CITY ON THE HILL OR PRISON ON THE BAY? THE MISTAKES OF GUANTANAMO AND THE DECLINE OF AMERICA'S IMAGE

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS, HUMAN RIGHTS, AND OVERSIGHT

OF THE

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CITY ON THE HILL OR PRISON ON THE BAY? THE MISTAKES OF GUANTANAMO AND THE DECLINE OF AMERICA'S IMAGE

TUESDAY, MAY 6, 2008

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL ORGANIZATIONS,
HUMAN RIGHTS, AND OVERSIGHT,
COMMITTEE ON FOREIGN AFFAIRS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:10 p.m. in room 2172, Rayburn House Office Building, Hon. William D. Delahunt (chairman of the subcommittee) presiding.

Mr. DELAHUNT. The hearing will come to order. Let me apologize for the delay, but we just finished wrapping up votes. I think we have an extended period of time without votes. But if we do have votes, let me say once more please indulge us, and we will return as quickly as possible.

Today's hearing continues our examination of the detention facility at Guantanamo, and how its operation influences the perception of the United States by the international community and the resulting consequences for American national security and foreign policy objectives.

Years after Secretary Rumsfeld described the GTMO detainees as the worst of the worst, we can now conclude that, as one of our witnesses, I think it was Ms. Gilson, stated, that many are more accurately described as the unluckiest of the unlucky. For it is important to understand that a majority of the detainees were the victims of a bounty system that made them easy prey for local thugs who seized an opportunity to make a quick buck. Remember, only 5 percent of the Guantanamo inmates were captured by American forces. The rest were primarily purchased by Afghanis and Pakistanis.

Now, the fact that mistakes are made in the fog of war is understandable, and as in any human endeavor, can be expected. But once discovered, we should acknowledge those mistakes and fix them, design a system that allows redress, that embraces the rule of law in full measure, and that shows the world that American justice is not afraid of the truth, but in fact seeks the truth, however embarrassing that may be to those in power.

But no, this White House rather, in my opinion, compounds its mistakes. I find it particularly repugnant that this White House did invite the worst of the worst to come and visit Guantanamo. The administration granted security agents from Uzbekistan per-

mission to interview Uzbeks, including one Oybek Jabbarov, who we will hear more about later, to come and visit, and to interview. Imagine interrogators from one of the most egregious human rights violators in the world—and by the way, there is evidence that they have actually boiled people alive. That is according to our own Department of State Country Reports. These individuals were given full rein by our own Government to come in and threaten detainees who were in American custody.

But that is not the end of the story. Security police from China were permitted to interrogate Uighurs. Now, Uighurs are a persecuted minority from China. These detainees claimed they were supportive of the United States. And yet we allow Chinese agents to threaten and abuse them. I would say that is more than intolerable, it is despicable.

I find it particularly ironic that while Uzbek and Chinese Communist regimes can have their agents walk into this ultramaximum security facility, my own ranking member finds it difficult to meet with a convicted terrorist in a United States prison. Something doesn't compute, at least for me.

But I am not just troubled by the continued detention of some of these people, but by the U.S. practice of sending some detainees back to abusive countries on the basis of diplomatic assurances. That is a term that I have come to have an opportunity to examine on other occasions. What the term means in its essence is that when we receive promises from the receiving country that the detainee would not be tortured, we would send those individuals there to comply with our Convention against Torture obligations. Now, some of the countries that we received diplomatic assurances from include Libya, Tunisia, Kazakhstan, and Iran. Iran. All nations which our State Department described as practitioners of systematic torture in their penal institutions.

While, as I indicated, this subcommittee has examined diplomatic assurances in the context of renditions, and we know that all too often they are worth little more than the scrap of paper that they are written on, if in fact they are in writing, I can't seem to find in one particular case of anything in writing. That case is the case of Maher Arar, a Canadian of Syrian origin who was detained at JFK, shipped off to Syria on the basis of diplomatic assurances, assurances that did little good in preventing his torture.

Now, the United States uses these diplomatic assurances to argue that it has, as I said, fulfilled its obligations under the Convention against Torture. But in the case of the Uighurs, Chinese diplomatic assurances couldn't pass the laugh test. The administration was forced to concede that the Uighurs could not be sent back to China. Albania agreed to take some, but now China has made it very clear that any nation which accepts Uighurs will suffer the consequences. So the rest of them simply languish at Guantanamo.

Now what about Mr. Jabbarov, the Uzbek? It has been over a year since his lawyer received an e-mail indicating that he was determined to be "no longer a threat and could depart Guantanamo," but the administration has no place to send him, all the while refusing to rule out that they might send him back to Uzbekistan. Well, if the Chinese cannot be trusted to treat people humanely, it

is baffling to me how we could rely on the Karimov regime that boils people alive.

Let's be clear about what is at stake here. The damage from Guantanamo goes well beyond the pain and suffering of those involved and their families. It has become a symbol, a sad symbol. It has single-handedly dealt a blow to the Nation's image in the world that will take decades to overcome. I presume that is why Senators McCain, Clinton, and Obama, as well as Secretaries Rice and Gates, have called for Guantanamo to be closed. But we are paying the price. The consequences to our national interests are devastating.

The State Department's own Group on Public Policy for the Arab and Muslim World concluded that hostility toward the United States makes achieving our policy goals far more difficult, including dealing with terrorism. And as we know, it is not limited to the Middle East. As the Government Accountability Office stated in April 2005, that reputation seriously undermines our ability to pursue our foreign policy objectives all across the globe in an array of spheres, whether it be building a security alliance or selling American goods.

In our efforts to claim a moral authority, Guantanamo is a serious obstacle. Sixty-eight percent of people across the globe disapprove how the United States Government has treated detainees in Guantanamo and other prisons. In several countries, including Germany, the United Kingdom, Argentina, and Brazil, disapproval rates exceed 75 percent.

So it is well past time for the Bush administration to deal with its mistakes. And we all have to work aggressively to free those who everyone agrees can depart. If no nation can be found to which detainees could safely be sent without risk of torture, then we need to be creative about alternatives, including bringing some of them to the United States. For those who the administration still considers a threat, give them a day in court and let's be done with it.

Now let me turn to my friend and colleague from California, the ranking member, Mr. Rohrabacher, for any statements he cares to make.

Mr. ROHRABACHER. Thank you very much, Mr. Chairman. And I appreciate the fact that you feel passionate about this issue, and I appreciate the fact that you have called us together to have an honest discussion of it. Whenever we discuss issues like Guantanamo or some of the other elements of our current reality, I have to always keep in mind that the reality in which we are dealing was shaped with the mass murder of 3,000 Americans on 9/11, as well as the slaughter of innocent people by the followers of radical Islam in various parts of the world. Thus, the world we live in was shaped by those events. We are actually committed now, and we have been committed since 9/11, to preventing such mass slaughter to happen again.

One of the reasons why this very well-funded threat of radical Islam has not been successful in killing more thousands of Americans, as well as others in the West, as well as moderate Muslims, has been because we have had some success in our dealings with the challenge that we face, and part of the success has been the

incarceration of individuals who are in the leadership of that movement.

I have no apologies that Khalid Sheikh Mohammed, the man who planned the 9/11 attack, number three man to Osama bin Laden, was waterboarded. I have got no apology whatsoever. And after he was waterboarded, and the report is—and by the way, waterboarding as we know has been used three times, at least reportedly that we understand. One was Khalid Sheikh Mohammed, the other was the man who was responsible for publicly videotaping the beheading of an American journalist, and I am not sure what the other man who was waterboarded was guilty of. But the fact is that information from this waterboarding, which is nothing more than creating a psychological sense of fear and overwhelming fear, we got a lot of information. And perhaps, and perhaps from that, from the Khalid Sheikh Mohammed who gave us a tremendous amount of information, we were able to do something that actually stopped another event of the magnitude of 9/11, or maybe two or three of them. Or maybe the fact that Ramzi Yousef, who was part of Khalid Sheikh Mohammed's family, was targeting Disneyland in Orange County, where I come from, perhaps when they found his laptop in the Philippines with lists of targets that they meant to kill tens of thousands of people going to Disneyland. This is the type of people we are up against. I have no apologies that we waterboarded three of those people. And that has been turned into, internationally, into a horror story. My gosh, we used this kind of psychological pressure on these type of mass murderers. I have got no apologies for that at all. And in fact, our Special Forces, as perhaps people know, go through waterboarding as part of their training. But it is okay to go through that to train our Special Forces, but not to get information to prevent the blowing up of an American target, saving hundreds or thousands of lives?

The people in Gitmo have been the subject of a great deal of attention, and rightfully so. These are not ordinary people. These are not Afghans that were caught in Afghanistan and shipped to Gitmo. Who are they? They are by and large foreign fighters who were in Afghanistan, foreigners, at a time of great conflict, at a time when people were being shot and identified, perhaps wrongly, perhaps there were some who were identified inaccurately, identified as being a part of the al-Qaeda terrorist legion, the al-Qaeda terrorist legion who was at that time conducting a massive fight against Commander Massoud's forces and murdering Afghans by the thousands who opposed the Taliban. You had a foreign legion of radical Islamists in Afghanistan just prior to 9/11 murdering the people of Afghanistan. And that is why after 9/11, when we called on the Afghan people, they joined us in driving the Taliban out of Afghanistan, as well as driving al-Qaeda out of course. And turning over to us anyone that they thought was involved with that.

Now, obviously some of the people in any type of chaotic situation are innocent, and we should do our very best to make sure that in a time of conflict that we admit our mistakes, we tell the truth, and we admit our mistakes. And how do you determine what the truth is in a situation like this? It is very difficult. We could have left these people in Afghanistan. And I will tell you right now had we left these hundreds of men in Afghanistan, oh, we wouldn't

have gotten the criticism for what we have done to them now because they would be all dead now because the people who drove the Taliban out of Afghanistan would have killed these people because they looked at them as foreign terrorists who had come into their society and were engaged in the murder of their own people. But we took them to Guantanamo in order to question them and, yes, even to protect them. Because had we left them in Afghanistan at that time I can tell you, whether it is General Dostum, or Halili, or Ismael Khan, or any of the family members of Abdul Haq or Commander Massoud, you name it, those people would have demanded that these people would have paid the ultimate price for coming into their country.

Now, what has happened to them since? Now we have a group today that we are talking about, the Uighurs. There is nobody who has been a stronger voice for the cause of the Uighurs and their plight in China than I have been. And we have with us a lady, Mrs. Kadeer, who spent 7 years imprisoned by the Chinese, tortured, her children are held, her children are being threatened and tortured while she is on the phone listening. Yes, there is no one who has been more concerned than I have been. But she would have to admit, I believe, there are some Uighurs who are not good people, just like there are some Americans who are not good people.

I have no idea whether the Uighurs who were in Afghanistan at that time were wonderful people who were just trying to escape the tyranny of China, or whether or not there were some radical Islamic groups that decided they were going to be part of Osama bin Laden's international network. I am concerned that if there are people who are innocent who are Uighurs, just like any of those people are innocent, we should do our best to try to find out. But I would submit, Mr. Chairman, that we have released several people from Guantanamo who have then gone out and participated again in the killing of Americans.

I have a report which I will submit for the record today, this is dated July 12, 2007——

Mr. DELAHUNT. Without objection——

[The information referred to follows:]

U.S. Department of Defense
Office of the Assistant Secretary of Defense (Public Affairs)

Detainees at Guantanamo Bay

On the Web:
http://www.defenselink.mil/Utility/printitem.aspx?print=http://www.defenselink.mil/news/detainees.html
Media contact: +1 (703) 697-5131

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Special Reports

07/12/2007 Ex-Guantanamo Detainees who have returned to the fight

01/18/2007 The Manual for Military Commissions, January 18, 2007

08/14/2006 Application of Common Article 3

07/14/2006 CSRT Procedures

07/14/2006 ARB Procedures

03/11/2005 Guantanamo Bay Transforms to Meet Needs of Detainee Mission

04/19/2006 List of Detainees who went through the complete Combatant Status Review Tribunal (CSRT) process.

Related Pages

U.S. Naval Station Guantanamo Bay, Cuba

Joint Task Force-Guantanamo Bay

U.S. Southern Command

Military Commissions

Fact Sheets

08/09/2006 Flow Diagram for ARB Procedures

02/15/2006 Guantanamo Detainee Processes Fact Sheets

09/08/2005 GTMO Detainee Processes

03/04/2005 GTMO Detainee Information

12/09/2004 Habeas Notification

02/13/2004 Guantanamo Detainees

Former Guantanamo Detainees who have returned to the fight:

Our reports indicate that at least 30 former GTMO detainees have taken part in anti-coalition militant activities after leaving U.S. detention. Some have subsequently been killed in combat in Afghanistan.

These former detainees successfully lied to US officials, sometimes for over three years. Many detainees later identified as having returned to fight against the U.S. with terrorists falsely claimed to be farmers, truck drivers, cooks, small-scale merchants, or low-level combatants.

Other common cover stories include going to Afghanistan to buy medicines, to teach the Koran, or to find a wife. Many of these stories appear so often, and are subsequently proven false that we can only conclude they are part of their terrorist training.

Although the US government does not generally track ex-GTMO detainees after repatriation or resettlement, we are aware of dozens of cases where they have returned to militant activities, participated in anti-US propaganda or other activities through intelligence gathering and media reports. (Examples: Mehsud suicide bombing in Pakistan; Tipton Three and the Road to Guantanamo; Uighurs in Albania)

The following seven former detainees are a few examples of the 30; each returned to combat against the US and its allies after being released from Guantanamo.

Mohamed Yusif Yaqub AKA Mullah Shazada:
After his release from GTMO on May 8, 2003, Shazada assumed control of Taliban operations in Southern Afghanistan. In this role, his activities reportedly included the organization and execution of a jailbreak in Kandahar, and a nearly successful capture of the border town of Spin Boldak. Shazada was killed on May 7, 2004 while fighting against US forces. At the time of his release, the US had no indication that he was a member of any terrorist organization or posed a risk to US or allied interests.

Abdullah Mehsud:
Mehsud was captured in northern Afghanistan in late 2001 and held until March of 2004. After his release he went back to the fight, becoming a militant leader within the Mehsud tribe in southern Waziristan. We have since discovered that he had been associated with the Taliban since his teen years and has been described as an al Qaida-linked facilitator. In mid-October 2004, Mehsud directed the kidnapping of two Chinese engineers in Pakistan. During rescue operations by Pakistani forces, a kidnapper shot one of the hostages. Five of the kidnappers were killed. Mehsud was not among them. In July 2007, Mehsud carried out a suicide bombing as Pakistani Police closed in on his position. Over 1,000 people are reported to have attended his funeral services.

Maulavi Abdul Ghaffar:
After being captured in early 2002 and held at GTMO for eight months, Ghaffar reportedly became the Taliban's regional commander in Uruzgan and Helmand provinces, carrying out attacks on US and Afghan forces. On September 25, 2004, while planning an attack against Afghan police, Ghaffar and two of his men were killed in a raid by Afghan security forces.

Mohammed Ismail:
Ismail was released from GTMO in 2004. During a press interview after his release, he described the Americans saying, "they gave me a good time in Cuba. They were very nice to me, giving me English lessons." He concluded his interview saying he would have to find work once he finished visiting all his relatives. He was recaptured four months later in May 2004, participating in an attack on US forces near Kandahar. At the time of his recapture, Ismail carried a letter confirming his status as a Taliban member in good standing.

Abdul Rahman Noor:
Noor was released in July of 2003, and has since participated in fighting against US forces near Kandahar. After his release, Noor was identified as the person in an October 7, 2001, video interview with al-Jazeerah TV network, wherein he is identified as the "deputy defense minister of the Taliban." In this interview, he described the defensive position of the mujahideen and claimed they had recently downed an airplane.

Mohammed Nayim Farouq:
After his release from US custody in July 2003, Farouq quickly renewed his association with Taliban and al-Qaida members and has since become re-involved in anti-Coalition militant activity.

Ruslan Odizhev:
Killed by Russian forces June 2007, shot along with another man in Nalchik, the capital of the tiny North Caucasus republic of Kabardino-Balkaria. Odizhev, born in 1973, was included in a report earlier this year by the New York-based Human Rights Watch on the alleged abuse in Russia of seven former inmates of the Guantanamo Bay prison after Washington handed them back to Moscow in 2004.

As the facts surrounding the ex-GTMO detainees indicate, there is an implied future risk to US and allied interests with every detainee who is released or transferred.

Mr. ROHRABACHER [continuing]. Talking about the release of one Kuwaiti who had been detained. And what happened when we let him go from Guantanamo? He has been killed in Iraq after his participation in a homicidal attack that resulted in the killing of seven innocent people in Iraq. Well, wonderful. Everybody pressured them because maybe there was some bad things being done in Guantanamo and to some of these fellows, and we let this guy go. And what is worse, the killing of these seven people, or the other people that were killed by some of the people we have released, or the fact that several people who are innocent were unjustly kept in that prison?

Now, there certainly is no excuse for people not to take that job seriously of finding out who is innocent there at Guantanamo and who is not. But for those people who are not innocent, those people, whether they are Uighurs, or whether they are from Kuwait, or whether they are from other parts—any other part of the world and they came there to be part of that al-Qaeda terrorist legion, we do not need to bow our heads and apologize for keeping them in Guantanamo.

I hope that today that we learn more about the plight of the Uighurs, and I hope to find out whether these are innocent people or whether or not these are terrorists. But let me add this one last point. Whether they are terrorists or whether they are innocent, that is no excuse, the chairman is absolutely right, that is no excuse for us to be cooperating with terrorist gangster regimes like China. We should never have permitted the Chinese to come in and interrogate prisoners being held in Guantanamo or anywhere else. The people who run the regime in China are the ones who should be in prison. And I agree with you totally on that point. But I do not agree with you on the assessment of the importance of Guantanamo and what that has done to our battle against radical Islam, and protecting the American people against the other type—the type of mass slaughter that we faced in 9/11.

Thank you very much.

Mr. DELAHUNT. I thank the gentleman. And I would note that we have been agreeing too often in the course of the past several hearings. And it is finally good to have this sharp disagreement that we now have, with the exception of the statement that you made relative to allowing security agents from authoritarian regimes, such as China and Uzbekistan to come into an American prison to interrogate, to intimidate, and to abuse prisoners under our control and our custody. That is unacceptable. And I am glad to hear that the gentleman agrees.

I also would yield to the gentleman from Missouri. But before I do, I think you asked the salient question, as you frequently do, Mr. Rohrabacher, who are these people? And I would respond by saying you don't know and I don't know, and nobody knows, with the possible exception of the individuals that represent them. There are people there that are guilty. No doubt. And we should deal with them. We have dealt with them in the past. We dealt with the Yusufs. We dealt with others that are currently serving life imprisonment. No one, no one, not any American would say that anything other than dealing in justice demands that they be dealt with.

But again, we are Americans. We believe in a search for the truth. We are not going to hide in the shadows. We are not going to hide behind classified information when it is not really classified. We are not going to kid the American people.

With that, I yield to the gentleman, the vice chair of this committee, Mr. Carnahan from Missouri.

Mr. CARNAHAN. Thank you, Mr. Chairman and ranking member, for having this hearing, for our panelists. Many of the hearings we have held have shown that most people around the world don't view the U.S. poorly because of what we stand for. They view our country poorly because of the actions we have taken around the world. The administration demands high standards from some countries, excuses others, and then turns around and commits serious human rights violations like Guantanamo and Abu Ghraib. It is not hard to see how our image suffered.

The common theme that has come up in my discussions with other leaders and citizens from around the world is that most people still respect American values of international cooperation, standing for the rule of law, the Geneva Convention, basic human rights. We really lose ground on the issue of how we act in the world. The Bush administration's actions over the last several years at Guantanamo played directly into our declining image around the world. When we don't hold ourselves to the standards we expect of others, it is only common sense that our country will be viewed in a less favorable light.

And I think history is a good teacher in this respect. Back at the turn of the last century one of our Presidents, President Teddy Roosevelt, during the Philippine insurrection and accusations of waterboarding against our own military, wrote to one of our military commanders, and I want to read a passage from his letter. He said,

> "The President desires to know in the fullest and most circumstantial manner all the facts for the very reason that the President intends to back up the Army in the heartiest fashion in every lawful and legitimate method of doing its work. He also intends to see that the most vigorous care is exercised to detect and prevent any cruelty or brutality, and that the men who are guilty thereof are punished. Great as the provocation has been in dealing with foes who habitually resort to treachery, murder and torture again our men, nothing could justify or be held to justify the use of torture or inhuman conduct of any kind on the part of the American Army."

That was President Teddy Roosevelt back at the turn of the last century. I think those words are very useful today as well, and I yield back.

Mr. DELAHUNT. I thank the gentleman. Now let me introduce our speakers. The detainee representatives, however, will discuss the situation in terms of their clients, happen to all be from New England, where it all began. America. Boston, specifically. The home of Red Sox Nation.

Mr. Mone, who represents Mr. Jabbarov, who I alluded to earlier, is an associate of the Boston firm of Esdaile, Barrett & Esdaile. He practices in all areas of civil litigation. Before joining the firm he

worked as an assistant district attorney, prosecuting a broad spectrum of criminal cases in both the District and superior courts. He actually tried cases. He is not an academic. He understands what it is to deal with witnesses, and to examine credibility, and to make some tough decisions. He graduated from Skidmore and also graduated from my alma mater, Boston College Law School.

Steve Oleskey, who is an attorney for the Bosnian Algerians is a partner at Wilmer Hale, also in Boston. His practice focuses on complex civil litigation and appellate argument. From 1987 to '88 he served as Massachusetts deputy attorney general and chief of the Public Protection Bureau. He has received numerous awards that I am not going to go into, except for one. He is the 2007 recipient of the ABA's Pro Bono Public Service Award for outstanding lifelong commitment to pro bono work. And I think that is of special note. And Steve, welcome. He is a graduate from Wesleyan as well as New York University Law School.

Elizabeth Gilson is a solo practitioner based in New Haven, Connecticut. She has 30 years of experience; 20 in private practice and 10 as a lobbyist and public policy analyst. Her practice focuses on environmental regulation and general litigation. She chairs the Legal Committee of the Connecticut Fund for the Environment. She also provides special environmental counsel services to general municipalities in Connecticut.

Emi MacLean from the Center for Constitutional Rights in New York also joins us. And she has worked at the Center's Guantanamo Global Justice Initiative since June 2006. In this role she helps coordinate the pro bono attorneys representing the hundreds of men still detained at Guantanamo and supports the Center's direct representation of a number of current detainees. She graduated magna cum laude from Harvard and Georgetown University Law Center.

We also welcome Lee Casey, a partner at Baker and Hostetler here in Washington. His practice focuses on Federal environmental, constitutional, election, and regulatory law issues, as well as international and international humanitarian law. He has an extensive practice as well. From 1986 to 1993, he served in various capacities in the Federal Government, including the Office of Legal Counsel and the Office of Legal Policy at the U.S. Department of Justice. He served as the deputy associate general counsel at the Department of Energy. He is an adjunct professor at George Mason University School of Law. He is a graduate of Oakland University and the University of Michigan Law School.

I want to thank all of our witnesses for coming here today and participating in this hearing. I am sure that your statements will be most informative. Let me begin calling on—I will go in this order, Ms. MacLean, Mr. Casey, Mr. Mone, Mr. Oleskey, and we will wrap up with Ms. Gilson.

Ms. MacLean.

STATEMENT OF EMI MACLEAN, ESQ., STAFF ATTORNEY, GUANTANAMO GLOBAL JUSTICE INITIATIVE, CENTER FOR CONSTITUTIONAL RIGHTS

Ms. MACLEAN. Good afternoon. Thank you, Chairman Delahunt, Ranking Member Rohrabacher, and Representative Carnahan, and the House Oversight Committee, for hosting this hearing.

In the past 6 years we have seen two Supreme Court decisions that have recognized that habeas hearings should proceed in Federal court for the prisoners at Guantanamo, allowing them that most basic right, to challenge the legality of their detention in a fair hearing. Yet there have been 500 men released from Guantanamo and 275 who remain, and not a single one has had a fair hearing. Only one Guantanamo prisoner has been convicted by military commission, and only then on a plea agreement negotiated by political actors to secure his release. And day by day the military commission process, intended to try a very small number of the Guantanamo prisoners, is losing any semblance of legitimacy. Indeed, just last week the former military commission chief prosecutor testified on behalf of a defendant. If there was ever any doubt, it should be clear now the continued existence of Guantanamo as an offshore prison facility intended to be outside of the reach of the law is destructive for the U.S. image abroad and counterproductive for human rights and national and international security.

This statement should have been—has been said enough times by a diverse enough array of voices that one would hope that it would no longer need to be said, but the prison continues and 275 men remain. One group of men remaining at Guantanamo has been particularly forgotten, 50 detainee refugees currently imprisoned most for more than 6 years.

In many ways, the prison at Guantanamo is a place devoid of fortune, yet one's lot at Guantanamo is shaped in large part by the great vagaries of fortune and misfortune that is the country of one's birth. The prisoners from Europe were released from Guantanamo years ago, not because of threat assessments that said they never should have been there, but because their countries demanded their return. The sole Westerner remaining in Guantanamo in 2008 has been removed from the psychologically deadening solitary confinement 23 hours a day, day after day, and instead placed in a small communal living quarters. His government's advocacy urged it.

And on the distant other end of the spectrum of fortune at Guantanamo, the most unfortunate may be the detainee refugees, those men who were either born in brutal human rights abusing regimes or those who are effectively stateless. These men are faced with an impossible choice: To be detained indefinitely in the U.S. extrajudicial prison camp at Guantanamo Bay or to be repatriated to countries in which they face certain torture or persecution, in clear violation of the international law prohibition against refoulement. Almost to a person they remain imprisoned in solitary confinement at a supermaximum prison with almost no human interaction.

These men are from countries whose nationals comprise large swaths of the United States refugee and asylum population, places

like Algeria, China, Libya, Russia, Syria, Tajikistan, Tunisia, and Uzbekistan. These men have never been charged with any crime and are not expected to be charged. Indeed, approximately 30 already have been acknowledged by the United States to have been cleared for release some months or years ago, which means that the U.S. has officially recognized that it has no interest in detaining them. As with so much else at Guantanamo, the term "cleared for release" is relatively meaningless, and not just because these men remain in prison many months or years after official clearance. According to the Defense Department, there were 118 men transferred out of Guantanamo in 2007, but only about one-third of them were officially cleared. The remainder were not cleared, but they flew home all the same. At Guantanamo, the decisions about the fate of individuals are largely based on geopolitics.

So who are these refugees imprisoned at Guantanamo after more than 6 years without charge, the question that Ranking Member Rohrabacher started with? Well, there are 17 Chinese Uighurs still imprisoned at Guantanamo. Adel Noori is one. He suffered in China because he was well-connected to literary and progressive movements. Like other Uighurs, he escaped the persecution of the Chinese Government and made his way to what he thought was safety in Afghanistan in a village with other Uighurs. Forced to flee when the war started, the Uighurs were taken in by Pakistanis at the border and then sold for bounty to the United States. The United States, according to Defense Secretary Rumsfeld and documents that we have in our possession that are now publicly available, had peppered Afghanistan and Pakistan with flyers promising "wealth and power beyond your dreams," some with very specific amounts of money attached to them, for the handover of unknown enemies. The Uighurs, like many others, were caught up in a dragnet relying on limited intelligence and manufactured incentives.

Abdul Ra'ouf Al Qassim is a Libyan refugee who deserted the Libyan army when he was young and fled religious persecution in his home country. He was living with his pregnant Afghan wife in Kabul when the war forced him and his wife to flee to Pakistan. Mr. Al Qassim's house was subjected to a raid in which he was turned over to U.S. authorities, also likely for a sizable bounty. The United States Government has twice attempted to transfer Mr. Al Qassim to Libya despite Libya's known record of egregious human rights abuses.

Ravil Mingazov fled Russia because of religious intolerance and persecution by the Russian intelligence and military services. He fled in search of a new home that would be tolerant of his faith and hospitable to his family. Instead, he found himself a refugee twice over, fleeing religious persecution in his home country and war in another. His fearful second flight, hoping for safety, led him to Guantanamo and the chaos of war. He remains there today.

All of these men and approximately 45 others remain at Guantanamo today, tomorrow, and for the foreseeable future unless some intervention alters their situation.

The prohibition against torture and transfers to torture is one of the most widely recognized obligations of international law. This nonrefoulement principle is the bedrock of refugee law, and it requires an individualized determination of whether someone is at

risk prior to a transfer. Yet almost 40 men have been transferred by the United States from Guantanamo to notorious human rights abusing regimes, with no process in place to determine whether these men face individualized risks of torture or persecution upon their repatriation. They have been returned to countries like Uzbekistan, Libya, Tunisia, and Egypt. Some of these men are known to have been tortured, abused or indefinitely detained after their return. Others have simply disappeared.

The United States has for generations loudly spoken about the importance of human rights norms and refugee protection and is still the largest receiving country of resettled refugees from around the world, yet the United States has to its shame consistently refused to open its doors to any of the men it brought halfway around the world to a U.S. military prison on extraordinarily limited information. The United States should demonstrate that it is committed to preventing the transfer of these men to torture and to facilitating an official review of the individual refugee claims by the United Nations High Commissioner for Refugees or asylum claims by the Department of Homeland Security.

Representatives of the U.S. Government have insisted that they have asked dozens of countries to accept some of these men into their borders. However, if the United States is serious about finding a solution, we would commit to adhere to the international law principle of nonrefoulement, as the U.S. is legally obligated to do, invite UNHCR to conduct refugee status determinations at Guantanamo, and accept at least some of Guantanamo's refugees inside our own borders.

While a solution is being found, these men without a country should at the very least not be held in brutal conditions, in solitary confinement, simply because no country has advocated for better for them. They should be transferred out of Camp 6 to communal living urgently.

Like the hundreds of others who have since been released, these men were picked up and brought to Guantanamo without any process in place to separate the guilty from the innocent. Any meaningful oversight was consistently averted. The result is that these men remain at Guantanamo in 2008, afraid of being transferred to torture and afraid also that their debilitating confinement at Guantanamo will never end. We must rectify this wrong. Our commitment to uphold our legal obligations and realize a humanitarian solution must be more powerful than our desire to avoid recognizing the mistakes that have been made.

Thank you.

[The prepared statement of Ms. MacLean follows:]

centerforconstitutionalrights

Congressional Oversight Hearing on Guantánamo

before the

House Committee on Foreign Affairs
Subcommittee on International Organizations, Human Rights and Oversight

"The Mistakes of Guantánamo and the Decline of America's Image"

Testimony of
Emi MacLean
Center for Constitutional Rights (CCR)
Rayburn House Office Building, Room 2172
May 6, 2008

Good afternoon. Thank you, Chairman Delahunt, Ranking Member Rohrabacher and the House Oversight Subcommittee, for hosting this hearing and being seized of this important issue.

My name is Emi MacLean and I am a Staff Attorney at the Center for Constitutional Rights, or CCR. CCR is a forty-year old litigation and education organization dedicated to advancing and protecting the Constitution and international human rights. We have been representing the men detained at Guantánamo since the prison opened in 2002. Through litigation and advocacy, we have been engaged in efforts to close Guantánamo and restore the rule of law.

In the past six years, we have seen two Supreme Court decisions call for habeas hearings to proceed in federal court for the prisoners at Guantánamo – allowing them that most basic right, to challenge the legality of their detention in a fair hearing. Yet there have been 500 men released from Guantánamo, and 275 who remain – and not a single one has had a fair hearing. Only one Guantánamo prisoner has been convicted – and only then on a plea agreement negotiated by political actors to secure his release. And day by day, the military commission process intended to try a very small number of the Guantánamo prisoners is losing any semblance of legitimacy. Indeed, just last week, the former military commission chief prosecutor testified of behalf of a defendant.

If there ever was any doubt, it should be clear now. The continued existence of Guantánamo as an offshore prison facility intended to be outside of the reach of the law is destructive for the U.S. image abroad and counter-productive for human rights and national and international security. This statement has been said enough times by a diverse enough array of voices that one would hope that it would no longer need to be said. But the prison continues, and 275 men remain.

One group of men remaining at Guantánamo have particularly compelling stories, and have been particularly forgotten: fifty detainee-refugees currently imprisoned at Guantánamo – most for more than six years – simply because no country has agreed to open its doors to them. It is for the restoration of the rule of law, and for the sanity, survival and dignity of these wrongly detained men, that I am both honored and saddened to be speaking here today.

In many ways, the prison at Guantánamo is a place devoid of fortune. Yet one's lot in Guantánamo is shaped in large part by the great vagaries of fortune or misfortune that is the country of one's birth.

The prisoners from Europe were released from Guantánamo years ago – not because of threat assessments that said they never should have been there, but because their countries demanded their return. In almost all cases, European governments found that there was no evidence that would justify a prosecution of any of their nationals who had been brought to Guantánamo.

The sole westerner remaining in Guantánamo in 2008 has been removed from the psychologically deadening solitary confinement, 23 hours a day, day after day, and instead placed in a small communal living quarters. His government's advocacy urged it.

The prisoner from Australia had a plea agreement negotiated at the highest levels of the Australian and US governments – and out of earshot of the military commission prosecutor who was theoretically responsible for his case. After serving a nine-month sentence, that single convicted Guantánamo detainee was released and is now free.

And on the distant other end of the spectrum of fortune at Guantánamo, the most unfortunate may be the detainee-refugees – those men who either were born in brutal human rights abusing regimes and have individualized fears of return or those who are effectively stateless. These men do not have a nation fighting to have them safely repatriated. Indeed, they face quite the opposite – return to possible persecution and torture in their country of nationality. And their home governments certainly do not advocate for them to receive a fair trial, or to be treated humanely in Guantánamo.

Instead, these men are faced with an impossible choice: to be detained indefinitely in the U.S. extrajudicial prison camp at Guantánamo Bay or to be repatriated to countries in which they face certain torture or persecution, in clear violation of the international law prohibition against *refoulement*. Almost to a person they remain imprisoned in solitary confinement at a supermaximum security prison – with almost no human interaction aside from the clanging of a food slot for the meal that breaks the monotony.

The Stories of Guantánamo's Refugees

There are approximately 50 refugees who remain at Guantánamo today. These men are from countries whose nationals comprise large swaths of the U.S. refugee and asylum population – places like Algeria, China, Libya, Russia, Syria, Tajikistan, Tunisia and Uzbekistan. These men have never been charged with any crime and are not expected to be charged with any crimes by military commission or any other process. Indeed, approximately 30 already have been acknowledged by the United States to have been "cleared" for release – some months or years ago – which means that the U.S. has officially recognized that it has no interest in detaining them any longer.

As with so much else at Guantánamo, the term "cleared for release" is relatively meaningless – and not just because these men remain in prison many months or years after official "clearance." According to the Defense Department, there were 118 men transferred *out* of Guantánamo in 2007. About 1/3 of them were officially "cleared"; the remainder were not cleared but flew home all the same. The terminology is political. The processes – to the extent they exist – are fundamentally flawed. And despite the perpetuation of unsubstantiated language about the "worst of the worst" at Guantánamo, the decisions about the fate of individuals are largely based on geopolitics and little more. Cleared or not, the refugees at Guantánamo have been dealt the weakest cards in the geopolitical game that governs their fate. And they remain in Guantánamo, or they are sent home to face even worse.

Who are these men, imprisoned at Guantánamo after more than six years without charge? These men are afraid of both a transfer to torture and, alternatively, that their long and unjustifiable imprisonment at Guantánamo will continue unabated.

- There are 17 Chinese Uighurs still imprisoned in Guantánamo. Adel Noori is one. He suffered in China because he was well-connected to literary and progressive movements. His friends – authors and activists – have been imprisoned by the Chinese state for exercising their expression. Adel, like the other Uighurs, escaped the persecution of the Chinese government and made his way to safety in a small refugee community in Afghanistan with other Uighurs. Forced to flee when, in October 2001, the war started in Afghanistan, the Uighurs were taken in by Pakistanis on the border but then were sold for bounty to the United States. The U.S. had peppered Afghanistan and Pakistan with flyers promising "wealth and power beyond your dreams" for the handover of unknown enemies. The Uighurs, like many others, were caught up in a dragnet relying on limited intelligence and manufactured incentives. Five were eventually declared to be not enemy combatants. Years later they were released to Albania, the first country to agree to accept non-nationals detained at Guantánamo. The remaining 17, despite virtually identical factual circumstances regarding their stays in and escape from Afghanistan, remain in Guantánamo because neither the United States nor any other country has yet opened its doors to them.

- Abdul Ra'ouf Al Qassim is a Libyan refugee who deserted the Libyan Army when he was young and fled religious persecution in his home country. He was living with his pregnant Afghan wife in Kabul when the war forced him and his wife to flee to Pakistan. Like Mr. Abdallah, Mr. Al Qassim's house was subjected to a raid in which he was turned over to U.S. authorities, likely for a sizable bounty. The U.S. has twice attempted to transfer Mr. Al Qassim to Libya despite Libya's known record of egregious human rights abuses, and the increased risks that Mr. Al Qassim would face if repatriated because he deserted the army and has been tarnished by false and unsubstantiated allegations that he was associated with a group opposed to the Qadhafi regime.

- Ravil Mingazov is a Russian ballet dancer who fled Russia because of religious intolerance and persecution by the Russian intelligence and military services. He fled in search of a new home that would be tolerant of his faith and hospitable to his family. Instead, he found himself a refugee twice over – fleeing religious persecution in his home country and war in another. His fearful second flight hoping for safety led him to Guantánamo in the chaos of war. He remains there today.

All of these men, and approximately 45 other refugees, remain in Guantánamo today, tomorrow, and the foreseeable future unless some intervention alters their situation and they are given the opportunity to live again.

An Impossible Choice: Indefinite Detention at Guantánamo *or* Torture and Persecution in the Countries of One's Birth

The impossible choice faced by these men is neither acceptable nor legal. The prohibition against torture, and transfers-to-torture, is one of the most widely recognized obligations of international law.

The Convention Against Torture – of which the U.S. is a party along with over 140 other nations – states unequivocally that "No State shall expel, return . . . or extradite a person to

another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. . ." This non-*refoulement* principle is the bedrock of refugee law – and it requires an individualized determination of whether someone is at risk prior to a transfer.

In an international hearing on the issue, the U.S. recently implied that the Red Cross serves a function akin to an individualized refugee status determination – something that the Red Cross is neither trained to do, nor has as part of its mandate. Refugee status determinations, however, are exactly within the mandate of the United Nations High Commissioner for Refugees and what UNHCR is trained to do. Yet, thus far, the United States government has not asked the UNHCR to serve this role – which would be a valuable step in properly classifying these individuals as refugees and finding safe haven for them.

Instead, almost 40 men have been transferred by the United States from Guantánamo to notorious human rights abusing regimes with no process in place to determine whether these men face individualized risks of torture or persecution upon their repatriation. They have been returned to countries like Uzbekistan, Libya, Tunisia and Egypt. In 2006 and 2007, the U.S. sent two men from Guantánamo to Libya without any process to determine whether they should be granted a reprieve, and even though the our own State Department report for 2006 acknowledges that in Libya, "security personnel routinely tortured prisoners during interrogation or as punishment," including through gruesome measures, such as "chaining prisoners to a wall for hours, clubbing, applying electric shock, applying corkscrews to the back, pouring lemon juice in open wounds, " and the list continues. No information about these men's safe whereabouts has been made available. A similar laundry list of egregious treatment inflicted on detainees in Tunisian custody, described in the 2006 U.S. State Department report of Tunisia, did not prevent the U.S. from transferring two men to the custody of the Tunisian government. Both men immediately were jailed and subjected to abusive treatment.

In these transfers, the U.S. has relied largely on secretly-negotiated diplomatic assurances – the vague and unenforceable promises made by human rights abusing regimes that they will treat returnees humanely even if they have flouted their obligations under international law with myriad others caught up in the state security apparatus. The U.S. government has aggressively challenged the judicial oversight of such transfers. Subsequent to the enactment of the Military Commissions Act, the lack of judicial oversight is explicit – with dramatic consequences. Under the Military Commissions Act, no non-citizen detainee classified as an "unlawful enemy combatant" is entitled to challenge any aspect of his transfer or conditions of confinement, in any way. What this court-stripping provision has meant is that the government's actions with respect to the transfer of Guantánamo detainees have virtually no judicial review. Further, no diplomatic assurance agreement for a detainee ever has been subject to any form of review.

Ending Guantánamo's Refugee Crisis and Finding Safe Haven for its Victims

The United States has for generations loudly spoken about the importance of human rights norms and refugee protection – and is still the largest receiving country of resettled refugees from around the world. Yet, the United States has, to its shame, consistently refused to open its doors to any of the men it brought halfway around the world to a U.S. military prison on extraordinarily limited information. Instead, Albania – one of the poorest countries in Europe – became the first country to accept any non-citizens who had been caught up in the dragnet of Guantánamo in the months after the Afghan invasion. In 2006, Albania agreed to accept eight refugees from Guantánamo – five Uighurs, one Uzbek, one Egyptian and one Algerian. The U.S. should safely release the remaining refugees in the United States or in third countries if they

cannot safely be repatriated. In addition to the integrity of this country and our adherence to the rule of law, human lives are at stake.

The U.S. should demonstrate that it is committed to preventing the transfer of these men to torture and to facilitating an official review of the individual refugee claims by UNHCR, or asylum claims by the Department of Homeland Security. Representatives of the U.S. government have insisted that they have asked dozens of countries to accept some of these men into their borders. However, if the U.S. is serious about finding a solution, we would commit to adhere to the international law principle of non-*refoulement* as the U.S. is legally obligated to do; invite UNHCR to conduct refugee status determinations in Guantánamo; and accept at least some of Guantánamo's refugees into our own borders. While a solution is being found, these men without a country should at the very least not be held in brutal conditions in solitary confinement simply because no government has advocated for better for them. They should be transferred out of Camp 6 to communal living urgently.

The situation at Guantánamo for these men is desperate. Abdulghappar Turkistani, one of the Uighurs at Guantánamo, recently wrote an exasperated letter to his lawyers. "Although in 2004 and 2005 we were told that we were innocent . . . we are being incarcerated in jail for the past 6 years . . . We fail to know why . . ." One of his fellow Uighurs at Guantánamo had been on a hunger strike while in solitary confinement and was forcibly fed with the assistance of a riot squad and a rubber tube. Abdulghappar wrote in his letter to his lawyers that he was worried about his friend's health but cognizant that his intolerable reality seemed to force such an impossible choice: "If the oppression were not unbearable, who would want to throw himself on a burning fire?"

Fifty refugees were brought to Guantánamo in 2002 on the most tenuous of evidence – many after being handed over to the United States with the vaguest of allegations in expectation of widely-publicized bounties. Like the hundreds of others who have since been released, they were picked up and brought halfway around the world without any process in place to separate the guilty from the innocent. Any meaningful oversight was consistently averted. The result is that these men remain at Guantánamo in 2008 – afraid of being transferred to torture, and afraid also that their debilitating confinement in Guantánamo will never end.

We must rectify this wrong. Our commitment to uphold our legal obligations and realize a humanitarian solution for these desperate men must be more powerful than our desire to avoid recognizing the mistakes that have been made.

Thank you.

Mr. DELAHUNT. Thank you, Ms. MacLean.
Mr. Casey.

STATEMENT OF LEE A. CASEY, ESQ., PARTNER, BAKER AND HOSTETLER, LLP

Mr. CASEY. Thank you, Mr. Chairman. I appreciate the opportunity to appear today. I would like to note at the outset that I am not speaking on behalf of my law firm or any of its clients, and would ask that my written statement be included in the record.

Mr. DELAHUNT. So ordered.

Mr. CASEY. The nature of our enemy in the war on terror has created many difficult and unique challenges. Al-Qaeda and its jihadist allies are not controlled by any particular state or government. They do not recognize, accept or implement the law of armed conflict. They do not have a regular and transparent command structure. They do not wear uniforms, carry their arms openly, or distinguish themselves from the surrounding civilian population in any other manner.

Because of these purposeful choices, it has been far more difficult than in conventional conflicts for the United States to identify enemy forces with certainty. That of course is exactly why guerillas and others engage in asymmetrical warfare, especially those operating among and preying upon the civilian population, organize themselves as irregulars.

Although violating the laws of war gives such groups an operational advantage, their illegitimate and unlawful choices do not change the legal rights of the United States to confront al-Qaeda militarily, and to attack, capture and detain its personnel, just as we would be entitled to attack, capture, and detain the lawful soldiers of a sovereign state.

That is the purpose served by the Guantanamo Bay facilities. Closing those facilities, as some have suggested, would require the construction of a similar detention camp elsewhere, and it would very likely not dampen international criticism of the United States. The real issue is not the physical location at Guantanamo Bay, but the policy of treating America's conflict with al-Qaeda as a war, a legally cognizable armed conflict, rather than a criminal law enforcement exercise.

While it is true that abandoning this policy might obtain some temporary bounce in U.S. international popularity, it would at the same time severely handicap efforts to anticipate and prevent future catastrophic attacks on the American homeland and against the United States and its allies overseas.

At the same time, again because of the difficulties created by our enemy's illegitimate choices, a handful of individuals have been detained at Guantanamo Bay who should not have been. In such cases it certainly would be appropriate for Congress to provide some compensation, just as compensation has been provided by the United States Armed Forces to civilians in Iraq and Afghanistan who have been mistakenly targeted. These cases, however, must be distinguished from other instances in which the Armed Forces have concluded that particular enemy combatants no longer need to be detained.

This conclusion does not undercut our legal right to detain these individuals. Nevertheless, a number of such individuals have been released and repatriated. In some cases, however, returning detainees to their homes is not possible, either because of a refusal of their own governments to accept them or more especially because they would face a realistic danger of persecution or mistreatment by those governments.

This obviously puts the United States in a difficult position of detaining individuals who may no longer present a threat on the battlefield, but who also may not be appropriate subjects for a grant of asylum or some other access to the United States proper. They have no right of entry into the United States. However, Congress' broad constitutional power over immigration and naturalization would certainly permit the adoption of a new status that might allow certain detainees to enter the United States under restrictions designed to ensure that they do not pose a danger. This of course is far easier said than done. And the better solution remains repatriation with suitable guarantees by the receiving state.

However, the problem will not go away. The legal right of the United States to hold the detainees depends upon continuation of active hostilities. When hostilities cease, the detainees will have to be criminally charged or repatriated. For those who cannot be returned to either their own country or the country in which they were captured in the first instance, a long-term solution will have to be found. This may take the form of some type of administrative detention, or potentially a conditional parole into the United States, or some combination of both. Creating this system will be practically, politically, and legally difficult, but the effort must begin now.

And I will stop there and be pleased to take any questions you may have.

[The prepared statement of Mr. Casey follows:]

PREPARED STATEMENT OF LEE A. CASEY, ESQ., PARTNER, BAKER AND HOSTETLER, LLP

I appreciate the opportunity to appear before the Subcommittee today, and to address some of the issues surrounding the detention facility in the United States Naval Station at Guantanamo Bay, Cuba. I should note at the outset that I am not speaking on behalf of my law firm or any of its clients.

The nature of our enemy in the war on terror has created many difficult and unique problems for the United States. Al Qaeda and its jihadist allies are not controlled by any particular state or government. Indeed, they reject the nation-state and any kind of "international" law as organizing principles. They do not recognize, accept or implement the law of armed conflict. They do not have a regular and transparent command structure. They do not wear uniforms, carry their arms openly, or distinguish themselves from the surrounding civilian population in any other manner. They do not obey the laws and customs of war in their operations.

Because of these purposeful decisions made by the enemy, it has been far more difficult than in conventional conflicts for the United States to identify their forces with certainty. That, of course, is exactly why guerillas and others engaged in "asymmetrical warfare"—especially those operating among and preying upon the civilian population—organize themselves as irregulars. The lawful armed forces of states, by contrast, do mark themselves out from the civilian population, and this is one of the key criteria they must meet, under the laws and customs of war, in order to achieve the status of "lawful" or "privileged" combatants. Such lawful combatants, when acting under the authority of a sovereign state, are not subject to prosecution for their violent acts—so long as they otherwise operate in accordance with the applicable laws of armed conflict—and are also entitled to the various rights and privileges of honorable prisoners of war upon defeat or capture.

This is not, of course, the case with groups like al Qaeda which resort to the use of armed force but which eschew these basic rules. Although violating the laws of war gives such groups an operational advantage vis-à-vis regular forces, their illegitimate and unlawful choices in this regard do not change the legal rights of the United States to confront al Qaeda militarily and to attack, capture, and detain its personnel—just as we would be entitled to attack, capture and detain the lawful soldiers of a sovereign state with whom we were at war.

The detention facilities at Guantanamo Bay, Cuba, are a necessary and inevitable part of that war which was, it should be emphasized, duly authorized by Congress in its Joint Resolution of September 18, 2001, specifically stating that "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for the Use of Military Force, Pub. L. No. 107–40 (Sept. 18, 2001).

In wartime, of course, enemy forces are subject to armed attack at any time and without warning. However, quarter must be given when sought, or when an individual enemy combatant is no longer capable of resistance. In exchange for granting this quarter, however, the law of armed conflict permits captured enemy combatants to be detained—without a judicial hearing, access to a lawyer, or a criminal trial—until hostilities have been concluded. Captured enemies must be housed and prevented from escaping to return to the fight. That is the purpose served by the Guantanamo Bay detention facilities.

Both Congress and President Bush were right to treat the September 11, 2001 attacks against the United States as the acts of war they certainly were. Al Qaeda's actions on that day were fundamentally different from those of other terrorists, such as we experienced from radical groups like the "Weathermen" during the 1960s and 1970s, or during the 1990s in Oklahoma City. Al Qaeda's attacks certainly were violent, and calculated to cause as many deaths among the civilian population as possible. They were not, however, directed at achieving some misguided political change in our government or society, or even to prompt civil disorders or revolution. The targets selected clearly show a deliberate attempt by al Qaeda pre-emptively to decapitate what it understood to be the United States' financial, political and military leadership. These were most certainly criminal acts, but they are not the acts of mere criminals. Al Qaeda's purpose, goals and capabilities are geopolitical.

Just as Imperial Japan sought, with the December 1941 attack against Pearl Harbor, to drive the United States from its position and influence in East Asia, so al Qaeda seeks to force the United States—and other Western influence—from the Middle East and the rest of the Islamic world. The ultimate goal, of course, appears to be the establishment of a transnational Islamicist regime over the entire area—a modern reincarnation of the medieval Caliphate. In this connection, of course, it is important to recall that al Qaeda's military assault on the United States did not begin on September 11, 2001, but well before in the 1990s with attacks against American military and diplomatic targets throughout the Middle East. The proper response was a military response.

Thus, Guantanamo Bay, and the detention policy it represents, are part and parcel of the use of military force against al Qaeda and were inevitable in some form. The facilities at Guantanamo have been established at significant expense and serve as a secure location for holding captured enemy combatants. Although Guantanamo has never been a "law free zone," as critics of the Bush Administration's policies have often claimed—since American activities there have always been subject to the laws and customs of war—the area's legal status has been refined in important ways by the decisions of the United States Supreme Court and by congressional action. At this time, individuals held at Guantanamo are entitled to an elaborate administrative review, in the form of combatant status review tribunals to consider their classification as enemy combatants and periodic administrative review boards to determine whether their continued detention is necessary. In addition, detainees must be tried before military commissions, in accordance with the 2006 Military Commissions Act, if they are to be criminally punished.

Closing the Guantanamo facilities, as some have suggested, would require the construction of a similar detention camp elsewhere, either in the United States or abroad, and it very likely would not dampen international criticism of the United States. The real issue is not the physical location or facilities at Guantanamo, but the policy of treating America's conflict with al Qaeda as a war, a legally cognizable armed conflict, rather than a criminal law enforcement exercise. While it is true that abandoning this policy might obtain some temporary "bounce" in U.S. international popularity, it would at the same time severely handicap efforts to antici-

pate and prevent future catastrophic attacks on the American homeland and against the United States and its allies overseas.

To date, despite an ever expanding body of rhetoric, no practical alternative to detaining captured enemy combatants—whether at Guantanamo Bay or elsewhere—has been presented. Although some of the detainees doubtless could be processed through the civilian criminal justice system, many could not because the type of evidence necessary in such trials simply is not available. Even if it were, however, I do not believe that this would not be a viable option. First, treating captured jihadists as criminal defendants—just as treating them as honorable prisoners of war under the Geneva Conventions—would grant them rights they have not earned. Second, abandoning the wartime legal paradigm would have far-reaching effects that go far beyond detention issues.

The law of armed conflict and the civilian criminal justice system are not interchangeable. Criminal suspects cannot be the subject of armed attack. Ordinarily, they can be taken into custody only under limited circumstances—based upon lawfully issued arrest warrants. Even where law enforcement officials are privileged to arrest individuals without a warrant—as when they have themselves witnessed criminal activity for example—they may use only that force necessary to effect the arrest. In wartime, by contrast, the armed forces are privileged to use the level of force necessary to defeat or destroy the enemy forces, so long as certain basic rules relevant to distinction (between military and civilian targets) and proportionality (ensuring that the likely collateral damage to civilians or civilian objects does not outweigh the importance of the military objective sought to be achieved) are observed.

In addition, the law enforcement authorities of one country are not (absent some special agreement) privileged to enter another sovereign nation's territory to effect an arrest. Although, under United States federal law, seizing a suspect overseas and forcibly bringing him or her to the United States will not necessarily undermine a later prosecution, *see United States v. Alvarez-Machian*, 504 U.S. 655 (1992), such action remains an international delict if done under color of state authority. If a state harboring "criminal" suspects refuses a request for judicial cooperation by the United States, then there are few options—other than diplomatic remonstrance and an approach to the United Nations Security Council.

Most important of all, however, the criminal justice system is simply ineffective in preventing attacks. It has been designed as a reactive mechanism—through which criminal offenders are identified, tried and punished for past actions. The threat of arrest and punishment certainly can and does create a deterrence effect with respect to most people, most of the time. However, this deterrence has proven ineffective when the perpetrators are ideologically or religiously motivated and willing to sacrifice their own lives, as well as those of others, to attain their ends. This was proven beyond peradventure on September 11 itself. That was, of course, the second attempt by al Qaeda and its allies to destroy the World Trade Center. The fact that many of those responsible for the first attempt to blow up the twin towers, in 1993, were identified, tried and punished through the federal courts did not deter or otherwise prevent this second, successful attack.

If the American people are to be protected against attack—and they have a right to that protection—then the United States must continue the war against terror, whatever the next President may choose to call it. Otherwise, the government will be faced with the choice between failing in its duty to protect the American people, or proceeding to warp the rules governing law enforcement operations beyond recognition.

At the same time, again because of the difficulties created by our enemy's illegitimate choices, a handful of individuals have been detained at Guantanamo Bay who should not have been. In such cases, it certainly would be appropriate for Congress to provide some compensation, just as compensation has been provided by the U.S. Armed Forces to civilians in Iraq and Afghanistan who have been mistakenly targeted. Such cases, however, must be distinguished from other instances in which the Armed Forces have concluded that particular enemy combatants no longer need to be detained. Here, it is important to emphasize that this conclusion in no way undercuts the legal right of the United States to detain these individuals up until the conclusion of all hostilities with al Qaeda.

A number of such individuals have been released from Guantanamo over time—most, as I understand it—have been returned to their own countries. In some cases, however, returning individuals to their homes is not possible either because of a refusal of their own governments to accept them, or more especially because they would face a realistic danger of persecution or mistreatment by those governments, up to and including the risk of torture or other extra-judicial penalties. This obviously puts the United States in the difficult position of detaining individuals who

may no longer present a threat on the battlefield, but who also may not be appropriate subjects for a grant of asylum or some other access to the United States proper.

These individuals are not being held on American soil and have no right of entry into the United States—unless Congress chooses to create such a right. Congress' broad, constitutional power over immigration and naturalization would certainly permit the adoption of a new status that might allow certain detainees to enter the United States under restrictions designed to ensure that they do not pose a danger to our own people. This, of course, is far easier said than done—and the better solution remains repatriation, with suitable guarantees by the receiving state. However, the problem will not go away.

The legal right of the United States to hold the detainees at Guantanamo Bay, and at detention facilities elsewhere in the world, depends upon continuation of active hostilities between our Armed Forces and al Qaeda and its allies. Once those hostilities cease, the detainees will have to be charged with a criminal violation and tried by military commission, or they must be repatriated. For those who cannot be returned to either their own country, or the country in which they were captured in the first instance, a long term solution will have to be found. This may take the form of some type of administrative detention, or potentially a conditional parole into the United States, or some combination of both. Creating this new system will be practically, politically and legally difficult, but the effort must begin now.

I would be pleased to answer any questions they Subcommittee may have. Thank you.

Mr. DELAHUNT. Thank you, Mr. Casey.

Mr. Mone.

STATEMENT OF MICHAEL E. MONE, ESQ., MEMBER, ESDAILE, BARRETT AND ESDAILE

Mr. MONE. Thank you, Mr. Chairman, and thank you, Ranking Minority Member Rohrabacher, for inviting me to speak to the subcommittee today about my client Oybek Jamoldinivich Jabbarov, an Uzbek national who has been unlawfully detained at Guantanamo Bay, Cuba.

My client is approximately 1 of 30 detainees who represent Guantanamo's refugees. These are detainees who have been cleared for release by the U.S. Government, for some years ago, yet they remain imprisoned at Guantanamo because they come from high risk countries where there is a potential danger of persecution or torture should they be forcibly returned. And no country other than Albania has been willing to accept these refugees from Guantanamo for resettlement.

Indeed, the United States has already transferred detainees from Guantanamo to high risk countries despite credible individualized fears of persecution or torture upon their repatriation. My client is one of these refugees who fears repatriation to his native Uzbekistan.

Oybek's 6-year long imprisonment at the hands of the United States Government is a tragic case of being in the wrong place at the wrong time. Now 30 years old, Oybek and his pregnant wife, infant son and elderly mother were living with other Uzbek refugees in northern Afghanistan in 2001 when fighting broke out between the Taliban and the Northern Alliance. Oybek was not captured on the battlefield, nor was he harmed. Instead, he accepted a ride from a group of Northern Alliance soldiers he met at a roadside teahouse who said they would give him a ride to Mazar-e-Sharif. Unfortunately, instead of driving him to Mazar-e-Sharif, the soldiers took Oybek to Bagram Air Base, where they handed him over to U.S. forces, undoubtedly in exchange for a sizable bounty.

In a desperately poor, war torn country, Oybek was an easy mark for soldiers responding to leaflets dropped throughout Afghanistan by the United States military offering thousands of dollars in cash rewards to anyone who turned over a Taliban or foreign fighter.

After Bagram, Oybek was taken to a prison in Kandahar, Afghanistan, and then transferred to Guantanamo Bay in June, 2002. During his first few months at Guantanamo, an FBI agent told Oybek, "You are a free man, you are not a problem," and to be patient while diplomatic arrangements were made for his release. But months turned into years, and still nothing happened.

Finally, in February 2007, Oybek received approval from the United States Government to leave Guantanamo. This news brought little comfort, however, because Oybek fears for his life if he is returned to his native Uzbekistan, a country with a long and well-documented history of human rights abuses, including the widespread use of torture. Indeed, Oybek had a chilling encounter with Uzbek officials who came to Guantanamo in September 2002 to interrogate him and the other Uzbek detainees. The Uzbek interrogators told Oybek he would be sent to prison upon his return to Uzbekistan, and implied he might face torture to force him to confess to things that he did not know. They asked him questions about the Islamic Movement of Uzbekistan, the IMU, an outlawed militant group in Central Asia despised by the Uzbek Government. They called Oybek a Wahhabi, a pejorative term broadly used by Uzbek authorities to describe individuals they view as radical Islamic extremists.

The Uzbek interrogators also told Oybek he would be sent to prison upon his return to Afghanistan for the alleged crime of illegally crossing the border into Tajikistan without a visa, even though no requirement for a visa existed at the time. They showed him a photo array and asked him if he could identify any of the individuals pictured. When he did not recognize any of the faces, one Uzbek interrogator banged his fist on the table and told him menacingly, "When you go back to Uzbekistan you will know these things." Oybek understood the security officer to mean that they would torture him until he told them what they wanted to hear.

Mr. Chairman, my client is more Borat than he is Khalid Sheikh Mohammed. Unfortunately, Oybek fits the very profile of someone who will face persecution, arrest, imprisonment, and torture at the hands of the Uzbek authorities. While Oybek would like to practice Islam freely, even the most basic acts of wearing a prayer cap, keeping a beard, and going to mosque in the Ferghana Valley, where he is from, are viewed with grave suspicion by the Uzbek security services. Even worse, the stigma attached to his prolonged detention in Guantanamo will follow him home with dire consequences.

The U.S. Government has accused Oybek of being a member of the IMU, as well as supporting al-Qaeda and fighting for the Taliban, all of which Oybek denies, and for which no credible evidence has been proffered. But these accusations are tantamount to a death sentence if Oybek should ever fall into the hands of the Uzbek authorities. Having been branded by the United States as an alleged member of an outlaw extremist group that is especially loathed by the Uzbek Government, Oybek should expect to face the

harshest legal, even extrajudicial treatment if he is ever returned to his country.

Yet despite the grave and obvious danger facing him, the United States Government refuses to rule out repatriating Oybek to his native Uzbekistan. Oybek yearns to be reunited with his family, to finally meet his youngest son, who was born just after his arrest, but he is afraid he will never see his family again if he is returned to Uzbekistan. He is afraid that if he is returned to Uzbekistan he will be killed.

My client continues to languish behind the thick concrete walls and barbed wire of Camp 5 in Guantanamo, the result of a grave mistake not of his own making. It is our mistake that he sits there. And we as a nation need to recognize that Guantanamo does not contain just the worst of the worst. It also contains far too many mistakes, like my client, a poor soul who was not captured on the battlefield as an armed enemy combatant, but was simply in the wrong place at the wrong time.

We are a great nation, but we are, as our Founding Fathers envisioned, a perpetual work in progress. Sometimes our Nation has made mistakes: Slavery, our treatment of Native Americans, the interment of Japanese Americans, and Jim Crow, to name a few. But part of our greatness lies in our capacity to recognize when we have made a mistake and to make it right.

Therefore, I think it is fair that we as a nation ask ourselves: How many more days must Oybek remain in Guantanamo for our mistake? How many more days must he sit in his 8-by-12 cell until we make it right?

Thank you. I would be happy to answer any questions you may have.

[The prepared statement of Mr. Mone follows:]

PREPARED STATEMENT OF MICHAEL E. MONE, ESQ., MEMBER, ESDAILE, BARRETT AND ESDAILE

Thank you, Mr. Chairman, for inviting me to speak to the Subcommittee today about my client, Oybek Jamoldinivich Jabbarov, an Uzbek national who is being unlawfully detained at Guantánamo Bay, Cuba.

My client is one of approximately 30 detainees who represent "Guantánamo's refugees." These are detainees who have been cleared for release by the U.S. government—for some, years ago, yet they remain imprisoned at Guantánamo because they come from "high-risk" countries where there is a potential danger of persecution or torture should they be forcibly returned, and no country, other than Albania, has been willing to accept these refugees from Guantánamo for resettlement. Indeed, the United States has already transferred detainees from Guantánamo to high-risk countries despite credible individualized fears of persecution or torture upon their repatriation. My client is one of these refugees, who fears repatriation to his native Uzbekistan.

Oybek's 6-year long imprisonment at the hands of the U.S. government is a tragic case of being in the wrong place at the wrong time. Now 30 years old, Oybek and his pregnant wife, infant son, and elderly mother were living with other Uzbek refugees in northern Afghanistan in 2001 when fighting broke out between the Taliban and the Northern Alliance. Oybek was not captured on the battlefield, nor was he armed. Instead, he accepted a ride from a group of Northern Alliance soldiers he met at a roadside teahouse who said they would give him a ride to Mazar-e-Sharif. Unfortunately, instead of driving him to Mazar-e-Sharif, the soldiers took Oybek to Bagram Air Base where they handed him over to U.S. forces, undoubtedly in exchange for a sizable bounty. In a desperately poor, war-torn country, Oybek was an easy mark for soldiers responding to leaflets dropped throughout Afghanistan by the U.S. military offering thousands of dollars in cash rewards to anyone who turned over a Taliban or foreign fighter.

After Bagram, Oybek was taken to a prison in Kandahar, Afghanistan, and then transferred to Guantánamo Bay in June 2002. During his first few months at Guantánamo, an FBI agent told Oybek, "you're a free man, you're not a problem" and to be patient while diplomatic arrangements were made for his release. But months turned into years and still nothing happened. Finally, in February 2007, Oybek received approval from the U.S. government to leave Guantánamo. This news brought little comfort, however, because Oybek fears for his life if he is returned to his native Uzbekistan, a county with a long and well-documented history of human rights abuses, including the widespread use of torture.

Indeed, Oybek had a chilling encounter with Uzbek officials who came to Guantánamo in September 2002 to interrogate him. The Uzbek interrogators told Oybek he would be sent to prison upon his return to Uzbekistan and implied he might face torture to force him to confess to things he did not know.

They asked him questions about the Islamic Movement of Uzbekistan ("IMU"), an outlawed militant group in Central Asia despised by the Uzbek government. They called Oybek a "wahhabi"—a pejorative term broadly used by Uzbek authorities to describe individuals they view as radical Islamic extremists. The Uzbek interrogators also told Oybek he would be sent to prison upon his return to Uzbekistan for the alleged crime of "illegally" crossing the border into Tajikistan without a visa—even though no such visa was required at the time. They showed him a photo array and asked if he could identify any of the individuals pictured. When he did not recognize any of the faces, one Uzbek interrogator banged his fist on the table and told him menacingly, "when you go back to Uzbekistan, you will know these things." Oybek understood the security officer to mean that they would torture him until he told them what they wanted to hear.

My client is more Borat, than he is Kahlid Sheik Mohammed. Unfortunately, Oybek fits the very profile of someone who will face persecution, arrest, imprisonment, and torture at the hands of Uzbek authorities. While Oybek would like to practice Islam freely, even the most basic acts of wearing a prayer cap, keeping a beard, and going to mosque in the Ferghana valley, where he is from, are viewed with grave suspicion by the Uzbek security services.

Even worse, the stigma attached to his prolonged detention in Guantánamo will follow him home with dire consequences. The U.S. government has accused Oybek of being a member of the IMU, as well as supporting al Qaida and fighting for the Taliban—all of which Oybek denies and for which no credible evidence has ever been proffered. But these accusations are tantamount to a death sentence if Oybek should ever fall into the hands of the Uzbek authorities. Having been branded by the United States as an alleged member of an outlawed extremist group that is especially loathed by the Uzbek government, Oybek should expect to face the harshest legal, even extra-judicial treatment if returned to his country. Yet, despite the grave and obvious danger facing him, the U.S. government refuses to rule out repatriating Oybek to his native Uzbekistan.

Oybek yearns to be reunited with his family—to finally meet his youngest son who was born just after his arrest, but he is afraid he will never see his family again if he is returned to Uzbekistan. He is afraid that if he is returned to Uzbekistan he will be killed.

My client continues to languish behind the thick concrete walls and barbed wire of Camp 5 in Guantánamo, the result of a grave mistake, not of his own making. It is our mistake that he sits there and we as a nation need to recognize that Guantánamo does not contain just "the worst of the worst." It also contains far too many mistakes like my client, a poor soul who was not captured on the battlefield as an armed enemy combatant, but was simply in the wrong place at the wrong time.

We are a great nation, but we are, as our founding fathers envisioned, a perpetual work in progress. Sometimes, our nation has made mistakes—slavery, our treatment of Native Americans, the internment of Japanese Americans, and Jim Crow, to name a few. But part of our greatness lies in our capacity to recognize when we have made a mistake, and to make it right.

Therefore, I think it is fair that we as a nation ask ourselves: How many more days must Oybek remain in Guantánamo for our mistake? How many more days must he sit his 8x12 cell, before we make it right?

Thank you. I am happy to answer any questions you may have.

Mr. DELAHUNT. Thank you, Mr. Mone.

Mr. Oleskey.

STATEMENT OF STEPHEN H. OLESKEY, ESQ., PARTNER, WILMER CUTLER PICKERING HALE AND DORR, LLP

Mr. OLESKEY. Thank you, Mr. Chairman, Mr. Vice Chairman, Ranking Member. I represent six men turned over to the United States in Bosnia in January 2002. Their names are Mustafa Ait Idir, Bensayah Belkacem, Hadj Boudella, Lakhdar Boumediene, Saber Lahmar, and Mohamed Nechla. My firm has visited them 14 times in Guantanamo between December 2004 and April 2008.

They were not in the wrong place. They were in the place they had chosen to live, which was Bosnia, in October 2002. The United States ordered them arrested by the Bosnians on the grounds that the United States had evidence they were going to blow up the United States and British Embassies. The Bosnians said they had no such evidence and that their justice system, which we had approved at the Dayton Peace Accords in 1995, would not allow them to arrest men without evidence. The United States charge d'affaires said, "The only evidence you need is that we are telling you to arrest these men. If you don't do it, we will withdraw our support from your country, and then God help Bosnia."

The Bosnians complied. They then investigated the men for 90 days in their judicial system with the help of Interpol and the United States. The men's computers were seized; their offices and homes were searched. No evidence was found of any plot. No weapons were found. No plans. Nothing on their computers disclosed any inkling of any terrorist affiliation. The Bosnian justice system, which we had put in place in Dayton in 1995, ordered them released for lack of evidence on the recommendation of Bosnian prosecutor.

The Human Rights Chamber Court, an arm of the European Human Rights Court, which we had established at Dayton to speak with final authority on human rights abuses in Bosnia, ordered the men not taken out of Bosnia. So there was an order for release and an order that they not be turned over by two different tribunals. One is a national court that we had directly established. The men were turned over to the United States military in Bosnia at the United States' demand, despite those orders. They were flown to Guantanamo over 30 hours in cargo planes. The pictures are attached to my testimony. Those are not the pictures of my clients. Those are pictures from the Internet of other men being flown to Cuba. Shackled, put on the floor of a cargo plane for 30 hours, no food, no bathroom, hooded, tied in place, shouted at, cursed, and beaten. When they arrived in Guantanamo, they were kept outdoors in a place called Camp Delta for a number of months in the open air, menaced and threatened by dogs and soldiers, and beaten. They have been prisoners there since January 20, 2002, so they are now in just over 6⅓ years in Guantanamo. They have never been charged with anything. They have never been tried for anything. There was no indication that they ever will be tried or charged with anything.

I want to just comment briefly on the treatment of three of my clients which is highlighted in my testimony, but I will summarize it here. Saber Lahmar has been in near complete isolation for the past 2 years. For 18 months he was confined to an 8-by-6 cell, illuminated 24 hours a day. The only window was painted with opaque

paint so he could not tell night from day. He was for a time denied a toothbrush and toothpaste. And for the entire time he was denied any books except the Koran. He was given 10 minutes of exercise a day. I was not able to see him for a year until this March, when we were there. And I said, "Saber, I have been here the last three times, at roughly 3- or 4-month intervals. I haven't been able to see you, and they told me that you did not want to see me." And he said, "You know that I was in isolation." I said, "Yes, I did know that." He said, "They never told me that you were here. I always saw you before. I am seeing you now. Of course I wanted to see you. Why would I not want to see you? You are my only link with the outside world."

He has a host of debilitating physical and psychological ailments, nerve and muscle damage in his knees, has been told to engage in physical exercise, which is realistically not an option for him, given his lack of mobility now and the tiny cell in which he is confined. He has been deliberately exposed to extreme temperatures by constantly blowing cold air in his cell, on one occasion so much that ice formed on the cooling vent. He has been kept naked and at times deprived of food and water.

Our client Mustafa Ait Idir in 2004 was in a cell block when guards came through and demanded everyone give up their pants. Because the men have to pray with their knees covered, which means either a prayer rug in Islamic tradition as I understand it, or with pants, and he refused to give us his pants. He was rushed by a squad of five guards who tear gassed and beat him, bent back two fingers near to the breaking point, and left him. A few days later they came back to his cell, pepper-sprayed him, secured his hands behind him, took him in the courtyard, jumped on his head, drove it into the stones, inducing a form of paralysis known as Bell's Palsy. They then removed a hose, ran it full force into his face, while holding his head still so as to cut off all air, twisted the remaining fingers on his hand that had not been damaged in the previous attack, took him back to his cell, slammed him against the wall, then slammed him head first into a toilet and flushed it repeatedly. We have asked for the tape of these events, because these events are taped in Guantanamo, and been told that we cannot have them. More recently, during an interrogation in October 2007, he asked for a second pair of shorts on account of a rash. The following day, when coming back from recreation shackled and hooded so that he could not see where he was, a guard grabbed him so hard by the arm it left bruises, drove his knuckles into his back, and then slammed him into a wall so that he heard a pop in his back. His head began to bleed from the wound. He was not allowed to go to the clinic, talk to an interpreter, or speak with his superiors. Since then he has had headaches, unable to turn his neck, and the symptoms of Bell's Palsy have recurred.

Lastly, my client, Lakhdar Boumediene, has been on a hunger strike since November 2006. When I was there in March and April, I said, "Lakhdar, I may have the privilege of speaking to a committee of the U.S. Congress, and they may ask why is it that in this place where you have suffered so much already you would go on a hunger strike?" And he said, "I am on a hunger strike because I have been here for 6 years and more, I have never been charged,

I have never been tried, I have never been told why I am here, and I have been told I will be kept here until the end of something called the war on terror, in which I did not participate and in which I have no role. The only thing left for me to do is to take some control over the only thing that I can control, and that is food. So I will not take food." I said, "You know, you are force-fed twice a day. I have read about it. I want you to tell me in your own words, so I can tell the Congress, what is it like to be force-fed in Guantanamo?" And so he did. And this is an abbreviated description.

Twice a day he is strapped head, chest, arms and legs into a chair in the courtyard outside his cell and force fed for an hour or more through a 43-inch tube inserted through his right nostril because his left nostril is damaged, so he can only have it through one nostril twice a day. When inserted properly, as often happens, this causes excruciating pain. In one instance, a guard tied his head back so far the feeding tube choked Mr. Boumediene and caused so much damage he was unable to speak for 5 days. On many other occasions, medical personnel have had trouble inserting his feeding tube. At one point they tried for 2 hours. He has had to experience this forced feeding violently twice a day for the past 18 months. This is in direct contravention of Article V of the World Medical Association Tokyo Declaration, which United States doctors are legally bound to follow through their membership in the American Medical Association, which that article forbids doctors from force feeding voluntary participants in a hunger strike under any circumstances.

We have twice had a proxy psychological evaluation done by a forensic psychiatrist at the University of Hawaii named Daryl Matthews, who was a Defense Department consultant until he was taken to Guantanamo in 2002, and was revolted at what he saw, and no longer consulted. And based upon that proxy psychological evaluation, which we administered through interpreters to our clients in 2005 and 2007, Dr. Matthews has diagnosed severe post-traumatic stress disorder, and opined that without substantial therapy and assistance when the men return home, which is problematic in Bosnia I don't have to tell you, it is unlikely that they will be able to be restored to what we all think of as healthy, functioning life.

So these are men who went to Bosnia after the war for the most part to assist in its reconstruction. Two of them worked for the Red Crescent of the United Arab Emirates, which is one of the entities of the International Association of Red Cross and Red Crescents. They were doing what we would consider social work. They were not on a battlefield. They were not carrying guns. They were thousands of miles from a battlefield.

I agree with the ranking member that the time has long past to determine the truth about their innocence. If they are guilty of anything let them be properly charged, let them be put in a proper courtroom. We have predicates for that many times in our judicial system, the blind sheik, the bombing of the *USS Cole*, the Embassy bombings in Africa, Richard Reid, the shoe bomber was tried, Mr. Chairman, in our own court in Boston. But let's not hold them until the end of whatever it is we say is a war on terror. Let's prac-

tice the American justice system as we have all known it and lived in it and been so proud of it, and either try them or send them home. They want to go home. They deserve to go home like the other clients we are here to advocate for here today.

Thank you very much.

[The prepared statement of Mr. Oleskey follows:]

PREPARED STATEMENT OF STEPHEN H. OLESKEY, ESQ., PARTNER, WILMER CUTLER PICKERING HALE AND DORR, LLP

INTRODUCTION

Thank you Chairman Delahunt, Ranking Member Rohrabacher, and Members of the House Committee on Foreign Affairs Subcommittee on International Organizations, Human Rights, and Oversight for inviting me to speak to you today on this important issue. All counsel to Guantanamo detainees are grateful for the time, energy and thought which this Subcommittee is devoting to consideration of the issues presented by the detention of our clients, who have now been detained at Guantanamo Bay for almost six years and four months.

My name is Stephen H. Oleskey and I am a partner at the law firm of Wilmer Cutler Pickering Hale and Dorr. I have been a member of the Massachusetts Bar since 1968 and am also admitted in New York and New Hampshire. I previously served as Massachusetts Deputy Attorney General and Chief of that office's Public Protection Bureau. My practice generally focuses on complex civil litigation.

By way of background to today's testimony, my experience in the critical matter before this Committee arises from my role as co-lead counsel and pro bono advocate for six Guantanamo detainees in the period since July 2004, following the decisions of the United States Supreme Court in the *Rasul* and *Hamdi* cases.

Our clients, Algerians by birth, were working and living with their wives and children in Bosnia and Herzegovina—an American ally—when, at the demand of the United States, they were arrested by Bosnian police in October 2001. Relying on statements by representatives of the United States that our clients were suspected of planning terrorist acts in Bosnia, the men's homes and offices were thoroughly searched and examined. After a ninety-day investigation, and based on the recommendation of the Bosnian prosecutor, the Bosnian Supreme Court ordered in January 2002 that all six men be released for lack of evidence. This decision came the same day as a binding order by the Human Rights Chamber of Bosnia and Herzegovina instructing the Bosnian government to take all necessary steps to prevent our clients from being taken out of the country. Nevertheless, as our clients were about to leave the Central Jail in Sarajevo, the Bosnian executive turned them over to the U.S. military forces resident in Bosnia as part of the international peacekeeping mission. In a harrowing 30-hour trip in which they were stripped naked, subjected to an invasive medical exam, short shackled by their hands and wrists, blinded and deafened by sensory deprivation helmets, and verbally and physically abused, the men were flown to the just-opened Camp Delta facility at the U.S. Naval Base at Guantanamo Bay, Cuba, where they have been held since January 20, 2002. Our clients have now been detained for nearly six and one-third years without charge much less trial, and without being shown any of the evidence against them.

These six and one-third years have seen our client Mustafa Ait Idir beaten to the point of facial paralysis and broken bones and sprayed with pepper spray in unprovoked attacks by guards at Guantanamo. They have seen our client Saber Lahmar's muscles atrophy and his psychological well-being decline precipitously during the nearly two years he has spent confined to an 8' x 6' concrete cell in near complete isolation, cut off from human contact, physical activity, and all natural light. And they have seen our client Lakhdar Boumediene—now entering the eighteenth month of his hunger strike against the injustices he and others have suffered at Guantanamo—painfully force-fed twice every single day through a 43-inch tube that is excruciatingly inserted into his nostril and down into his stomach.

I am here today to speak about and for these six men. The government has never produced any reliable evidence that these men ever had anything to do with Al Qaeda. It has never produced any evidence that any of these men had ever taken up arms against the United States or participated in any form in any violent action against the United States. And it has never produced any evidence that any of these men is implicated in any way with the horrible events of 9/11 or with the ensuing wars in Afghanistan and Iraq.

The topic for today's hearing is "City on the Hill or Prison on the Bay? The Mistakes of Guantanamo and the Decline of the American Image." This title could not have been more apt. When John Winthrop spoke to the Puritan Colonies of a City upon a Hill, he was not merely extolling the virtues that our society possessed, but was also, and equally importantly, warning about the pending dangers if we fail to live up to our own enlightened ideals. As Winthrop noted in 1630,

> we must consider that we shall be as a City upon a Hill. The eyes of all people are upon us; so that if we shall deal falsely with our God in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a byword through the world, we shall open the mouths of enemies to speak evil of the ways of God and all professors for God's sake, we shall shame the faces of many of gods worthy servants, and cause their prayers to be turned into curses upon us till we be consumed out of the good land whether we are going.

Winthrop has proven quite prescient when we examine what has happened at Guantanamo. The story of these six men's imprisonment and suffering in Guantanamo is a story of this great country holding itself out to the world as a beacon of freedom and liberty while blatantly denying those same freedoms and liberties to these six men [and others] we unjustly seized and transported from their homes in Bosnia; separated from their wives, their children, and their communities; and subjected to daily mistreatment and humiliations; with no promise of release, no courtroom to challenge their confinement, and not even the basic right of learning anything about the facts claimed to justify their indefinite imprisonment. The eyes of the world are indeed upon us at Guantanamo, and the message we are sending daily is not one of decency and fair process, but rather of shame and the betrayal of our core values.

I am not here to speak to the necessity or propriety of maintaining a prison at the Naval Base at Guantanamo Bay, Cuba. Rather, I intend to tell the story of these six men who have been imprisoned there since January 20, 2002, in hopes that their story can shed light on why, as so correctly noted in the title of today's hearing, America's image is in decline around the world as a direct result of our actions in Guantanamo.

I. LIVES IN BOSNIA

All six of these men moved to Bosnia in the 1990s during or shortly after the Bosnian Civil War. Entering a country amidst a war that had left more than a hundred thousand dead and far more than a million displaced, most of our clients sought employment helping the thousands of children that had been orphaned by the fighting. Mohamed Nechla and Lakhdar Boumediene worked for the Red Crescent Society of the United Arab Emirates, one of the 186 national member organizations of the International Federation of Red Cross and Red Crescent Societies. Mr. Nechla directed orphan relief for the Red Crescent Society, visiting orphans at their home, distributing food, and teaching English and computer literacy. Mr. Boumediene oversaw the Red Crescent Society's distribution of humanitarian aid to hundreds of children orphaned by the war. Similarly, Hadj Boudella served as the Director of Orphan Social Assistance for the charity Human Appeal International.

Those that did not work with orphans were equally productive members of their community. Saber Lahmar was a scholar of Islamic theology and a teacher who was preparing to matriculate in a Master's degree program. He served as a librarian and a teacher of Arabic at the Islamic Cultural Center of the King Fahd Mosque in Sarajevo. Mustafa Ait Idir worked as a computer technician at the charity Taiba International, and also gave his time as a volunteer working with orphans and teaching karate to children aged six- to twelve-years-old. Mr. Ait Idir is an accomplished karate expert who competed in national tournaments in Croatia and Bosnia before his imprisonment and coached a college karate team in Sarajevo. Belkacem Bensayah was a merchant who sold clothing and jewelry.[1]

These men had large, loving families at home. Each was married with multiple children. Absent their income and support, these families have been thrown into abject poverty, living off government welfare or the charity of friends and relatives.

These men are allowed no non-legal visitors at Guantanamo and are often denied access to sending or receiving family mail, thereby robbing them of even the slightest participation in their families' lives. [Before we first visited in December 2004, they had seen no one but guards, interrogators and occasionally a Red Cross worker

[1] Photographs of each of these men taken prior to their arrests in Bosnia are attached as Exhibits A–F.

in almost three years]. Saber Lahmar, Hadj Boudella, and Mustafa Ait Idir each have children whom they have never met, because they were separated from their wives before the children were born. More disturbingly, Hadj Boudella was unable to be present during the illness and eventual death of his daughter Sajmaa, who died of a heart defect in early 2006. Mr. Boudella only learned of her death from me during a visit.

II. SEIZURE AND TRANSPORT

In October of 2001, everything changed for our clients. Under pressure to respond immediately to the horrible terrorist attacks of 9/11, and having long sought an opportunity to rid Bosnia of any man from the Middle East who arrived during or after the war that ended in 1995, the United States identified our clients among others in Bosnia as possible terrorists.

The U.S. demanded that Bosnian authorities arrest them, and when the Bosnians hesitated, due to lack of any probable cause linking our clients to any terrorist activity they knew of, the U.S. Charge d'Affaires, Chirstopher Hoh, threatened to withdraw all Embassy staff from Bosnia unless the Bosnian authorities complied, an action that would have had devastating consequences on the stability of the fragile tri-partite government established by the Dayton Peace Accords.

So the Bosnians reluctantly arrested our clients. A three-month investigation ensued while the men were imprisoned in Bosnia. After the Bosnian authorities, despite the assistance of Interpol and the United States, failed to unearth any evidence of the alleged plot against the U.S. or anyone else, the Supreme Court of the Federation of Bosnia and Herzegovina ordered the release of our clients. As they were walking out of the Central Jail in downtown Sarajevo to be reunited with their waiting families, our clients were illegally handed over to U.S. military forces. Each was later stripped naked and subjected to a medical examination at gunpoint in front of several onlookers. Our clients were then flown to a U.S. airbase in Turkey where they were again stripped naked and examined. Scared and disoriented, they were left on the cold floor of the airplane hanger with nothing to cover them but a flimsy garment, exposed to the freezing cold, as soldiers cursed them. They were then placed on a U.S. Military cargo plane for a 30-hour journey where they were chained in place for the entire 30 hours with their hands shackled to their feet and their eyes and ears covered with sensory deprivation devices.[2] They were fed a single apple, were not allowed to speak, change position, pray, or even use a toilet. Soldiers screamed and threatened them for the entire duration of the ride. From the prolonged exposure to the cold, Mr. Ait Idir lost all feeling from his left knee to his hip for a period of months.

III. CONFINEMENT

Arrival at Guantanamo was no less traumatic and degrading. Our clients were again stripped naked and were menaced by snarling dogs. They spent the next several months living in open cages until more permanent conventional prison facilities were constructed, constantly exposed to sun, rain, snakes and scorpions. They were severely beaten and taunted during this period.[3]

In the initial months at Guantanamo, the Government engaged in a radical and untested form of interrogation aimed at breaking down the psychological defense mechanisms of the individual detainees. This interrogation method, which has been shunned by the psychological community both for its sheer brutality as well as for its ineffectiveness, consisted of overloading or depriving the detainee's senses of time and place until they became so weak and disoriented that they could no longer muster the will to fight back. Our clients were placed in windowless rooms where a fluorescent light would be left on for days at a time. Whenever they attempted to block the light with a towel they were punished. They were kept in total isolation for periods that lasted in some cases almost two years. To disrupt any potential sleep, guards awakened our clients every half an hour and instructed them to rearrange their belongings. Loud heavy-metal music was constantly blasted so as to block sleep and normal thought patterns.

Saber Lahmar

The practice of extended isolation has continued sporadically for the past six years. Saber Lahmar has now been held in near complete isolation for the past two years. For the first roughly year and a half of that time, he was confined to a cell

[2] Photographs of the transport to Guantanamo are attached as Exhibits G and H.

[3] A photograph of Camp X-Ray, where our clients were initially detained, is attached as Exhibit I.

that was just 8' x 6' in size and was illuminated twenty-four hours a day. His window was painted over with opaque paint, so no natural light could enter and he could not tell night from day. For a period of an entire month he was denied a toothbrush and toothpaste, and has been denied access to any books aside from the Koran. He was allowed out just ten minutes a day, and then only to an adjacent cage to shower.

This complete isolation has not only taken a severe psychological toll, but has also led to a host of debilitating physical ailments. Mr. Lahmar suffers from nerve and muscle damage in his knees, and has been ordered by doctors to engage in physical exercise in order to stop his muscles from atrophying. Confined to such a tiny cell with no ability to move around, Mr. Lahmar's legs have suffered dramatic and lasting damage.

Guards also deliberately exposed Mr. Lahmar to extreme temperature by constantly blowing cold air into his cell—a tactic that has been practiced upon each of our clients. On one occasion, it was so cold in Mr. Lahmar's cell that ice formed on the cooling vent shaft. On another occasion, Mr. Lahmar was kept in a cold cell, without lights, for three months. During this period, he was kept naked, and at times deprived of food and water.

Similar extended periods of isolation have been experienced by each of our clients, most notably by Belkacem Bensayah, who at one point spent 17 consecutive months in isolation.

Mustafa Ait Idir

Treatment by the guards was perhaps harshest when our clients attempted to pray. Knowing that inmates would not pray without their knees being covered, guards demanded that our client Mustafa Ait Idir and every member of his cell block give up their pants at one point in 2004. When Mr. Ait Idir refused, guards doused him with tear gas. After he was blinded and writhing in pain, a team of soldiers stormed into his cell in full riot gear, grabbed his testicles and squeezed. As he collapsed on the ground in a fetal position, the soldiers jumped on him and began to beat him. They restrained his hands behind his back and secured them to his feet. Even after he was fully immobilized, guards continued to beat him, bending two of his fingers back so far that they broke, and then denying him necessary medical treatment to set the fingers. They are now permanently damaged.

Just a few days later, the guards again attacked Mr. Ait Idir. Entering his cell for a search, a guard sprayed Mr. Ait Idir in the face with pepper spray. Five guards in full riot gear [the so-called IRF Team] entered his cell, secured his hands behind his back with plastic restraints, and then carried him out to a gravel courtyard. While two guards drove their knees into Mr. Ait Idir's back, a third guard jumped repeatedly on his head, driving his face into the stones. The guards then stuffed a water house into Mr. Ait Idir's mouth and turned it on full force, suffocating him. After observing that he could still breathe through his nose, they removed the hose and ran the water full force into his face while holding his head still, so as to cut off all air. They then began to twist the pinky and adjacent finger on the hand that had not been damaged in the previous attack, this time dislocating all of his knuckles and causing excruciating pain. The gang of guards then carried Mr. Ait Idir back to his cell where, while suspending him by his waist and legs with his hands still secured behind him, they slammed his body and head into the steel walls and floor of his cell, then slammed his head into the foot stirrups of the toilet in his cell, and finally lowered his head into the toilet and flushed it repeatedly.

These beatings left Mr. Ait Idir's face paralyzed, having induced Bell's Palsy. Unable to control his mouth, food was nearly impossible to eat. Yet, instead of providing Mr. Ait Idir with medical attention, the guards mocked him for his disability. It was at least 10 days before he was seen by a doctor, even though the paralysis, swelling and pain disturbed his ability to eat, drink, and sleep. Food and liquid would drip from his mouth whenever he attempted to feed himself.

Most recently, during an interrogation in October of 2007, Mr. Ait Idir asked for a second pair of shorts on account of a rash. The following day, while coming back from recreation, shackled and hooded, a guard grabbed him so hard by the arm that it left bruises, then drove his knuckles into Mr. Ait Idir's lower back, where he was holding the chain wrapped around Mr. Ait Idir's waist. When they arrived at Mr. Ait Idir's cell, the guard pushed the hooded and defenseless Mr. Ait-Idir into the doorframe, striking his head and causing a "pop" in Mr. Ait Idir's neck vertebrae. His head immediately began to bleed from the wound. The lead officer on the cell block refused to let Mr. Ait Idir go to the clinic, talk to the interpreter, or talk to his superiors. When the guard involved wrote up the incident, he claimed that Mr. Ait Idir threatened him, and Mr. Ait Idir was punished for the ordeal. Since the incident, Mr. Ait Idir has had headaches for several weeks. He is also unable to turn

his neck to either side. The symptoms of his Bell's Palsy returned for three to four days. They have since lessened, but have not gone away. His left eye flutters and his lip spasms occasionally. He has lost even more taste in his mouth.

Lakhdar Boumediene

Mr. Ait Idir's experience was unfortunately not unique. Cruel and degrading mistreatment was experienced by each of our clients. For example, on three separate occasions, Lakhdar Boumediene's beard, a symbol of his religious expression, has been shaven against his will by guards at Guantanamo.

Using the only form of protest available to him, Mr. Boumediene began a hunger strike in December of 2006. He continues to refuse food and, already a slight man, he has lost at least 40 pounds since his initial incarceration. The Camp Command have met this hunger strike with force, engaging in feeding techniques that can only be described as their own form of torture. Twice daily, Mr. Boumediene is strapped head, chest, arms and legs into a chair and force-fed an hour or more through a 43-inch tube inserted into his right nostril. When inserted improperly, as often happens, this tube causes excruciating pain. In one instance, a guard tied Mr. Boumediene's head back so far that the feeding tube choked him and caused so much damage to his throat that Mr. Boumediene was unable to speak afterwards for five days. On many other occasions, medical personnel have had trouble inserting his feeding tube (at one point, they tried for two hours). Mr. Boumediene has had to experience this violent force feeding twice a day for the past eighteen months. This is in direct contravention of Article 5 of the World Medical Association Tokyo Declaration, which U.S. doctors are legally bound to follow through their membership in the American Medical Association. Article 5 forbids doctors from force-feeding voluntary participants in a hunger strike under any circumstances.

Camps V and VI

Over the past couple of years, the U.S. government has opened two new facilities that it has held out to be improvements over the brutalizing conditions prisoners experienced during the initial years at Guantanamo. These facilities are in fact far worse, as they have been designed to accentuate many of the psychological tortures that are utilized in Guantanamo.

Describing one of the two new facilities, Camp V, the lawyer for a British detainee found that his client was "slowly but surely slipping in to madness" after a nine-month ordeal in isolation. In Camp V, detainees are deprived of any contact with human beings aside from their jailors, and that contact is only in passing as the jailors shove food through a slot in the door. No natural light enters the cell, and the fluorescent light above is never shut off. Recreation, to the degree that it is even offered, is confined to a caged area in a high-walled courtyard.

Yet, despite how oppressive the conditions in Camp V are, the conditions in Camp VI are far worse. Cells in Camp VI let in no natural light, causing great disorientation in prisoners who cannot tell whether it is day or night. The Camp was constructed with materials that amplify noise, rendering sleep difficult if not impossible. Surveillance is constant, even when the detainee is using the toilet, irrespective of whether the guard is male or female, and detainees are confined to their cells for 22 hours every day; cells so inhospitable that Mr. Bensayah is forced to use his toothbrush to clean his area.

The cumulative effects of these conditions have been dramatic. Dr. Daryl Matthews, a forensic psychologist at the University of Hawaii and former Department of Defense consultant, designed and reviewed a proxy psychological evaluation that we have twice administered to our clients during visits. Dr. Matthews found that the complete loss in control over their daily lives has resulted in profound depression and Post Traumatic Stress Disorder. This has left the six men psychologically unfit to resume anything like their former lives without intense and prolonged therapy and support. Further, when examining the change in mental health between proxy psychological assessments administered in 2005 and 2007 for each of our clients, Dr. Matthews concluded that each client's psychological condition was continuing to worsen dramatically.

Dr. Grant Brenner, a New York trauma specialist who has written a report on the likely psychological effects of the conditions of Guantanamo based on a review of studies of many other wartime prison confinements, has found that many of the techniques used, such as the use of sensory and sleep deprivation, have been "reported to have 'disabling or lethal' effects on human beings."

The physical effects of this prolonged imprisonment and systematic mistreatment on our six clients have been equally dire. Forced to drink unclean water that is often yellow or brown and carries a strong stench, almost all of our clients have developed kidney problems. Due to regular denial of adequate toothbrushes, almost all of our

clients have experienced severe dental problems which are not meaningfully addressed. All appear to have advanced periodontal disease. When they have suffered injuries, these injuries have been left untreated, greatly exacerbating what could have at times been minor issues.

IV. DIPLOMATIC AND LEGAL EFFORTS

As lawyers to these men, we have explored several different diplomatic and legal options to alleviate their situation and bring them the justice they deserve. Along with colleagues from WilmerHale, I have gone to Guantanamo Bay on twelve occasions to meet and counsel our clients since December 2004. (Before visits by pro bono counsel to Guantanamo began in the wake of the Supreme Court's June 2004 decision in Rasul v. Bush, no detainee had met with or spoken to an attorney, although many—including our clients—had been imprisoned in Guantanamo for almost three years.) I represented the men in habeas corpus proceedings in the United States District Court for the District of Columbia and in subsequent appeals. On December 5, 2007, we argued our case in front of the Supreme Court, and are currently awaiting the Court's decision.

Separately, we also filed petitions for each of our clients pursuant to the Detainee Treatment Act of 2005 ("DTA"). Those appeals are now pending at a preliminary stage in the District of Columbia Court of Appeals.

Recognizing that Bosnia is complicit in the horrors that have been visited upon our clients, in late 2006 and early 2007, we filed applications against Bosnia on behalf of each client before the European Court of Human Rights. These applications allege that the government of Bosnia and Herzegovina illegally handed our clients over the United States and has not fulfilled its obligations to seek our clients' safe return or to protect our clients from torture and the possible imposition of the death penalty. We filed Written Observations and our Claim for Just Satisfaction with the Court on March 12, 2008, and are waiting for answers from Bosnia and Herzegovina, which are due at the end of this month.

We have also engaged in extensive diplomatic negotiations with the United States, Bosnian, and Algerian governments. We believe that Bosnia, especially, has a positive obligation to secure the safe return of our clients. On October 12, 2002 and April 4, 2003, the Human Rights Chamber of Bosnia and Herzegovina held that the removal of our clients from Bosnian soil occurred in violation of the laws of Bosnia and Herzegovina and the European Convention on Human Rights. In those orders, the Chamber instructed the Bosnian government to use diplomatic channels to repatriate our clients and to protect them while in United States custody.

Despite these rulings, and despite the fact that our clients have been subjected to repeated torture and harsh treatment, the Bosnian government has made only a cursory effort to secure the safety of the men or their safe return. Still, at least to some degree, elements of the Bosnian government have formally acknowledged its obligations. On April 21, 2004, [more than two years after the men's illegal handover to the United States] the Commission for Human Rights, Immigration, Refugees and Asylum of the Parliament of Bosnia and Herzegovina formally accepted the conclusions and measures ordered by the Human Rights Chamber. The Commission urgently requested all relevant institutions of Bosnia to implement the Chamber's decision and to initiate a procedure with the United States authorities for the return of Guantánamo detainees to their homes in Bosnia and Herzegovina. The Commission's report was adopted by the full House of Representatives of the Parliament on May 11, 2004.

On September 16, 2005, the Parliament of Bosnia adopted a resolution obligating the Bosnian Council of Ministers to enter into contact with the U.S. Government and resolve the issue of the six Bosnian citizens and former residents at Guantánamo as soon as possible. The resolution passed by a large majority.

Bosnia's positive obligations to seek the return of our clients also stem from its obligations as a member state in the Council of Europe, the pan European human rights umbrella group of 47 European nations. On April 26, 2005, the Parliamentary Assembly of the Council of Europe passed Resolution 1433, calling on all member states of the Council of Europe, including Bosnia, to "enhance their diplomatic and consular efforts to protect the rights and ensure the release of any of their citizens, nationals or former residents currently detained at Guantánamo, whether legally obliged to do so or not." In 2006, the Bosnian Foreign Minister admitted in writing to the Secretary General of the Council of Europe that our clients' rendition was an extralegal "hand-over." We believe that at this time our clients are the only European citizens and residents still held in Guantanamo.

Nevertheless, the Bosnian Government has taken few concrete steps to secure the safe return of our clients over the last six plus years. We have met with numerous

Bosnian officials over the last three years to encourage diplomatic efforts to seek the return of our clients. We have had discussions with, and received verbal support from, Haris Silajdžić (Bosnian Presidency Member), Zlato Lagumdžija (former P.M.), Nikola Spiric (P.M.), Mirsad Kebo (V.P.), Sulejman Tihic (former Presidency Member), Adnan Terzic (former P.M.), and Bisera Turković (long-time Ambassador to U.S.) on their trips to the U.S. and our three trips to Bosnia. We can show our clients little for these efforts.

We have also been in discussions with the Algerian government since 2004. Our clients prefer to return to their families and lives in Bosnia, rather than to their birthplace in Algeria, and the official position of the Algerian government is that they will only accept the six men if they return willingly. The diplomatic efforts with Bosnia have been greatly slowed and impeded by the political turmoil and institutional weakness that still paralyzes the Bosnian government eleven years after the Dayton Accords. This political instability has increased over the past few months.

CONCLUSION

Our clients' imprisonment and mistreatment in Guantanamo without charge or trial for over six years has had a devastating impact on their mental and physical well being. But the effects of their confinement in Guantanamo are also experienced far more broadly. Their treatment is seen in much of the rest of the world as a symbol of American hypocrisy. Each day that their confinement continues is a day America's image in the world continues to decline;[4] is a day we are seen as oppressors rather than liberators; and is a day that we have once again failed to live up to the promise or to heed the warning of John Winthrop in describing our City upon a Hill.

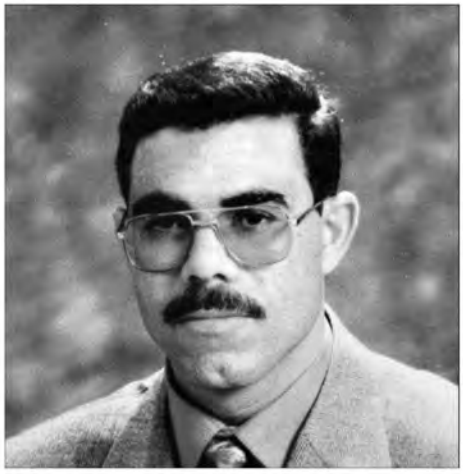
Appendix A: Photograph of Mustafa Ait Idir

Mustafa Aid Idir

[4] Assuredly, this is why the three major candidates for President has each said he or she will close Guantanamo

Appendix B: Photograph of Belkacem Bensayah

Belkacem Bensayah

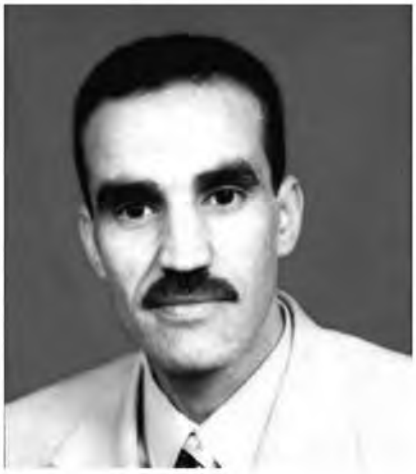


Appendix C: Photograph of Hadj Boudella

Hadj Boudella

Appendix D: Photograph of Lakhdar Boumediene

Lakhdar Boumediene



Appendix E: Photograph of Saber Lahmar

Saber Lahmar

Appendix F: Photograph of Mohamed Nechla

Mohamed Nechla

Appendix G: Photograph of Transport to Guantanamo

Appendix H: Photograph of Transport to Guantanamo

Exhibit I: Photograph of Camp X-Ray

Mr. ROHRABACHER. Just one question. Where do your clients come from originally?

Mr. OLESKEY. They were all born and left Algeria roughly in their late teens, early 20s.

Mr. ROHRABACHER. I didn't catch that in your testimony. So they are all Algerian.

Mr. OLESKEY. Algerian by birth. All but one of them had become a Bosnian citizen by the time of 2001.

Mr. ROHRABACHER. And when did they go to Bosnia?

Mr. OLESKEY. Two of them went there apparently in the mid-90s. The rest went after the war.

Mr. ROHRABACHER. After which war?

Mr. OLESKEY. After the Bosnian war.

Mr. ROHRABACHER. And none of them had been in Afghanistan?

Mr. OLESKEY. Not to my knowledge.

Mr. ROHRABACHER. Okay. Thank you.

Mr. DELAHUNT. Ms. Gilson.

STATEMENT OF ELIZABETH P. GILSON, ESQ., ATTORNEY-AT-LAW

Ms. GILSON. Thank you, Chairman Delahunt and ranking member—can you hear me?

Mr. DELAHUNT. Can you hit that button?

Mr. GILSON. Is that better?

Mr. DELAHUNT. That is much better. Thank you.

Ms. GILSON. Ranking Member Rohrabacher. I am grateful for your leadership in examining this important issue, and I am deeply grateful to both of for your concern with the Chinese Uighur people. Mrs. Kadeer, who is the president of the World Uighur Congress, was here, along with Eileen Satif. I think you both saw her. She couldn't stay, but she was anxious to hear what we had to say and is pleased that you had this hearing.

I represent two Uighur men, Uighur as they call it. And you have explained very well, Mr. Chairman, that they are a Turkic Muslim minority in northwest China that has been—it was an independent country until it was overrun by the Chinese Communists in 1949 and has been annexed to China ever since then. The people have been persecuted.

So your question was who are these people in Guantanamo? My clients are two of what were 22 Uighurs, 18 of whom were caught under identical circumstances with identical facts. Five of these 18 were found to be nonenemy combatants. Three of them were found to be nonenemy combatants by command pressure. Under orders they did it over, they did sometimes two or three do-overs to finally find that they were enemy combatants.

Mr. DELAHUNT. Let me interrupt, Ms. Gilson, because we are going to be adjourning, and I am going to ask if you would consider staying for about another 45 minutes while we have a series of votes. But you said command pressure.

Ms. GILSON. Yes.

Mr. DELAHUNT. Can you expand on command pressure? I think it is important that the committee understands that there was a hearing, presumably before a CSRT——

Ms. GILSON. We would not call it a hearing. They never saw one piece of paper. They never saw any evidence against them. They weren't allowed a lawyer. But there was a process by which the military said, "Let's reconfirm that they were enemy combatants." So it was not a hearing. And on top of that, my client was found an enemy combatant, but they recommended his release, but not to China. We can go through that.

But as far as command pressure, we have—this is my petition filed under the Detainee Treatment Act. I would like to submit it for the record.

Mr. DELAHUNT. Without objection.

Ms. GILSON. It has all of the details in there. But basically, some of the Uighurs were found—we knew from the beginning, and the Uighurs have told us, and it was widely reported that America did not think that the Uighurs belonged in Guantanamo. However, they still went through the CSRT process. Five of them, as I say, were NECs, no longer enemy combatants, which is sort of a Kafkaesque——

Mr. DELAHUNT. How do you get to be a nonenemy combatant? What is the magic criteria for that? What magic wand do you wave to be no longer a threat?

Ms. GILSON. I think Emi told you both the nonenemy combatant status and the cleared status is irrelevant. This is a political process. In the case of the Uighurs, and it is all in here, the commanders back in Washington said, "You cannot—these people are all the same. You can't find some of them nonenemy combatants and some enemy combatants. Do it over again until you get it right." And so they did.

Mr. DELAHUNT. So your suggestion is do it right until you make the determination that they are enemy combatants?

Ms. GILSON. That is correct.

Mr. DELAHUNT. That is what you are stating?

Ms. GILSON. That is correct.

Mr. DELAHUNT. I don't want to interpret your statement in a way that it could be suggested that I am leading you to that conclusion. You reached that of your own free will.

Ms. GILSON. I think I said it. That is correct.

Mr. DELAHUNT. Maybe because I just find that so outrageous that that happens.

Ms. GILSON. Do-overs?

Mr. DELAHUNT. Do-overs. That is a real, I guess, an elaborate process.

Ms. GILSON. There was a memo—yes, very elaborate. There was a memo where that was produced in the—it is now unclassified where it says we can't have these inconsistencies, we need to exploit these Uighurs here in Guantanamo as long as possible. And a case has been filed before the Supreme Court, an original habeas petition, which is still pending.

So you were asking who these people are. I am not clear whether you wanted us to stop now?

Mr. DELAHUNT. No, you can go right ahead and take all the time, because we are going to hear your testimony in full and then we will return and have an opportunity to have a conversation, myself, the ranking member and the vice chairman, with this panel. So you

just go ahead with your testimony as you have written it, or feel free to shorten it.

Ms. GILSON. I can summarize, since this panel seems thrillingly aware of some of the issues that we have told judges about this and we haven't been able to get a hearing yet. We have talked about as our clients, my clients were captured in Pakistan, they had never been on a battlefield, they had never picked up a weapon, and turned over for bounty. You have heard about these bounty flyers which Secretary Rumsfeld said were dropped on the Afghani and Pakistani people like snow over Chicago in the winter. I attached——

Mr. DELAHUNT. Does this sound familiar to you? I just want to submit this into the record. On the front of this flyer it says, "Get wealth and power beyond your dreams."

Ms. GILSON. Isn't that Madison Avenue?

Mr. DELAHUNT. Help the anti-Taliban forces rid Afghanistan of murderers and terrorists. You can receive millions of dollars for helping the anti-Taliban force catch al-Qaeda and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and schoolbooks and housing for all your people.

Is this the flyer that you are referring to?

Ms. GILSON. Yes, sir. This is found——

Mr. DELAHUNT. I submit this for the record, and without objection so ordered.

[The information referred to follows:]

Afghanistan Leaflets

TF11-RP09-1

FRONT

"Get wealth and power beyond your dreams. Help the Anti-Taliban Forces rid Afghanistan of murderers and terrorists"

BACK

TEXT ONLY

"You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."

From http://www.psywarrior.com/afghanleaf40.html

Ms. GILSON. Thank you. This is found right on the Department of Defense Web site. It is called psy-ops, psychological operations, which were used for hearts and minds. I think it actually reads like this: "You can receive millions of dollars." I think it is more Madison Avenue than that.

Mr. DELAHUNT. You have more passion than I do.

Ms. GILSON. But our clients, the Uighurs, learned that when they were sent to Kandahar that they had been sold for $5,000 a head. $5,000 is a lot of money for a poor Pakistani, and it is no wonder that so many innocent men wound up at Guantanamo. You explained how many were caught. Actually, only 5 percent were caught by U.S. forces. And indeed our own commanders made statements such as they weren't dangerous. We didn't always catch the right guys. These guys didn't know anything of value. And General Martin Lucenti, who was then the deputy commander, said, "Most of these guys weren't fighting. They were running."

Mr. DELAHUNT. What did he say? Can you repeat that, please, Ms. Gilson?

Ms. GILSON. Most of these guys weren't fighting, they were running.

Mr. DELAHUNT. They were running. Thank you.

Ms. GILSON. In U.S. custody, my client, Bahtiyar, affirmed that he had nothing of value to give to the military. He denied in fact ever hearing of al-Qaeda. He said, "Al-Qaeda's mainly heard here in Guantanamo. Al-Qaeda is an enemy of the whole world and the

United States. The whole world is against the al-Qaeda organization. If we had ties with al-Qaeda, that would mean all the Uighur people would lose help from the whole world and lose our goals," and other statements like that.

It is heartbreaking. In fact, the Uighurs consider themselves allies of America because they themselves are so supportive of an independence movement, this kind of support that got Mrs. Kadeer put in prison for nearly 6 years. And three of her sons are in prison now for what the Chinese call splitism.

Now it is not surprising then that the Chinese were intensely interested in the Uighurs at Guantanamo. In 2002, the Chinese Foreign Ministry demanded that these men be returned to China to face terrorism charges. And this is a very tragic story that I am about to tell. The Chinese claim that Uighur dissidents, whether they are violent or peaceful, are terrorists. And they have accused them of being organized as a group called the East Turkistan Islamic Movement, ETIM. We don't have any independent evidence that it even exists, and our men had never heard of such a thing, and certainly denied being a part of it. This label is applied indiscriminately to the Uighur dissidents. We have never heard of it. In fact, the State Department, which maintained a list of terrorist organizations, never had ETIM on its list.

Then in 2002, during the run-up to the Iraq war, both Iraq—we were trying to get a coalition of the willing together for the invasion of Iraq. And Iraq itself wanted China to be on its side. And we wanted China to remain neutral. There was a race to China. The Iraqi Ambassador went first and Richard Armitage, our own Under Secretary of State, got there ahead of him and took the point. He arranged a quid pro quo with the Uighurs as a bargaining chip whereby China would agree to remain neutral in our Iraq war, and we in turn would agree to list the Uighurs and the ETIM on our terrorist watch list.

Interestingly enough, they are not on the other lists. They are not on the list for, you know, the organizations whose funds need to be stopped. Uighurs have been a preferred minority for immigration purposes. They are not on the immigration list. But on this terrorist watch list, which is separately maintained, for the first time we changed our mind; we have said we have statements saying that we don't think ETIM is a real group. We, because of this devil's bargain, not only listed ETIM on our terrorist watch list, but we allowed the Chinese to interrogate these poor helpless men who were in our care. You are well aware of this. Let me just tell you a few of the things they said.

Not only did they threaten, they said to the men, "You are lucky you are in Guantanamo, because if you get out and come to China——"

Mr. DELAHUNT. These are the Chinese agents?

Ms. GILSON. Yes.

Mr. DELAHUNT. That said to the men that were under our control, in our custody, "You are lucky to be in Guantanamo"?

Ms. GILSON. Because if they got out, they threatened them with torture, and jail time, and even death. More frightening in some ways, they said, We know who your family is and we know where

they are. And that I have been told bothered them more than anything else.

So I guess this establishes that these men have a reasonable fear of persecution should they be sent back to China. Indeed, I and other counsel for the Uighurs recently wrote to the Justice Department, the lawyers who are litigating the cases, asking them to confirm that the United State's position was still that the Uighurs would not be sent back to China. And we have not been able to get any confirmation as to this. And we also understand that the Uighurs, after a 6-, almost 7-year hiatus, may be being interrogated again. Things have changed in the world. We are just not sure——

Mr. DELAHUNT. Interrogated by?

Ms. GILSON. By the Americans. They had nothing of value before. Again because of the unrest in China——

Mr. DELAHUNT. This is what you would call a do-over.

Ms. GILSON. Well——

Mr. ROHRABACHER. Can I ask one question?

Ms. GILSON. Yes, sir.

Mr. ROHRABACHER. How many clients do you have?

Ms. GILSON. I have two. There are 17 remaining in Guantanamo.

Mr. ROHRABACHER. 17 remaining. And to your knowledge were any of them in Afghanistan?

Ms. GILSON. Yes, they were in Afghanistan.

Mr. ROHRABACHER. I mean not after they were transported back, but had they been in Afghanistan during the time before 9/11?

Ms. GILSON. Yes. And indeed it is in my statement. What happened, at least in the case of my client, along with—it is very similar to the others; he was an ambitious young man. He left China to find a better life. He had $700 in his pocket. He made his way to Pakistan from East Turkistan and found that that was not going to last him very long. He was told that there was a Uighur village in the mountains of Afghanistan. He went there. They were put to work doing construction. It was all Uighurs. There were no Arabs there. He had never even seen an Arab before he got to Guantanamo. He said, "Remember, I come from a closed country." They knew—they had never heard of al-Qaeda. The village was not near or it was not part of any fighting between the Taliban and the Northern Alliance. But one day during the Afghan incursion by the United States in September 2001 there bombs started falling. The men fled into the mountains without their passports, without their luggage, and wandered around for about a month when they found their way into Pakistan, where they were welcomed by a village of Pakistanis, fed, and then soon betrayed for bounty. They were in Afghanistan. There is no accusation at all that they engaged in any hostility against America or its allies. And indeed, the only statements that they did make were that if they were hostile to anyone, it was to China.

We have not received—I can't tell you about classified information, but in the unclassified information there is no allegations of any hostilities. And indeed they have all been cleared for release.

Mr. DELAHUNT. They have all been cleared for release, but they are enemy combatants, and they can't go back to China, and we got them for $5,000 a head?

Ms. GILSON. Right.

Mr. DELAHUNT. They are cattle.

Ms. GILSON. While our country calls these guys the worst of the worst here at home, for years they have been shopping these Uighurs abroad, trying to find a place for them. And I think as Mr. Rohrabacher said, no one will take them because the Chinese always get there first. And the Uighur community in America, the Uighur President and the Secretary General who were here today, stand ready to help resettle these Uighurs in America with jobs and housing. However, so far the U.S. Government has declined that solution. Meanwhile, my clients for unfathomable reasons remain locked away in solitary confinement.

Mr. DELAHUNT. 24 hours a day.

Ms. GILSON. I don't know if anyone has told you about this. These are metal boxes with three windows, each 3 inches wide, with only a clock to look at. It is almost cruel that they have to look at a clock.

Mr. DELAHUNT. We are going to have to recess, and we shall return. And if you can indulge us for about 45 minutes.

Ms. GILSON. Thank you.

[The prepared statement of Ms. Gilson follows:]

PREPARED STATEMENT OF ELIZABETH P. GILSON, ESQ., ATTORNEY-AT-LAW

Good afternoon, Chairman Delahunt, Ranking Member Rohrabacher, and all members of the subcommittee. Thank you for inviting me here. I am grateful for your leadership in examining the mistakes made at Guantánamo and the effects of those mistakes on America's image. This is one of the most important issues of our time—one that implicates America's basic values and its commitment to the rule of law.

My name is Elizabeth Gilson. I am a lawyer practicing in New Haven, Connecticut. I represent two men imprisoned by the U.S. Government at Guantánamo Bay since 2002, without any charges or a hearing. My clients are brothers, Uighur refugees from China. They are among 17 Uighurs held at Guantánamo. The Uighurs are a Turkic Muslim minority group in far-west China. Their homeland, East Turkistan, was annexed by the Chinese Communist Government in 1949 and re-named the Xinjiang Uighur Autonomous Region.

The Uighur people have been, and continue to be, brutally oppressed by the Chinese Government.[1] The oppression of the Uighur people, and the state-sponsored mass-migration of millions of ethnic Han Chinese into the Uighur homeland, has led to ethnic tensions and to a Uighur nationalist movement, much to the displeasure of the Chinese Government.[2] Chinese officials allege that Uighurs carried out "terrorist operations" by using "literary means" and "arts and literature" to "distort historical facts." Uighurs were accused of "taking advantage of art and literature to tout the products of opposition to the people and to the masses and of advocating ethnic splittist thinking."[3]

I. THE CIRCUMSTANCES OF CAPTURE BY BOUNTY HUNTERS

Let me tell you about one of my clients, Bahtiyar, a Uighur. Bahtiyar is from Ghulja, a city astride the Lli River in western Xinjiang, near the border with Kazakhstan. In Ghulja, he ran a small business selling clothing.[4] He left the city

[1] *See* U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2004 (Feb. 28, 2005) and 2007 (March 11, 2008), *at* http://www.state.gov/g/drl/rls/hrrpt/2004/41640.htm and http://www.state.gov/g/drl/rls/hrrpt/2007/.

[2] *See* Joshua Kurlantzik, "Unnecessary Evil: China's Muslims aren't terrorists. So why did the Bush administration give Beijing the green light to oppress them?" Washington Monthly (Dec. 1, 2002) ("More than 3,000 Uighurs reportedly have been secretly jailed since 9/11, and many have been executed for no given reason. Xinjiang province . . . remains the only place in China where people are routinely put to death for purely political disagreement.").

[3] *See* Human Rights Watch Report, *Devastating Blows, Religious Suppression of Uighurs in Xinjiang: II, available at* http://hrw.org/reports/2005/china0405/4.htm.

[4] See Summary of Admin. Rev. Board's Proceedings for ISN 277, 20303, 20312, *available at* http://www.dod.mil/pubs/foi/detainees/csrt/ARB__Transcript__Set__6__20255–20496.pdf.

amid increasing political oppression of the Uighurs by the Chinese Government.[5] He did not want to "waste his youth" in such a climate, and hoped to travel to a country like the United States or Canada.[6] Bahtiyar left China with two others, heading first to Kazakhstan, then to Pakistan. In Pakistan, he learned that his life savings of $700 would not sustain him for long. He was told about a Uighur community in the mountains of Afghanistan, where he would be given food and shelter in exchange for construction work. There were no Afghans or Arabs in the village. The village itself was no more than a handful of houses bisected by dirt tracks. Bahtiyar, as well as five Uighurs who would later be determined to be non-combatants, lived at this village in October, 2001. In return for food and shelter, the Uighur men did odd construction jobs and manual labor. They helped build houses and a mosque. The Uighur community was quiet and peaceful—separated from the fighting between the Taliban and the Northern Alliance.[7]

In late 2001, the entire village was forced to flee the U.S. aerial bombardment of the surrounding area. Bahtiyar fled along with 17 others. They camped out for several days in the mountains of Afghanistan because they could not find a road in the rugged terrain. Eventually, they were able to make their way to Pakistan, thinking they would be safer there with the war raging on and their village insecure. After crossing into Pakistan, Bahtiyar and the other Uighurs were welcomed and fed by Pakistani villagers—who promptly betrayed them in return for the generous bounties that the United States offered for "helping the anti-Taliban forces."[8]

II. THE BOUNTY PAYMENTS

Following the Afghan incursion in 2001, the United States bombarded Pakistan and Afghanistan with leaflets promising large sums for turning over "murderers."[9] An illustrative flyer makes a hard-to-resist offer:

> "Get wealth and power beyond your dreams . . . You can receive millions of dollars helping the anti-Taliban forces catch al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people."[10]

These leaflets and the promised rewards help explain how so many innocent prisoners ended up at Guantánamo. The payments reportedly began at a minimum of $3,000—certainly enough to tempt poor Pakistani villagers to capture and peddle a group of Uighur foreigners to the Americans, no questions asked.[11] The Uighurs learned in Kandahar that the United States paid a $5,000 bounty for each of them.[12] Recent government data shows that only 5 percent of the prisoners at Guantánamo were captured by U.S. Forces. The rest were sold by Afghanistan and Pakistan.[13] Bahtiyar, like many, if not the majority of the prisoners in Guantánamo, was simply in the wrong place at the wrong time. Rather than being the "worst of the worst," as Department of Defense officials repeatedly called them,[14] they are more accurately described as the "unluckiest of the unlucky."

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[5] *Id.* at 20311.

[6] *Id.*

[7] *Id.*

[8] See footnote 10, page 2.

[9] Leaflets were "dropping like snowflakes in December in Chicago," according to Secretary of Defense Rumsfeld. Remarks at a Department of Defense News Briefing, Nov. 19, 2001, *available at* http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/rumsfeldtext__111901.html.

[10] A copy of this flyer is attached. This and other flyers are posted on the on the Department of Defense website, http://www.psywarrior.com/afghanleaf40.html.

[11] See, e.g., FOIA CSRT 01236. The FOIA documents were produced by the military under a Freedom of Information Act request from the AP. The documents were all posted at the DOD FOIA website: http://www.dod.mil/pubs/foi/detainees/csrt/index.html.

[12] *See generally* FOIA CSRT 001220.

[13] General Pervez Musharraf wrote in his 2006 book that "millions" were delivered to Pakistan as bounty payments for turning over prisoners. *See also* Mark Denbeaux *et al., The Guantanamo Detainees: the Government's Story* at 2–3 (2006), *available at* http://law.shu.edu/news/guantanamo__report__final__2__08__06.pdf (up to 86% of Guantanamo detainees may have been handed over to the United States in return for a bounty).

[14] *See, e.g.*, DoD News Briefing-Gen. Richard B. Myers, Chairman, Joint Chiefs of Staff (Jan. 11, 2002), *available at* http://www.defenselink.mil/transcripts/2002/t01282002__t0128asd.html (prisoners are "the worst of the worst")

III. "THEY WEREN'T DANGEROUS AND DIDN'T KNOW ANYTHING OF VALUE."

According to the admissions of American military and intelligence officials, the vast majority of men detained in Guantanamo had nothing to do with September 11th and have no association with a terrorist organization. As the Wall Street Journal reported: *"American commanders acknowledge that many prisoners shouldn't have been locked up here in the first place because they weren't dangerous and didn't know anything of value. 'Sometimes, we just didn't get the right folks,' says Brg. Gen. Jay Hood, Guantánamo's [then-]current commander."* The then-deputy commander, Gen. Martin Lucenti, said that *"Most of these guys weren't fighting. They were running."*[15]

In U.S. custody, Bahtiyar denied (as did every other Uighur) having any ties to al Qaeda or the Taliban, arguing sensibly that:

> *"Al Qaeda's name we heard in here [Guantánamo]. Al Qaeda is an enemy of the whole world and the United States. The whole world is against the Al Qaeda organization. . . . if we had ties with Al Qaeda, that would mean all the Uighur people would lose help from the whole world and lose our goals."*
>
> . . .
>
> *"We understand that Al Qaeda was established by Arab people, and we understand also that those Arab people have their own country and can live however they want in their own country. We are Uighurs and have lost our country on the west side of China. I don't know what their goals are, they can live independently and freely in their country and I don't understand why they're fighting with the whole world and the Americans. I have no knowledge about why they're fighting."*[16]

There was absolutely no link to the Taliban or al Qaida, and none has even been alleged.

IV. COMMUNIST CHINESE AGENTS INTERROGATE THE UIGHURS AT GUANTÁNAMO.

In December 2002, a spokesman for the Chinese Foreign Ministry demanded that any Uighurs captured in Afghanistan be returned to China "to face charges of terrorism."[17] The Chinese claim that Uighur dissidents are members of the East Turkistan Islamic Movement (ETIM), which they say is an extremist movement, with ties to Al Qaida.[18] This label is applied by the Chinese indiscriminately to any Uighur suspected of political dissidence. Chinese authorities did not distinguish between peaceful political activists, peaceful separatists, and those advocating or using violence.[19]

Originally, the United States did *not* consider that ETIM was a terrorist group. On December 6, 2001 (about the time Bahtiyar and the other Uighurs came into U.S. custody), U.S. State Department Coordinator for Counter-terrorism Francis X. Taylor said, following talks in Beijing, that *"the U.S. has not designated or considers the East Turkistan organization as a terrorist organization."*[20] *ETIM was not on the State Department list of terrorist organizations.*[21] However, in the period after 9/11, State Department officials were negotiating with China concerning legitimate U.S. needs for international cooperation in connection with terrorism.

In the run-up to the war in Iraq, it was a U.S. priority to develop consensus among major world powers, and China was crucial. The Uighurs—and specifically the Uighurs in Guantanamo—became a diplomatic chip in this high-stakes game, a *quid pro quo* for Chinese acquiescence in the Administration's Iraq policy. Speaking to the press in Beijing immediately after a meeting on August 26, Undersecre-

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[15] Wall Street Journal, January, 2005, October, 2004.

[16] *See* Decl. of Joseph Imburgia, *Mahnut* v. *Bush*, no. 05–1704 (filed Dec. 30, 2005) (Docket No. 17).

[17] Human Rights Watch, *Afghanistan: Return of Foreign Fighters and Torture Concerns*, HRW Backgrounder (Dec. 2001), *available at* http://www.hrw.org/backgrounder/asia/afghanistan/afforeign1220.htm.

[18] *See* Human Rights Watch Report, *Devastating Blows, Religious Suppression of Uighurs in Xinjiang: II, available at* http://hrw.org/reports/2005/china0405/4.htm. The Chinese government initiated an active diplomatic and propaganda campaign against "East Turkistan terrorist forces." In particular it urged that there existed a terrorist organization known as the "East Turkistan Islamic Movement" ("ETIM"), and that Uighur political dissidents were members of ETIM.

[19] *Id.*

[20] September 11, 2001: Attack on America: Press Conf. of Ambassador Francis X. Taylor, Beijing, China (Dec. 6, 2001), http://www.yale.edu/lawweb/avalon/sept__11/taylor__003.htm.

[21] U.S. Dept. of State 2001 Report on Foreign Terrorists, *available at* http://www.state.gov/s/ct/rls/rpt/fto/ 2001/5258.htm.

tary of State Richard Armitage advised that the groundwork had been laid for an October 2002 summit between President Bush and President Jiang Zemin. He acknowledged that talks had focused on Iraq.[22]

Several weeks later, the ETIM was added to the official State Department list of "terrorist organizations." This designation was purely a political accommodation to the Chinese, granted solely to secure Chinese acquiescence in the U.S.'s Iraq war plans.[23] Moreover, not only did the U.S. agree to reverse itself and declare ETIM a "terrorist organization," it granted the Chinese permission to interrogate the Uighurs at Guantánamo Bay. Only weeks later, in September 2002, Chinese agents interrogated the Uighur prisoners at Guantánamo.[24]

One month later, President Bush welcomed Chinese President Jiang in Crawford, Texas, for talks that focused on China's position on a potential invasion of Iraq.[25] This astonishing episode in U.S. diplomatic history—the United States welcoming agents of a Communist government to its secure military facility at Guantánamo, granting them access to prisoners that it has strenuously denied to U.S. courts, members of Congress, the United Nations, and the Press, and branding as "terrorist" an "organization" it had previously determined *not* to be a terrorist organization—points up the urgency, at the time, of the Iraq issue. This was a naked political deal to help secure China's tacit acquiescence in the Iraq invasion being planned in 2002.

Agents of the Chinese government visited Bahtiyar and the other Uighur men in Guantánamo on several occasions.[26] Based on unclassified information gained from interviews with these men, they were interrogated, abused, and threatened by Chinese representatives.[27] More than once these agents threatened the Uighurs with imprisonment and possible torture upon their return from Guantánamo to China. The agents also ominously warned them that they knew who their families were and where they could be found.

Several Uighurs later described these incidents to the CSRT tribunals. For example, one Uighur named Abdusemet described how he was forcibly interrogated, threatened, and deprived of sleep and food by the Chinese delegation in Guantánamo.[28] He stated that an American who identified himself as a "White

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[22] QUESTION: Could you brief us a little bit more about what kind of talks you had on Iraq? Especially, have you touched upon the possibility of a U.S. attack on Iraq?

> ARMITAGE: I discussed the fact that Iraq left untended, we felt, was a threat to us and to Iraq's neighbors. I discussed some of our President's comments, to the effect that he has all options before him and he's made no decisions. I discussed, with our Chinese friends, the fact that we will consult with them as we move forward, and that no final decisions have been made now. Finally, we discussed sort of the theory of having U.N. Security Council Resolutions existent, and the specter of a nation basically thumbing their nose at the United Nations Security Council, and what this augured for the body.

The next question and answer was telling.

> QUESTION: You mentioned the ETIM, and discussed putting it on the terrorist list. Does this mean that the U.S. considers the ETIM to be a terrorist organization, and would support putting it on a list of terrorist organizations?
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> ARMITAGE: We did.

Transcript of Deputy Secretary of State Richard Armitage Press Conference-Conclusion of China Visit (Aug. 26, 2002), *available at* http://lists.state.gov/SCRIPTS/WA–USIAINFO.EXE?A2=ind0208d&L=us-china&H=1&O=D&P=75.

[23] Curiously, ETIM was *not* designated as a "terrorist organization" for U.S. immigration purposes. Following August, 2002, the Uighurs continued to be a favored group as to applications for political asylum in the United States.

[24] Amnesty International, *People's Republic of China: Uighurs Fleeing Persecution as China Wages its "War on Terror"* 33–34 (2004); see FOIA 00174 (unclassified return from Sabir Osman).

[25] Commenting immediately after the meeting, a senior administration official said, "The question is . . . was there common ground between the two Presidents on Iraq. Did the President come away thinking that he had President Jiang's support. The two Presidents did, indeed, discuss Iraq fairly thoroughly. I think that you know our position very well and I think President Jiang Zemin has also made it very clear that Iraq should implement all previous Security Council resolutions. I'm not going to go much beyond that, *but to say that I think we have common ground to work."* White House News Release, *President Bush Chinese President Jiang Zemin Discuss Iraq, North Korea*, (Oct. 25, 2002), (emphasis added), *available at* http://www.whitehouse.gov/news/releases/2002/10/20021025.html.

[26] Amnesty International, *People's Republic of China: Uighurs Fleeing Persecution as China Wages its "War on Terror"* 33–34 (2004).

[27] It is alleged that during the delegation's visit, the detainees were subjected to intimidation and threats and to stress and duress techniques such as environmental manipulation, forced sitting for many hours, and sleep deprivation." *Id.*

[28] FOIA CSRT 2916.

House representative" specifically threatened to send Abdusemet to China if he did not cooperate with interrogators.[29] A Chinese interrogator told Adel Abdul Hakim (who was later determined to be a noncombatant) that he was "lucky" to be in Guantanamo; if they took him back to a Chinese jail, he would be "finished." Several Uighurs were told that they would be killed in China.

Despite these threats, most of the Uighurs refused to cooperate with Chinese interrogators. The coercive and abusive interrogations of the Uighurs took place while they were in the custody of the United States Government, under our complete control, and with our Government's cooperation and complicity. Thus my clients, like all the Uighurs in Guantánamo, have a reasonable fear of persecution if returned to China. In particular, Bahtiyar fears repatriation because he is wanted by the Chinese police for attending a demonstration.

V. "DO I HAVE TO MAKE MYSELF GUILTY?"

Indeed, even at Bahtiyar's Combat Status Review Tribunal review—initiated two years after his detention began—the Tribunal members recognized that he should not be sent to China upon release. During his CSRT review,[30] the Tribunal President asked, *"If you were to be set free, you would go back to your homeland, which is China, unless you were to get asylum somewhere?"* Bahtiyar, aware that return to China would mean certain persecution, responded:

> *"I was going to ask that. My Personal Representative told me that if I am innocent I'll go back to my home country. If I'm guilty and come back an enemy, I will stay. I was going to ask you about this. If I go back to China they will kill me, but if I wanted to stay here do I have to make myself guilty?"*

The Tribunal President offered no reassurance that a finding that Bahtiyar was not an enemy combatant could protect him, and he was warned that: *"It is my understanding that if we determine you are not properly classified as an enemy combatant, you will be released to your home country."*[31]

VI. THE CSRT RECOMMENDS "FAVORABLE CONSIDERATION FOR RELEASE—BUT NOT TO CHINA."

Apparently both Bahtiyar and the Tribunal understood that he faced a Hobson's choice: he could be designated as a "non-enemy" combatant and be sent back to China for possible torture and even death, or be classified as an enemy combatant, which would save his life at the cost of his liberty. In a bizarre twist, the Tribunal chose neither option. Instead, it adjudged Bahtiyar an enemy combatant yet simultaneously recommended "favorable consideration for release," and urged that he "not be sent back to China."[32] Thus, in an apparent attempt to protect him from repatriation, the Tribunal also erroneously classified Bahtiyar as an enemy combatant.

Despite his classification as an enemy combatant, *Bahtiyar has been formally cleared for release.* Indeed, the U.S. has for years represented to dozens of countries that the Uighurs are appropriate candidates for release and resettlement.[33] However, none of the nearly 100 countries that the U.S. apparently has approached has thus far been willing to accept the Uighurs, presumably at the risk of angering the Chinese.[34] The Uighur community in the U.S. stands ready to help with resettlement in the U.S., but the U.S. Government declines that solution.

VII. SOLITARY CONFINEMENT AND THE HUMAN COST OF THE DETENTION POLICY.

Today, Bahtiyar and the other Uighurs remain locked away in individual 8-foot by 12-foot metal boxes, unable to communicate except by shouting under the door to one another, with nothing to read, touched only by guards wearing rubber gloves,

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[29] *Id.*

[30] *See* Decl. of Joseph Imburgia, *Mahnut* v. *Bush*, no. 05–1704 (filed Dec. 30, 2005) (Docket No. 17).

[31] *Id.*

[32] *Id.*

[33] In May, 2004, State Department spokesman Richard Boucher reiterated that the U.S. had no interest in continuing to detain the Uighurs. U.S. State Dep't Daily Press Briefing (May 13, 2004), *available at* http://www.state.gov/r/pa/prs/dpb/2004/32455.htm; "The Uighurs are a difficult problem and we are trying to resolve all issues with respect to all detainees at Guantánamo. The Uighurs are not going back to China." Remarks of Secretary of State Colin Powell, U.S. State Dep't, *Roundtable with Japanese Journalist* (Aug. 12, 2004), *available at* http://www.state.gov/secretary/former/powell/remarks/37356.htm.

[34] In 2006, five Uighurs who had been captured with Bahtiyar were released from Guantánamo to Albania, where they now live as refugees. However, Albania will not agree to take more Uighurs, because of pressure from China.

and moved outside only for two hours of "recreation" in every 24, sometimes at night, in a holding pen with no view of the horizon. The men are exhibiting classic psychological symptoms resulting from solitary confinement: depression, anxiety, difficulties with concentration and memory, hallucination and perceptual distortions, paranoia, and suicidal thoughts and behavior.

The Uighurs should be transferred immediately out of solitary confinement, into a camp where they can be detained in humane living conditions pending a final resolution of their terrible situation. While Bahtiyar and the other Uighurs plainly deserve release, the United States must not send them to a country where they will be arrested, tortured, and even killed. If these men cannot be resettled in the U.S., the Government must exert every effort, through the United Nations High Commissioner for Refugees and diplomatic channels, to find a home where the Uighurs can again be free men.

The Uighurs are illustrative of the enormous human tragedy resulting from the United States' dragnet global detention system. The assertion of boundless executive power to hold a virtually-limitless class of people has resulted in the prolonged detention of people the government itself acknowledges are blameless. The unpardonable treatment of the men in Guantánamo prison has brought lasting damage to the image of the United States, its Constitution, and the rule of law. Guantánamo prison has become a potent symbol that focuses worldwide hostility against the United States, and it has become a rallying cry for America's enemies.

VIII. CONGRESS MUST ACT NOW.

The Guantánamo population is being reduced to a core of men who present no danger to America, but who cannot be returned to their homelands. No court has held a hearing to consider the plight of these men. Rather than defend its brutal detention policies in a court of law, the United States Government has stonewalled by seeking stay after stay, year after year. The outrage presented by continued detention of the Uighurs and the other stateless refugees will not be fixed until America and its allies agree to take them in, and that will not happen unless the United States accepts some of them first. Congress and its Committees must act now by directing our government to grant asylum to the Uighurs and the other innocent men among the Guantánamo population, to shut down the Guantánamo prison, and then to make sure that the United States never again establishes an off-shore penal colony beyond the reach of the American law.

Thank you.

Mr. DELAHUNT. The committee stands in recess.

[Whereupon, at 3:35 p.m., the subcommittee was recessed, to reconvene at 5:30 p.m., this same day.]

Mr. DELAHUNT. I am going to go right to my ranking member because he had an opportunity to reflect, whereas I have not as I ran over here. But, again, let me express my gratitude for all of your testimonies. It really does add to the record. Does anyone have a flight or a time issue?

Mr. OLESKEY. Not anymore, Mr. Chairman.

Mr. DELAHUNT. You have already missed it. I managed that. Well, again, I want to extend my gratitude and that of Mr. Rohrabacher's.

Dana?

Mr. ROHRABACHER. Thank you very much. I would just suggest that we need to make sure that we think very carefully about charges that are made like this because of two elements. Number one, innocent people may be being mistreated and treated very harshly. I personally do not believe that a human rights analysis should be based on how you treat a terrorist who has murdered lots of other people and you are trying to get information from him. But instead, human rights concerns are what you are trying to do to make sure that innocent people are not injured in your attempts to get at people who are terrorists.

While we were voting, I made sure I asked for some information, and I have gotten information from the Intelligence Committee

that indicates over 30 former Gitmo detainees who were detained but have been released, over 30 of them ended up going back into some sort of radical and/or violent activity. And many of them, there are some examples here, which I will put in for the record, of individuals who went back and killed other people after being released from Gitmo. And there are examples here, for example, of people who repeatedly told their interrogators at Gitmo that they were not involved in the Taliban or in the al-Qaeda operations that were going on in Afghanistan, and that they claimed to have been farmers, or truck drivers, or cooks, or had gone to Afghanistan looking for a wife, or to study the Koran, or any number of excuses they had. Of those who were let go, 30 ended up going back and participating in activity that threatened the lives, if not took the lives, of individuals, like the one I just mentioned that was reported today of one who was released and was involved in a bombing in Iraq that caused the death of seven people.

So when we are talking about this issue, we have to realize that if indeed people are being lied to and we are dealing with terrorists, they will go out and kill other people. So other people's lives are at stake. It is not just, is this person that you represent, is this person a good person and an innocent person? That is not the issue at all. I mean, that is not the total issue. That is an issue, but if we make a mistake in letting him go, we are actually risking the lives of other people. And that has been demonstrated.

Mr. DELAHUNT. Without objection.

If Mr. Rohrabacher, if you would allow anyone who wants to respond to that observation, I think it would be——

Mr. ROHRABACHER. Sure.

Mr. DELAHUNT [continuing]. Informative.

Ms. GILSON. Mr. Rohrabacher, we among Guantanamo counsel have looked into these allegations. And I am not sure that that is not anecdotal evidence. Many of these men apparently never were in Guantanamo. We have never had their names on any list. And I would appreciate it if I could share some information that we have prepared.

[NOTE: The information referred to is not reprinted here but is available in committee records.]

Mr. ROHRABACHER. This is a DoD list that was provided to me by the Intelligence Committee. There are specific names involved. I would appreciate you looking at the names——

Ms. GILSON. Yes, sir.

Mr. ROHRABACHER [continuing]. And to tell us if you believe the names we are being given by the Department of Defense are not accurate.

Ms. GILSON. We would just like to respond with some information.

Mr. ROHRABACHER. These will be in the record of the hearing. Be very happy to have your commentary and say, "No, no, this person was not what they say. This person, as we know him, he is now running a spaghetti restaurant down here and doing very well, and never went back to the——"

Ms. GILSON. Perhaps felafel.

Mr. ROHRABACHER. Right.

Let me ask some questions about——

Ms. MACLEAN. Would you mind, Mr. Ranking Member, if I could just add one piece?

Mr. ROHRABACHER. Go for it.

Ms. MACLEAN. I would also like to submit something for the record, which I don't have available but would be happy to share with the committee, which was perhaps related to the letter that you were able to receive from the Department of Defense that said that there were 30 people who have returned to the battlefield. Not clear whether they were all on the battlefield. And certainly I am sure there is evidence that some people have, you know, might have engaged in things that we would find problematic and violent. But included in that list were five Uighurs who had been transferred to Albania and were living in a refugee center in Albania at the time. And they were presumably on that list because they had spoken with a New York Times reporter at the time that President Bush was visiting Albania. Included on that list were three men who were living freely in the UK.

[NOTE: The information referred to is not reprinted here but is available in committee records.]

Mr. ROHRABACHER. I would love to get that specific back from you. And I will——

Mr. DELAHUNT. If my friend would yield for a moment, I think that the ranking member has really raised an issue here that would serve a thorough review by as many eyes and as many individuals and as many groups as possible. And let's get the Department of Defense in here. Let's start to get specific. Because see, I don't think that we really know. I don't think there is much that we really know. And that is what causes me grave concern. We can take allegations that everybody in Gitmo was evil. Well, and then we hear, "Gee, it was $5,000 a head sold by the Afghanis and the Pakistanis." I think the American people have a right to know what is happening in terms of Guantanamo.

I think this goes to the issue, if I can, Mr. Rohrabacher, about the lack of a significant viable process to make the kind of assessments as to whether an individual should have been detained in the first place. If that is accurate that there are 30 individuals that left Gitmo and then went back and committed violence against innocents or against American forces, it tells me something about the threat assessment was rather shoddy, was rather poor. And certainly there is—we don't know. We don't know who the good guys are and who the bad guys are because of what I consider a very faulty process that has been described by many—I think Mr. Casey would disagree, in his written testimony he calls it an elaborate procedure—I call it a sham procedure. I think it has absolutely minimal effectiveness in terms of determining the truth.

Mr. ROHRABACHER. Reclaiming my time, I can't make that statement. I think that—but we would like your knowledge of specific people. If people are being reported as being having left Gitmo and having then rejoined terrorist elements and that is not the truth, I would like to know. And these names will be included. There are obviously some people who have left Gitmo, obviously some, who rejoined terrorist elements. Clearly, some did. Now, whether or not that some is 10 percent of them or 20 percent or 75 percent of those released. What we are interested in is the truth. I mean, the

one thing my chairman and I, we may have lot of disagreements, but getting to the truth of the matter and making sure people tell us what really is going on is really the heart of what we are trying to do. So that is fine.

Something about some of the cases, and I will have to tell you I am very skeptical about Uighurs going from, you know, East Turkistan and coming to Afghanistan to a village of Uighurs. I just, you know, one of the things that this report says is that terrorists, as we know, are trained. One of the things al-Qaeda did, and they had training camps in Afghanistan operating for several years where they trained hundreds if not thousands of people, one part of the training is lie when you are captured. Just lie. Blatantly lie. You have no obligation from the Koran to tell the truth to these whatever they want to call them. So if they captured you, lie. And we know that. That is clear.

Whether or not there was a Uighur town there, I am a little skeptical of that. And again, I am a defender of the Uighurs. I actually think that the Uighurs and the whole issue with China is a horrible situation where the Chinese have massive human rights violations upon their Uighur population. And I am one of the defenders of that. But that doesn't mean that if the truth is some of those people became—and by the way, the United States has, what, a supportive relationship with Beijing. And so there might be a conclusion by some Uighurs that we are going to go out and attack Western powers as well, you know, because they are the ones propping up the Beijing dictatorship. And if it means being involved in a terrorist attack on the West, that is what we are going to do. That wouldn't surprise me if that was it.

Now, if that doesn't relate directly to your people, maybe some people were picked up, and I haven't studied it, but your explanation that they went to Afghanistan to work at a Uighur village sounds suspicious to me.

Ms. GILSON. May I address that, sir?

Mr. ROHRABACHER. Yes.

Ms. GILSON. Well, the fact of the matter is, at the CSRTs, the only thing that they were accused of was being possibly affiliated and traveling with members of the ETIM, the group that the Chinese view as terrorists.

Mr. ROHRABACHER. I remember you mentioning that, right.

Ms. GILSON. There is no evidence that they ever trained or fought against America. If you recall, Mr. Casey in his testimony talks about——

Mr. ROHRABACHER. By the way, it wouldn't have to be just America, because I have to say people do not understand that what was going on in Afghanistan in the 2 years prior to 9/11 was that bin Laden had basically turned that area into a staging area for a radical Islamic offensive against the West. And you had people there who were part, and within the country, you had these foreigners who came in, radical Islamist foreigners who came in and joined bin Laden and wandered around Afghanistan killing the Afghans. I mean, the Afghans are very devout Muslims, and immediately, when they had their chance to kick out the Taliban, they did because the Taliban had brought in this army. So these Uighurs that you are talking about, it is not that they may have been bearing

arms against the United States, but maybe they were part of this al-Qaeda training camp, and they were taught to say, "Hey, we were just up there working in Afghanistan." It seems to me if I was going to find work, it wouldn't have been in Afghanistan at that time. Afghanistan was a dirt poor place. What kind of work is there in Afghanistan?

Mr. DELAHUNT. But my friend would acknowledge you are speculating.

Mr. ROHRABACHER. I am speculating. Absolutely I am speculating.

Let me ask you now about your client, sir.

Mr. OLESKEY. Yes, Congressman.

Mr. ROHRABACHER. You went into great detail about the brutality experienced by your clients.

Mr. OLESKEY. Yes.

Mr. ROHRABACHER. Now, is it your contention that this is a standard way people are treated when they are prisoners in Guantanamo?

Mr. OLESKEY. It has been the standard for my clients. And I——

Mr. ROHRABACHER. No, no, is it your position that this is standard, that this is not unique, that your clients—this is the way they are treated across the board, or the large percentage of them are treated that way?

Mr. OLESKEY. There are other clients who have been treated in this fashion. Other lawyers here can testify to that. Other lawyers who you could have before you could testify to that. You know, whether it is the result of particular policies in every case I don't know. But certainly forced feeding is not disputed. It is going on. It goes on——

Mr. ROHRABACHER. Forced feeding was the least of the things that you——

Mr. OLESKEY. Not if you are the subject of the forced feeding.

Mr. ROHRABACHER. When you look at your testimony and you are going into great detail about his face is slammed against the wall, they put the hose down his throat and all of these things——

Mr. OLESKEY. Yes.

Mr. ROHRABACHER [continuing]. Guantanamo has had, you know, visits from——

Mr. DELAHUNT. Chinese agents.

Mr. ROHRABACHER. Well, no, from international human rights organizations and have not come up with reports that this is widespread. And in the description that you gave me seems to indicate that there was an altercation. You know, it is different to say somebody just came into a cell where a guy wanted to pray and just started to beat the hell out of him because they are a bunch of ghouls there. That, of course, would be a totally unacceptable type of thing. But if somebody, what you seem to be describing, frankly, I was a reporter for a number of years, and if I saw this as a description of something that is going on, I would suspect that the person involved with this treatment had done something or was engaged with fighting his captors.

Mr. OLESKEY. He wouldn't give up his trousers because he couldn't pray without his knees covered. That is true. And he would not let them take his trousers. That is true.

Mr. ROHRABACHER. They would not let him take what?

Mr. OLESKEY. He would not let them take his trousers. They came in to seize his trousers. Then they did what they did. Then they came back 2 days later and did the additional things they did, including putting the hose in his face and then sticking his head in the toilet and running the toilet.

Mr. ROHRABACHER. Yeah.

Mr. DELAHUNT. Would my friend yield for just a moment?

Mr. ROHRABACHER. Sure. But one moment, let's get one last little thing.

Mr. DELAHUNT. Sure.

Mr. ROHRABACHER. Was all of this abuse of your client reported in an official report and a complaint about the abuse?

Mr. OLESKEY. I report these things. But the military, of course, doesn't have to respond to me because there is no forum in which they have to answer my questions. So it goes into a black hole. I sent it to the Justice Department, which may send it to the Defense Department.

Mr. ROHRABACHER. So there has been an official complaint——

Mr. OLESKEY. Oh, yes.

Mr. ROHRABACHER [continuing]. About these prison guards and you have received nothing back from the Department of Defense.

Mr. OLESKEY. I can't complain about specific guards because I have no idea who they are. We complain about the incidents. And separately, in an FOIA case that we have, we requested the tape of the incident in order to validate and affirm whether we have got it correct.

Mr. ROHRABACHER. Right.

Mr. OLESKEY. And they have refused to provide us with the tape.

Mr. ROHRABACHER. Okay. Let me be very clear, if people are being treated that way, that should be—we should know about it and that should be corrected. No one is suggesting that we should cover up wrongdoing like what was being suggested. If what you are describing is an altercation with a guard—if they came in to take his trousers and maybe they had some problem with people hiding something in their trousers that they had to look into a prisoner's trousers, and he began fighting them, everything that you have reported is, frankly, justified. If they just came in and just in order to make him—in order to punish him because he had a bad attitude, well, then that is wrong. But, again, if they found some other prisoner with something in his trousers, they decided they have to go through everybody's clothes, and your client did not go along with that and instead fought them, what you seem to be describing to me is an altercation and not some torturous activity.

Mr. OLESKEY. If they want to give us the report, if they want to give us the tape, if they want to defend what happened on some basis such as you suggest, then that is a point that could be discussed. But there has been silence and what lawyers might sometimes call stonewalling.

Mr. ROHRABACHER. I would support a requirement that videotapes be taken of prisons throughout the United States and Guantanamo. That wouldn't bother me at all. Also let me ask, again, let me just get this last one thing.

Mr. DELAHUNT. Okay.

Mr. ROHRABACHER. Have any of your clients been polygraphed and asked about their involvement? All of you claim to be representing people who are not at all involved with bin Laden. These were not part of al-Qaeda's foreign legion in Afghanistan. These are just people—I mean, we realize 30 of them now I understand are actually Afghans that were picked up, but the rest of them were foreigners who have been picked up. Have your clients been polygraphed to support that, support their contention they were not?

Mr. OLESKEY. Mine certainly have not. And of course, I am in no position to do it in any event.

Ms. GILSON. Mine have been cleared. They have been cleared for release.

Mr. ROHRABACHER. Were they polygraphed?

Ms. GILSON. No, sir, but what you are raising are very important questions. We have filed motions and papers with judges about this very issue. And instead of the Justice Department defending these punitive and prolonged detention policies, they have stonewalled. They have asked for stay after stay year after year. Not a single court has ever heard a hearing. If Mr. Oleskey was allowed to have a hearing, maybe we can separate the truth from the fact. But we can't.

Mr. ROHRABACHER. You know, what level, when you are dealing with a war situation where you have—and by the way, the well-funded part of al-Qaeda is something we cannot forget. Where does this funding come from that is enabling a nonstate entity, the al-Qaeda terrorist network, to pose such a major threat that they can slaughter thousands of people? And again, I think Mr. Casey presented the case very well, the complications in that. And it is not—we are not talking about a criminal offense here, and this is where we major disagree, and that is we are talking about a wartime situation. Now let me ask about your client.

Mr. MONE. Yes, sir.

Mr. ROHRABACHER. Is your client a Wahhabi, by the way? I think it is you that were——

Mr. MONE. He is accused of being a Wahhabi, but he is not.

Mr. ROHRABACHER. Is he a Wahhabi?

Mr. MONE. Excuse me?

Mr. ROHRABACHER. Is your client a Wahhabi?

Mr. MONE. I don't think he considers himself a Wahhabi. A Wahhabi is a term that——

Mr. ROHRABACHER. It is a sect. There is a Wahhabi sect within Islam.

Mr. MONE. Yes, but that is in Uzbekistan, the Uzbeks throw that word around to apply to a lot of different people.

Mr. ROHRABACHER. I understand. That is not the question.

Mr. MONE. No.

Mr. ROHRABACHER. He is not a Wahhabi?

Mr. MONE. No.

Mr. ROHRABACHER. Okay. That is all I needed to know. So it was a lie. I mean, they lied about him and the Uzbeks—is he part of the resistance, you would say, to the Uzbek thing, or is he an innocent person who is nonpolitical?

Mr. MONE. He was a dirt farmer. He was living in northern Afghanistan raising chickens for cockfighting, and buying and selling sheep and goats in northern Afghanistan.

Mr. ROHRABACHER. Okay.

Mr. MONE. He was living——

Mr. ROHRABACHER. Is he in solitary confinement now?

Mr. MONE. Yes, he is.

Mr. ROHRABACHER. Now, we know that the vast majority of people in Guantanamo are not in solitary confinement now.

Mr. MONE. I think that that——

Mr. ROHRABACHER. Why is he in solitary confinement?

Mr. MONE. I think the vast majority of the inmates in Guantanamo are in Camp 5 and Camp 6. I believe the population in Camps 1 and 4 are being steadily declined, and more people are being put into Camps 5 and 6. My client initially was in Camp 1 until one day he woke up in the middle of the night and his back was in excruciating pain. He had numbness in his legs, and he couldn't get up. So he was taken to the hospital, and they determined that he had a herniated disk that was impinging on one of his nerves of unknown etiology. I asked my client, how do you think you got it? He said, "Well, it could have been injured while I was exercising in my cell or it could have been injured in one of the 30 to 35 times that the emergency reaction forces came into my cell and visited me." But he was taken to the hospital. They operated on him. They were not able to fix the problem. When he got out of the hospital, he was——

Mr. ROHRABACHER. Let's go back to the solitary confinement.

Mr. MONE. No, but the reason he went into Camp 5 was because after he got out of the hospital, he was in Camp 1, which is an open air camp. He had a healing surgical incision that he was concerned was going to be infected. He asked the camp—and he couldn't walk. He was confined to a wheelchair——

Mr. ROHRABACHER. All right.

Mr. MONE [continuing]. After the surgery.

Mr. ROHRABACHER. I am trying to find out how many people in Guantanamo are in solitary confinement, and how many of your clients are in solitary confinement, and why your clients are in solitary confinement as compared to the other people.

Mr. MONE. And my client was put into solitary confinement because he asked to be taken out of the open air camp and into a place that was wheelchair accessible and out of the elements so that his surgical incision could heal.

Mr. ROHRABACHER. So he wanted to go to solitary confinement.

Mr. MONE. He wanted to go inside into a handicapped camp, but he has never been let back out.

Mr. ROHRABACHER. Are any of your other clients in solitary confinement?

Mr. OLESKEY. I have several clients in what you and I would consider solitary, but the Defense Department says is merely segregation because solitary confinement is unlawful under military rules. So it is not called that at Guantanamo. You can't say that to the military lawyers. They get very angry and say, we don't do that. But you have used the correct term.

Mr. ROHRABACHER. What is the percentage of your prisoners in Guantanamo——

Mr. OLESKEY. We will give you that information. But I agree with Mr. Mone, our understanding generally is that more and more prisoners have been put in five and six, which we would colloquially call, you and I, Congressman, solitary.

Mr. ROHRABACHER. Basically, we need to know that.

Mr. Casey, do you have any idea of how many are in solitary confinement?

Mr. CASEY. I am sorry, no, I don't.

Mr. ROHRABACHER. I would feel a lot better about the whole thing if, number one, we knew how many people are in solitary confinement, and whether your clients are in solitary confinement, and number two, whether or not they would voluntarily take a lie detector test.

Mr. DELAHUNT. If the gentleman would yield to me for a moment.

Mr. ROHRABACHER. Yes.

Mr. DELAHUNT. Why wouldn't you and I be able to go to Guantanamo and secure that information? Do you think that is a state secret, Mr. Rohrabacher?

Mr. ROHRABACHER. I think that we have had lots of congressional trips to Guantanamo. And every——

Mr. DELAHUNT. And asked those kind of questions and maybe interview their clients?

Mr. ROHRABACHER. I have not gone to Guantanamo. But I know lots of our members have. And in fact, when I go down to vote, I am going to go down to ask them about it.

Mr. DELAHUNT. You know what they get when they go to Guantanamo? They get the Potemkin village scene. I think if you and I went down and we had an opportunity to interview all of the clients, you and me, and you can bring your polygrapher, and you can bring Mr. Berkowitz and I could bring Ms. Coburn, and do you think we would get cooperation from this White House, this administration to do that, which is our function as an oversight of American foreign policy? And I would suggest this implicates American foreign policy. Is that asking too much?

Mr. ROHRABACHER. Frankly, Mr. Chairman, I do believe that we have had so many members who have gone down there, and I don't believe simply because they have not reported evil things——

Mr. DELAHUNT. No, because they have not had the access. They have not had the access to these individuals. And I think that you and I, as elected Representatives of the American people, have a right to go down and examine these allegations.

Mr. ROHRABACHER. I think we certainly have a right to, and I think there would be no—you would get no argument about requests from the chairman to go down and talk to them. Whether or not I can afford the time to go down——

Mr. DELAHUNT. I know you have got family issues. He has triplets. You wouldn't believe it looking at him, but he does. But let me clear up something.

Mr. ROHRABACHER. I yield back my time.

Mr. DELAHUNT. I thank you. And you know, let's understand this, too. It isn't what their people—there is a single motion to ad-

journ, and I am going to—it is not necessary that I be in attendance. But I would point out to my friend that it was the Federal Bureau of Investigation that repeatedly complained about the torture of detainees at Guantanamo Bay and Iraq, and believed their eyewitness accounts of beatings, strangulation, and other abuses were subject to a cover-up official memos show. Even after heavy censorship, the memos contained graphic details of abuse, in which military and government interrogators put lit cigarettes in detainees' ears, spat on them, knocked them unconscious, or resorted to deliberate humiliation.

I would say to my friend from California, we are hearing this from representatives of those detainees. How about getting the FBI in here with these memorandums? Are we going to not believe what they say? Are we going to continue to speculate, or are we going to listen to our own Federal Bureau of Investigation that wanted to get out of there as fast as they could because they were concerned about liability and being embarrassed? That is the reality I would dare say. The Federal Bureau of Investigation. Does anybody have any comment?

Mr. OLESKEY. Last year—that is—I think there is no dispute that those reports exist and that they are valid. There were reports up the chain from agents sent to aid in interrogation that they couldn't participate because the conduct that the military was engaging in with the prisoners violated FBI rules for the treatment of prisoners in custody. So I don't think—I think the chairman is right. And I have never understood there is any dispute about the authenticity of that.

Last year, the president of the International Red Cross came to Washington and met with the government and then gave an interview in which he said that the conditions at Guantanamo were those which the Red Cross had to speak out against, which it never does, because they didn't conform with international norms.

Mr. DELAHUNT. Mr. Oleskey, I can assure you that no Member of Congress that has ever visited Guantanamo has had an opportunity to interview any of your clients or any other detainee down there.

Mr. OLESKEY. And we would welcome that.

Mr. DELAHUNT. But let me put this into the record, too. It is a report, a story from the Washington Post dated March 16th. It is entitled, "Military Lawyers Say Tactics Broke Rules." Not lawyers for the detainees, not the FBI, not some vague speculation out there about what this is and what that is and what this is; these are the military lawyers.

Let me read:

> "The top lawyers for the Army, Navy, Marine Corps have told Congress that a number of aggressive techniques used by military interrogators on a detainee at the Guantanamo Bay were not consistent with the guidelines of the Army Field Manual. The Judge Advocates General, responding in writing to the Senate Armed Services Committee found that several techniques used at Guantanamo Bay, Cuba, could be considered violations of interrogation policy because individually they are humiliating or degrading."

I mean, these are our own internal Department of Defense, Marine Corps, Army, Navy, FBI that are saying things went on there, that as the former Commandant of the United States Marine Corps, P. X. Kelley, I would daresay we could consider him a good American and a good patriot, someone who is concerned about terrorism and attacks in this country, had this to say: We cannot in good conscience defend a decision that we believe has compromised our national honor and that may well promote the commission of war crimes by Americans and place at risk the welfare of captured American military.

That is General P. X. Kelley. That is not some fuzzy wuzzy lefty group from New York City.

Mr. ROHRABACHER. Or Boston.

Mr. DELAHUNT. Or Boston, or Cambridge. So, you know, I mean, I continue to hear all of this, you know, them versus us. It is about our responsibility to get in and to examine this.

Mr. MONE. If I may, Mr. Rohrabacher, you brought up a very important point, which as it relates to this allegation that 30 former detainees have left Guantanamo and returned to battle.

Mr. DELAHUNT. Mr. Mone, we are going to find that out. Mr. Rohrabacher and I are going to pursue that. Our staffs are going to pursue it. We are going to find out the truth on that one specific issue.

Mr. MONE. It is a very—whether it is 30 or 15 or—we have never been able to get an answer as to how many have left or who they are or what evidence they have to support the fact that they returned to the battlefield. But just accepting that it is 30, isn't that just an incredible indictment of the entire process in Guantanamo? As is the fact that my client, who has been cleared over a year ago, which they have no credible evidence that they can proceed with, that he continues to sit there? They are both complete and utter indictments of the entire process down there. And the problem is that you have got a process that gives you results that you cannot rely on.

The man from Kuwait, this last person who is alleged to have blown himself up in a suicide bombing, why did he get out of—how did he get out of Guantanamo and why? He got out of Guantanamo because he is from Kuwait, because Kuwait is an ally, a strong ally, of the United States.

Why did the Saudis get out of Guantanamo? Because they are close allies. Why did the Brits get out? Why did David Hicks get out? Why did Murat Kurnaz?

Mr. ROHRABACHER. Your argument is that they should have stayed in. And I would be supportive of that. I don't care if there is a dichotomy that the Kuwaitis get out and some other terrorist doesn't if they are both terrorists. Quite frankly, that doesn't phase me one bit. I would hope that a terrorist——

Mr. DELAHUNT. What if they were both innocent?

Mr. ROHRABACHER. If they are both innocent, that is another question. The truth of the matter is certainly important. And if these are innocent people, anyone who is an innocent person who has been caught up, and I have seen people caught up in the system before, you know, once a prosecutor targets you in this country, look what happens. I mean, you know, whether you are inno-

cent or not, they are out to get you. And one wonders and can understand that that might happen overseas in the middle of a war against radical Islam as well. And we need to go for the truth.

Mr. MONE. But it is not even that you are going to get the truth. It is that you are not even getting a result that you can reasonably rely upon. My client from Uzbekistan, there was another gentleman from Uzbekistan who was charged, had the same exact charges about attending an IMU training camp and being a member of the IMU, very similar charges. This gentleman, however, had a personal representative at his CSRT who didn't realize that it was fixed. And he actually offered a piece of evidence that called into question the source of the information of the allegations against his client. And as a result of that one document, he got his client, this gentleman Zaqir, out of Guantanamo. He was declared no longer an enemy combatant, and he is free in Albania. Okay.

My client—that is the rare exception in the CSRTs, to have a personal representative who actually puts a case on. My client, who had the exact same allegations, some of the exact same facts, his personal representative asked no questions, offered no evidence, put no case on, did nothing to challenge any of the allegations, and he just sat there like a potted plant. And because of that, my client continues to sit in Guantanamo Bay, whereas Zakir, who had the rare fortune of having a personal representative who was going to act like a lawyer and challenge the government's case—he is the rare exception—who is finally out. That is what—that is the thin line between what keeps you in Guantanamo and what gets you out.

Mr. ROHRABACHER. Thank you very much. I have got to vote. The chairman does, too. I am going to make this vote. Thank you very much. And again, no one should interpret my skepticism—I was a journalist for a long time, to note—no one should interpret my skepticism as being someone who is not open-minded and not committed to the truth. If what you are saying is true, people have been mistreated, especially innocent people mistreated; we have to correct the situation.

Thank you very much, Mr. Chairman.

Mr. DELAHUNT. I thank you very much, Mr. Rohrabacher. There is only one vote, and it is simply a motion to adjourn, and I am going to respect your patience and not go to this particular vote but to continue to have this conversation with you.

I think the information that you have given to the committee today has been very helpful. Clearly, you understand that many are watching via C–SPAN—your testimony and this particular hearing. I think it is very, very important that we educate the American people and educate Members of Congress as well as to the realities. I like to get into the issue of process. And I think that is what this is about. And I want to get simply to examine the issue of the CSRT. Mr. Casey describes it as an elaborate, robust administrative process. Nothing that I have seen would indicate that that is the reality. Have any of you represented individuals or have made an appearance before a CSRT, or has it always been a so-called personal representative?

Mr. OLESKEY. Mr. Chairman, those all basically took place in the fall of 2004, before lawyers were admitted. And by the rules of the

CSRT, which were set up in July 2004 by the Defense Department, lawyers are specifically excluded. And it was provided that the personal representatives could not be lawyers. And they are not lawyers. They were lower-ranking military officers who, as my colleagues have said, essentially showed up, generally asked no questions, took no active role, and the hearings went over.

I will give you a graphic example of the deficiency of the process coming out of my prior testimony. My clients, obviously, were uniquely situated in that they had been through a criminal justice system in an allied country in Bosnia. They had been arrested, held, investigated, and been ordered released for lack of evidence. You would think that was pertinent when they were called before a CSRT almost 3 years later and accused of being affiliated with al-Qaeda, which is the catch-all term that the CSRTs generally used. And the CSRT rules are, you can get any evidence in documentary form, any witness, so long as the panel of three military lawyers determines it is reasonably available. So two of my clients said to the panel, I have an order of exoneration on release from Bosnia I would like to have you see because that will show you that I have been through a criminal justice process involving inquiry into whether or not I am a terrorist. If I have been ordered released by your ally Bosnia, then that would certainly be strong evidence that I shouldn't be here held as a terrorist. In one case, the panel immediately ruled that that release order was not reasonably available because it wasn't in their file. In a second case, they actually were more conscientious. They suspended the hearing for a week. This is what the transcript shows, and then the transcript shows they came back on the record, and the presiding officer says the Defense Department asked the State Department to inquire of the Bosnian Government about the existence of such an order. It is reported back to us here that there is no such order that could be located, so I am sorry, we cannot take any account of what you say. Now, at the time that all this went on, both the declaration by one CSRT that the document wasn't reasonably available because it wasn't in Guantanamo supposedly, and in the case of the second CSRT where the supposed inquiry took place, we had filed our habeas proceeding in Washington reciting, in July 2004, months before, reciting that this had happened and calling out in our papers that order, and we determined later that the order was available, in fact, to at least some in Guantanamo. So what can you make of a process where people who have been pulled off the streets in an allied country thousands of miles from a battlefield, sent to Guantanamo after they had been exonerated in that country, and then say, let me show you the paper of exoneration, are told that it is not available or can't be found and therefore that none of this can be considered? That is why people say this process was a sham. And that is why a review of that record will always be a sham. And that is why we all advocate for habeas.

Mr. DELAHUNT. Well, let's talk for a minute about the CRST. What does that acronym stand for?

Mr. OLESKEY. Combat Status Review Tribunal.

Mr. DELAHUNT. Okay. And why was it established?

Mr. OLESKEY. Established because the Supreme Court, in June 2004, facing the first challenges over habeas, said that the process

at Guantanamo, which was no process, was suspect and deficient, and there had to be some process and suggested that something happen. Approximately 10 days later, Deputy Secretary Wolfowitz issued an order creating this process, which then went to place in Guantanamo to satisfy, the Defense Department hoped, the concerns the Supreme Court had stated in the Hamdi——

Mr. DELAHUNT. And the purpose of the CSRT would be to provide some quantum of evidence to establish that the initial apprehension of these individuals was accompanied by evidence that would lead to the conclusion that they were enemy combatants. Is that——

Mr. OLESKEY. I would say that would be the Defense Department's explanation of the process. The problem with the process is that most of the record that the military tribunal sees is classified. So the prisoner literally is called in, and we have seen this in every transcript, and said, "Congressman, we understand that you are affiliated with or associated with al-Qaeda; what do you say?" And you say——

Mr. DELAHUNT. I am not.

Mr. OLESKEY [continuing]. That is not true. Call my uncle, call my father. Two of my clients, the ones working for the Red Crescent of the United Arab Emirates, our ally, said, "Call my boss." But the tribunal said, "He is in Sarajevo; he is not reasonably available."

Mr. DELAHUNT. Is it available in the record to the personal representative—and let's be very clear, the personal representative is probably a junior grade——

Mr. OLESKEY. Correct——

Mr. DELAHUNT [continuing]. Officer——

Mr. OLESKEY. Correct.

Mr. DELAHUNT [continuing]. Who is not trained in the law.

Mr. OLESKEY. Correct.

Mr. DELAHUNT. And presumably they would have varying degrees of expertise and commitment.

Mr. OLESKEY. Yes, and moreover, the rules of the CSRT require them to report anything they learn in their assistance to the prisoner to the military authorities.

Mr. DELAHUNT. Right. So there would be no attorney-client privilege as we know——

Mr. OLESKEY. Correct.

Mr. DELAHUNT [continuing]. In our jurisprudence.

Mr. OLESKEY. Just the opposite. That is right.

Ms. GILSON. But, sir, even if they had the classified evidence, I am not sure it would have done any good. They couldn't share it with the client. But, more importantly, Judge Joys Hens Green, in a decision that she issued saying that the prisoners had the right to habeas and counsel, her decision records a colloquy that one detainee had at his CSRT where the tribunal president says, "You have been accused of traveling with someone who was Taliban." He said, "Well, who was it? Maybe he was; maybe he wasn't." And they said, "We can't tell you who it was." And he says, "Well, when was this? When did this happen?" They said, "We can't tell you; it is classified." And he breaks up the room. He laughed, he says, "I have to tell you, if you came before me and you had this kind of

evidence, I would say it is a bunch of rubbish." But he was unable to defend himself because they wouldn't tell him what it was he was charged with. And while that is a strong example, it was the way it was. These men didn't see what they were charged. And in fact, they were never charged with anything. This isn't evidence. There is not a single source behind this, as Mr. Oleskey told you. The material is not sourced, for example.

Mr. DELAHUNT. Would there be information in the record that would indicate the size of a bounty?

Ms. GILSON. There was no evidence of bounty in the record.

Ms. MACLEAN. The only evidence that is in the record often that is publicly available is the detainee's own statement. You will often have CSRT transcripts where the only evidence that is publicly available is the detainee's own statement.

Mr. DELAHUNT. How would it be established in individual cases the price for the apprehension of this particular individual? Does that exist anywhere?

Mr. Casey, are you aware, in your experience?

Mr. CASEY. No. No. And I am not sure how, frankly, how relevant that would be.

Mr. DELAHUNT. You don't think it is relevant if you pay somebody $4,000; $5,000; $6,000?

Mr. CASEY. The question is whether the individual is an enemy combatant.

Mr. DELAHUNT. No, the question is—the question, Mr. Casey, the question, Mr. Casey, goes to the credibility of the evidence as to whether the individual is an enemy combatant. Presumably, some of that evidence would come via the individual who received the bounty. I would like to know, if I were sitting as an arbiter, if you will, as to whether an individual was an enemy combatant or whether supported al-Qaeda or whatever, whether there was a bias on the part of the individual who apprehended or identified this individual as being affiliated with some terrorist group. I would think that is very, very important. You have tried criminal cases, correct?

Mr. CASEY. No, I have never tried a criminal case.

Mr. DELAHUNT. You have never tried a criminal case?

Mr. CASEY. No, and I think in part we have to keep in mind here that we are all measuring this process by the process of a criminal trial.

Mr. DELAHUNT. No, no, I am not. You are, Mr. Casey. You are measuring the process of a criminal trial.

Mr. CASEY. It is designed as an administrative process to determine whether there is credible evidence, not whether you are right or wrong, keep in mind, whether there is credible evidence that the individual is an enemy combatant.

Mr. DELAHUNT. And I agree with that. But my point is credible evidence, you just used that term, credible evidence, the impeachment of an individual because he received $5,000 is a significant factor to that determination as to whether that evidence is credible. It is absolutely, I would think, a paramount concern that I would have if I were the trier of fact in that particular case.

Mr. CASEY. But——

Mr. DELAHUNT. And I am not using the criminal justice paradigm.

Mr. CASEY. Of course, that is what is implied by trier of fact.

Mr. DELAHUNT. I am not implying anything. Whoever makes the determination. I don't want to get dragged into whether this is a law enforcement or a wartime issue. This is ab initio a very significant decision. However we make it, let's make it in terms of what is common to our jurisprudence, a rational, thoughtful search for the truth. If you don't know, if you don't know whether that individual before you was purchased for $5,000 and whether the information that was provided along as you exchanged that cash was false, then I daresay that is not a very—that is not any kind of a process that has any integrity whatsoever, unless that information is made available to the personal representative or to the lawyer, whether it be in a, you know, in a wartime, or a war paradigm, or law enforcement paradigm. This isn't about some esoteric, erudite discussion of legal theories here. This is just really basic humanity. That is what I am suggesting. That is what I find concerning. To charge somebody, to say you are going to spend 6 years, and we are not going to tell you what it is, but you got to come up and guess and tell us why we shouldn't hold you, I don't care whether it is a military commission, a CRST, or a Title III court, how can you operate under those circumstances? How can you operate under those circumstances?

Mr. OLESKEY. Justice O'Connor pointed out in the Hamdi case that because this so-called war on terror, as it is often said, could go on for generations, being determined to be an enemy combatant, she observed, in these proceedings could be the equivalent of a life sentence without a trial or a hearing. That is as true now as when she said it in 2004 for the reasons you have just articulated, Mr. Chairman. And that was Justice O'Connor, not an advocate for a prisoner.

Mr. CASEY. Mr. Chairman, getting back to the question of how we can operate that way, I think the issue here is whether the traditional law of war way of handling this is harsh. And I agree it is very harsh. It is meant to be harsh. The fact that people may be held based on minimal evidence, based on evidence that we would not accept in a criminal courtroom, that would either be excluded or simply considered to be not credible——

Mr. DELAHUNT. I guess in the case I am saying, no evidence, no credible evidence.

Mr. CASEY. That is what a CSRT is supposed to determine, whether there is some credible evidence. And the fact that you don't have a quantum of evidence that would lead you to believe someone is "guilty of anything," we are not talking about whether they are guilty of anything; we are talking about whether they have been associated with al-Qaeda or one of its allies in a way that can——

Mr. DELAHUNT. I will accept your premise for the sake of discussion purposes.

Mr. CASEY. Okay.

Mr. DELAHUNT. But what I am suggesting is, from what I am hearing and from what I have been able to glean from the readings that I have done in this issue, there are a disturbing number of cases where there is no credible evidence, no credible evidence. That is—that ought to be of concern to us as lawyers, as a country

that speaks to the rule of law, that promotes the rule of law, that preaches the rule of law.

And, you know, let me just for a moment digress. This is a story that was published in the Boston Globe about, well, almost a year ago now. And let me just read excerpts from it: An Army Reserve officer who served on a military panel at Guantanamo Bay determined whether a detainee should be held indefinitely as an enemy combatant said the process is deeply flawed, relying on vague evidence prepared by poorly trained personnel and is subject to undue pressure from the military chain of command, according to an affidavit that was unsealed yesterday. In the first account of a military review process by a participant, Lieutenant Colonel Stephen Abraham wrote that when he and two other officers were assigned to serve in the tribunal concluded that a detainee should not be classified as an enemy combatant, his superiors in charge of the process forced him to reopen the hearing so the government could present more evidence. It goes back to Ms. Gilson's the do-agains.

I mean, the world is watching this. This isn't, again about, you know, making the distinction, in my judgment, between the so-called law enforcement paradigm and, you know, the law of war. And we—we ought not to be minimalist. You know, I understand that you don't think that—how many of you handled a habeas corpus petition? Have you?

Mr. CASEY. No.

Mr. DELAHUNT. How long do you think a habeas corpus petition—what kind of time is invested in a habeas corpus petition?

Mr. CASEY. Well, it depends——

Mr. DELAHUNT. I guess I am asking you, Mr. Casey, because you indicate that—or at least you suggest, I don't want to put words in your mouth, but you suggest that the courts would be overwhelmed.

Mr. CASEY. No, Mr. Chairman, I don't think I have ever suggested the courts would be overwhelmed. In other words, I don't they are entitled to habeas if they are not within the United States.

Mr. DELAHUNT. Okay. That is fine.

Mr. CASEY. I never said that I think the courts would be overwhelmed.

Mr. DELAHUNT. You think we have the capacity—let me ask you this question. Does our Federal Judiciary have the capacity to handle habeas petitions for 275 detainees that are currently in Guantanamo?

Mr. CASEY. Well——

Mr. DELAHUNT. If you know.

Mr. CASEY. Mr. Chairman, if I were politically minded, I would point out how many judges the Senate is now holding up. But yes, I think our court system is well——

Mr. DELAHUNT. I don't think they should hold them up either. They should wait until after November.

Mr. CASEY. The issue is not we don't have enough judges, we don't have enough lawyers. We can hire more lawyers, and we can hire more judges. There are other issues at stake.

Mr. DELAHUNT. Okay. But I just wanted to be really clear on that particular issue, because my experience with habeas is that

this is not a very lengthy process. This isn't a 5-week trial. I think I read somewhere, and maybe it was an op-ed piece, I think that maybe it was you, Mr. Casey, or somebody was talking about 15 to 20 years. That is silly. That is absurd. Anybody who is familiar with the criminal jurisprudence knows that habeas corpus petitions are processed with great dispatch and certainly would be no strain on our Federal Judiciary. Believe me, if you want an education as to why the Federal Judiciary is being overwhelmed, come and listen to the other committee I serve on, which is the House Judiciary Committee, which for years was criminalizing, you know, or federalizing if you will, State criminal law, and case after case was usurping traditional civil areas which in the past had been the particular province of State courts. But just as an aside, it was kind of fascinating that States' rights seemed to fall victim to an ideology. But, no, I can see where you make a legal argument that they don't deserve habeas corpus.

Mr. CASEY. And, Mr. Chairman, also keep in mind the very real, practical argument as articulated by Justice Jackson in his opinion in the Eisentrager case of why providing a regular legal process for enemy combatants is fundamentally antithetical to the ability to fight a successful war. I think he is probably the most articulate.

Mr. DELAHUNT. Mr. Casey, I read something that you said about deterrence and that the criminal justice system would not be a sufficient deterrent to acts of terrorism.

Mr. CASEY. Right.

Mr. DELAHUNT. It is not international treaties, it is not conventions on the laws surrounding the conduct of war that would ever deter those people whom have done us ill. There is no such thing, and I say this respectfully, as deterrence. And it really doesn't exist either in the criminal law. Believe me, the people who go around and violate, and commit serious felonies, they are not carrying around in their hip pocket, I can assure you, the Uniform Criminal Code, and taking a look and seeing what the sanction would be.

So deterrence doesn't exist. Deterrence, I would respectfully suggest, doesn't exist in this debate. It just simply doesn't happen. The only deterrence is to have the intelligence and the capacity to intercept and incapacitate at the right time, and no one is suggesting that any different.

This isn't about the war on terror. This has nothing to do with the war on terror. You are not going to find anybody. And that is an argument that I would suggest is false. I might use stronger language, but we are on TV. I mean, it just doesn't happen.

But to say that this process serves as deterrence in Guantanamo, no. I reject that totally. What it does do is it radicalizes those that maybe were innocent; and it clearly radicalizes their families, their societies, their tribes, and it hurts our national security interests.

This isn't about being liked. This isn't about being popular. This is about standing up for our values. That is what this is about.

Because that is what people admire about us. That is the distinction. And not providing fodder for our enemy to say, look at those hypocrites. They say one thing and they do another. They condemn the Chinese Government for human rights abuses. They have resolution after resolution speaking to human rights abuses all over the world, whether it is Tibet, or Kazakhstan, or Uzbekistan, Equa-

torial Guinea, and yet when it comes down to crunch time they are willing to put aside their principles. So don't preach to me, America. Don't preach to me.

Mr. OLESKEY. Mr. Chairman, just to put Mr. Casey's terms in a different context—his comments in a different context. The Supreme Court is going to tell us within 6 weeks whether Eisentrager, which dealt with German prisoners of war who had been through a military justice system and had lawyers and evidence and witnesses and been convicted, controls in Guantanamo in 2008. And they will have the final word on that, not what Justice Jackson said in a different context 60 years ago.

Secondly, the CSRT process which you have been asking Mr. Casey about was designed by the Army not to be employed 3 years after people were seized all over the world on and off battlefields but to be used to screen people on battlefields to make a quick determination: Are you a saboteur? Are you an innocent person? Are you a combatant? And that was it. It was never designed to be used like this.

And, thirdly, as my colleague said, and she was actually quoting from Judge Green's opinion, my client Mustafa, the same man whose face was mashed in, in the courtyard in Guantanamo. He said, "You say to me somebody says I am al-Qaeda. Tell me who it is. Maybe it is somebody in my mosque that I know from my religious services. Maybe it is somebody in my neighborhood. But how can I respond?"

And what he was saying in our terms is, How can there be credible evidence if you say you know from something I can't, see that somebody says I am al-Qaeda, but I can't even speak to it because I can't know about it?

That is the problem. That is why it is not credible evidence. That is why this process has been so misused.

Mr. DELAHUNT. Well, let me go on with this story that appeared in the Washington Post. Again, let's recognize that and let's presume that these quotes are accurate and that these stories are somewhat accurate.

And who is saying these things? It is—like I mentioned earlier, it is the FBI. It is the military offices. Here we have someone who is in the process that is expressing concern because it doesn't compute. There is a lieutenant colonel that is serving on these CSRTs. And we all are adults and we know the pressures that come on people to comply and go along. It is natural. And to reject that is not recognizing human nature. But he wrote that the intelligence agencies routinely screened the information that he was allowed to see and refused to give him a statement pledging that they had not withheld any information that could point to a detainee's innocence.

This is an intelligence agency not cooperating with an American who is serving his country in uniform as a lieutenant colonel. This isn't, again, the Center for Constitutional Rights or the ACLU. This is not some way-out-there, on-the-margins group. I am not including you in that, Ms. MacLean. But, please reflect. Go ahead.

Ms. MACLEAN. As a representative of the Center for Constitutional Rights, I would just say that I was on a panel with Lieutenant Colonel Abraham at one point and spoke to him about that

process and how that process was for him. And he said he came in a true believer in the process. He thought, "We are going to go through, we are going to look at the evidence, we are going to have an understanding of who these people are and whether they are held rightly or wrongly." He had decades of experience behind him doing intelligence work, and he came out of the process feeling that it was a completely inadequate process. And, of course, after they required another CSRT for the individual whose CSRT panel he sat on, Mr. Al Gazawi, he was never asked again to sit on another CSRT panel. And Mr. Al Gazawi, who was initially classified as a non-enemy combatant, is still detained in Guantanamo after more than 6 years of detention.

Mr. DELAHUNT. I don't want to keep you any longer. I think this has been very informative. I respect what you have done. You make me proud of the law as a noble profession. You are more than practitioners of the law; you are practicing democracy. And I am sure as you look back on your careers when you get to be my age, this moment, as painful as it might be, because you are representing people, you are doing well by the profession, and you are doing very well by our country. And that is important. That is so important, because we need people to stand up and to speak out. Not to be confrontational, but to be thoughtful and respectful in examining these issues in a way that really produces processes and an approach that protects our national interests, that protects our country.

I mean, we will do whatever it takes to protect our country, but we have established and proved over and over again that we can do it in a way that honors our Constitution, that honors the fact that we, in my humble opinion, really truly are, as the title of this hearing would suggest, a City on the Hill. So thank you.

Mr. OLESKEY. Thank you, Mr. Chairman, for your personal and passionate commitment, which is very important.

Mr. DELAHUNT. Thank you all.

Ms. GILSON. Mr. Chairman, it wouldn't take an act of Congress to somehow pressure the DoD to take these men out of solitary confinement and put them into more humane conditions.

Mr. DELAHUNT. I am going to take the ranking member at his word. I think that we ought to request, if your clients will agree—and we can bring Mr. Casey along, let him handle his first criminal defense case. We won't call it a criminal defense case. But you have got to get into it, you have got to see it, you have got to understand it, you have got to feel it, and you need to see the realities of it. Because only that way can you really understand, you can only really understand the process. And what we want to do is we all want, every one of us, from Ms. Gilson to Mr. Casey and I think every American, we want to have a process that we can be proud of but that respects us.

And I think my ranking member has learned that we need checks and balances on the Executive as well as on the Congress as well as on the Judiciary, and that is the only way we are going to move forward.

But we will take up that request. But I am going to look to Ms. MacLean to follow through on Mr. Rohrabacher's request about those 30.

Let's do this. Let's make this a project. Call on Mr. Casey. He comes from a very large law firm. They have got a lot of money. They have a lot of pro bono time, I am sure, and make him part of this team just to get to the truth. And let's learn from this particular example. That is the best way to understand this. And if we can make adjustment and changes, we will. We will make the commitment here. We will get the Department of Defense in.

I mean, everybody wants to close Guantanamo now. Every candidate wants to close it. You know, President Bush talks about closing Guantanamo. Senator McCain. And how can we improve?

And let's try to do this in a way—we come at it from different perspectives. But the only way to really understand it is to take something specific and discrete to get into the weeds and find out where there are problems in terms of the truth and the facts. Because, all too often, it is only about the rhetoric and the posturing and ideological debates.

Ms. GILSON. There is one other issue. Because we have men here who the government has been trying to place. In Guantanamo, we have some people who might possibly get a trial. But the ones that the government has been trying to place and can't, this problem will not be fixed, stateless men who are not a danger to America but who have no place to go. It won't be fixed until America and its allies agree to take them in, and that won't happen until America agrees first.

Mr. DELAHUNT. Ms. Gilson, I have had a conversation with parliamentarians from the European Union. Now, you know that we are not necessarily well liked, and that polling data is very true. And I have said to them, "We need your help on this, because we want to get those people who are no longer a threat, enemy noncombatants. We don't want to send them to Iran." I really don't want to send them to Libya. I mean, I don't think any American wants to do that.

If all of you could compile a list of those that are in that status, I have no reluctance in reaching out to the Department of State saying, "How can Congress help?" Because there are times when Members of Congress have a much more—let me put it this way—a better rapport with other governments than our Executive does. And maybe if we bring enough pressure on other potential receiving countries that we can resolve this problem in a way that we can all feel good about at its conclusion.

I mean, there are 270, I think, today with the latest statistics in terms of detainees in Guantanamo. I mean, I am sure some deserve the full punishment of the law. No problems on that. As Mr. Mone knows, we put a lot of people in jail that are still there, and I have no reservations about doing that. But we did it in a way that there is no—we did the best we could, and it was transparent, and I believe that it was done in a way that the people whom we represented had confidence in the integrity of what we did.

I can remember standing up at a press conference and apologizing to five young men that had been charged with a very serious rape. But we pursued it, and we discovered that they did not commit that crime. But, you know, I was embarrassed. I made a mistake. But I know in the end that it was important to demonstrate the integrity of the process to the people whom we represented,

and that is—if you don't have that, you do not have a healthy, viable democracy.

Mr. MONE. Mr. Chairman, that is the problem with this process. It is so completely flawed you cannot rely on any decision coming out of it. You cannot rely on—there is no truth. Truth is the first casualty of war, and it went down a long time ago in this, with this Guantanamo. And there is nothing that you can rely on that comes out of these CSRTs. It is a fundamentally flawed process. It has to be scrapped, and Guantanamo needs to be closed by finding a place for those who cannot go home, lobbying the European Union, trying to find people who can't return to their countries a place to go, and by clearly identifying those who have committed crimes and prosecuting them.

Mr. DELAHUNT. Thank you all again. We are adjourned.

[Whereupon, at 6:47 p.m., the subcommittee was adjourned.]

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