

**STATEMENT OF MATTHEW C. WAXMAN
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**HEARING ON
GUANTANAMO DETAINEES AFTER *BOUMEDIENE*: NOW
WHAT?**

**BEFORE THE
UNITED STATES COMMISSION
ON SECURITY AND COOPERATION IN EUROPE
(HELSINKI COMMISSION)**

July 15, 2008

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

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

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

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

decisions. I commend the Commission for holding today's hearing to grapple with these crucial and vexing issues.

In that regard, let me emphasize three points today:

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

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

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

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

We need to solve the Guantanamo problem. But to consider Guantanamo in isolation from other U.S. Government detention operations, including those in Afghanistan and elsewhere, will leave significant legal and policy issues unresolved and could produce unintended consequences. Indeed one problem with previous, incremental legislative and judicial decisions is that they have focused on Guantanamo as a unique geographic location. The Supreme Court's decision in *Boumediene v. Bush*, for example, which held that constitutional *habeas corpus* rights apply to detainees at Guantanamo, leaves uncertain whether some of the same constitutional rights apply to otherwise similarly-situated detainees held near combat zones or in other sites. To focus too narrowly on the few hundred detainees currently remaining at Guantanamo fails to address what is really a global problem, and can, for instance, inadvertently create incentives to keep detainees in less transparent conditions, in less secure locations.

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

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

and agents and in providing a better picture of al Qaida's structure and operations. If we close Guantanamo we will need alternative detention and intelligence capabilities.

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

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

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

My third point is that despite the many challenges I have just outlined, Guantanamo should be closed. If handled right, doing so will *improve*, not detract

from, our ability to combat terrorism. While some may frame the issue as a stark choice between preserving principles of liberty and preserving our security, I believe closing Guantanamo is an opportunity to achieve both objectives.

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

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

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

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

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