

Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
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Senate Judiciary Committee
Hearing on "Improving Detainee Policy:
Handling Terrorism Detainees Within The American Justice System"
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Since 9/11, America has faced 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.

Unfortunately, this administration has not successfully met that challenge, and the policies implemented at Guantanamo Bay are 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 a so-called "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."

All of this has been done far outside the bounds of the traditional American justice system, civilian or military, and indeed outside the bounds of traditional notions of the law of war.

Some in this administration 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. You do not need to oppose this administration or even disagree with its policies to conclude that at least some of the 750-plus people detained in Guantanamo - only one of whom has been convicted of any crime by the U.S. - were incorrectly designated "enemy combatants." After all, any government, including this one, is capable of making mistakes.

That is why our legal system has long relied on review by an independent and neutral decision-maker as the one true safeguard against wrongful executive detention. This month, the Supreme Court will determine whether the detainees held at Guantanamo Bay are entitled under the Constitution to the great writ of Habeas Corpus. I hope that the Supreme Court will reject the Administration's cramped reading of the Constitution, and strike down the provision of the Military Commissions Act purporting to deny habeas rights to the Guantanamo detainees.

Some have proposed that Congress should establish an entirely new system of preventive detention and trial for terrorism detainees under the purview of a special national security court, arguing that our traditional justice system is inadequate to deal with the special circumstances presented by terrorism. But as demonstrated by the thoughtful report issued last week by Human Rights First and by the testimony of Judge Coughenor, who presided over the 2001 terrorism trial of Ahmed Ressam, the United States has successfully prosecuted terrorist suspects in federal courts, and courts have provided the flexibility needed to address complicated evidentiary and legal issues. The traditional military justice system, too, is available. There is no doubt that the administration's actions over the past seven years have created a difficult situation at Guantanamo Bay with respect to a small number of detainees. But I am gravely concerned about establishing an entirely new regime, with rules that would not otherwise be tolerated in federal court or military court-martial and that would be subject to years of challenges, to address this very narrow set of cases, when there is every indication that we can effectively use our long-established institutions.

We can - and must - combat al Qaeda aggressively while maintaining our principles and our values.

