Delegation of the United States of America
to the Parliamentary Assembly of the
Organization for Security and Cooperation in Europe

September 11, 2003

The Honorable Bruce George
President
OSCE Parliamentary Assembly
International Secretariat of the PA
Radhusstraede 1
1466, Copenhagen K
Denmark

Dear President George:

We write as follow up to the discussion surrounding the "Supplementary Item on the Prisoners Detained by the US at the Guantanamo Base" that was introduced and debated at the Rotterdam Annual Session in early July. While there may be disagreement regarding specific aspects of the detentions at Guantanamo Bay, we appreciate the genuine goodwill that compelled many of our colleagues to engage members of the U.S. delegation on this matter.

It is imperative that human rights concerns – even those related to sensitive matters of national security – are discussed fully and openly. We value the OSCE and the OSCE Parliamentary Assembly as fora where these and other human rights concerns can be debated with the aim of encouraging full implementation of OSCE commitments by the participating States.

The terrorist attacks of September 11 revealed the unprecedented questions, challenges and risks that the international community now faces. The U.S. Government has and will continue to devote considerable resources to investigate and prosecute terrorists, in an effort to prevent future terrorist attacks at home and abroad. As it does so, a diverse community of individuals – including U.S. and foreign legal experts, academics, non-governmental human rights groups, and other members of civil society – has produced an extraordinary body of materials that analyze, critique, and debate the legal and policy options and practices related to this effort.

We have no doubt that this healthy scrutiny of actions by the U.S. Government strengthens our democracy. As Members of Congress, we support the vigorous prosecution of the war on terrorism. At the same time, we believe that fundamental human rights can and must be safeguarded.

In that spirit – and having now led a congressional delegation to visit the detention facilities at the U.S. Naval Base in Guantanamo Bay, Cuba, in keeping with the commitment we made in

Rotterdam – we wish to share with you information we have gathered since the Annual Session. We would appreciate it if you could ensure that, through the Secretariat, this letter and attachment are distributed to all other national delegations to the Assembly which attended the Rotterdam meeting.

Sincerely,

BENJAMIN L. CARDIN, M.C.
U.S. Delegation to OSCE PA
Chairman of the Second Committee, OSCE PA

CHRISTOPHER H. SMITH, M.C.
Chairman, U.S. Delegation to OSCE PA

Enclosure

MEMORANDUM
Regarding the Detainees at Guantanamo Bay, Cuba September 11, 2003

General Information

From the outset of hostilities, the United States invited the engagement of the International Committee of the Red Cross (ICRC). The ICRC has maintained a presence at the detention facilities at the U.S. Naval Base at Guantanamo Bay, Cuba, for extended periods since their establishment. As a result of the military campaign in Afghanistan and the ongoing war on terrorism, more than 8,000 persons were temporarily detained and, pursuant to a standardized procedure, screened to determine if they were enemy combatants who posed a continuing threat to U.S. security. More than 90 percent of those individuals were released following this screening in the field by U.S. and coalition forces. In approximately 725 cases, the screening process resulted in the transfer of the detainee to the Joint Task Force, based at Guantanamo. (The exact number of detainees at Guantanamo is fluid, largely reflecting the process of screening and releasing detainees.)

Each country with nationals detained at Guantanamo has been informed of their detention and invited to send government officials to meet with their respective detainees for law enforcement or intelligence purposes. Parliamentarians with questions about nationals from their own country are urged to be in touch with their respective governments on this matter.

U.S. officials have stated that the purpose of this detention is twofold. First, the detainees present a continuing security threat and may be detained until the end of hostilities. Second, the United States is engaged in an ongoing intelligence-gathering mission. Detainees at Guantanamo are questioned by law enforcement and intelligence officials from a variety of U.S. Government departments and agencies.

Detained Juveniles

There are three juvenile detainees at Guantanamo. Each of these child soldiers had been forced into fighting and captured during hostilities. During their detention at Guantanamo, they have been housed separately from adult detainees in a secure facility. The United States is working with various organizations to ensure that they are provided with education and counseling during their detention.

Legal Status of Detainees

The U.S. Government has determined that none of the detainees at Guantanamo qualifies as a prisoner of war (POW) since they do not meet the criteria (i.e., being commanded by a person responsible for his or her subordinates, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and conducting operations in accordance with the law and customs of war) set forth in Article 4 of the Third Geneva Convention Relative to the Treatment of Prisoners of War. Article 5 of the Third Convention only requires a hearing before a competent tribunal to determine an individual's status when there is doubt as to whether he or she meets the criteria set forth in Article 4.

Those who take part in hostilities but fail to meet the criteria established for POWs are "unprivileged combatants" (also known as "unlawful combatants"). Under the laws of war, neither lawful combatants (POWs) nor unprivileged combatants have a right to counsel for the purpose of challenging their detention during armed hostilities. Unprivileged combatants may be prosecuted by the detaining power for their participation in hostilities. Those who are charged with crimes will have the right to counsel once formal charges have been made. Like POWs, unprivileged combatants may be interrogated for intelligence purposes, provided there is no physical or mental torture or other form of coercion.

An ongoing process is in place to reach a final determination regarding all detainees at Guantanamo, with a view toward their prosecution by the United States; their return to their own country for prosecution or detention; or their release in cases where it is determined they no longer pose a threat. Thus far, approximately 725 individuals have been detained at Guantanamo; of those, 64 have been released.

The president has made a determination that six persons currently detained by the United States fall within the jurisdiction of the U.S. Military Commission which will be established to try violations of the laws of war. One of the principal objectives of the president's decision to proceed through Military Commissions, rather than civilian courts, was a desire to avoid compromising the ongoing intelligence gathering mission and to facilitate the capture of other terrorists. The president's determination regards jurisdiction only. No charges have yet been filed against the six or any other enemy combatant.

The U.S. Military Commission will have many of the safeguards of civilian trials: e.g., a right to remain silent without adverse inference; a presumption of innocence; guilt must be proved beyond a reasonable doubt. Any defendant will be assigned a military defense counsel. Defendants may also obtain, at no expense to the U.S. Government, appropriately qualified civilian counsel of their own choosing to represent them in addition to their detailed military defense counsel, who is provided at the expense of the U.S. Government.

Additional information about the Military Commission may be found at: www.defenselink.mil.

Conditions of Detention

Notwithstanding their status as unprivileged combatants, the U.S. Government has reiterated that it has and will continue to treat the detainees humanely.

Since the first detainees arrived in Guantanamo in January 2002, the detention facilities have undergone significant structural changes. In particular, new, ventilated detention units have replaced the temporary facilities initially available; a hospital has been specifically built for the care of

of detainees; and a medium security facility was built to house cooperative detainees and those who may be released.

All detainees are given three meals a day, prepared according to Muslim dietary laws. Detainees have, on average, put on approximately 15 pounds since arriving at Guantanamo. Detainees receive extensive medical treatment, including complicated surgeries as needed. Detainees may send and receive mail, subject to security screening.

The ICRC has had regular private access to detainees since their arrival in Guantanamo as well as prior to transfer from Afghanistan.

Detainees have the opportunity to worship, including the ability to wear prayer caps during prayer. The call to prayer is broadcast five times a day and each cell is marked with an arrow indicating the direction of Mecca. Detainees may keep copies of the Koran and prayer beads in their cells. There is a U.S. military Muslim Chaplain on base who has regular contact with the detainees.

Although the detainees receive benefits similar to those that POWs receive in keeping with the Third Geneva Convention, the detainees do not receive some privileges such as access to a canteen to buy food, soap, and tobacco; a monthly advance of pay; the ability to have personal financial accounts; and the ability to receive scientific equipment, musical instruments, or sports outfits.

Finally, in the June 25, 2003, response to a letter dated June 2, 2003, from Senator Patrick Leahy, Department of Defense Legal Advisor William J. Haynes II stated,

> we can assure you that it is the policy of the United States to comply with all of its legal obligations prohibiting torture. Its obligations include conducting interrogations in a manner that is consistent with the Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") as ratified by the United States in 1994. And it includes compliance with the Federal anti-torture statute, 18 U.S.C. secs. 2340-2340A, which Congress enacted to fulfill its obligations under the CAT. The United States does not permit, tolerate or condone any such torture by its employees under any circumstances.

On June 26, 2003 (the U.N. International Day in Support of Victims of Torture), President Bush reiterated the U.S. commitment against torture and the infliction of severe physical or mental pain or suffering on those within its custody or control.