

Testimony of William K. Lietzau
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House Armed Services Committee
Sub-Committee on Oversight and Investigations
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Chairman Wittman and Congressman Cooper, thank you for the opportunity to appear before you today to discuss our detention and transfer policies. It is a privilege to be here. I was asked to take the position of Deputy Assistant Secretary of Defense for Detainee Policy after serving 27 years in the Marine Corps. I agreed because I recognize the vital importance of this issue to our war-fighting efforts and to our broader national security interests. For that same reason, I welcome this opportunity to discuss our detention and transfer policies.

Since its creation, the Office of Detainee Policy, and its predecessor, the Office of Detainee Affairs, has worked closely with the House Armed Services Committee, and your colleagues on the Senate Armed Services Committee, to develop durable detention policies, procedures, and practices that conform with our domestic and international legal obligations, uphold our national values, and protect and further our national security interests. Together, we have learned that there are many challenges when dealing with the complexities associated with detention in a 21st Century asymmetric armed conflict. As President Obama said in his remarks on national security nearly two years ago, "After 9/11, we knew that we had entered a new era."

In the first days of this Administration, the President issued three Executive Orders focused on detention policy. Executive Order 13492 directed the closure of the detention facility at Guantanamo Bay, a policy to which the Administration remains committed because it is important for our national security. The President also set forth a robust agenda to develop a

more sustainable detention policy that reflects our values, including by reaffirming the U.S. commitment to the prohibition on torture; continuing to treat all persons in U.S. custody in armed conflict humanely; and banning the use of abusive interrogation techniques, acknowledging what our men and women in uniform have asserted for years – that the Army Field Manual provides all the flexibility our interrogators need to collect valuable intelligence. In addition, the Administration established a plan to comprehensively review each detainee remaining at Guantanamo Bay, in order to determine the disposition most appropriate to each individual. This comprehensive review concluded in January 2010.

Since that time, working collaboratively with Congress, we have reformed military commissions to ensure fair proceedings that afford fundamental judicial guarantees. Information derived from cruel, inhumane, degrading treatment or punishment has been banned as evidence. As announced by the Attorney General last week, the Administration intends to try the alleged perpetrators of 9/11 in these reformed commissions. The Administration will also continue to seek to prosecute terrorists in our Article III court system, which is a critical tool in our counterterrorism efforts. Reformed military commissions and civilian prosecutions are each important tools in the fight against terrorism. We remain steadfast in our belief that the most effective way to deliver justice and ensure the Nation's security is by trying particular individuals in the forum most appropriate to the facts of an individual case.

Traditionally, in war, militaries capture and detain individuals who belong to the enemy's armed forces to mitigate the threat they pose in the ongoing conflict. Modern armed conflict with transnational terrorist organizations severely complicates this effort. Membership in armed

groups can be difficult to determine, and the scope of an armed conflict with a transnational non-state actor is difficult to define. Because of these complicating factors, over the years, this Department has developed and refined a series of processes in Afghanistan, Iraq, and Guantanamo Bay, each of which is designed to protect our war-fighters by removing threats from the battlefield. At the same time, these processes are designed to ensure that the United States neither deprives any individual of liberty unnecessarily, nor detains any individual longer than required to mitigate the threat to our national security, including our ongoing military operations.

Building on the earlier processes, Executive Order 13492 provided for a new comprehensive review of every detainee at Guantanamo Bay, to determine whether they should be held in detention pursuant to authority under the Authorization for the Use of Military Force, prosecuted by our federal courts or in a military commission, or transferred to their home or a third country. A Task Force of senior officials from the Departments of Defense, State, Homeland Security, Justice, and the Office of the Director of National Intelligence, drawing upon information assembled from agencies across the government, reviewed each individual detainee to determine an appropriate disposition. Decisions were made by the unanimous agreement of the represented agencies.

In Iraq, where our operations are now governed by Iraqi law and the Security Agreement between our two countries, the Department previously set up the Multi-National Forces Review Committee, a board of three officers, to review each detainee's case periodically in order to determine how best to mitigate any continuing threat they may have posed.

In Afghanistan, the Department established a new administrative review system for individuals that also significantly improved on previous iterations. This “Detainee Review Board,” which provides each detainee a personal representative before a board of three field grade officers, assesses both the legality of the detainee’s detention and the best long-term disposition every six months.

Focusing more directly on the Guantanamo transfer process, it is important to remember that a determination that a detainee is approved for transfer does not necessarily result in immediate departure from Guantanamo. The “transfer” designation a detainee received from the Task Force review or the designation a detainee may receive from a future Periodic Review Board established pursuant to Executive Order 13567 is only the first step in a process. Finding a detainee a suitable location that is satisfactory from both a security and humane treatment perspective is a delicate and difficult task. For that reason, we again have turned to the interagency to help provide the fullest possible assessment to ensure we are handling the transfer of detainees appropriately.

The decision to transfer a Guantanamo detainee to his home country or a third country is taken only after these comprehensive review processes have taken place, and we believe that his detention is no longer necessary for national security purposes. In this Administration we have established an interagency coordinating process, which Special Envoy Dan Fried and I co-chair. In that process, we carefully assess all information related to the transfer modalities and any new information arising since the Task Force review identified the detainee as a transfer candidate.

Our task is both to ensure that a former detainee is not transferred to an environment in which his reengagement is likely and to ensure that we do not unnecessarily hold individuals in contravention of our values and to the detriment of our credibility in the international community and with the American people. As we seek the right balance, we must maintain the flexibility to use all our military and law enforcement tools.

Recognizing that your focus is on transfers from Guantanamo Bay, I would briefly like to outline for you the broader policy context in which transfers fit. Transfers should not be viewed as merely a means toward the end of closing Guantanamo Bay, even though they further that interest. The current conflict does not lend itself to a one-size-fits-all solution. The flexibility to determine when it is in our national security interest to transfer individuals we are detaining is a necessary component to an effective detention, and our broader counterterrorism, policy.

The latest development in the evolution of process for detainees is Executive Order 13567, which defines a process for periodic review of covered detainees. This process will evaluate regularly the propriety of continued detention for each detainee at Guantanamo who is not already identified for transfer or been charged or convicted criminally. These measures are in addition to Guantanamo detainees' right to challenge the legality of their detention in Federal court as most have done. The new review process builds upon the interagency review process coordinated by the Department of Justice under the 2009 Executive Order and ensures that we will continue to determine whether our national security interests require their continued detention. With respect to those we must continue to detain, borrowing again from the President's May 2009 National Archives speech, these detainees are "people who, in effect,

remain at war with the United States.” And we will continue to hold these individuals in a manner that complies with our domestic and international obligations, and is consistent with our values.

In addition to strengthening our own policies and procedures, we must continue to work with our partners around the world to build their capacity to confront this common challenge. We are cognizant that deepening our cooperation with our international partners to develop credible rehabilitation and reintegration programs as well as a durable counterterrorism legal framework, are vital to addressing the threat of violent extremists in their own countries and the threat posed by recidivism. Importantly, we need to ensure that our detention policies are principled, that they evoke credibility with our public and the international community, and that they can be sustained into the future as a useful tool in our counter-terrorism fight.

In applying these policies, first and foremost, we must ensure that we do not detain the wrong individuals; we must make certain that those we capture are in fact legally detained as persons who are part of or substantially supporting enemy forces. The review processes we apply must be carefully calibrated to ensure that those who are lawfully detainable under the law of war are detained, and that no detainee who was mistakenly or unnecessarily detained in the heat of combat continues to be held.

Similarly, we must carefully weigh the costs and benefits of continued detention in our counter-terrorism fight. We hold at Guantanamo those detainees we assess as continuing to pose a threat in our ongoing conflict. Just as we do with prisoners of war in more traditional armed conflicts,

we acknowledge that the threat they pose may change over time. In today's conflict, the threat posed by a particular detainee may be mitigated, through participation in a reintegration program or through other focused measures to prevent reengagement. Detention without a process sufficient to assess whether the threat an individual poses can be sufficiently mitigated through means other than detention by the United States comes at a significant cost with respect to the cooperation and respect of allies and partners – cooperation that is vital to the success of future counterterrorism efforts. Collectively, the review conducted under Executive Order 13492 and the new Periodic Review Boards comprise such a process.

To address these very complex matters, we cannot rely on a one-size-fits-all mentality; instead, we must retain the flexibility to use all our tools in order to have a framework of detention policies and practices that are principled, credible, and sustainable. By principled, I mean it must provide fair and humane treatment to each detainee, including a process by which we can distinguish between a belligerent who poses a significant threat and one who should not be detained, whose desire to remain a belligerent has ended, or whose threat can be mitigated without further detention.

In order to be credible, this framework must advance the law in a way that imbues the entire system with legitimacy so that it will be accepted at home and abroad and serve as a model to influence other countries' conduct. By ensuring our system's credibility, we can diffuse the common, but inaccurate, criticism that the United States is acting outside the law, and strengthen our effectiveness in combating al-Qa'ida and its associated forces.

Finally, the sustainability of such a framework depends not only on its principled nature and its credibility with our courts, our people, and the international community, but on its ability to address the realities of 21st Century warfare, thus maintaining in the law of war an appropriate balance between military necessity and humanitarian interests. No review system will be perfect. We must be able to guard against belligerent reengagement, while still allowing for the full spectrum of transfer or prosecution options as alternatives to prolonged detention. Flexibility to use the tool which best serves our national security interests is absolutely essential to accomplishing these objectives.

The Department stands ready to work with this Committee and other interested Members of the Congress to further, in both policy and practice, the requirements of a principled, credible, and sustainable detention policy that maintains the flexibility critical to meeting and addressing our national security needs.