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THE SENATE COMMITTEE ON ARMED SERVICES

STATEMENT OF

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FOR POLICY

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Mr. Chairman, Ranking Member Reed, distinguished members of this committee, thank you for the opportunity to testify today on the detention center at Guantanamo Bay, our policies on transferring detainees, and related issues.

On January 22, 2009, President Obama signed Executive Order 13492, which ordered the closure of the detention center at Guantanamo Bay, Cuba. Pursuant to that order, a special task force was established to broadly review information in the possession of the U.S. government about the detainees, and to determine the possibility of their release. Through that rigorous interagency effort, which continued for several months into 2010, a certain number of detainees were approved for transfer, a certain number of detainees were referred for prosecution or further review, and a certain number were designated for continued law of war detention.

Since then, pursuant to Executive Order 13567, signed on March 7, 2011, and consistent with section 1023 of the NDAA for FY 2012, a Periodic Review Board has begun to review the status of those detainees not currently eligible for transfer except for those detainees against whom charges are pending or a judgment of conviction has been entered.

When President Obama came into office in January 2009, there were 242 detainees at Guantanamo Bay. Today, because of the work of the task force and subsequent efforts, **122** detainees remain. Of these, **54** are eligible for transfer, **10** are being prosecuted or have been sentenced, and **58** are being reviewed by the Periodic Review Process (PRB). In his nearly two years as Secretary of Defense, Secretary Hagel has approved the transfer of **44** detainees -- **11** of whom were transferred in 2013, **28** of whom were transferred last year, and **5** of whom have been transferred this year. The

great majority of these transfers occurred under the authorities in section 1035 of the FY14 NDAA. I urge you to maintain these authorities.

***Closure Is a National Security Imperative***

Mr. Chairman and members of the committee, I want to make a fundamental point regarding the detention facility at Guantanamo Bay. The President has determined that closing this detention facility is a national security imperative. The President and his national security team all believe that the continued operation of the detention facility at Guantanamo weakens our national security by draining resources, damaging our relationships with key allies, and is used by violent extremists to incite local populations. It is no coincidence that the recent ISIS videos showing the barbaric burning of a Jordanian pilot and the savage execution of a Japanese hostage each showed the victim clothed in an orange jumpsuit, believed by many to be the symbol of the Guantanamo detention facility.

Forty retired military leaders -- all retired general officers or flag officers -- wrote the chairman and ranking member of this committee on January 28, 2015 and stated, “[I]t is hard to overstate how damaging the continued existence of the detention facility at Guantanamo has been and continues to be. It is a critical national security issue.” The letter continued, “[M]any of us have been told on repeated occasions by our friends in countries around the world that the greatest single action the United States can take to fight terrorism is to close Guantanamo.”

This letter is signed by General Charles C. Krulak, a retired Commandant of the Marine Corps, Major General Michael R. Lehnert, the first commanding general of the joint detention task force at Guantanamo, General Joseph Hoar, the former head of

CENTCOM, General David M. Maddox, the former head of the U.S. Army in Europe, and thirty-six other retired senior military leaders.

Many other military leaders acknowledge the need to close this detention facility. Admiral Michael Mullen and General Martin Dempsey, the former and current chairman of the Joint Chiefs of Staff, support Guantanamo closure. In 2010, General David Petraeus, then the commander of CENTCOM stated, “I’ve been on the record on that for well over a year as well, saying that it [Guantanamo] should be closed. . . . And I think that whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside. . . . Abu Ghraib and other situations like that are nonbiodegradables. They don’t go away. The enemy continues to beat you with them like a stick.”

Senior figures across the political spectrum have made clear that Guantanamo poses profound risks to our national security and should be closed. Former Secretaries of Defense Robert Gates and Leon Panetta, and the current Secretary of Defense, Chuck Hagel, all support Guantanamo closure.

Finally, President George W. Bush concluded that the Guantanamo detention facility was “a propaganda tool for our enemies and a distraction for our allies.”

I will now briefly address the remaining specific issues addressed by the Committee’s letter of invitation.

***Recent Decisions to Transfer Detainees Held at the Detention Facility at Guantanamo Bay, Cuba, by the Department of Defense and Explain How Detainees are Designated as Ready for Transfer.***

Twenty-seven detainees have been transferred since November 2014. These detainees have been transferred to nine different countries.

Key features of the process that leads to a decision to transfer include a comprehensive interagency review and rigorous examination of information regarding the detainee, the security situation in the potential host country, and the willingness and capability of the potential host country to implement and maintain appropriate compliance with security measures. Those initial reviews were conducted by career professionals, including intelligence analysts, law enforcement agents, and attorneys, drawn from the Department of Justice, Department of Defense, Department of State, Department of Homeland Security, Office of the Director of National Intelligence, and other agencies within the intelligence community. Next, any transfer decision requires an assessment by the Special Envoys of the security situation in the receiving country, and of the willingness and capability of the country to comply with security assurances. Finally, each decision to transfer has been subject to the unanimous agreement of six Principals – the Secretary of State, the Secretary of Homeland Security, the Director of National Intelligence, the Attorney General, the Chairman of the Joint Chiefs, and finally, the Secretary of Defense. Under Section 1035 of the NDAA, the Secretary may approve the transfer if he determines that the transfer is in the national security interests of the United States and that actions have been or are planned to be taken that will substantially mitigate the risk of the detainee engaging in terrorist or other hostile activity that threatens the United States or U.S. persons or interests. The factors considered in making this determination include:

- The security situation in the foreign country to which the detainee is to be transferred;
- Confirmed past activities by individuals transferred to the foreign country to which the detainee is to be transferred;

- Actions taken by the U.S. or the foreign country to reduce the risk the individual will engage in terrorist or hostile activity;
- Security assurances provided by the foreign government; and
- An assessment of the willingness and capabilities of the foreign government to meet those security assurances.

A primary concern we have regarding a potential transfer is whether a detainee will “return to the fight” or otherwise reengage in acts that threaten the United States or U.S. persons. We take the possibility of reengagement very seriously. The most recent public data on reengagement of former Guantanamo detainees was released in September 2014 and are current as of July 15, 2014. There is a lag in the public reporting and I know you may have seen a more recent classified report on this matter. I can address updated classified statistics in a closed setting.

The ODNI categorizes the figures in three ways: 1) Total, 2) Pre-22 January 2009, which refers to former detainees who departed Guantanamo prior to January 22, 2009, and 3) Post-22 January 2009, which refers to former detainees who departed Guantanamo after January 22, 2009, as follows:

- **Total: 17.3%** confirmed of reengaging (107 of 620); **12.4%** suspected of reengaging (77 of 620), for a total of **29.7%** confirmed or suspected of reengagement.
- **Pre-22 January 2009: 19%** confirmed of reengaging (101 of 532); **14.3%** suspected of reengaging (76 of 532), for a total of **33.3%** confirmed or suspected of reengagement.
- **Post-22 January 2009: 6.8%** confirmed of reengaging (6 of 88); **1.1%** suspected of reengaging (1 of 88) for a total of **7.9%** confirmed or suspected of reengagement.

In other words, the rate of reengagement has been much lower for those transferred since 2009, which attests to the rigor of this new process. Of the detainees transferred under

this Administration, over 90 % are neither confirmed nor suspected of having reengaged. This statistic speaks to the result of the careful scrutiny given to each transfer in the intensive interagency review process, and the negotiation of agreements regarding security measures the receiving government intends to take pursuant to its own domestic laws and independent determinations that will mitigate the threat that the detainees will not pose a continuing threat to the United States and its allies after they have been transferred.

An additional point about the data: of the **107** confirmed of reengaging (the vast majority of them transferred prior to 2009), **48** are either dead or in custody.

Reengagement also does not equate to a free pass. We take any indications of suspected or confirmed reengagement very seriously, and we work in close coordination with our partners to mitigate reengagement and to take follow-on action when necessary.

***Explain How Security Arrangements Are Determined to be Sufficient to Transfer Detainees to Receiving Countries***

I cannot discuss the specific security assurances we receive from foreign governments with any degree of specificity in open testimony. However, among the types of security measures that we seek are the ability to restrict travel, monitor, provide information, and reintegration/rehabilitation programs.

The decision to transfer is made only after detailed, specific conversations with the receiving country about the potential threat a detainee may pose after transfer and the agreement about the measures the receiving country will take in order to sufficiently mitigate that potential threat. We also review the capability of the receiving country and

its security establishment, and its track record in adhering to prior agreements in this regard.

***Provide a Detailed Explanation of the Procedures of the Periodic Review Board (PRB) and PRB Risk Assessment***

The PRB process is an interagency process established to review whether continued detention of detainees held at Guantanamo Bay remains necessary to protect against a continuing significant threat to U.S. national security. We will be providing your staff information detailing the process and the PRB conduct of detainee risk assessments.

To date, the results of ten full hearings, for nine detainees, have been made public. Six detainees have been made eligible for transfer with appropriate security assurances, pursuant to the PRB process. Two of these detainees made eligible by the PRB process have been transferred, one to Kuwait and one to Saudi Arabia. The other three detainees remain subject to law of war detention. Efforts are being made to expedite the PRB process and prioritize hearings.

PRB panels are made up of senior representatives from the Departments of Defense, Homeland Security, Justice, and State; the Joint Staff; and the Office of the Director of National Intelligence. Pursuant to the Executive Order, and consistent with section 1023 of the FY12 NDAA, the Department of Defense established the Periodic Review Secretariat (PRS) to administer the PRB review and hearing process. The PRS is responsible for overseeing the implementation of the process and coordinates with the agencies involved. It is headed by a retired admiral.

The PRB process makes an important contribution toward the Administration's goal of closing Guantanamo Bay by ensuring a principled and sustainable process for

reviewing and revisiting prior disposition determinations in light of the current circumstances and intelligence, and identifying whether additional detainees may be designated for transfer.

By necessity, detainee reviews involve consideration of highly classified intelligence in addition to information that can be made public. To enhance the transparency of these reviews, the Department of Defense operates a website sharing unclassified information with the public. Postings include milestones in each detainee's case, unclassified information associated with the PRB hearings, and the results of the detainee reviews. In addition, a portion of the PRB process is open to the press and representatives of NGOs.

The PRB process does not address the legality of any individual's detention under the authority of the Authorization for Use of Military Force, as informed by the laws of war. Detainees have the constitutional privilege of the writ of habeas corpus to challenge the legality of their detention, and nothing in EO 13567 or its implementing guidelines is intended to affect the jurisdiction of federal courts to determine the legality of their detention. If, at any time during the PRB process, material information calls into question the legality of detention, the matter is referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

### ***Proposed Legislation***

The recent legislation proposed by Senator Ayotte and several members of this Committee would effectively ban most transfers from Guantanamo for two years. It reverts to the previous certification regime under the NDAA for FY 2012 and the NDAA for FY 2013, which resulted only in court-ordered transfers, transfers pursuant to pleas

agreements and only a few national security waivers. In addition, it adds a proposal to limit transfers based on JTF-GTMO threat assessments that may be outdated or not include all of the available information. We believe that any decisions regarding transfers should be based on current information and individual assessments of detainees.

Because this legislation, if enacted, would effectively block progress toward the goal of closing the Guantanamo Bay detention center, the Administration opposes it.

### ***Yemen***

The proposed legislation bars transfer of any detainees to Yemen for two years. **76** Yemenis remain at Guantanamo Bay: **47** are eligible for transfer, **26** are eligible for PRB review, **2** have charges referred and **1** is serving pre-sentence confinement.

A ban on transfers to Yemen is unnecessary because we are not, at the present time, seeking to transfer any of them in Yemen, especially in light of the recent further deterioration in the security situation. Since the President's moratorium on detainee transfers to Yemen was lifted nearly two years ago in favor of a case-by-case analysis, not a single detainee has been transferred to Yemen. The **12** Yemenis who have been transferred recently have been transferred to five countries: Slovakia, Georgia, Kazakhstan, Estonia and Oman. We are currently seeking to find other third countries to take additional Yemenis.

### ***Plan to Close Guantanamo Detention Facility***

Our plan has three main elements.

First, we will continue the process of responsibly transferring the **54** detainees eligible for transfer.

Second, we will continue the prosecution of detainees in the military commissions process, and if possible, in the federal courts. Currently 7 detainees are being actively prosecuted under the military commission process; 5 accused of the 9/11 attacks, 1 charged with the bombing of the *USS Cole*, and 1 charged with actions as a senior al Qaeda commander; and 3 are in the sentencing phase or are serving sentences.

Third, we will continue and expedite the PRB process.

When we have concluded these three lines of effort, it is likely that several detainees cannot be prosecuted but who are too dangerous to transfer, even with security assurances, will remain in our custody.

Ultimately, closing the detention center at Guantanamo Bay will require us to consider additional options, including the possibility of transferring some detainees to a secure facility in the United States. The Department of Justice has concluded that in the event detainees were relocated to the United States, existing statutory safeguards and executive and congressional authorities provide robust protection of national security. We understand that such transfers are currently barred by statute. As a result, the Government is prohibited from prosecuting any detainees in the United States, even if it represents the best – or only – option for bringing a detainee to justice. The President has consistently opposed these restrictions, which curtail options for managing the detainee population. We understand the Committee has a continuing request for more information. We understand we need to work with Congress on this and I pledge to you we will do so.

***Explain the Administration's Policy Regarding the Detention of Future Combatants Captured on the Battlefield***

The disposition of an individual captured in the future will be handled on a case-by-case basis and by a process that is principled, credible and sustainable. When a nation is engaged in hostilities, detaining the enemy to keep him off the battlefield is permissible and is a humanitarian alternative to lethal action. In some cases, those detained will be transferred to third countries. In other cases, they will be transferred to the United States for federal prosecution, after appropriate interrogation, as occurred in the case of Ahmed Warsame. Some cases may be appropriate for law of war detention. But the President has made clear that we will not add to the population of the detention center at Guantanamo Bay.

### ***Conclusion***

President Bush worked towards closing Guantanamo, and many officials in his Administration worked hard towards that objective. We are closer to this goal than many people may realize. Of the nearly 800 detainees to have been held at Guantanamo since the facility opened in 2002, the vast majority have already been transferred, including more than 500 detainees transferred by the previous Administration. The President and the national security experts of this Administration believe it should be closed. The senior military leaders of the country and the leaders of the Department of Defense concur. We believe the issue is not whether to close Guantanamo; the issue is how to do it.

Thank you and I look forward to your questions.