

**TESTIMONY OF  
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**HEARING ON  
RESTORING THE RULE OF LAW**

**BEFORE THE  
UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON THE CONSTITUTION,  
CIVIL RIGHTS AND PROPERTY RIGHTS**

**September 16, 2008**

## I. Introduction

Chairman Feingold, Ranking Member Brownback and Members of the Subcommittee, thank you for inviting me to be here today to share the views of Human Rights First on what must be done to restore the rule of law in the area of detention and prisoner treatment policy. We are grateful for the Subcommittee's persistent attention to these important matters, and we look forward to continuing to work with Subcommittee Members into the next Congress and the next Administration to ensure that U.S. detention and interrogation policies uphold the government's domestic and international legal obligations and respect American values.

My name is Elisa Massimino, and I am the Chief Executive Officer and Executive Director of Human Rights First. Human Rights First works in the United States and abroad to promote 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.

For nearly thirty years, Human Rights First has been a leader in the fight against torture and other forms of official cruelty. Human Rights First was instrumental in drafting and campaigning for passage of the Torture Victims Protection Act and played an active role in pressing for United States ratification of the Convention Against Torture and other forms of Cruel, Inhuman or Degrading Treatment or Punishment. We worked for passage of the 1994 federal statute that makes torture a felony and for passage of the 2005 McCain Amendment, which reinforces the ban on cruel, inhuman or degrading treatment of all detainees in U.S. government custody, regardless of their location or legal status. We fought efforts by the current administration to weaken the humane treatment requirements of the Geneva Conventions, and have advocated for measures that would enforce existing prohibitions on torture and other official cruelty. Over the past seven years, Human Rights First has published a number of groundbreaking reports on U.S. detention and interrogation policy including: *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*; *Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects*; *Leave No Marks: Enhanced Interrogation Techniques and the Risk of Criminality* (a joint report with Physicians for Human Rights); *Behind the Wire: An Update to Ending Secret Detentions*; and *Command's Responsibility: Detainee Deaths in U.S. Custody in Iraq and Afghanistan*. These reports document a system of interrogation, detention and trial of prisoners that bears none of the hallmarks – consistency, predictability and transparency – of the rule of law.

## II. What is at Stake

Restoring our Nation's commitment to the rule of law must be a top priority for the next president of the United States. Words will be important; but, particularly because of the way the current administration has sought to distort, obscure and evade the clear language of the law, words will not be enough. The actions of the next

administration will either confirm Vice President Cheney's assertion that the drift away from the rule of law – which necessitates today's hearing – is “the new normal,” or they will prove him wrong. The world will be watching what we do.

Indeed, the world has been watching all along. The erosion of human rights protections in the United States in the aftermath of September 11 has had a profound impact on human rights standards around the world. Over the last seven years, the United States has become identified with its selective observation of international human rights treaties to which it is bound, a pattern that has weakened the fabric of human rights norms and emboldened other governments to do the same. A growing number of countries have adopted sweeping counterterrorism measures into their domestic legal systems, at times significantly expanding on the substance of U.S. measures while explicitly invoking U.S. precedent. Opportunistic governments have co-opted the U.S. “war on terror,” citing support for U.S. counterterrorism policies as a basis for internal repression of domestic opponents. In some instances, U.S. actions have encouraged other countries to disregard domestic and international law when such protections stand in the way of U.S. counterterrorism efforts.

In the course of my work I often meet with human rights colleagues from around the world, many of them operating in extremely dangerous situations. When I ask how we can support them as they struggle to advance human rights and democratic values in their own societies, invariably their answer is: “get your own house in order. We need the United States to be in a position to provide strong leadership on human rights.”

The next president will have an opportunity to restore that leadership. This December, we mark the 60<sup>th</sup> anniversary of the Universal Declaration of Human Rights. Adopted by the United Nations in 1948, the Declaration calls on member states to recognize “the inherent dignity . . . and equal and inalienable rights of all members of the human family.” If the president-elect embraces the agenda set out in this testimony, we will be able to celebrate that anniversary as the beginning of a return by the United States to respect for the most fundamental human rights principles.

You have asked me to focus today on concrete steps the United States must take in order to realize a return to the rule of law in two key areas: enforcing the prohibitions on torture and other cruel and inhuman treatment of prisoners; and abandoning the failed experiment at Guantánamo in favor of the proven effectiveness—and due process—of our federal criminal justice system. Taking these steps will go a long way toward restoring the essential moral authority of the United States as a leader for human rights and will strengthen national security by contributing to a more effective counterterrorism strategy.

### **III. Ending Torture and Policies that Facilitate Torture: The Case for a Clean Break**

U.S. detention and interrogation policy over the past seven years has been marked by ongoing violations of fundamental humane treatment standards rationalized by a series of secret legal opinions that have stretch the law beyond recognition. Such violations

range from abusive interrogations sanctioned by Department of Justice memoranda to renditions of individuals to torture and the maintenance of a secret detention system shielded even from the confidential visits of the International Committee of the Red Cross (ICRC). The return to a detention policy that is firmly rooted in the rule of law—not in loophole lawyering—is essential both to restoring the moral authority of the United States and to ensuring the success and sustainability of U.S. counterterrorism efforts going forward.

Abusive detention policies have inhibited intelligence cooperation with close allies<sup>1</sup> and interfered with the ability of allied governments to coordinate detention operations with our military.<sup>2</sup> Forty-nine retired general and flag officers have joined in urging the United States to end these immoral, ineffective, and un-American practices, which increase the risk of abuse against U.S. military personnel captured by the enemy, now and in future wars.<sup>3</sup>

On the battlefield in Afghanistan and Iraq, the military has learned the importance of ensuring that prisoners are treated humanely. The joint Army-Marine Corps Counterinsurgency Manual issued in June 2006 makes clear that in order to gain the popular support it needs to confront insurgency threats, the United States must send an unequivocal message that it is committed to upholding the law and basic principles of human dignity:

Efforts to build a legitimate government through illegitimate action—including unjustified or excessive use of force, unlawful detention, torture, or punishment without trial—are self-defeating, even against insurgents who conceal themselves amid noncombatants and flout the law. . . . Any human rights abuses or legal violations committed by U.S. forces quickly become known throughout the local population and eventually around the world because of the globalized media and work to undermine the COIN [Counterinsurgency] effort.<sup>4</sup>

General David Petraeus, then-Commander, Multi-National Force-Iraq, reiterated this message in a May 2007 open letter to the troops serving under his command:

This fight depends on securing the population, which must understand that we—not our enemies—occupy the moral high ground. . . . In everything

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<sup>1</sup> See e.g. Hearing of the S. Comm. on Armed Services, 110<sup>th</sup> Cong. 5 (2008) (written statement of Alberto J. Mora) Available at <http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf>; CBC NEWS, The Controversy Over Detainees, April 27, 2007 at <http://www.cbc.ca/news/background/afghanistan/detainees.html>; Glenn Kessler, Europeans Search for Conciliation With U.S., WASHINGTON POST, Dec. 9, 2005 available at [http://www.washingtonpost.com/wpdyn/content/article/2005/12/08/AR20\\_05120800995.html](http://www.washingtonpost.com/wpdyn/content/article/2005/12/08/AR20_05120800995.html).

<sup>2</sup> See e.g. Raymond Bonner & Jane Perlez, British Report Criticizes U.S. Treatment of Terror Suspects, N.Y. TIMES, July 28, 2007.

<sup>3</sup> Letter from 49 Admirals and Generals to the Senate Armed Services Committee, Sept. 12, 2006 available at <http://www.humanrightsfirst.org/media/etn/2006/alert/107/index.htm>.

<sup>4</sup> U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (Dec. 2006), p. 1-19.

we do we must observe the standards and values that dictate that we treat noncombatants and detainees with dignity and respect.<sup>5</sup>

The costs of the current policy of official cruelty are now manifest and include loss of leadership internationally and damage to the war effort. The next president of the United States should also understand the strategic security *gains* to be reaped from shifting to a policy of complete, consistent and transparent compliance with human rights norms. Accordingly, the U.S. government should strictly uphold the existing ban on torture and other cruelty.

### A. Uncovering Lessons Learned

Through extensive document requests and multiple hearings, Congress has already shed much light on the extent of abuse of detainees in U.S. custody.<sup>6</sup> But there is much the American people still do not know about the parameters of the CIA secret detention and interrogation program and how abusive interrogation techniques came to be approved at the highest levels of government. There must be a thorough, comprehensive and sober examination—across all agencies involved—of policies and practices that led to the official sanctioning of torture and other cruelty in order to inoculate against future abuse, identify the most effective means of prevention and demonstrate that the United States is now committed to treating all prisoners humanely.

The current administration has engaged in a shell game of legal justifications to rationalize its policy of official cruelty and secret detentions.<sup>7</sup> A true accounting of past abuses will require that these relevant legal opinions, including those no longer in force, be made public. The next president should direct the appropriate agency heads to review the classification of these documents—where classification is an issue—and to the maximum extent possible publicly release memoranda and documents authorizing or providing legal clearance of secret detention, rendition and coercive interrogations by all agencies. It is imperative that the public and Congress have a full understanding of the faulty reasoning that was used to circumvent humane treatment standards so that these standards can be effectively fortified in the future.

In order to facilitate this exercise, the next President should work with Congress to appoint a non-partisan commission of distinguished Americans to examine, and

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<sup>5</sup> David H. Petraeus, General, United States Army, Commanding, *Letter to Soldiers, Sailors, Airmen, Marines and Coast Guardsmen serving in Multi-National Force-Iraq*, May 10, 2007.

<sup>6</sup> See e.g. Senate Judiciary Committee Hearing on Coercive Interrogation Techniques, 110th Congress (June 10, 2008); House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight Hearing on Extraordinary Rendition, 110th Congress (June 10, 2008); House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties and House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight Joint Hearing on the Maher Arar Deportation Investigation, 110th Congress (June 5, 2008); Senate Judiciary Committee Hearing on Improving Detainee Policy, 110th Congress (June 4, 2008); House Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight Holds Hearing on the FBI's Role at Guantánamo Bay, 110th Congress (June 4, 2008).

<sup>7</sup> See e.g. Scott Shane, D. Johnston and James Risén, Secret U.S. Endorsement of Severe Interrogations, N.Y. TIMES, Oct. 4, 2007.

provide a comprehensive report on, policies and actions related to the detention, treatment, and transfer of detainees after 9/11 and the consequences of those actions, and to make recommendations for future policy in this area

## **B. The Way Forward**

If the United States is to reclaim what General Petraeus referred to as the “moral high ground” in our counterterrorism and counterinsurgency efforts, then it must both decisively abandon abusive practices and take bold steps to reinforce existing prisoner treatment standards—including the Convention against Torture, Common Article 3 of the Geneva Conventions, the domestic Anti-Torture Statute, the McCain Amendment, and other applicable laws. To demonstrate a renewed commitment to humane treatment standards, and to ensure clarity about what the United States means when it pledges to the world that it will treat prisoners humanely, the next president should take the following concrete steps:

- **Revoke and repudiate all existing orders and legal opinions that authorize cruel interrogations or secret detention or imply that legal standards of humane treatment differ when applied to the CIA.** This would include revoking Executive Order 13440, which authorizes the CIA to maintain a secret detention program using interrogation techniques that have been rejected by our own military as unlawful and unproductive. In addition, the next president should revoke the reported September 17, 2001 Executive Order, and any other directive not yet made public which authorizes the CIA detention and interrogation program. The next president should enforce a single standard of humane treatment of prisoners across all government agencies, based on the military’s Golden Rule standard: we must not engage in conduct that we would consider unlawful if perpetrated by the enemy against captured Americans.
- **End the practice of holding “ghost prisoners” and acknowledge such practices as illegal.** Timely notification and access to *all* detainees in the custody of *any* U.S. government agency should be required to be given to the ICRC (such a requirement is included in this year’s Senate intelligence authorization bill). In addition, the next president should sign, and the United States should ratify, the International Convention for the Protection of all Persons from Enforced Disappearances.
- **Sign and request advice and consent of the Senate to ratification of the Optional Protocol to the Convention Against Torture.** The Optional Protocol requires states party to the treaty to allow visits by experts of the UN Committee Against Torture to prisons and other facilities where people are being deprived of their liberty. The object of the Optional Protocol is to prevent torture and other unlawful abuse of prisoners, and its ratification by the United States would send a clear message to the world that the United States is serious about upholding its obligations to treat prisoners humanely.

- **Urge Congress to enact legislation requiring the videotaping of all intelligence interrogations of individuals in the custody of the military or intelligence community.** Such recording, as is provided for in the House version of National Defense Authorization Act for Fiscal Year 2009, would actually *strengthen* intelligence-gathering, as it would allow the careful examination of body language, and source and collector interaction, and could be used for training effective interrogation techniques. Videotaping also would simultaneously help to deter abuse of detainees and protect interrogators from spurious claims of abuse.
- **Invest in efforts by the intelligence community to pursue effective means of intelligence gathering that rely on humane treatment.** In June 2008 Human Rights First hosted a forum for 15 senior interrogators, interviewers and intelligence officials with more than 350 years collective field experience in the U.S. military, the FBI and the CIA. These intelligence experts unanimously agreed that more resources are needed to support the *non-coercive*, traditional, rapport-based interrogation approaches that provide the best possibility for obtaining accurate and complete intelligence, instead of ineffective cruelty that actually can impede efforts to elicit actionable information.<sup>8</sup> Such resources should support efforts such as further professionalizing the interrogation field, researching best practices and lessons learned, and developing language and cultural skills.
- **Support legislation to ensure that the government has jurisdiction over U.S. government civilians and contractors implicated in detainee abuse.** The Attorney General has expressed concern that current law does not provide sufficient jurisdiction over U.S. government contractors for violent abuses committed overseas. Congress should clarify and expand the Military Extraterritorial Jurisdiction Act to ensure effective enforcement of prohibitions on torture and other abuse committed by civilian personnel of the U.S. government. The U.S. government should neither send nor employ any civilians abroad to interrogate prisoners without ensuring that it has the ability—and devotes the resources necessary—to prosecute such individuals when they are implicated in serious abuse.
- **Declare a moratorium on extraordinary renditions and develop with Congress effective law and regulations to ensure that the United States is not complicit in torture.** Recent experience has demonstrated that existing rendition procedures, including those that permit reliance on bare assurances from the receiving governments, are woefully insufficient to ensure that individuals are safeguarded from transfer to torture. Many Members of Congress, including members of this committee, have offered proposals to enforce the obligation of

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<sup>8</sup> See Human Rights First, Press Release: Top Interrogators Declare Torture Ineffective in Intelligence Gathering, June 24, 2008 available at <http://www.humanrightsfirst.org/media/etn/2008/alert/313/> (Contains a list of principals on interrogation and humane treatment that all 15 participants agreed to); see also attached Principles for Effective Interrogation.

United States under Article 3 of the Convention Against Torture in the context of renditions. Going forward, Congress and the Executive Branch must work together to devise an effective process that ensures the rendered individual an opportunity to present his fear of torture to an independent decision-maker.

These steps, if adopted, will begin to repair the damage done to America's moral leadership and will send an important signal that the United States is reclaiming our values, ideals, and commitment to humane treatment standards.

#### **IV. Guantánamo: A Failed Experiment**

The decision to send detainees to the Guantánamo Bay detention camp was driven in large part by a desire to insulate the detention, interrogation and trial of terrorism suspects there from judicial scrutiny and the rule of law. Early on, one Administration official called Guantánamo “the legal equivalent of outer space.” The Administration's goal—to create a law-free zone in which certain people are considered beneath the law—was illegitimate and unworthy of this Nation. Any policy designed to implement it was destined for failure.

And the government's policy at Guantánamo *has* failed, in several important respects. First and most obviously, Guantánamo has failed as a legal matter. The Supreme Court has rejected the government's detention, interrogation and trial policies at Guantánamo each time it has examined them. In its third such decision in June 2008, *Boumediene v. Bush*, the Court ruled that prisoners at Guantánamo have a right to habeas corpus, thereby invalidating the Administration's position that Guantánamo lies beyond the reach of the U.S. Constitution and the federal courts.

One of the foremost obligations of the current Administration since September 11 has been to provide a legal process that could bring those implicated in the horrific acts of that day to justice. But the military commissions at Guantánamo have failed to hold terrorist suspects accountable for the most serious offenses. In more than six years, only one military commission trial has been conducted; none of the suspects implicated in the 9/11 attacks have been tried.

Second, fueled by the assertion that it was a “legal black hole,” Guantánamo became a laboratory for a policy of torture and calculated cruelty that later migrated to Afghanistan and Iraq and was revealed to the world in the photographs from Abu Ghraib. These policies aided jihadist recruitment and did immense damage to the honor and reputation of the United States, undermining its ability to lead and damaging the war effort.

Third and perhaps most importantly, the policy at Guantánamo has backfired in terms of our counterterrorism strategy. Labeling Guantánamo prisoners as “combatants” engaged in a “war on terror” ceded an important advantage to al Qaeda, supporting their claim to be “warriors” engaged in a worldwide struggle against the United States and its allies rather than the criminals that they truly are. Accused 9/11 planner Khalid Sheikh Mohammed revealed in this status at his “combatant status review tribunal” hearing at

Guantánamo in March 2007: “For sure I am [America’s enemy],” he said. “[T]he language of any war in the world is killing . . . the language of war is victims.”<sup>9</sup>

Those whose job it is to take the fight to al Qaeda understand what a profound error it was to reinforce al Qaeda’s vision of itself as a revolutionary force engaged in an epic battle with the United States. The new Army-Marine Corps counterinsurgency manual, drafted under the leadership of General Petraeus and incorporating lessons learned in a variety of counterinsurgency operations (including Iraq), stresses repeatedly that defeating non-traditional enemies like al Qaeda is primarily a *political* struggle, and one that must focus on isolating and delegitimizing the enemy rather than elevating it in stature and importance. As the Manual states: “It is easier to separate an insurgency from its resources and let it die than to kill every insurgent. . . . Dynamic insurgencies can replace losses quickly. Skillful counterinsurgents must thus cut off the sources of that recuperative power.”<sup>10</sup>

But U.S. counterterrorism policy has taken just the opposite approach. Prolonged detention without charge at Guantánamo, interrogations that violate fundamental human rights norms, and unjust military commissions have impaired counterterrorism cooperation with our allies and nurtured the “recuperative power” of the enemy.

There is now widespread agreement—even among many who initially supported the decision to detain prisoners at Guantánamo—that Guantánamo should be closed. Secretary of State Rice, Secretary of Defense Gates, and President Bush have all said they would like to close Guantánamo. Senators McCain and Obama have each vowed to close the facility as president.

Closing Guantánamo will require comprehensive policy changes and a major investment of domestic and political capital. After seven years of error upon error, the policies underlying the existence of Guantánamo are embedded in law and executive pronouncements. Reversing this will require bold action.

It will be up to the next Congress and Administration to make the difficult choices that will lead us out of the trap that Guantánamo has become, and to construct a counterterrorism policy that instead conforms to the logic of counterinsurgency operations, to international human rights standards, and to the rule of law.

#### **A. Close Guantánamo: Empty the Detention Facility within a Year**

In July 2007, President Bush said: “I’d like to close Guantánamo, but I also recognize that we’re holding some people there that are darn dangerous and that we better have a plan to deal with them in our courts.” More than a year later—and despite growing recognition, even inside the current Administration, that Guantánamo is hurting

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<sup>9</sup> By contrast, when Federal District Judge William Young sentenced Richard Reid to life plus 110 years in federal prison in 2003, this is what he said: “You’re a big fellow. But you’re not that big. You’re no warrior. I know warriors. You are a terrorist. A species of criminal guilty of multiple attempted murders.”

<sup>10</sup> U.S. Department of Defense, FM 3-24/MCWP 3-33.5, Counterinsurgency, (December 2006), p. 1-23.

U.S. interests—paralysis has set in, and no one in the Administration appears to be prepared to move.

In August 2008, Human Rights First unveiled the attached detailed, multi-phased blueprint for closing Guantánamo during the first year of the next Administration.<sup>11</sup> Our blueprint sets forth a series of recommendations in three phases—one month, six months, and twelve months into the next Administration—based on our extensive study of Guantánamo, military commissions and the federal criminal justice system.

Human Rights First observers have made 25 trips to Guantánamo and have attended nearly every military commission hearing since the proceedings began in 2004. Beginning in November 2007, Human Rights First participated in an inter-disciplinary and nonpartisan Working Group on Guantánamo and Detention Policy convened by the Center for Strategic and International Studies (CSIS). CSIS has issued an important and detailed plan for closing Guantánamo drawn from the findings of the working group.<sup>12</sup>

Human Rights First's blueprint for closing Guantánamo is based on our belief that Guantánamo has become a symbol of injustice, of expediency over fundamental fairness, and of this country's willingness to set aside its core values and beliefs. But, if the prison facility is closed, but the policies pursued there persist in another venue, the objectives prompting the closure of Guantánamo will not be achieved. Creating a state-side replica of the system for detaining and trying suspects at Guantánamo, as some have proposed, would raise serious practical and constitutional questions, and would likely perpetuate the same bureaucratic incentives that resulted in prolonged detention without trial at Guantánamo.

Part of the current problem with Guantánamo is that the system lacks incentives to force decisions about who to transfer and who to try. Under current policy, Guantánamo prisoners can be held without trial for an indefinite period. If they are tried and convicted in a military commission, they remain in detention—perhaps even after their sentences are served; if they are tried and acquitted, they may also remain in detention.

The next president should announce his intention to empty the Guantánamo facility within one year. Setting a firm and definitive deadline for closing Guantánamo would change the existing incentive structure and create a new sense of urgency to separate those whom the United States suspects of having committed crimes from the rest.

The remaining prisoners at Guantánamo fall into three groups:

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<sup>11</sup> See "How to Close Guantánamo: Blueprint for the Next Administration," <http://www.humanrightsfirst.org/pdf/080818-USLS-gitmo-blueprint.pdf>.

<sup>12</sup> See "Closing Guantánamo: From Bumper Sticker to Blueprint," <http://www.csis.org/hrs/gtmoreport/>.

- **Prisoners suspected of having committed crimes against the United States.** These should be prosecuted in regular criminal courts or in court-martial proceedings under the Uniform Code of Military Justice (UCMJ).
- **Prisoners suspected of having committed crimes in their home countries or third countries.** These should be transferred for prosecution in accordance with international human rights obligations and humanitarian laws.<sup>13</sup>
- **Prisoners not suspected of any criminal activity.** These should be repatriated to their home countries whenever possible in accordance with international human rights and humanitarian law obligations. Those who face a substantial likelihood of torture in their own countries should be resettled in third countries.

To succeed, this plan requires the cooperation of third countries. U.S. allies, particularly European leaders who have called most loudly for the prison to be closed, must help and not just criticize. It is true that the United States climbed into this box alone, but those of our allies who truly want to see the end of Guantánamo will have to help us get there. To the extent Guantánamo and other failures of the current Administration's counterterrorism policy have promoted terrorist recruitment, this is more than just a U.S. problem now. And our allies have a shared interest and responsibility to help fix it.

The next president and next Congress will need to take swift action that demonstrates to the international community their complete rejection of this Administration's policies and their clear intention to close Guantánamo and steer a new course:

- **Immediately improve conditions of confinement at Guantánamo.** Increasing access to family members through video- and tele-conferencing, improving access to counsel, and reducing the use of solitary confinement will ease the burden of isolation experienced by many Guantánamo prisoners and bring U.S. policy more in line with international treatment obligations. In addition, providing prisoners' families access to regular health assessments and other appropriate data, as is done for the families of U.S. detainees in Iraq, will inspire international confidence that the United States is treating prisoners with appropriate care.
- **Resettle some Guantánamo prisoners in the United States.** Then-Secretary of Defense Donald Rumsfeld's early pronouncements that all Guantánamo prisoners are all dangerous terrorists engendered reluctance on the part of other countries to

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<sup>13</sup> Facilitating the transfer of some detainees for criminal prosecution is essential to closing Guantánamo, but those transfers must be conducted responsibly. "Arbitrary Justice," a recent Human Rights First report, studied the transfer of prisoners from Bagram and Guantánamo to the Afghan government for criminal prosecution and found that the criminal trials held in Afghanistan fail to meet international or Afghan fair trial standards. See <http://www.humanrightsfirst.info/pdf/USLS-080409-arbitrary-justice-report.pdf> In the future, countries should be pressed to conduct prosecutions in accordance with international fair trial standards. The U.S. government should assist in this effort by providing these countries with information in its possession, including witness names and statements, interrogation reports and exculpatory evidence.

accept prisoners now found years later to pose no danger. Our failure to resettle any such prisoners here in the United States has only compounded that reluctance. A small number of prisoners who have not committed crimes against the United States, and whose individual circumstances make them eligible for relief, should be resettled here.<sup>14</sup> This would send an important message and likely would increase the willingness of third countries to accept some prisoners themselves. It may also be necessary to convince other countries to accept their *own* citizens and legal residents.

- **Manage effectively the risk posed by repatriation and resettlement.** Releasing some of the prisoners at Guantánamo will require an assumption of some risk. But that risk can be managed, and it is undoubtedly less than the risk posed by the continued detention of more than 200 Guantánamo prisoners without criminal charge. Risk management can be achieved by performing individualized risk assessments of detainees selected for repatriation and resettlement; obtaining appropriate security assurances from receiving countries; making transfers on a rolling basis to ease the burden on home countries; and passing legislation to invest in reintegration programs modeled after the Saudi rehabilitation program, which led to the transfer of more than 100 Saudis out of Guantánamo.

## **B. Repeal the MCA and Terminate the Military Commissions**

In March of last year, I testified before the House Armed Services Committee and urged that terrorist suspects at Guantánamo be tried in regular federal courts or pursuant to the Rules for Courts-Martial under the UCMJ. Such trials would satisfy the requirement of the laws of war—and of our own laws—that sentences be carried out pursuant to a “previous judgment pronounced by a *regularly constituted court* affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>15</sup> That remains our view.

<sup>14</sup> For example, the Uighers are one group of detainees that could be settled in the United States. The United States has small Uigher communities in Los Angeles, San Francisco, New York and Washington, D.C., and these communities have already agreed to provide assistance. If the United States takes some Uighers, other countries with Uigher communities, such as Canada and Germany, may be willing to negotiate resettlement agreements for those Uighers who remain.

<sup>15</sup> See Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3217, 75 U.N.T.S. 31, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3217, 75 U.N.T.S. 85, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/44072487ec4c2131c125641e004a9977>; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3316, 75 U.N.T.S. 135, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>; Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, *entered into force* Oct. 21, 1950, 6 *U.S.T.* 3516, 75 U.N.T.S. 287, *available at* <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5>.

Human Rights First opposed the Military Commissions Act (MCA). Even some Members of Congress who voted for it did so while expressing the hope that the courts would step in to remedy its many defects.

Congress should not wait for the courts to come to the rescue, nor should it merely tinker with the machinery of military commissions. Instead, Congress should repeal the MCA and embrace its responsibility to ensure that suspected terrorists are brought to justice in proceedings worthy of this country.

The defects of the MCA are many and have been well-documented by Human Rights First<sup>16</sup> and others. They include permitting coerced evidence, rules for classified evidence that prevent the defendant from seeing evidence that may show innocence or lack of responsibility, and violating the basic due process requirement that a person cannot be held criminally responsible for an action that was not legally prohibited at the time it was taken.

One of the most telling indictments of the military commissions is the way the system looks up close in actual practice. Recently Human Rights First observers attended the first military commission trial held at Guantánamo, of Salim Hamdan. There is no question that the defects in the MCA infected Hamdan's trial. Though the judge excluded some of Hamdan's statements obtained following coercive interrogations at Bagram, he admitted other statements extracted under abusive conditions at Guantánamo, conditions that included sleep deprivation and sexual humiliation.

The MCA itself is just one component of the problem. The military commission system has shown itself vulnerable at every turn to unlawful influence, manipulation and political pressure. Air Force Brig. Gen. Thomas Hartmann, the Pentagon's chief legal advisor to the military commissions, has already been disqualified from his role in three Guantánamo trials because of the perception that he is biased toward the prosecution. Gen. Hartmann still has legal advisor status in fourteen other cases, but defense lawyers in several of those cases also have filed motions to disqualify him based on unlawful command influence.

The military commissions at Guantánamo are staffed by many talented, dedicated and honorable service personnel. But the system itself is illegitimate, and no amount of good will or good lawyering can change that. It is abundantly clear from our observations of trial proceedings there why Common Article 3 of the Geneva Conventions requires, as a prerequisite for passing sentences and carrying out executions, trials by a "regularly constituted court." The system in operation at Guantánamo does not come close to passing that test.

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<sup>16</sup> See "Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects," <http://www.humanrightsfirst.info/pdf/08307-etn-tortured-justice-web.pdf>

### C. Try Suspects in Federal Criminal Courts

Some say the answer to the failings of the military commissions lies in creating yet another substitute system for detaining and trying terrorist suspects. But such a detour risks embroiling the next President in prolonged legal challenges that would obviate many of the advantages of closing Guantánamo and ending military commissions. Most importantly, no new system has been proven necessary.

Last year, Human Rights First asked two former federal prosecutors from the Southern District of New York—Richard Zabel and James Benjamin, now partners at Akin Gump Strauss Hauer & Feld—to carefully examine and evaluate international terrorism prosecutions brought in the federal courts. Their report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, published by Human Rights First in May 2008, examines more than 120 terrorism cases prosecuted over the past 15 years, ranging from epic mega-trials for completed acts of terrorism to individual, pre-emptive prosecutions focused on prevention.<sup>17</sup> It draws on the personal perspectives of judges, prosecutors and defense lawyers with firsthand terrorism litigation experience, as well as the views of security experts and academics. The focus of the examination is on the legal and practical issues that confront courts, law enforcement, and Congress regarding terrorism-related crimes. *In Pursuit of Justice* concludes that the federal system has capably handled important and challenging terrorism cases without compromising national security or sacrificing rigorous standards of fairness and due process.

The report found that:

- Prosecutors have invoked a host of specially-tailored anti-terrorism laws and longstanding, generally-applicable federal criminal statutes to obtain convictions in terrorism cases.
- Courts have consistently exercised jurisdiction over defendants brought before them, even those defendants apprehended by unconventional or forcible means.
- Existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases.
- Applying the Classified Information Procedures Act (CIPA), courts have successfully balanced the need to protect national security information, including the sources and means of intelligence gathering, with defendants' fair trial rights.
- *Miranda* warnings are not required in battlefield and non-custodial interrogations or interrogations conducted purely for intelligence-gathering purposes, and *Miranda* requirements have not impeded successful criminal terrorism prosecutions.

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<sup>17</sup> “In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts,” <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>

- The Federal Rules of Evidence, including rules that govern the authentication of evidence collected abroad, provide a common-sense, flexible framework for guiding admissibility decisions.
- The Federal Sentencing Guidelines and other applicable sentencing laws prescribe severe sentences for many terrorism offenses, and experience shows that terrorism defendants have generally been sentenced to lengthy periods of incarceration.
- Courts are well able to assure the safety and security of trial participants and observers.

The justice system is not perfect, of course. Some terrorism cases have posed difficult challenges for the federal courts. But these challenges have not prevented the trials from proceeding successfully. To the contrary, the federal system has proved to be highly adaptive and flexible in delivering justice in these cases.

Many judges support our view that the federal system adequately meets the special challenges presented by terrorism prosecutions. In testimony before the Senate Judiciary Committee in June 2008, Judge John Coughenour, who presided over the trial of the trial of “millennium bomber” Ahmed Ressaam, remarked: “It is my firm conviction, informed by 27 years on the federal bench, that the United States courts, as constituted, are not only an adequate venue for trying suspected terrorists but also a tremendous asset against terrorism. Indeed, I believe it would be a grave error with lasting consequences for Congress, even with the best of intentions, to create a parallel system of terrorism courts unmoored from the values that have served us so well for so long.” Similarly, during a speech at American University’s Washington College of Law in February 2008, Judge Leonie Brinkema, presiding judge in the trial of Zacarias Moussawi, said: “I think that we need to seriously think about the implications of getting away from the standard criminal justice model for these cases....[We must not be] so overcome with fear that we jettison fundamental principles of our legal and political system. It’s something that we absolutely have to remember. You can address the terrorist threat with tools that we have if the people who are running those tools do their job.”

While *In Pursuit of Justice* does not respond directly to the proposals of those who advocate a substitute justice system—such as “preventive detention” or a “national security court”—I would note here two significant disadvantages of such schemes:

First, it has become increasingly clear that many prisoners were sent to Guantánamo, rather than being indicted and tried in federal court, because sending them to Guantánamo relieved the government of the burden of doing the hard work of investigation and prosecution. A new system of indefinite or “preventive” detention would continue to relieve the government of this burden; in fact, it would undercut the incentive to use the criminal justice system at all. But if U.S. counterterrorism policy consists of detaining indefinitely everyone who harbors hostility toward the United States, we must face the reality that several hundred men at Guantánamo are just a drop in that bucket, and that holding them there without charge or fair trials will eventually

mean that we will need to get many more, and much bigger, buckets. Second, creating a national security court would require devising from scratch the procedures, precedents, and body of law that would govern such a court. We already have walked down that path *twice* since 9/11—with the current Administration’s unilateral creation of its original military commissions in 2002, and with the MCA. The disarray that has plagued the military commissions at Guantánamo—with abundant litigation and internal dissention within the military command structure—does not bode well for a new system. By contrast, federal courts have amassed many years of experience, a reservoir of judicial wisdom, and a broadly experienced bar to guide the course of particular cases.

Human Rights First continues to study these issues carefully. We urge Congress and the next Administration to consider them as well, and to explore any continuing gaps and shortcomings in the law that can be remedied by revision rather than with the creation of an entirely new court system.

## **V. Conclusion**

The current Administration’s misguided embrace of indefinite detention, torture and deeply flawed military commissions has greatly damaged the reputation of the United States, fueled terrorist recruitment and undermined international cooperation in counterterrorism operations. Repairing our reputation as a nation committed to the rule of law will require bold action, including finally closing the detention facility in Guantánamo and demonstrating — in deed, not just in word—an unequivocal commitment to treating all prisoners humanely.

The next Congress and the next Administration will have a window of opportunity to signal to the American people and to the world that the policies of the last seven years were an aberration and that the United States is serious about restoring the rule of law, upholding our Constitution and respecting the international rules and laws our country played such a central role in formulating.

The stakes are incredibly high. In the balance hangs the ability of the United States to: maintain the integrity of our counterterrorism policy; improve intelligence cooperation with allies; support the human intelligence community in employing proven, effective methods for gathering actionable information; and re-establish the moral authority necessary to restore the United States as a world leader in upholding human rights.

Thank you for your attention to these important matters.