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HEARING ON

THE LEGAL, MORAL, AND NATIONAL SECURITY CONSEQUENCES OF 'PROLONGED DETENTION'

BEFORE THE
UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION,

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Introduction

Chairman Feingold, Ranking Member Coburn and Members of the Subcommittee, thank you for inviting me to be here today to share the views of Human Rights First on the dangers of establishing a system for prolonged preventive detention for suspected terrorists. We are grateful for the Subcommittee's persistent attention to these important matters and I appreciate the opportunity to address how the choices made by the U.S. government on detention policy going forward will impact U.S. national security and international standing.

My name is Elisa Massimino, and I am the Chief Executive Officer and Executive Director of Human Rights First. Human Rights First works in the United States and abroad to promote a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

For nearly thirty years, Human Rights First has been a leader in the fight against arbitrary detention, torture and other cruel treatment and to restore the rule of law. We worked for the restoration of habeas corpus, served as official observers to the flawed military commissions at Guantánamo, and published a number of groundbreaking reports on U.S. detention policy. IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS[1], examines more than 120 terrorism cases prosecuted over the past 15 years and concludes that the federal system has capably handled important and challenging terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process. TORTURED JUSTICE: USING COERCED EVIDENCE TO PROSECUTE TERRORIST SUSPECTS[2] concludes that the introduction of coerced evidence into military commission trials was jeopardizing the prospects for bringing those responsible for 9/11 to justice. HOW TO CLOSE GUANTANAMO: A BLUEPRINT FOR THE NEXT ADMINISTRATION[3], provides a multi-phased blueprint for closing Guantánamo during the first year of the next Administration and urges the next president not to base future detention policy on needing to solve complex problems caused by the past mistakes at Guantánamo.

The use of arbitrary and unlimited detention by the Bush Administration has done considerable damage to America's efforts to defeat terrorists because it has served as a powerfully effective recruiting advertisement for al-Qaida and others. It has strengthened the hand of terrorists – rather than isolating and delegitimizing them – in the political struggle for hearts and minds. It has undermined critical cooperation with our allies on

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[1] RICHARD B. ZABEL & JAMES J. BENJAMIN, IN PURSUIT OF JUSTICE, 65 (Human Rights First 2008).
[2] HUMAN RIGHTS FIRST, TORTURED JUSTICE: USING COERCED EVIDENCE TO PROSECUTE TERRORIST SUSPECTS (Human Rights First 2008).
[3] HUMAN RIGHTS FIRST, HOW TO CLOSE GUANTANAMO: BLUEPRINT FOR THE NEXT ADMINISTRATION (Human Rights First 2008).

intelligence and detention. It has done considerable damage to the reputation of the United States, undermining its ability to lead other countries and international opinion.

President Obama has stated clearly that he wants to reverse the negative impact of these policies. In his speech last month at the National Archives, the President made clear that trust in our values and our institutions will enhance, not undermine, our national security.[4] But other details articulated by the President would undermine the vision he outlined. Policies of revising the failed military commissions and continuing to detain Guantánamo prisoners without trial will, as described below, undermine the President's efforts to 'enlist the power of our fundamental values', proving counterproductive and nondurable Such efforts are also unnecessary in light of existing laws that provide an adequate basis to detain terrorism suspects and to try them for crimes of terrorism before regularly constituted federal courts.

I. Continued prolonged detention of terrorist suspects without trial is counterproductive.

In January Dennis Blair told the Senate Committee on Intelligence that "the detention center at Guantánamo has become a damaging symbol to the world and that it must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security, so closing it is important for our national security."[5] But the damage done by Guantanamo will continue if Guantanamo detention policies are not reversed and the detainees simply moved to another facility.

Proponents of preventive detention argue that those ready to do harm to the United States should be treated as warriors. Yet the decision to label all Guantánamo prisoners as "combatants" engaged in a "war on terror" ceded an important advantage to al Qaeda, supporting their claim to be "warriors" engaged in a worldwide struggle against the United States and its allies rather than the criminals that they truly are. Accused 9/11 planner Khalid Sheikh Mohammed reveled in this status at his "combatant status review tribunal" hearing at Guantánamo in March 2007: "For sure I am [America's enemy]," he said.[6] "[T]he language of any war in the world is killing . . . the language of war is victims."[7] Former CIA case officer and counterterrorism expert Marc Sageman stated, "Terrorist acts must be stripped of glory and reduced to common criminality…. It is

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[4] President Barack Obama, Remarks by the President on National Security (May 21, 2009) *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/ (last visited June 8, 2009).

[5] *Nomination of Admiral Dennis Blair to be Director of National Intelligence: Hearing before S. Comm. on Intelligence*, 109th Cong. 7 (Jan. 22, 2009) (statement of Admiral Dennis Blair USN (Ret.)). *available at* http://www.dni.gov/testimonies/20090122_testimony.pdf (last visited June 8, 2009).

[6] Verbatim transcript of Combatant Status Review Tribunal Hearing for ISN 10024 at 21 *available at* http://www.defenselink.mil/news/transcript_ISN10024.pdf (last visited June 8, 2009).

[7] By contrast, when Federal District Judge William Young sentenced Richard Reid to life plus 110 years in federal prison in 2003, this is what he said: "You're a big fellow. But you're not that big. You're no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders." CNN, *Partial transcript of Sentencing of Richard Reid*, Jan. 31, 2003, http://www.cnn.com/2003/LAW /01/31/reid. transcript/ (last visited June 8, 2009).

necessary to reframe the entire debate, from imagined glory to very real horror." Likewise, General Wesley Clark stated and 19 other former national security officials and counterterrorism experts agreed:

> By treating such terrorists as combatants … we accord them a mark of respect and dignify their acts. And we undercut our own efforts against them in the process…. If we are to defeat terrorists across the globe, we must do everything possible to deny legitimacy to their aims and means, and gain legitimacy for ourselves…. [T]he more appropriate designation for terrorists is not "unlawful combatant' but the one long used by the United States: "criminal."[8]

Those whose job it is to take the fight to al Qaeda understand what a profound error it was to reinforce al Qaeda's vision of itself as a revolutionary force engaged in an epic battle with the United States. Last June, Alberto Mora, former Navy General Counsel Alberto Mora also testified that "Serving U.S. flag-rank officers... maintain that the first and second identifiable causes of U.S. combat deaths in Iraq – as judged by their effectiveness in recruiting insurgent fighters into combat – are, respectively the symbols of Abu Ghraib and Guantánamo."[9]

The new ARMY-MARINE CORPS COUNTERINSURGENCY MANUAL,[10] drafted under the leadership of General Petraeus and incorporating lessons learned in a variety of counterinsurgency operations (including Iraq), stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a *political* struggle, and one that must focus on isolating and delegitimizing the enemy rather than elevating it in stature and importance. As the Manual states: "It is easier to separate an insurgency from its resources and let it die than to kill every insurgent. . . . Dynamic insurgencies can replace

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[8] Brief for Ali Saleh Kahlah Al-Marri as Amici Curiae Supporting Petitioner, Al-Marri v. Spagone, 129 S.Ct. 1054 at 21 (2009) (No. 08-368) (citing General Wesley K. Clark & Kal Rautiala, *Why Terrorists Aren't Soldiers*, N.Y. TIMES, Aug. 8, 2007, at A19) signed by 19 former national security officials and counterterrorism experts including William Banks (Director of the Institute for National Security and Counterterrorism), Ken Bass (former Counsel for Intelligence Policy, Department of Justice), M.E. (Spike) Bowman (former Senior Counsel, Federal Bureau of Investigation), Frank J. Cilluffo (Director, Homeland Security Policy Institute, George Washington University), Albert C. Harvey (Chair, Standing Committee on Law and National Security, American Bar Association), Brian Jenkins (former Member, White House Commission on Aviation Safety), Dr. David A. Kay (former Head, Iraq Survey Group), David Low (Consultant, Oxford Analytica and National Intelligence Council), John MacGaffin (Senior Advisor, Transnational Threats Project, Center for Strategic and International Studies), Ronald Anthony Marks (Director of Washington DC Operations, Oxford Analytica), Thurgood Marshall Jr. (Partner, Bingham McCutchen LLP), Rear Admiral James E. McPherson (former Judge Advocate of the Navy), Paul Pillar (Director of Studies, Security Studies Program, Georgetown University), Nicholas Rostow (former Legal Adviser, National Security Council), Britt Snider (former General Counsel, U.S. Senate Select Committee on Intelligence), Suzanne E. Spaulding (former Assistant General Counsel, CIA), Michael Vatis (former Associate Deputy Attorney General), Dale Watson (former Executive Assistant Director for Counterintelligence and Counterterrorism, Federal Bureau of Investigation), and Jonathan Winer (former U.S. Deputy Assistant Secretary of State for International Law Enforcement).

[9] *Hearing on the Treatment of Detainees in U.S. Custody Before the S. Comm. on Armed Servs.*, 109th Cong. (June 17, 2008) (statement of Alberto J. Mora) *available at* http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf (last visited June 8, 2009).

[10] U.S. DEPARTMENT OF DEFENSE, FM 3-24/MCWP 3-33.5: COUNTERINSURGENCY, (2006) *available at* http://www.usgcoin.org/library/doctrine/COIN-FM3-24.pdf (last visited June 8, 2009).

losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power."[11]

As long as Guantánamo detainees are held in prolonged detention without charge or tried before extraordinary military commissions the facility's legacy will continue to nurture the "recuperative power" of the enemy. Focus will remain on how the procedures, even if improved, deviate from those in criminal trials before regularly established Article III courts and courts martial.

Guantánamo has become a symbol to the world of expediency over fundamental fairness and of this country's willingness to set aside its core values and beliefs. As Secretary of Defense Robert Gates has said, "[t]here is no question in my mind that Guantánamo and some of the abuses that have taken place in Iraq have negatively impacted the reputation of the United States."[12]

Reputational damage caused by the Guantánamo detention policies has practical ramifications for our counterterrorism operations. If U.S. detention policies continue to fall short of the standards adhered to by our closest allies, those policies will continue to undermine our ability to cooperate in detention and intelligence operations. In his June testimony, Mora described in detail how concerns about U.S. detainee policies in Afghanistan damages U.S. detention operations by leading our allies to hesitate to participate in combat operations, to refuse to train on joint detainee operations, and to walk out on meetings regarding detention operations.[13]

In addition to the operational consequences, the United States may face loosing the cooperation of the international community in closing Guantanamo if it continues with trials using coerced evidence and holding prisoners with out trial in indefinite detention. The Council for the European Union (EU) made this clear last week when it expressed support for taking-in Guantánamo detainees but only with the understanding that the underlying policy issues would be addressed in a manner consistent with international law, presumably as that law is understood not just by the United States but by EU member states.[14]

II. A new form of preventive detention without charge will lead to costly errors.

The long standing safeguards of the U.S. criminal justice system are intended to ensure accuracy of judicial outcomes. Any detention system that deviates from these proven mechanisms reduces that accuracy, particularly if decision makers resort to racial profiling and stereotypes or are allowed to consider the use of secret, classified or coerced evidence. Errors will be made that will waste valuable resources and fuel

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[11] *Id.* at 1-23.

[12] Thom Shanker, *Gates Counters Putin's Words on U.S. Power*, N.Y. TIMES, Feb. 12, 2007 *available at* http://www.nytimes.com/2007/02/12/world/europe/12gates.html (last visited June 8, 2009).

[13] Mora, *supra* note 3.

[14] Press Release, Council Conclusion on the closure of the Guantanamo Bay Detention Centre, 2946th Justice and Home Affairs Council meeting Luxembourg (June 4, 2009) *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/ pressdata/en/jha/108299.pdf (last visited June 8, 2009).

resentment and criticism of the system. As three retired senior military officers stated in a letter to the President last month:

> The Guantánamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not great enough to warrant departure from hundreds of years of western criminal justice traditions.[15]

Additionally, such a system inevitably would be weighted against a fair determination of a suspect's connections to terrorism. The Combatant Status Review Tribunals (CSRT), created to review "enemy combatant" determinations at Guantánamo, provide fair warning of this possibility. From 2004 to 2007, more than 570 CSRT hearings were conducted with all but 38 detainees designated as enemy combatants. Eventually, more than half of these detainees were released by the Bush Administration, and dozens of others were cleared for release, indicating a lack of credible evidence regarding dangerousness after all.

Additional procedural protections in a newly created system, including the right to an attorney and the right to judicial review would still fall far short of the accuracy safeguards provided by the criminal justice system, where guilty findings require a sufficient degree of certainty through the establishment of proof beyond a reasonable doubt. In fact, there are significant national security benefits that come from building a criminal case, as opposed to the sort of preliminary intelligence gathering upon which some Guantánamo detentions were based. As explained by former federal prosecutor Kelly Moore:

> [w]orking towards obtaining sufficient evidence to establish the elements of a criminal offense forces agents to fully digest and understand the information that they gather. It is more difficult to draw faulty inferences from new information when a prosecutor is cross-examining you about every detail, demanding a correctly translated transcript, and then insisting on further corroboration. When investigators aimlessly 'gather intelligence,' no one is focusing on what the information is or what it means.[16]

III. Any scheme for prolonged detention is not a durable solution.

Strong constitutional challenges will likely tie up any new law providing for expanded detention in extensive litigation. While the American legal system tolerates some administration detention in certain circumstances, the Supreme Court has never allowed

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[15] Letter from Vice Admiral Lee F. Gunn, USN (Ret.), Rear Admiral John D. Hutson, USN (Ret.), & Brigadier General James P. Cullen, USA (Ret.) to Barack Obama, President of the United States (May 14, 2009).

[16] *See also* Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 837, 848 (2007).

preventive detention based solely upon a perceived risk of future dangerousness, nor has it permitted the use of preventive detention to bypass the criminal justice system altogether. Indeed, what would be the limits of a new system of preventive detention based on the possibility of future dangerousness; could someone be held for 15 years, or 20 years? A new preventative detention system would be highly vulnerable to constitutional attack and can not be considered a durable solution to problems presented by the Guantánamo detentions.

The Supreme Court has approved pretrial detention on a risk of future dangerousness only where probable cause of a suspect's criminal conduct has already been established.[17] Civil commitment of the mentally ill is also permitted, but only where the State is able to prove both mental illness and therefore dangerous beyond their control.[18] In *Foucha v. Louisiana*, the Court said, that a dangerous person who recovers his sanity must be released otherwise "[i]t would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law."[19] Likewise, some state laws permit the civil commitment of charged or convicted sex offenders, but again the Supreme Court has held that such detention is permitted only where the risk of dangerousness accompanies "mental abnormality."[20]

IV. Additional laws for preventive detention are unnecessary; existing law provides an adequate basis to detain terrorism suspects.

Despite the claims of those in favor of a new system of preventive detention that criminal law lacks adequate tools to detain suspected terrorists before they have committed violent acts, for years the government has been able to effectively and lawfully detain many suspected terrorists under provisions of criminal, immigration and other laws. As Human Rights First outlined in IN PURSUIT OF JUSTICE, there are four means of detention useful in complex terrorism cases under existing law:

- Under the **Bail Reform Act**, the government may arrest and seek to detain suspected terrorists when it files criminal charges again them by promptly bring the defendant before a magistrate judge, who decides whether the defendant should be detained or released on bail. The government is entitled to a presumption that terrorism defendants should be detained. [21]

- **Immigration law** permits the government to arrest—and in many circumstances detain—aliens alleged to be unlawfully present in the United States, pending a decision whether they should be removed from the country.

[17] United States v. Salerno, 481 U.S. 739, 749 (1987).
[18] Foucha v. Louisiana, 504 U.S. 71, 82-83 (1992).
[19] *Id*.
[20] Kansas v. Hendricks, 521 U.S. 346, 346-47 (1997).
[21] 18 U.S.C § 3142(e).

- When a grand jury investigation is underway, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a "**material witness**" in the investigation.

- As discussed above, the **law of war**, or International Humanitarian Law (IHL), authorizes detention during international armed conflict for the duration of hostilities to prevent those who participate in hostilities or pose a serious security threat from rejoining the fight.

IN PURSUIT OF JUSTICE closely studies each of these tools and the authors conclude that they "do not believe that the need for a brand-new scheme of administrative detention has been established."[22] Instead the report demonstrates that existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases. In fact:

> [g]iven the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable.[23]

V. Established Article III courts are fully equipped to handle criminal trials of individuals suspected of terrorist crimes.

Proponents of preventive detention also argue that our domestic criminal laws and courts are ill-suited for the national security issues that arise in terrorism cases. To the contrary, not only do civilian courts have a solid track record of dealing with terrorism cases – including managing classified information – bringing cases in criminal courts have contributed significantly to the gathering of intelligence of terrorist plots and networks.[24] In testimony before the Senate Judiciary Committee in June 2008, Judge John Coughenour, who presided over the trial of Ahmed Ressam, also remarked "[i]t is my firm conviction, informed by 27 years on the federal bench, that the United States courts, as constituted, are not only an adequate venue for trying suspected terrorists, but also a tremendous asset against terrorism."[25] In our report IN PURSUIT OF JUSTICE we clearly document the capability and flexibility of our federal courts concluding that:

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[22] Zabel *supra* note 1, at 65.
[23] *Id.* at 8.
[24] Zabel and Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, p. 118. See also, Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 Lewis & Clark L. Rev. 837, 847 (2007).
[25] *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System*: *Hearing before the S. Comm. on the Judiciary,* 110th Cong., 3 (June 4, 2008), (testimony of Honorable John C. Coughenour).

- Prosecutors have invoked a host of specially-tailored anti-terrorism laws and longstanding, generally-applicable federal criminal statutes to obtain convictions in terrorism cases.

- Courts have consistently exercised jurisdiction over defendants brought before them, even those defendants apprehended by unconventional or forcible means.

- Existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases.

- Applying the Classified Information Procedures Act (CIPA), courts have successfully balanced the need to protect national security information, including the sources and means of intelligence gathering, with defendants' fair trial rights.

- *Miranda* warnings are not required in battlefield and non-custodial interrogations or interrogations conducted purely for intelligence-gathering purposes, and *Miranda* requirements have not impeded successful criminal terrorism prosecutions.

- The Federal Rules of Evidence, including rules that govern the authentication of evidence collected abroad, provide a common-sense, flexible framework for guiding admissibility decisions.

- The Federal Sentencing Guidelines and other applicable sentencing laws prescribe severe sentences for many terrorism offenses, and experience shows that terrorism defendants have generally been sentenced to lengthy periods of incarceration.

- Courts are well able to assure the safety and security of trial participants and observers.

Critics presuppose that there have been a significant number of “dangerous” terrorist suspects whom prosecutors pursued but never charged because they lacked sufficient admissible evidence against the suspects or were reluctant to risk the disclosure of sensitive national security information in open court. But the public record contains little—if any—information about the names, number, or types of individuals who purportedly fall into this group. Without specific examples of cases where the current system has failed, it is impossible to know whether critics’ speculations are true. Nonetheless, if this group of suspects does indeed exist, the government is not always powerless to pursue them. In cases where the government cannot immediately charge or detain an individual, it may confront, disrupt, and/or monitor the individual until a criminal case is built.

Conclusion

There has not yet been a full public accounting of the strategic and operational costs of the failed Bush administration policies on Guantánamo and detention. But there is plenty of evidence to suggest that continuing down the road prolonged detention without trial

will continue to undermine our security. It will also continue to impede the Obama administration's efforts to turn the page on the past and successfully implement a new strategy to combat terrorism that brings the United States and its allies together in pursuit of a common goal. We hope that the Congress will encourage the Administration to reject this path, and prevent the entrenchment of an entirely new system of detention in the federal law and on American soil.