



Testimony of Tom Malinowski
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**Hearing on Improving Detainee Policy:
Handling Terrorism Detainees within the American Justice System**
Senate Judiciary Committee
June 4, 2008

Mr. Chairman, thank you for calling us together today and for inviting me to testify.

You have heard today from witnesses who described the strength of the American justice system and its success in handling terrorism cases. I fully agree that America's traditional institutions of justice, including federal civilian courts and military courts martial, both can and should be used to deal with those who have committed, planned or conspired to commit acts of terrorism. These courts have developed procedures to handle these complex cases effectively, striking a pragmatic balance between the government's interest in protecting classified information, and the need to protect the rights of defendants and to preserve the fairness and legitimacy of criminal proceedings.

Had the Bush administration used the American justice system to deal with terrorism detainees, instead of pushing it aside after September 11, 2001, America's reputation would be stronger today and its terrorist enemies would be weaker. The harm caused by Guantanamo and the dilemma of how to close it would have been avoided. There would be no need for you to hold this hearing today.

When it comes to the relative strength of traditional courts in dealing with terrorism, the record of the last six-and-a-half years speaks for itself. In that time, the federal civilian courts have prosecuted dozens of people accused of involvement in international terrorism, both inside and outside the United States. These trials have often been complicated and difficult. Some have been messy. But time and again, they have succeeded. They have disrupted conspiracies and attacks. They have put dangerous people away. They have given us finality in a way that is widely seen as fair.

In contrast, every alternative to the traditional system – whether detention without charge in Guantanamo or in secret CIA facilities, or trial by military commission – has failed. In six years, the military commissions have convicted only one person – an Australian kangaroo-trapper named David Hicks who was at best a bit player in al-Qaeda, and who is now free after serving his sentence.

If the record is so clear, why do we face any dilemma at all? Why are we still debating alternatives to a system that works?

Some of the reasons for distrusting the traditional American system of justice can easily be dismissed. They are put forward by partisans who do not wish to admit that what the Bush administration did was wrong, or by ideologues who believe that criminal justice undermines the idea of a war on terror. But one remaining reason is worthy of debate: the fear that there are people in Guantanamo, or at loose in the world, who cannot be prosecuted – because they have not yet committed a crime or because the evidence against them would not be admissible in a normal court – but who nonetheless are so dangerous that they must be held. To deal with such people, some have proposed that the United States establish through legislation a formal system of preventive detention, which would permit the long-term, potentially indefinite detention of suspects after some sort of hearing but without the filing of criminal charges or a trial.

What do we do with people who are hard to prosecute but who nonetheless scare us, because of their beliefs, their associations, and desire to do the United States harm? There may be a few dozen such people in Guantanamo today (though no one should claim to be sure about this, given the at best uncertain and at worst deeply tainted intelligence that is the basis for many of the detentions there). There are not likely to be many more in the future – those few detainees who have been brought to Guantanamo in the last two years have been accused of serious involvement in al-Qaeda that clearly renders them candidates for prosecution. But the number of people living at large in the world who fit the same profile is vastly more than a few dozen – it is probably in the tens or hundreds of thousands.

After all, many thousands of young men committed to helping the Taliban passed through Afghanistan before 2001, staying in the same camps and guest houses and developing the same associations as those now detained in Guantanamo. Many more subscribe to the extremist ideology that gave rise to al-Qaeda; they read the literature, surf the websites, watch the videos, and may be potential recruits to suicide squads or terror cells. If US

troops swept today through a city like Kandahar, Afghanistan or Karachi, Pakistan, and detained and interrogated the first thousand young men they encountered, they would probably find at least a few dozen who fit the profile of scary-but-not-prosecutable that we are discussing today. Leave those thousand men in a place like Guantanamo for six years, and the number deemed too frightening to release would likely rise even further.

So here is the question: If the United States is holding in Guantanamo 20 or 50 or even a hundred of these countless thousands of potentially dangerous, but difficult to prosecute, men, should it set up a preventive detention system to keep that small number from joining the larger pool? Keep in mind that the US Congress has never in its history formally established a system of detention without trial to deal with national security threats. Not during the Civil War. Not during World War II or the Cold War when the survival of the nation was clearly at risk. (And all of the few executive-branch experiments with such programs – the quickly-reversed suspension of habeas corpus during the Civil War, the Palmer Raids of 1919-1920, and the internment of citizens with Japanese ancestry during World War II – were, like Guantanamo, repudiated as mistaken experiments that violated America's commitment to the rule of law).

The benefit of experimenting with such a system now is that it would help incapacitate a few dozen people who may wish the United States great harm, out of thousands like them who would remain at large in the world. Would that benefit be worth the cost of taking such a historically unprecedented step?

The cost of establishing a preventive detention system to deal with terrorism detainees would, in my view, be extremely high. If the Committee is ever asked to consider such a proposal, let me suggest a few hard questions that I hope you will ask.

First, can Guantanamo detainees be moved to a new system of detention without trial in the United States without making it seem like Guantanamo was being transplanted to US soil? Would such a new system repair the damage Guantanamo has done to America's reputation, or perpetuate it?

Closing Guantanamo would bring the United States plenty of short-term credit. But the price America has paid for Guantanamo is not fundamentally related to its physical location. What concerns American and foreign critics of the camp is that the United States is holding prisoners indefinitely without trial or charge, based on evidence that may have been

obtained through coercion, which they are not allowed to confront, in a way that offends traditional American and international principles of justice.

Theoretically, one could design a system of preventive detention that affords detainees such a high level of due process that it would not look like Guantanamo, or even Guantanamo-lite. But if you allow protections similar to those already provided by federal courts and courts martial, why go to the trouble of creating a new system at all?

The only point of establishing a preventive detention system is to lower standards to a point where it can deal with people who cannot be prosecuted in the criminal system. That's why almost all proposed preventive regimes assume, for example, that the person presiding could consider classified evidence never presented to the suspect. This would make it virtually impossible for defendants to challenge that evidence, and statements obtained through coercion could easily be concealed and relied upon.

The temptation would be enormous to exploit the proceedings' secrecy and lax standards of evidence to pursue people with only tenuous connections to terrorist activity. Inevitably, errors would be made; some innocent people would be detained based on faulty intelligence or mistaken identity. Just as inevitably, journalists and lawyers would uncover these mistakes. And once again, people around the world would be focused on the injustices the United States commits, not on the crimes the terrorists commit. Except this time, the principle of detention without charge would be part of the regular practice of the US government and embedded in the law of the land forever. This would not solve Guantanamo; it would make the problem permanent.

A second question is whether one can create a new form of preventive detention without enduring more years of frustration and delay?

The military commissions system currently in place was invented by White House lawyers after 9/11, then reinvented after it was challenged by critics within and outside the administration, then reinvented again after the Supreme Court's Hamdan decision. It may have to be reinvented yet again after the Supreme Court reviews the habeas-stripping provisions of the Military Commissions Act this summer. Meanwhile, the commissions have experienced enormous delays and embarrassments. Trials have started and stopped abruptly. Key participants, including the former chief prosecutor, have denounced the system as unfair. Most recently, charges against the alleged 20th 9/11 hijacker had to be

dismissed, likely because evidence was tainted by torture. As I mentioned, there has only been one conviction in six years.

Some of these problems are due to the inherent flaws of the system. But many are the inevitable result of creating any new system from scratch, especially one that deviates so much from standards with which American courts are comfortable and American lawyers are familiar. America's civilian criminal system, on the other hand, has been around for more than 200 years. The Uniform Code of Military Justice has been around for almost 60. We've had all that time to get the kinks out of the system, to establish stable rules, to train a cadre of lawyers and judges who know those rules, and to develop special procedures for special kinds of cases, including those involving terrorism.

If we try again to create a new system from scratch, if we rely again on trial and error to work out the rules, the result will again likely be more error than trial. Eventually, a stable set of rules may emerge, after all the legal challenges and legislative re-dos are exhausted. But how long would you be prepared to wait to get to that point, Mr. Chairman? Five years? Ten years? Can the United States afford more years of controversy over how to detain suspected terrorists?

A third question I hope you'll ask is whether the risk of releasing truly dangerous people would be lower with a preventive detention system, or higher?

Now, that may sound like a counterintuitive question. Surely, the whole point of a preventive system is to detain people who might otherwise be released by ordinary courts, with their higher standards of evidence and due process. But the answer is not as obvious as it may seem.

If a system of preventive detention is established, it will always be easier in the short term for the government to put suspected terrorists through such a system than to prosecute them before civilian courts. The government will have a strong incentive to use this parallel system even for those detainees who could be prosecuted in criminal courts. After all, why go to the trouble and expense of a trial, which might require declassifying evidence, and even the risk of an acquittal, when you have a more expedient option?

At the same time, because a new preventive system would likely face tremendous legal challenges as well as domestic and international criticism, the government will eventually feel pressure to move detainees out of it. This is precisely what has happened in

Guantanamo. At first, setting up the camp looked like a good way to avoid the uncertainties of the criminal justice system; the administration could put who it pleased there and control their fate for as long as it pleased. When Guantanamo became controversial, the administration started trying to move people out of it. It sent hundreds of detainees back to their home countries, including a number of apparently very dangerous men who might well be sitting in a federal prison right now had they been brought before a criminal court at the start. Any system that lacks legitimacy is likely to result in more potentially dangerous people being released sooner than a system that is unassailable, like our criminal courts. The lesson is that here, as in so many aspects in life, the short-term expedient solution is self-defeating in the long term.

A fourth question is whether a preventive detention system would effectively delegitimize terrorists in the way that the criminal justice system does?

One thing all terrorists have in common is the desire not to be seen as ordinary criminals. Al-Qaeda members clearly want to be thought of as soldiers, as part of a great army at war with a superpower on a global battlefield. They crave the attention and, in their own minds, the glory that comes with that status; and they use it to recruit more misguided young men to join their cause. Remember how the 9/11 mastermind Khalid Sheikh Mohammed behaved before his “Combatant Status Review Tribunal” at Guantanamo Bay. He wore his designation as “enemy combatant” proudly, comparing himself to George Washington and saying that had Washington been captured by the British, he, too, would have been called an “enemy combatant.” In a sense, the Guantanamo tribunal gave Khalid Sheikh Mohammed exactly the status that he wanted.

In contrast, consider how upset the convicted “shoe bomber,” Richard Reid, was to be brought before an ordinary court in Boston, how he demanded to be treated as a combatant, and how the judge in that case, William Young, put him in his place by saying: “You're no warrior. I know warriors. You are a terrorist” – as he sentenced Reid to life in prison. Isn't this a far better way to deal with such men, to let them fade into obscurity alongside the murderers and drug traffickers who populate our federal prisons?

As counterterrorism expert Mark Sageman has written: “Any policy or recognition that puts such people on a pedestal only makes them heroes in each others' eyes – and encourages others to follow their example.” The best system for dealing with suspected terrorists is the system that makes them feel the least special. The criminal justice system passes that test. A brand new system of preventive detention designed just for members of

al-Qaeda would fail it miserably. It would fuel the notion that these men deserve special treatment and risk elevating their status. The risk would be compounded by the likelihood that such detainees would receive regular reviews of their detention – keeping their names and cases in the press and making them poster children for advocacy and recruitment efforts alike. By comparison, the criminal justice system provides closure, allowing convicted terrorists to largely disappear from the public eye.

That leads me to a final question: Would a preventive detention system actually prevent terrorism?

Again, if you believe that incapacitating a few dozen potentially dangerous young men out of the thousands of such people at large in the world weakens al-Qaeda, then the answer is “yes.”

But if you agree with General Petraeus that the fight against non-traditional foes like al-Qaeda “depends on securing the population, which must understand that we – not our enemies – occupy the moral high ground,” the answer is clearly “no.” It is “no” if you believe the US Army's Counterinsurgency Manual, which warns that “punishment without trial” is an illegitimate action that enemies exploit to replenish their ranks. It is “no” if you look at the websites that use images of Guantanamo to recruit more fighters to the terrorists’ ranks. It is “no” if you believe the April 2006 National Intelligence Estimate, which argues that to defeat al-Qaeda, the United States needs to “divide [terrorists] from the audiences they seek to persuade” and make “the Muslim mainstream... the most powerful weapon in the war on terror.”

There is, unfortunately, no shortage of potential suicide bombers in the world. Guantanamo has made that problem worse, not better, probably creating far more enemies than it has taken off the battlefield. If a new system of preventive detention is seen as another departure from America’s commitment to the rule of law, the problem would be compounded.

The experience of America’s allies is often cited to justify preventive detention regimes. But that experience is far from encouraging. Between 1971 and 1975, for example, the British army rounded up close to 2,000 people it believed to be associated with the Irish Republican Army (IRA) and interned them in prison camps, where they were held without charge. Violence increased as anti-detention anger helped fuel the conflict.

Years later, the home secretary, Reginald Maudling, who sanctioned the internments, said the experience “was by almost universal consent an unmitigated disaster which has left an indelible mark on the history of Northern Ireland.” In the words of former British Intelligence officer Frank Steele, who served in Northern Ireland during this period: “[Internment] barely damaged the IRA's command structure and led to a flood of recruits, money and weapons.” Even Edward Heath, the British Prime Minister in 1971, when internment was introduced, later called it a “mistake” which “gave the IRA a way to recruit from amongst people who had been interned, and... proved impossible to stop.”

Mr. Chairman, there are no easy, expedient answers to the question of what to do with the remaining detainees in Guantanamo, and others like them who may be detained in the future. But for those who are not sent home (which is likely the best answer for most), the American criminal justice system offers the best alternative.

In a sense, the United States has been running a controlled experiment for the last six years in how best to bring suspected terrorists to justice. And the results are clear.

Those accused men who have been brought into the civilian system are, to use one of President Bush's favorite expressions, no longer a problem for the United States. If guilty, they have been convicted, put away, and largely forgotten. They are not being used for propaganda purposes by groups like al-Qaeda. Their treatment has reinforced America's status as a nation of laws, not undermined it.

Meanwhile, every single person who remains in the alternative system at Guantanamo remains an enormous problem for the United States.

The lesson is equally clear. We should stop experimenting. We should not build yet another untested structure on a foundation of failure. We should use the system that works.