GUANTANAMO DETAINEES AFTER BOUMEDIENE: NOW WHAT?

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SECOND SESSION

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July 15, 2008

COMMISSION ON SECURITY AND COOPERATION IN EUROPE

WASHINGTON, DC

The hearing was held at 2:40 p.m. in room B–318 of the Rayburn House Office Building, Washington, DC, Hon. Alcee L. Hastings, Chairman, Commission on Security and Cooperation in Europe, presiding.

Commissioners present: Hon. Alcee L. Hastings, Chairman, Commission on Security and Cooperation in Europe; Hon. Christopher H. Smith, Ranking Member, Commission on Security and Cooperation in Europe; Hon. Hilda L. Solis, Commissioner, Commission on Security and Cooperation in Europe; and Hon. G.K. Butterfield, Commissioner, Commission on Security and Cooperation in Europe.

Witnesses present: Gabor Rona, International Legal Director, Human Rights First; Matthew C. Waxman, Columbia Law School; and Jeremy Shapiro, Fellow and Research Director, Center on the United States and Europe, The Brookings Institution.

HON. ALCEE L. HASTINGS, CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. HASTINGS. If I could gavel our hearing to order and thank all of you for being here.

In January in 2005, 3½ years ago, Brigadier General Jay Hood, at that time the U.S. Commander in charge of the detention facility at Guantanamo Bay, gave an interview to the Wall Street Journal in which he acknowledged, and I quote, "Sometimes we just didn't get the right folks," unquote. Sometimes we just didn't get the right folks.

The Wall Street Journal article continued, "In theory, once a detainee is thought no longer to present a threat to the U.S. or possess any valuable intelligence, he should be sent home. In practice, the system is stuck. Releasing a prisoner requires the approval of the Defense Department headquarters as well as the State Department, Central Intelligence Agency, and the FBI."

General Hood further observed, "Nobody wants to be the one who signs the release statement. There's no muscle in the system."

And I'm referencing the Wall Street Journal article of January 26, '05.

Unfortunately, 3½ years after General Hood made those comments, and 6 years after the Guantanamo camp was opened, there

seems to be little progress made in addressing the fundamental problems that plague that detention facility.

In fact, the shortcomings of the Guantanamo system are perhaps best illustrated by the fate of the extremes among those detained there.

Last month, the United States Court of Appeals for the District of Columbia ordered that 1 of 17 Chinese Uighurs be released or given a new military hearing.

The United States had previously cleared this man, Huzaifa Parhat, of the charge of being an enemy combatant, but nonetheless has kept him in prison at Gitmo. He is not an enemy of the United States but our country keeps him in prison.

At the other end of the spectrum, there's not been a single completed trial of those suspected of the most serious crimes committed against our country, including Khalid Sheikh Mohammed, who is believed to be responsible for helping to plan the 9/11 attacks.

The case against alleged 20th hijacker, Mohammed al Qahtani, has been dismissed without prejudice for reasons that were not announced. In his case, it is speculated that there is insufficient evidence against him that is not completely tainted by the means used to extract it, or that the methods of interrogation used against him have rendered him incapable of participating in his trial.

The fact that Gitmo is still open is a testament to the genuine challenges we face in relocating its residents. And we discussed those challenges at the hearing the Commission held last year. But it also speaks to a lack of political leadership in fixing the problems there.

Today, in light of last month's Supreme Court's decision in the *Boumediene* case, upholding the right of Guantanamo detainees to habeas corpus, I believe it is timely and appropriate to revisit the policy questions related to our detention policy.

For that purpose we've invited Matthew Waxman and Gabor Rona to join us and share their considerable insights.

Mr. Rona, who testified at our Guantanamo hearing last year, has just returned from visiting on Guantanamo.

In addition, we're joined by Jeremy Shapiro, who is going to discuss the question of what Europe is doing with its terror suspects. The United States is not the first country to struggle with terrorism. And perhaps there's something we can learn from European experiences.

Clearly, no European country has thrown the prohibition against torture out the window or tried to defend waterboarding as a professional interrogation technique.

But at the same time, if we look carefully at the civilian criminal procedures used in Europe, they seem to present their own set of challenges. At a minimum, we can say that many European countries are struggling with some of the same issues we are. And I look forward to hearing more from Mr. Shapiro.

The biographies of all our witnesses, ladies and gentlemen, have been printed out and made available to everyone attending this hearing. And I look forward to all of their remarks.

Finally, I'd like to know—we did invite witnesses from the administration to join us here today. We asked people from the Department of Defense and the Department of State and the Depart-

ment of Justice. Unfortunately, they are apparently unprepared or unwilling to discuss this issue at this time. And in light of the vital implications of this subject for our country, I sorely regret the absence of administration witnesses.

I do however warmly welcome, if he does attend, our fellow commissioner from the Department of State, David Kramer, who may be along, as well as Senator Cardin, who is finishing up a hearing on the Senate side.

With that in mind, I guess it doesn't matter—maybe we'll start with Mr. Rona.

I don't know whether you gentlemen have worked it out.

We'll go to Mr. Rona, Mr. Waxman and then Mr. Shapiro.

Gentlemen?

GABOR RONA, INTERNATIONAL LEGAL DIRECTOR, HUMAN RIGHTS FIRST

Mr. RONA. Thank you, Chairman Hastings. Thank you very much for inviting me to share the views of Human Rights First on these important issues.

My name is Gabor Rona. I am the International Legal Director of Human Rights First.

I came before you a year ago to discuss international law applicable to detainees at Guantanamo and others detained in the so-called War on Terror.

Chairman Hastings, you were especially gracious in your comments about my written testimony and I thank you for that.

You have asked me to come back to express views on the future of Guantanamo detainees following the Supreme Court's Boumediene decision. And as you encapsulated, Boumediene of course recognizes the right of detainees to habeas corpus.

This decision vindicates a bedrock provision of the U.S. Constitution.

But I want to emphasize that it also comports with majority views among the international, legal and policy community that human rights law and domestic law operate in concert with the laws of war in the times of armed conflict.

Still, popular but false notions persist and I want to address three of those.

First is that the existing laws of war and criminal law are not adequate because they didn't anticipate today's conflicts.

Second, that there is a conflict and a requirement under existing law to choose between war and crime paradigms.

And third, that therefore a new legal architecture needs to be developed to bridge the difference.

As to the first point that existing laws of war and criminal law are inadequate because they didn't anticipate today's conflicts, I would only say that just because Henry Ford was not foreseen by the inventor of the wheel does not mean that wheels are inappropriate to facilitate the locomotion of automobiles.

The proper question is not whether the traditional criminal law and the law of war were built to deal with modern forms of transnational terrorism, but rather are they legally applicable to it and are they practically applicable to it.

Second, the either/or, neither/nor approach that pits two distinct camps against each other—"It's a war. No, it's a crime"—is also misguided. In fact, criminal law applies in war time. And the laws of war that apply to detention and trials of terrorism suspects are not so different from applicable domestic criminal law and international human rights law.

Nonetheless, this false "tastes-great-less-filling" argument does have staying power. And one reason is that the administration has falsely insisted that domestic criminal law and human rights law should not or do not apply in this, quote, "war." And only the laws of war apply as a "lex specialis."

The lex specialis concept does not, however, mean that one body of law applies to the exclusion of others.

In armed conflicts, for example, it merely means that individual law-of-armed-conflict rules trump conflicting and otherwise applicable individual law-of-peacetime rules.

Critics of the administration naturally gravitated to the opposite view, equally incorrect, that only criminal law and human rights law should apply, not the laws of war.

There is a way out of this endless and fruitless exercise in contradiction. And I believe it lies in two steps.

First, recognizing the difference between how three complimentary legal regimes, domestic law, international human rights law and the laws of war, operate in tandem in three different situations, in wars between states, in wars that are not between states and in peacetime.

Second, once that task is accomplished it is of course also important to exercise good faith judgment in deciding in which three of those contexts an individual is being held or tried.

This does not mean that detention under laws of war can have no place beyond the battlefield. Far from it. It does, however, mean that lines must be drawn between detentions that are truly in the context of war and those that are not.

My third major point is that there is no need for a new legal architecture. The existing one that recognizes the complimentarity of domestic criminal law and the international laws of war and human rights works well if we let it. That is the law.

Mr. HASTINGS. Mr. Rona, just hold up just a minute so we can get added chairs.

David, help him.

Young, Mr. Jeffers, help him with those chairs if you don't mind.

I apologize for interrupting you but better to do that than have the rumble going on in the back and you not know what's happening.

And ladies and gentlemen, those of you that are standing, you're welcome to take seats if you so desire.

All right. That should just about cover it, I would think.

Thank you very much.

And I apologize, and if you would go back maybe to the beginning of your last sentence.

Mr. RONA. Thank you, Mr. Chairman.

And that was concerning my third major point that there's no need for a new legal architecture because the existing one recognizes the complimentarity of domestic criminal law and the inter-

national law of war and human rights law. And it works well if we let it. That is the law.

This factor has been skewered by the administration's pick-and-choose approach to the laws of war and its wrongheaded assertions about lex specialis.

I want to make clear what I advocate here is not a mere slavish implementation of preexisting rules.

Within that existing legal architecture, there is more than sufficient flexibility to adopt new rules for current exigencies.

In fact, Congress has been a player, providing new tools in the realms of surveillance, terrorism financing and criminal responsibility for support of terrorism both at home and abroad.

Some argue that the criminal courts are ill-equipped to prosecute terrorism cases. Calls for administrative detention legislation and a national security court are built on this premise.

Human Rights First recently released a report authored by former federal prosecutors detailing the experience of the criminal justice system in dealing with well over 100 terrorism cases, some before, but most after 9/11.

That study, "In Pursuit of Justice," is grounded on real experience with real cases, not on speculation.

And it found that the Federal courts, while not perfect, have proven themselves to be capable of bearing the load.

It found, most significantly, that tools such as the Classified Information Procedures Act operate properly to ensure the protection of sensitive information and that there is sufficient substantive law to cover preparatory acts and conduct occurring abroad.

It also found that criticism about soldiers being required to issue Miranda warnings and to conduct criminal investigations while under fire is simply misplaced.

U.S. Judge Leonie Brinkema, who presided over the Moussaoui trial, noted that that trial featured a variety of challenges, including a defendant serving as his own lawyer and a block of classified evidence. She noted that individually those circumstances were not unusual, but they are uniquely concentrated in the Moussaoui case.

She said, "I've reached the conclusion that the system does work and that the notion of a national security court should," quote, "send shivers down the spine of everyone."

Because the system works, it enjoys public confidence and is capable of delivering true justice and accountability.

Now this is not to say that Federal prosecution is the silver bullet. Other strategies, such as intelligence gathering, interruption of terrorism financing, diplomacy and even the use of armed force have their place.

But when the question is, according to what legal architecture should we detain and try terrorist suspects, the answer is in plain sight, not in a hidden, secret place on the distant tip of a Caribbean Island.

And having just returned from observing military commissions in Guantanamo last week, I say this with great conviction.

H.L. Mencken is reputed to have said that to every complicated problem there is a solution that is clear, simple and wrong. The choice between crime and war is a debate inviting just such a solution. But the complex world in which we lived has fortunately, over

considerable time, given us a suitable architecture of overlapping legal frameworks. If understood and respected, it will provide the tools necessary to meet the challenge of international terrorism without the harm to both security and civil liberties that would certainly result should we abandon it.

Thank you.

Mr. HASTINGS. Thank you very much.

Mr. Waxman?

MATTHEW C. WAXMAN, ASSOCIATE PROFESSOR, COLUMBIA LAW SCHOOL

Mr. WAXMAN. Thank you, Mr. Chairman, for inviting me to testify today.

And I'd also ask that my complete written statement be entered into the record.

Mr. HASTINGS. Without objection.

Mr. WAXMAN. My name is Matthew Waxman and I'm currently Associate Professor of Law at Columbia Law School where I teach national security law and international law.

I should also mention that from 2004 through 2005, I served as Deputy Assistant Secretary of Defense for Detainee Affairs, a position created after the Abu Ghraib crisis to advise on and help manage the improvements of U.S. military detention operations, including to those related to the fight against al Qaida.

On September 11, 2001, the United States suddenly confronted a grave threat for which it was poorly prepared. Alongside the need to develop a long-term strategy, the United States had to take urgent and immediate actions under conditions of great uncertainty. And neither traditional criminal law, nor the law of war provided clear solutions.

With the past seven years of experience however, we need to reconsider the basic legal and policy decisions taken immediately after 9/11.

Previous reform efforts focused predominately on interrogation standards. Although that issue has not yet been satisfactorily resolved, the next reform effort should also focus on the future of Guantanamo and the appropriate role of courts in reviewing detention decisions.

In that regard, let me emphasize three points today.

First, Guantanamo is a symptom of a much larger problem. And we should not consider it in isolation from other U.S. Government detention operations.

Second, closing Guantanamo will be hard; there is no easy fix.

And third, despite these challenges, Guantanamo should be closed because doing so, if handled right, will improve, not detract from, our ability to combat terrorism.

My first point is that Guantanamo is just one part of a much larger problem, that for the foreseeable future, the United States and its allies will continue to capture suspected terrorists and al Qaida affiliates and we need a durable framework for handling them.

This framework must permit the long-term detention of the most dangerous individuals while facilitating intelligence collection, including through lawful interrogation, but with rules and proce-

dures that are politically, legally, ethically, and diplomatically sustainable.

We need to solve the Guantanamo problem. But to consider Guantanamo in isolation from other U.S. Government detention operations, including those in Afghanistan and elsewhere, will leave significant legal and policy issues unresolved and could produce unintended consequences.

The Supreme Court's decision in *Boumediene* v. *Bush,* for example, which held that constitutional habeas corpus rights apply to detainees at Guantanamo, leaves uncertain whether some of the same constitutional rights apply to otherwise similarly situated detainees held near combat zones or in other sites.

To focus too narrowly on the few hundred detainees currently remaining at Guantanamo fails to address what is really a global problem and can, for instance, inadvertently create incentives to keep detainees in less transparent conditions in less secure locations.

My second point is that closing Guantanamo will be difficult. There is no easy alternative without significant risks and costs.

One reason it will be hard is because Guantanamo serves some critically important functions. It would be a mistake to exaggerate Guantanamo's continued intelligence value or to deny that some individuals detained there should never have been or should have been released long ago.

But it would also be mistake to deny Guantanamo's important role in incapacitating would-be terrorist plotters and agents and in providing a better picture of al Qaida's structure and operations.

If we close Guantanamo, we will need alternative detention and intelligence capabilities.

Another reason that closing Guantanamo will be hard is because there is no simple and ready alternative.

Sending detainees back to their home countries has proven difficult. While the U.S. Government continues to make progress in transferring or releasing detainees through its administrative review board process, many home countries either will not take them, will likely mistreat them, or will likely take inadequate steps to mitigate their continuing threat.

Simply detaining individuals inside the United States instead of at Guantanamo requires working through difficult issues of where to hold them and pursuant to what rules, and answering tough questions, such as what to do with detainees who are ordered released.

And prosecuting them for crimes in U.S. courts is no easy answer either. Criminal prosecutions should be carried out whenever possible. But evidence against a particular suspect sometimes cannot be used to prosecute without compromising intelligence sources and methods, or the important evidence may not be admissible or sufficient under U.S. criminal laws.

The most promising alternative to Guantanamo will not entail a one-size-fits-all solution. Instead, I believe it will require a combination of prosecuting some of them in civilian or military courts, transferring or releasing others to home countries or third countries, and perhaps detaining or even releasing some of them inside the United States.

One of the most significant debates likely to arise as part of any effort to close Guantanamo is whether the United States should create a new national security court to administer detention outside the normal criminal justice system. Without weighing in for or against such proposals, I do want to emphasize that any such long-term detention system outside combat zones, must include, at a bare minimum, robust judicial review and a meaningful opportunity for detainees to contest the legal and factual basis for detention with assistance of counsel. Not only are these minimum features required under Boumediene, but without them, any detention system will fail the fundamental test of legitimacy.

My third point is that despite the many challenges I've just outlined, Guantanamo should be closed.

If handled right, doing so will improve, not detract from our ability to combat terrorism. While some may frame the issue as a stark choice between preserving principles of liberty and preserving our security, I believe closing Guantanamo is an opportunity to achieve both.

Successfully combating terrorism over the long term requires building and sustaining webs of cooperative international relationships and promoting principles and institutions of governance inhospitable to violent extremism.

Continued controversy over Guantanamo has inhibited agreement with our coalition partners on how to confront terrorist networks at the strategic level and has impeded cooperation at the operational and tactical levels. Negative perceptions abroad about Guantanamo also undermine our ability to promote principles of justice, rule of law and good governance, which are tied to our success in combating violent extremism.

The Supreme Court's recent decision in *Boumediene* v. *Bush* does not change the bottom-line conclusion that Guantanamo should be closed. The habeas litigation that will now follow *Boumediene* erodes the argument that closing Guantanamo would result in judicial interference with detentions there. But at the same time, that ruling is unlikely to wipe away the indelible perception abroad that Guantanamo exists to keep detainees beyond oversight and the full reach of legal protections due the detainees there.

So with those three points in mind, let me conclude with one final thought.

All of the alternatives to Guantanamo carry risks, including the possibility that some dangerous individuals may be released. But this risk should not determine unilaterally our policy. Detention policy is not about eliminating risk, but about balancing and managing competing risks, including risks to our values and legal systems. We must assess realistically, not with alarmism or for political advantage the marginal risks entailed and the counter-risks our own policies to date have created.

The legal and policy challenges I've outlined are difficult but they are surmountable in ways that will simultaneously strengthen both our security and our adherence to core democratic principles.

I thank you for the opportunity to testify and I look forward to our discussion.

Mr. HASTINGS. Thank you, Mr. Waxman.

Mr. Shapiro?

JEREMY SHAPIRO, FELLOW AND RESEARCH DIRECTOR, CENTER ON THE UNITED STATES AND EUROPE, THE BROOKINGS INSTITUTION

Mr. SHAPIRO. Thank you, and thank you for having me.

My name is Jeremy Shapiro. I'm the Research Director at the Center on the United States and Europe at the Brookings Institution. And I'm going to speak to the experience of detaining terrorism suspects in—I'm going to limit myself I think to France and the United Kingdom because Europe is rather large.

And I want to make two general points first about detention of terrorism suspects in Europe.

The first I think is that these issues of detention that we're dealing with are not particular U.S. problems. Terrorism, by its nature, really always challenges legal regimes. And these issues have not been easy anywhere. France, Britain and all the other democratic countries that I've looked at that have faced terrorist threats have struggled with precisely these issues.

Most of them have made very serious errors in creating a policy around detention. They've embarked on policies that they have later repudiated. And they have had a long painful process of reform, some of which are not over.

The second general point is that while of course it's very difficult to transfer lessons while the threat situation of every country and the domestic political context of every country is different, I think one lesson still emerges quite strongly from all of the European cases. And that is that counterterrorism measures, including detention measures, need to be rooted in the legal traditions of the country that is employing them, needs to be rooted in the societal notions of fairness, and needs to have broad support across the political spectrum.

If the detention policies don't, and they often have not, they will not only oppress individual citizens, but they will fail in the long term in their very purpose to prevent terrorism as they will be unsustainable. And they will often, in falling apart, leave the country unprotected.

And so in this regard, for both of these lessons, I think it's instructive to look at Britain and France, which are two very close allies with very different systems and experiences.

First, France. France has a long and very painful history with terrorism. They have a firm criminal justice approach. They tried extrajudicial mechanisms in the 1960s. These proved divisive and ineffective. And they were thrown out when the socialist governments came into office in 1981.

Still, the criminal justice approach that they take recognizes the special nature of the terrorism crime and creates specialized and flexible procedures in the law and in the courts for dealing with terrorism cases.

It is a firmly and explicitly preemptive system. And there have been no successful terrorist attacks of any consequence since 1996 in France despite many attempts and much denunciation of France by al Qaida and other Islamist terrorist groups. So it appears to be a fairly successful system.

Central to this system are what's called investigating magistrates. These are sort of a cross between prosecutors and judges

who are, in theory, impartial investigators with broad powers for subpoena, wiretap, detention that only a judge would have in an Anglo-Saxon legal system.

Detention is a very important part of this system. There are essentially two types of detention—pre-charge and pre-trial.

The law allows for a pre-charge detention in terrorism cases of from 4 to 6 days and in pre-trial detention in terrorism cases for up to 4 years.

The question of detention is largely determined by the investigating magistrate. But due to some abuses they had in the late 1990s, the pre-trial detention is now overseen by a special liberty-and-detention judge, who authorizes pre-trial detention and holds a hearing to renew it every 4 to 6 months.

Still, it is the investigating magistrate who largely determines the pace of the trial.

There are in the system many—there have been many individual accusations of torture and of out-sourcing of torture, not totally unfamiliar to us. And in response, they have recently created an inspector general of Places of Deprivation of Liberty—they need to work on the name—to oversee detention locations, although this is not yet operational.

There is however no—there have been no accusations of systematic abuse. They have never tried to enshrine the use of torture or harsh interrogation techniques. But there's a lot of evidence that they have used them.

French counterterrorism officials view both types of detention as important and useful to their counterterrorism system.

They've used pre-charge detention particularly for gathering intelligence, sometimes in mass sweeps as, for example, before the 1998 World Cup.

They use pre-trial detention to gather the case, sometimes to replace intelligence information that can't be used in trial with other sources which can be used in trial.

French counterterrorism officials are broadly satisfied with their detention regime, although they sometimes find the pre-charge detention period too short.

However, the detention system has been roundly criticized by human rights groups.

Just this month, a Human Rights Watch report on the role of investigating magistrates labeled them as far too powerful and abusive of some basic human rights.

And certainly, from the American perspective, the role of the investigating magistrates does seem very repressive.

What's interesting however is that the system is not very controversial within France, even within the communities that you would expect to be most affected, the Muslim community and the Corsican community. It's not much of a political issue there, which implies that it does have some broad acceptance and that it is rooted in French legal traditions.

Moving on to Britain. Detention is a much more controversial issue in Britain. It's a big political issue right now.

Britain also has a very difficult history with terrorism and detention. They implemented a system of internment in Northern Ireland in the 1970s, which was seen as a huge failure that made the

problem of terrorism in Northern Ireland much worse. And they clearly, to this day, have not found a system that meets the needs of counterterrorism and satisfies British legal traditions and international obligations.

I would say their biggest problem is they have no system for plea bargaining, very little capacity for post-charge questioning. And it's very hard and very risky to put intelligence information into trials.

These things mean that the authorities need to gather intelligence in pre-charge detention periods, which means that they need increased—as terrorism gets more complex, they need increasingly long periods for pre-charge detention. In fact, they currently have a longer period that anywhere else in the developed world. And they are looking to extend it.

The evolution of these pre-charge detention periods began in 2000 where they instituted a seven-day period. It had been 48 hours prior to that. And then a 14-day maximum was secured in 2003. After the 7/7/2005 attack, the government attempted to extend the pre-charge detention to 90 days. Keep in mind this is 48 hours in the United States. But that was rejected after contentious debate in Parliament.

The current 28-day limit was established in 2006. And the current situation is very shaky. The government is trying to extend the period to 42 days with various safeguards, but this remains very controversial.

The security services insist they need this 42-day period, although the current 28-day limit has never been hit and only approached six times.

After 9/11, the United Kingdom also attempted to put in place a separate system for detaining foreign nationals suspected of terrorism and to detain them without charge in a manner similar to Guantanamo, though these were suspects not brought in from abroad, but arrested in the United Kingdom.

The indefinite detention-without-charge system that they put in place in their 2001 terrorism act was ruled inconsistent with their European human rights obligations in 2004 and replaced by so-called Control Orders, essentially house arrest and other restrictions, but which also can be applied to citizens. And this has also been very controversial and never been applied to more than 16 people at one time. So it's a fairly small system.

So I would say, in sum, Britain has the biggest problem in Europe in dealing with detention. It's less publicized, but they have probably a bigger legal problem than the United States does.

They lack the flexibility of the French system and they lack the procedural options of the U.S. system.

So with that, I will take questions. Thank you.

Mr. HASTINGS. I very much appreciate all of your testimonies. And you add clarity to a very complex situation and, at the very same time, don't bring much comfort to the subject that was chosen as the head of this hearing, and that is after the Supreme Court decision, what next.

And I'm not clear from either of your testimonies as to just where do we go from here.

So perhaps, Mr. Waxman, I'll ask you to elaborate a bit more on why you believe closing Guantanamo will improve our ability to combat terrorism.

Mr. WAXMAN. Sure, I'd be happy to. And let me say that there will be the need I think, no matter what, for some congressional legislation to tackle some of the detainee issues left open by the Supreme Court in *Boumediene.* It leaves a number of questions unanswered. And it's possible even to divide them into two categories.

One of them is that there may be a need for Congress to provide for what we may call some "rules of the road" for the wave of habeas litigation that we now expect from the detainees and their lawyers at Guantanamo, rules that would guide the Federal courts in handling the hundreds of detainee habeas cases, in such terms as which court will hear them, pursuant to what type of rules, and with what kind of appeal. Those are some immediate procedural issues.

Then I'd call a separate set of issues the "big picture framework" issues, looking even beyond perhaps Guantanamo to what kind of laws do we want to have in place to hold detainees in the future.

And it's on that second question that I would urge some caution. There is eventually going to be a need for congressional legislation I think to deal with those issues. But I would urge Congress to make sure that it gets those laws put into place correctly rather than quickly.

That said, I think closing Guantanamo is the critical part of the next phase of reform. And I've chosen in my remarks to emphasize the counterterrorism benefits of doing so.

In particular, I'm concerned that the continued controversy between the United States and even its closest allies in Western Europe, for example, over the continued operation of Guantanamo continues to risk pushing us apart when it comes to a long-term commitment to combating al Qaida.

I think it erodes the sense of trust that has developed between our law enforcement, intelligence and military services and those of our allies.

And I worry that the continued operation of Guantanamo, because of what I call an indelible perception that it exists to keep detainees beyond the full reach of legal protection, erodes the sense of American commitment to certain rule-of-law values.

I think those values are important in and of themselves, but they also play a valuable role in combating terrorism in the long run; that ultimately combating terrorism is about undermining the type of radical, violent extremism that feeds it. And I think promotion of certain values can play a role in undermining the spread of that extremism.

Mr. HASTINGS. You call for our allies to do more. And don't you think it's a pretty tough sell to get countries to take detainees that we ourselves won't take?

Mr. WAXMAN. I can tell you that it is a very hard sell because I've been part of the negotiating team trying to sell it.

It's very hard to sell and get other countries to take some Guantanamo detainees into their territory if we're not willing to do the same.

And we're talking about a particular subset here of tough cases at Guantanamo. Usually, these are detainees, like the Uighurs, who you mentioned, who have been cleared for release from Guantanamo either because they were found not to be an enemy combatant after all or because they were found through the Status Review Tribunal process to in fact be an enemy combatant but are not considered a very dangerous, continuing threat.

And nevertheless, there are some detainees who fall into that category, who cannot simply be sent to their home country because of concern that that home country will torture, execute or persecute those individuals.

In such cases, the U.S. Government has generally tried to find a third country that would be willing to resettle those detainees. And that has indeed proven very difficult.

One of the arguments we hear back from countries when we've approached them on this is why should we take detainees into our country if the United States is not willing to take any.

Mr. HASTINGS. Well, using the Uighurs, for example, the prohibition immigration-wise to having them released into the United States is that they trained as terrorists. But am I correct that they trained as terrorists against China and not terrorists against the United States?

Mr. WAXMAN. That's certainly an issue that's been disputed. I don't know. It's been a long time since I've looked at these particular cases. But I think that may be a fair interpretation for at least some of them.

I would imagine that it's complicated to propose taking into the United States an individual who trained in a terrorist training camp no matter who that training was intended to—was directed against, whether the United States or not. I imagine this would make the Department of Homeland Security at least anxious, to put it mildly.

That said, Guantanamo is a big problem and especially if there are individuals who are deemed to pose very low threat, I think bringing some detainees into the United States is one of the very tough decisions that I think we may need to swallow if necessary as part of a broader plan to shut down Guantanamo.

And what I tried to emphasize in my statement is that once we make a firm commitment to closing Guantanamo, I'd like to see us, as a government, leverage that commitment in order to secure cooperation and a sharing of the burden from some of our allies.

In order words, if we were able to go to our allies and say, "We are committed to shutting down Guantanamo and are even perhaps willing to take the following individuals into the United States, but in order for us to do so, we need the following assistance from you," I think that has at least a better chance of success than our current negotiating posture.

Mr. HASTINGS. And at the same time, some revision of some of our immigration laws.

Mr. WAXMAN. Correct.

Mr. HASTINGS. Which would be useful.

Mr. WAXMAN. Correct. And I don't want to suggest that this is a risk-free suggestion. What I'm saying here does carry some risks. But as I emphasized at the end of my remarks, every option on the

table carries risks, including the status quo, from which we continue to incur significant costs. So there is no risk-free option. It's a matter of weighing and managing competing risks.

Mr. HASTINGS. Right.

Before I go to any further questioning of the gentlemen, I'd like to bring up to speed my colleagues that have joined me. And that is we have just completed the testimony of all three witnesses and are in the question period.

But I would not want to preclude, in the order that they came, Commissioner-Congressman Butterfield and Commissioner-Congressman Smith, the Ranking Member, any comments they may wish. And then if you care to, spin on in to questions, I'm sure that these gentlemen—I heard their testimony. And I'll tell you, of the testimonies that we have had on the subject, it could not be more clear, at least in so far as presenting the problem, the solutions are up in the air.

And maybe you all will ask the magic question that will get us to the magic solution.

Mr. Butterfield?

HON. G.K. BUTTERFIELD, COMMISSIONER, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. BUTTERFIELD. Thank you very much, Mr. Chairman.

Let me start by apologizing to all of you for my tardiness. I've been over on the House floor. The President vetoed the Medicare bill that we sent over. And we are trying to override that legislation this afternoon. And so it was called up just a few minutes ago. And my committee has jurisdiction over that so please forgive me for being late.

But thank you very much, Mr. Chairman, for convening this very important hearing.

As most of you know, I've only been in the Congress now for about 4 years. For the 30 years before that, I was in a courtroom. For 15 of those years, on the judicial side of the courtroom as a judge, and the other 15 years, sitting at the table as a lawyer. And so I have a particular interest in this matter, to say the least.

When I first came to Congress, I went down with a delegation to Guantanamo and had an opportunity to look around for myself. I believe it was in 2005. And from all appearances, it appeared to be a very neat, clean, well-run facility. But after looking into it and studying the history of Guantanamo and looking at the President's Executive orders and what he had in mind for due process, I became very disappointed, to say the least.

What really confused me was the President's authority, even as Commander in Chief, to classify someone as an enemy combatant and say that he has the unilateral authority to detain that individual for the duration of the conflict.

What is the conflict? The conflict apparently is the War on Terror. And more likely than not, we're going to be engaged in the War on Terror for a long time.

And so if the Commander in Chief has the authority to detain someone without the application of Geneva or the application of Federal law for the duration conflict, is tantamount of the Commander in Chief imposing a life sentence upon these individuals.

And that greatly disturbed me, not only as a lawyer, but as an American.

But even more than that, the president also took the unfortunate position that those who are detained have no rights whatsoever, no rights that are afforded under Geneva, no rights that are afforded under habeas corpus, no rights whatsoever, that they don't have the opportunity to visit with family, to have the American Red Cross to come by and see how they're getting along. They have no right to counsel, no right to due process as we know it here in this country and in Europe. It's just so disappointing, to say the least.

And so when, Mr. Chairman, you were the chairman of the Parliamentary Assembly, we were out in Brussels, I suppose it was, a couple of years ago. And our European friends were just outraged that America would have this approach to those who are suspected of terrorism. And I know there was outrage in the European Union over this matter.

And there were numerous petitions that were being prepared to offer during the assembly. And the chairman allowed me the opportunity to address the assembly. And I assured our European friends that this would not fall on deaf ears.

Even with our Supreme Court, as conservative as it has become, I had every reason to believe that our Supreme Court would favorably address the issue. And it has.

It has not addressed and brought closure to all of our concerns. But at least it has extended the right of habeas to those who have been detained.

But there are unresolved issues under this Supreme Court decision.

I can't pronounce the name. I'm from the South and those of us from the South can't pronounce these fancy names. But you know what I'm talking about. There are still many unresolved matters that have to be addressed.

But we can be assertive here in the Congress. We can lead the way.

And that's what the chairman has on his mind. That's what he says privately and publicly.

The Congress must lead the way. And hopefully, we can have a relationship with the new administration, whoever that may be. And hopefully, we can put many of these issues to rest.

So thank you, Mr. Chairman, for your interest in this subject. You and I have traveled many times around the world and, everywhere we go, this is a conversation that our leaders in foreign countries are terribly concerned about. And we must put this to rest. If not, the American image is going to continue to suffer.

Thank you. I yield back.

Mr. HASTINGS. Mr. Smith?

HON. CHRISTOPHER H. SMITH, RANKING MEMBER, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. SMITH. Thank you very much, Mr. Chairman. Thank you for convening this hearing.

I have not had a chance to read all of your testimonies and I apologize for that. But I have read one so far since I've been here.

Let me just ask Mr. Waxman, if I could, you mentioned that there are—all of the alternatives to Guantanamo carry risks. And one of the things that we're all concerned about is not only risks of an attempt to try to release these people, like violent attacks—certainly, where there's a will, I'm sure there will be a way. And unfortunately, Guantanamo has become a lightening rod for international criticism, some of it very well justified.

I think all of us have been concerned about and have spoken out against those methods of interrogation that would be inhumane, tortorous, or in any way violations of the Geneva Conventions. So hopefully, we're getting to the point where that is not occurring there. But it's probably an open question from day to day whether or not any of this occurs.

You mentioned in your testimony there's no simple and ready alternative. And I'm wondering two things.

And you all might want to speak to this.

How many people have been released?

And I think we should prosecute. I think we need to—you know, rule of law should mean that. And indefinite periods of detention should not lead to months and years without a trial ensuring and a process that is completely above board getting to a conclusion.

But the idea of no simple or ready alternative, do any of you have any suggestions as to what might constitute a viable and truly just alternative?

And we hear numbers that people have been released and got back onto the battlefield. I've heard 30. I don't know if that's accurate. Maybe you can shed some light on it.

You don't want to have individuals back out in the field hurling bombs and the like at our troops or at civilians either.

So there's a dilemma there. I mean, this war is unlike perhaps any other war we've engaged in—the Global War on Terrorism. But I think rules, especially how you treat people once they're incarcerated, tell an awful lot about who we are.

And if the other side doesn't do it, which they know they don't, well, we find that. But we need to uphold I think the highest principles of the rule of law. And certainly, that's called for when you're interrogating.

But if you could maybe speak to that—simple and no ready alternatives. Are there alternatives?

Mr. WAXMAN. Thank you, sir. I would say that there—when I say that there's no simple and ready alternative, what I'm really getting at is that there's no easy solution out there that's going to take care of the whole problem on its own. There are other options that I go through.

And my main point was that rather than looking for a one-size-fits-all solution, such as send them all home to their home country, bring them all into the United States, prosecute them all, the solution to Guantanamo probably lies in a combination of all of those things. And it means some hard work of going through all of the cases and figuring out what's the most appropriate solution among those options—and those are among the main ones—a final option, a controversial one being new legislation that might create what is sometimes called administrative or preventative detention authority to hold somebody inside the United States.

But it's going to be a combination of some or all of those things that will be the ultimate solution to the detainees—to the Guantanamo problem.

Guantanamo should be closed. It can't be closed over night. This process will take some time.

But I do hope and do think that the U.S. Government can commit in the short term to doing so and doing so quickly. I hope that it would do so.

I'd be happy to talk, if you'd like, about the releases that have taken place so far.

Just in terms of some rough numbers, about 500 detainees have been either released or transferred from Guantanamo to date. So you had close to 800 at its peak. And I think there are around 270 now at Guantanamo.

I say transferred or released because generally, when I was at the Pentagon working on this, the distinction between the two was a "release" meant simply this person either poses no threat or should not have been detained as an enemy combatant. This person is free to go and it's just a matter of negotiating the return of the home country.

A "transfer" was meant to suggest that the individual was indeed identified as an enemy combatant, was believed to pose some continuing threat but we didn't feel that it should be the U.S. Government that held that person. And then it became a matter of negotiating with the home country or a third country a sufficient package of guarantees, both security guarantees and humane treatment guarantees, to ensure that that country would take appropriate responsibility for the individual.

It's difficult to figure out what level of threat the people at Guantanamo pose.

And I think, speaking frankly from my own experience, there have been errors both ways, meaning there have been individuals who were thought—highly suspected of involvement with al Qaida and terrorism—who were brought to Guantanamo, who should not have been. They were erroneously detained.

On the other hand, there were errors in the other direction, of individuals who were believed to pose no threat. They were believed to have been mistakenly detained, for whom now, in retrospect, intelligence indicates we were fooled. And some of those individuals have gone on to commit violence. Most recently, there was a former Guantanamo detainee who I believe was a suicide bomber in Iraq.

Your staff may be interested in requesting from the Defense Intelligence Agency, the DIA, a report dated May 12, 2008, which has data and information on detainees released from Guantanamo or suspected to have gone on to commit further terrorism-related violence.

Mr. SMITH. I appreciate that. I will follow up on that.

Mr. HASTINGS. Mr. Rona?

Mr. RONA. Yes, I would like to make a couple of observations about your question.

The number 30, in the concept of back to the battlefield, first of all, of course it assumes that all of those people were in the battlefield in the first place.

And the definition of enemy combatant encompasses a huge swath of activities, many of which have nothing to do with battlefield. Associating with terrorists, for example.

So when the United States decides that somebody is releasable and declares that they are no longer an enemy combatant, that doesn't mean that they made the correct decision in the first place that this person had engaged in hostilities against the United States.

And some of the individuals, who have no doubt been released and gone on to undertake hostilities, are individuals who, before they were detained, did not engage in hostilities against the United States. But it is completely conceivable and obvious that somebody might engage in hostilities against the United States after they have experienced Guantanamo. That is something that needs to stop.

Second, I believe that the universe of activities that have been deemed to be re-engaging in hostilities, in one case, even includes the act of an individual who wrote an op-ed piece in a newspaper in Great Britain against the United States' practices and policies. So that too has to be—the reason why we take this number 30 with a grain of salt.

I also just wanted to make the observation that—I agree entirely with Mr. Waxman that there's no easy solution. But that doesn't mean there isn't a solution.

Whether we've been in a courtroom or not, I think we're all aware of the idea that hard cases make bad law. And while Guantanamo is a hard case and it has to be solved with law, Guantanamo should not be the template for a universal solution to the question of what to do with suspected terrorists.

If we take the entire population that is at Guantanamo now and we bring them onto U.S. soil, into secure facilities—Leavenworth has been suggested—and charge them with federal crimes—there are crimes of conspiracy. There are crimes of material support for terrorism, which are very broad in their particular application. That statute now has extraterritorial application.

There are, in the Human Rights First report on the experience on the federal judiciary concerning international terrorism cases, both before and after 9/11, there have been identified a huge swath of potential criminal charges that can be used and have been used against suspected terrorists.

So I think it shouldn't be too difficult to come to the conclusion that the devil that we know, which is our criminal justice system and is not a devil at all, in fact has shown itself to be able to be quite capable of handling cases involving suspected international terrorism.

There has also, on the other hand, been speculation that if we close Guantanamo and bring these individuals into the criminal justice system, well, there may be problems with classified evidence, there may be problems with inadmissibility of certain evidence. This is speculation.

That speculation can be matched against what we, in our report, concluded and showed to be the experience of the federal criminal justice system in over 100 cases involving international terrorism.

Now there may indeed be cases that cannot be brought. And that brings us back to the point that Mr. Waxman was making that there is no perfect solution. But if we continue to look for the perfect, we will never be able to find a solution. And it will continue to be the enemy of the good. The good is the criminal federal justice system.

Mr. HASTINGS. Yes, Mr. Shapiro?

Mr. SHAPIRO. Yes, I think that I would like to emphasize some of those points.

I think this question of return to the battlefield, while it has happened, is exactly the wrong metric to use because, as Mr. Waxman said, there are no cost-free alternatives. And the question of whether a returned detainee may present a danger needs to be weighed against the danger that the existence of Guantanamo is doing every day in creating recruits for terrorism.

So it's not simply the case that you will release somebody into a static pool of terrorists. The problem of Guantanamo, the image that Guantanamo is creating is Europe and in the rest of the world is, I would argue, on a daily basis is adding to our terrorism problem. And that needs to be weighed against the possibility—a very real possibility, I would admit—that some people who are released might constitute a danger.

I think when you weigh those two things in the balance, the case will be quite clear, the danger of release of these few dozen individuals that we're talking about is much less than the damage and the extra recruits that terrorist groups are getting from the existence of Guantanamo.

Mr. WAXMAN. If I could just add, I think there's a lot of agreement among us on the panel and with some of the points that you began with, Mr. Smith.

You used the term lightening rod. And I think all of us have made a similar point up here which is that ultimately the fight against terrorism is not going to be won or lost based on whether a particular individual goes free or not, with a few exceptions. I mean, there are certain people, certain masterminds that it's critical that we get our hands on.

But over the long term, much more important than whether a particular individual is captured or goes free, is the question of whether we can set up, like I said in my statement, a framework for detaining and collecting intelligence that is legally, ethically, politically and diplomatically durable. And right now, we don't have that. We don't have that system.

I also agree with Mr. Rona, at least in large part with many of his points, on the value of prosecution. I would say that prosecution has certainly become a much more powerful tool since 9/11 due to some changes in our criminal law, greater experience in our court system with handling terrorism cases.

And I certainly commend a really excellent report by Human Rights First on this, which Mr. Rona referred to in his statement. It's an excellent report. It is limited to those cases that have been brought by federal prosecutors, meaning it doesn't necessarily address the questions of, well, what about cases that DOJ—that Federal prosecutors—did not believe they could successfully bring to trial.

And really, the question is not whether prosecution should or should not be used. I think we are in perfect agreement that, where possible, it should be used. It's a very powerful tool. And it's really the best solution because it has the most legitimacy of any of the options.

The real question is, is prosecution a sufficient tool? And I think I would say that is a very, very difficult question.

Mr. HASTINGS. From the standpoint of our image, to the degree that's important—and I suggest it is in light of the fact that we have suffered consequences of poor image by virtue of the existence of Guantanamo—then it would seem to me that if we were to be in a position to establish an appropriate architecture for trying individuals, we would stand a much better chance of having a better image if we were to at least have the trail of a person.

I do disagree, in part, Mr. Shapiro, with the notion that Guantanamo standing alone—I agree that it is a recruiting tool. But I think we ignore the real harshness of those who would do us and our allies harm in the sense that if we take, for example, Khalid Sheikh Mohammed, you could hold him anywhere and he has established his martyrdom in the minds of those that would be his followers. And therefore, whether he's at Guantanamo or in Leavenworth or wherever he was before they took him to Guantanamo, he as a recruiting tool, as an individual—and there are others that are there—is already established.

And so while I have been in the vanguard of those that argue that Guantanamo should be closed, I think for the purposes that it was opened, it should never have been opened in the first place.

But at the very same time, I think we ignore, to our peril, the fact that the persons that would do us harm, I don't think we have as much clarity about them as we are hopeful of establishing for ourselves and trying to make sure that our traditions and our culture and our judicial system speaks to this very difficult and delicate issue. And I think you all have done us proud in that regard.

I think, as I listen to you, although we don't have Russia on our agenda, I just would be interested, what do they do with persons that they perceive as terrorists. And we know, I think, a little bit of what they do.

And then the other thing that the world needs to do is to have some international conventions that treat this subject in an appropriate way. But you can't even get a good definition of terrorism.

My colleagues in Europe are always trying to get that definition established. And I'm not so sure that the French model or the British model or many of the others that I have seen come any closer to what is needed—and that's justice, swift and true—to answer what is a complex problem for us.

We've been joined by our colleague, Commissioner and Congresswoman Hilda Solis.

And Hilda, all of us have made comments. If you're desirous of doing so, then please feel free to do so.

Thanks, Chris.

HON. HILDA L. SOLIS, COMMISSIONER, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Ms. SOLIS. Yes, thank you, Mr. Chairman. I apologize for coming in late. We were on the floor debating the override of the President's veto on the physicians' payment, which is very important, I know, to all of us.

I just wanted to mention too, this is such an important issue and one that I know that we need to spend a lot of time on.

And I just want to, for the record, state that I also voted against the Military Commission Act back in 2006, and know that it is quite an embarrassment when we go out and represent our country to other countries, talking about democratization and free will and transparency, and it's hard to explain to some of our colleagues of member OSCE states that some of us in fact, from the Congress, would like to see a change in direction in this particular policy.

And because of recent activity with our Supreme Court, I know there are some very important issues and opinions that I think some of us would like to get clarified. And I just have two questions that apply to the Supreme Court's most recent decision.

And I wanted to ask Mr. Waxman and Mr. Rona if they could address this, whether or not the Constitution applies to detainees held outside of Gitmo.

And, two, what the substantive standard for detention is. Specifically, the court said, and I quote, "It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined," quote, unquote.

So I'd like to get your feedback from you two gentlemen on that.

Mr. WAXMAN. Thank you. Those are two huge questions left unanswered by the Supreme Court in *Boumediene*. In fact, the Supreme Court, as you say, at the end of the opinion says, "we're not reaching those substantive questions."

So the Supreme Court held that constitutional habeas corpus rights apply to detainees at Guantanamo. It left open the possibility that similar habeas corpus rights might apply to other sites of detention. And it mentioned that there were a number of factors that would weigh in that determination, including the practicality to extending the habeas corpus rights there, the conditions of confinement and the conditions under which detainees were—the circumstances of capture.

As to the issue of the substantive scope of, for example, what does it mean to be an enemy combatant, or "what is the substantive scope of the president's detention authority?," again, the Supreme Court didn't need to reach that in this case and it left it alone.

What this means is, I think, the U.S. Government is in need of some clarity of the law here.

I read the Supreme Court's decision in that regard as trying to put the onus on the Congress and the executive branch to work together on legislation that would answer some of those questions.

As I said earlier, I think there's very much a need for legislation in this area that would clarify some of the procedural protections that detainees have and that would also clarify issues of the substantive scope of the executive detention authority.

I would also, though, caution that it's more important that we get this right than that we get it done quickly.

There may be a need in the short term for some legislation to, as I said before, provide some rules of the road in the short term for habeas litigation to proceed, to streamline the habeas litigation that's going to ensue from Boumediene.

In terms of the broader issues of where does the executive's detention authority extend, what is the substantive scope of it, what are the procedures that might be required beyond Guantanamo, those are issues that are extremely complex. And I would just urge some caution in rushing too quickly to answer them, especially during a politically charged time.

Ms. SOLIS. Thank you.

Mr. HASTINGS. Mr. Rona, you are the most recent, at least among us, that have been to Guantanamo. When I was there, on at least two occasions and another before, I was there in my capacity as a member of the Intelligence Committee. I'm not on that committee as we speak. But I came away from those two experiences—and I believe my good friend, Mr. Butterfield, and I have had this experience with detention facilities in the United States of America, both of us having been judges that sent people to prison, visited prisons.

I take full responsibility for causing the prison to be built that's in Palm Beach County because of overcrowding, et cetera. And the political will didn't exist because it costs money. And the then-county commissioners could do it until they were forced by the federal courts. And I had that responsibility. The same with the Miami-Dade detention facility, so a good deal of experience.

But when I came from Guantanamo, quite frankly, I felt just like I did when I visited the prison. I know that they had washed it that day. Cleaned it up. And the prisoners were eating the best meal that they had gotten in a week. And I could go on and on and on and on.

I even remember I got there—I did so deliberately—2 hours early one day. And they were still whitewashing the walls and what have you.

I wasn't impressed. I just called it a dog and pony show. And I think I may have seen more than you did, in one sense of the work.

What's your recent impression from your visit?

Mr. RONA. Mr. Chairman, as a representative of a non-governmental organization, we're kept on an extremely short leash in Guantanamo. And the only thing that we were allowed to observe is the military commission proceedings.

I can tell you however that I did spend 6 years in the legal division of the International Committee of the Red Cross. And in that capacity, I had a good deal of exposure to the type of interactions with the facility and detainees that only the Red Cross has. And I cannot and will not say anything about what I saw and what I learned in that capacity. It would be a violation of everything that the ICRC stands for.

However, as we all know, there have been a number of ICRC reports that have been leaked, not by the ICRC, but there are a number of individuals in the U.S. Government that receive ICRC reports. And on a couple of occasions those reports have been leaked.

Those reports, and particularly one that was referred to recently in a book just published—I think that just comes out this week by New Yorker columnist, Jane Mayer—have indicated that the content of ICRC reports reflect upon the conditions in Guantanamo and the treatment that some detainees have been subjected to, as not only being tantamount to torture, but having been indeed torture, and potentially creating liability on the part of the detaining authorities, either those who have implemented interrogation techniques and detention techniques, or those who have crafted and ordered them, as being war crimes.

Mr. HASTINGS. Mr. Butterfield, was there something you——

Mr. BUTTERFIELD. Yes, let me just go back to Mr. Waxman, if I can, for a moment.

As we try to construct a body of law that will apply to the prosecution of alleged enemy combatants, can we use the Geneva Conventions as a framework for constructing this body of law or do we need to start afresh?

Mr. WAXMAN. The Geneva Conventions help, but they don't answer many important questions, is my first point.

And my second point is I'd be very wary of opening them up, the Geneva Conventions, for any sort of renegotiations because where the Geneva Conventions do clearly apply, they serve a very good purpose. And I'd be very nervous about the idea of opening up some of those provisions for any sort of renegotiating.

Mr. BUTTERFIELD. What about the UCMJ?

Mr. WAXMAN. Oh, the UCMJ is helpful. But what I was going to suggest though is that——

Mr. HASTINGS. For the purpose of the audience, he's talking about the United States Code of Uniform——

Mr. BUTTERFIELD. Code of Military Justice.

Mr. WAXMAN. Code of Military Justice.

Mr. HASTINGS [continuing]. Or Code of Military Justice.

Mr. WAXMAN. Both the Geneva Conventions and the Uniform Code of Military Justice are useful guides for answering some questions, in particular, the questions concerning the treatment of detainees.

What neither the UCMJ nor the Geneva Conventions tell us too much about are the questions of who can be detained in a war.

If we do indeed accept that we are in an armed conflict, for example, with al Qaida or with the Taliban in Afghanistan, who can be detained? That's a question that the UCMJ and the Geneva Conventions don't provide a lot of guidance on.

And another question is that of regular procedural due process. What kinds of processes are detainees entitled to, to review their detentions?

The Geneva Conventions do give a little bit of guidance on that. There's Article 5 of the third Geneva Convention—calls for a competent tribunal to review the status of detainees if there's some uncertainty there, several articles of the fourth Geneva Convention when it comes to security internees, calls for review by a tribunal of the continuing need to detain a person. But it's very sparse in its detail. And the reason for that is the Geneva Conventions were not designed to deal with the kind of fight that we're now in with a transnational, borderless terrorist organization. Now——

Mr. BUTTERFIELD. Are you telling me that there's no universal definition of what a terrorist is?

Mr. WAXMAN. I do agree with that statement that there is no universal agreement.

I should say—and if I don't, I think my colleague, Mr. Rona, will jump in—there are some parts of the fight against al Qaida, the fight against the Taliban where the laws of war do provide some clear guidance.

For example, on the battlefield of Afghanistan, the Geneva Conventions have a very important role to play. It's really beyond these kinds of traditional battlefields that the traditional law of war doesn't provide a lot of clear guidance.

Mr. BUTTERFIELD. I think my time has expired. I yield back.

Mr. HASTINGS. We've been joined by Senator Cardin.

And while he's gathering his thoughts on the subject, Mr. Shapiro, I'll ask you if you would evaluate the ability of European countries to establish counterterrorism systems that are consistent with their values and how important that is.

And as a second question, what do you think the reaction of countries in Europe would be if we continued our plans to try suspects by military trials. And not necessary as currently conceived, but maybe under the trials under the Uniform Code of Military Justice?

If you would answer those two questions, then we'll turn to Senator Cardin.

Mr. SHAPIRO. Sure, I'll give it a shot.

In terms of the ability of the European countries to handle terrorism in a way that's consistent with their values, I think the record is very mixed.

First of all, a lot of the counties haven't really faced a terrorism problem. And it's quite clear that they don't put these procedures into place preemptively.

There are several countries that have faced the problem I think preeminently, Britain, France, Spain, and to a certain degree Italy and Germany.

I think there's really a markedly consistent record across all of those countries. They all——

Mr. HASTINGS. But not as it pertains to international law. It's part of their tradition and legal codes?

Mr. SHAPIRO. No, even as it pertains to international law. They go through similar struggles that we have gone through.

And I think maybe as you're going out and taking it on the chin, as you mentioned, from European colleagues, you might mention this to them. I think many of them are much further down the road than we are, but they have all traveled the same road.

As Spain, for example, sent hit squads into France to assassinate Basque terrorists who were finding sanctuary there, in clear violation of their own domestic law and in clear violation of international law. I think the interior minister eventually went to jail because of it. It was a government operation that killed a lot of innocent people.

Pretty much all the countries have struggled with this. All of the threatened countries have violated various international laws and some of their own domestic traditions somewhere along the line.

And then they have all engaged in a process where they sort of retreated back onto their traditions, retreated back into frankly their criminal justice systems because they had no other place to go, because they realized—they saw very quickly—Britain is a very good example of this—they didn't see quickly, but they saw it—that this effort to crush terrorism in the short term by betraying your own values was counterproductive. It never worked. It particularly doesn't work in the domestic environment. But it actually doesn't even work abroad, I would argue.

As to your question, what would be the reaction of our European allies, I was interested to hear Mr. Waxman saying that European officials are very much bothered by Guantanamo. I haven't personally—although I'm not as privy to it I think as Mr. Waxman is—seen this really affecting sort of day-to-day European cooperation.

I think one of the problems for responding to the demands of our allies is that they make one demand on a political level, but really don't pay a price at an operational level. In fact, the cooperation, in my view, works quite well. And that's actually sort of a problem in the long run because we can do a lot without really hearing very much substantive. We'll hear complaints, but we won't really suffer in any way from our European allies, from the officials.

What happens is that we become increasingly unpopular in the domestic societies of these European allies. And that's a slow erosion that suddenly has a political effect after some election, not after we implement some change.

And that actually represents a danger for us. We can get, I think, pretty far out ahead of the populations of our allies without really hearing from it, from the operation officials, and without suffering any material damage. And then suddenly, it comes back to haunt us when it's too late.

Mr. HASTINGS. Well, let me tell you one of the things that we did do through the Helsinki Commission, and just before asking the Senator to precede. He is fully mindful of what I'm about to say.

One of our French colleagues came to me when I had just been elected President of the Parliamentary Assembly. And, boy, you talking about taking it on the chin, I mean, he was really laying into me.

This was Senator Blum, Ben and Hilda.

So actually, what we wound up with was sort of a working group within the organization. And then I appointed he and others, headed by the woman who was then President of the Belgian Senate, to chair a working group, an ad-hoc committee on Guantanamo inside the OSCE Parliamentary Assembly. And to her credit and to ours and to our State Department's credit, they were permitted to visit Guantanamo. And it has produced, as lately as in Kazakhstan, when all of us where just in our annual meeting, a report on—I left before it was reported, so I don't have it in hand. But we are doing some things to block some of that criticism, and are mindful of many of their responsibilities.

Senator, if you would go forward?

And I think you hear that I'm——

[Crosstalk.]

HON. BENJAMIN L. CARDIN, CO-CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. CARDIN. I'm not going to take it personally, Mr. Chairman, when you all walk out in the middle of my questions. [Laughter.]

Mr. HASTINGS. I know you will, but we understand.

Mr. CARDIN. Wait until you hear what I say about you after you leave. Don't worry about a thing. [Laughter.]

Let me first thank Chairman Hastings for conducting this hearing and holding this hearing.

We have been very open about Guantanamo Bay internationally over the last 5 years, plus. And when he mentioned Senator Blum, he's one of the more moderates within the OSCE on this issue.

So this has been a constant area of concern and has clearly impacted the ability of the U.S. Helsinki Commission to lead on human rights issues generally because it has been a matter that has been brought up over and over again. And we've spent a lot of energy trying to deal with Guantanamo Bay when we could have been using that I think to advance the many other issues of importance to the United States, where the United States needed to exercise leadership.

My questions really deal with we are where we are today. It is unlikely we will see a credible change in U.S. policy until the next administration as it relates to Guantanamo. There may be some statements made. But as a practical matter the United States will not, through this administration, exercise the type of leadership internationally to deal with the relatively new issue of how do you deal with terrorists, how do you deal with individuals who are apprehended who are not in uniform, who are conducting war against the United States or our allies or other countries. How do you deal with their detention? How do you deal with their rights? How do you deal with the relationship to their native country or their country of citizenship?

The 9/11 Commission recognized this as a matter that we needed to deal with.

And their recommendation, if I'm correct on it—and if you have a different understanding, please correct the record. They thought that we should seek international norms as to how to deal with this, that we should go to the international community and either through treaty or through some other means, develop a way in which we deal with terrorists who are apprehended, as to protect the countries' legitimate needs to receive and interrogate not only those who are planning to do harm to do us, but also protecting the rule of law and international norms on appropriate conduct of people that are under our control.

Knowing where we are today, what advice would you give President Obama or President McCain next year when one of those individuals will be seeking, I believe, stronger international understanding on what to do here? What process should we go forward with as it relates to Guantanamo Bay and as it relates to what form we should use, what means should we use to establish acceptable international standards for dealing with what we call unlawful combatants, because clearly, this issue will be with us for the foreseeable future?

Mr. WAXMAN. Thank you, Senator. I begin by saying that on some of the questions, there already are clear international norms, especially when it comes to questions of baseline treatment. So in some cases I think international law is and should have been regarded as clear.

On other issues—especially issues related to the process by which an individual is detained, perhaps for thinking about the transfers of individuals from one country to another, if needed, outside of the criminal justice system, what to do with detainees who are ultimately released—those are some questions where I think international law is perhaps——

Mr. CARDIN. Let me just stop you for one moment. The confusion that the United States played over, whether these were detainees are prisoners of war or not, subject to the treaties of the prisoners of war, the administration took the position they were not considered prisoners of war.

If they had taken the position they're prisoners of war, they could argue they could detain them until the war is over, the War against Terror.

Mr. WAXMAN. Sure. Sure.

Mr. CARDIN. Which could be never. So in one respect, classifying them as prisoners of war might have meant that they could be kept under our control indefinitely, which is what they're doing anyway.

Mr. WAXMAN. I think that's right, Senator. I mean, ironically, had the administration accepted a tighter interpretation of the laws of war when it came to the treatment, for example, it might have found itself in a much stronger position when litigating the cases now as to its authority to continue to detain.

Given that, as you say, we are where we are, I would issue two pieces of advice based on what I see as some mistakes of this administration, And that is that in developing in what I call in my statement a "legal framework that is durable" that meets the durability tests in terms of legal durability, political durability, diplomatic and ethical durability—it's critically important that the next administration work both with the Congress and with our coalition partners. And it's going to be a difficult negotiation to conduct simultaneously.

But we do need, I think, agreement among the political branches on the scope and process that would govern detention authority. And I do think we need to do a better job of developing some common rules and standards with our coalition partners because right now we're quite far apart.

Mr. CARDIN. Let's assume we could reach standards. How would those standards be enforced?

Mr. WAXMAN. In part of the previous discussion, it came up, do we need perhaps changes to the Geneva Conventions, suggesting that maybe the solution is a new treaty regime.

I actually would go a different direction.

What I would suggest is that if the United States and some of its closest allies and partners were able to come together and agree at the political level on some common baseline standards that would govern—and these would be minimum standards—that would govern issues of detainee treatments, the process to which individuals would be entitled to review their detention, access to

the International Committee of the Red Cross, rules for transferring detainees between countries—if we and our closest allies were able to reach some basic agreement—in some cases, there's already international law on this. And so it would really a matter of reaffirming——

Mr. CARDIN. So you're suggesting on a bilateral basis or a multinational basis?

Mr. WAXMAN. I would do it on a multinational basis that the United States would lead.

Mr. CARDIN. But then we would not have agreements with those areas which are most likely to be countries that could be involved with citizens that we might be detaining.

Mr. WAXMAN. Eventually, I would hope that the standards that we worked out with our closest allies would basically become the gold standard and that it would be adhered to and agreed to, much beyond that core group of like-minded allies.

What I have in mind is something called the Proliferation Security Initiative, which started out as an agreement among just a core group of like-minded allies to develop some rules for handling the interdiction of weapons of mass destruction material. And ultimately, once a core set of sensible rules were developed and had some international legitimacy, even if not enshrined in treaty, but had some international standing and legitimacy, other countries have been eager to sign onto them and adhere to them.

And I'd like to see the United States lead a similar process when it comes to handling suspected terrorists.

Mr. CARDIN. Does that worry you at all about the impact it has on the Geneva provisions that we are now, in a way, undermining the potential broadness of using the Geneva protections?

Mr. WAXMAN. No. I would use this actually as an opportunity to strengthen the force of the Geneva Conventions because I would use it as an opportunity to reaffirm that the baseline treatment standards found in Common Article 3 of the Geneva Conventions represent an absolute floor of treatment, an absolute minimum of treatment of any suspect regardless of legal status in our custody or in the custody of any of our coalition partners. I would borrow from the Geneva Conventions in that regard.

Mr. CARDIN. Let me put one more question on the table and then I'll ask the other two witnesses if they want to comment.

How would you deal with the concern that is expressed by those involved in collecting intelligence information that, at least for a limited period of time, it's important to have total isolation of terrorists who are apprehended so that the regime legitimately, to collect information, is not compromised by outside contacts?

Mr. WAXMAN. I'll begin by saying I'm not an intelligence specialist. But I have spoken to them and interacted with them on this question. My sense from them is that there is sometimes an important value when what's often called a high-value detainee is taken into custody to keep that individual isolated from outside contact as part of the interrogation process.

At the same time, I think that it's important that any such provisions in the rules be measured in sort of days and weeks rather than months and years if we were to allow such an exception.

And that it be done with some important tools of oversight, whether that's oversight by, say, the Congress or by courts, it is important that there be some additional oversight for any system of detention that would involve a lack of outside contact. One, as a matter of principle, two, because I think historically there is an added risk of abuse when there is no outside contact.

So to sum up, I think there is some intelligence value. It may be possible to craft a sensible rule there that would allow for sort of isolation of short duration, but it would be important that it be cabined with oversight processes.

Mr. CARDIN. Mr. Rona?

Mr. RONA. Thank you, Senator. When Latin dictatorships did it, we called it enforced disappearance.

That's not to say that there can't be intelligence gathered from keeping people in isolation and even potentially from torturing them. But the cost is great.

We've spoken to interrogators at some length at Human Rights First. We've had meetings with them in larger numbers, one-on-one. And inevitably, what they tell us is that the way to get the goods from a suspect or from a person, who may not even be suspected of criminal activity but may know something, is to establish rapport and to treat them humanely.

The problem with isolating an individual is, as Mr. Waxman said, it leaves much too much of a door open for potential abuses.

But even incommunicado, detention itself is a form of abuse.

Now, it is absolutely clear that in international armed conflict situations, people may be detained. But it is just as clear that they are entitled to have access and to be accessed by the International Committee of the Red Cross.

That doesn't mean they can't be interrogated. That doesn't mean that they can't be prevented from communicating with the outside world. But at the very least, what is critical in any detention situation is that an individual not be disappeared. And that's essential.

I wanted to also make a comment about your reference to the question of how the U.S. could go forward in connection with its allies or the international community, and particularly in relationship to establishing legal frameworks.

My point in my testimony—I testified before you last year at which time I submitted some written comments concerning what the legal frameworks are for dealing with terrorism. And at that point, I emphasized, and what I reemphasize today is that we shouldn't be looking for an either/or solution. Either it's war or it's crime. The fact is that laws of war have their place. Domestic criminal law has its place. And international human rights law has its place.

And if we see how those three legal frameworks complement—and they complement each differently in different situations. They complement each other one way in state-to-state wars. They complement each other a different way in insurgency, armed conflict. And they complement each other a different way in non-war situations. But in each of those situations, those legal frameworks give us the answers to the questions of detention, treatment and trail of detainees.

I don't think we need a new legal architecture. We only need to look in the toolbox that we already have to see that detainees have to be treated humanely, that in international armed conflict, people can be detained as POWs or as civilians without any recourse to habeas. But in peace time situations and in non-international armed conflict situations, I think the best thing to do and what the legal frameworks tell us to do is to let the domestic criminal law take its course.

Mr. CARDIN. Mr. Shapiro?

Mr. SHAPIRO. Yes, we can usually refer to the French experience in answering your question. The French have also been concerned about this question about getting intelligence early on in detentions. And they built a process to do just that where essentially the investigators have three days with the suspect without even the presence of a lawyer in a terrorism case, and then a further three days with the presence of a lawyer in some cases.

And this is a process which is entirely in the cadre of the judicial system. It is strictly regulated. It has a huge number of safeguards of the type that Mr. Waxman referred to associated with it, including oversight by a special judge who is focused on these issues.

It's come under a lot of fire for this process because it's quite exceptional and it's really only used for terrorism cases.

I personally feel though that it has a lot of benefits from it.

One of the things that makes me feel it might have hit on something is that the counterterrorism officials complain that they don't have enough time and the human rights advocates complain that they have too much. So they must be hitting it in the middle somewhere.

And it's interesting when you talk to them about the United States adjusting to this system, to the U.S. system, you sometimes say, "Well, what is your problem with what we're doing? You're doing it too." And they say, "Well, yes, but what we're doing is in a cadre of laws, and so we can understand and our partners can understand what our obligations are and what the rules are. The problem with what you're doing is not so much precisely what you're doing, but that it is not regulated."

And I think our partners actually are not looking for us to adopt everything that they do. And they aren't looking for us to adopt even wholesale the power of international law to regulate these very precise domestic issues.

But what they are looking for is something they have usually found from the United States, is a system of laws that delineates for them very specifically what the process is, what the protections are and what they can expect from the process. And then they can interact with that type of judicial process even if it's not exactly the same as there.

Mr. CARDIN. Well, let me first agree, particularly with Mr. Rona's point. And I think it answered—Mr. Rona's point answers a lot of the questions here. And that is that our criminal statutes, our international obligations are firm. They don't change because of the circumstances that we find ourselves in. We are a country of the rule of law.

As our courts have said now pretty clearly, we might be in difficult and stressful and extraordinary times, but the Constitution

still is in effect. And it's there for the calm times and difficult times.

And that the difficulty we have on this subject of course is because the president has exercised, as he has announced, under Article II, certain extraordinary procedures which, in many cases, the courts have struck down. But he's done it. And it caused a great deal of problems for the United States. And it caused a lot of problems for us internationally. So I think it is important that there be efforts made to clarify internationally the appropriate conduct.

But just to underscore a couple of points. Torture is against international law. It's against our domestic law. It can never be condoned under any circumstances, including the 3-day rule in France or the whatever. And the definition of what is torture is really not up for us to determine and really is an international definition. And some of the enhanced procedures used by the United States clearly violate international definitions of torture. It might too violate our domestic definitions of torture. And it cannot be condoned under any scenario.

And, Mr. Waxman, I'm not an intelligence expert either. But from what we have learned in our hearings, it also is not a good idea to do it from the point of view of trying to get reliable information.

So it's not even a good thing to do from a pragmatic point of view if you're trying to get information in those first three days, and you use enhanced procedures or torture, you're more likely to get unreliable information than reliable information. So you're wasting the opportunity to try to get valuable information.

Mr. WAXMAN. That's a point I certainly would agree with. I wasn't sure whether you were suggesting that I——

[Crosstalk.]

Mr. CARDIN. Oh, OK. No, I was agreeing with what you were saying.

Mr. WAXMAN. OK, good. Thank you. [Laughter.]

Mr. CARDIN. So, no, we're in agreement on that.

But it doesn't negate the importance of individuals who are expert in getting information using legitimate procedures during a critical period of time to get valuable information that can save lives and help us. That's certainly a legitimate—not legitimate, an obligation we have to make sure that our rules of law and international standards avail that type of interrogation.

But it has to be conformed to international norms and our domestic laws. And I think we can come up with it.

But I think as a result of what's happened by the creation of Guantanamo Bay, which has become the icon internationally of how not to do things, that it's important that we do convene international—our allies to establish what is expected moving forward under a new administration.

And I think your comments helped us in trying to deal with it.

This Commission sometimes has been the only focus of the U.S. Congress on Guantanamo Bay. Now there are many committees that have been interested in it. And the courts have obviously played a very active role.

And thanks to your involvement, I think we're in a better position to move forward.

And I thank each of your for your participation in today's hearing.

With that, the hearing will stand adjourned. Thank you all very much.

Mr. WAXMAN. Thank you.

Mr. RONA. Thank you.

[Whereupon, at 4:23 p.m., the hearing was adjourned.]

APPENDICES

PREPARED STATEMENT OF HON. BENJAMIN L. CARDIN, CO-CHAIRMAN, COMMISSION ON SECURITY AND COOPERATION IN EUROPE

Mr. Chairman, as you and I know from our work in the OSCE Parliamentary Assembly, the detention facility at Guantanamo Bay serves as a lightning rod for international human rights criticism of the United States. As I've said before, I am happy to defend the United States when we're right—even if we're alone—but in this case, I'd don't think we are right. I think the detention facility there should be closed.

I therefore welcome your convening this hearing so we can revisit some of the issues we addressed at last year's hearing on Guantanamo, now taking into consideration the Supreme Court's recent decision in Boumediene.

In fact, in light of the latest defeat for the administration's detention policies at the hands of the Supreme Court, as well as several unfavorable lower court rulings, I think it is high time to stop tinkering with a failed system and re-open entirely the question of how we handle terrorism suspects.

In that regard, the United States has an opportunity to act on one of the unimplemented recommendations of the 9/11 Commission, which is "to engage its friends and allies to develop a common coalition approach toward the detention and trial of captured terrorists, including drawing on Article 3 of the Geneva Conventions on the law of armed conflict."

I'm not sure that the various national systems in Europe for handing terror suspects provide a model that can be transposed to the United States—many European countries have restrictions on religious clothing, permit broad surveillance in public places including of demonstrations, criminalize mere membership in organizations, criminalize speech based on content alone, and have other substantive law provisions that I think many Americans would find unacceptable.

But so far, there has been precious little discussion in this town of what other countries do, and I think we need to broaden our examination of these issues to at least consider what European countries are doing with their terror suspects. And I certainly believe that whatever detainee policies are developed by the next administration must have more support from countries that we look to for critical counter-terrorism cooperation.

I would also note for the record that the Senate Judiciary Committee, on which I sit, is holding a hearing tomorrow on how the Administration's failed detainee policies have hurt the fight against terrorism. The Committee will examine how to put the fight against terrorism on sound legal foundations.

I look forward to the testimony of our distinguished witnesses. Thank you.

PREPARED STATEMENT OF GABOR RONA, INTERNATIONAL LEGAL DIRECTOR, HUMAN RIGHTS FIRST

Chairman Hastings, Co-Chairman Cardin and Members of the Commission, thank you for inviting me to share the views of Human Rights First on these important issues. We appreciate the work of the Helsinki Commission and in particular its leadership among OSCE member states in the areas of human rights and humanitarian affairs—"the human dimension." Human Rights First is honored to have the opportunity to express its views to you today about how best to ensure that U.S. policy on the detention, interrogation and trial of terrorist suspects is effective, humane and consistent with our laws and values.

My name is Gabor Rona and I am the International Legal Director of Human Rights First. For thirty years, Human Rights First has worked in the United States and abroad to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. We support human rights activists who fight for basic freedoms and peaceful change at the local level; protect refugees in flight from persecution and repression; help build a strong international system of justice and accountability; and work to ensure that human rights laws and principles are enforced in the United States and abroad.

I last came before you a year ago to lay out the international law applicable to the detainees held at Guantanamo and others detained in the so-called "War on Terror" and to make recommendations designed to bring U.S. policies and practices back into the fold of the international legal order that the United States shares with its OSCE partner-States. You have asked me back to express views on the future of Guantanamo detainees following the Supreme Court's Boumediene decision.

I want to start by noting, with some satisfaction, that each successive decision of the Supreme Court on the subject of post-9/11 detention has brought the United States further back toward, if not into, the fold of respect for international human rights and humanitarian law and the purposes they serve. Boumediene recognizes the right of detainees to habeas corpus, and in so doing, not only vindicates a bedrock provision of the U.S. Constitution, but also comports with majority views among the international legal and political community that human rights law and domestic law operate in concert with the laws of war in times of armed conflict.

Still, popular notions persists that a) existing laws of war and criminal law are inadequate because they did not anticipate today's conflicts, b) that there is conflict and a requirement to choose between "war" and "crime" paradigms, and c) that therefore, a new "legal architecture" needs to be developed. I will address each of these three notions.

First, just because Henry Ford was not foreseen by the inventor of the wheel, does not mean that wheels are inappropriate to facilitate the locomotion of automobiles. The proper question is not whether traditional criminal law and the law of war were built to deal with modern forms of transnational terrorism, but rather, whether they are legally and practicably applicable to it.

Second, the "either/or" and "neither/nor" approach that pits two distinct camps against each other ("it's a war, no it's a crime") is

misguided. In fact, criminal law applies in wartime. And the laws of war that apply to detention and trial of terrorism suspects in today's conflicts are not materially different from domestic criminal law, as tempered by international human rights law. Nonetheless, this false "tastes great/less filling" argument has staying power. One reason is that the administration has falsely insisted that domestic criminal law and human rights law do not apply in this "war" and only the laws of war apply. Critics naturally gravitated to the converse view, equally incorrect, that only criminal law and human rights law should apply, not the laws of war. The administration was able to build up steam for its inaccurate vision because there is relatively little familiarity with how the laws of war, domestic law and international human rights law interact, both complementing and indeed, reinforcing one another. The way out of this endless and fruitless exercise in contradiction lies in two steps: first, recognizing the difference between how these three complementary legal regimes (domestic law, human rights law, laws of war) operate in three situations: in war between states, in war not between states, and in peacetime; and second, in exercising good faith judgment in deciding in which of those three contexts an individual is being held or tried. This does not mean that detention under the laws of war can have no place beyond the battlefield. Far from it. It does mean, however, that lines must be drawn between detentions that are truly in the context of war, and those that are not.

Third, this third way—the one that does not require a choice between competing visions of war and peace, but rather, recognizes the complementarity of domestic criminal law and international laws of war and human rights—does not need to be "invented" with new laws, as some have advocated. It is the law. That fact has been obscured by the administration's pick-and-choose approach to the laws of war and its wrong-headed assertions about what it means for the law of war to be the lex specialis, or specialized law, in times of war. "Lex specialis" does not mean that one body of laws applies to the exclusion of others. In armed conflict, for example, it merely means that individual law-of-war rules trump conflicting, and otherwise applicable, law-of-peacetime rules.

Critics who scoff at this vision of complementary relations among applicable legal regimes think it naïve. I believe they overstate the benefits and underestimate the costs of ignoring domestic criminal and international human rights law in both liberty and security terms.

What I envision is not a mere slavish implementation of pre-existing rules. The changing meaning of sovereignty in an increasingly interconnected world, the shifting focus of international law from state-to-state to state-to-individual relationships, the post-Second World War flowering of the age of rights, the maturation of the laws of war (sponsored in large part by the United States) into ever-more finely tuned rules designed to protect those who are not, or are no longer, taking part in hostilities—these are the moving parts in a delicate architecture upon which counterterrorism practices and policies are built. It's a finely tuned balance derived of experience and negotiation among generations of lawyers, politicians, diplomats and other experts. This is the china shop into

which the U.S. has now injected itself like a bull. The cries that the old rules are quaint, or that they were not designed for this new model of conflict, or that their imprecision makes it impossible for us to behave humanely, are shallow arguments in light of the grand interests that those rules are designed to vindicate. In other words a new "legal architecture" for terrorism is not merely unnecessary. It would risk doing more violence to the relationship among existing applicable criminal law, human rights law and the laws of war than the U.S. has already done, and of most importance, to the humanitarian purposes those laws serve.

And within the existing legal architecture, there is more than sufficient flexibility to adopt new rules for current exigencies. In fact, Congress has been a player, providing new tools in relation to surveillance, terrorism financing, and criminal responsibility for support of terrorism at home and abroad.

Some argue that the criminal courts are ill-equipped to prosecute terrorism cases. Calls for an administrative detention law and/or the establishment of a new national security court are built on this premise. Human Rights First recently released a report authored by former federal prosecutors detailing the experience of the criminal justice system in dealing with over 120 terrorism cases some before, and most after 9/11. The study, "In Pursuit of Justice: Prosecuting Terrorism in the Federal Courts," is grounded in real experience with real cases, not on speculation. It found that the federal courts, while not perfect, have proven themselves to be capable of bearing the load and capable of flexing to meet the exigencies of cases brought before them. It found, most significantly, that tools such as the Classified Information Procedures Act (CIPA) operate properly to assure the protection of sensitive information and that there is sufficient substantive law to cover preparatory acts and conduct occurring abroad. It also found that criticism about soldiers being required to issue "Miranda" warnings and to conduct criminal investigations while under fire is simply misplaced.

U.S. District Judge Leonie Brinkema, has presided over multiple terror trials including that of the so-called "20th hijacker"—possibly the most notorious and complicated post-9/11 terrorism prosecution—the Moussaoui case. The trial featured a variety of challenges, including a defendant serving as his own lawyer and a block of classified evidence. Judge Brinkema noted that individually those circumstances are not unusual, but they were uniquely concentrated in Moussaoui. She said "I've reached the conclusion that the system does work," and that the notion of a national security court should "send shivers down the spine of everyone." [1]

In other settings, federal judges have confided that where federal terrorism prosecutions falter or run aground, it is because the Justice Department had hyped and politicized the cases and brought charges not sustained by the evidence.

Because this system works, it enjoys public confidence and is capable of delivering true justice and accountability. This is not to say that federal prosecution is the silver bullet answer to terrorism. Other strategies such as intelligence gathering, interruption of terrorism financing, diplomacy and even the use of armed

[1] See AP article, attached.

force have their place. But when the question is "According to what legal architecture should we detain and try terrorist suspects?" the answer is in plain sight, not in some hidden, secret place on the distant tip of a Caribbean island.

In the Hamdan case, the Supreme Court recognized that Common Article 3 of the Geneva Conventions applies to wars that are not between two states, in this case, between the United States and al Qaeda. Boumediene takes the next logical step, consistent with the notion of complementarity among domestic law, human rights law and laws of war. It decides that, at least with reference to Guantanamo, where Common Article 3 applies, so can provisions of domestic law relevant to detention and trial, in this case, habeas corpus. While the Court focused its attentions on the constitutional right to habeas, it is equally important to note that Article 9 of the International Covenant on Civil and Political Rights, to which the U.S. is a party, also recognizes a prohibition against arbitrary detention, enforced by a right to judicial challenge of detention. This is a classic example of the co-operation of domestic law, human rights law and the law of war.

In a somewhat anachronistic but pregnant phrase, Common Article 3 requires trials conducted in the context of wars that are not between two or more states to afford "all the judicial guarantees which are recognized as indispensible by civilized peoples." This reference to law beyond the pages of the Geneva Conventions, themselves, is in contrast to the Conventions' other sections dealing with wars that are between states. In state-to-state wars detainees have no right to habeas. Domestic and international human rights law have a minimal role. But these absences are compensated for by the fact that in wars between states, elements of fair trial are spelled out in detail that trumps inconsistent rules of domestic law and international human rights law.

This distinction that the Conventions make between rules that govern state-to-state armed conflicts and rules that govern other armed conflict makes sense. In state-to-state conflict, a captured enemy combatant or civilian fighter does not get a habeas review, but instead, benefits from administrative review of detention. In lieu of judicial review to challenge detention, the Conventions provide detailed protections for treatment and trial of both prisoners of war and civilians. Such details are conspicuously absent from Common Article 3. Their absence is no accident. Combatants in state-to-state armed conflict are privileged belligerents who break no law by their mere participation in hostilities. But in other forms of conflict, fighters are unprivileged belligerents. And while unprivileged belligerency, contrary to the belief of some, is not a violation of the laws of war, it is definitely a violation of domestic criminal laws. In other words, where fighters are mere criminals the law of war anticipates that they would be treated under domestic law as tempered by international human rights law obligations.

H.L. Mencken is reputed to have said that to every complicated problem there is a solution that is clear, simple, and wrong. The choice between crime and war is a debate inviting just such a solution. The complex real world in which we live has fortunately, and over considerable time, given us a suitably complex architecture of overlapping legal frameworks. If understood and respected, this ar-

chitecture will provide the tools necessary to meet the challenge of international terrorism without the harm to both security and civil liberties that would certainly result should we abandon it.

THE ASSOCIATED PRESS

SATURDAY, FEBRUARY 2, 2008

WASHINGTON: The judge who presided over Zacarias Moussaoui's trial questioned the government's decision to seek a death sentence against the Sept. 11 conspirator, and offered a strong defense of federal courts' ability to handle terror trials.

U.S. District Judge Leonie Brinkema said in a speech Friday at the American University law school that the government's decision to seek a death sentence against Moussaoui appeared to be politically motivated, and that the zealous pursuit of a death sentence opened up numerous issues of exposing classified information that otherwise could have been avoided.

"The war on terror is an important piece of political leverage," Brinkema said. "Don't lose sight of the political realities."

Because the trial was a capital case, Moussaoui was allowed access to a wide array of evidence that would have been irrelevant in a non-capital case, including statements from captured al-Qaida leaders that Moussaoui was at best a bit player in their plans.

The court struggled for nearly two years in trying to balance Moussaoui's right to have access to those witnesses with the government's right to continue its ongoing interrogations of those witnesses, including Sept. 11 mastermind Khalid Sheikh Mohammed, without interruption. Eventually the 4th U.S. Circuit Court of Appeals ordered that summaries of the men's statements be prepared for trial without allowing defense depositions.

At one point Brinkema barred the government from pursuing the death penalty as a sanction for its refusal to make key witnesses available, although an appellate court later lifted that sanction.

Moussaoui pleaded guilty in 2005 to conspiring with al-Qaida to hijack aircraft, among other crimes. In a 2006 sentencing trial, a jury concluded that Moussaoui's actions furthered the Sept. 11 plot. But the jury ultimately decided to spare his life and sentence him to life in prison.

Rob Spencer, the lead prosecutor in the Moussaoui case, who is now in private practice at Lockheed Martin Corp., agreed that the case would have been much simpler as a non-capital case.

"But it was the greatest mass murder in our history, and it should have been charged as a death-penalty case," Spencer said in a telephone interview.

Both Brinkema and Spencer are in agreement, though, that the federal courts are equipped to handle terror trials, despite suggestions by Attorney General Michael Mukasey and others that some sort of new national security court should be considered to handle such cases.

Brinkema, who has presided over multiple terror trials in Alexandria, Va., in addition to the Moussaoui case, said the notion of a national security court should "send shivers down the spine of everyone."

The judge said she bristles at descriptions of Moussaoui's trial—which included frequent outbursts by the defendant and a retracted confession—as a circus. Instead, she said the trial included a variety of challenges, like a defendant serving as his own lawyer and a block of classified evidence. Individually those circumstances are not unusual, but they were uniquely concentrated in the Moussaoui case, she said.

"I've reached the conclusion that the system does work," Brinkema said.

Spencer said a jury trial "serves a useful public purpose. It lets the public see what a terrorist really looks like. It lets the victims participate in the process."

David Laufman, a former assistant U.S. attorney in Alexandria who prosecuted Ahmed Omar Abu Ali, a U.S. citizen from Falls Church who was convicted of joining al-Qaida and plotting to assassinate President Bush, acknowledged that such trials can be complicated. But he said in a telephone interview that courts have "legitimate constitutionally defensible mechanisms to allow these cases to go forward while protecting the rights of the accused." Laws exist, for example, to develop declassified substitutions at trial for classified evidence under a judge's supervision.

Brinkema also said in her speech that there is no room in the American justice system for evidence obtained through torture, saying that "coerced testimony is inherently unreliable."

She cited Moussaoui as an example of an individual who likely would have cooperated with the right kind of questioning.

"I'm convinced that if someone sat down and had tea with him and could put up with his ramblings, that they could have gotten some information from him because he couldn't keep his mouth shut," Brinkema said.

PREPARED STATEMENT OF MATTHEW C. WAXMAN, ASSOCIATE PROFESSOR, COLUMBIA LAW SCHOOL

I want to thank Chairman Hastings, Co-Chairman Cardin, and members of the Commission for inviting me to testify today.

My name is Matthew Waxman and I am an Associate Professor at Columbia Law School, where I teach national security law and international law. I am also an Adjunct Senior Fellow for Law and Foreign Policy at the Council on Foreign Relations and a member of the Hoover Institution's Task Force on Law and National Security. From 2001 to 2007 I served in several national security policy positions within the executive branch. Most relevant to today's hearing, from 2004 through 2005 I served as Deputy Assistant Secretary of Defense for Detainee Affairs, a position created after the Abu Ghraib crisis to advise on and help manage the improvement of U.S. military detention policy and operations, including those related to the fight against al Qaeda.

On September 11, 2001, the United States suddenly confronted a grave threat for which it was poorly prepared. Alongside the need to develop a long-term strategy the United States had to take urgent and immediate actions under conditions of great uncertainty, and neither traditional criminal law nor the law of war provided clear solutions.

With the past seven years of experience, however, including important victories against terrorist networks as well as setbacks and mistakes, we need to reconsider the basic legal and policy decisions taken immediately after 9/11. Previous reform efforts, sparked by images and allegations of abuses, focused predominantly on interrogation standards. Although that issue has not yet been satisfactorily resolved, the next reform effort should also focus on two interlocking issues: the future of Guantanamo and the appropriate role for courts in reviewing detention decisions. I commend the Commission for holding today's hearing to grapple with these crucial and vexing issues.

In that regard, let me emphasize three points today:

First, Guantanamo is a symptom of a much larger problem, and we should not consider it in isolation from other U.S. Government detention operations.

Second, closing Guantanamo will be hard. There is no easy fix.

And, third, despite these challenges, Guantanamo should closed because doing so—if handled right—will improve, not detract from, our ability to combat terrorism.

My first point is that Guantanamo is just one part of a much larger problem: for the foreseeable future the United States and its allies will continue to capture suspected terrorists and al Qaida affiliates, and we need a durable framework for handling them. This framework must permit the long-term detention of the most dangerous individuals while facilitating intelligence collection (including through lawful interrogation), but with rules and procedures that are politically, legally, ethically and diplomatically sustainable.

We need to solve the Guantanamo problem. But to consider Guantanamo in isolation from other U.S. Government detention operations, including those in Afghanistan and elsewhere, will leave significant legal and policy issues unresolved and could produce un-

intended consequences. Indeed one problem with previous, incremental legislative and judicial decisions is that they have focused on Guantanamo as a unique geographic location. The Supreme Court's decision in Boumediene v. Bush, for example, which held that constitutional habeas corpus rights apply to detainees at Guantanamo, leaves uncertain whether some of the same constitutional rights apply to otherwise similarly-situated detainees held near combat zones or in other sites. To focus too narrowly on the few hundred detainees currently remaining at Guantanamo fails to address what is really a global problem, and can, for instance, inadvertently create incentives to keep detainees in less transparent conditions, in less secure locations.

My second point is that closing Guantanamo will be difficult. There is no easy alternative without significant risks and costs.

One reason it will be hard is because Guantanamo serves some critically important functions. It would be a mistake to exaggerate Guantanamo's continued intelligence value or to deny that some individuals detained there should never have been or should have been released long ago. But it would also be a mistake to deny Guantanamo's important role in incapacitating would-be terrorist plotters and agents and in providing a better picture of al Qaida's structure and operations. If we close Guantanamo we will need alternative detention and intelligence capabilities.

Another reason that closing Guantanamo will be hard is because there is no simple and ready alternative. Sending detainees back to their home countries has proven difficult. While the U.S. Government continues to make progress in transferring or releasing detainees through its Administrative Review Board process, many home countries either will not take them, will likely mistreat them, or will likely take inadequate steps to mitigate their continuing threat. Simply detaining individuals inside the United States instead of at Guantanamo requires working through difficult issues of where to hold them and pursuant to what rules, and answering tough questions such as what to do with detainees who are ordered released. And prosecuting them for crimes in U.S. courts is no easy answer either. Criminal prosecutions should be carried out whenever possible, but the evidence against a particular suspect sometimes cannot be used to prosecute without compromising intelligence sources and methods, or the important evidence may not be admissible or sufficient under U.S. criminal law rules.

The most promising alternative to Guantanamo will not entail a one-size-fits-all approach. Instead, I believe it will require a combination of prosecuting some of them in civilian or military courts, transferring or releasing others to home countries or third countries, and perhaps detaining or even releasing some of them inside the United States. These efforts should be made in close consultation with our allies, for greater international transparency as well as to make clear that the pace of Guantanamo's closure will depend on our allies' greater willingness and ability to shoulder a greater share of the burden, including taking custody of some Guantanamo detainees and pressuring diplomatically home countries to do so under appropriate conditions.

One of the most significant debates likely to arise as part of any effort to close Guantanamo is whether the United States should

create a new "national security court" to administer detention outside the normal criminal justice system. Such proposals involve complex policy and legal questions and carry major risks. Without weighing in for or against such proposals, I do want to emphasize that any such long-term detention system outside of combat zones must include, at a bare minimum, (1) robust judicial review; and (2) a meaningful opportunity for detainees to contest the legal and factual basis for detention, with assistance of counsel. Not only are these minimum features required under Boumediene, but without them any detention system will fail the fundamental test of legitimacy.

My third point is that despite the many challenges I have just outlined, Guantanamo should be closed. If handled right, doing so will improve, not detract from, our ability to combat terrorism. While some may frame the issue as a stark choice between preserving principles of liberty and preserving our security, I believe closing Guantanamo is an opportunity to achieve both objectives.

Successfully combating terrorism over the long term requires building and sustaining webs of cooperative international relationships and promoting principles and institutions of governance inhospitable to violent extremism. Continued controversy over Guantanamo has inhibited agreement with our coalition partners on how to confront terrorist networks at the strategic level, and has impeded cooperation—information-sharing, law enforcement collaboration, etc.—at the operational and tactical level. Negative perceptions abroad about Guantanamo also undermine our ability to promote principles of justice, rule-of-law and good governance, which are tied to our success in combating violent extremism. Closing Guantanamo alone will not solve these issues. But continuing to operate it as a long-term detention site certainly will make it difficult to do so.

The Supreme Court's recent decision in Boumediene v. Bush does not change the bottom line conclusion that Guantanamo should be closed. The habeas litigation that will now follow Boumediene erodes the argument that closing Guantanamo would result in judicial interference with detentions there. At the same time, that ruling is unlikely to wipe away the indelible perception abroad that Guantanamo exists to keep detainees beyond oversight and the full reach of legal protections due detainees there.

With those three points in mind, let me conclude with one final thought: All of the alternatives to Guantanamo carry risks, including the possibility that some dangerous individuals may be released. But this risk should not determine unilaterally our policy. Detention policy is not about eliminating risk, but about balancing and managing competing risks, including risks to our values and legal system. We must assess realistically—not with alarmism or for political advantage—the marginal risks entailed and the counter-risks our own policies to date have created.

The legal and policy challenges I have outlined are difficult, but they are surmountable in ways that will simultaneously strengthen both our security and our adherence to core democratic principles.

I thank you for the opportunity to testify and look forward to our discussion.

PREPARED STATEMENT OF JEREMY SHAPIRO, FELLOW AND RESEARCH DIRECTOR, CENTER ON THE UNITED STATES AND EUROPE, THE BROOKINGS INSTITUTION

Thank you for the opportunity to testify. I've spent the last several years trying to glean lessons from Europe's long and troubled history with terrorism. I think it is a worthwhile effort and I commend this commission for this effort on the issue of detention.

The problem of creating a system of norms and laws for detaining terrorism suspects has been a challenge for every democratic government that has faced a terrorist threat. The system of detention established in the United States after 9/11 has come under much justifiable criticism, but we should not infer from those errors that the U.S. government did not correctly identify an inadequacy in existing laws and practice. Terrorism always challenges existing legal regimes. One result is that effective and accepted standards for the detention of terrorism suspects are not well defined by the laws of war, by international human rights law, or by the domestic law of any democratic country that I have studied. Each democratic country that has faced a terrorist threat has struggled with precisely these issues; most have made very serious errors, embarked on policies that they later repudiated, and engaged in a long, painful process of reform. There are no silver bullets in the experience of other countries.

It is also moreover the case that the threat and the domestic situation in every country are unique and policies cannot simply be transferred from one context to another. One other general lesson, however, does emerge quite strongly from the experience of other democratic countries. Counterterrorism measures, including those regarding detention, need to be rooted in pre-existing notions of law and fairness and they need to have broad support across the political spectrum. In the face of an imminent threat or after an attack, there is always pressure to act quickly and forcefully. But this is a long-term struggle and the record shows that ad-hoc antiterrorist measures that have little basis in societal values and shallow support in public opinion will not only oppress individual citizens, but they will ultimately fail, even by the standard of preventing future terrorist actions.

With those general lessons in mind, I think it will be useful to look at the experience of two of America's closest allies, France and Britain.

FRANCE

France has a long and painful history with terrorism. In the 1960s, the French struggled with both left- and right-wing terrorism stemming from the Algerian War of Independence; in the 1970s, they suffered through attacks by Palestinian terrorists led by Carlos the Jackal; in the 1980s they faced persistent bomb attacks in Paris from groups sponsored by Iran and Syria; and in the 1990s, they dealt fairly effectively with the first deadly stirrings of the Islamist threat, including a 1994 attempt to fly a hijacked airliner into the Eiffel Tower.

French counterterrorism is firmly rooted in the criminal justice system, French officials emphasize that they do use extrajudicial or

administrative measures. This commitment reflects some hard-won experience. During the 1960s, De Gaulle created a quasi-military court, Le Cour de Surête de l'Etat (the State Security Court) to try national security cases. The court was composed of three civilian judges and two military officers, it conducted trials in secret and offered no right of appeal. While that court was reasonably effective at its immediate task, it was very controversial and seen as a creature of the political party that created it. It lacked the legitimacy of a normal judicial procedure that could sustain it through the inevitable lulls in France's struggle against terrorism. When the opposition socialists came to power in 1981, during a time of diminished terrorist threat, they eliminated the State Security Court.

The current system was developed after the terrorist threat returned to France in the mid-1980s. Although based in the criminal justice system, counterterrorism in France recognizes the special nature of the terrorist crime and creates exceptional and flexible procedures in law for terrorist cases. In the view of the French legal scholar Antoine Garapon, it is precisely the flexibility of the French legal system that has eliminated the need to resort to extrajudicial measures. The French also take a self-consciously pre-emptive approach—they intend to stop terrorist attacks before they happen, not simply prosecute afterwards. They seem to be fairly good at this—there have been no serious terrorist attacks in France since 1996 despite several attempts and despite the frequent denunciations of France by Islamist terrorist groups, including al-Qa'eda.

Detention is an important part of this pre-emptive system. It's important to note that the French system of justice is based on an inquisitorial approach in which an investigating magistrate (an inexact translation of juge d'instruction) conducts a judicial investigation of serious criminal offenses. The investigating magistrate, somewhat of a cross between a prosecutor and a judge, has no precise analogue in the Anglo-Saxon system of justice. He is not an advocate for the prosecution or the defense, but rather he is charged with conducting an impartial investigation to determine whether a crime worthy of a prosecution has been committed. Because these magistrates are in theory impartial arbiters, they are granted fairly wide powers to open judicial inquiries, authorize search warrants and wiretaps, and issue subpoenas—powers that in the U.S. would require authorization from a judge. There are seven investigating magistrates in France that handle all of the terrorism cases in the country. In practice, the terrorism magistrates are not impartial investigators, they act like prosecutors but have the powers of a judge—a fact often noted by human rights advocates.

The investigating magistrate can make use of two types of detention, both highly regulated within the judicial system: pre-charge detention (garde à vue) and pre-trial detention (détention provisoire). In normal cases, pre-charge detention is allowed for 24 hours, extendible once. But if the case involves terrorism or a few other serious crimes, the investigating magistrates can authorize pre-charge detention for four days and, under some circumstances, six days. Suspects are not entitled to see their lawyer until after 72 hours, and even then the lawyer is usually only allowed 30 min-

utes with the suspect. The suspect can usually notify his representatives of his arrest, but that privilege can be denied by the prosecutor if he believes it might prejudice investigations and it often is in terrorism cases. He is also not notified of his right to silence and can be interrogated without his lawyer present. As noted, the limitation of these rights is justified by the supposed impartiality of the investigating magistrate who is not considered an advocate for the prosecution.

If the investigating magistrate recommends that the suspect be charged, he may also recommend pre-trial detention. Such detention is by law recommended only if it is necessary to preserve material evidence, prevent witness pressure, prevent flight, or to protect the accused, but it is quite common in terrorism cases. Pre-trial detention can last for up to four years in terrorism cases with the investigating magistrate effectively determining the pace of the investigation and therefore the trial. Alternatively, the investigating magistrates can also decide on house arrest and other limitations, such bail or the surrender of a passport. There were some well-publicized abuses of pre-trial detention in terrorism cases during the 1990s, so since 2001, all pre-trial detentions must be approved a new type of independent magistrate, the Liberty and Detention Judge (juge des libertés et de la detention). That judge must also hold a hearing every four or six months (depending on the charge) to re-authorize pre-trial detention in which he insures that that the investigation and trial are progressing at a reasonable pace.

There have been many allegations of torture taking place during detentions, particularly of the use extended questioning periods and sleep deprivation, but no accusation of systematic abuse. In response, France created in 2007 an independent authority for the monitoring of all places of detention, the Inspector General of Places of Deprivation of Liberty (Controleur Général des lieux de privation de liberté), but it is not yet operational. There are also controls in place to ensure that the suspects are seen by doctors at various points in the process.

French counterterrorism officials view both types of detentions as critical to their success. The ability to hold essentially anybody for four days and to hold charged suspects for four years gives them ample opportunity to assemble a case. The investigating magistrates have occasionally chafed at the short pre-charge detention period, gaining an increase to six days under exceptional circumstances in 2006. But they consider the ability to question suspects for three days without a lawyer as critical and usually sufficient to obtain information about terrorist networks. In the 1990s, there were many instances of mass arrest (50–100 people) for preventative and intelligence purposes, including before the 1998 World Cup in Paris in which people would be arrested in what were essentially sweeps. That technique is no longer used, but the pre-charge detention period is still clearly used as investigative technique in a more individualized fashion. The investigating magistrates also see the pre-trial detention as allowing them the time to assemble evidence from multiple sources, and to find alternatives sources for intelligence information that can't be used in trial.

This system of detention has been roundly criticized by human rights organizations within and beyond France, including in a highly critical report by Human Rights Watch released this month. The role of the investigating magistrates is broadly condemned as too powerful and lacking in procedural checks, even after the reforms to create a Liberty and Detention Judge. Certainly, by American standards, the French counterterrorism apparatus is extraordinarily repressive and intrusive and this repression falls particularly on specific groups, primarily Muslims and Corsicans. During the wave of terrorist attacks in 1995, French authorities detained some 70,000 people for questioning; the vast majority of them were North African.

Given these facts, the criticism of the system, including of detention, in French civil society has been rather tepid. Attacks on counterterrorism enforcement in France have not generally emanated from Muslim civil society groups. There is very little talk about the degree to which this cadre of special anti-terrorism legislation contributes to the frictions between the Muslim community and the state—a debate which is almost glaring in its absence. The Muslim community in France apparently has bigger issues with which to contend—issues of cultural integration and economic opportunity, the plague of "normal" criminal activity in Muslim areas, and the debate over public religious expression. In this generally highly contentious environment, occasional counterterrorism actions that affect the Muslim population do not generate much public outcry from within the Muslim community. This fact that these measures are consistent with French traditions and firmly embedded in law helps to limit public disapproval.

UNITED KINGDOM

As in France, the history of detention policy in the UK is a contentious one, but in the British case, the controversy continues. The backdrop for the current debate is the British experience in Northern Ireland, particularly during the 1970s. In response to the violence in Northern Ireland, the British introduced internment, essentially rounding up terrorism suspects in camps without recourse to any judicial process. In a manner similar to the U.S. government after 9/11, the British authorities at the time showed a deep lack of confidence in the courts, especially in the capacity of juries to confront the problem of terrorism and to persevere in an environment of intimidation (and also sympathy for many of the accused.) Hundreds were rounded-up and interned. In part because the internees were overwhelmingly Catholics, the internment system was seen as biased and was very controversial. Internees were interrogated without trials and there were many accusations of torture. The system eventually collapsed under its own weight when a British Commission ruled that internment was contrary to British domestic law. The European Court of Human Rights later determined that the interrogation techniques were not torture but "amounted to a practice of inhuman and degrading treatment." In retrospect, most scholars believe the internment policy accomplished little beyond helping the IRA with recruitment.

After this experience, the British government made a conscious effort beginning from the late 1970s to "criminalize" the terrorism

problem. As Margaret Thatcher so eloquently put it, "a crime is a crime is a crime." In a similar manner to France, they created special courts and rules of evidence, but made a conscious effort to model them on the existing criminal justice system and to apply criminal law to the special circumstances of the terrorist crime. Judges were able under this system to authorize detentions. The IRA resisted the criminal label and, in part because of continual abuses of the system in Northern Ireland, in part because it still did not meet the test of living up to British legal traditions, the system did not succeed in de-politicizing terrorism in Britain. It was gradually abandoned, although not finally until 2005.

As a result, the UK had still not found by 9/11 a method for detention that both comports with Britain legal traditions and its international obligations, and also meets the requirements of counterterrorism. In part, this is because the British system is more inflexible in its procedures than the French, but also it is because it doesn't have the procedural options of the American system. Britain relies on a common law, adversarial system which means that the pace of the process is controlled throughout by the judge who is a neutral arbiter. The system permits post-charge questioning only in very limited circumstances and mostly rules out plea bargaining. The result is that gathering intelligence and evidence, must take place before an arrest, or at least before the charge is laid. In practice, this means that the questioning suspects can only be done in the limited pre-charge detention period. As the needs of intelligence on terrorism have mounted, the result has been a continual expansion of the pre-charge detention period

Originally, the pre-charge detention period was limited to 48 hours. It was extended in stages to 14 days (with a district judge's approval) and then 28 days (with a high court judge's approval). Currently, there is a bill before parliament to extend the period to 42 days for special circumstances (i.e. the Home Secretary declares an exceptionally grave terrorist threat.) The bill will also allow some post-charge questioning in terrorism cases for 24 hours, with five day extensions available with the authorization of a justice of the peace. Each of these extensions has occasioned greater controversy than the last—the 2006 Terrorism Act had originally sought a 90 day detention period, but this was scaled back to 28 days in response to parliamentary opposition.

The current situation is very shaky—the 42 day period will probably pass, but not without great controversy and thus with fairly shallow support. The government remains wedded to the project, insisting that the long detention periods are necessary for terrorism investigations, although they have presented no evidence that this is the case. They will probably seek even greater extensions if there is another terrorist attacks in the United Kingdom. Eventually, the pre-charge detention period will run up against Britain's European Charter of Human Rights (ECHR) Article 5 obligation to inform suspects "promptly" of the charges against them (if it has not already done so.)

A separate but related issue concerns the British government's efforts to detain foreign nationals without charge in a manner similar to that done by the US government in Guantanamo, albeit on a much smaller scale. The Anti-Terrorism Crimes and Security Act

of 2001 permitted such detention of foreign nationals on suspicion of being international terrorists. It applied to those who could not be deported and could not be tried because the government claimed that doing so would reveal sensitive and dangerous intelligence. In 2004, the House of Lords ruled such detentions incompatible with Britain's obligations under the ECHR Article 5, which forbids depriving any person of their liberty without due process of law. To avoid freeing suspected terrorists, the Prevention of Terrorism Act of 2005 replaced the detentions with a regime of "control orders" that was immediately applied to the ten individuals detained under the 2001 Act. The Act allows the Home Secretary to subject persons he reasonably suspects to be involved in terrorist activity, including British citizens, to a range of varied obligations including curfews, prohibition on arranged meetings with non-approved persons, prohibition on use of the internet or mobile phones, and a requirement to live at a specified address. Control orders that meet certain rather unclear standards are not considered deprivations of liberty under ECHR Article 5. This regime has also been immensely controversial and has only been applied to at most 16 individuals at a time.

The British case presents a cautionary tale. The British experience in Northern Ireland led them to seek legislative solutions rooted in criminal law to the problem of counterterrorism after 9/11, but they were unable to find solutions that met both the test of efficacy and the test of comporting with British legal traditions and their international human rights obligations. The result has been continuing controversy and a continuing lack, in the views of counterterrorism officials, of the necessary tools for combating terrorism in the United Kingdom. In part, this was because they were too reactive to attacks and failed to think creatively about what modifications to their legal system were most necessary and possible in the long term. But it is also because they began with a very serious lack of flexibility.

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