

TESTIMONY
OF
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BEFORE THE
SUBCOMMITTEE ON NATIONAL SECURITY
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES
ON
“GUANTANAMO BAY: THE REMAINING DETAINEES”
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Mr. Chairman, Ranking Member, and Members of the Subcommittee:

I want to thank you for inviting me here today to participate in this important hearing regarding the status of the detention facility at Guantanamo Bay, Cuba. Of the three principal questions the Subcommittee will address today, I will focus my comments mainly on the Subcommittee’s third area of inquiry: the implications that the closure of the detention facility would have on the United States’ national security interests. I will also make a few remarks on the Periodic Review Board (PRB) process.

It is my judgment that the national security interests of the United States would be advanced by permanently closing the Guantanamo detention facility and transferring the detainees there either to a detention facility or facilities in the United States or, if appropriate, to third countries. While one can understand the reasons why Guantanamo was initially chosen as a detention facility for high-level detainees captured in the War on Terror, those reasons no longer apply, circumstances have changed, better alternatives have emerged, and the high costs of Guantanamo are now fully visible and should be regarded as untenable. To keep the Guantanamo detention facility open today would be contrary to our nation’s financial, administrative, military, foreign policy, and national security interests. Other than for reasons of inertia, there is no need to keep the facility open – but there are pressing reasons to close it.

I.

Before turning to the reasons that support this opinion, the Subcommittee may find a description of my background and experience in Guantanamo detention issues to be of assistance in determining what weight to give to it. My background on the subject is both official and academic.

My official involvement in Guantanamo dates back almost continuously from the first day of my service as General Counsel of the Department of the Navy in the administration of President George W. Bush, which was in the summer of 2001, until my last day in office almost five years later. Immediately following my confirmation by the Senate, I participated in an evaluation by the Department of the Navy and Marine Corps' training facilities in the Caribbean, including Guantanamo. After the attacks on 9/11 and following the decision to use Guantanamo as a detention facility (a decision I did not participate in), I was involved in some of the contractual and administrative details regarding the conversion of the naval base into a detention facility. I visited the base three times. On my first visit in early 2002 I witnessed the second planeload of detainees land on the base and used the occasion to inspect the detention facility, which then consisted only Camp X-Ray – Guantanamo at its most rudimentary origin.

More substantive official involvement with detention operations followed. In November of 2002 I became deeply engaged in Guantanamo interrogation operations when the Naval Criminal Investigative Service (NCIS) – which reported to me within the Navy hierarchy – came to me with what would prove to be well-founded concerns about detainee abuse during interrogations. And later, starting in early 2004, I provided legal support to the Secretary of the Navy and my boss, Gordon England, when he was appointed by Defense Secretary Donald Rumsfeld to be his Executive Agent in the formation and management of the Guantanamo Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs, the precursors of today's Periodic Review Boards, or PRBs). Both the CSRTs and ARBs exposed me to the backgrounds of some (if not all) of the detainees, to the quality of the representative data or intelligence maintained on them, and to the inter-agency process used to evaluate the status of the detainees for possible release, transfer, or continued detention.

Academically, my involvement in Guantanamo dates from the start of my research activities at Harvard University in 2014. First as an Advanced Leadership Fellow and now as a Senior Fellow at the Kennedy School's Carr Center for Human Rights Policy¹, I have been involved generally in the study of the interrelationship of human rights to national security and more particularly in the assessment of the costs and consequences of certain decisions concerning the legal status and interrogation of prisoners in the War on Terror. During this research, data demonstrating the adverse policy impact of the decision to open Guantanamo and to maintain it as a detention center has surfaced repeatedly.

My experience from both my official and academic involvement with Guantanamo informs this testimony.

¹ This testimony is provided in my personal capacity and does not reflect the views of the Carr Center for Human Rights Policy, the Harvard Kennedy School, Harvard University, or any other person or institution.

II.

Why should Guantanamo be closed?

I believe it should be closed for five reasons, each of which stems from what I regard to be a neutral cost/benefit assessment of the policy ramifications of closing, or not closing, Guantanamo. My position, I should note, is one shared by many who have spent their careers protecting and defending our country. Five former and current Secretaries of Defense² and five Chairmen of the Joint Chiefs of Staff³ have supported closing Guantanamo, as have seven former Secretaries of State⁴ across both Republican and Democratic administrations. Numerous national security experts support closing Guantanamo.⁵ Earlier this year, thirty-six retired generals and admirals, including General Charles Krulak—the former commandant of the Marine Corps—and Major General Michael Lehnert—the commander in charge of setting up the detention facility at Guantanamo after 9/11—wrote to Congress urging that it cooperate with the administration to pave a path to closing Guantanamo.⁶

Without seeking to speak of behalf of any of these leaders, in all probability their calls to close Guantanamo include some or all of the following five mutually supporting reasons. They are, in ascending order of importance:

First, Guantanamo is no longer outside the jurisdiction of U.S. federal Courts and thus there is no significant legal advantage to holding detainees in Guantanamo vis-à-vis federal detention facilities in the United States.

While there were a number of factors that led to the selection of Guantanamo as a detention facility, most historical accounts of that decision cite the belief that it was outside the jurisdiction of U.S. federal courts – and, thus, largely a law-free zone – as one of the primary reasons. This is, of course, no longer the case. Starting with *Hamdi v. Rumsfeld*⁷ the Supreme Court has stepped in four times since 9/11 to assert federal court jurisdiction over the base.

² <https://www.foreignaffairs.com/articles/vietnam/2005-10-01/iraq-learning-lessons-vietnam>, <http://www.nydailynews.com/news/politics/defense-secretary-robert-gates-closing-guantanamo-bay-prison-priority-article-1.355127>, <http://cnsnews.com/news/article/melanie-hunter/sen-cotton-decision-close-gitmo-political-not-based-security-concerns-0>, <https://www.gpo.gov/fdsys/pkg/CHRG-113hrg80754/html/CHRG-113hrg80754.htm>, <http://www.washingtonexaminer.com/ash-carter-closing-guantanamo-bay-would-be-a-good-thing/article/2581311>

³ <http://www.nbcnews.com/news/us-news/colin-powell-says-closing-guantanamo-bay-america-s-best-interest-n525041>, http://www.technicianonline.com/news/article_ef3216a9-95fd-5332-9acf-126207211a86.html, <http://www.newsweek.com/general-peter-pace-casualty-war-102447>, <http://abcnews.go.com/ThisWeek/story?id=7664072&page=1#.UebEaKz0-xM>, http://www.huffingtonpost.com/2015/01/11/martin-dempsey-guantanamo_n_6451668.html

⁴ <http://articles.latimes.com/2008/mar/28/nation/na-advice28>, <http://news.bbc.co.uk/2/hi/7155142.stm>, <http://www.cbsnews.com/news/hillary-clinton-urged-obama-to-close-guantanamo-bay/>

⁵ <http://www.humanrightsfirst.org/resource/quote-sheet-national-security-leaders-support-closing-guantanamo>

⁶ <http://www.humanrightsfirst.org/resource/retired-generals-and-admirals-letter-senate-and-house-armed-services-committees-closing>

⁷ 542 U.S. 507 (2004).

There is thus no longer a significant legal advantage to holding detainees in Guantanamo as compared to federal detention facilities in the continental United States.⁸ And because the principal factor that led to the selection of Guantanamo no longer applies, the basis for maintaining Guantanamo as a detention facility is correspondingly weakened.

Second, the financial costs and personnel burdens of maintaining detainees at Guantanamo are extravagantly wasteful in comparison with other alternatives.

Guantanamo is incredibly costly from both a financial and personnel perspective — and unnecessarily so. Financially, Guantanamo costs the U.S. taxpayer \$445 million a year, or about \$5.56 million per detainee annually.⁹ The cost to house prisoners in maximum-security prisons, by contrast, is about \$78,000 per prisoner.¹⁰ In the recently-submitted DOD plan for closing Guantanamo it was reported that, even with substantial construction or modification costs, the government could save upwards of \$85 million dollars a year by closing Guantanamo.¹¹

From a personnel perspective, Guantanamo is similarly inefficient. Based on one recent estimate, there are upwards of 1,700 members of the military serving at Guantanamo, which breaks down to about 18 troops for each detainee¹² — an astonishingly high number from a custodial perspective. And even if one were to analyze only the guard force component in isolation from other personnel elements the conclusion of wastefulness and inefficiency is inescapable. By some accounts, the number of guards at Guantanamo total 1,200, a ratio of 15 guards per detainee. By contrast, the average ratio of prisoners per guard in the federal correctional system as reported in a 2012 GAO study is 5.2 prisoners per guard.¹³

Given these wide margins between Guantanamo and other U.S. custodial alternatives, one could significantly underestimate the costs of transferring and maintaining the Guantanamo detainees in the United States and still achieve sizeable economies after making the relocation.

Third, given the availability of U.S.-based civilian alternatives, by closing Guantanamo the military personnel now serving as guards there could be reassigned to higher-priority duties.

The guard force at Guantanamo is performing a valuable and necessary function and those who serve or have served in that capacity have done so honorably and have earned the gratitude of the nation. Still, the demands on our military personnel after 14 years of the War on Terror are daunting and highly trained soldiers must be regarded as scarce resources. Given that civilians could perform many or all of the custodial duties at Guantanamo as effectively as military

⁸ See, e.g., <https://s3.amazonaws.com/s3.documentcloud.org/documents/1160074/5-14-14-kadzic-to-pjl-re-fy14-ndaa.pdf>

⁹ http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf

¹⁰ <http://www.miamiherald.com/news/nation-world/article1953705.html>

¹¹ http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf

¹² <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article61672022.html>

¹³ Government Accountability Office, “Bureau of Prisons: Growing Inmate Crowding Negatively Affects Inmates, Staff, and Infrastructure”, at 79 (GAO-12-743, September 2012).

personnel, the question must be posed whether transferring the detainees to the United States and the custodial responsibility to the Bureau of Prisons may not permit the reassignment of the military personnel to higher-priority military duties, thus enhancing national security.

Fourth, because the federal prison system has demonstrated that it can successfully and safely hold terrorists as dangerous as any of those as Guantanamo, closing Guantanamo and transferring the detainees to the United States would not appreciably add to the current level of risk.

In the public debate about whether or not to close Guantanamo, many Americans appear to be of the view that the 80 remaining Guantanamo detainees pose a security threat that only Guantanamo can contain. But that is not an accurate view. Stateside detention facilities are currently holding at least 443 convicted terrorists across 21 U.S. states, including a number of high-level al Qaeda plotters and even one former Guantanamo detainee.¹⁴ There is no evidence that the presence of these men within the United States has presented any danger to local communities.¹⁵ As the Executive Director of the American Correctional Association James A. Gondles Jr. recently stated: “Hundreds of convicted terrorists have gone to prison in the United States since 9/11. None has escaped. None has created security threats for the communities near the prisons.”¹⁶

Thus, two points emerge here. First, if the 80 remaining Guantanamo detainees were added to the 443 terrorists already held in captivity in the United States, that would neither change the type of risk already faced by the United States nor appreciably raise its level. And second, as a detention facility, Guantanamo should no longer be seen as providing unique security.

Fifth, and most importantly, the foreign policy and national security costs of maintaining Guantanamo as a detention facility are too high and outweigh any benefit it provides.

Guantanamo has damaged us with our friends and has constituted a strategic gift to our enemies. It is not an overstatement to say that the Guantanamo has seriously undermined our national security and contributed to a loss of American lives overseas.

Let’s look first at how it has provided aid and comfort to our enemy. That Guantanamo has been used as a recruiting symbol by al Qaeda and ISIS is well documented and is generally accepted. What is less well known and remains the subject of debate is how effective these symbols have proved. My view is that they have been very effective. Last year, a Carr Center researcher discovered a 2006 U.S. diplomatic cable from our embassy in Kuwait that summarized the results of a conference of chiefs of mission and military commanders in the Middle East to develop a regional counterterrorism strategy—the cable states, and I quote: “the primary motivator for most [terrorists and foreign fighters], as reported by U.S. military

¹⁴ http://www.nytimes.com/interactive/2016/04/07/us/terrorists-in-us-prisons.html?_r=0

¹⁵ <https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-theamerican-constitution-society-convention>

¹⁶ <http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf>

intelligence, remains perceived U.S. abuses of and lack of due process for detainees at Abu Ghraib and Guantanamo Bay, making this issue a key driver of [terrorist and foreign fighter] flows and a key element undermining international confidence in the United States' ability to conduct an effective war on terrorism that remains true to American values.”¹⁷

The cable goes on to state—again, I’m quoting—“Detainee debriefs and intelligence reporting indicate that U.S. treatment of detainees at Guantanamo Bay, Abu Ghraib, and elsewhere is the single most important motivating factor for [terrorists and foreign fighters] traveling to Iraq. Regional concern over detainee issues undermines our credibility, and our partners' willingness to cooperate, on a host of CT issues.” Given that these symbols were the “primary” motivator for foreign terrorist flows into theater, that they were responsible for some American combat deaths is almost a certainty.

Although that cable was written in 2006, the propaganda effects of Guantanamo retain their potency. In 2013, the Director of National Intelligence stated that Guantanamo continues to serve as a propaganda tool in service of al Qaeda’s false narratives and justifications for waging global jihad against the United States,¹⁸ an assertion that we ourselves can verify each time we see an al Qaeda or ISIS prisoner paraded in Guantanamo’s signature orange jumpsuit.

Beyond bolstering our enemies, Guantanamo continues to damage us with our alliances. Government officials have testified that Guantanamo continues to undermine counterterrorism cooperation with allies. For example, allies will often refuse to provide access to terrorism suspects or potentially valuable intelligence if they believe doing so could be seen as supporting detention operations at Guantanamo.¹⁹ Detention at Guantanamo has also compromised evidence necessary to the prosecution of prisoners once they have been sent home²⁰ and has exposed U.S. officials to legal risks in foreign courts.²¹ By undermining the prosecution of suspected terrorists, Guantanamo has damaged a critical aspect in the endgame in the War on Terror.

So, too, the presence of Guantanamo corrodes U.S. soft power and moral authority and it compromises our ability to act credibly as a global leader on human rights. Former Secretary of State Colin Powell said just this year in reiterating his support for closing Guantanamo, I quote: “Guantanamo was a heavy load to carry as I went around the world talking about human rights, talking about how you treat prisoners, talking about how you can’t have indefinite detention or the use of torture to get things out of people. And I always had pushback at me: 'But look at

¹⁷ https://wikileaks.org/plusd/cables/06KUWAIT913_a.html

¹⁸ <https://www.scribd.com/doc/185248699/DNI-Letter-on-GTMO-11-14-13>

¹⁹ <http://www.humanrightsfirst.org/uploads/pdfs/Kerry-GTMO-NDAA-Nov2013.pdf>,
<http://www.reuters.com/article/us-security-usa-guantanamo-idUSTRE51O89820090226>,

<https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-northwestern-university-school-law>

²⁰ “Court Frees 'Spanish Taliban',” Wikileaks, 06MADRID1914, 28 July 2006.

²¹ Center for Constitutional Rights, “Former Guantánamo Chief Being Investigated for Torture Is a No-Show at French Court Hearing,” 1 March 2016.

what you were doing at Guantanamo.²² That burden continues to be heavy: Guantanamo constitutes a symbol of American injustice to many around the world, contributes to anti-Americanism, diminishes public support for U.S. policies, and continues to be used by dictators and repressive regimes to justify their own abusive detention practices.²³

III.

As I noted, there are important reasons why Guantanamo should be closed. But Guantanamo also raises other issues and the members of this Subcommittee are right to thoroughly scrutinize the process that the administration uses to determine if and under what circumstances a detainee should be transferred. If the process is not fair and thorough, the result could mean the transfer of detainees who should not be released, or the continued detention of individuals who should no longer be held. In this regard, let me say a few words about the PRB process.

I can attest from my own personal experience working on and in Guantanamo that during the Bush administration in many cases there was very little information available to evaluate whether and to what extent Guantanamo detainees had been engaged in criminal or hostile acts such that their detention could be justified. In many cases, information—if it did exist—was dispersed across agencies and departments, with no central repository to collect and properly analyze it. Often continued detention decisions were based on unreliable or inaccurate reporting.

In 2009, the Obama administration established an interagency taskforce to collect all available information on Guantanamo detainees. This taskforce, made up of representatives of the Office of the Director of National Intelligence, the Joint Chiefs of Staff, and Departments of Justice, Defense, State, and Homeland Security, evaluated each detainee individually, determining which should be cleared for transfer, which should be prosecuted, and which the United States should continue to hold.

Those detainees whom the taskforce decided should continue to be held are now eligible for Periodic Review Board, or PRB, reviews, which are conducted by senior officials from the same agencies that comprised the task force. The PRB process was codified into federal law on a bipartisan basis.²⁴ It conducts periodic hearings to determine whether the detainees “represent a continued significant threat to the United States such that their continued detention is warranted” or whether any potential risks associated with their transfer can be mitigated so they can be cleared for transfer.²⁵ The PRB evaluates all government information relevant to

²² <http://www.politico.com/story/2016/02/colin-powell-guantanamo-bay-219739>

²³ <http://webtv.un.org/meetings-events/human-rights-council/watch/usa-review-22nd-session-of-universal-periodic-review/4229106422001>

²⁴ See National Defense Authorization Act for the 2012 Fiscal Year, Section 1023.

²⁵ <http://www.prs.mil/AboutthePRB.aspx>

each detainee, along with diplomatic considerations, security assurances, the detainee's mental and physical health, and any other mitigating circumstances.

As a result of this stringent evaluation processes, the rate of former detainees engaging in terrorist or insurgent activities after their release is reported to have dropped considerably. Of the 118 former detainees that the Office of the Director of National Intelligence has reported are confirmed of engaging in terrorist or insurgent acts, 94 percent were transferred under the prior administration. Of those suspected of engaging in terrorist or insurgent acts (a designation that is based on "unverified or single-source reporting"), 86 percent were transferred by the prior administration.²⁶ The confirmed recidivism rate for former detainees transferred under the current administration remains at less than 5 percent.²⁷

I cannot speak to the question of whether it is wise or appropriate to transfer any one of the particular remaining detainees being held at Guantanamo. I am, however, reasonably confident that the interagency process is vetting any proposed transfer thoroughly, which may help explain the lengthy delay in many cases in the time between initial Guantanamo task force or PRB clearance for transfer and the actual transfer.

Of course, it is important to emphasize that there is no such thing as a zero-risk option in discussing Guantanamo, or any other national security issue, and that it would be imprudent, unwise, and unlawful to simply hold all detainees indefinitely without charge or trial based on suspicion that they may in the future engage in potentially dangerous acts. For these reasons, it is my sense that the PRB process appears to be responsibly assessing the potential recidivism risks associated with detainee transfers and that its transfer recommendations merit support.

IV.

In concluding, I thank the committee again for receiving my testimony today on the importance of moving as rapidly as possible to close the detention facilities at Guantanamo Bay. I look forward to answering any questions you may have.

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²⁶https://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Summary_of_the_Reengagement_of_Detainees_Formerly_Held_at_GTMO_Ma%204_2016.pdf

²⁷ Id.