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**GUANTANAMO DETAINEE TRANSFER
POLICY AND RECIDIVISM**

HEARING

BEFORE THE

SUBCOMMITTEE ON OVERSIGHT
AND INVESTIGATIONS

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

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GUANTANAMO DETAINEE TRANSFER POLICY AND RECIDIVISM

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS,
Washington, DC, Wednesday, April 13, 2011.

The subcommittee met, pursuant to call, at 4:00 p.m., in room 2118, Rayburn House Office Building, Hon. Rob Wittman (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. ROB WITTMAN, A REPRESENTATIVE FROM VIRGINIA, CHAIRMAN, SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS

Mr. WITTMAN. All right, folks, I think everybody is situated, so we will get started, in the interest of time. I appreciate everybody's efforts to accommodate us in today's busy schedule, but I want to make sure that we are respecting everybody's time.

I want to welcome everybody to the Oversight and Investigations Subcommittee hearing on the U.S. Government's Guantanamo detainee transfer policies and procedures and the reengagement of some former detainees in terrorist activities.

Earlier today, our subcommittee members received a classified briefing on these issues from our invited guests in a closed session; and we will examine these issues further now in an open hearing.

I am going to enter my opening remarks for the record and dispense with those in the interest of time.

[The prepared statement of Mr. Wittman can be found in the Appendix on p. 21.]

Mr. WITTMAN. But before introducing our witnesses, I ask unanimous consent that non-subcommittee members, if any, be allowed to participate in today's hearing after all subcommittee members have had an opportunity to ask questions. Is there any objection?

Without objection, non-subcommittee members will be recognized at the appropriate time for 5 minutes.

Our witnesses today are Mr. William Lietzau, Deputy Assistant Secretary of Defense for Detainee Policy; Ambassador Daniel Fried, Special Envoy for the Closure of Guantanamo Bay Detention Facility, Department of State; Mr. Ed Mornston, Director of Joint Intelligence Task Force, Defense Intelligence Agency; Ms. Corin Stone, Deputy Assistant Director of National Intelligence for Policy and Strategy, Office of the Director of National Intelligence; and Mr. Brad Wiegmann, Principal Deputy Assistant Attorney General, National Security Division, Department of Justice.

I want to welcome you all and thank you for your participation. As we previously arranged, only Mr. Lietzau and Ambassador

Fried will make brief opening statements; and their written testimony, without objection, will be made part of the record. We look forward to Mr. Mornston, Ms. Stone, and Mr. Wiegmann responding to questions from the subcommittee members.

I also want to remind my colleagues that we will use our customary 5-minute rule today for questioning, proceeding by seniority and arrival time.

Mr. Lietzau, let's start with you; and then we will proceed to Ambassador Fried. Thank you very much.

STATEMENT OF WILLIAM K. LIETZAU, DEPUTY ASSISTANT SECRETARY OF DEFENSE FOR DETAINEE POLICY, U.S. DEPARTMENT OF DEFENSE

Mr. LIETZAU. Chairman Wittman, thank you for the opportunity to be here.

In order to take this job, I retired from the Marine Corps after more than 27 years of service, and I did so because I recognize the vital importance of this issue to our warfighting efforts and to our broader national security interests. For that same reason, I welcome your investigation and this opportunity to discuss our detention and transfer policies.

Since its creation, the Office of Detainee Policy has worked closely with the House Armed Services Committee to develop durable detention policies that conform with our domestic and international legal obligations, uphold our national values, and protect and further our national security interests. Together, we have learned that there are many challenges when dealing with the complexities of detention in a 21st-century, asymmetric armed conflict.

In the first days of this administration, the President issued three executive orders that set forth a robust agenda to develop a more sustainable detention policy that reflects our values. Besides directing Guantanamo's closure, a policy to which the administration remains committed, the President ordered a comprehensive review of detainees remaining at the detention facility to determine the disposition most appropriate to each individual. This review, concluding in January 2010, involved a task force of senior officials from across the government. The recently signed executive order builds on this effort by providing a periodic review for covered detainees that again looks to the interagency for unanimous agreement on any decision to transfer.

It is important to remember that a determination that a detainee is approved for transfer does not necessarily result in immediate departure from Guantanamo. The transfer designation flowing from the earlier Justice Department coordinated task force review or from a future periodic review board is only the first step in a process.

Finding for a detainee a suitable location from both a security and humane treatment perspective is a delicate and difficult task. For that reason, Special Envoy Dan Fried and I co-chair an interagency process where we carefully assess all information related to transfer modalities and any new information arising since the task force review identified the detainee as a transfer candidate.

Providing a context in which transfers fit, I note that they should not be viewed merely as a means towards the end of closing Guan-

tanamo Bay. A transfer process is a necessary component to any law of war detention regime. Traditionally in war, militaries capture and detain individuals to mitigate the threat they pose in the ongoing conflict. Modern armed conflicts with transnational terrorist organizations severely complicate this effort. Membership is difficult to determine, and the scope of the conflict is difficult to define.

Because of these complicating factors, over the years the Department has developed and refined a series of processes in Afghanistan, Iraq, and Guantanamo Bay, each of which is designed to protect our warfighters by removing threats from the battlefield, while ensuring that the United States does not detain someone longer than necessary.

We must carefully weigh the costs and benefits of continued detention in our counterterrorism fight. Just as we do with prisoners of war in a more traditional armed conflict, we acknowledge that the threat detainees pose change over time. We cannot simply put belligerents back on the battlefield, but the absence of process to assess whether the threat warrants continued detention comes at significant cost in the cooperation and respect of allies and partners.

To address these very complex matters, we must have a framework that is principled, credible, and sustainable. By principled, I mean it must provide fair and humane treatment to each detainee, including a process by which we can distinguish between a belligerent who poses a significant threat and one whose detention is no longer necessary. In order to be credible, this framework must advance the law in a way that imbues the entire system with legitimacy.

Finally, the sustainability of such a framework depends not only on its principled nature and its credibility but on its ability to address the realities of 21st-century warfare. No review system will be perfect. We must be able to guard against belligerent reengagement, while still allowing for the full spectrum of transfer or prosecution options as alternatives to prolonged detention.

The Department stands ready to work with Congress to further the requirements of a principled, credible, and sustainable detention policy. Thank you for your continued support, and I look forward to your questions, Mr. Chairman.

[The prepared statement of Mr. Lietzau can be found in the Appendix on p. 25.]

Mr. WITTMAN. Thank you, Mr. Lietzau. Ambassador Fried.

**STATEMENT OF AMBASSADOR DANIEL FRIED, SPECIAL ENVOY
FOR THE CLOSURE OF THE GUANTANAMO BAY DETENTION
FACILITY, U.S. DEPARTMENT OF STATE**

Ambassador FRIED. Chairman Wittman, thank you for the opportunity. I welcome the chance to offer background to this important and complex issue.

Working closely with our interagency colleagues, the State Department has been involved in negotiations for the transfer of 67 detainees to foreign countries during this administration. This includes the transfer of 40 detainees to third countries, that is countries of which they are not nationals. We also follow the progress

of former detainees, particularly these detainees resettled in third countries.

The detention facilities at Guantanamo are modern and humane; and the men and women who run them are serious, capable professionals. Nevertheless, my years of working on this issue directly in this administration, indirectly in the last one, lead me to believe that the closure of the Guantanamo detention facility is in our national interest.

The facility's existence does more to harm than improve our security. Indeed, for many years, the facility has constituted a net liability for our Nation and the world.

Transferring detainees from Guantanamo and expressing the objective of closing it are not new. In 2006, President Bush publicly expressed his desire to close the facility; and the previous administration transferred 537 detainees from Guantanamo, including 198 to Afghanistan, 121 to Saudi Arabia, 50 to Pakistan, and 14 to Yemen. These transfer efforts were publicly known but generated neither much credit for the prior administration nor much controversy.

By January 20, 2009, there were 242 detainees at Guantanamo. Many already had been approved for transfer, and 20 had been ordered released by Federal courts. Our allies and partners were calling for action to close Guantanamo.

President Obama signed Executive Order 13492, which directed a comprehensive review of all remaining Guantanamo detainees and the closure of the facility. The Guantanamo Review Task Force and higher-level review panel established under the executive order reviewed 240 detainees. Decisions required unanimity among all the agencies represented on the task force.

Of the 240 detainees reviewed, 36 were referred for prosecution, either in Article III courts or military commissions; 30 from Yemen were designated for "conditional detention" because of the deteriorating security environment in that country, meaning that they could be repatriated if security conditions in Yemen improved; 48 were determined to be too dangerous to transfer but not feasible for prosecution, and thus were designated for longer-term detention under the Authorization for Use of Military Force passed by Congress after the 9/11 attacks; and 126 were approved for transfer.

My office focused on the 126 detainees approved for transfer. These included, first, detainees who could in theory be repatriated to their country of origin. This included 35 Yemenis approved for transfer before security conditions in Yemen further deteriorated, and that is by far the largest national group of detainees remaining at Guantanamo. In working on repatriations, my office built on the experience of the previous administration.

The second group approved for transfer included 57 detainees who could not be returned to their countries of origin due to treatment concerns, and who therefore required resettlement in third countries. As a matter of longstanding policy both in this administration and the previous one, the United States does not send any detainee to a country where it is more likely than not that he will be tortured. This is consistent with U.S. implementation of its obligations under Article III of the Convention Against Torture. We take this obligation seriously.

Because of the difficulty in finding countries willing to accept detainees not their nationals but also capable of mitigating whatever risk the detainee may pose, the bulk of my office's work focused on third-country resettlements. These are labor intensive.

Each resettlement is individually tailored to the country and detainee concerned. We created solid channels of information sharing with potential receiving governments about detainees eligible for resettlement; we developed security assurances appropriate to the detainee; and we encourage measures to facilitate the former detainees' successful reintegration into the receiving country.

We found that receiving governments approached detainee settlement with care and caution. They took their own security as seriously as we take ours. Often, it would take many months to conclude a single resettlement. The time and care invested were worth it.

Our work does not end with the detainee transfer. We follow up with receiving governments to know how the resettlement is going, both to learn lessons and to determine where there are issues that need addressing. So far, our experience has been generally positive, though a number of issues, more related to integration than security, have developed.

We are alert to the potential for reengagement. The interagency Guantanamo Detainee Transfer Working Group consults regularly and in real time, when appropriate, on issues that arise.

Of the 126 detainees cleared for transfer, 59 remain at Guantanamo. Twenty-seven of these are Yemenis, and we are not planning to repatriate any, absent a court order, until the security situation there improves. The remaining 32 are candidates for either repatriation or resettlement, and we continue to assess each potential transfer case by case, and my office works on a daily basis with members of the working group about this process.

My office has also the responsibility to help inform the Congress about detainee transfers. In that regard, some of the Guantanamo-related reporting requirements, such as the 15-day advance notification of all transfers, have facilitated this flow of information. On the other hand, new certification requirements on the transfer of detainees to foreign countries interfere with executive branch authority and hinder our ability to act swiftly and with flexibility during negotiations with foreign countries. Flexibility is vital to developing an arrangement that best addresses U.S. national security.

The Guantanamo Bay detention facility has raised controversy and concern since it opened. Closing it remains in the national interest, but doing so raises complex and difficult legal, diplomatic, and security questions and choices. It is worthwhile discussing these and seeking sound solutions.

For too long, the debate about Guantanamo has been polarized and, frankly, prone to extreme positions. As President Obama said in his 2009 speech at the National Archives, we seek to do what is right over the long term. We can leave behind a legacy that endures and protects the American people and enjoys a broad legitimacy at home and abroad.

I hope these remarks and this whole process will help demystify the careful work that goes into transferring Guantanamo detainees abroad, and I look forward to your questions. Thank you, sir.

[The prepared statement of Ambassador Fried can be found in the Appendix on p. 34.]

Mr. WITTMAN. Thank you, Ambassador Fried. We appreciate you and Mr. Lietzau's opening comments there, and we will continue on with the hearing.

I want to welcome Mr. Andrews here and offer to him, if he would like to enter a statement into the record or to make one for the opening, we are open for doing that.

Mr. ANDREWS. Mr. Chairman, I would just reserve Mr. Cooper's right to do that in the future should he want to before the record closes.

Mr. WITTMAN. Without objection.

All right, we will move then to questioning, and I will begin the questioning. I will begin with Ambassador Fried.

I wanted to know, are there regions or nations that are more likely to accept transferees from Guantanamo than others? And, if so, why or what are the specifics that they look at in whether or not they will accept detainees?

Ambassador FRIED. If you are referring to resettlements, that is, accepting detainees not their nationals, it has been principally European countries who have been the most responsive.

Now, it is also true that when we look for countries we look for countries that are both willing to accept detainees but also capable, that is, have the capacity to mitigate any risk that the detainee may pose. So that number of countries quickly drops. But European countries have been very helpful, though not only European countries. In working for resettlements abroad, we do keep in mind the country's capacity and the nature of the detainee.

Mr. WITTMAN. Very good. Are there reimbursements or payments that are made to nations or certain nations in exchange for resettlement of these detainees?

Ambassador FRIED. Yes, sir. Some countries—not—fewer than half the countries—but some countries have asked for and we have offered, I would say, defraying of some of their costs. These amounts have been reported to the Congress. The amounts are classified, but let me say that the greatest amount was under—per detainee, was under \$100,000. So, yes, and I am happy to provide the details.

Mr. WITTMAN. Very good. And one last question. If you can tell us a little bit about the due diligence that goes into place to determine what surrounds a detainee being sent to a country, whether it is resettlement or whether it is another set of conditions, if you can let us know a little more of the specifics about that.

And then I know there has been some concern about detainees going back to some of the countries that are war-torn and have dealt with extremism and give us some of your thoughts about those particular transfers that have taken place with those countries.

Ambassador FRIED. I have to be very careful in an open session, so I will watch my words. And there is more to say in a closed session, and I am willing to keep working with the committee and with your staff, sir.

With respect to resettlements, countries that agree to accept a detainee are taking on a responsibility to help that detainee find

a new life and also a responsibility for security. We have found that governments have put in a lot of effort to making detainee resettlements successful. Language training, housing, vocational training, medical help, sometimes psychological help are all elements of this.

When we discuss with a prospective receiving country a resettlement, we do want to know in advance what the resettlement will look like and in some detail. We also follow up with governments to find out how it is going. Our experience with resettlements has generally been positive, as I said.

Repatriations are rather different. Repatriations, of course, mean the countries are going—detainees are going back to their country of origin. In the previous administration, they did so in rather large numbers, as I said. In this administration, we became cautious about repatriations, particularly to Yemen as the security situation deteriorated.

This was not, I should add, a break with the previous administration. The caution had started in I think the last year or so of the prior administration, and we continued it. And, of course, President Obama suspended all repatriations to Yemen in early 2010.

The challenges of a successful and secure repatriation to countries where there is conflict is obviously greater, and we benefit from DIA's [Defense Intelligence Agency] analysis greatly in making these determinations.

I should also say, as a final point, that there are very few detainees cleared for transfer, either resettlement or repatriation, who are nationals of Afghanistan or Saudi Arabia. So that problem is a small one, simply due to the numbers—the remaining problem is small due to the numbers.

Mr. WITTMAN. Thank you, Ambassador Fried. Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman. I thank the witnesses for your testimony.

Ambassador, your statement is very factual and very helpful. I just want to walk you through it to be sure I understand it correctly.

Prior to the present administration taking office, 537 detainees were transferred from Guantanamo, is that correct?

Ambassador FRIED. Yes, sir.

Mr. ANDREWS. And then on the day the administration took office, there were 242 detainees. Only 240 were included in the executive order because one had already been convicted and sentenced and the other committed suicide, is that correct?

Ambassador FRIED. Yes, sir.

Mr. ANDREWS. Now we are down to 240. And of that 240, your focus is on the 126 detainees that were approved for transfer, correct?

Ambassador FRIED. Correct.

Mr. ANDREWS. Let me understand. What is the substantive basis for the decision to transfer someone out? I am sure there are different rationales, but what is the basis for that decision?

Ambassador FRIED. The decisions on transfers were made by the review panel that was set up pursuant to the President's executive order. And this was an interagency group. Its decisions had to be

unanimous. That is, if there was no unanimity, there was no decision to transfer.

The group, the review panel, met weekly under the chairmanship of the Department of Justice. It reviewed files of detainees which provided the background of each detainee. The principal criterion was security. That is, could a detainee be transferred out of Guantanamo into conditions where any remaining threat that detainee represented be mitigated in the country to which he was going? That was the principal consideration.

Mr. ANDREWS. Was there any like probable cause determination made of innocence or guilt of the person? Presumably—I am sorry, presumably, these people were detained in the first place because there was some degree of suspicion that they had either participated in some act of violence against the United States or perhaps were a great threat to. Were those concerns alleviated before the people were transferred?

Ambassador FRIED. I will defer at some point to my Department of Justice colleague, but since I sat on the review panel, I can answer some of this.

After 2008, detainees had access to the habeas process in Federal courts; and one of the criteria that the review panel was supposed to use was the legal basis for detention. In other words, we were allowed to—in fact, instructed to look at this. But when we were looking at the detainees, the principal criterion was the threat that this detainee might represent and whether that detainee should be detained or could be transferred into a situation where there was any residual threat could be mitigated.

Mr. ANDREWS. Let me ask you this question about no particular case, because it would be unwise to ask or have you comment. But, hypothetically, if a determination were made that a detainee had likely participated in some act of violence against the United States but there was a determination that for some reason the person wasn't likely to do it again or wasn't somehow a threat, would the person be detained or shipped out?

Ambassador FRIED. It was exactly these sorts of considerations that occupied the time and discussions of the review panel. We looked at everything we had in front of us; that is, the detainee's background, the degree of commitment to his struggle against the United States, the likelihood—the severity of his involvement, and the likelihood that he would reengage.

Mr. ANDREWS. Can I just ask you this, though, as a rhetorical—and it is not meant to be a rhetorical question, frankly, but if we thought there was any reasonable grounds to think the person had committed an act of violence against the United States, why would we ever release any of these people?

Ambassador FRIED. The review panel took a look at the totality of the detainee. All of its decisions were unanimous. And, of course, the Joint Chiefs of Staff, the Defense Department, Intelligence Community were sitting on the panel, as well as the State Department, Department of Justice, and Homeland Security. We certainly did take into account any credible information in the file about a detainee's involvement.

I am not talking about particulars, but I want to give you a sense of the sorts of factors we had to consider. Was the detainee actually

ever in combat? Did the detainee participate in a terrorist act? Did the detainee participate in training but never actually did anything? Did the detainee not even participate in training?

In other words, you had a variety of factors, and we made decisions based on the background of the detainee. But the question you posed, that is, did the detainee fight against American forces, was a major consideration.

Mr. ANDREWS. But not a dispositive consideration?

Ambassador FRIED. Without going back into the files, each and every one, I don't want to make categorical statements, but I would say it was an important consideration.

And, as I said, many detainees were not in the fight at all. They had had—I am not talking about any particular detainee—maybe 2 weeks of training, never did anything, picked up while fleeing. No terrorism, no attacks on the U.S., not much of a history of commitment.

But there were other detainees.

Mr. ANDREWS. Thank you, Mr. Chairman.

Mr. WITTMAN. Thank you, Mr. Conaway.

Mr. CONAWAY. Thank you, and I apologize to the witnesses I didn't hear.

But, Ambassador, I am struck, having been in this thing since 2005, that all of those folks who could have been released with the least amount of risk were in the 537 and that we had whittled this thing down to 242 really bad guys.

Now this whole conversation has been held in a very sterile environment. We say "resettlement," we say "detainees," you say "it is the struggle against the United States." That belies how dangerous these folks may very well be to this country, without getting to specifics on this thing.

The other thing that occurs to me is your open bias against Guantanamo Bay colors your judgment as to whether or not these guys should be let go. Because one way to get rid of them is to let them go into resettlement, whatever that phrase means. And somehow if you could visit with us about how your bias to close Guantanamo Bay but for the greater good did not influence your decision-making when it came to looking at these guys who are the worst of the worst.

If our review system, which all of these detainees have gone through multiple, multiple assessments as to who they are, what they are, what they did, and what they didn't do since they were detained, at least since 2005 when I came into the Congress, how we wound up keeping the shopkeeper or the farmer who got swept up on the battlefield by accident, how many of those were in the 242.

So it is a little troubling about how cavalier and how sterile this conversation is. These are bad guys who either did or want to hurt Americans and may very well want to again. Their recidivism rate is high enough among the ones we did let go, even under the Bush administration, that it gives all of us involved in that idea or in that process great pause that, one, we make a mistake, a grievous mistake and let somebody go that we shouldn't, and they turn around and hurt one of our young men and women in this fight.

So can you visit with me a little about my perception that, because you are so driven to close Guantanamo Bay, that that helped you with your decision as to who to let go?

Ambassador FRIED. Of course, it is the policy of this administration that Guantanamo should be closed. It isn't a personal policy. I happen to agree with it.

But it was also——

Mr. CONAWAY. It turned into a personal policy. It is weird that you would——

Ambassador FRIED. No, no.

Mr. CONAWAY. Well, I don't want to be argumentative. Never mind.

Ambassador FRIED. President Bush also said he wanted to close Guantanamo.

Mr. CONYERS. We all want to, but whether or not we can is the issue.

Ambassador FRIED. But, to be clear, the administration's policy includes long-term detention for detainees who are deemed too dangerous to be released; and we believe—the administration believes that that is legal, justified, and prudent.

You mentioned that the 242 that were at Guantanamo were the worst of the worst, the most dangerous. I believe you said that.

Mr. CONAWAY. You would expect that given the process——

Ambassador FRIED. In some cases, that is certainly true. That is, the most dangerous detainees at Guantanamo are still at Guantanamo, and they were not let out under the previous administration. They are not going to be let out under this one.

However, in some cases, the detainees—in other words, some of the detainees in that group of 242 were not more dangerous. They were not let out not because of any particular danger that they posed but because they could not be sent back to their country of origin.

For example, when in January 2009, there were 17 Uyghurs—that is a Turkic people, Chinese minority. They could not be sent back to China because of treatment concerns. They had been ordered released by U.S. courts, and there were no countries willing to take them. One of the jobs of my office was to find countries willing to take them, and we did so.

Other detainees, for example, Syrians, Egyptians, Uzbeks, could not be sent back to their countries of origin.

Mr. CONAWAY. I understand that. Excuse me, my time is about to expire.

I also understand that there is a group there we all agree never gets let out, and then there is the rest. So the further down that food chain you go to get to that group that we never let out, the risks increase.

I have got good confidence in you. You have let go all the Uyghurs and the folks who don't—but as you close on that number of folks who should not ever be let go, then you run the risk of letting somebody go that shouldn't be.

So you really didn't address whether or not your personal bias and/or the administration's bias to close Guantanamo had an effect on letting people go that shouldn't have been let go.

Ambassador FRIED. I will answer that straight up. Absolutely not. I am perfectly comfortable and was perfectly comfortable on the review panel with decisions not to transfer detainees. That is part of the process. That is perfectly legitimate. That is a perfectly legitimate, justified decision. If it is a question of security and it is a judgment of the review panel that someone should remain at Guantanamo for security reasons or remain in detention for security reasons, that is a legitimate, valid call, fully supported.

Mr. WITTMAN. Thank you, Mr. Coffman.

Mr. COFFMAN. Thank you, Mr. Chairman. First of all, I just want to say that what we have is a politically driven failed policy and really maybe by both administrations. But certainly in 2000 I think the decision—when was the decision not to put any more prisoners in Guantanamo Bay? When was that decision made?

Ambassador FRIED. It was 2006 or 2007. The last administration. My colleague may know.

Mr. LIETZAU. The last detainee went in 2008. But certainly if you track how the detainees went in, there was a waning before that, making it clear that there was an intent to not put anyone there if you could avoid it.

Mr. COFFMAN. Right. I think perhaps when candidate Barack Obama was running for the Presidency, he distinguished himself from his rivals by certainly using this as an issue. And I think not only did he convince the majority of the American electorate that it was an issue, but I think he convinced the international community at the same time that it was an issue.

But I think the greatest failure of the policy is that it doesn't admit that we are a nation at war. That I think it is part of this administration's fiction that we no longer have the global war on terror, we have overseas contingency operations; and we no longer have terrorist attacks, we have man-caused disasters. So since we are removing certainly the vocabulary from the lexicon of war, we therefore need to close Guantanamo Bay.

We still need it. Because there are still individuals that want to kill American civilians. And I really think that we ought to consider the lives of Americans as more important than the rights of terrorists, and that ties into military commissions versus bringing them to U.S. soil and trying them there. So that is just my view of the policy.

Let me ask a question. Ms. Stone or Mr. Mornston, what impact has recidivism had on U.S. troops in Afghanistan and elsewhere? A news article earlier this week highlighted two former Gitmo detainees who were among America's most wanted, Mullah Abdul Qayum Zakir—if I am saying this right—and Mullah Abdul Rauf Khadim. Why were these detainees released from Gitmo?

Mr. MORNSTON. Sir, there have been instances where detainees who have been transferred from Gitmo have reengaged and have been in the fight and have impacted the lives of U.S. service members. We do track that. I can't discuss that much further in this open session, but we do in fact know that that has happened.

Mr. COFFMAN. Okay. Ms. Stone.

Ms. STONE. Again, I would echo my colleague. We track that information, but we would have to discuss it further in a closed session.

Mr. COFFMAN. When we resettle these terrorists because we no longer think they are a problem, yet we have had a recidivism rate of 14 percent that we know of—and, obviously, the rate is much higher than that, probably, and I think there is an admission that it is higher than that—what costs do U.S. taxpayers bear in the resettlement?

Ambassador FRIED. There are some cases in which the U.S. Government has offered to defray some of the receiving country's costs. Those figures have been reported to Congress.

But in this—I can't in this session give the exact number, but I will say that the highest per detainee was under \$100,000. This was used to defray housing costs, language training, costs associated with a successful and secure resettlement. But those figures are available, and they can be provided to this committee.

Mr. COFFMAN. For the record, I would like them provided to this committee.

[The information referred to was not available at the time of printing.]

Mr. WITTMAN. Thank you. Mr. Rooney.

Mr. ROONEY. I will try and be quicker this time, Mr. Chairman. I know we are voting.

During opening statements of both the gentlemen at the witness table, I kind of got the sense that there is this perception problem with Gitmo. I have heard it a million times before. You know, we are better off without Gitmo than we are with it, regardless of if you have gone down there and you have seen it, what is actually happening at Gitmo versus the perception of it.

And one of the things that always bothered me was when you talk about these guys that can't be released because they are too dangerous, I mean, isn't there a perception problem with that, that we in America detain people? If we are going to try them, I assume some of these guys we are going to put through military commissions or Article III or whatever comes down the pike, and they are going to be found not guilty perhaps or guilty. But if they are found not guilty because of lack of evidence or because we gained evidence through what is now termed as torture and we re-detain them anyway, isn't there a perception problem with that internationally? That is just as bad as whatever people think of Guantanamo Bay, realistic or not?

Ambassador FRIED. There have been enormous perception problems with Guantanamo; and Guantanamo has been the subject of heated, exaggerated, and often highly polarized and inaccurate debate from both sides, from all sides.

Guantanamo itself, the facilities itself are modern, decent, humane; and the people who work there should be given credit for doing a tough job and doing it, as far as I can tell, doing it extremely well.

Mr. ROONEY. Because I am running out of time, isn't that our problem then? Isn't that a leadership problem from both Bush and Obama, that we have let it become something that it is not globally? And don't we owe it to whatever we are trying to do down there and for whatever reason why to say to the international community, come to Guantanamo Bay and see what is really going on there, rather than just saying like, okay, we will shut it down? You

know, we might end up detaining these people forever, even though they may be found not guilty.

Ambassador FRIED. Well, before I had this job, I was Assistant Secretary of State for European Affairs in the Bush administration; and I saw firsthand the liability that Guantanamo constituted for our country and the world.

Mr. ROONEY. How do you measure that? How do you measure the liability?

Ambassador FRIED. I will give you an example. Every time I went to Europe as Assistant Secretary and asked our allies for something, help in Afghanistan or some common project, it was as if I was sailing into the wind or swimming with a 50-pound weight tied to a leg—choose your metaphor—because of the problem that Guantanamo represented.

Now, you might argue—and I might agree with you—that there was misinformation, a lot of the problems were exaggerated, there was a lot of ignorance. But it was a genuine problem. I don't want to see any American administration saddled with that sort of a problem in the future.

Now, for the past 2 years, a lot of that problem has been alleviated. And I agree with you that it is important to make the case for a sound, sustainable, well-grounded detention policy which is not going to satisfy either extreme. This administration has sought to do it, and it is part of our job to explain it.

Mr. ROONEY. Can I ask you really quickly, the third-country transferees, are they released in the third country or are some of them released and some of them imprisoned by that country? How does that work?

Ambassador FRIED. Most of them, with the exception, in fact, of two who went to Italy for prosecution, all the others have been transferred for resettlement, which means they are—

Mr. ROONEY. Monitored.

Ambassador FRIED. In this unclassified session, I will say they are strongly assisted by the receiving government.

Mr. ROONEY. Ms. Stone, why doesn't the DIA provide the names of these individuals or publish the names of these individuals anymore as they used to?

Ms. STONE. I will let my DIA colleague answer that.

Mr. MORNSTON. Thank you for that question, Congressman.

Mr. ROONEY. I just wanted to stop picking on the Ambassador for a minute.

Mr. MORNSTON. I understand. I am glad to take the heat off of him for a second.

DIA publishes a classified report concerning the reengagement of individual detainees. We use all sources of intelligence, some clandestinely collected, some collected through open sources. But my big concern and the concern of the Intelligence Community is protecting those sources and methods.

We do the work that we do to provide information that is used to warn our troops, inform our commanders and policymakers of the potential risks on the battlefield; and my strongest concern is that we perform that function and we can do that best by keeping that classified information in very closed channels.

Mr. WITTMAN. Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman. Is it fair to say, Ambassador Fried or Mr. Lietzau, that some of the persons detained in Guantanamo were scooped up in operations that perhaps caught them in the wrong place at the wrong time but really there were no factual bases in place to support them being enemy combatants? Is that true? Real quick because our time is running out.

Ambassador FRIED. Okay. When I look at the Guantanamo detainees, at least the 242 that were there when this administration took office, I think it is best put in terms of a bell curve. At one end are truly dangerous people. The phrase "the worst of the worst" applies to them. At the other end, there are people who may have been at the wrong place at the wrong time but not many of them.

Mr. JOHNSON. And, of course, you came in at only 242 that were in, but it was a total of 779 since January of 2002, some of whom, I would argue, were just caught in the wrong place at the wrong time, scooped up, brought over. A decision was made either by the courts or by the Bush administration to release them. It was about 537 released under Bush. And of those 537, I think I show where 79 confirmed cases where detainees went out and reengaged, 79 of those detainees were released under the Bush administration watch. Would you disagree? Anybody?

Mr. LIETZAU. I think you are correct in both assertions. There were people in the first large group that were just scooped up; and they have been cleared out through previous processes, as Congressman Conaway was alluding to in his earlier question. And there are those who have reengaged, or in this case were found to have reengaged, may not still be in that status right now. But, yes, that mostly come from the earlier, larger group.

Mr. JOHNSON. And only two confirmed cases of detainees being released under the Obama administration.

Ambassador FRIED. Three confirmed cases and two suspected.

Mr. JOHNSON. All right. So now what you have been doing is evaluating these remaining 242, I believe, detainees. We know some of them, like the high-value detainees that we have, are going to stand trial. Others, we don't know whether or not they will stand trial or not. I seem to remember that there was an issue with there being an adequate file in existence on each detainee.

Do we have any detainees down in Guantanamo at this point where we have that kind of a problem, where there is no file that documents any evidence against the detainee that could support a court case?

Mr. WIEGMANN. I will take that question.

In the Guantanamo Review Task Force process, all the detainees were evaluated. One of the factors was how many of them could be prosecuted. There were only about 36 who were evaluated and determined they could be prosecuted, either in a military commission or a Federal Court.

So for the remaining detainees down there, I think it is fair to assume—well, actually, the ones who are transferred are being transferred. But for those who are being kept, there is another 48 who, it is fair to assume, can't be tried. So there is 36 who can be prosecuted out of the 242.

Mr. JOHNSON. So a civilized society like the one that we live in cannot be known as being a place where we can go and take a citizen from another country and hold them in prison or in detention, whatever you want to call it, forever. We just can't do that.

Thank you.

Mr. WITTMAN. Thank you, Mr. Johnson.

I would like to thank our witnesses today for your testimony and responses. We have a vote on the floor, so we are going to need to head down there. But we appreciate all of your time and effort. We would appreciate your prompt response to any questions for the record that we may send you after this session. There may be some things that we weren't able to encompass in the time provided.

We appreciate your patience and diligence through this process with us going in and out with votes and the other activities of the day. So we appreciate that and look forward to your answers to our written questions. Thanks again.

[Whereupon, at 4:52 p.m., the subcommittee was adjourned.]

A P P E N D I X

APRIL 13, 2011

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

APRIL 13, 2011

**Opening Statement of Chairman Rob Wittman
Subcommittee on Oversight and Investigations**

**Hearing on “Guantanamo Bay Detainee Transfer Policy and
Recidivism”**

April 13, 2011

Good afternoon.

Welcome to the Oversight and Investigations subcommittee’s hearing on the U. S. government’s Guantanamo detainee transfer policies and procedures, and the “reengagement” of some former detainees in terrorist activities.

Earlier today, Subcommittee members received a classified briefing on these issues from our invited witnesses in a closed session. We will examine these issues further in this open hearing.

As a consequence of the nation’s response to the 9/11 terrorist attacks, the United States took custody of a large number of individuals in Afghanistan and elsewhere who were believed to be “Enemy Combatants.” Many of these individuals were sent to the U.S. naval station at Guantanamo Bay, Cuba for detention. Since the facility became operational in January 2002, a total of 779 detainees have been held at Gitmo.

Beginning not long after the Gitmo facility was established, detainees have been released or transferred from it to other countries, under conditions meant to minimize any danger they posed.

When President Obama took office, 242 detainees remained at Gitmo. Days after the President’s inauguration, he announced his intention to close Guantanamo and issued an Executive Order establishing an interagency Task Force to determine, among other things, whether it is possible to transfer or release any of

the remaining detainees in a manner which was “consistent with the national security and foreign policy interests of the United States.”

The Task Force determined a detainee was eligible for transfer if any threat he posed could be “sufficiently mitigated through feasible and appropriate security measures.” The Task Force also evaluated specific countries to which detainees might be sent.

As a result of the Task Force’s year-long review, 126 of the 242 remaining detainees were approved for transfer. To date, 67 of the 126 have been relocated: 26 to their home countries, and 41 to other nations.

When undertaking transfers, officials in the Obama Administration, like the Bush Administration before it, endeavored to ensure that recipient countries would implement appropriate security measures and closely monitor detainees to minimize the possibility that they would reengage in terrorist-related activities. Officials have also sought assurances from receiving nations that these individuals would not be mistreated.

In practice, however, there appears to be great variation in the treatment of former detainees. In some cases, they have been prosecuted or imprisoned upon transfer; others have been closely supervised; and still other detainees, especially those sent to Saudi Arabia, have been placed in “rehabilitation” programs. But, many other former detainees have faced little or no legal consequences or restrictions on their activities or actions post-transfer.

More alarming, however, is the fact that according to an unclassified December 2010 report from the Office of the Director of National Intelligence, 25 percent of the detainees transferred or released from Gitmo since 2002 are confirmed or suspected of reengaging in terrorist or insurgent activities. This is a substantially higher rate than the 8 percent rate of confirmed or suspected reengagement reported in May 2008.

Shockingly, some of the former detainees have reportedly been involved in attacks against U.S. and coalition forces in Afghanistan and Iraq. Others have recruited for al-Qaida and provided other direct support for our enemies. In rejoining the fight, these individuals threaten our deployed forces and endanger our security.

Two months ago, when testifying before Congress, Secretary of Defense Robert Gates declared that the United States “has been very selective in terms of returning people,” and he conceded “we’re not particularly good at predicting which returnee will be a recidivist.”

The Intelligence Community assesses that the rate of reengagement is likely to increase in the future, in part because detainee reengagement activities do not typically become apparent until two or more years after detainees have left Gitmo.

As detainees continue to be released from Gitmo, it is essential that the government develop “lessons learned” from the past in order to properly inform future policy.

This hearing is one component of a larger effort by the Subcommittee to conduct a long-term, bipartisan investigation of Guantanamo Bay detainee transfer practices and procedures. It will make recommendations to improve the process.

Our purpose today is to examine the U.S. government’s current process for transferring detainees, the assurances negotiated with host-nation countries regarding security and humane treatment, and the mechanisms in place for post-transfer monitoring.

I believe the high rate of reengagement is alarming. I’m interested in determining if the government conducted sufficient due diligence when identifying detainees for transfer or release, and if their destinations were properly assessed. In some cases, it seems detainees were sent to relatively unstable nations. These

seem to be unlikely locations to receive potentially threatening individuals, and I am eager to understand better these decisions.

Before introducing our witnesses, I will turn to Mr. Cooper, our ranking member, for his opening remarks.

Testimony of William K. Lietzau
Deputy Assistant Secretary of Defense for Detainee Policy
House Armed Services Committee
Sub-Committee on Oversight and Investigations
April 13, 2011

Chairman Wittman and Congressman Cooper, thank you for the opportunity to appear before you today to discuss our detention and transfer policies. It is a privilege to be here. I was asked to take the position of Deputy Assistant Secretary of Defense for Detainee Policy after serving 27 years in the Marine Corps. I agreed because I recognize the vital importance of this issue to our war-fighting efforts and to our broader national security interests. For that same reason, I welcome this opportunity to discuss our detention and transfer policies.

Since its creation, the Office of Detainee Policy, and its predecessor, the Office of Detainee Affairs, has worked closely with the House Armed Services Committee, and your colleagues on the Senate Armed Services Committee, to develop durable detention policies, procedures, and practices that conform with our domestic and international legal obligations, uphold our national values, and protect and further our national security interests. Together, we have learned that there are many challenges when dealing with the complexities associated with detention in a 21st Century asymmetric armed conflict. As President Obama said in his remarks on national security nearly two years ago, "After 9/11, we knew that we had entered a new era."

In the first days of this Administration, the President issued three Executive Orders focused on detention policy. Executive Order 13492 directed the closure of the detention facility at Guantanamo Bay, a policy to which the Administration remains committed because it is important for our national security. The President also set forth a robust agenda to develop a

more sustainable detention policy that reflects our values, including by reaffirming the U.S. commitment to the prohibition on torture; continuing to treat all persons in U.S. custody in armed conflict humanely; and banning the use of abusive interrogation techniques, acknowledging what our men and women in uniform have asserted for years – that the Army Field Manual provides all the flexibility our interrogators need to collect valuable intelligence. In addition, the Administration established a plan to comprehensively review each detainee remaining at Guantanamo Bay, in order to determine the disposition most appropriate to each individual. This comprehensive review concluded in January 2010.

Since that time, working collaboratively with Congress, we have reformed military commissions to ensure fair proceedings that afford fundamental judicial guarantees. Information derived from cruel, inhumane, degrading treatment or punishment has been banned as evidence. As announced by the Attorney General last week, the Administration intends to try the alleged perpetrators of 9/11 in these reformed commissions. The Administration will also continue to seek to prosecute terrorists in our Article III court system, which is a critical tool in our counterterrorism efforts. Reformed military commissions and civilian prosecutions are each important tools in the fight against terrorism. We remain steadfast in our belief that the most effective way to deliver justice and ensure the Nation's security is by trying particular individuals in the forum most appropriate to the facts of an individual case.

Traditionally, in war, militaries capture and detain individuals who belong to the enemy's armed forces to mitigate the threat they pose in the ongoing conflict. Modern armed conflict with transnational terrorist organizations severely complicates this effort. Membership in armed

groups can be difficult to determine, and the scope of an armed conflict with a transnational non-state actor is difficult to define. Because of these complicating factors, over the years, this Department has developed and refined a series of processes in Afghanistan, Iraq, and Guantanamo Bay, each of which is designed to protect our war-fighters by removing threats from the battlefield. At the same time, these processes are designed to ensure that the United States neither deprives any individual of liberty unnecessarily, nor detains any individual longer than required to mitigate the threat to our national security, including our ongoing military operations.

Building on the earlier processes, Executive Order 13492 provided for a new comprehensive review of every detainee at Guantanamo Bay, to determine whether they should be held in detention pursuant to authority under the Authorization for the Use of Military Force, prosecuted by our federal courts or in a military commission, or transferred to their home or a third country. A Task Force of senior officials from the Departments of Defense, State, Homeland Security, Justice, and the Office of the Director of National Intelligence, drawing upon information assembled from agencies across the government, reviewed each individual detainee to determine an appropriate disposition. Decisions were made by the unanimous agreement of the represented agencies.

In Iraq, where our operations are now governed by Iraqi law and the Security Agreement between our two countries, the Department previously set up the Multi-National Forces Review Committee, a board of three officers, to review each detainee's case periodically in order to determine how best to mitigate any continuing threat they may have posed.

In Afghanistan, the Department established a new administrative review system for individuals that also significantly improved on previous iterations. This “Detainee Review Board,” which provides each detainee a personal representative before a board of three field grade officers, assesses both the legality of the detainee’s detention and the best long-term disposition every six months.

Focusing more directly on the Guantanamo transfer process, it is important to remember that a determination that a detainee is approved for transfer does not necessarily result in immediate departure from Guantanamo. The “transfer” designation a detainee received from the Task Force review or the designation a detainee may receive from a future Periodic Review Board established pursuant to Executive Order 13567 is only the first step in a process. Finding a detainee a suitable location that is satisfactory from both a security and humane treatment perspective is a delicate and difficult task. For that reason, we again have turned to the interagency to help provide the fullest possible assessment to ensure we are handling the transfer of detainees appropriately.

The decision to transfer a Guantanamo detainee to his home country or a third country is taken only after these comprehensive review processes have taken place, and we believe that his detention is no longer necessary for national security purposes. In this Administration we have established an interagency coordinating process, which Special Envoy Dan Fried and I co-chair. In that process, we carefully assess all information related to the transfer modalities and any new information arising since the Task Force review identified the detainee as a transfer candidate.

Our task is both to ensure that a former detainee is not transferred to an environment in which his reengagement is likely and to ensure that we do not unnecessarily hold individuals in contravention of our values and to the detriment of our credibility in the international community and with the American people. As we seek the right balance, we must maintain the flexibility to use all our military and law enforcement tools.

Recognizing that your focus is on transfers from Guantanamo Bay, I would briefly like to outline for you the broader policy context in which transfers fit. Transfers should not be viewed as merely a means toward the end of closing Guantanamo Bay, even though they further that interest. The current conflict does not lend itself to a one-size-fits-all solution. The flexibility to determine when it is in our national security interest to transfer individuals we are detaining is a necessary component to an effective detention, and our broader counterterrorism, policy.

The latest development in the evolution of process for detainees is Executive Order 13567, which defines a process for periodic review of covered detainees. This process will evaluate regularly the propriety of continued detention for each detainee at Guantanamo who is not already identified for transfer or been charged or convicted criminally. These measures are in addition to Guantanamo detainees' right to challenge the legality of their detention in Federal court as most have done. The new review process builds upon the interagency review process coordinated by the Department of Justice under the 2009 Executive Order and ensures that we will continue to determine whether our national security interests require their continued detention. With respect to those we must continue to detain, borrowing again from the President's May 2009 National Archives speech, these detainees are "people who, in effect,

remain at war with the United States.” And we will continue to hold these individuals in a manner that complies with our domestic and international obligations, and is consistent with our values.

In addition to strengthening our own policies and procedures, we must continue to work with our partners around the world to build their capacity to confront this common challenge. We are cognizant that deepening our cooperation with our international partners to develop credible rehabilitation and reintegration programs as well as a durable counterterrorism legal framework, are vital to addressing the threat of violent extremists in their own countries and the threat posed by recidivism. Importantly, we need to ensure that our detention policies are principled, that they evoke credibility with our public and the international community, and that they can be sustained into the future as a useful tool in our counter-terrorism fight.

In applying these policies, first and foremost, we must ensure that we do not detain the wrong individuals; we must make certain that those we capture are in fact legally detained as persons who are part of or substantially supporting enemy forces. The review processes we apply must be carefully calibrated to ensure that those who are lawfully detainable under the law of war are detained, and that no detainee who was mistakenly or unnecessarily detained in the heat of combat continues to be held.

Similarly, we must carefully weigh the costs and benefits of continued detention in our counter-terrorism fight. We hold at Guantanamo those detainees we assess as continuing to pose a threat in our ongoing conflict. Just as we do with prisoners of war in more traditional armed conflicts,

we acknowledge that the threat they pose may change over time. In today's conflict, the threat posed by a particular detainee may be mitigated, through participation in a reintegration program or through other focused measures to prevent reengagement. Detention without a process sufficient to assess whether the threat an individual poses can be sufficiently mitigated through means other than detention by the United States comes at a significant cost with respect to the cooperation and respect of allies and partners – cooperation that is vital to the success of future counterterrorism efforts. Collectively, the review conducted under Executive Order 13492 and the new Periodic Review Boards comprise such a process.

To address these very complex matters, we cannot rely on a one-size-fits-all mentality; instead, we must retain the flexibility to use all our tools in order to have a framework of detention policies and practices that are principled, credible, and sustainable. By principled, I mean it must provide fair and humane treatment to each detainee, including a process by which we can distinguish between a belligerent who poses a significant threat and one who should not be detained, whose desire to remain a belligerent has ended, or whose threat can be mitigated without further detention.

In order to be credible, this framework must advance the law in a way that imbues the entire system with legitimacy so that it will be accepted at home and abroad and serve as a model to influence other countries' conduct. By ensuring our system's credibility, we can diffuse the common, but inaccurate, criticism that the United States is acting outside the law, and strengthen our effectiveness in combating al-Qa'ida and its associated forces.

Finally, the sustainability of such a framework depends not only on its principled nature and its credibility with our courts, our people, and the international community, but on its ability to address the realities of 21st Century warfare, thus maintaining in the law of war an appropriate balance between military necessity and humanitarian interests. No review system will be perfect. We must be able to guard against belligerent reengagement, while still allowing for the full spectrum of transfer or prosecution options as alternatives to prolonged detention. Flexibility to use the tool which best serves our national security interests is absolutely essential to accomplishing these objectives.

The Department stands ready to work with this Committee and other interested Members of the Congress to further, in both policy and practice, the requirements of a principled, credible, and sustainable detention policy that maintains the flexibility critical to meeting and addressing our national security needs.



William K. Lietzau

Deputy Assistant Secretary of Defense (Detainee Policy)



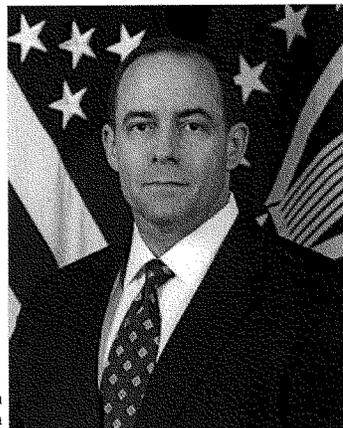
William K. Lietzau was appointed as the Deputy Assistant Secretary of Defense for Detainee Policy on February 16, 2010.

In this capacity, he is responsible for developing policy recommendations and coordinating global policy guidance relating to individuals captured or detained by the Department of Defense.

Mr. Lietzau is a retired Marine Corps officer who served primarily as a judge advocate. His most recent assignment was at the White House as Deputy Legal Adviser to the National Security Council where he addressed a variety of legal issues dealing with subjects such as international criminal law, counter-narcotics, interdictions, piracy, counter-terrorism, weapons of mass destruction, non-proliferation, missile defense, foreign assistance, and treaty implementation. Mr. Lietzau was initially trained as an infantry officer in the Marine Corps. His first assignment was with Company G, 2nd Battalion, 3rd Marine Regiment in Kaneohe, Hawaii where he served as a Rifle Platoon Commander, Executive Officer, and Company Commander. As a judge advocate in the Marine Corps, he was stationed in Japan,

Germany, and numerous locations within the United States. His criminal law experience includes service as a Prosecutor, Defense Counsel, Military Judge, and Deputy Chief Judge of the Navy-Marine Corps Trial Judiciary. He also served as a Special Assistant U.S. Attorney and headed the Navy and Marine Corps' Appellate Government practice. As a legal adviser, he served as Staff Judge Advocate to United States European Command, Chief of the Law of War Branch for the Department of the Navy's International Law Division, Deputy Legal Adviser to the Chairman of the Joint Chiefs of Staff, and Special Adviser to the General Counsel in the Office of the Secretary of Defense. As a Lieutenant Colonel, he commanded 1st Recruit Training Battalion in San Diego, and as a Colonel, he commanded the Marine Corps installation at Henderson Hall. Mr. Lietzau also has served on several United States delegations in multilateral treaty negotiations including those adopting the Terrorist Bombing Convention, the Ottawa Convention banning anti-personnel landmines, the Second Protocol to the Hague Cultural Property Convention and the Rome Statute for the International Criminal Court. He led the United States negotiating team responsible for defining war crimes for the International Criminal Court. He has also taught international law as an adjunct professor in Georgetown University Law Center's Master of Laws program and published several articles on international, criminal and constitutional law subjects.

Mr. Lietzau earned his B.S. in Political Science from the United States Naval Academy and his J.D. from Yale University. He also holds an LL.M. from the Judge Advocate General's School, U.S. Army and an M.S. in National Security Law from the National War College. He is a member in good standing of the State Bar of Connecticut.



**Testimony of Ambassador Daniel Fried
Special Envoy for the Closure of the Guantanamo Detainee
Facility
House Armed Services Committee
Sub-Committee on Oversight and Investigations
April 13, 2011**

Chairman Wittman and Ranking Member Cooper, thank you for the opportunity to testify here today. I welcome this opportunity to offer background to an important and complex issue.

On May 15, 2009, I assumed my current responsibilities as Special Envoy for Closure of the Guantanamo Detainee Facility, after four years as Assistant Secretary of State for European and Eurasian Affairs. I am a career foreign service officer of 34 years and in my current assignment serve as the Department of State's lead for the diplomatic aspects of detainee transfers related to President Obama's January 22, 2009 Executive Order 13492 on the review and disposition of individuals detained at Guantanamo and the closure of the detention facility.

The Department of State has had responsibility for engaging America's allies and partners across the world on this issue. Working closely with our interagency colleagues, particularly with the Department of Defense and the intelligence community, we have been involved in negotiations for the transfer of 67 detainees to foreign countries during this Administration. This includes the transfer of 40 detainees to third countries (i.e., countries of which they are not nationals). We are also closely involved in follow up with those countries on the post-transfer progress of former detainees, particularly detainees resettled in third countries.

Working closely with the Department of Defense, my office has brought many foreign government delegations to Guantanamo. These officials have seen what some of you and I have seen: the facilities that house detainees at Guantanamo are modern and humane, and the men and

women who run them are serious, capable professionals. Despite the high quality of the facilities and the skill of the personnel there, my years of working on this issue, indirectly in the last Administration and directly in this one, lead me to believe that the closure of the Guantanamo detention facility is in our national interest. The facility's existence continues to do more to harm than improve our security; indeed, for many years, the facility has constituted a net liability for our nation in the world. It continues to be one of the primary concerns raised with the United States by countries around the world. Many of our closest allies are so committed to supporting the President's policy of seeking to close the Guantanamo detention facility that they have moved past rhetorical support to assistance through action, including by accepting detainees into their own country.

Transferring detainees from Guantanamo and expressing the objective of closing it are not new tasks. In 2006, President Bush publicly expressed his desire to close the facility, and the previous Administration transferred 537 detainees from Guantanamo. Most of those transferred were repatriated to their country of origin, and in large numbers: the previous Administration repatriated 198 detainees to Afghanistan, 121 to Saudi Arabia, 50 to Pakistan and 14 to Yemen. There were also smaller numbers of detainees repatriated to other countries, including European countries, where they had citizenship. The previous Administration also resettled eight detainees in a third country, Albania, which agreed to accept detainees who, mainly due to humane treatment concerns, could not be repatriated. Albania was the only country during the previous Administration that accepted detainees that were not its own nationals. Hundreds of these transfers pre-dated the Supreme Court's landmark *Boumediene* decision of 2008, meaning, in short, that there were no court orders then compelling release of these detainees. The transfers thus were initiated by the Executive. These transfer efforts were publicly known but generated neither much credit for the prior Administration nor much controversy.

By January 20, 2009, there were 242 detainees at Guantanamo. This included a large number of detainees who had been approved for transfer

during the prior Administration. It is important to note this because of a common misperception that detainees transferred earlier were necessarily the “easy cases,” and that all those who remained were therefore more dangerous. In fact, a number of detainees at Guantanamo in January 2009 were still being held not because of the threat that they might pose, but because they could not be returned to their country of origin due to concerns about their humane treatment, and no other country had yet been found to accept them. The 242 detainees at Guantanamo also included 20 detainees who had been ordered released by federal courts, including the 17 Uighurs (an ethnic minority from western China) initially ordered released into the United States in October 2008.

This in short was the situation that the United States faced at the beginning of 2009: we had transferred well over 500 detainees to foreign countries; there remained a significant number of Guantanamo detainees who had been approved for transfer or ordered released; and our allies and partners were calling for action to close Guantanamo. On January 22, 2009, President Obama signed Executive Order 13492 which directed a comprehensive review of all remaining Guantanamo detainees and the closure of the detention facility. That order called for a determination as to the appropriate disposition of each detainee: prosecution, transfer, or other lawful means. There were no assumptions as to whom or how many would fall into each of those categories. Rather, the overarching goal was to have a comprehensive, clean-slate, professional interagency assessment of each detainee, and, among other tasks, to move forward on transfers, using the momentum of the President’s commitment to close Guantanamo, to countries that could mitigate any future threats as evaluated in those assessments.

The Guantanamo Review Task Force and higher-level Review Panel established in accordance with the January 22, 2009 Executive Order, reviewed 240 of the Guantanamo detainees (two of the 242 at Guantanamo were not reviewed under the Executive Order: one had already been convicted and sentenced in the military commission system in 2008 and the other committed suicide in 2009 before his case was reviewed). The

Guantanamo Review Task Force submitted its final report on January 20, 2010. I served as a voting member on the Review Panel and my office supported the work of the Task Force. The other agencies represented as voting members of the Review Panel included the Department of Defense (the Office of the Secretary of Defense and the Joint Chiefs of Staff had independent votes), the Department of Homeland Security, the Office of the Director of National Intelligence, and the Department of Justice (which chaired the Review Panel). The review process was designed to prevent the stove-piping of information and the review was undertaken by experienced career professionals with a broad range of skills. The Task Force and Review Panel achieved a serious, comprehensive, and professional understanding of each detainee at Guantanamo. I encourage every member of this Committee who has not yet read the Task Force's Final Report to do so: it is one of the best-written, clearest examples of government prose available on any subject. All decisions required unanimity among all the agencies represented on the Task Force, either at the level of the Review Panel or at more senior levels.

As a result of this process, of the 240 detainees under the Executive Order:

- 36 were referred for prosecution, either in Article III federal courts or military commissions;
- 30 from Yemen were designated for "conditional detention" because of the deteriorating security environment in that country (meaning they were not approved for repatriation to Yemen, but could be repatriated in the future if security conditions in Yemen improved and the current moratorium on transfers to Yemen were lifted);
- 48 were determined to be too dangerous to transfer but not feasible for prosecution, and thus were designated for longer-term detention under the Authorization for Use of Military Force passed by Congress after the 9/11 attacks; and
- 126 were approved for transfer.

As provided in the Task Force final report (page 16), *“There were considerable variations among the detainees approved for transfer. For a small handful of these detainees, there was scant evidence of any involvement with terrorist groups or hostilities against Coalition forces in Afghanistan. However, for most of the detainees approved for transfer, there were varying degrees of evidence indicating that they were low-level foreign fighters affiliated with al-Qaida or other groups operating in Afghanistan.... It is important to emphasize that a decision to approve a detainee for transfer does not reflect a decision that the detainee poses no threat or no risk of recidivism.”*

My office was focused on the 126 detainees approved for transfer. This category was made up of two groups of detainees: first, detainees who could, at least in theory, be repatriated to their country of origin. This included 35 Yemenis approved for transfer before security conditions in Yemen further deteriorated, by far the largest national group of detainees remaining at Guantanamo, and also included detainees of other nationalities (Afghans, Algerians, Kuwaitis, Saudis, and others). In working with receiving governments for repatriations of this first group, my office built on the experience of the previous Administration. For example, Algeria had demonstrated a solid record of secure and humane treatment of repatriated detainees. This Administration has repatriated a total of four detainees to Algeria and its record of secure and humane treatment continues. In some cases, such as Yemen, the challenge was greater. This Administration repatriated eight detainees to Yemen, including two detainees ordered released by federal courts. But, as a result of growing concerns about the security situation in Yemen, in January 2010 the President suspended all further transfers to Yemen (other than court-ordered releases), and this suspension remains in effect. (As this Committee is aware through our advance notification process, one of those detainees was ordered released by a federal court and was repatriated to Yemen last summer.)

The second group of detainees approved for transfer included 57 detainees who could not be returned to their countries of origin due to

treatment concerns and who therefore required resettlement in third countries. As a matter of longstanding policy, including both in this Administration and the prior one, the United States does not send any detainee to a country where it is more likely than not that he will be tortured. This is consistent with the U.S. implementation of its obligations under Article 3 of the Convention Against Torture. We take this obligation seriously and do not split definitional hairs. Because of the difficulty in finding countries that are willing to accept detainees who are not their nationals and also capable of mitigating whatever risk the detainee may pose, the bulk of my office's work focused on these third-country resettlements.

One early step was our conclusion with the European Union of an "umbrella" joint statement – issued June 15, 2009 – which welcomed the closure of the Guantanamo Bay detention facility and encouraged individual EU countries to accept detainees. Following this joint statement, a number of European and other countries expressed interest in accepting detainees for resettlement. The United States was and remains grateful for their support in this challenging effort.

As my office followed up on these expressions of interest, we drew on the previous Administration's experience with repatriations, including its repatriations to European countries. This Administration's resettlement efforts have tended to be a labor-intensive process, as each resettlement was individually tailored to the country and detainee concerned.

Working closely with the other members of the Review Panel, we sought to (1) create solid channels of information sharing with a potential receiving government about a prospective detainee for resettlement; (2) develop security assurances appropriate to the detainee; and (3) encourage measures to facilitate the former detainee's successful reintegration into society. We encouraged governments considering resettlement of detainees to send delegations to Guantanamo Bay to interview the detainee and to meet with the professional staff there, and many did so. We provided interested governments with as much information as possible on a given

detainee, subject to foreign disclosure requirements, derived from the detainee assessment considered by the Review Panel as part of its decision-making process. That information regarding the detainee was provided to foreign governments through longstanding foreign disclosure procedures established for information of this nature. And we discussed with the receiving government the reintegration program planned for each detainee.

While the State Department had responsibility for these discussions, we consulted closely and regularly with our interagency colleagues on all aspects of potential resettlements. We found that receiving governments also approached each detainee resettlement with care and appropriate caution. Needless to say, receiving governments took their own security as seriously as we take ours. Often it would take many months to conclude arrangements for a single transfer for resettlement. The time and care invested was worth it.

As a result, we have thus far transferred 67 of those 126 detainees approved for transfer, including 12 Uighurs who had initially been ordered released into the United States, and 11 other detainees ordered released by the courts. These 67 transfers include 40 detainees transferred to 17 third countries.

Our work does not end with the detainee's transfer. On the contrary, using diplomatic, intelligence, and other channels, we follow up on a regular basis with receiving governments to determine how the resettlement is going, both to learn lessons and to determine where there are issues that need addressing. So far, our experience has been generally positive, though a number of issues, more related to integration than security, have developed. We were and remain alert to the potential for reengagement. The interagency Guantanamo Detainee Transfer Working Group, which replaced the Review Panel, consults regularly and in real time when appropriate, on issues that arise.

Of the 126 detainees cleared for transfer, 59 still remain at Guantanamo. Twenty-seven of these are Yemenis, and we are not planning

to repatriate any of these Yemeni detainees, absent a court order, until the security situation in Yemen improves. The remaining are candidates either for repatriation or resettlement. The Guantanamo Detainee Transfer Working Group continues to assess each potential transfer on a case-by-case basis, and is fully informed about diplomatic prospects and possibilities.

My office also has the responsibility to help inform the Congress about our progress with respect to detainee transfers and issues that have arisen. My interagency colleagues and I have sought to do so in a number of briefings and appreciate the opportunity to do the same in this hearing. In that regard, some of the Guantanamo-related reporting requirements the Congress has imposed – such as the 15-day advance notification to Congress of all transfers to foreign countries – have facilitated this flow of information. On the other hand, new “certification” requirements on the transfer of detainees to foreign countries interferes with Executive branch authority and hinders our ability to act swiftly and with flexibility during our negotiations with foreign countries. As I have stated, flexibility is vital to developing an arrangement that best addresses U.S. national security. Requiring the Executive branch to certify to additional conditions hinders the conduct of these delicate negotiations and has the potential to undermine our efforts to transfer detainees altogether. Our friends and allies were not merely looking to assume our problems when accepting detainees from Guantanamo. They were joining our efforts to close the facility. They took on the burden of accepting detainees out of a sense of shared and committed partnership to a common goal.

The Guantanamo Bay Detention Facility has raised controversy and concern since it opened. Closing it remains in the national interest. Doing so, in the best of circumstances, raises complex and difficult legal, diplomatic, and security questions and choices. It is worthwhile discussing these and seeking sound solutions. For too long, the debate about Guantanamo has been polarized and, frankly, prone to extreme positions. As President Obama said in 2009 speech at the National Archives, “We seek to do what’s right over the long term.... [W]e can leave behind a legacy

that endures and protects the American people and enjoys a broad legitimacy at home and abroad.”

I hope these remarks have helped demystify the careful work that goes into transferring Guantanamo detainees abroad, and I look forward to your questions.

Daniel Fried
Special Envoy for Closure of the Guantanamo Detention Facility

Daniel Fried assumed his position as Special Envoy for Closure of the Guantanamo Detainee Facility on May 15, 2009. Prior to that, he served from May 5, 2005 Assistant Secretary of State for European and Eurasian Affairs. Ambassador Fried served as Special Assistant to the President and Senior Director for European and Eurasian Affairs at the National Security Council from January, 2001 to May, 2005.

Ambassador Fried was Principal Deputy Special Advisor to the Secretary of State for the New Independent States from May 2000 until January 2001. He was Ambassador to Poland from November 1997 until May 2000.

Daniel Fried, of Washington, DC, began his career with the Foreign Service in 1977. He served in the Economic Bureau of the State Department from 1977 to 1979; at the U.S. Consulate General in then-Leningrad from 1980 to 1981; as Political Officer in the U.S. Embassy in Belgrade from 1982 to 1985; and in the Office of Soviet Affairs at the State Department from 1985 to 1987. Ambassador Fried was Polish Desk Officer at the State Department from 1987 to 1989 as democracy returned to Poland and Central Europe. He served as Political Counselor in the U.S. Embassy in Warsaw from 1990 to 1993.

Ambassador Fried served on the staff of the National Security Council from 1993 until 1997, first as a Director and then as Special Assistant to the President and Senior Director for Central and Eastern Europe. In his service during the Administrations of the first President Bush, President Clinton, President George W. Bush, and the early months of the Obama Administration, Ambassador Fried was active in designing U.S. policy to advance freedom and security in Central and Eastern Europe, NATO enlargement, and the Russia-NATO relationship.

QUESTIONS SUBMITTED BY MEMBERS POST HEARING

APRIL 13, 2011

QUESTIONS SUBMITTED BY MR. WITTMAN

Mr. WITTMAN. For many years, the U.S. government has sought security and humane treatment assurances from countries prior to the transfer of detainees. How effective are these assurances? Where and under what circumstances have they worked and not worked well? Why have they not been effective in some cases? What needs to be done to ensure effective assurances are in place before transferring any detainees in the future? Please provide response in classified form, if necessary.

Mr. LIETZAU. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. Why did the U.S. government send detainees to war-torn, unstable locations such as Afghanistan? Were detainees transferred to these locations even after cases of recidivism had been identified? Please provide response in classified form, if necessary.

Mr. LIETZAU. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. Given the rate of reengagement reported, were there errors in judgment with respect to transfer decisions? What lessons have been learned and to what extent have they been applied in more recent detainee transfer determinations? Please provide response in classified form, if necessary.

Mr. LIETZAU. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. Did the Executive Order Task Force review result in different assessments of the security threats posed by detainees? If so, please explain. Please provide response in classified form, if necessary.

Mr. LIETZAU. Of the 126 detainees approved for transfer by the Task Force, 63 had previously been approved for transfer during the prior administration, ordered released by a court, or both. The remaining detainees approved for transfer had not previously been approved.

However, this result does not necessarily reflect a change in the threat assessment of each detainee. Rather, the decision reflects the best predictive judgment of senior government officials, based on the available information, that any threat posed by the detainee can be sufficiently mitigated through feasible and appropriate security measures in the receiving country. Indeed, all transfer decisions were made subject to the implementation of appropriate security measures in the receiving country, and sensitive discussions are conducted with the receiving country about such security measures before any transfer is implemented. Thus the assessment of the prospects for mitigating a threat in a receiving country is a key factor that may lead to different results over time.

Moreover, the Task Force for the first time systematically consolidated information and expertise from across the United States Government and provided detailed guidance as to how both the detainee's threat and the ability of a receiving country to mitigate that threat should be evaluated. In all instances, the Task Force reviewed all prior threat assessments. In many cases, the resulting Task Force assessments were consistent with those prior assessments. In others, the assessments differed, just as security assessments made during the prior administration sometimes differed from one another or evolved over time. In some cases a different assessment could be based on the fact that the Task Force was evaluating a wider array of material than had been previously considered and that the input of all relevant agencies on the decision was received. In other cases, facts may have changed since prior assessments, including facts bearing on the credibility of some of the relevant evidence concerning the detainee or the situation in the potential receiving country.

Again, all transfer decisions were ultimately based on the unanimous agreement of DOD, DOS, DOJ, DHS, the Joint Chiefs of Staff, and the Office of the Director of the National Intelligence.

Mr. WITTMAN. In December 2010, the U.S. government reported that 25 percent of former detainees from Guantanamo are confirmed or suspected of reengaging in terrorist activities. Do you believe this is an accurate estimate of the number of recidivists? Could it be much higher than what you confirm or suspect? What would be your best guess as to what the rate actually is?

Please provide response in classified form, if necessary.

Mr. MORNSTON. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. What impacts have recidivists had on U.S. troops in Afghanistan and elsewhere? A news article earlier this week highlighted 2 former GTMO detainees who are among America's most wanted—Mullah Abdul Qayyum Zakir and Maulvi Abdul Rauf Khadim. Why were these detainees released from GTMO? Please provide response in classified form, if necessary.

Mr. MORNSTON. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. The rate of former Guantanamo detainees confirmed or suspected of re-engaging in terrorist-related activities remained relatively constant during the years 2004 to 2008, at about 5 to 8 percent. However, since 2008 the rate has increased to 25 percent. What accounts for this dramatic increase in the past 2 years? Is it due to the transfer and release of higher threat detainees, a change in reporting criteria, improved government monitoring, or something else? Please provide response in classified form, if necessary.

Mr. MORNSTON. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. Are there particular groups of former detainees or countries where monitoring and follow-up is problematic? What is being done to increase our government's capacity to track these former detainees? Please provide response in classified form, if necessary.

Mr. MORNSTON. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. The Defense Intelligence Agency previously published names of some former detainees suspected or confirmed of reengagement. This allowed the lists to be scrutinized by outside individuals and groups. Why did DIA publish these names in the past? Why does DIA no longer provide any specific names of individuals known or thought to be reengaged? Will it ever return to the previous practice? Please provide response in classified form, if necessary.

Mr. MORNSTON. [The information referred to is classified and retained in the subcommittee files.]

Mr. WITTMAN. What analysis has DIA conducted, or plans to conduct, to identify the key characteristics or factors associated with former detainees who have reengaged in terrorist activities? Please provide response in classified form, if necessary.

Mr. MORNSTON. [The information referred to is classified and retained in the subcommittee files.]