STATEMENT OF SENATOR KYL
TERRORISM SUBCOMMITTEE HEARING ON GUANTANAMO DETAINEES
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At least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies. A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured. Two released detainees later became regional commanders for Taliban forces. One released Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers. Another former detainee has killed an Afghan judge. One released detainee led a terrorist attack on a hotel in Pakistan, and also led a kidnapping raid that resulted in the death of a Chinese civilian. This former detainee recently told Pakistani journalists that he plans to "fight America and its allies until the very end." (*See* "U.S. Divulges New Details on Released Gitmo Inmates," CNN, May 14, 2007; John Mintz, "Released Detainees Rejoining The Fight," The Washington Post, October 22, 2004.)

The reality is that this nation needs to be able to detain those active members of Al Qaeda and related groups whom it captures. Releasing committed terrorists has already resulted in the deaths of allied soldiers and innocent civilians, and one day may very well result in the deaths of U.S. servicemen. Such a result would be unacceptable, and the possibility of such a result must always be kept in mind when we debate what kinds of rights should be extended to these detainees.

A detention regime for terrorists whom we intend to detain until the end of hostilities should seek to weed out mistakes, but it must be designed in a way that also protects our nation's legitimate interests. Extending the civilian habeas litigation regime to unlawful war prisoners is problematic because detainees will demand access to classified evidence. In the civilian habeas system, a detainee would have a presumptive right of access to classified evidence. The government could seek to redact portions of the evidence or to summarize evidence, but in the end, it must provide the defendant with the substance of the evidence. If it cannot do so – if revealing the substance of the evidence compromises a unique source, for example – the government simply cannot use that evidence.

As difficult as the problems with classified evidence have occasionally proven in criminal trials, they would be greatly exacerbated in proceedings

involving Al Qaeda detainees. Much of the information that we obtain about Al Qaeda and its members comes from our most sensitive sources of intelligence. For example, much information has been provided to the United States by various Middle Eastern governments. These governments often are afraid of Al Qaeda or radicalized elements of their own populations, and do not want anyone to know that they are helping the United States fight Al Qaeda. Often, these governments provide information to the United States only on the condition that the information not be disseminated outside the U.S. intelligence community. If we were suddenly required, in a detainee litigation proceeding, to reveal to a detainee and his lawyer that we had obtained particular information from one of these governments, we would badly damage our relations with that government and would lose our access to an invaluable source of intelligence about Al Qaeda.

The same problems arise with certain technological sources of intelligence, or with regard to particular human sources. And there is no simple solution through redaction or summarization of the evidence. Oftentimes, the most important types of intelligence are *sui generis*, and revealing the nature of the evidence reveals its inevitable source. These types of problems would arise again and again in enemy-combatant litigation, and would repeatedly present the United States with a Hobson's choice: either damage a valuable intelligence source that could provide information about future Al Qaeda attacks, or release a committed Al Qaeda member. This is not a choice that the United States should be forced to make.

Another question that immediately arises when contemplating the extension of litigation rights to Al Qaeda detainees is, where does it end? The United is holding 800 detainees at Bagram air base in Afghanistan, and tens of thousands of detainees in Iraq. If the Guantanamo detainees can sue, why shouldn't these detainees be allowed to sue as well? After all, the U.S. military's "absolute control" over Guantanamo is really no greater than its control over any other U.S. military base anywhere in the world.

If this is a matter of principle, it should have applied in past wars. The United States detained over 2,000,000 enemy war prisoners during World War II, including 400,000 who were held inside the United States. Should they have been allowed to sue us in our courts? Would there have even been enough lawyers in the United States to handle the litigation?

At the very least, we should be able to agree that we should not extend greater rights and privileges to combatants who violate the laws of war – including terrorists – than we do to those who obey the laws of war.

The Guantanamo debate poses many difficult questions – questions that remain unresolved in light of the Supreme Court's most recent foray into this area. I look forward to the testimony from today's witnesses and hope that it can shed light on some of these questions.