the military, and the rule of law literally becomes a dead letter. In Hamdi, the Supreme Court recognized explicitly that such a radical alteration of our constitutional system cannot rest on so slender a reed: "Certainly we agree that indefinite detention for the purpose of interrogation is not authorized."

To put in some perspective the claimed need for extended detention, it is essential to consider the experience of other Western nations. In the face of unremitting terrorist attacks in Northern Ireland, Britain sought to lengthen the period of incommunicado detention beyond its usual norm of 48 hours. The European Court of Human Rights held that because of the emergency conditions, detention prior to judicial review could be permitted for a maximum of five days, and then only subject to the proviso that there be an unconditional right of access to a solicitor after the first 48 hours.

Turkey, confronting persistent attacks by separatists who had caused instability and thousands of deaths in its Kurdish region, sought to detain suspected terrorists for exceptional periods without access to judicial review. The European Court held that despite grave emergency conditions, detention incommunicado for up to fourteen days was incompatible with the rule of law.

In connection with the second intifada and the Israeli military's extensive combat operations on the West Bank in 2002, the Israel Supreme Court held that incommunicado detention of suspected enemy combatants for up to eighteen days was unacceptably long; the IDF has since limited its periods of detention prior to the first court hearing to a maximum of eight days.

These benchmarks must play an important part in any effort to understand the international reaction to Guantánamo detentions that have continued incommunicado for more than three years, with no end in sight. I believe we all know that Israeli forces confront tight resource constraints and a grave threat to their national survival, as well as legal doctrines that since 1999 have largely succeeded in precluding the use of highly coercive interrogation techniques. Yet IDF interrogators have worked well for years within the eight-day boundary imposed by their commitment to the rule of law. Surely the American military, the best in the world, can function effectively under similar conditions.

Staying on the Safe Side. The nub of the matter is that global terrorism under modern conditions poses a threat of unprecedented destruction and loss of life. We can no longer reflexively assume that it is better for ten guilty suspects to be released than for a single innocent person to be imprisoned. The attraction of a new principle - - when in doubt, detain - - is readily understandable.

The problem, unfortunately, is that in the battle against global terrorism, there is no such thing as the safe decision that eliminates risk. To be sure, if suspects are detained indefinitely at Guantánamo, the actual terrorists among them will certainly be neutralized. To that extent, the pool of potential terrorists will be reduced. But that pool is not static. New recruits are constantly joining, and we know that our own policies influence the flow of these recruits, often in the opposite direction from the one we intend. The innocent civilians we inadvertently detain have families back in their home countries, they have former schoolmates and perhaps entire villages that wonder why their friends are being held in secrecy. The people back home doubt whether there is really any evidence against them and grow furious at what they see as America's hypocrisy and abuse of power.

To rely on secret evidence, to use hearsay accusations insulated from rebuttal, and to detain whenever in doubt eliminates much of the risk that a dangerous suspect will be released, but that approach may create thousands of new enemies for every existing terrorist it removes from the fight. Yes, adhering to our best due process traditions will mean taking some chances. It will require some courage, courage the American people surely can muster. But there is no simple, risk-free alternative.

Specific Solutions

It will be helpful to focus on four distinct groups of detainees. We should put aside for a moment the small number of prisoners actually accused of war crimes. These prisoners now face trial before a military commission, but to date, fewer than 15 detainees have been found eligible for this process. Hundreds of detainees have NOT been accused of any crime and are NOT facing any sort of trial. This is the major difficulty now clouding the entire anti-terror effort - - 99% of the Guantánamo detainees, more than 500 people, have not been charged with any misconduct, and they continue to be held even though many of them claim to be ordinary civilians. The immediate problem is to establish a credible procedure to resolve these old cases quickly, focusing first on detainees allegedly captured on battlefields in Afganistan.

Second, we must establish an efficient and sustainable system for dealing with combatants who may be captured in battle from this point forward. Third, we need a procedure for prisoners held at Guantánamo now (or apprehended in the future) who were not captured in combat but instead were arrested by law enforcement authorities or seized by other government agents on ordinary city streets and other areas far removed from the battlefield. Finally, we have to deal with the small number of detainees, present and future, who may be charged with criminal offenses.

Of course, all four of these tasks fall squarely within Congress' lawmaking responsibilities under Article 1, section 8 of the Constitution.

The solution, in a nutshell, is simply for Congress to make clear that these cases can be and should be addressed in accordance with the ordinary processes of military law and federal criminal procedure. Methods of unquestioned

legitimacy are already in place for dealing with combatants captured on a battlefield, suspected terrorists apprehended elsewhere, and individuals allegedly responsible for war crimes or other serious offenses. All that remains to be done is for legislation to remove technical impediments and start the ball rolling, so that existing processes can be set free to do their traditional work. To be sure, difficult problems may arise, but they are best addressed incrementally within the framework of existing institutions and procedures. There is no reason to cast aside two hundred years of experience in an effort to build a new legal system from scratch. The preferable, incremental approach is explained more specifically below.

1. Current prisoners captured in battle.

Hundreds of foreign nationals allegedly captured in battle are currently held at Guantánamo and other places where the United States exercises exclusive jurisdiction and control. Most of these prisoners were seized in late 2001 or early 2002. Habeas corpus challenges to their detention have received initial support from the Supreme Court in the Hamdi and Rasul cases, and litigation to determine just what process is due these detainees continues to work its way through the courts. A final resolution by that route may be years away, as judges seek to iron out minimally acceptable procedures and the substantive facts required to justify detention.

The courts cannot and should not prejudge all these questions. But the time courts will require to sort out the issues will come at a heavy cost in terms of the continuing erosion of trust in our government and continuing damage to global respect for American ideals. No responsible corporation would allow the fate of its brand to languish for years in this way. Here Congress can make an enormously valuable contribution by settling the principal issues quickly, in terms that can carry a strong presumption of legitimacy.

Because many of these detainees deny that they were engaged in battle against the United States or our coalition partners, Hamdi and Rasul hold that they are entitled to a hearing that comports with the requirements of due process. But they were not afforded a battlefield hearing promptly after capture, as contemplated by U. S. Army Reg. 190-8 and Article 5 of the Third Geneva Convention. It is now far too late for a 190-8 battlefield hearing. And the newly minted Combatant Status Review Tribunals established to take the place of Reg. 190-8 are mired in litigation, because of doubt that they provide the independent forum and other safeguards required by Hamdi.

There is a straightforward and essentially costless solution to this festering problem. Congress could restore credibility to the process overnight, by simply granting these detainees the immediate statutory remedy of a habeas corpus hearing as outlined in Hamdi. 28 U.S.C. § 2241 should therefore be amended to confirm that habeas hearings using the Hamdi procedures are available to review detention not supported by the judgment of either a court or a battlefield tribunal convened in close proximity to the time and place of capture. After a fair proceeding of this sort before an Article III judge, prisoners found to be enemy combatants can be detained under judicial orders of unquestionable legitimacy.

Under Hamdi's balancing analysis, detention predicated on a scaled-down hearing of this sort cannot be punitive, nor can it be perpetual. Legislation should therefore make explicit that such detainees are entitled to be held in conditions of transparency and accountability, with all the privileges and protections available to prisoners of war under the Geneva Conventions. Similarly, legislation should confirm, as stressed in Hamdi, that such detainees must be "released and repatriated without delay after the cessation of active hostilities."

Detainees accused of war crimes are obviously another matter. They should be prosecuted and, if guilty, suitably punished - - the sooner the better. Their prosecutions should proceed promptly in existing military or civilian courts, as discussed below. And of course, detainees who are determined to be neither combatants nor war criminals should be immediately repatriated to their home countries, where they will be either released or detained and prosecuted as their own governments see fit.

There will be enormous benefits all around from legislation that resolves these issues quickly and puts the Guantánamo nightmare behind us.

2. Prisoners captured in future battles

For the future, the appropriate treatment of individuals captured in battle is straightforward. Army Regulation 190-8 already sets forth detailed rules for promptly resolving questions relating to the status of alleged belligerents captured in the course of armed conflict. Congress need only require, pursuant to its Article 1 § 8 power, that the armed forces follow the standard Regulation already in place. Its procedures, of proven workability, afford ample scope for adapting rules of evidence and other requirements to battlefield conditions. And adhering to this previously established approach protects against perceptions that the United States is inventing new rules of its own choosing in order to create legal black holes in which ordinary safeguards do not apply.

Again, Congress should make clear that detainees not facing criminal charges are entitled to communicate regularly with their families, that they must be afforded decent treatment, including all the Geneva Convention privileges and protections available to prisoners of war, and that, as Hamdi emphasizes, they have the right to be repatriated as

soon as the active hostilities in which they participated have ceased.

3. Prisoners not captured in battle

When most of us think of the Guantánamo detainees, we picture Taliban or al Qaeda fighters captured on battlefields in Afganistan. These are the detainees who fit the definition of an "enemy combatant" that the Supreme Court carefully spelled out in Hamdi, specifically "an individual who, [the government] alleges, [supported] forces hostile to the United States or coalition partners in Afganistan and who engaged in an armed conflict against the United States there."

But a substantial portion of the Guantánamo detainees, probably several hundred of them, are NOT enemy combatants in the specific Hamdi sense. The government does NOT allege that they were captured in battle - - in Afganistan or elsewhere. These detainees were arrested by ordinary law enforcement agents or caught in other situations not involving military combat. The government claims the authority to treat as "enemy combatants" not only those who fit the Hamdi definition - - prisoners captured in battle - - but also suspected terrorists seized on metaphorical battlefields, American and foreign cities far removed from actual combat operations.

With respect to citizens arrested within the United States who deny membership in any organized enemy armed forces, authority of that sort was never claimed, much less tested, in the World War II Quirin case. And the constitutional validity of such a power has now been rejected explicitly by five justices in the Hamdi-Padilla cases.

The opposing view - - which the U. S. government continues to support - - is that American and foreign cities are part of a universal battlefield in a global war on terror and that suspected al Qaeda operatives are in effect enemy soldiers operating out of uniform behind our lines.

That analogy, if accepted, would obliterate much of the U.S. Constitution, together with most criminal justice procedures of the United States and our allies, because the safeguards applicable to determining criminal responsibility would cease to apply whenever the President unilaterally designates a terror suspect as an enemy combatant. The Justice Department even takes the position that a person who contributes to a charity, not realizing that it is a front to finance al Qaeda, would be properly classified as an "enemy combatant" and could be detained at the discretion of the military. Indeed if the "universal battlefield" analogy is valid, it leads to the conclusion that an "enemy combatant" spotted in the concourse of an American airport could, under the accepted laws of war, simply be shot on sight. Armed conflict under international law cannot be an infinitely elastic concept that displaces domestic criminal law whenever executive and military authorities wish to do so.

In addressing this issue, Congress should make clear that within the borders of the United States, disputed allegations of terrorist activity must be resolved by the Article III courts in accordance with the Constitution and the ordinary criminal process. Similarly, suspects seized abroad, but outside zones of active combat, must be prosecuted if the facts warrant, but otherwise they should be returned to their home countries for further proceedings or released as their own governments see fit. Terrorism suspects who may, in the future, be apprehended outside a zone of battle must be processed in accordance with established standards for formal extradition and the other accepted norms of international criminal justice.

4. Detainees accused of criminal conduct.

For suspected terrorists accused of crimes, including war crimes, the proposed military commission system is deeply flawed. The commissions can draw on none of the usual sources of legitimacy, and their procedures lack elementary guarantees of public acceptability and reliable results. As an entirely new legal invention, the commissions' most basic ground rules have yet to be authoritatively settled. Their proceedings accordingly are certain to remain, at best, cumbersome and slow-moving for months and probably years to come.

All to what end? The novelty of the commissions, their secrecy, and the highly contested flexibility of their procedures defeat their very purpose, by shielding terrorists from a convincing and clearly visible accounting of their responsibility and by postponing indefinitely the day of judgment that the American public deserves to see.

The straightforward solution is to refer all such cases for prosecution in Article III courts or courts-martial under the existing, well-established rules of federal criminal procedure and the Uniform Code of Military Justice. As shown in the Brennan Center report, these systems provide well-tested procedures, readily adaptable to new challenges, that preserve the essentials of a reliable adversary trial, while fully protecting classified information and other national security interests. With such a powerful yet uncomplicated solution right at our finger tips, it is simply tragic that we allow ourselves to continue losing the propaganda war, while hardened terrorists paint themselves as victims and elude the authoritative condemnations and punishments that are now long overdue. We can and must do better.

Thank you very much for your attention.