

Testimony
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Senate Armed Services Committee
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Mr. Chairman, Senator McCain, it is a special privilege for me to appear before this Committee today to discuss some of the most important legal and policy issues facing this country as we prosecute the wars in Iraq, Afghanistan and the broader war on terror.

I commend this Committee for beginning to examine very important questions, including how should we treat detainees; what interrogation techniques are permissible under U.S. and international law; what standards should we use for detaining persons who pose a continuing threat to the United States but have not committed a crime; what procedures should be followed to try those who have committed a crime; what should be done about the detention facility in Guantanamo; should the CIA be able to secretly hold persons outside the United States, the so-called “ghost detainees;” and under what circumstances, if at all, should the United States be able to engage in extraordinary renditions of persons to third countries where they might be tortured?

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I am appearing today at the request of the Committee on my own behalf and not on behalf of any clients of our firm. As I have advised the Committee, our firm represents the International Counsel Bureau, Kuwaiti counsel for the families of Kuwaiti citizens held in Guantanamo. We understand that the Government of Kuwait makes financial contributions for the legal fees and expenses of the International Counsel Bureau for this representation and accordingly, out of an abundance of caution, we have registered with the Department of Justice under the Foreign Agents Registration Act. I participate in that representation and am registered with the Department.

I hope my comments today will help the Committee address these critical questions. In that regard I intend, first, to emphasize the importance of fidelity to the rule of law, not only as a constitutional imperative but also as a strategic necessity as we seek to re-establish our moral leadership and diplomatic standing in the world. Second, I turn to the specific matters you have asked me to address regarding U.S. detention and interrogation policy.

I. Fidelity to the Rule of Law as a Legal and Strategic Imperative

Mr. Chairman, the President was correct when he concluded that many of our laws were inadequate or outmoded when it came to responding to the new threats that came into focus in the aftermath of the attacks of September 11, 2001. The President was wrong, however, when he concluded he could adhere to those laws with which he agreed and disregard those with which he did not agree. The Administration's attitude vis-à-vis selective adherence to the law was most famously captured in then-White House Counsel Alberto Gonzales's memo to the President in which he declared the Geneva Conventions "quaint" and "obsolete," and thus inapplicable to those who attacked us on 9/11.

Mr. Chairman, law matters - especially in time of war. It matters because we are a democracy and because we respect the rule of law. It matters because the law of war governs how we fight the war. It governs how we treat those whom we capture and, perhaps most importantly, it governs how we expect our fellow citizens to be treated when they are captured.

Fidelity to law also matters because how we fight the war - and how others see us - shapes the political landscape after the war is over. This is especially true in the wars we are currently fighting.

The war against al Qaeda is, at bottom, a political war fought in small engagements on a global scale, often against non-state actors. The war in Iraq is a combination of counterinsurgency and civil war - a witches' brew that is one of the most difficult challenges our nation has ever faced. In Afghanistan we are facing a classic insurgency.

In all three wars we are trying to build legal, political and economic institutions that will assure long-term political stability, democracy and economic prosperity in regions of the world where they are rare indeed. And in this struggle the rule of law is not only an objective we seek, but also a tool we can use to achieve those broader objectives.

Mr. Chairman, I am deeply concerned that in our efforts to get tough with the terrorists we have strayed from some of our fundamental principles and undermined 60 years of American leadership in the law of war. In six short years, our disregard for the rule of law has undermined our standing in the world and, with it, our ability to achieve our objectives in the broader war. As one gleans from news reports and as I have learned through my own conversations with military, intelligence and diplomatic officials, our efforts to foster democracy and the rule of law - and the efforts of those in the region who want change - are too quickly and easily undermined by those who need only gesture toward Abu Ghraib or Guantanamo in order to ensure that millions remain hostile to true reform.

Our actions have also affected the level of cooperation we have received from allied and friendly governments. When the United States is seen as acting arrogantly and ignoring international law, it makes it difficult for other governments to cooperate with us. This Committee understands full well that the United States must maintain our leadership in the world, but that we also need the cooperation of other governments. We cannot lead without partners, and partners need to believe in the direction we are leading them.

International cooperation is key to our success in each of the wars we are fighting. Other governments - and their people - often place great weight on complying with international law and the Geneva Conventions. When we are seen as flouting international law and the Conventions, it makes it much more difficult for those governments to cooperate with us.

As Senator McCain has said:

Everywhere I go, I encounter this issue of the treatment of prisoners and the photos of Abu Ghraib and what is perceived in the world to be continued mistreatment of prisoners. It is harming our image in the world terribly. We have to clarify that that is not what the United States is all about. That is what makes us different. That is what makes us different from the enemy we are fighting. The most important thing about it is not our image abroad but our respect for ourselves at home.

II. U.S. Detention and Interrogation Policy

Mr. Chairman, before I turn to some of those specific matters you have asked me to address, I would like to lay out a few principles that I believe should guide your deliberations.

First, the United States must regain its leadership position in upholding the law of war and promoting adherence to the Geneva Conventions. The Geneva Conventions do need, in my judgment, to be re-examined in light of the changing face of international conflict. But rather than just setting the Conventions to the side, we must abide by them and, at the same time, work with the international community to identify and adopt revisions to confront the realities of the war on terror.

Second, the United States should take concrete steps to convince the world that we do not torture any person held in U.S. custody. The President has repeatedly said that the United States does not torture anyone, yet he is unwilling to endorse for use by all agencies the Army Field Manual, which has long been the closest thing our government has to a definitive interpretation of the Geneva Conventions on detainee treatment.

Third, the President has said he wishes to close the detention center at Guantanamo. I believe that would be an important step and urge the Congress to direct the President to outline a specific plan to close Guantanamo. Presumably this would mean returning some of the detainees to their home country to serve a criminal sentence, or to continue in preventative detention. It may also be necessary to open a detention facility in the United States where these individuals could be held and treated in accordance with the Geneva Conventions, including consular access.

Fourth, Congress should revise the Military Commissions Act along the lines suggested by Senator Dodd in S.576. Key among his proposals is the guarantee of the right of habeas corpus for detainees in Guantanamo.

Fifth, the use of renditions has been a very valuable tool in the war on terror and in law enforcement matters. There is, however, a great deal of uncertainty about its legality, especially in Europe. I believe that the President, perhaps with Congressional authority, should issue an Executive Order establishing clear criteria for the conduct of renditions, including specific measures that must be taken to ensure, to the maximum extent practicable, that individuals are not handed over to states where they will be tortured.

Sixth, and of critical importance, the United States must develop clear guidance for the men and women of the armed forces and intelligence services who implement these policies and enforce these laws. We ask these brave men and women to take physical risks on our behalf. We should not also ask them to take legal and financial risks. Too frequently these officers are asked to carry out directives not knowing whether, when the political winds shift in Washington, they will be left out on a limb and forced to face multiple investigations and possible prosecution for doing what was thought to be proper at the time. We owe it to these men and women to be clear in what we want them to do and then to back them up when they do it. This does not mean, of course, that actions such as those at Abu Ghraib should be tolerated. Indeed, it is my belief that lack of clear direction and failures in the chain of command contributed directly to the terrible abuses at Abu Ghraib.

Now, Mr. Chairman, let me turn to some of the specifics you have asked me to address.

The Detainee Treatment Act of 2005 and the Military Commissions Act of 2006 are important steps in establishing a firm legal basis for our actions. As this Committee knows, the President accepted this legislation reluctantly and only under great pressure after the courts repeatedly rebuked his legally unmoored policies. I salute Congress - and the leadership of many on this Committee - for taking these initial steps.

However, I also believe that further legislative action is needed. I am therefore pleased to support S.576, which was introduced by Senator Dodd and co-sponsored by Senator Kennedy and others, that corrects some of the shortcomings in the Military Commissions Act of 2006. The following are my specific comments on the Dodd Kennedy bill.

- I support the restoration of the right of habeas corpus to “unlawful enemy combatants” and “lawful enemy combatants” as defined by the Military Commissions Act. This would mean that the detainees in Guantanamo would have the right to file habeas corpus. I do not support providing habeas corpus to those individuals who may be detained in a theatre of war, such as Iraq or Afghanistan, and held in US or coalition detention facilities in theater.
- I agree with Senator Dodd that the definition of an unlawful enemy combatant should be narrowed to those individuals who directly participate in hostilities against the United States and who are NOT lawful combatants. The definition in

the Military Commissions Act of 2006 is, in my judgment, too broad. I should add that the terms “unlawful enemy combatants” and “lawful enemy combatants” are new terms and new concepts in the law of war. As such, they don’t enjoy broad international acceptance and reinforce the need to consult with our allies to revise and modernize the Geneva Conventions.

- I agree that detainees should be entitled to be represented by a civilian defense counsel who is qualified to practice before the Military Commission.
- I agree with the changes suggested by Senator Dodd that a statement obtained by coercive means should not be admissible in a Military Commission.
- I agree that the U.S. Court of Appeals for the Armed Forces should review the decisions by the Military Commissions and that the narrow standard of review in existing law, namely whether the final decision is consistent with the standards and procedures of the Commission, should be repealed. The courts should use existing canons of criminal law to consider appeals.

There are also three additional suggestions I would like to make.

First, the Military Commissions Act gives the prosecution the right to make interlocutory appeals but not the defense. It is not clear to me why the defense should not also have the right to make interlocutory appeals.

Second, in prosecuting the war on terror, we also need to consider how to square evidentiary questions concerning classified information with our expectations of adversarial

justice. S.576 would not alter the basic procedures of the Military Commissions Act, namely that a military judge may order the trial counsel to disclose to the defense counsel classified information about the methods or activities by which the United States obtained an out of court statement; in other words, was a confession or other testimony obtained by coercion or other inappropriate means. I believe that is an important step in the right direction, but I note that the government has the right to assert a national security privilege for classified information which could presumably trump the order of the military judge to disclose it to the defense counsel. I believe this can be remedied by providing that the privilege may not be asserted if the classified information at issue relates to the elucidation of evidence by coercion or other inappropriate means. In particular, I would add the following new subparagraph (D) to 10 U.S.C. § 949d(f)(1):

The privilege referred to in subparagraph (A) may not be claimed if the classified information at issue pertains to whether evidence to be introduced at trial was obtained by coercive or other improper techniques and is the subject of a motion under 10 U.S.C. § 949j(3).

Third, I also believe that the statute should make it clear that defense counsel, whether military or civilian, can be granted clearances to have access to classified information relevant to their defense.

Mr. Chairman, as we discuss the procedures to be followed by the Military Commissions, it is important to understand that the vast majority of individuals we hold in Guantanamo are not likely to be charged with a crime. Rather, they will be held as enemy combatants under the sole

authority of the President. Under the current DoD Directive, they may be held if a Combatant Status Review Tribunal determines that they are “part of or supporting Taliban or al Qaeda 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 enemy armed forces.” This is a very broad definition and, when combined with the extremely limited ability of detainees to effectively challenge the factual basis on which they are held, means that they could be held for years, perhaps decades, without meaningful review of their cases. That is not acceptable - and, as I have said earlier - undermines our effectiveness in the war on terror.

I believe that the individuals held at Guantanamo should be able to challenge the basis of their detention, including the accuracy of the underlying information, as we have always done it in our system - with a writ of habeas corpus. There are, to be sure, many practical difficulties courts would face in considering these petitions. Much of the information may be classified. Many of the witnesses upon which the government or the petitioner would rely may be overseas and unwilling or unable to provide depositions of the sort ordinarily used in habeas proceedings. But I have great confidence in our courts to fashion procedures that will strike the right balance between the security needs of our nation and the due process to which the detainees are entitled. Indeed, in her plurality opinion in the *Hamdi* case, Justice O’Connor provided express guidance regarding some of the measures a habeas court could adopt in striking a reasonable balance.

As Judge Rogers noted in her recent dissent in the *Boumediene* case, the CRSTs are no substitute for a habeas court. Nevertheless, the CRSTs still serve an important, but different,

function and, by advocating restoration of the right for detainees to file a habeas petition, I do not advocate eliminating the CSRTs.

The current CSRT procedures are loosely based on the requirements of the Geneva Conventions to assure that capturing states establish a process to determine whether persons captured are legitimately prisoners of war and entitled to protection under the Conventions - a process commonly known as the "Article 5 proceeding." These proceedings have never been intended as a substitute for a habeas proceeding, but rather as an initial, first-pass effort at very rough justice. Those procedures are appropriate for determinations on the battlefield and for in theater detentions. But when an individual is brought to the United States or to territory where we are in essence the sovereign, such as Guantanamo, a higher standard must be met. Therefore, I believe that the procedures for the CSRT should be substantially beefed up, thus giving detainees far greater opportunities to question the basis for their detention. But even these new procedures are not a substitute for a habeas petition and I urge the Congress to restore the right of habeas.

With respect to the Detainee Treatment Act, as I said earlier, I do not believe that there should be two standards for interrogation of detainees. That Act, in Section 1002, provided that treatment of persons in the custody of the Department of Defense will be governed by the Army Field Manual on Intelligence Interrogations. However, treatment of individuals held by other government agencies was subject only to the general prescription against torture contained in Section 1003. I understand that many believe the intelligence community needs additional authority to conduct interrogations that go beyond the procedures permitted by the Army Field

Manual. As the Committee knows, the Military Commission Act gave the President authority to issue an Executive Order interpreting the Geneva Conventions and presumably spelling out those techniques.

I am not persuaded that two different techniques are required and I believe the Congress should hold hearings to carefully examine what techniques are productive and to ensure that all elements of the U.S. Government, both military and civilian, have clear guidance as to what techniques are permitted. I must add that if these more aggressive techniques produce valuable intelligence, why should only the CIA be entitled to use them? If we believe the CIA needs these techniques because they yield vital intelligence, why should our armed forces not be able to use them? Are they not entitled to the best intelligence?

In that regard, I would like to call the Committee's attention to a recent set of studies published by the National Defense Intelligence College that concluded there was no scientific support for the proposition that coercive techniques produced valuable intelligence. I am well aware there is a lot of anecdotal evidence, including stories as recently as this past Sunday in the *New York Times*, that coercion works. That does not make these techniques correct nor does it mean that the United States should endorse their use.

You have also asked for my views on whether the CIA should be permitted to maintain "ghost detainees" or "secret prisons." In brief, I believe that any person detained by the United States should be subject to the Detainee Treatment Act and should have his or her status subject to review by the Combatant Status Review Tribunals. I am pleased that the President has now

moved all detainees into that system. The President appears, however, to have reserved the right to revert back to the old practice of detaining persons outside of the system. I am deeply skeptical of either the need or the wisdom for such detentions. That said, I am not certain that I would prohibit by statute the President from ever engaging in such action.

Finally, the Committee has asked for my views on the process known as “extraordinary renditions.”

Extraordinary renditions, the practice of seizing an individual in one state and moving him or her to another state without following the judicial procedures of a deportation or extradition has been a tool long employed by the United States. Rendition is a valuable option, and I support the practice. In my personal experience, the vast majority of these renditions was used to bring someone to justice, either in the United States or elsewhere, when there was no extradition treaty in place or extradition was not a viable option. Perhaps the most dramatic use of rendition was the seizing of the terrorist Carlos in Sudan and flying him to Paris to stand trial for the murder of French intelligence officers. In addition, we have successfully “rendered” persons back to the United States to stand trial for heinous crimes, and I believe we should continue to have the ability to do that.

In the wake of 9/11, however, serious questions have been raised about the increased use of renditions for a different purpose: transferring someone to another state, often not his or her home country, for purposes of interrogation or preventative detention. As the Committee knows, individuals who are subject to extraordinary rendition typically have no formal access to the

judicial system of the sending state and thus have little opportunity to challenge their transfer. If the end result is not a trial, but simply more detention, the act of rendition is much less transparent.

In my experience the United States never engages in a rendition unless the state where the individual is located gives its consent to the rendition. In 1980, the Justice Department's Office of Legal Counsel issued an opinion that irregular renditions absent consent of the "host" state would violate customary international law because the seizures would be an invasion of sovereignty. That presumes, of course, we are dealing with a functioning state. There could be circumstances in which a fugitive or terrorist is in a part of a country where there is no effective government. In that situation a strong case can be made for seizing a suspect and delivering him to stand trial even without, or over the objections of, the state with authority over that territory. If the purpose of a rendition is merely to "take them off the streets" or subject them to interrogation, the case is less compelling but may nevertheless be an important and valid tool.

The statutory basis for renditions is scarce. As noted by the Congressional Research Service, the only provision in the U.S. Code that appears to expressly authorize an agency's participation in rendition is 10 U.S.C. § 374(b)(1)(D), which permits the Department of Defense, upon request from the head of a federal law enforcement agency, to use DoD personnel and equipment to assist in the rendition of a suspected terrorist from a foreign country to the United States to stand trial.

Other relevant laws include the Convention Against Torture and the International Covenant on Civil and Political Rights. The United States is a party to both Conventions.

Article III of the Convention Against Torture provides that no state “shall expel, return, or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.” The United States has interpreted the “knowledge” element to mean that it would be unlawful to remove an individual if it were “more likely than not” that the person would be tortured. In the Foreign Affairs Reform and Restructuring Act of 1998, Congress implemented the U.S. obligations under Article III of the Convention Against Torture by declaring that it would be U.S. policy “not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing that the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.” 8 U.S.C. § 1231 notes.

Article IV of the Convention Against Torture also requires signatory states to criminalize torture as well as attempts to commit torture and related acts of aiding and abetting. The United States, which already banned torturous acts occurring on United States soil, put Article IV into effect by enacting 18 U.S.C. § 2340A. Section 2340A criminalizes torture occurring outside of the United States and provides jurisdiction so long as the offender is a United States national or is present in the United States. The statute requires a showing of specific intent to commit torture and it is therefore doubtful that merely sending someone to a state where torture might occur violates the statute absent a more specific showing of intent.

As the Committee knows, it is United States policy to obtain assurances from a state to whom we send an individual that he or she will not be tortured. Because the details of United States requirements are not public, we do not know the specifics of what types of assurances are sought. We also do not know whether there is any requirement of a follow-up to confirm whether those assurances were honored.

Additionally, there is a great deal of concern in Europe and among other allies that the United States has conducted renditions outside of the scope of law. I do not believe that to be the case, despite the arrest warrants issued by independent prosecutors in Italy and Germany for individuals alleged to be CIA officers conducting renditions in those countries.

Nevertheless, there is considerable uncertainty about the legal footing for renditions, and therefore, I believe that Congress should require the President to issue an Executive Order establishing solid legal footing and clear criteria for the conduct of extraordinary renditions. The elements of such an Executive Order might include the following:

- Criteria for determining who should be rendered to what state and for what purpose;
- A requirement that the United States be highly confident of the accuracy of the information upon which the rendition is based, including the proper identification of the individual;

- A detailed procedure for granting approval at senior levels for the conduct of an operation, perhaps even requiring written approval by a Cabinet or Subcabinet officer;
- A prohibition on sending an individual to a state that is not a party to the Convention Against Torture or the International Covenant on Civil and Political Rights;
- Written assurances from the state to which the individual is being sent that it will adhere to the requirement of these conventions;
- Some means of follow-up, perhaps even follow-up visits by U.S. officers or, in the case of a third party, consular officers of the rendered individual's home country;
- An annual report to Congress on renditions conducted during the previous year, classified as necessary.

In summary, Mr. Chairman, it has been a great honor for me to appear before this Committee today and to give you my thoughts on some of the most difficult, demanding and important legal and policy issues we face as a nation. I commend the Committee for tackling these critical issues, as we must get them right as we fight and win the war on terror.

I look forward to your questions.