Statement of
Deborah N. Pearlstein

Prepared Testimony to the
Subcommittee on the Constitution
Committee on the Judiciary
United States Senate
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Restoring the Rule of Law

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Chairman Feingold, Ranking Minority Member Brownback, members of the Subcommittee, thank you for giving me the opportunity to testify. The question this hearing poses is of critical importance: What steps should the next President and Congress take to repair the damage that this President has done to the rule of law in the pursuit of U.S. national security? I have testified and written elsewhere about the Bush Administration's deeply troubling record of detainee treatment since 2001, a record that has had devastating consequences both for our nation's efforts to protect and enforce some of our most important laws, and for our national security.[1] In this testimony, I shall first explain why I believe not only adherence to, but reliance on, the rule of law is so essential to the success of U.S. counterterrorism policy. I then offer a list of specific steps I believe the U.S. Government should take to begin to correct key failures and ill-effects of U.S. intelligence and detention operations since the attacks of September 11.

The Rule of Law and National Security

In the years since the September 11 attacks, it has often seemed that this Administration has viewed the task of counterterrorism as if it were no more than a function of balancing rights and security, where less of the first would guarantee more of the second. The Administration's prolonged equivocating about the legality of cruel treatment, its insistence on broad-scale, indefinite detention, its embrace in 2001 of a novel form of military commission trial – all are examples of this philosophy in action.

But if any lesson has emerged from the past seven years, it is that this facile equation of rights and security is wrong. As the 9/11 Commission Report itself made clear, the fundamental freedoms of our open society were not the primary or even secondary reason the terrorists succeeded on September 11. Societies decreasingly concerned with human rights like Russia have not necessarily been increasingly well protected from terrorism. The most important actions Congress has taken to protect against catastrophic attacks – like legislation expanding U.S. involvement in international cooperative efforts to inventory, secure, and track the disposition of fissile materials –

[1] My previous testimony on this matter, written and oral, was provided on July 15, 2008, to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties, in connection with its hearing "Administration Lawyers and Administration Interrogation Rules," and is available at http://judiciary.house.gov/hearings/hear_071508.html. *See also* Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006); HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

have involved no compromise of human rights.[2] And the most rights-damaging actions we have taken as a nation have had an overwhelmingly negative effect on our security.[3]

Rather than asking what rights can be limited in the interest of security, wise counterterrorism policy should begin with far more basic questions: what specifically is the threat of terrorism; what is a realistic national goal to work toward in addressing it; what is our strategy for reaching that goal; and only then - what tools are necessary to make that strategy a success? To be sure, these questions of threat assessment, objective setting, strategy and tactics are questions in the first instance not for lawyers, but for experts in psychology, history, technology, religion, organizational design and decision-making, policing, and national security. What *lawyers* can perhaps offer at this stage is some guidance about the role law can play in aiding this task of government – in particular the detention and interrogation operations likely to accompany it.

Our society has long thought the rule of law a good idea for reasons that are centrally relevant to the detention and intelligence collection missions. (To be clear, the expression "rule of law" does not refer, in particular, to a list of rules to be followed. It means a set of ideas: people will be governed by publicly known rules that are set in advance, that are applied equally in all cases, and that bind both private individuals and the agents of government.[4]) The law can create incentives and expectations that shape institutional cultures – a function that was eliminated to disastrous results when the current Administration decided to lift Geneva Convention rules for our troops with no clear replacement doctrine.[5] The law can construct decision-making structures that take advantage of the expertise of security professionals – a possibility short-circuited when civilian leaders in the Pentagon cut uniformed JAG officers out of the loop in designing military commission trials.[6] The law can provide a vehicle for building and maintaining more reliable working relationships with international partners – relationships that have suffered serious damage as a result of American failure to abide by even our most profound commitments to international human rights.[7] Finally, and not least, it sets limits

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[2] *See, e.g.*, Department of State Authorities Act of 2006, Pub. L. No. 109-472, Sec. 10 (2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ472.109.pdf (authorizing foreign assistance to support nuclear non-proliferation detection and interdiction activities).

[3] Deborah Pearlstein, Testimony to the House Judiciary Committee, Subcommittee on the Constitution, Civil Rights and Civil Liberties, From the Department of Justice to Guantanamo Bay: Administration Lawyers and Administration Interrogation Rules, Part IV (July 15, 2008), at pp. 7-11 (sources cited).

[4] *See* Richard H. Fallon, *The Rule of Law in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7-9 (1997).

[5] I describe the evolution of these policies (based largely on the Pentagon's own investigations) and the effects they had on operations in the field in detail in my article, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006).

[6] *See* Jane Mayer, *Annals of the Pentagon: The Memo*, THE NEW YORKER, Feb. 27, 2006, available at http://www.newyorker.com/fact/content/articles/060227fa_fact.

[7] *See, e.g.*, Raymond Bonner & Jane Perlez, *British Report Criticizes U.S. Treatment of Terror Suspects*, N.Y. TIMES, July 28, 2007 at A6 ("Britain pulled out of some planned covert operations with the Central Intelligence Agency, including a major one in 2005, when it was unable to obtain assurances that the actions would not result in rendition and inhumane treatment, the report said."). *See also* INTELLIGENCE AND SECURITY COMMITTEE, RENDITION, 2007, ISC 160/2007, *available at* http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/publications/intelligence/20070725_isc_final.pdf.ashx (providing the full report of the Committee).

on behavior and ensures accountability – which, when removed in 2002, led to the human rights and security catastrophe known as Abu Ghraib.[8]

This list of law's virtues is, of course, only the way law functions ideally; the law itself must be clearly conceived and reliably enforced. But in considering the lessons of the past several years, it becomes apparent that the success of U.S. counterterrorism depends upon law to fulfill these roles. Protecting the rule of law must be considered an essential component of counterterrorism strategy going forward.

Recommended Actions

Given the extent to which U.S. counterterrorism goals depend upon the maintenance of a vital rule-of-law system, among the first counterterrorism priorities for an incoming Administration should be a package of corrections to address the detention and interrogation policies of the past seven years. To be clear, the list of corrective recommendations below should not be mistaken for an answer to the real policy challenges that remain about how best to protect the United States from terrorism. A new law and security policy agenda is inadequate if it does no more than identify what has not worked and correct our most recent mistakes. But a corrective package is necessary to help restore our allies' faith in our commitment to the laws against torture and cruelty; clarify for our troops and agents in the field what kind of detainee treatment is lawful and effective; reinforce government structures that check and constrain executive power; and provide a full and public accounting of what happened so that it may be clear to all that the United States continues to take its rule-of-law obligations seriously.

(1) Establish a single, government-wide standard of detainee treatment.

Since the President's veto earlier this year of the Intelligence Authorization Bill that would have effectively banned the CIA's use of waterboarding and other cruel and torturous interrogation techniques already forbidden by the Army Field Manual,[9] the guidance governing intelligence interrogation is again unclear for our agents in the field who just want to know the rules of the road. While the Defense Department now appears to be training to, and enforcing, the strictures of the U.S. Army Field Manual on Intelligence Interrogation (which is itself broadly in compliance with U.S. and

[8] *See, e.g.*, News Transcript, Dep't of Defense, Coalition Provisional Authority Briefing (May 10, 2004), available at http://www.defenselink.mil/transcripts/2004/tr20040510-0742.html (Brigadier General Mark Kimmitt, spokesman for the U.S. military in Iraq, acknowledged "The evidence of abuse inside Abu Ghraib has shaken public opinion in Iraq to the point where it may be more difficult than ever to secure cooperation against the insurgency, that winning over Iraqis before the planned handover of some sovereign powers next month had been made considerably harder by the photos."); *Guantanamo's Shadow*, ATLANTIC MONTHLY, Oct. 2007, at 40 (polling a bipartisan group of leading foreign policy experts and finding 87% believed the U.S. detention system had hurt more than helped in the fight against Al Qaeda) ("Nothing has hurt America's image and standing in the world—and nothing has undermined the global effort to combat nihilistic terrorism—than the brutal torture and dehumanizing actions of Americans in Abu Ghraib and in other prisons (secret or otherwise). America can win the fight against terrorism only if it acts in ways consistent with the values for which it stands; if its behavior descends to the level employed by the terrorists, then we have all become them instead of us.").

[9] Intelligence Authorization Act for Fiscal Year 2008, H.R. 2082, Sec. 327.

international laws governing detainee treatment),[10] there is no indication that the CIA or other intelligence agencies are bound by the same restrictions. Continued equivocation on this issue is an ongoing strain on international counterterrorism cooperation, as noted above. Worse, in an environment in which effective security demands more, not less, interoperability between and among defense and intelligence agencies, conflicting guidance on such critical matters is bound to produce more, not less, confusion in the field.[11] Such confusion can only serve to undermine U.S. intelligence collection missions. And it continues to leave military and intelligence officials in the field every day holding the bag for decisions that properly belong in leadership's control.

The laws governing the treatment of U.S.-held detainees – rules already established by the Constitution, treaties, and statutes of the United States, and reflected in the U.S. Army Field Manual on Intelligence Interrogation – should be standardized by Congress government-wide. U.S. efforts to educe information from detainees, whether held by our own military or intelligence agencies, or other agents acting at the United States' behest, should be guided by uniform rules and training programs, backed by the clear support of the law and the best evidence of what is effective.

(2) Exclude from any legal proceeding under color of U.S. law information obtained by torture, or cruel, inhuman or degrading treatment.

Rules of evidence for military commission proceedings now underway at Guantanamo Bay contemplate the admissibility of statements made under cruelty and coercion, sending the message that acts of cruelty, when they happen, need not result in adverse consequences. As it stands, Congress' most recent action on the question of the utility of information obtained under torture or cruel treatment was in the Military Commissions Act of 2006 (MCA), in which it authorized the admissibility in commission proceedings of statements obtained by cruel, inhuman or degrading treatment, as long as the statements were obtained before 2005, and "the totality of the circumstances renders the statement[s] reliable and possessing sufficient probative value" and their introduction serves the "best interest of justice." The MCA ostensibly excludes evidence "obtained by use of torture," but it does not specify which interrogation methods constitute torture – a term the administration has defined to near non-existence in the past.[12]

In addition to undermining the legitimacy of these particular trial proceedings, and raising significant questions about the reliability of the evidence on which military commission convictions may be sought, such rules send precisely the wrong message to those who would engage in torture and cruelty on the United States' behalf – namely, that if U.S. agents or officials engage in torture or cruelty, the fruits of that conduct, however

[10] U.S. ARMY FIELD MANUAL 2-22.3 HUMAN INTELLIGENCE COLLECTOR OPERATIONS (September 2006), available at http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.
[11] *See, e.g.*, Deborah Pearlstein, *Finding Effective Constraints on Executive Power: Detention, Interrogation and Torture*, 81 IND. L. J. 1255 (2006).
[12] Military Commissions Act of 2006, 10 U.S.C. § 948r (b-d); 10 U.S.C. § 949a (b)(2)(C) (further providing that "[a] statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title").

unreliable, may subsequently be used in the service of our own system of justice. It is the opposite of a rule of deterrence.

No trial under color of U.S. law, whether by court martial, military commission or in civilian criminal courts, should admit evidence obtained by torture, or cruel, inhuman or degrading treatment. Anglo-American jurisprudence has rejected the use of such evidence for more than three centuries for reasons that remain valid today: it is unreliable, it is inhuman, and it degrades all who participate in the process. As the Supreme Court put it in one of its many decisions prohibiting the use of coerced testimony in any criminal trial:

> The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.[13]

We cannot effectively claim to be a nation that does not torture, and yet allow such evidence in our courts. As trials involving such evidence are today under way today at Guantanamo Bay, it is imperative these rules be clarified with haste.

(3) Establish an independent commission to investigate U.S. detention and interrogation operations.

It is now apparent that there have been widespread violations by U.S. agents of some of our most important provisions of law – laws prohibiting torture and cruelty.[14] Failure to fully take stock of these violations, and to take meaningful corrective action, calls into question our commitment to the rule of law, as well as our ability to constrain government power, deter harmful behavior, and afford some measure of recognition to those who have been wronged. Indeed, even the problem of ambiguity for agents in the field is compounded by the reality that key information regarding the scope and nature of internal guidance governing U.S. detention and interrogation operations remains shrouded in secrecy.

While there is no question that some information can and should be appropriately classified, there can be no legitimate security justification for continuing the wholesale

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[13] Ashcraft v. Tennessee, 322 U.S. 143, 155 (1944).

[14] *See, e.g.*, N.Y. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE ET AL., BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2 (2006), http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf; HUMAN RIGHTS FIRST, COMMAND'S RESPONSIBILITY: DETAINEE DEATHS IN U.S. CUSTODY IN IRAQ AND AFGHANISTAN (2006), http://www.humanrightsfirst.org/us_law/etn/dic/index.asp.

classification of investigations such as that by the CIA Inspector General into detainee torture and abuse.[15] It will never be clear what kind of remedial action is wise or necessary without full information about the scope of U.S. conduct. Nor do I believe we will be successful in persuading our allies – or our own troops – of the seriousness with which we take these matters without a full, public accounting of what actually happened.

The Pentagon and others may rightly point out the several investigations into such matters already conducted – and indeed, some of these have been most useful. But as I reported in 2004, and continue to believe today, the investigations to date have suffered from a range of flaws, including narrowly circumscribed investigative charges (for example, focusing only on a single unit, rather than a series of complex interactions among units); a failure to investigate all relevant agencies and personnel (for example, CIA was often excluded or was uncooperative in DOD-led investigations); cumulative reporting (one investigation relying on a prior investigation's findings without independent verification); contradictory conclusions; questionable use of classified label to withhold information; a failure to address senior military and civilian command responsibility; and an incomplete game plan for corrective action.[16] None of the major investigations to date has been able to provide a comprehensive picture across agencies and up and down the chain of command about the scope of the abuses that took place, why they happened, and how best to ensure they will not happen again.

As a wide range of political leaders from both parties have sought now for years, I believe Congress should establish by legislation an independent, non-partisan commission to determine all the facts and circumstances surrounding violations of law committed in the course of U.S. detention and interrogation operations. The commission should be led by recognized experts in military and intelligence operations, as well as in relevant U.S. and international law. It should be constituted with expert staff, subpoena power, and the power to take testimony under oath. It must be fundamentally independent of the executive branch, with commission members selected jointly by appropriate congressional and executive officials. It must have access to classified information from all relevant agencies and all levels of authority, civilian and military. It must have the authority to offer whistleblower protection to anyone with relevant knowledge who may fear retribution for testifying truthfully. It must establish the facts independent of any other investigation. Critically, it should, within the reasonable constraints of specific national security interests, be open to the public.

The model for the kind of commission I am proposing may be found in, for example, the National Commission on Terrorist Attacks Upon the United States, established by Congress in the wake of September 11. That commission featured most of these characteristics, and produced a widely cited, highly useful report on the failures of

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[15] *See* JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 288-89 (2008) (describing some of the content of the 2004 CIA Inspector General report).

[16] *See* HUMAN RIGHTS FIRST, GETTING TO GROUND TRUTH: INVESTIGATING U.S. ABUSES IN THE "WAR ON TERROR" (September 2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/Getting_to_Ground_Truth_090804.pdf.

government policy and practice leading up to those attacks, and on the needed reforms going forward. The model should not be, I believe, a body on the order of South Africa's Truth and Reconciliation Commission, as some have suggested. While that body performed a great service in documenting many of the human rights violations that occurred during the regime of apartheid, it also promised amnesty from prosecution for all those who participated. An effective investigative commission need not, I believe, promise amnesty in exchange for truthful testimony. Particularly if the commission mandate is accompanied by provisions for strict and justiciable limits on the permissible scope of executive privilege, and clear mechanisms for the enforcement of subpoenas and contempt citations, it should need no further incentive to compel truthful disclosure.

There may be those who object to the commission idea as insufficiently punitive, or a poor substitute for the criminal prosecution of individual wrongdoers. To be clear, the commission would not be established to serve as a substitute for criminal prosecution where the facts and law warrant such prosecution in an individual case. But criminal prosecution itself is fraught with challenges that make it unlikely alone to effectively constrain power, deter misconduct, and clarify treatment standards under current law. Criminal prosecution takes place in an adversarial setting; its goal is to establish in a particular limited set of circumstances whether one individual violated a particular legal standard. In this function alone, it can be tremendously valuable. But an individual trial is not designed to, and often does not, shed light on what may ultimately be systemic failures. It does not produce recommendations for future action. And it does not identify failures of policy and judgment that, while perhaps not criminal in nature, are just as critical to identify for the purpose of recognizing past failings and re-establishing our international reputation as a champion of human rights.

(4) Close detention facilities at the U.S. Naval Base at Guantanamo Bay.

Given the near-universal consensus surrounding the failure of detention operations at Guantanamo Bay to justify their extraordinary cost in terms of both human rights and national security,[17] the key question for any incoming administration is not whether to close Guantanamo Bay, but how. The first answer is negative guidance: we must not let the hard case of Guantanamo make bad law for all future counterterrorism detention operations. That is, the failures of the current Administration – ignoring our obligations under the Geneva Convention to afford all detainees Article 5 hearings upon capture, subjecting at least some fraction of detainees to torture and cruelty, transferring the detainees thousands of miles away from any area of active hostilities – have badly limited the lawful policy options available to resolve these cases.[18] The taint of torture on

[17] Both presidential candidates have called for the closure of Guantanamo as a detention facility. *See* DEMOCRATIC NATIONAL COMMITTEE, REPORT OF THE PLATFORM COMMITTEE, RESTORING AMERICA'S PROMISE 55 (2008), available at http://www.demconvention.com/assets/downloads/2008-Democratic-Platform-by-Cmte-08-13-08.pdf; John McCain, Speech on Foreign Policy to the Council on Foreign Relations (March 2008), available at http://www.cfr.org/publication/15834/.

[18] *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 52-56 (2003), *available at* http://www.humanrightsfirst.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf (summarizing status of Guantanamo detainees); *see also, e.g.*, Neil A. Lewis & David Johnston, *New F.B.I. Files*

some evidence may make it impossible to successfully prosecute some Guantanamo detainees who might otherwise have been lawfully detained pursuant to criminal sanction. The initial disregard for Geneva Convention obligations may make it impossible to continue to detain those who may otherwise lawfully have been held until the conclusion of the ongoing conflict in Afghanistan. Assuming an incoming Administration adheres to U.S. and international law currently on the books, these options would be available for counterterrorism detention efforts going forward.

There are thus two separate policy problems the next Administration and Congress must distinguish, and face in turn: (1) How best to resolve the cases of the Guantanamo detainees, and (2) What kind of counterterrorism authorities are necessary to detain individuals who may be seized going forward. In enabling the Guantanamo facility's closure, only the first question must be answered. In contrast, well-intentioned proposals for legislation that would, in the interest of trying to rein in executive abuses at Guantanamo, affirmatively authorize further indefinite detention of "enemy combatants," defined far more broadly than and independent of our international treaty obligations, let the policy disaster that is Guantanamo set the standard for U.S. detention policy going forward. We must try to limit the damage Guantanamo has done; we need not add to it.[19]

A more complete answer to the "how" question requires distinguishing the three, broad types of detainees who remain at Guantanamo today. First are those who have committed an unlawful act and may be subject to prosecution. These detainees should be promptly subject to federal criminal prosecution or court martial. The current military commissions are, I believe, hopelessly viewed as illegitimate by our allies and those whose views we would hope to sway. Although it is possible to constitute lawful military commission proceedings by, for example, amending the existing Military Commissions Act,[20] I believe any effort to repair the current commissions will take more time than is necessary, prolonging the damage done by the current situation, while remaining unlikely to succeed in overcoming the perception of illegitimacy. While any court (civilian or martial) will face the special challenges associated with security prosecutions, including the protection of classified information, our existing trial institutions are both accustomed and suited to resolving such challenges based on existing rules case by case.[21]

A second set of detainees includes those who have been cleared for release but who have no place suitable to go (because, for example, they face torture in their home country or because their home country refuses their return). These detainees pose fundamentally a diplomatic problem. The existing law is clear on our obligation not to

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Describe Abuse of Iraq Inmates, N.Y. TIMES, Dec. 21, 2004, at A1 (recounting July 2004 F.B.I. agent report describing Guantanamo detainees chained to the floor for 18-24 hours or more without food or water, left to soil themselves, and others subjected to temperatures freezing or "well over 100 degrees").

[19] I have written elsewhere about the adverse security consequences of pursuing preventive detention operations outside the Geneva Convention regime. *See* Deborah Pearlstein, *We're All Experts Now: A Security Case Against Security Detention*, 40 CASE W. RES. J. INT'L L. (forthcoming Winter 2008).

[20] Among other required amendments would be those to correct the evidentiary issue highlighted above.

[21] For more on how federal courts have long successfully addressed these challenges, see Richard B. Zabel and James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts (2008), available at http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf.

return them to places they are likely to be tortured;[22] we and our allies must thus find a suitable alternative home. While I do not wish to undersell the difficulty of resolving these cases by calling the disposition of these detainees a diplomatic problem, it may be reasonable to expect any new Administration may have some more success – and must press actively and immediately – to seek international cooperation on these cases. The more aggressively the next Administration works to take a series of real, unilateral steps to restore our credibility on matters of the rule of law, and reestablish our interest in and respect for international partnerships, the more success I believe it reasonable to expect such efforts will find. Excepting any court order that finally determines the status of one or more of these detainees – any such order must be observed immediately – detainees awaiting release while final transfer arrangements are made may be housed for a limited period of time in a military facility in the continental United States.

A final category comprises those who have not demonstrably committed any wrongful act but who have asserted their membership in Al Qaeda or otherwise stated their intention to do harm to the United States. These may include men seized far from any traditional field of active combat, men who are at best only arguably involved in an armed conflict within the meaning of international law, and some who may only arguably be covered by the 2001 congressional Authorization for the Use of Military Force. The U.S. Supreme Court ruling in *Boumediene v. Bush* makes clear that all Guantanamo detainees, including this set, have a constitutional right to petition U.S. courts for a writ of habeas corpus.[23] Unless circumstances change, these cases will be ongoing when the next administration takes office. The next administration should immediately conduct its own, independent review of all available evidence, and release its conclusions about individuals in this category publicly and in as much detail as possible without compromising appropriately classified information. Those who can be prosecuted should be, and those who should be released must be. For those administration counsel believe may be appropriately detained under U.S. and/or international law *as it existed* when the detainee was seized, it should present its best legal arguments as to the basis and scope of their detention. Because there was substantial domestic and international law governing the authority and limits on detention of this nature on the books when these detainees were arrested, and because our courts are constitutionally charged and institutionally trained to interpret that law as it applies case by case, I believe remaining questions about the procedural and substantive rights of these detainees may be best and most swiftly resolved in the federal courts. While there may be an appropriate role for Congress in designing any new detention authority going forward, any such law can have no bearing on the rights of the Guantanamo detainees as they existed upon initial arrest.

Conclusion

While no set of corrective actions can fully repair the damage done by the record of torture and abuse the United States has accumulated over the past six years, we may

[22] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, entered into force June 26, 1987, Art. 3.
[23] 553 U.S. ___ (2008).

undertake a set of actions that demonstrate a willingness to have our ongoing conduct conform to the promise of our laws. These measures, as part of a broader package of corrective steps, may begin to serve the interests in preserving legality and promoting security for all Americans. As ever, I am grateful for this Subcommittee's efforts, and for the opportunity to share my views on these issues of such vital national importance.