

Prepared Statement of Jamil N. Jaffer¹
on
Closing Guantanamo: Ending 20 Years of Injustice
before the
Senate Committee on the Judiciary

December 7, 2021

I. Introduction

Chairman Durbin, Ranking Member Grassley, and Members of the Committee: thank you for inviting me to discuss the detention of terrorists at Guantanamo Bay, Cuba and the current threat facing our nation from global terrorists.

As this Committee knows, the threat of terrorism facing our nation and its people remains significant, with terrorist groups like al Qaeda, ISIS, and their affiliates seeking to conduct or inspire attacks against Americans both at home and abroad in the near-term, as well as the longer-term threats coming from state-sponsored groups like Hizballah. Likewise, the Committee is well aware that the individuals currently detained at Guantanamo Bay represent a small portion of the nearly 800 detainees that have passed through that facility since that fateful day just over 20 years ago when nearly 3,000 Americans were killed on our soil, and, in many cases, represent the most-hard core, committed fighters, planners, and leaders that we have captured to date.

I commend the Chairman and Ranking Member for holding today's hearing on these important issues, and hope that we will have the opportunity for a frank—and robust—discussion about these matters, including how we ought best defend our nation against the very real, ongoing threat of international terrorism.

II. The Current Terrorist Threat Environment

Despite suggestions to the contrary, the fact of the matter is that the War on Terror is not over. This is an issue on which our Intelligence Community, military leaders, and perhaps most troublingly, our adversaries, agree fully.

According to the Office of the Director of National Intelligence's annual threat assessment released earlier this year, "ISIS, al-Qa'ida, and Iran and its militant allies continue to plot terrorist attacks against US persons and interests, including to varying degrees in the United

¹ Jamil N. Jaffer currently serves as Founder & Executive Director of the National Security Institute and as an Assistant Professor of Law and Director, National Security Law & Policy Program at the Antonin Scalia Law School at George Mason University. Among other things, Mr. Jaffer previously served as Chief Counsel & Senior Advisor to the Senate Foreign Relations Committee, Senior Counsel to the House Intelligence Committee, Associate Counsel to President George W. Bush, and Counsel to the Assistant Attorney General for National Security in the U.S. Department of Justice. Mr. Jaffer is testifying before the Committee in his personal and individual capacity and not on behalf of any organization or entity, including but not limited to any current or former employer. Mr. Jaffer would like to thank Bridgett Neff-Hickman and Ryan Griffith for their excellent research and other assistance in the preparation of this testimony.

States.”² That threat assessment indicates that while both al Qaeda and ISIS have suffered significant losses—including in recent years—as a result of the sustained counterterrorism pressure brought to bear by the United States and our allies, and even though we have seen a decline in both capabilities and quantities of attacks in the West since these groups were at their peak capacity, the reality is that “attacks in the West...remain a high priority” for ISIS and key al Qaeda leaders continue to “call[] for attacks against the United States and other international targets,” while also seeking to “advance plotting around the world.”³ And both of these groups—and their affiliates—are taking advantage of ungoverned spaces around the globe to advance their capabilities and threaten U.S. and Western interests.⁴

Indeed, National Counterterrorism Center Director Christine Abizaid recently testified that ISIS “probably maintains the intent to conduct external attacks through a variety of means, including by deploying attackers from the conflict zone, sending operational suggestions virtually to individuals in target countries, and inspiring supporters through their propaganda” and that “[o]utside Iraq and Syria, ISIS will most likely continue to grow its already robust global enterprise, which includes approximately 20 branches and networks...provid[ing] ISIS with launch points to plan and conduct attacks, recruit, and galvanize supporters[.]”⁵ Director Abizaid likewise noted that “al-Qa’ida and its affiliates around the world remain committed to attacking the Homeland and U.S. interests abroad” and that even though it has “varying degrees of capability and access to Western targets” and has “[i]n the past two years,...endured a number of senior leadership losses—including its deputy amir and the heads of three affiliates” al Qaeda has also “repeatedly demonstrated its ability to evolve, adapt, and capitalize on changing security environments and geopolitical realities to expand its reach.”⁶

Here in the United States, the ODNI threat assessment makes clear that the main international terrorist threat that we face is from attacks conducted by homegrown violent extremists (HVEs) that are inspired by groups like ISIS and al Qaeda.⁷ The FBI Director, Chris Wray, recently testified before the Senate that “HVEs pose the greatest, most immediate IT threat to the Homeland” and that “[t]he FBI remains concerned that [Foreign Terrorist Organizations or] FTOs, such as ISIS and al-Qa’ida, intend to carry out or inspire large-scale attacks in the United States.”⁸ Specifically, Director Wray raised concerns that “ISIS continues to aggressively

² Office of the Director of National Intelligence, *Annual Threat Assessment of the U.S. Intelligence Community* (Apr. 9, 2021), at 5, available online at <<https://www.dni.gov/files/ODNI/documents/assessments/ATA-2021-Unclassified-Report.pdf>>.

³ *See id.* at 23.

⁴ *See id.*

⁵ Office of the Director of National Intelligence, *Statement of Christine Abizaid*, Director, National Counterterrorism Center, *Hearing on Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11*, Senate Homeland Security and Governmental Affairs Committee (Sept. 21, 2021), at 4, available online at <<https://www.hsgac.senate.gov/imo/media/doc/Testimony-Abizaid-2021-09-211.pdf>>.

⁶ *See id.* at 5.

⁷ *See Annual Threat Assessment*, *supra* n. 2 at 23; *see also Abizaid Testimony*, *supra* n. 5 at 4-5.

⁸ Federal Bureau of Investigation, *Statement of Christopher Wray*, Director, Federal Bureau of Investigation, *Hearing on Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11*, Senate Homeland Security and

promote its hate-fueled rhetoric and attract like-minded violent extremists with a willingness to conduct attacks against the United States and our interests abroad” and that “propaganda from al-Qa’ida leaders continued to seek to inspire individuals to conduct attacks in the United States and other Western nations,” a trend that Director Wray expects will continue.⁹ And this assessment is underlined by NCTC Director Abizaid, who recently testified that “[d]espite the degraded threat from FTOs to the Homeland, al-Qa’ida and its affiliates remain intent on using individuals with access to the United States to conduct attacks”¹⁰

Iran too continues to build capabilities in the United States, both directly and through its terrorist proxy, Hizballah. While Iran may not be likely to conduct an attack against Americans in the United States in the near future, the fact that leaders in Iran and with Hizballah have actively threatened to retaliate for the killing of the Islamic Revolutionary Guards—Quds Force (IRGC-QF) Commander Qassem Soleimani by the United States in January 2020,¹¹ when combined with the fact that the FBI has, in recent years, arrested multiple people in the United States with connections to the Iranian government and Hizballah,¹² and that Hizballah maintains some capability to target U.S. interests both at home and abroad,¹³ raises significant concerns about homeland plotting.¹⁴ Likewise, FBI Director Wray recently testified that “Iran and its global proxies and partners, including Iraqi Shia militant groups, continue to attack and plot against the United States and our allies throughout the Middle East in response to U.S. pressure.”¹⁵

In her annual testimony regarding worldwide threats facing the United States earlier this year before the Senate Armed Service Committee, Director of National Intelligence Avril Haines indicated that when it comes to terrorism, “ISIS and Al Qaeda remain the most pressing threats to U.S. interests overseas,” and that “[t]hese groups [also] seek to conduct attacks inside the United States.”¹⁶ Our military leaders agree. In testimony before the Senate Armed Services

Governmental Affairs Committee (Sept. 21, 2021), at 4, *available online at* <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Wray-2021-09-21-REVISED.pdf>.

⁹ *See id.* at 4-5.

¹⁰ Office of the Director of National Intelligence, *Statement of Christine Abizaid*, Director, National Counterterrorism Center, *Hearing on Threats to the Homeland: Evaluating the Landscape 20 Years After 9/11*, Senate Homeland Security and Governmental Affairs Committee (Sept. 21, 2021), at 4, *available online at* <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Abizaid-2021-09-211.pdf>.

¹¹ *See Annual Threat Assessment*, *supra* n. 2 at 14; *Wray Testimony*, *supra* n. 8 at 5.

¹² *See id.*

¹³ *See Annual Threat Assessment*, *supra* n. 3 at 24.

¹⁴ *See Wray Testimony*, *supra* n. 8 at 5 (“FBI arrests in recent years of alleged Iranian and Hizballah operatives in the United States suggest the Government of Iran and Hizballah each seek to establish infrastructure here, potentially for the purpose of conducting operational or contingency planning.”); *see Abizaid Testimony*, *supra* n. 5 at 2 (“Several people, including US citizens and Iranians, have been arrested or indicted in the past five years for seeking to build operational capability against US-based organizations and people. Protecting against such threats is even more important now, as Iran, its agents, and proxies plan ways to retaliate against the United States for the January 2020 killing of IRGC-QF Commander Qassem Soleimani.”).

¹⁵ *See Wray Testimony*, *supra* n. 8 at 5.

¹⁶ *See* Senate Armed Services Committee, *Transcript*, *Hearing on Worldwide Threats* (Apr. 29, 2021), at 18, *available online at* https://www.armed-services.senate.gov/imo/media/doc/21-32_04-29-2021.pdf. (“ISIS and Al

Committee just over two months ago, the Chairman of the Joint Chiefs of Staff, Gen. Mark Milley, and the Commander of United States Central Command, General Kenneth McKenzie, both testified that the War on Terror is not over, and Gen. McKenzie went further noting that the war in Afghanistan—despite the withdrawal of U.S. troops—is likewise not over.¹⁷ And as the Director of the Defense Intelligence Agency, Lt. Gen. Scott Berrier, made clear earlier this year, in testimony before the Senate Armed Services Committee, “[a]lthough transnational terrorist groups have suffered significant losses, the terrorism threat persists, and we must remain vigilant to protect our interests and those of our allies.”¹⁸

And lest one think our enemies have forgotten about us, it is worth noting, as NCTC Director Abizaid pointed out in recent Senate testimony, that the 2019 attack in Pensacola, Florida, which killed three and wounded eight U.S. service members, was probably approved by al-Qa’ida in the Arabian Peninsula (AQAP) and that since 2019 alone, “there have been six possible attacks by individuals inspired or enabled by an FTO in the United States, and two of those—including the [] Pensacola attack—resulted in the loss of life.”¹⁹ Indeed, just this past June, AQAP published an its first English-language *Inspire* product since 2017, which Director Abizaid indicated was designed to “provide English-language operational guidance to would-be attackers in the Homeland.”²⁰ And we know that al Qaeda’s al Shabaab affiliate continues to “pose[] a persistent threat to U.S. citizens and Western interests, as demonstrated by the group’s attack last year on a U.S. military base in Kenya that tragically killed three U.S. personnel and the late 2020 federal indictment of a suspected al-Shabaab operative who was part of a plot to hijack a commercial aircraft[,]” not to mention the fact that al Shabaab’s emir publicly called for attacks on American and French citizens in Djibouti in March of this year.²¹ And there remain significant concerns that groups like ISIS-Khorasan—which killed 170 Afghans and 13 American soldiers—and other ISIS and al Qaeda affiliates present in or heading to Afghanistan

Qaeda remain the most pressing threats to U.S. interests overseas. These groups seek to conduct attacks inside the United States, but sustained counterterrorism pressure has broadly degraded their capabilities.”).

¹⁷ See Senate Armed Services Committee, *Transcript, Hearing to Receive Testimony on the Conclusion of Military Operations in Afghanistan and Plans for Future Counterterrorism Operations* (Sept. 28, 2021), at 192, available online at <https://www.armed-services.senate.gov/imo/media/doc/21-73_09-28-2021.pdf> (“Senator Tillis: [] General Milley and General McKenzie, some people have said we are glad that we have ended this war. Is the war on terror over? General Milley? General Milley: Absolutely not. Senator Tillis: General McKenzie? General McKenzie: The war on terror is not over, and the war in Afghanistan is not over either.”).

¹⁸ See Defense Intelligence Agency, *Statement for the Record of Lt. Gen. Scott Berrier, Director, Defense Intelligence Agency, Hearing on Worldwide Threats*, Senate Armed Services Committee (Apr. 29, 2021), at 2, available online at <armed-services.senate.gov/imo/media/doc/2021%20DIA%20Annual%20Threat%20Assessment%20Statement%20for%20the%20Record.pdf>.

¹⁹ See *Abizaid Testimony*, *supra* n. 5 at 3 (“Despite the degraded threat from FTOs to the Homeland, al-Qa’ida and its affiliates remain intent on using individuals with access to the United States to conduct attacks, as demonstrated by al-Qa’ida in the Arabian Peninsula’s probable approval of the 2019 Pensacola, Florida, attack where a Saudi Air Force officer killed three and wounded eight U.S. service members. . . . Since 2019, there have been six possible attacks by individuals inspired or enabled by an FTO in the United States, and two of those—including the aforementioned Pensacola attack—resulted in the loss of life”).

²⁰ See *id.*

²¹ See *id.*

“could try to take advantage of reduced counterterrorism pressure and a relatively more permissive operating environment to rebuild their capacity to carry out attacks against Western targets.”²² Indeed, it’s worth noting that on September 11, 2021, al Qaeda leader Ayman al-Zawahiri released a video praising the Pensacola attacker, arguing that our withdrawal from Afghanistan was a defeat that al Qaeda operatives ought celebrate, and that they ought take the opportunity to take action against American military targets around the globe.²³

Suffice it to say, that it is clear from the words and actions of our terrorist adversaries, as well as the analysis of our military and intelligence communities that Americans and our allies continue to face a significant threat from international terrorism both home and abroad.

III. Detention of Terrorists at Guantanamo Bay

The detention of just over three dozen terrorists that remain at Guantanamo Bay takes place in the context of the terrorist threat environment described above and the ongoing War on Terror that the United States military and intelligence community continues to fight. All told, the number of individuals now remaining at Guantanamo Bay represents approximately 5% of the total number of detainees believed to have been held at that facility.²⁴ Of those that remain, roughly a third have been convicted or are awaiting trial by military commission, another third are awaiting transfer to a third-country pending appropriate security arrangements being made, and a third are being currently being held in law of war detention without charges.²⁵

The detainees currently held at Guantanamo Bay, and those facing charges or being held in continuing law of war detention, in particular, include some of the most most-hard core, committed terrorist fighters, planners, and leaders that we have captured to date. For example, Khalid Shakyh Muhammed, at the time of the 9/11 attacks served the “head of the al Qaida military committee and was Usama bin Laden’s principal al Qaida operative who directed the 11 September 2001 attacks in the United States[.]”²⁶ Similarly, Abd al Rahim al Nashiri, was

²² See *id.* at 6.

²³ See *id.* (“On September 11 this year, al-Qa’ida released a video of group leader Ayman al-Zawahiri praising the Pensacola attacker and claiming that the US withdrawal from Afghanistan proved that the U.S. was defeated.”); see also Mark Moore, *Al Qaeda Leader, Believed Dead, Appears in Video on 9/11 Anniversary*, New York Post (Sept. 12, 2021), available online at <<https://nypost.com/2021/09/12/al-qaeda-leader-ayman-al-zawahiri-seen-in-video-after-death-rumors/>> (showing video screen captures indicating that Zawahiri called for attacks on American military targets around the globe).

²⁴ See New York Times, *The Guantanamo Docket* (updated Nov. 29, 2021), available online at <<https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html?action=click&module=RelatedLinks&pgtype=Article#held-table>> (“Since 2002, roughly 780 detainees have been held at the American military prison at Guantánamo Bay, Cuba. Now, 39 remain. Of those, 12 have been charged with war crimes in the military commissions system — 10 are awaiting trial and two have been convicted. In addition, 14 detainees are held in indefinite law-of-war detention and are neither facing tribunal charges nor being recommended for release. And 13 are held in law-of-war detention but have been recommended for transfer with security arrangements to another country.”)

²⁵ See *id.*

²⁶ See Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, *Unclassified Summary of Evidence: Khalid Shaykh Muhammed* (Feb. 8, 2007),

convicted in Yemen in absentia for his role in the U.S.S. Cole bombing that killed 17 American sailors and injured 37 others, and is “one of the main suspects for masterminding the attacks on the USS Cole and on the French oil tanker Merchant Vessel Limburg in October 2002.”²⁷ Likewise, Ramzi bin al-Shibh, a member of the Hamburg Cell who was “closely associated with three of the hijackers responsible for the 9/11 attacks, Mohammed Atta[], Marwan Al-Shehhi[,] and Ziad Jarrah” was captured at safe house along with “high explosives, sheet explosives, a large quantity of improvised detonation devices, passports for Usama bin Laden's family members, a handwritten note to a senior al Qaida operative, identification cards for a senior al Qaida operative, identification cards for Ahmad Ibrahim Al-Haznawi, a 9/11 hijacker, and contact information for several known al Qaida operatives.”²⁸ And Mustafa Faraj Masud al-Jadid Mohammed (aka “Abu Faraj Al Libi”) was determined as recently as June 2019, by a Periodic Review Board, to be eligible for continued law of war detention to “protect against a continuing significant threat to the security of the United States,” based on his “involvement with al Qaida, to include acting as the group’s general manager, and as a trusted advisor for and communications conduit to Usama bin Laden and deputy Ayman al Zawahiri.”²⁹

These individuals, along with the other detainees, for whom significant measures have been undertaken to either find transfer destinations with appropriate security assurances, bring charges, or assess their status as appropriate subjects for law of war detention, are currently being held in facilities that are modeled on American prisons.³⁰ And while there is much to be said about the way in which facilities were set up at Guantanamo Bay and the way in which detainees were treated at that facility and others early on during the War on Terror, as well as the process by which detainees were selected for transfer to and out of Guantanamo Bay, today, at least in my limited experience having visited the facility on a congressional staff delegation visit in 2013, the prison appears to be run in a professional manner and detainees appear have access to many of the same facilities and resources as those held in the military and federal prison

at 1, available online at <<https://int.nyt.com/data/documenttools/78033-isn-10024-khalid-shaikh-mohammed-combatant/414bd1cf130bdfc8/full.pdf>>.

²⁷ See Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, *Unclassified Summary of Evidence: Abd al Rahim Hussein Mohammed al Nashiri* (Feb. 8, 2007), at 2, available online at <<https://int.nyt.com/data/documenttools/78015-isn-10015-abd-al-rahim-al-nashiri-combatant/3a5a4d00e5f96965/full.pdf>>.

²⁸ See Department of Defense, Office for the Administrative Review of the Detention of Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, *Unclassified Summary of Evidence: Ramzi bin al Shib* (Feb. 8, 2007), at 1, 3, available online at <<https://int.nyt.com/data/documenttools/78011-isn-10013-ramzi-bin-al-shibh-combatant-status/ff9a66af96c3a79b/full.pdf>>.

²⁹ See Department of Defense, Periodic Review Board, *Unclassified Summary of Final Determination: Mustafa Faraj Mohammed Masud al-Jadid al-Uzaybi* (June 20, 2019), available online at <https://www.prs.mil/Portals/60/Documents/ISN10017/SubsequentReview1/190620_U_PR_ISN10017_FINAL_DETERMINATION.pdf>.

³⁰ Carol Rosenberg, *Military Closes Failing Facility at Guantanamo Bay to Consolidate Prisoners*, New York Times (Apr. 4, 2021), available online at <<https://www.nytimes.com/2021/04/04/us/politics/guantanamo-bay-prisoners.html>> (“The two-story building, a maximum-security facility that cost \$17 million to build in 2004, is modeled after a state prison in Bunker Hill, Ind. It has a modest detainee health clinic and a psychiatric ward with a padded cell, but none of the hospice or end-of-life care capacity once envisioned by Pentagon planners.”); Correctional News Staff, *Guantanamo Facility Modeled on Michigan Jail*, Correctional News (Dec. 9, 2005), available online at <<https://correctionalnews.com/2005/12/09/guantanamo-facility-modeled-on-michigan-jail/>>.

systems (with appropriate exceptions relevant to their law of war detention status). In addition, as appropriate, detainees that are currently being held in law of war detention and not otherwise subject to disposition by military commission or transfer, receive access to regular reviews of their status through the Periodic Review Board process.³¹

The fundamental question that has been debated repeatedly, over at least four successive presidential administrations, is how the detainees remaining at Guantanamo Bay ought be dealt with going forward. Multiple Presidents, their senior officials, and hundreds of members of Congress and their staffs, have grappled with finding a reasonable approach to this difficult matter. All of the individuals held at Guantanamo Bay today are foreign nationals held during a time of conflict who have limited rights under our laws. While the Supreme Court, in *Boumediene v. Bush*, 553 U.S. 723 (2008), afforded certain rights for habeas corpus review to these detainees, it is worth noting that no court to have considered the matter has ever held that these individuals enjoy access to full scope of constitutional rights available to Americans in the United States (nor, for that matter, the full scope of rights available to foreign nationals that the U.S. government has admitted to the United States). Nor is there any available standing precedent that indicates that these individuals have a right to be transferred to or released in the United States.

This is important because in considering what might be done to address the detainees in Guantanamo, it is critical to understand that any decision on these issues is a matter of policy, not law. Indeed, the Supreme Court has long made clear the Executive Branch has the right to detain individuals captured on the battlefield of the War on Terror for the duration of the conflict, which as noted above, remains ongoing.³² Given the policy issues at play, it may be worthwhile to focus for a moment on two of the major issues in play: detainee transfer or release and the location of detention.

One question that has often been raised in the debates surrounding Guantanamo Bay is why the individuals that are eligible for transfer remain in custody for long periods of time and why additional detainees cannot be made available for transfer. The answer, in my view, is fairly straightforward. We know, today, based on statistics released by the Office of the Director of National Intelligence in late 2020, that of the 729 individuals that have been transferred out of Guantanamo Bay, over 1/3 of them (229 individuals) are known to have returned to the fight against the United States and our allies or are suspected of have done so.³³ We also know that

³¹ See Department of Defense, Periodic Review Secretariat, *About the PRB*, available online at <<https://www.prs.mil/About-the-PRB/>> (“Full reviews of each detainee, to include the hearings described above, will be conducted every three years. File reviews will be conducted for any detainee whom the PRB has determined that continued detention is necessary every six months in between full reviews, and will focus on any new information or changed circumstances that the PRB should consider.”).

³² See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (plurality op.); see also *Boumediene*, 553 U.S. at 733 (noting that five Justices in *Hamdi*—the O’Connor plurality plus Justice Thomas in dissent—“recognized that detention of individuals who fought against the United States in Afghanistan ‘for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the “necessary and appropriate force” Congress has authorized the President to use.”) (quoting *Hamdi*, 542 U.S. at 518).

³³ See Office of the Director of National Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (declassified on Dec. 18, 2020), available online at

the individuals remaining at Guantanamo Bay largely represent the most challenging of detainees. And, we have seen in the past, the dramatic impact that a single individual or two joining the fight with a particular group, can have on the aspirations and effectiveness of that group's terror agenda. For example, there are many analyses written about the impact that Anwar al-Awlaki (and, in part, Samir Khan) had on the aspirations and effectiveness of individuals and organizations that formed Al Qaeda in the Arabian Peninsula when he joined the group.³⁴ Nearly overnight the organizations that made up AQAP went from a regionally focused effort with limited capabilities to one with aspirations to strike the West and a much more active group in terms of attacks both abroad and in Yemen.³⁵ Given this, the idea that we would transfer any of the current set of detainees out without significant security assurances (and transfer certain of them at all), particularly given that those remaining present a significant threat based on their various combatant status reviews and periodic review board assessments, including the comprehensive assessment conducted by the Obama Administration in 2009—which determined that nearly all of the individuals currently at Guantanamo Bay ought continue to be detained or tried in military commissions³⁶—seems unwise at best. Moreover, given the new ungoverned spaces opening up in Afghanistan following our precipitous withdrawal earlier this year, it would seem particularly unwise to transfer individuals who might join up with the groups that are increasingly active and rebuilding in that region.

The second question that often arises with respect to detainees is why we simply can't move them to the United States and detain them here in some form. A corollary that is often raised alongside this issue is why these individuals simply can't be tried in the federal court system. Bringing detainees to the United States raises significant concerns, because it is unclear what legal rights the decision of the federal government to voluntarily admit an individual—in this case foreign nationals subject to law of war detention or military commission trials—into the United States. One might assume that in addition to the existing limited habeas rights the Supreme Court afforded detainees at Guantanamo Bay in *Boumediene*, that detainees brought to the United States may gain additional rights under the Constitution, including the right to due process under the Fifth Amendment, as well as other rights, including the jury trial right, the full scope of Fourth Amendment rights, rights under the confrontation clause, and the like.³⁷ Of course, for some, affording detainees such right may non-controversial. However, as a general matter, successive administrations of both parties—at least until recently—have taken the view that detainees do not have such rights and, even under the new approach ostensibly adopted by

<https://www.dni.gov/files/documents/Newsroom/12-18-20_Report_Summary_GTMO_Reengagement_20-01043_U_CR-OGC-Final.pdf>.

³⁴ See, e.g., Scott Shane, *OBJECTIVE TROY: A TERRORIST, A PRESIDENT, AND THE RISE OF THE DRONE* (Random House 2016); Alexander Meleagrou-Hitchens, *INCITEMENT: ANWAR AL-AWLAKI'S WESTERN JIHAD* (Harvard University Press 2020); see also

³⁵ See, e.g., *OBJECTIVE TROY*, *supra* n. 34 at 26, 33-34.

³⁶ See Guantanamo Review Task Force, *Final Report and Guantanamo Review Dispositions* (declassified for public release) (Jan. 22, 2010), available online at <<https://int.nyt.com/data/documenttools/guantanamo-review-task-force-determination/f77c873e5f28c769/full.pdf>>.

³⁷ See, e.g., Jamil N. Jaffer, Prepared Statement, Hearing on Civil Liberties and National Security, House Committee on the Judiciary (Dec. 10, 2010), at 4-8, available online at <<https://www.govinfo.gov/content/pkg/CHRG-111hhrg62958/pdf/CHRG-111hhrg62958.pdf>> (at pp. 48-52).

the Biden Administration, the government has not taken a view on whether the detainees at Guantanamo Bay have the right to due process under the Fifth Amendment.³⁸

Moreover, affording detainees such rights, including potentially the right to a trial in federal court, could raise serious questions about what happens if the government fails to convict a given detainee. As a general matter, if a suspected criminal is tried in federal court and is exonerated, the government is generally required to release them. While some exceptions, including immigration detention, may apply, such detentions cannot last forever, and potentially may require the government to release individuals into the United States or transfer them to foreign countries without adequate security assurances. Likewise, the procedural and substantive law that would apply in the case of federal trials may create significant challenges in the case of certain Guantanamo Bay detainees. For example, the rules of criminal procedure applicable to such trials, including rules related to evidence, chain of custody, and the like, as well as the limitations of particular statutes that may not apply to the conduct of certain detainees, could make the prosecution of individuals captured on the battlefield and still detained at Guantanamo Bay quite difficult, if not completely impossible.³⁹ And regardless what one thinks of the enhanced interrogation techniques used on certain of the current detainees—and many were deeply troubling to be sure—the fact of the matter is that some number of the individuals currently in custody at Guantanamo Bay, including those scheduled for trial by military commission, were subjected to such techniques. Given this, there are significant questions of whether any successful prosecution of such individuals could be brought in federal court. While some might argue this is the right and just outcome, this still does not resolve the question of what is to be done with such individuals if they are brought to the United States without available federal charges.

At the end of the day, while the current situation at Guantanamo Bay is not ideal—and its history leaves a great deal to be desired—the reality is that, given the current population of detainees and the issues discussed above, it may very well be the best option available to the United States at this time.

Conclusion

Thank you again for the opportunity to present my views to the Committee. I look forward to your questions and ideas.

³⁸ See Adam Chen, *Al-Hela v. Biden and Due Process at Guantanamo*, Lawfare Blog (May 25, 2021), available online at <<https://www.lawfareblog.com/al-hela-v-biden-and-due-process-guantanamo>>; Charlie Savage, *Biden Administration Punts on Due Process Rights for Guantanamo Detainees*, NY Times (July 10, 2021), available online at <<https://www.nytimes.com/2021/07/09/us/politics/guantanamo-detainees-due-process.html>>.

³⁹ See, e.g., *Jaffer House Testimony*, *supra* n. 37 at 4-8.