Testimony of

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"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"

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IMPROVING DETAINEE POLICY: HANDLING TERRORISM DETAINEES WITHIN THE AMERICAN JUSTICE SYSTEM

I. INTRODUCTION

Mr. Chairman, Senator Specter, and Members of the Committee, my name is Amos N. Guiora and I am a Professor of Law at the S.J. Quinney College of Law, The University of Utah. Prior to my appointment at The University of Utah, I served for 19 years in the Judge Advocate General Corps of the Israel Defense Forces where I was involved in the legal and policy aspects of operational counterterrorism. I was posted as a military prosecutor in the West Bank Military Court, as a Judge in the Gaza Strip Military Court and as the Legal Advisor to the Gaza Strip Military Commander. In three and a half years in academia I have published widely on the issues before the Committee today. My publications, relevant to my testimony include, Where are Terrorists to be Tried - A Comparative Analysis of Rights Granted to Suspected Terrorists, Catholic University Law Review, Vol. 56, No. 2, Spring 2007; Quirin to

Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists Florida Journal of International Law, 19 FLA. J. INT'L L. 2 (2008). and Light at the End of the Pipeline?: Choosing a Forum for Suspected Terrorists University Pennsylvania Law Review PENNUMBRA, Vol. 156, Spring 2008.

Almost seven years after 9/11, nearly two years after Hamdan v. Rumsfeld and the Military Commissions Act (MCA), one of the critical questions of the "post-9/11 world" has still gone unanswered: where do we try terrorists? More accurately, where do we try the thousands of individuals held world-wide either by the US or on behalf of the US suspected of terrorism?

I deliberately emphasized the word "suspected" because it is important to recall that the individual in question is no more than that--a suspect. He or she may be the "worst of the worst" (as then Sec. of Defense Rumsfeld described all individuals held at GITMO) or they may be like the hundreds of detainees released from GITMO who had no reason to be detained in the first place.

My testimony begins with the following questions: who is the detained individual? What has he done? Why did we detain him? What are his rights? When may an individual may be detained; under what conditions (and how) may he be interrogated; what evidence (and how) may be introduced into a court of law; whether (and when) does he know the charges against him and if convicted, where may he appeal?

All of these lead to the following question: how do we define the detained individual?

II. DEFINING DETAINEES

My fundamental premise is that the detainees are neither criminals as understood in the criminal law paradigm nor Prisoner's of War. However, without a defined status, we cannot discuss what rights and privileges they are to be granted

If the individual is neither a criminal nor a POW, what is he? Various terms have been suggested including enemy combatant, illegal combatant, illegal belligerent, and enemy belligerent. Although all have failed to contribute to the establishment of a workable rights-based regime, the starting points are as follows: all individuals have rights and all individuals must be defined. Furthermore, the individual's rights cannot be determined until we define the conflict itself. Is this a war? Is this a "war on terrorism"? Is this a "police action"?

In numerous decisions (Rasul v. Bush , Rumsfeld v. Padilla , Hamdan v. Rumsfeld , Hamdi v. Rumsfeld) the US Supreme Court has failed to articulate how to define what rights to grant the suspected terrorists. Similarly, Congress has failed in its constitutionally granted oversight powers.

Into that vacuum, I propose that the post-9/11 detainees are a "hybrid," neither POW nor criminal. A "hybrid" suggests adopting aspects from both the POW and criminal law paradigm and thereby creating a new paradigm. This proposed model would establish a mechanism and infrastructure enabling going forth with fair trials for those detained post-9/11.

I suggest adopting the term used by the Israel Supreme Court: armed conflict short of war. Such a term reflects that the conflict is not a classic war (which according to international law can only be conducted between states) and is also does not fall within the traditional criminal law paradigm. That is the essence of the recommended hybrid paradigm.

The hybrid paradigm is philosophically and jurisprudentially founded on the principle that the accused must be brought to some form of trial, but that the American criminal law process is inapplicable to the current conflict. Accordingly, in order to guarantee the suspect certain rights and privileges, the hybrid paradigm will be predicated on the following: the use of intelligence information, interrogation methods that do not include torture, the right to appeal to an independent judiciary, the right to counsel of the suspect's own choosing, known terms of imprisonment, and procedures to prevent indefinite detention.

First, the hybrid paradigm must enable the prosecution to introduce intelligence information which the judge would review and use for purposes of deciding guilt or innocence. While intelligence information cannot be the sole basis for the decision, it can be used to strengthen the holding. This provision is the most severe break from the criminal law paradigm. Unlike the criminal law process, where the prosecutor is obligated to put forth all available evidence, the hybrid paradigm recognizes that in the world of counterterrorism, it is not always possible to do so.

However, this standard needs to be restricted whereby the prosecution may not use the intelligence information unless and until a judge has determined that presenting the information to the defendant poses a significant threat to national security. Further, if traditional evidence is available and sufficient for the court to order the suspect's continued detention, the state must submit the criminal law evidence, rather than relying on the classified intelligence information.

In the hybrid paradigm, the judge's determination on these questions of admissibility must favor the defendant's rights. Despite Justice O'Connor's unfortunate words in Hamdi, where she indicated that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," I argue that on the contrary, the constitution does not contain a rebuttable presumption that favors the state at the expense of a defendant's rights.

III. TRYING SUSPECTED TERRORISTS: 9/11/2001-6/4/2008

To date: the military commissions (whether in their original construction or revamped post Hamdan and the Military Commissions Act) have not proven successful. Thus far, only one detainee has been convicted. Furthermore, the Legal Advisor to the Convening Authority for the Military Commissions, Brig. Gen. Thomas W. Hartmann testified before Congress that evidence obtained from a detainee subjected to water-boarding could be admitted--this, despite universal condemnation of water-boarding as torture. These facts speak resoundingly to the military commission's failure to establish adequate safeguards for suspected terrorists. It is clear that even in their re-vamped format these safeguards are, in a word, non-starters.

On the other hand, as the US is responsible for the detainees it holds (either directly or indirectly), it must develop (quickly) a workable judicial process. Given that some of the detainees present a genuine threat to American national security and that indefinite detention violates constitutional principles and fundamental concepts of morality, this is a must.

IV. PROPOSED ALTERNATIVES

In proposing alternatives to the military commissions established in the immediate aftermath of 9/11, the following are critical fundamental premises: indefinite detention of suspects is unconstitutional regardless of citizenship; a "vetting" process must be immediately established to determine whether a detainee presents a continuing threat to America's national security and if not, the individual must be released (this, understandably, requires development of an infrastructure enabling the return of the particular detainee to his home country or safe haven in accordance with international law. Admittedly, this is a complex issue but logistical considerations cannot serve as an impediment to the granting both of substantive and procedural rights); a formalized "vetting" procedure will result in a significant reduction of the number of detainees which will enable the constituting of a viable judicial process.

There are, I suggest, three workable legal-judicial models for the "post-9/11 detainees"; GITMO, whether in its present format or in some re-articulated or re-constituted framework, is an unacceptable model for the military commission process and has been permanently and irrevocably tainted.

V. TREATY BASED INTERNATIONAL TERROR COURT

While attractive sounding from a globalization perspective, the concept is largely a non-starter. The reason is simple: in order to establish such a court, the nations of the world (at least those who would be party to such a court) would need to agree on a definition of the term "terrorism." As has been documented elsewhere, agreeing upon a definition of terrorism eludes the FBI, and the State and Defense Departments. The UN's role post-9/11 is extraordinarily limited as member nations similarly cannot agree upon a definition of terrorism.

Supposing that this enormous stumbling block could be overcome, member nations would then need to address a laundry list of issues. To mention but a few: imposition of the death penalty, jurisdiction over domestic terrorism (of another nation), cooperation regarding intelligence gathering and sharing, rules of evidence and prison conditions. While only a partial list, the point is clear: the establishment of such a court (though perhaps worthwhile) will not be an immediate development. In the meantime, there are detainees awaiting trial.

VI. ARTICLE III COURTS

Bringing thousands of post-9/11 detainees to a traditional criminal trial is also a non-starter. The trial of Zacarias Moussaoui--held out by some as an example justifying the effectiveness of Article III courts for terrorists--highlights the many problems attendant with trying suspected terrorists in an Article III Court. Moussaoui, often referred to as "the 20th hijacker," was suspected of training with al-Qaeda in preparation for the 9/11 attacks and later pled guilty to six counts of conspiracy. While initially denying involvement, he ultimately confessed that he was supposed to fly a fifth plane into the White House. Grandstanding throughout the trial, Moussaoui largely turned the trial into a farce. The court--particularly when Moussaoui chose to represent himself--was largely unequipped to respond or prevent his "antics" which significantly affected public perception of the judicial process.

Furthermore, Moussaoui's trial raised Sixth Amendment compulsory due process concerns. Preparing his defense, Moussaoui asked for access to "alleged terrorist ringleader Ramzi bin al-Shibh" in federal custody who he believed could provide exculpatory evidence. The government argued that giving Moussaoui access to al-Shibh would compromise national security. The court, however, agreed with Moussaoui, holding that "the Sixth Amendment right to compulsory process is not outweighed by claims that the government's intelligence-gathering efforts would be undermined." The court's decision highlights the ongoing conflicts between a suspected terrorist defendant's rights and the government's security concern.

The fundamental deficiencies with trying Article III in a terrorist context are inherent. First, much of the evidence available against suspected terrorists is predicated on intelligence information. Article III courts, however, are based on certain constitutional rights, including the right to "confront one's accuser," as upheld by the Supreme Court in Pointer v. Texas. This right explicitly places a limitation on the prosecution. It deprives the prosecutor of the ability to go forth with all available (and confidential) intelligence information which the defendant would not be able to confront because of the state's absolute requirement to protect its intelligence sources (both their identity and how the information was received).

In addition, a defendant has a right to trial by a "jury of his peers." Put simply: if Osama Bin-Laden were detained today and brought before a court of law, would it be possible to find a "jury of his peers"? Would it be possible to find 12 members of the community willing to sit in judgment of Bin-Laden?

While an instinctual, reflexive revenge based answer is "yes," closer scrutiny suggests that fears of retribution from OBL supporters would drive the overwhelming majority of potential jurors literally "underground." Two principle staples of Article III courts are--in essence--incompatible with terrorism related trials: the right to confront accusers and trial by a jury of one's peers.

VII. THE SOLUTION: DOMESTIC TERROR COURTS

The proposed domestic terror courts resolve two issues-- the suspected terrorists right to confront his accusers and the right to a trial by a jury of one's peers --critical to the criminal law paradigm while establishing a paradigm that guarantees a fair trial, admittedly with less rights for the defendant than in Article III Courts. By enabling the government to introduce available intelligence information, the proposal enables the Court to hear the government's case in full. Does this affect the rights of the defendant? In full candor, the answer is yes. But, the proposed court will protect the defendant by ensuring that the Court will not automatically accept the introduced intelligence into the record. That is, the government will have to show that the intelligence information is valid, viable, relevant and corroborated. Strict scrutiny that balances the legitimate rights of the individual with the equally legitimate national security rights of the state is one of the significant advantages of the proposed domestic court.

How will the intelligence information be presented? In camera by the prosecutor and a representative of the intelligence services that will be subject to rigorous cross examination by the Court. The judges who will sit on the domestic terror court will be trained in understanding intelligence information. In addition, the bench will be expected to fulfill a "double role," that of fact-finders and defense counsel alike. As the latter will be barred from attending the hearings when intelligence information is submitted, the Court must proactively engage the prosecutor. The burden on the Court is enormously significant because the defendant (not present) does not have counsel representing him when the prosecutor seeks to introduce classified intelligence information.

This is a major stumbling point regarding domestic terror courts. Based on my experience (sitting as judge in administrative detention hearings of Palestinian's suspected of involvement in terrorism, where the only evidence relevant to the detainee was intelligence information), the burden on the judge is significant. However, it is the only manner in which intelligence information can be submitted.

It is important to emphasize that the intelligence information can only be used to buttress a conviction; it cannot be the sole basis of conviction. Simply put: if the only information available with respect to a particular detainee is intelligence, he must be released unless an administrative detention process (subject to independent judicial review) is established in addition to the proposed domestic terror court.

Based both on my scholarship and professional experience in the Israel Defense Forces Judge Advocate General Corps, it is critical that the role of intelligence information be fully understood with respect to individual's suspected of involvement in terrorism: it is all but impossible to conduct a terrorism related case without it.

Without making intelligence information available, the court will not be able to fully understand or appreciate the role a particular defendant played in a terrorist cell nor understand its inner workings, goals, missions and motivations. Simply put: without that information, the court will be--in essence--groping in the dark.

Those in favor of Article III courts suggest that:
The difficulties involved in using classified evidence in terrorism prosecutions do not provide compelling support for an argument that the criminal justice system should be abandoned in terrorism cases; these difficulties are entirely self-imposed...If the government determines that it is more important to national security that a piece of information remain secret than to prosecute the terrorist, it can simply choose not to use that information or not to charge that terrorist until some unclassified evidence of his guilt can be presented. If the government determines that it is more important to national security to prosecute the terrorist than to keep the information in question secret--perhaps to prevent him from carrying out a terrorist attack--it can simply declassify the information and use it as evidence against him.

While this argument is true, it is inherently limiting that the government must choose between prosecuting a terrorist or keeping intelligence information classified. In such a context, the government is caught in an all-or-nothing situation. This highlights both the importance of intelligence information (essential in order to try terrorists) and the Article III Court's inability to properly account for its importance. Domestic Terror Courts, on the other hand, allow the government to both maintain the secrecy of intelligence information and try suspected terrorists.

The necessity of procuring good Intelligence is apparent and need not be further urged. All that remains for me to add is, that you keep the whole matter as secret as possible. For upon secrecy, success depends in most Enterprises of the kind, and for want of it, they are generally defeated, however well planned and

promising a favourable issue.
-George Washington, July 26, 1777

VIII. FINAL THOUGHT

Domestic terror courts are not problem-free, far from it. However, the suggested proposal would enable trying an individual suspected of terrorism in a court of law while simultaneously balancing his legitimate rights with the state's

equally legitimate national security rights. The other available models--GITMO, international terror court and Article III courts--for the reasons above would not and do not meet this requirement. While the proposal is not "problem free", particularly with respect to the defendant's constitutionally guaranteed right to confront his accuser, the alternatives pale in comparison. Premised on the understanding that GITMO is, today, a "non-starter" the available alternatives are not ideal. That being said, the requirement to immediately develop a workable judicial model is absolute. While Article III Courts present a tempting solution, the reality of operational counterterrorism suggests that constitutionally guaranteed rights are impractical with respect to all detainees. While the right to confront may be applicable in some cases, it is not relevant in all cases. That is the fundamental basis for the proposed recommendation of establishing domestic terror courts.

Such a properly constituted court, comprised of judges schooled in understanding classified intelligence reports would be fully competent to protect the rights of the defendant whose rights--without a doubt--will be negatively impacted by his or counsel's inability to confront his accuser. However, in an effort to maximize both the state's obligation with respect to national security and the detainees right to a fair trial, a domestic terror court competently meets this critical two-part test.

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1 Rasul v. Bush, 542 U.S. 466 (2004).
2 Rumsfeld v. Padilla, 542 U.S. 426 (2004).
3 Hamdan v. Rumsfeld, 548 U.S. 557 (2006).
4 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
5 The judge shall construe all the information in a manner most favorable to the defendant.
6 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
7 See Hon. Shira A. Scheindlin & Matthew L. Schwartz, With all Due Deference: Judicial Responsibility in a Time of Crisis, 32 HOFSTRA L. REV. 795 (Spring2004).
8 Id at 835 -836.
9 Id. at 835.
10 Id.
11 See Carter v. Jury Commission of Greene County, 396 U.S. 320, 330 (1970) (defining "peers" as "equals of the person whose rights it is selected or summoned to determine ... of his neighbors, fellows, associates, persons having the same legal status in society as that which he holds.").
Michael German, Trying Enemy Combatants in Civilian Courts, 75 GEO. WASH. L. REV. 1421, 1426-1427 (2007)
Letter from George Washington to Col. Elias Dayton (July 26, 1777), in 8 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745-1799, at 479 (John C. Fitzpatrick ed., 1931) [hereinafter WRITINGS OF GEORGE WASHINGTON], cited in Nathan Alexander Sales, Secrecy and National Security Investigations, 58 ALA. L. REV. 811, 811 (2007).