Testimony of

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Prepared Statement of Benjamin Wittes
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"Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System"

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Thank you, Mr. Chairman and members of the committee, for inviting me to testify concerning what is probably the single most important unresolved legal policy challenge affecting America's confrontation with international terrorism: The design of an appropriate regime for detaining alien terrorist suspects seized abroad.

I am a Fellow in Governance Studies and Research Director in Public Law at the Brookings Institution. I am the author of the book, Law and the Long War: The Future of Justice in the Age of Terror, which is forthcoming this month and from which this testimony is partly adapted. I have written extensively on the challenges to the legal system posed by the detention operations that became necessary after the September 11 attacks. I also serve on the Hoover Institution Task force on National Security and the Law. The views I am expressing here are my own.

It is difficult to overstate the scope and magnitude of our political system's collective failure in detention operations to date. In the fall of 2001 and the winter of 2002, almost nobody doubted the proposition that in an international conflict involving a congressionally-authorized use of force and characterized by repeated military engagements, the United States is entitled to detain enemy forces. Yet today, doubt concerning the legitimacy of war-on-terrorism detentions is more the norm than the exception. The reason is simple, and it is not that the rationale for these detentions has grown less powerful. The current administration has refused to tailor the detention system contemplated by the laws of war to the unusual features of the current conflict--a set of circumstances that demand more nuanced fact-finding than does traditional warfare and consequently also demand greater procedural protections for detainees. Congress has declined to create a better system legislatively. And the courts have so far provided next to no guidance on the ground rules for detention, other than to emphasize the fact of their own habeas jurisdiction.

The result is a recipe for public and judicial suspicion: A system in which complex questions of fact get resolved in closed proceedings that produce a minimal administrative record based on information--some of it undoubtedly flawed--that detainees have had virtually no opportunity to rebut.

Let me be as clear as I can: The current system has not worked and it cries out for reform by this body to make detentions fairer, more transparent, and more defensible both before the public and the courts.

But let me be candid on another point as well: The appropriate reform will almost certainly not rely exclusively on civilian prosecutions in American federal courts as the source of the power to detain the enemy. This is the case for two distinct reasons:

First, relying exclusively on federal court prosecution would likely require the release of portions of the detainee population at Guantanamo whose continued detention prudence requires. Nobody outside of the executive branch knows exactly how many current detainees are too dangerous to release yet could not face criminal charges in federal court--because they have not committed crimes cognizable under American law, because evidence against them was collected in the rough and tumble of warfare and would be excluded under various evidentiary rules, or because the evidence is tainted by coercion. Without access to a great deal of material that remains classified, one can only guess how many such detainees there are. But the number is almost certainly not trivial. Even under the

somewhat relaxed rules of the Military Commissions Act (MCA), military prosecutors have estimated that they might under ideal circumstances be able to bring to trial only as many as 80 detainees. Excluding those current detainees already cleared for transfer from Guantanamo, that still leaves roughly 100 whom the military deems too dangerous to transfer yet against whom charges are not plausible. Even if we assume the military is being hopelessly conservative in clearing detainees for repatriation, there is almost certainly still a gap. That gap involves dangerous men who want to kill Americans.

Consider, for example, the case of Mohamed Al Kahtani, an alleged September 11 conspirator against whom the military recently dropped criminal charges. According to the 9/11 Commission, Kahtani flew to Orlando International Airport, where Mohammed Atta was waiting to meet him. Kahtani did not end up on a plane on 9/11 only because he was denied entry to the United States that day. This is a man, in other words, who allegedly took active steps to kill large numbers of Americans. Yet the brutal circumstances of his interrogation make his prosecution now difficult, perhaps even impossible. If that proves to be the case, American forces would likely have to set him free absent some extrinsic non-criminal detention authority. Whatever the right remedy may be for the interrogation tactics used upon Kahtani, such an outcome seems to me maladaptive for any society with an instinct for self-preservation.

Second, even if we could magically repatriate, resettle, or free all current detainees, a pure prosecution model would face prohibitive obstacles with respect to future captures. Specifically, American forces often obtain custody of detainees--either in the field or from allied governments or militias--without knowing precisely who they are. Abu Zubaydah, for example, was captured in a safe-house raid by Pakistani forces along with a handful of other people. While we can plausibly imagine an extant warrant permitting American forces to take custody of such an Al Qaeda bigwig himself, it is highly implausible to imagine pending warrants against all those who may accompany him. If the rule, however, is that anyone against whom charges are not either outstanding or imminent must go free, what authority would American forces have even to take custody of future non-battlefield detainees whom opportunity might present to them? The honest answer is that they would have none.

To put the matter bluntly, there simply has to be some detention authority broader than the four corners of the criminal justice system. This necessity should not be a matter for national shame or embarrassment. American law authorizes preventive detentions across a range of areas, many less compelling than the situation of sworn military enemies of the country against whom Congress has authorized the use of force. That the laws of war apply uncomfortably to the task at hand does not mean that no detention authority is appropriate here at all.

For all its errors, in other words, the current administration is not being eccentric in insisting on some authority to detain the enemy outside of the conventional justice system. While I try to avoid making predictions, I believe the next administration--of either party--is most unlikely to forswear this power entirely. The right question for this body is not whether to force it to do so, but what appropriate rules for detention ought to look like, what the substantive standards for detention ought to be, and how to construct appropriate mechanisms of judicial review for those detentions.

Not all detainees require new law. The laws of war work well for the preponderance of those in American custody around the world. A relatively small subset, however, comprises detainees for whom release at the termination of hostilities, an endpoint key to law of war detention, is something of a fiction--detainees whom, even if they have committed no crime, American forces cannot and will not blithely set free. This type of fighter, who generally hides among civilians, can be much harder to identify accurately than the traditional detainee, whom the laws of war assume will identify himself by wearing a uniform. So relying for these detentions on the laws of war produces at once too low a threshold for the detention itself and paradoxically a requirement for release that is quite unsuited to a global fight with a non-state actor. The hallmark of this type of detainee is that one regards him as dangerous not merely as an arm of a particular military force but in his individual capacity as well--and that one cannot imagine relinquishing custody of him without some mechanism to manage the danger that he poses.

Defusing the controversy over such detentions requires the creation for each detainee of a rigorous set of factual findings and a documentary record justifying the decision to hold the person, a record available to the public and the press to the maximum extent possible and reviewed by an independent judicial body.

Towards that end, I make the following suggestions in my book:

First, civilianize the detention regime by severing the authority to detain this limited class of terrorists from the laws of war and putting such detentions under judicial supervision. The premises of these detentions differ considerably from those of traditional wartime captures. So the reviewing body should be a civilian federal court assessing whether each detainee meets a legislatively prescribed standard, not a military panel assessing whether or not the detainee meets the definition of an "unlawful enemy combatant."

Second, enhance the procedural protections for the accused. A solid legislative scheme requires a few core elements not present in the current Combatant Status Review Tribunals (CSRT), all designed to make the process more adversarial and courtlike and to produce an outcome that speaks with enough authority to support a detention in the public and judicial arenas. The first of these is an impartial finder of fact, specifically a federal judge. The detainee should also receive representation from competent counsel. Lawyers for the detainees should be cleared to see the evidence against their clients, including classified information and all exculpatory materials. The detainee himself should be given a more detailed summary of the evidence against him, one sufficiently specific to provide a fair opportunity for rebuttal. The detainee should also receive a more meaningful opportunity than the current CSRT process offers to present evidence, obtain witnesses, compel testimony, cross-examine witnesses against him, and respond to evidence admitted against him.

Third, the Court must retain jurisdiction over each detention for as long as it persists to ensure that detention remains necessary and that the conditions of detainees' confinement are humane. The government should be obliged on a regular basis to argue for the continued necessity of detention, and counsel for each detainee should have the opportunity to argue that, for one reason or another, his client no longer meets the statutory criteria for detention: that, as an alien terrorist, he poses a substantial threat to the security of the United States.

The best way to implement such a system would be through some kind of specialized national security court, an idea others have proposed with varying levels of specificity. Modeled on the special court that authorizes surveillance in national security cases, such an arrangement would maximize the public and international legitimacy of detention decisions. It would put detentions in the hands of judges with all the prestige of the federal court system yet with particular expertise applying rules designed to protect classified information and manage legitimate security concerns. Such a court is also, in my view, the best venue in which to try terrorists accused of war crimes, using rules that hybridize the current Military Commissions Act with normal federal court practice.

In sum, the current administration's reliance on a pure law of war model for detentions has been a fateful error. But the attempt to revert to a prosecutorial model for disabling terrorists would supplant that error with a system unsuited to the challenges we currently face as a society. The right answer is--as it has been since September 11--to design the detention system we need to handle the unique situation of global jihadist terrorism. That is a task only Congress can accomplish and it is long overdue.