

Submitted Testimony of
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Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights
and Human Rights

On the Need to Continue Operation of the
Unlawful Enemy Combatant Incarceration Facility
at Guantanamo Bay, Cuba

24 July 2013

Chairman Durbin, Ranking Member Cruz, members of the Subcommittee, thank you for affording me an opportunity to testify today on the implications of closing the detention/interrogation facility at Guantanamo Bay.

As a former member of the staff of a great Democratic Senator, Henry “Scoop” Jackson, and as a professional staff member for the Senate Armed Services Committee under Republican Chairman John Tower, I have great affection for this institution. I revere the mandate it received from the founders as a co-equal partner with the executive in governing this nation.

In my subsequent four-and-a-half years in the Reagan Defense Department – in which, among other capacities, I acted as the Assistant Secretary of Defense for International Security Policy, I had a different perspective on the accountability the Congress could exact from the executive branch. But I welcomed then, and encourage now, the legislature’s indispensable oversight role – a role that is, in my view, essential to maintaining a “well-ordered liberty.”

The Case for Gitmo

Let me begin my argument for retaining the detention and interrogation facility at Guantanamo Bay, Cuba (nicknamed “Gitmo”) by noting a fundamental reality: **Our nation is at war.** We are operating in that status pursuant to Congress’s 2001 Authorization for the Use of Military Force (AUMF), and in accordance with the laws of armed conflict governing a nation’s right to self-defense. These are the legal mechanisms of which we have availed ourselves to enable and guide the use of force necessary to protect the United States.

We have been obliged to go to war because it was thrust upon us. And, if we are to prevail in this conflict, we must understand the nature of the enemies with whom we are at war. They are *shariah*-adherent jihadists who believe, in accordance with that doctrine, that it is God's will that they destroy our way of life and subjugate us to theirs.

It is important to state at this point that not all Muslims subscribe to *shariah*, or seek to impose it on the rest of us. Those that do not adhere to this ideology are not necessarily a problem. They could even be critical to mitigating the threat posed by their co-religionists who *do* embrace *shariah*. But it is a grievous mistake to think that those we confront are not animated by what they believe to be a spiritual mandate, that we confront only threats from al Qaeda, or that its members are appreciably distinct from others who pursue *shariah*'s requirements to achieve its supremacy worldwide under the rule of a caliphate.

Our *shariah* supremacist enemies have made their intentions known to us prior to the devastating attacks on 9/11, and they have made no secret of them since. The belief that their holy war is divinely inspired has contributed not only to the violent and stealthy forms of jihad being waged against us. It has also contributed materially to the determination of a significant percentage of those captured on the battlefield and detained at Guantanamo Bay to return to the fight if and when they are released.

It would be the subject for another, most useful hearing if this Committee were to examine the lengths to which we have gone as a nation to ignore these realities. Suffice it to say for the present purpose that, by failing to understand the nature and abiding ambition of our foes, we are prone to making dangerous tactical decisions, such as releasing hardened detainees, and potentially fatal strategic ones, including contemplating the closure of Gitmo.

Let's be clear: **Guantanamo Bay is the optimal location for U.S. detention and interrogation of unlawful enemy combatants.** It is simultaneously a uniquely secure facility and a highly humane one. And Gitmo has these attributes primarily thanks to the servicemen and women whose professionalism, discipline and courage make them possible notwithstanding routine, vile and often violent provocations on the part of detainees.

The Absence of Sound Alternatives

The burden of proof should be on opponents of Gitmo to define a superior arrangement. To date, they have been unable to persuade the Congress that there is such an alternative. Indeed, the other choices pose grave risks for national security and/or are less humane than incarceration at Guantanamo Bay. Let me briefly examine several of these in turn.

First, handing detainees over to third-party nations can result in the prisoners deliberately being set free, breaking out of jail or otherwise being enabled to re-join fellow jihadists on the battlefield. In 2010, the Obama administration suspended the transfer of detainees to Yemen out of concern that, according to the *Washington Post*, "a deteriorating security situation

driven by a branch of al-Qaeda has stoked fears that detainees could join – or rejoin – the terrorist organization if released.” (http://articles.washingtonpost.com/2010-01-05/world/36778253_1_yemeni-detainees-guantanamo-bay-guantanamo-prison)

Just yesterday, the Iraqi arm of al Qaeda claimed responsibility for raids on prison facilities near Baghdad that released hundreds of inmates, including members of al Qaeda. This incident shows the folly of relying on vulnerable foreign prisons to keep dangerous individuals incarcerated.

The risk of former Guantanamo Bay detainees returning to the battlefield is a significant one. Last year, the Office of the Director of National Intelligence released a report indicating that, of the 599 released former Gitmo detainees, 27.9% were either confirmed or suspected of engaging in terrorist activity. This amounts to a 2.9% increase in former Guantanamo detainee recidivism as reported by the ODNI in December, 2010 (<http://www.reuters.com/article/2012/03/06/us-usa-guantanamo-recidivism-idUSTRE82501120120306>). My guess is that some number of the remaining group is *also* back in the jihad, even if there is no evidence of it thus far.

Second, transferring the Guantanamo detainees to the United States for detention – in say a prison like that formerly known as the Thomson Correctional Facility in Illinois – poses substantial security risks. For one thing, there is the danger arising from what the jihadi detainees might do inside a U.S. prison population in terms of violent plots or perhaps simply their toxic form of shariah proselytization.

For another, housing prominent jihadists in a given American community could cause it to be targeted by their comrades, either in the hope of actually freeing the detainees or simply as an act of jihad. Former federal prosecutor Andrew C. McCarthy, who secured the conviction of the “Blind Sheikh” for his role in the first bombing of the World Trade Center in 1993, has previously pointed out that jihadists target military bases, and U.S. military bases consist of entire communities where members of our Armed Forces live with their families.

Once detainees are physically inside the United States, moreover, they are within the jurisdiction of federal judges, before whom defense attorneys will argue their clients deserve the full array of constitutional rights afforded to common criminals. Undoubtedly, some federal judges will agree with this assertion.

That would, in turn, enable detainees to be tried in this country under criminal law standards that cannot, as a practical matter, be applied to the circumstances of wartime capture (e.g., evidentiary procedures, Miranda rights, etc.) Prosecutors could then be put in the position of having to disclose classified information in order to secure a conviction under these standards, or risk having the detainee be released – perhaps *inside the United States*, especially if no other country is willing to take him.

Let’s not kid ourselves. Even if such risks were non-existent, or simply deemed acceptable, there is no reason to believe that holding Gitmo detainees would spare us the criticism of human

rights advocates and defense lawyers of the “Gitmo bar” – including appointees in the Obama administration. As Andy McCarthy has also noted, some of these folks have previously asserted that Supermax-stype confinement is a human rights violation. In point of fact, “shoe-bomber” Richard Reid, who was held in a Supermax facility under “special administrative measures” (SAMs) to ensure his secure confinement, argued that the SAMs violated his constitutional rights. The SAMs were subsequently lifted. (Mr. McCarthy’s full treatment of this subject can be found here: <http://www.nationalreview.com/articles/229203/going-senator-grahams-cliff/andrew-c-mccarthy>)

Finally, it has been asserted that the existence of Guantanamo Bay has served as a “recruitment tool” for terrorists and that the facility should be shut down for that reason. In fact, shutting down Guantanamo Bay detention operations would rightly be seen by the jihadist movement worldwide as evidence of our submission, and a greatly emboldening victory. It would likely have the effect of *increasing* recruitment, while at the same time denying us a vital tool for incarcerating and interrogating those we capture rather than kill.

What is more, such a victory would embolden not only the violent jihadists, but also the *pre-violent* jihadists (most prominently the Muslim Brotherhood), here and abroad. The latter seek the same outcome as the former – the imposition globally of shariah under the rule of a new caliphate. The only difference is one of tactics driven by the Brotherhood’s perception that, for the moment, the correlation of forces is not conducive to success via direct and violent forms of jihad.

Conclusion

For all of these reasons, it is, in my professional judgment, not only desirable but necessary to continue to incarcerate detainees at Guantanamo Bay. We should, moreover, be free to add to their number at Gitmo, if that will help us gather vital intelligence and keep dangerous jihadist enemy combatants off the battlefield.

I will be happy to address your questions. Thank you.