Response of Richard Klingler to Post-Hearing Questions, Senate Judiciary Committee, Subcommittee on the Constitution, "The Legal, Moral, and National Security Consequences of 'Prolonged Detention'"

1. Enemy combatants in U.S. custody have been afforded review for determining the legality of their detention. How does this process compare to rights historically afforded alien enemy prisoners?

The scope of judicial review and status review mandated by statute, for detainees held at Guantanamo, is unprecedented in our nation's history.

Historically, non-U.S. persons detained by our military during armed conflicts had virtually no access to U.S. courts and no particular status review mandated by federal statute. This was so even for those conflicts where the combatant status of captured enemy personnel was often unclear (as during the Vietnam War, or the conflicts in the Philippines) and even for persons held as prisoners of war during World War II but who claimed they were mistakenly detained. Certain detainees prosecuted as war criminals during and after World War II did have their sentences reviewed by federal courts.

For detainees held at Guantanamo, the scope of mandated review of detention status has been considerably more extensive. In 2005, Congress supplemented the review procedures already required by the Department of Defense, by requiring that the propriety of continued detention at Guantanamo be determined by Combatant Status Review Tribunals and Administrative Review Boards subject to certain conditions. *See* Detainee Treatment Act of 2005, § 1005(b). At the same time, Congress provided that detainees could secure federal court review of determinations by the Combatant Status Review Tribunals. *See id.* § 1005(e)(2)-(3). These procedures are separate from the extensive judicial review provided with respect to the decisions of military commissions, addressing violations of the law of war rather than detention status itself, most recently undertaken pursuant to the Military Commissions Act of 2006 (with proceedings pursuant to that Act since suspended by the current Administration).

In addition, since *Boumediene v. Bush*, 553 U.S. __ (2008), detainees at Guantanamo have been able to secure judicial review of their detention through habeas corpus proceedings in federal district court. These have evolved into extensive, nearly trial-like proceedings that test the evidence underlying the government's detention determination. Never before had non-U.S. persons detained abroad by the military been able to secure habeas review, much less the extensive review now provided. That process of review has, in practice, displaced judicial review of the determinations of the Combatant Status Review Tribunals.

2. Is the battlefield in the conflict against al Qaeda and associated terrorist organizations limited to Afghanistan and Iraq? If not, what would be the consequences of adopting that view?

The battlefield is not so limited, and limiting the battlefield to Afghanistan and Iraq would dramatically curtain our nation's ability to address the threat posed by al Qaeda and related terrorist organizations.

Both the President and the Congress have defined the war against al Qaeda and related terrorist organizations in terms that extend far beyond Afghanistan. As in many other military conflicts, the "battlefield" is not defined by a geographical target, but instead by the location of the enemy we face. The President, as early as his Inaugural Address, defined the scope of the conflict by stating that "[o]ur nation is at war, against a far-reaching network of violence and hatred." He has stated that the Afghanistan component of the conflict is designed to deny al Qaeda a safe haven, and that objective applies equally to other locations that harbor al Qaeda.

Similarly, Congress's Authorization of the Use of Military Force in 2001 did not limit the U.S. military response to Afghanistan. Instead, it recognized that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States" and sought "[t]o authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States." *See* Pub. L. 107-40 (Sept. 18, 2001). To this end, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons … ." *Id.*

Even if the President and Congress chose to limit the "battlefield" against al Qaeda to areas of armed combat, that battlefield would extend far beyond Afghanistan. The President's most recent report to Congress, consistent with the War Powers Act, describes the breadth of the battlefield in the war against terrorists even under this limited definition. *See Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate*, June 15, 2009 (released June 16, 2009). There, the President reported that the United States "has deployed various combat-equipped forces to a number of locations in the Central, Pacific, European, Southern and Africa Command areas of operations in support of [Afghanistan] and other overseas operations." *Id.* Press accounts detailed combat activities in and around, for example, the Horn of Africa as well as other parts of the world, often in conjunction with our allies. In addition, President Obama indicated that he will "direct additional measures, as necessary" that "include short-notice deployments of special operations and other forces for sensitive operations in various locations throughout the world." *Id.*

Limiting the battlefield to Afghanistan would prevent the U.S. from defending itself by taking action against important operatives and leaders of al Qaeda and other terrorist organizations that threaten U.S. troops and citizens. Pakistan has, of course, become an important focus of our nation's counter-terrorism activities, and the President has long asserted that counter-terrorism activities may be undertaken there. In addition, recent press reports confirm that senior al Qaeda

leaders are increasingly migrating far beyond the Afghanistan theater, to Somalia and Yemen.[1] Under the view of critics who would limit the legitimate range of counter-terrorism action to the "battlefield" in Afghanistan, the U.S. would be powerless to pursue these senior terrorists, or to take action in conjunction with our allies against the resurgent al Qaeda in Northern Africa and elsewhere.[2] Indeed, under this view, if Osama bin Laden were to return to Sudan, the U.S. could not pursue him there or take military action against the nation that provided him with safe harbor. This limited conception of the "theatre of conflict" reflects a dangerous historical amnesia: after all, al Qaeda was at war against the U.S. on a global basis, through attacks on the *U.S.S. Cole*, our East African embassies, and in New York City, long before our troops and intelligence officers invaded Afghanistan.

[1] "Some in Qaeda Leave Pakistan for Somalia and Yemen," *N.Y. Times*, p. A1 (June 12, 2009).
[2] "Ragtag Insurgency Gains a Lifeline from Al Qaeda," *N.Y. Times*, p. A1 (July 1, 2009); "The Sahara Conundrum," *N.Y. Times*, Magazine (Feb. 13, 2009).

3. Please discuss the security concerns you have with moving Guantanamo Bay detainees to the United States for detention and trial?

Policymakers will have to consider at least three sets of security concerns that would arise as detainees held at Guantanamo Bay are brought to the United States for trial, detention, or release:

(i) Trial-related concerns. Providing security for the conduct of terrorism-related trials is complicated and costly in the usual case, as demonstrated in trials of the World Trade Center bombers in New York City and various trials in the Eastern District of Virginia. These costs and concerns will be even greater for trials in the U.S. of former Guantanamo detainees, especially senior al Qaeda leaders. As has been publicly discussed, the trial of a senior al Qaeda leader could present an unusual symbolic opportunity for a terrorist attack.

In addition, the choice to try a Guantanamo detainee in U.S. federal court presents national security concerns related to release of the detainee. For example, the detainee may be acquitted because the government could not present evidence in its possession of criminal wrongdoing, because admissible evidence did not meet the "beyond the reasonable doubt" threshold, or because the defendant was able to take advantage of procedural and substantive rules designed to protect U.S. citizens but unrelated to guilt or innocence. Or, the former detainee may be released after having served a relatively short sentence.

Release in these circumstances may have no bearing on whether that former detainee continues to pose a national security risk to U.S. citizens. In these circumstances, the Administration has and perhaps would seek to deport the released detainee. This course may simply free a dangerous detainee to harm U.S. interests from abroad, or may be unavailable due to asylum claims or the lack of an available country to receive the former detainee. The current Administration has also reserved the option of detaining an acquitted defendant as an enemy combatant, but whether this course is available in practice or would be exercised remains in considerable doubt.

(ii) Detention-related concerns. Very significant security concerns also may exist for detention of the former detainee in a military facility or, following or preceding trial, in a federal prison. As the current FBI Director has testified, these concerns extend to the potential for a prison-based terrorists to continue to direct terrorist activities, including fundraising, from prison, and to recruit and radicalize additional terrorists from the prison population.

This risk that detained terrorists will be able to continue to undertake terrorist activities exists even for the most highly monitored terrorist leaders. For example, the defense counsel for Omar Abdel Rahman (the "Blind Sheik") was convicted for acts related to serving as a public channel for directions from the defendant to his terrorist followers abroad (that conviction is currently on appeal, and the government is also appealing to secure a greater prison sentence).

In addition, detention in the United States increases security risks related to release of the detainee, even apart from the risks identified above in relation to release following trial or sentence. Even for those detainees who are not tried, their presence in the United States may provide them with additional rights that they might assert in habeas or other judicial proceedings,

increasing the likelihood of their being released. Of course, success in asserting these rights does not establish that the released detainee poses no national security threat to the United States.

(iii) Release-related concerns. National security concerns arise whenever a former Guantanamo detainee might be released in the United States for reasons unrelated to a completely foolproof determination that the detainee poses no risk to U.S. citizens or troops. For example, the debate surrounding the Uighur detainees' potential release in the United States arose because the initial judicial rulings in their favor were not based on the absence of any risk to U.S. security interests, but instead rested on their lack of direct ties to the particular terrorist groups whose members the court found the U.S. was authorized to hold at Guantanamo. Similarly, as noted above, the conclusion that a detainee is not guilty of a crime "beyond a reasonable doubt," has served his sentence, or has prevailed in a habeas proceeding does not establish that the released detainee poses no security risk. And even the military's own determination that particular detainees should be released abroad has often been mistaken, as a significant number of those detainees have rejoined the fight against U.S. troops and allies abroad. The risks of erroneous release in the United States, rather than abroad, obviously pose additional risks to U.S. citizens.

4. How would you respond to the claim made by Mr. Laufman in his piece, "Terror Trials Work," that there are already sufficient mechanisms (such as CIPA) available to courts to protect against the release of sensitive information in the trials of terrorists?

Those protections are insufficient because prosecutors must still decline to prosecute various cases or charges that involve sensitive information, and CIPA and related protections do not adequately prevent disclosure of sensitive information in the course of terrorism prosecutions that are undertaken.

While CIPA and related mechanisms to protect sensitive information may work for certain prosecutions, especially involving low-level terrorist supporters working in the United States and pursued by law enforcement officers over a lengthy period, those protections are much less effective when more sensitive information is at issue and when terrorists are apprehended by military, intelligence, or foreign officials in distant locales. The vast bulk of successful prosecutions to date fall into the former category. In contrast, the latter cases where protection of sensitive information is most difficult also are those where the need for ongoing detention – and the risk of premature or erroneous release – is greatest.

Mr. Laufman's own article and his testimony show the limits of CIPA's ability to protect sensitive information in particularly important cases. He acknowledges that "criminal prosecution of terrorists opens the door to defense efforts to seek sensitive classified information" and that "[i]t is also true that information shared confidentially with U.S. authorities by foreign law enforcement or intelligence sources can be at risk of disclosure under discovery rules." "Terror Trials Work," *Legal Times* (Nov. 5, 2007). His testimony also outlines the various barriers to bringing prosecutions against terrorists that make the criminal law process inappropriate, including "where the government's key inculpatory evidence is based on sensitive intelligence sources and methods that either should not be disclosed to the defense, or cannot be revealed in a public trial." D. Laufman, Written Testimony, at 12 (June 9, 2009).

His last observation points the essential weakness of CIPA: the act regulates only the procedures that govern the presentation of certain classified information, but does not lessen the defendant's right to have the information provided to defense counsel or to have the content of information relevant to the defense presented in court. That is, CIPA requires the government to choose between prosecuting a terrorist for particular crimes while disclosing information and, alternatively, declining to prosecute to avoid disclosing classified or other sensitive information required to make that prosecution a successful one. This is so even following the redaction and substitution measures encouraged by the Act. The statute does not allow the government to withhold information that a U.S. citizen would be entitled to have presented or made public as part of the normal constitutional Due Process, Confrontation Clause, and public trial rights afforded outside of the terrorism context – or indeed outside the context where sensitive information is at issue at all. For this reason, prosecutions will often not be successful where classified information is involved, despite CIPA's existence.

To see this dynamic in action beyond the terrorism context, review any of the principal opinions in the prosecution of Steven Rosen and Keith Weissman. *See United States v. Steven J. Rosen and Keith Weissman*, Case No. 1:05cr225 (E.D. Va., Ellis, J.). There, the government charged

the defendants with conspiring to disclose highly sensitive information. The district judge construed CIPA to provide only very limited protections of the information at issue and related sensitive information, and instead required broad disclosure to defense counsel and at trial. While these prosecutions should perhaps not have been pursued for a range of policy reasons, these rulings led the government to end the prosecution prior to trial, according to public reports.

For terrorist trials, the risk of disclosure of sensitive information is very high despite CIPA's provisions. These risks are particularly great for more senior terrorists captured abroad. For example, the trial of Omar Abdel Rahman, the "Blind Sheik" responsible for the bombing of the World Trade Center, presents one of the only examples of such a prosecution. It also led to the disclosure of quite sensitive information. As noted above, the trial process facilitated communications from the defendant to his terrorist followers. In addition, government information of high sensitivity and value to al Qaeda was publicly disclosed in the course of trial preparations. For this and related reasons, both the lead prosecutor (Andrew McCarthy) and the trial judge (Judge, and later Attorney General, Michael Mukasey) in those proceedings have since pointed to disclosure of sensitive information and related harm to national security as an important reason why prosecutions are often exceptionally poor vehicles for addressing the threats posed by terrorists. *See* A. McCarthy, *Willful Blindness* (2008); M. Mukasey, "Jose Padilla Makes Bad Law: Terror Trials Hurt the Nation Even When They Lead to Convictions," *Wall St. J.* (Aug. 22, 2007).

5. What do other countries' domestic detention regimes show about whether the United States can continue to detain members of al Qaeda and other terrorist organizations who are captured outside this country?

Virtually nothing. Certain critics of the current and past Administrations' policies toward alien enemy combatants, including Professor Cleveland in her June 9, 2009 testimony before the Subcommittee, point to other nations' experience with "preventive detention" regimes. Those experiences are decidedly mixed, but the essential point is that such detention regimes, directed against the domestic population of a country, have no bearing on ongoing detention of al Qaeda members captured abroad. Indeed, confusing the two types of detention poses a significant threat to the rights of U.S. citizens and persons lawfully residing in the country.

Critics such as Professor Cleveland point to the limited duration of detention of terrorist suspects permitted by principally European nations, and argue that those norms should for various reasons be adopted by the United States. Initially, it is far from clear why the United States should model its practices on the often anemic national defense commitments and policies of many European nations. We reject the benchmarks set by those countries for most of our national security policies, and should do so in this context as well. As Professor Cleveland acknowledges, countries that face serious terrorism threats and take those threats and other aspects of their national defense seriously, such as Israel and India, have chosen much more robust detention practices than have many European nations.

More importantly, the "preventive detention" regimes cited by critics seek to fulfill a far different function and operate much differently than does the U.S. military's detention of al Qaeda members captured abroad. Those European detention regimes principally address domestic terrorist suspects identified and captured within the detaining country. In this respect, those powers are crafted for citizens and residents of the detaining country, and are equivalent to the various, limited U.S. domestic detention powers identified in David Laufman's testimony: detention pursuant to material witness warrants, pre-trial detention, and, for foreign nationals, detention related to deportation or removal proceedings. Much like the European "preventive detention" powers, these U.S. detention powers are highly circumscribed and subject to judicial and other oversight.

In contrast to those domestic detention powers, detention of alien enemy combatants captured abroad is quite different. The detention is directed to non-U.S. persons, and thus is not crafted to protect the legal interests of U.S. citizens and lawful residents. It is undertaken by the military, rather than by domestic security officials. It is generally undertaken abroad, rather than within the U.S. And, most importantly, that ongoing detention is an appropriate and long-standing incident of the state of war that exists between the United States and al Qaeda and associated terrorist organizations. Ongoing detention of al Qaeda members at Guantanamo, or in Afghanistan, is not part of a domestic security arrangement, and analogies to other nations' domestic security arrangements often directed against their own citizens have little relevance to the U.S. military's practices at issue here.

The comparison is not only meritless; it is quite dangerous. The critics' analogy of U.S. military detention of alien al Qaeda members captured abroad to European domestic detention policies

suggests that the issue at hand focuses on the power to detain U.S. citizens and maintain domestic order. By doing so, they increase the risk that U.S. citizens' legal rights will be eroded and reduced to the level appropriate for alien enemy combatants held abroad. This may provide a short-term, rhetorical benefit for the critics of our counter-terrorism policies, but one that comes at the cost of ignoring important distinctions that protect U.S. citizens. Different considerations should and do apply to detention of U.S. persons, even if they support al Qaeda. Those considerations should not impede the ongoing detention of alien enemy combatants captured abroad and held at Guantanamo and in Afghanistan.

6. Are our counter-insurgency policies inconsistent with ongoing detention of captured al Qaeda terrorists?

Not at all. Critics of the current Administration's counter-terrorism policies, including Elisa Massimino of Human Rights First in her testimony of June 9, 2009, assert that the counter-insurgency policies developed by officials such as General Petraeus and others currently serving are in some manner inconsistent with the military's ongoing detention of enemy combatants such as members of al Qaeda and other terrorist organizations. The short rebuttal to this claim is that General Petraeus and others who have developed the most advanced counter-insurgency policies are also the very officials who are overseeing, continuing, and recommending the ongoing detention of terrorists as enemy combatants in Afghanistan and Iraq.

General Petraeus is the Commander of the U.S. Central Command. As such, he has responsibility for the military's practices in conflicts in Afghanistan and Iraq. In Afghanistan in particular, U.S. military forces are today detaining enemy combatants on an ongoing basis. As recent litigation confirms, some of those detainees were captured far from the Afghanistan battlefields. If there were any tension or inconsistency between those detention practices and General Petraeus's assessment of what is required for effective counter-insurgency, it is entirely within his power to alter those ongoing detention practices. That he has not done so confirms that the critics' argument is without merit, and that ongoing detention is entirely consistent with the most effective counter-insurgency practices.