

**TESTIMONY OF  
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DEAN AND PRESIDENT  
SENATE ARMED SERVICES PERSONNEL SUBCOMMITTEE  
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When historians write the book on the war on terrorism, there will be a chapter entitled "Treatment of Detainees." The first part of that chapter has already been written and it's not pretty. We don't yet know how that chapter will end. Fortunately, we have the opportunity — you have the opportunity — to write that ending.

At first blush, the issues are primarily legal in nature. Some have already been litigated and decided by courts. I believe that while the issues are legal in the first analysis, there are other ways to consider them, that in the end, are even more profound — moral, diplomatic, military and practical aspects must be considered. The legal analysis provides the floor, but the United States should strive for higher aspirations.

I want to make three points today. The first is to call for a limit on the duration of detention. The second is to urge that we either fix military commissions or use courts-martial to prosecute detainees. And finally, that we enact the provisions of the Army Field Manual relating to interrogation into law.

We have a very difficult problem with regard to the duration of the detention of those whom we have captured or who otherwise have been turned over to coalition forces. As has been often noted, this war won't end soon, and we may not even know when it's over. It likely will simply peter out someday and the end will be marked only by the passage of time. This uncertainty is exacerbated by the nature of the enemy. As has also been noted, he doesn't wear a uniform and isn't necessarily part of an army organized in a familiar manner. He is half civilian and half military and moves stealthily between those two worlds. He is not easy to identify. The flip side of this confusion is that true civilians can also be easily mistaken for enemy combatants.

This conundrum creates problems for detention policy. I believe we should place a reasonable time limit on the duration of confinement without a trial. If the war lasts five, ten, or twenty years, we simply can't confine people for that long without a resolution to their confinement, especially if we aren't absolutely sure of their status. We haven't done that in prior wars, and we mustn't do it now in this war. Throughout history, the law of war has moved inexorably towards a higher level of civility. We can't be the nation to take a step backwards.

At the end of that reasonable length of confinement, if they have not been prosecuted, they must be released to their country of origin absent a showing by the

**government that their continued detention is imperative. That showing could be based on their continued intelligence value or because of demonstrated threat to the security of the United States or our allies.**

**The government would bear a heavy burden. It would have to meet a high standard. A burden of proof such as beyond a reasonable doubt or, perhaps, by clear and convincing evidence, would have to be met. That standard would have to be achieved by articulable, specific evidence. Conjecture, opinion, rumor, or over-caution would not suffice.**

**I'm not sure about the forum. U. S. District Court or a specifically designated panel of jurists would work. There may be other alternatives. Whatever the duration of confinement, burden of proof, admissibility of evidence or forum, they must all be reasonably acceptable to the international community. If they are not, history will not be kind to us.**

**Now, turning to the prosecutions themselves. I was an early, ardent, and vocal supporter of military commissions as the appropriate forum. I still believe they can be fair, legal, and generally accepted by all but the most persistent naysayers. If done properly, they are historically founded, practical, and make sense. It is appropriate for military personnel to try their enemy by military commissions.**

**All of that said, although I don't necessarily agree with it, I understand the point of view of the critics who say that the commission process is now so flawed and maligned that we should simply start over. I should add, not quite as a parenthetical, that as a former Navy judge advocate for 28 years, I am pleased and proud, but not surprised by the strong advocacy of detailed military defense counsel in these cases. These are not popular cases, but they have served admirably.**

**For the success and viability of commissions, the devil is in the details. They aren't legal, they aren't appropriate, and they aren't practical, if they are done badly. They have to be accomplished reasonably promptly. The defense counsel must have reasonable access to their clients. Defense counsel must be able to confer with their clients in confidence. There must be a just review process. In summary, they must be fair and be perceived to be fair.**

**The Geneva Conventions require that military commissions approximate the same procedures by which we prosecute our own troops. That implicates the courts-martial system contained in the Uniform Code of Military Justice and the Manual for Courts Martial.**

**Consistency is a virtue, but it can also be the hobgoblin of small minds. We're the United States of America. If we decide in our might and wisdom that we need to make a course correction, we can do that. Knowing what we now know, perhaps we might decide to use the UCMJ and MCM for prosecuting enemy combatants. It's a tried and true system. All we really would need to do is relax the rules of evidence a**

**bit to accommodate the reality of battlefield operations, understanding that evidence is being gathered by soldiers, not police detectives.**

**Finally, let me speak briefly about interrogation policy. We are all patriots here. We wouldn't be here if we weren't. I don't mean to preach but some of these things can't be said too often. I like to think of America as being above the law. By that I mean that the law provides a floor below which no nation may descend. But the United States ... the United States should soar above that. The law says we can't torture people. The law says we can't treat them cruelly, or inhumanely, or degrade them.**

**I say they may be terrorists, they may be evil, but they are human beings and we're Americans and we should treat them with the dignity and respect that Americans should always treat all human beings by virtue of their humanity. I urge you to put the Army Field Manual into law for all U. S. agencies.**

**I understand and appreciate the need for the enemy to not know the limits of interrogation techniques. On the other hand, and more importantly, Americans and the community of nations must have confidence that we won't abuse people in our custody no matter what their status.**

**Our greatest strength as a nation is not our military might, awesome as it is; it's not our strong economy, natural resources or even our historic individual spirit. Our greatest strength is the rightness of our cause. For generations, Americans have stood tall for the Rule of Law and in support of human rights. That's our strength; that's why other civilized nations look to us for leadership and then follow that lead. If we lose that, we will have lost our greatest weapon.**

**On the other hand, the enemy's only weapon is terror. The true object of that weapon isn't so much human life or undermining our will to resist, as much as it is an effort to make us more like them. We must resist that at all costs. If we let that happen we will have lost the war. We will have lost our national identity. We must not take that fateful step down the slippery slope from the high road to the low road.**

**The Army Field Manual stands as a bulwark against that temptation. By enacting into law the interrogation techniques found in the current Army Field Manual for all U. S. interrogators, we will take a huge step in the right direction. It won't make us weaker, it will confirm our power for all to see and protect U. S. troops now and in the future.**

**As I stated early in this testimony, the important issues are legal, to be sure. But they are more than that. They have profound moral, diplomatic, military, and practical implications. How we are viewed by history and the community of nations, how we feel about ourselves, and how history treats us may in large part be determined by what you do, or don't do, now.**

**In summary, I urge you to place a reasonable limit on the duration of detention for enemy combatants absent a specific showing for the need for continued confinement. I urge you to either fix the Military Commission process or ensure cases are referred to the equivalent of courts-martial. And finally, I urge you to enact the Army Field Manual for all interrogations, regardless of location, the interrogator, or who is being interrogated.**