Statement
United States Senate Committee on the Judiciary
How the Administration's Failed Detainee Policies Have Hurt the Fight Against Terrorism: Putting the Fight Against Terrorism on Sound Legal Foundations
July 16, 2008

The Honorable John Cornyn
United States Senator , Texas

Senate Committee on the Judiciary

Hearing on
"How the Administration's Failed Detainee Policies Have Hurt
the Fight Against Terrorism: Putting the Fight Against Terrorism on
Sound Legal Foundations"

Statement of Senator John Cornyn
July 16, 2008

Mr. Chairman, I believe that this hearing is premised on two false assumptions: that the Bush Administration's detainee policies have irreparably harmed our international standing and that those policies have made this nation less safe. The facts show that the Administration has had great success in conducting international diplomacy to advance American and collective security against the terrorist threat, and that if anything is putting our national security at risk, it is the unilateral dismantling by the Supreme Court of the bipartisan detainee policy established by the two elected branches of the federal government.

It is important that we acknowledge the successes in international diplomacy over the last 7 years that have made America safer. In today's highly politicized environment, it is no surprise that many overlook any good news in our war on terror. It is particularly unsurprising that the Administration's diplomatic success in forging successful relationships with our European allies to build up our counterterrorism capabilities is practically unmentioned. These alliances contradict two of the most popular pieces of conventional wisdom: that there is no good news in the war on terror and that the Administration is a diplomatic failure. But these alliances are real, and they have proven successful.

Since the tragic events of 9/11, European and U.S. diplomatic and intelligence agencies have worked hand-in-hand to gather and share information on Al Qaeda and the global terrorist threat. This cooperation has led directly to intelligence that has kept America safe. Simply stated, the Administration's European diplomacy has helped prevent terrorist attacks on our homeland.

European support for America's War on Terror began when, just months after the terrorist attacks of 9/11, Spain entered into an agreement with the United States to exchange information on suspected terrorists. Since then, the Bush Administration has negotiated with other nations, including Italy, Poland and Switzerland, and entered into bilateral agreements that provide access to biometric data of known and suspected terrorists. The latest nation to enter into such an agreement was Germany, which has proven a steadfast ally committed to increased cooperation in our fight against terror.

Due to the partnerships forged by the Bush Administration, European nations have also made great contributions in our war on terror by sharing information on the assets of known and suspected terrorists. Danish officials, for example, have worked closely with the United States through the Financial Action Task Force (FATF). This relationship has resulted in freezing the assets of suspected terrorists and has helped shut off terrorist financing.

America has also forged informal intelligence relationships with nations such as Bosnia-Herzegovina, Bulgaria, and Switzerland. The sharing of information with these nations has established a network of intelligence that supports our efforts to defeat radical extremists and, ultimately, to secure our nation.

But in spite of these diplomatic, collective security successes, we frequently hear of European animosity toward the United States. We hear over and over that the influence and reputation of the United States abroad has suffered because of the policies of the Bush Administration in prosecuting the war on terror. One would think that America's relationship with Europe has been irreparably damaged—because of the detainee policies of the Administration. But these statements are at best overstated, and primarily fueled by partisan sentiments.

Setting aside the criticisms, we should give credit where credit is due: since 9/11, the United States has successfully increased its international intelligence gathering capabilities. Though some may fail to acknowledge the Administration's accomplishments, we cannot deny the strong, fruitful partnership between America and Europe that has successfully bolstered counterterrorism capacities. These diplomatic efforts have made America safer and helped to prevent another domestic terrorist attack for close to seven years. The international sharing of intelligence relating to terrorism today is much stronger than it was in the late '90s.

In short, the Bush Administration's successful diplomatic efforts, particularly with European nations, have made America safer. It is not a headline you will see on the front page of the New York Times, but it is a fact.

Equally important, I think that we should acknowledge how the Supreme Court has hurt the fight against terrorism by dismantling the sound legal foundations established by the Congress and the President. When it comes to fighting the war on terror, many on the other side of the aisle seem to have more faith in the decisions of judges and lawyers than they have in America's generals, soldiers, and elected representatives.

At best, this hearing is moot. The policies that this hearing attacks have already been dismantled by the Supreme Court in the Boumediene case. The challenge before Congress now is to reassert the primacy of the elected branches of the federal government in war making policy by crafting a new set of appropriate legal procedures that appropriately balance the national security of the United States with the necessity of protecting human rights and conducting successful diplomacy. That is the hearing we should be having today. Unfortunately, the majority would rather continue to rail against the Bush Administration than take on the much more difficult task of crafting a new detainee policy.

In the Boumediene decision, the Supreme Court granted, for the first time in the history of warfare, a nation's wartime enemies the right to contest their detention through the writ of habeas corpus in civil courts. In so holding, the Supreme Court rejected the considered wartime judgment of the people's elected representatives. In fact, the Boumediene decision raises the fundamental question of whether America's response to the threat posed by international terrorism will be directed by the people, through their elected representatives, or by politically unaccountable judges who lack expertise and experience in national security decision making.

The two laws the Court struck down in Boumediene, the Detainee Treatment Act of 2005 (the "DTA") and the Military Commissions Act of 2006 (the "MCA"), were broadly bipartisan bills passed by wide margins in Congress. The DTA ultimately passed the Senate by a unanimous 93-0 vote, with the support of many of those now praising the Court's ruling.

Together, the DTA and MCA provided a more-than-adequate review process for enemy combatants,

including an appeal to the D.C. Circuit Court of Appeals. Chief Justice Roberts correctly described the detention review process established by these laws as "the most generous set of procedural protections ever afforded aliens detained by this country as enemy combatants." The Chief Justice pointed out that the laws struck down by the Court provided "more opportunity and more process . . . than that afforded prisoners of war or any other alleged enemy combatants in history."

These generous procedures proved insufficient for five Justices on the Supreme Court, who held, for the first time, that alien enemy combatants detained during wartime by the United States military possess the constitutional privilege of habeas corpus. Never, from the birth of America until last month, have the captured enemies of the United States had a right to a habeas petition in the U.S. civil courts demanding their release.

Not only is it impossible to imagine the Supreme Court granting habeas corpus review to the hundreds of thousands of German or Italian or Japanese prisoners of war in World War II, but, in fact, the Court rejected just such an attempt in the well-known Eisentrager case. Despite the fact that the Eisentrager decision was directly applicable, the Court's majority ignored it—along with the fact that in the 700-year history of habeas corpus, the writ has never applied to foreign enemies captured during wartime.

Mr. Chairman, I must also stress that the Court's holding is contrary to the Constitutional order of our government. Even though the Constitution clearly places matters of war, peace, and international relations in the hands of Congress and the President, the Court grabbed for the Judiciary alone the power to decide how terrorists captured abroad should be treated. The Chief Justice correctly observed in his dissenting opinion that the Boumediene decision was "not really about the detainees at all, but about control of federal policy regarding enemy combatants."

The holding defies common sense. By the majority's admission, judges are ill-prepared to handle national security matters. Justice Kennedy wrote that "[u]nlike the President and some designated Members of Congress, neither the members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation's security." This is exactly why Congress and the Executive Branch—and not the Courts—should set the Nation's terrorist detention policies.

The Supreme Court's ruling puts this nation squarely on a backward path toward treating terrorists like common criminals—the misguided strategy that, in many ways, contributed to the attacks of September 11, 2001.

Unfortunately, many members of Congress seem to endorse the Court's usurpation of war powers, and with it the reversion to the pre-9/11 law enforcement model of combating terrorism. This would mean once again treating terrorists like common criminals and trying them in federal criminal courts rather than engaging them militarily, on the battlefield. We tried that approach in the wake of the first World Trade Center bombing in 1993—and it proved a failure.

Yes, there were some convictions. But, as the current Attorney General of the United States testified before Congress earlier this year, there are too many dangers inherent in criminal trials—most importantly with leaks of classified information and the inability to effectively gather intelligence through interrogation. Attorney General Mukasey speaks with authority on these problems inherent in criminal prosecutions of those who are waging war against us. That's because when he served as a federal district judge in New York City, he presided over the trial of the original bombers of the World Trade Center.

The Democrats would have you believe that granting terrorists the rights afforded common criminals has no consequence. But, as I and others have explained, there are dire consequences to our national security that flow from the Supreme Court's Boumediene decision. Despite that our military has removed these terrorists

from the battlefield, the Court's ruling allows them to continue to (figuratively) wage war against the United States from inside our own civil court system.

Two of the other side's most prominent foreign policy voices have explicitly said that, if captured and transferred to Guantanamo Bay, Osama bin Laden is entitled to challenge his detention through the writ of habeas corpus in U.S. civilian courts. This is highly revealing of a continued lack of understanding of the nature of the terrorist threat and the goals of our enemies. Granting Osama bin Laden the same rights and protections under our Constitution as common criminals does nothing to make America safer—and does everything to embolden our enemies.

Other than choosing not to detain the terrorists at all, could there be a more effective way to encourage our enemies to violate the laws of war than by granting them access to our civil court system? To understand the danger posed by this ruling in this age of terrorism you need only understand one thing: this ruling guarantees more rights and protections to terrorists who hide among civilian populations and kill innocents than the Geneva Conventions and laws of war afford U.S. soldiers who wear uniforms and bear arms openly.

When illegal combatants get more rights than legal combatants, the incentive to America's enemies is clear. Not only will conducting your war illegally through terrorism not be punished, it will increase your legal rights. The message to Osama bin Laden is plain: America doesn't have the sense to treat the war on terror like a war at all. Terrorists will only benefit in continuing to attack and hide among civilian populations in violation of the laws of war.

Osama bin Laden has declared war on the United States of America. And, in return, the Supreme Court has guaranteed that America will give bin Laden his day in court.

The argument that America's pre-Boumediene detainee policy has harmed the war on terror relies on an attenuated chain of reasoning: that our policy has so harmed our international standing that it has made international cooperation in fighting the war on terror impossible. This argument is belied by the facts—America has had many diplomatic successes in the war on terror that were achieved with the pre-Boumediene detainee policy intact.

The argument that the Boumediene case has harmed the war on terror is more direct and more plausible: that giving terrorists unprecedented rights and civil trials will return us to the failed, pre-9/11 law-enforcement model of fighting terrorism. This argument comports with the facts—the law enforcement approach failed to prevent 9/11, while no domestic attacks occurred during the pre-Boumediene detainee policy.

It is hard to understand how the Boumediene case will make America safer. I fear that it puts America at greater risk.

-30-