Testimony of Richard Klingler[1] Before the Senate Committee on the Judiciary, Subcommittee on the Constitution

"The Legal, Moral, and National Security Consequences of 'Prolonged Detention'"

June 9, 2009

Chairman Feingold, Ranking Member Coburn, and other members of the Subcommittee, thank you for allowing me to present my views today regarding the lawfulness, morality, and national security necessity of ongoing – or indefinite, or prolonged – detention.

Detention, for this purpose, means detention by our military of enemy combatants: persons who our military has concluded have waged or threaten war against our troops, citizens, and allies. The principal combatants at issue are members and supporters of al Qaeda and related terrorist organizations that pose a significant threat of violence to U.S. citizens.

The principal purpose of detention is to keep those who would harm U.S. citizens and troops from returning to the fight – and detention appropriately continues until that threat no longer exists. In this sense, wartime detention of combatants is always "indefinite" or "prolonged" until conflict ceases. A nation at war does not know when the conflict will end or, at times, whether it will even prevail. As a nation whose history includes the Vietnam War, engagements in Central America and the Philippines, World Wars that, but for certain fortuities, might have lasted much longer, and now the ongoing war in Afghanistan, we are familiar with prolonged engagements and wars against irregular and unconventional forces. The conflict against terrorist organizations is not different in kind.

The debate over indefinite detention often wrongly focuses on Guantanamo Bay. The current practice is considerably more widespread, and any limitations on indefinite detention would have correspondingly wide implications. The U.S. military indefinitely detains enemy combatants, including members and supporters of al Qaeda and other terrorist organizations, on a wide scale in Iraq and Afghanistan, as well as at Guantanamo, and press reports indicate that U.S. officials work closely with our allies to detain al Qaeda members in other countries.

"Prolonged" detention is thus not something proposed for the future, for just a small subset of Guantanamo detainees. It is, instead, a practice that this Administration is already conducting on a widespread scale, will continue to pursue, and has already defended repeatedly in federal court. No matter how Guantanamo detainees are handled, this Administration will continue, directly or indirectly, to detain hundreds if not thousands of enemy combatants indefinitely in many places for many years to come.

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Lawfulness and Legal Consequences. The lawfulness of ongoing detention of enemy combatants is clear and well-established.

In short, such detention of enemy forces is a lawful incident of war, authorized whenever the exercise of war powers is authorized. Addressing our current war against al Qaeda and associated forces and invoking sixty-year old precedent, the Supreme Court concluded that the capture and detention of enemy personnel "are 'important incident[s] of war'" justified, at least, by the 2001 Authorization of Use of Military Force ("AUMF").[2] It has ruled that the military may detain enemy forces even if "they have not actually committed or attempted to commit any act of depredation or entered the theatre or zone of active military operations."[3] The *current* Administration has correctly argued that "[l]ongstanding law-of-war principles recognize that the capture and detention of enemy forces are important incidents of war," that the AUMF's "principal purpose was to eliminate the threat posed by [al Qaeda]," that capture is not limited to the formal battlefield, and that international law and principles of self-defense further justify detention of al Qaeda and co-belligerent organizations.[4]

A very limited range of persons can be detained under these principles, and they are determined by who we fight in the current war. At a minimum, the AUMF confirms our war status against al Qaeda and the Taliban, and the Administration has correctly construed the AUMF as extending to forces associated with al Qaeda. Thus, the current Administration has defined the following persons as subject to ongoing military detention:

> The President has the authority to detain persons that the President determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban and al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy forces.[5]

With the exception of a single word with no material effect, this is the same standard employed by the previous Administration. As I testified before the House Armed Services Committee, Congress might usefully clarify the scope of authorized combat activities, but this is not necessary to support the general power to detain enemy combatants, even under the AUMF. Separately, a broader and additional basis for detaining enemy combatants arises from the President's power, as Commander-in-Chief, to direct military action against our enemies, and to detain combatants as an incident of that authority.

Challenges to the detention of enemy combatants usually depend on rejecting the premise that we are truly at war with terrorist organizations, often by asserting that the matter is really

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[2] *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality) (quoting *Ex Parte Quirin*, 317 U.S. 1, 28 (1942)).
[3] *Quirin*, 317 U.S. at 38.
[4] United States Dep't of Justice, *Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, In re Guantanamo Bay Detainee Litigation*, Nos. 08-442 et al., at 3, 4, 5-7, 8-10 (D.D.C. March 13, 2009) (internal citation omitted).
[5] *Id.* at 2.

one of criminal wrongdoing, to be addressed by the criminal law. That conclusion would surprise our troops in Afghanistan, Iraq, and elsewhere whose mission is to confront members of al Qaeda, either by killing them or capturing and detaining them.

That conclusion would surprise our Commander-in-Chief even more. One of the first lines of his Inaugural Address was that "[o]ur Nation is at war against a far-reaching network of violence and hatred." His recent speech on detention confirmed that "[w]e are indeed at war with al Qaeda and its affiliates" and that because "al Qaeda terrorists and their affiliates are at war with the United States … those that we capture – like other prisoners of war – must be prevented from attacking us again."[6] Ongoing detention is, again, a lawful incident of this state of war.

This Administration's understanding that war-fighting powers, including the power to detain, are appropriate should make detention less controversial, and less enmeshed in the heated debates of recent years. The extent of the current Administration's continued use of war powers against terrorist organizations is hard to overstate. The Obama Administration has pursued nearly every aspect the prior Administration's conduct of the war in Iraq and Afghanistan and against terrorist networks globally. As a formal matter, this Administration has embraced nearly all the components of wartime and related Executive powers asserted by its predecessor and then subject to controversy. In addition to continuing indefinite detention in Afghanistan, Iraq, and Guantanamo, and committing to do so for a subset of Guantanamo detainees even once transferred elsewhere, the Administration has, for example:

- continued, according to the Attorney General, a valuable foreign intelligence surveillance program, unsupported by warrants, that critics had characterized as "warrantless wiretapping";

- continued to use provisions of the previously controversial PATRIOT ACT, including the most contested provisions, which the current FBI Director has defended and sought to have reauthorized;

- asserted through a Presidential Signing Statement that the Executive Branch would treat certain statutory provisions infringing on the President's constitutional powers, as determined by the President, as "precatory" or "advisory";

- denied *habeas corpus* rights to detainees held by the military at Bagram, Afghanistan and elsewhere beyond Guantanamo, avoiding judicial review of detention decisions previously criticized as creating a "legal black hole";

- continued the robust use of the "state secrets doctrine" to prevent disclosure in litigation of national security information;

[6] Office of the Press Secretary, The White House, *Remarks by the President on National Security*, National Archives, Washington, D.C. (May 21, 2009) ("National Archives Speech").

- fought against disclosure of documents, under the Freedom of Information Act, where the military finds that release would harm the national security;

- declined to extend the protections of the Geneva Conventions for prisoners of war to members of al Qaeda;

- continued to act against designated financiers of terrorism, and against would-be travelers placed on "terror watch lists," without affording the affected individuals the due process protections demanded by critics; and

- committed to continue use of military commissions, virtually unmodified beyond formal recognition of requirements previously imposed by military judges.

Now that these policies and the wartime framework underlying them have settled well within the mainstream of the American tradition, a broader recognition of the established legal basis for indefinite detention may be possible.

Some have suggested that while the military may lawfully detain prisoners of war as defined by the Geneva Conventions, it lacks such powers over members of al Qaeda and their associates. This ignores and negates the Geneva Conventions and the laws of war: terrorists who choose not to follow the legal conventions that would entitle them to POW status should not be entitled to *greater* protections than POWs. One point of those Conventions is to provide incentives for combatants to conform to the laws of war; those who target civilians or attack without indicia of their membership in an armed force should not be rewarded for that behavior. If there had been any doubt of the military's power in this respect, the Supreme Court in *Hamdi* resolved it and added to the many prior cases establishing the power to detain.

Nor should the existence of the power to detain or the standards for detention be determined based on the Constitutional rights afforded to U.S. citizens and lawful U.S. residents. As even the current Administration has argued, foreigners beyond our shores lack the most basic Constitutional rights, including protections under the Due Process Clause. This distinction between rights afforded to U.S. persons and those accorded to foreigners abroad is well established by Supreme Court precedent and longstanding U.S. military and domestic practices.[7] Nothing in the Court's *Boumediene* decision[8] purported to overturn these precedents or to extend even to Guantanamo detainees the full range of Constitutional rights, or any rights beyond those afforded in habeas proceedings – and the better reading of *Boumediene* (again, endorsed by the current Administration) is that the decision does not apply in even that limited respect beyond Guantanamo itself. While there are circumstances where even U.S. citizens may be detained as part of the conflict against terrorists, as the Supreme Court confirmed in *Hamdi*, the legal implications of detention, and the potential cost to long-standing rights and traditions, are far greater in that context. That power was exercised in the prior Administration in only three instances not long after the attacks of September 11, and all were subject to extensive judicial consideration. That power is not the subject of the current debates.

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[7] *See, e.g., Verdugo-Urquidez*, 494 U.S. 259 (1990) (and cases cited).
[8] *Boumediene v. Bush*, No. 06-1195 (June 12, 2008).

Indeed, the greatest risks to our rights and values would arise if we fail to distinguish between the extensive Constitutional rights of U.S. citizens and the extremely limited rights of foreigners abroad who, according to our military, seek to harm our nation. Detention of U.S. citizens raises a series of difficult issues and requires heightened procedural safeguards if undertaken at all, and the standards under established law and practice for foreign combatants are not adequate for that purpose. In this respect, those who invoke or apply Constitutional protections in aid of foreigners who fight against us are likely in practice to erode the rights of the citizens we seek to defend.

National Security Consequences. Ongoing detention of enemy combatants has extremely important national security benefits, especially compared to the nation's other options – in the absence of detention -- for addressing the threat posed to U.S. interests by those combatants.

The most important national security benefit of detaining enemy combatants is simple but essential: to ensure that those detained do not directly or indirectly attack our troops or citizens, here or abroad, or the troops and citizens of our allies. The continued availability of detention also ensures that our military and intelligence forces can and will continue to seek to detain additional combatants.

Additional benefits become clear in light of the consequences of restricting or eliminating detention. These consequences arise whenever the standards for detention are increased, as when the due process rights afforded to detainees are heightened, and especially if ongoing detention were eliminated altogether:

1. Outsourcing of detention. If the U.S. cannot readily detain enemy combatants, or do so with the assurance that they will remain detained, military and intelligence officials will have tremendous incentives – and, in many respects, the responsibility – to have our allies detain and interrogate enemy forces. As The New York Times has recently reported, this is just what is increasingly taking place, even for the most senior al Qaeda leaders captured during this Administration.[9] According to the report, "the United States is now relying heavily on foreign intelligence services to capture, interrogate and detain all but the highest-level terrorist suspects seized outside the battlefields of Iraq and Afghanistan."[10] This is hardly the best outcome. Allied forces will often be far less effective in capturing the enemy. U.S. officials cannot ensure that the combatant is not released or collect intelligence. As human rights groups have emphasized, detainees may be treated considerably worse. Failing to take direct control over the detainee, at Guantanamo or elsewhere, helps no one. This option is less good for our security, and for the detainee.

2. Mistaken release. The point of detention is to keep combatants from returning to the fight, and from harming our troops and citizens and those of our allies, and when the U.S. mistakenly releases a detainee, it causes just these results. There is increasing evidence that this risk is real and significant. The Department of Defense recently released its assessment that confirmed that 27, or 5 percent, of the hundreds of

[9] Schmitt & Mazzetti, "U.S. Relies More on Aid of Allies in Terror Cases," *N.Y. Times*, May 24, 2009.
[10] *Id.*

detainees released from Guantanamo alone had undertaken or assisted in combat operations against U.S. troops, and that there was considerable basis to believe that an additional 47, or 9 percent, have done so.[11] These figures are likely to underestimate the problem: the Department has limited information regarding a number of former Guantanamo detainees, and the estimate does not address detainees released from detention in Afghanistan or Iraq, or by our allies.

These mistakes are tragic and, of course, preventable. For example:[12]

- Two released detainees announced that they had assumed leadership of al Qaeda's branch on the Arabian Peninsula.
- Another became a regional Taliban commander for two Afghan provinces.
- Another blew himself up in a suicide bombing in Iraq, killing civilians.
- Others have directed or participated in attacks on U.S. troops, or otherwise facilitated terrorist activities.

None of the detainees released from Guantanamo has – yet – successfully attacked citizens in the United States.

3. Initial failure to detain. An even greater risk is that we leave enemy combatants at large because we do not have the capacity or will to secure and hold them once identified. Where standards for detention are increased or detention is eliminated as an option altogether, U.S. officials may well pass up opportunities to secure those combatants, or rely on less capable allies. This result, of course, prompted a principal criticism of our nation's counter-terrorism efforts in the decade prior to the attacks of September 11, 2001. In either case, leaders and members of al Qaeda or other terrorist organizations remain at large to continue to plan and act against U.S. troops and citizens.

Similarly, as other commentators have observed, a trade-off often exists between efforts to capture and detain enemy combatants and efforts to defeat them using arms in combat. If ongoing detention is not an option, or less assured, then less justification exists for placing our troops at greater risk in capture operations instead of using greater force, even at some cost to securing intelligence. This use of armed force is clearly worse for the enemy combatant.

There are without doubt enormous, countervailing costs of mistaken detention. Military officials undertake extensive efforts to avoid the terrible hardships imposed on those detained who in fact pose no threats to U.S. interests, but erroneous detention is unavoidable in the military context as in others. In many respects, our legitimate wartime operations impose terrible costs on innocent civilians and others that far exceed the harm to detainees, and we accept those

[11] Dep't of Defense, *Fact Sheet: Former Guantanamo Detainee Trends* (April 7, 2009) ("DoD Fact Sheet"); Bumiller, "Later Terror Link Cited for 1 in 7 Freed Detainees," *N.Y. Times*, May 21, 2009.
[12] *DoD Fact Sheet*, at 1-2 (presenting examples used in this paragraph).

results because they accompany reasonable measures we undertake to defend our nation. But these hardships for certain detainees do not justify abandoning detention altogether, and the harms identified above, to combatants and U.S. troops and citizens, increase as we increase the procedural protections designed to ensure that we detain only those who threaten us.

Some suggest that we can avoid these tough choices by relying exclusively on criminal proceedings, and abandon military detentions altogether. This argument is hardly relevant today, because the President has largely mooted it by stating that "[w]e're going to exhaust every avenue that we have to prosecute those at Guantanamo who pose a danger to our country." He also notes that there will still be persons who cannot be prosecuted, "who, in effect, remain at war with the United States."[13] And, this does not account for the many more enemy combatants in this category who are currently held beyond Guantanamo.

Even apart from the President's commitment, criminal processes could not eliminate the need for ongoing detention:

> *First*, our troops *should* seek to defeat or detain enemy forces even when we cannot prosecute them successfully in a court of law. We need not and should not return to a pre-9/11 practice. As the President has said, we need to have the "tools … to allow us to prevent attacks, instead of simply prosecuting those who try to carry them out."[14] It is unreasonable to ask our troops and intelligence personnel to gather evidence of *past* wrongdoing, admissible in court and to a level supporting a criminal conviction, before concluding that a combatant poses a threat that requires an armed response or detention. We have never applied that standard to combat or to detention of combatants in prior conflicts, and there are enormous costs and risks to our troops and citizens of leaving the enemy in the field until that standard is satisfied. And if the point is that the standard applies to detention but not armed response, that creates the unintended but quite unsatisfactory consequences outlined above.
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> *Second*, as others have addressed at length, the evidence that a detainee is an enemy combatant and should be detained may not support a criminal conviction or charge for many reasons. The evidence may not be admissible in court; presenting it in court, even subject to the very cumbersome and unsatisfactory CIPA procedures, risks disclosure of sensitive information or withholding it from trial; the evidence may establish combatant status by a preponderance of evidence, but not "beyond a reasonable doubt"; or the evidence may support a finding of future threat rather than all the elements of a criminal act in the past. It is a *non sequitur* to assert that some or even many terrorists can be convicted in federal court (which is true) to support the claim that all can be (which is untrue).
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> *Third*, combatants we charge but fail to convict, due to a technicality unrelated to guilt or because criminal activity cannot be proved beyond a reasonable doubt, may still pose grave risks to U.S. citizens and troops. The "beyond a reasonable doubt" standard is designed to be strict enough to protect the rights of U.S. citizen defendants, and the

[13] *National Archives Speech, supra*, at 7.
[14] *Id.* at 3.

military can more than reasonably conclude that combatants have sought to harm U.S. troops or citizens, and will thus do so in the future, without having proof that meets that standard. The U.S. government has already found this to be the case: for this reason, it has deported even those who have been acquitted of terrorism-related charges – although deportation provides little assurance that U.S. troops abroad will not be harmed.

Fourth, enemy combatants who serve short prison terms, based on the nature of the crime that can be proved in court rather than the risk to U.S. troops and citizens, may thereafter still pose significant risks of continuing the fight against us.

Fifth, the capacities of our criminal justice system are limited. This alternative is usually raised in addressing a subset of the Guantanamo detainees, but hardly addresses the many combatants detained abroad or the many combatants our troops and allies are likely to detain in the years ahead.

Finally, placing such great reliance on the criminal justice system risks undermining the rights of U.S. citizens who are appropriately tried for past wrongdoing that the criminal law prohibits. We risk watering down defendants' rights when we stretch the criminal process to ensure that criminal sentences are meted out to all those who would otherwise threaten our troops. In many cases, prosecuting combatants will be akin to forcing a square peg into a round hole, and we want to ensure that the peg retains its sharp edges, and the hole its curves.

Moral consequences. This hearing's title invites comment on the moral consequences of detention policy, and I offer the following, tentative thoughts in response. As with other wartime practices, detention of enemy combatants is morally fraught, and parties on both sides of the issue have moral claims and arguments that we dismiss at our peril. There are only hard choices and least worst alternatives. The least defensible position is to pretend that there are no trade-offs or that one course will satisfy all the components of our moral traditions – by claiming for example, as the President has, that there is no trade-off between our national security and our moral values.

Even so, the moral consequences of policy in this area can be captured in large part in the legal and national security assessments canvassed above. A detention practice that is lawful, that focuses on discrete groups of foreigners abroad who would harm our troops and citizens, and that avoids alternatives that undermine the rights of U.S. citizens has a strong moral claim. A detention practice that avoids alternatives that cause detainees to be treated less well (as when we outsource our detention practices, or subject combatants to armed force instead) also has a strong moral claim.

There is immense moral value in ensuring that enemy combatants, through continued detention, do not kill or injure our troops or citizens, or those of our allies. Perhaps our greatest moral obligation, apart from protecting the nation's citizens, is to the troops we ask to defend us, and to their families. Ongoing detention in large measure seeks to, and succeeds in, satisfying that obligation.