

Statement of

# The Honorable Russ Feingold

United States Senator  
Wisconsin  
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Senate Judiciary Committee  
Subcommittee on Terrorism, Technology and Homeland Security  
Hearing: "The Legal Rights of Guantanamo Detainees: What Are They, Should They Be Changed, and Is an End in Sight?"  
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The horror that we experienced on 9/11 forced upon us 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.

So far, we have not successfully met that challenge, and Guantanamo is a major reason for that failure. We now live in a country where the government claims the right to pick up anyone, even an American citizen, anywhere in the world; designate that person an "enemy combatant" even if he never engaged in any actual hostilities against the United States; and lock that person up possibly for the rest of his life unless he can prove, without a lawyer and without access to all, or sometimes any, of the evidence against him, that he is not an "enemy combatant."

I fear that some have forgotten the very reasons for the due process protections enshrined in our Constitution. These protections are in place, not to coddle the guilty, but to protect against executive overreaching or even simple human error. One need not think ill of this Administration or even disagree with its policies to conclude that at least some of the 750-plus people detained in Guantanamo were incorrectly designated "enemy combatants." One need only acknowledge the indisputable fact that this Administration is capable of mistakes.

For people erroneously designated as "enemy combatants" and imprisoned in Guantanamo, the Combatant Status Review Tribunals are not a safeguard - they are a Kafka-esque nightmare. The sacrosanct principle of "innocent until proven guilty" that forms the bedrock of our justice system is turned on its head. And the available transcripts of the CSRT hearings vividly illustrate the impossibility of proving your innocence when you are not even allowed to see the evidence against you. One detainee was told that he had associated with a known terrorist, but when he asked for the name of that person, the request was denied. In effect, the only way this person could prove his innocence would be to prove that he never associated with anyone who could conceivably be called a terrorist.

The Administration claims that this process is more than the detainees deserve, and that no enemy combatant in history has ever had the protections that the current detainees are seeking. But no Administration in history has ever claimed, as this one does, that a person who writes a check to a charity without knowing that the charity is a front for a terrorist group is an "enemy combatant." And no Administration before this one has defined the conflict in such a manner that it can never truly end, thus making wartime detention a possible life sentence.

Review by an independent and neutral judiciary has always been the one true safeguard against wrongful executive detention. Last week, however, the Solicitor General argued to the Supreme Court that enemy combatants are not entitled to avail themselves of the great writ of Habeas Corpus. I hope that the Supreme Court will reject this cramped reading of the Constitution. But even if it doesn't, the Supreme Court cannot absolve us of our moral responsibility to decide what kind of nation we wish to be. As one of today's witnesses, Admiral John Hutson, told us two years ago, "The legal analysis provides the floor, but the United States should strive for higher aspirations."

I have joined Senator Feinstein in calling for the closure of Guantanamo. I did so because Guantanamo has become synonymous in the Arab and Muslim world with American abuses. It is harming our ability to gain the respect and cooperation of other nations, and I fear that it is giving the terrorists a potent recruiting tool. But closing Guantanamo will accomplish little if we simply continue the same or worse detention policies at other sites. The question is much broader and much deeper than simply whether to close Guantanamo. The question is how to combat al Qaeda while maintaining our principles and our values. I believe that we can - and must - do both.