

## HUMAN RIGHTS WATCH

1630 Connecticut Avenue, N.W.  
Suite 500  
Washington, DC 20009  
Tel: 202-612-4321  
Fax: 202-612-4333  
Email: hrwdc@hrw.org

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## Testimony by Tom Malinowski Washington Advocacy Director Human Rights Watch

### Senate Foreign Relations Committee On the CIA Secret Detention, Rendition, and Interrogation Program July 26, 2007

Mr. Chairman, thank you for holding this hearing and for inviting me to testify.

When I joined the staff of Human Rights Watch six years ago, I assumed I would be spending most of my time dealing with outrages committed by governments in countries like Sudan and China and Burma, and urging the United States to be a force for good in such places. I never imagined that I would see my own government engaging in the kinds of activities it has long condemned around the world: disappearing prisoners in secret facilities for years without any legal process, sending them to be interrogated in countries where torture is standard practice, and subjecting them to interrogation methods that I first learned about while reading accounts by Soviet dissidents of what they endured in KGB prisons.

These policies have undermined standards that defenders of human rights everywhere rely upon to fight for their cause. They have diminished America's moral standing and influence in the world. They have hindered, not aided, the fight against terrorism, handing America's enemies a victory they could never have achieved on their own.

For the last six years, a growing number of voices have been pushing back: members of Congress, the Supreme Court, active and retired members of the U.S. military and intelligence community, not to mention organizations

dedicated to promoting civil liberties and human rights. We have made considerable progress in righting the wrongs of the last few years and encouraging a counter-terrorism strategy that will be more effective as well as lawful. But much more needs to be done. And I am very glad, Mr. Chairman, to see you taking the lead in addressing some of the most complex and important aspects of the problem, including extraordinary rendition and secret detention.

What I'd like to do is discuss what we know about the CIA's detention, interrogation, and rendition program, as well as its consequences and the importance of fundamentally changing it. I will then offer a few comments on the legislation you have introduced.

### **The Program**

The administration has acknowledged that around 100 prisoners have been held in the CIA program, in facilities operated by the Agency in undisclosed locations around the world. The International Committee of the Red Cross has repeatedly asked for access to these facilities and been denied. These prisoners were effectively disappeared. In international law, an enforced disappearance is considered to be "the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State . . . followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law." That is precisely what happened to prisoners held by the CIA.

Some of the prisoners were subjected to what the administration has euphemistically termed "enhanced interrogation." These methods reportedly included "water boarding" – in which interrogators strap the prisoner to a board with his feet above his head, cover his mouth and nose with cellophane, and pour water over his face to create the sensation of drowning. They also apparently included a technique known as "long-time standing," in which a prisoner is forced to stand motionless for up to 48 straight hours, and extreme sleep deprivation for days on end – methods that survivors of some of the world's most brutal regimes have said cause as much suffering as the worst physical torture.

Last September, the President announced that the last (at that point) 14 prisoners held in CIA facilities were being transferred to military detention at Guantanamo Bay. But of course many more prisoners had been in CIA custody at some point before that. Human Rights Watch has identified 21 people who were almost certainly held in CIA facilities, and another 18

who may have been held, whose whereabouts remain unknown. Most, presumably, were rendered to other countries, most likely in the Middle East.

The administration says that it does not render people to torture. But the only safeguard it appears to have obtained in these cases was a promise from the receiving state that it would not mistreat the rendered prisoners. Such promises, coming from countries like Egypt and Syria and Uzbekistan where torture is routine, are unverifiable and utterly untrustworthy. I seriously doubt that anyone in the administration actually believed them.

We also know that the CIA detention and rendition program remains in operation today. This spring, four more prisoners were delivered to Guantanamo, some reportedly from secret CIA custody. At least one had actually been arrested months earlier. There is also strong evidence that the Agency may have participated in or condoned the rendition to Somalia and Ethiopia of a number of people who had escaped the conflict in Somalia earlier this year.

### **Consequences for Global Human Rights and America's Moral Authority**

Here, in a nutshell, are the arguments the administration has made to the world through these detention policies: first, the whole world is a battlefield in an open-ended war on terror. Anyone the chief executive of a country believes to be supporting or associated with terrorism is a combatant in that war, and can therefore be attacked on sight or held without charge. Second, such people can be seized anywhere, at any time, without judicial authorization, and if the leader of a country considers them especially dangerous, he can hold them in secret for as long as he likes. So long as these people are in the custody of an intelligence agency, governments can also subject them to interrogation procedures that would normally be prohibited in wartime, even though such practices have been prosecuted as torture by the United States for over a hundred years.

I have deliberately stated these propositions in their generic form – not as statements of what the United States can lawfully do, but as statements of what any government can lawfully do. This is how this debate should have been framed from the beginning – because America's policies inevitably set an example for others. But it was not framed that way. The administration failed to consider before it embarked on its interrogation and detention policies how the United States might react if others mimicked those policies and the arguments it was using to justify them.

Imagine if another government – let's say, for the sake of argument, the government of Iran – set up a prison camp on some island to which it claimed its domestic laws did not apply, and that it held there, without charge or trial, several hundred men of multiple nationalities, captured outside of Iran, who it accused, based on classified evidence, of supporting groups it claimed were hostile to Iran.

Imagine if some of these prisoners were Americans – not soldiers, but say a contractor the Iranians accused of housing or feeding U.S. troops, or a Treasury Department official they accused of financing the Pentagon. Imagine if Iran transferred those Americans to the custody of its intelligence agency, and on that basis claimed that it could hold them in secret without any legal process for as long as it wanted. Imagine if those Americans were ultimately given a makeshift military hearing, in which they tried to say that they had been tortured by their interrogators, but that the Iranian tribunal kept this testimony secret because it didn't want Iran's enemies to learn how it interrogates prisoners.

Imagine if the intelligence service of the United Kingdom suspected a lawful US resident of sending money to the IRA in Northern Ireland, or the secret police in China or Burma accused an American of supporting rebels in their country, and on that basis, kidnapped that American off the streets of Wilmington or Indianapolis, bundled him on a plane, and held him for years in a secret facility, hidden even from the International Committee of the Red Cross. How would the US government react? Would the president say "sure, no problem, I guess the leader of China or Burma decided that guy was an enemy combatant, so I can't really complain?" If it happened to one of your constituents, Mr. Chairman, would it matter to you if some official in the U.S. intelligence community had given Burma or China permission to whisk that American away?

Or, just for the sake of argument, imagine if the president of Russia declared that his country was engaged in a global war on terror, and that anyone with any connection to any group that supported separatist elements in places like Chechnya was a combatant in that war who could be detained or shot or poisoned wherever he was found, whether in Moscow, or Berlin, or, just for the sake of argument, London.

Clearly, we live in a world in which such things are possible. But do we want to live in a world where they are considered legitimate? That is what is at stake here. Whether we will preserve the legal and moral rules we have struggled to develop over generations to limit what governments – and here I mean not just the United States but all governments – can and

can't do to people in their power. And whether the United States will have the credibility to be the world's preeminent champion of those rules.

Now, it is important to note that nothing the administration has done can compare in its scale to what happens every day to victims of cruel dictatorship around the world. The United States is not Sudan or Cuba or North Korea. The United States is an open, democratic country with strong institutions – its Congress, its courts, its professional military leadership – which are striving to undo these mistakes and uphold the rule of law.

But the United States is also the most influential country on the face of the earth. The United States is a standard setter in everything it does, for better or for worse.

When Saddam Hussein tortures a thousand people in a dark dungeon, when Kim Jong Il throws a hundred thousand people in a prison camp without any judicial process, no one says: "Hey, if those dictators can do that, it's legitimate, and therefore so can we." But when the United States bends the rules to torture or to secretly and unlawfully detain even one person, when the country that is supposed to be the world's leading protector of human rights begins to do – and to justify – such things, then all bets are off. The entire framework upon which we depend to protect human rights – from the Geneva Conventions and treaties against torture – begins to fall apart.

It is simply an undeniable, objective fact that when President Bush talks about his freedom agenda today, most people around the world do not conjure images of women voting in Afghanistan, or of Ukrainians and Georgians marching for democracy, or of American aid dollars helping activists in Egypt or Morocco fight for reform. Even America's closest friends now turn their minds to Guantanamo, to renditions, to secret prisons and to the administration's tortured justifications for torture.

These policies have not only discredited President Bush as a messenger of freedom, they also risk discrediting the message itself. Because the whole idea of promoting democracy and human rights is so associated with the United States, America's fall from grace has emboldened authoritarian governments to challenge the idea as never before. As the United States loses its moral leadership, the vacuum is filled by forces profoundly hostile to the cause of human rights.

A couple of years ago, Human Rights Watch was meeting with the Prime Minister of Egypt, and we raised a case in which hundreds of prisoners rounded up after a terrorist bombing were tortured by Egyptian security

forces. The Prime Minister didn't deny the charge. He answered, "We're just doing what the United States does." We've had Guantanamo and the administration's interrogation policies thrown back in our face in meetings with officials from many other countries, including Saudi Arabia, Jordan, Pakistan and Lebanon. US diplomats have told us they face the same problem. A US ambassador to a major Middle Eastern country, for example, has told us that he can no longer raise the issue of torture in that country as a result.

The master of the tactic is Russia's president Vladimir Putin, who uses it preemptively to ward off criticism of Russia's slide back to authoritarianism. Just before the recent G-8 summit, a reporter asked Putin about his human rights record, and he immediately shifted the subject: "Let's see what's happening in North America," he said. "Just horrible torture . . . Guantanamo. Detentions without normal court proceedings."

Now, don't get me wrong: Putin doesn't need American renditions and secret prisons as an excuse to persecute his critics in Russia. These policies are not the reason why Egypt or any other country tortures and detains prisoners without charge. Still, America's detention policies are a gift to dictators everywhere. They can use America's poor example to shield themselves from international criticism and pressure, to say, to their own people as well as to the world, "we are just the same as everybody else."

In the days of the Cold War, the Communist leaders of Eastern Europe tried to do the same thing. But it didn't work. Dissidents and ordinary people behind the Iron Curtain knew that America wasn't perfect. But they believed that the United States was at least dedicated to the principle that governments were bound by law to respect human rights. It was profoundly important to them to know that the government of the world's other superpower limited its power in accordance with this principle. It gave them hope that a different way of life was possible, and the courage to fight for it.

Leaders like Putin understand how powerful America's example has been in the past, and they use the administration's policies to tear that example to shreds. They use it to tell their people that all this American inspired talk about human rights is hypocritical rubbish. "Even self-righteous America," they say, "which preaches moral ideals to the world, tortures prisoners and locks people up without a trial. Even America throws away the legal niceties and behaves ruthlessly when it feels threatened. The Americans use human rights talk to beat up their enemies, but they're really just the

same as us. And if you think that things can ever be different here or anywhere else, you're just naive."

### **Harm to Counterterrorism**

These are some of the costs of the administration's detention and interrogation policies. Do these policies have national security benefits that justify such costs? I believe the answer is no.

I believe that the fight against terror is as much a moral and political struggle as it is a military one. That's not just my view.

Listen to former Marine Corps Commandant Charles Krulak and former CENTCOM Commander Joseph Hoar, who have written: "This war will be won or lost not on the battlefield but in the minds of potential supporters who have not yet thrown in their lot with the enemy." Listen to General David Petraeus, who recently told his troops in Iraq: "This fight depends on securing the population, which must understand that we--not our enemies--occupy the moral high ground." Look at the most recent National Intelligence Estimate, which says that the United States needs to "divide [terrorists] from the audiences they seek to persuade" and make "the Muslim mainstream . . . the most powerful weapon in the war on terror." Read the U.S. Army's Counterinsurgency Manual, which says that in a war like this, you can't kill or capture every enemy fighter; the challenge instead is to diminish the enemy's "recuperative power"--its ability to recruit new fighters--by diminishing its legitimacy while increasing your own.

When America violates its own principles by secretly detaining, abusing, and rendering prisoners to torture, it cedes the moral high ground and loses the Muslim mainstream. These policies are one of the main sources of the terrorists' recuperative power.

What's more, secret detention, torture, and rendition hurt, rather than help, efforts to collect accurate intelligence about the enemy.

One of the best sources of intelligence on terrorist plots are the communities in which terrorists hide. Public cooperation has been the key to preventing many potentially deadly attacks: for example, it was a tip from a member of the Muslim community in London that allowed British investigators to foil a plot to bomb several transatlantic flights last year. But people who live in those communities are much less likely to come forward with information about their neighbors, acquaintances, and relatives if they think the people they're turning in are liable to be

abused, or held for years in a secret prison, or sent to a dungeon in a country where torture is rampant.

Interrogation of prisoners is also an important source of intelligence. But torture is not a reliable method of interrogation. Sure, if you water board a prisoner or strip him naked in a freezing room or deny him sleep for days on end, sometimes he'll blurt out the truth. But more often than not, tortured prisoners will say whatever they think their interrogator wants to hear, whether true or not, to end their suffering. And keep in mind: when prisoners confirm what their interrogators already believe to be true, interrogators are often highly tempted to believe it. Torture tends to confirm whatever false assumptions the intelligence community brings into an interrogation.

Perhaps the best example of this involves one of the first prisoners to be subjected to extraordinary rendition after September 11<sup>th</sup> -- a suspected al Qaeda member named Ibn al Sheikh al Libi. At first, al Libi was held by the FBI, which used traditional, tried and true, psychological interrogation methods. The FBI was apparently making progress. But the administration lost patience, turned him over to the CIA, which applied its enhanced procedures, and eventually sent him to be interrogated in Egypt. Reportedly, Libi's family was threatened; he was water boarded; and he was forced to remain standing overnight in a cold cell while being repeatedly doused with icy water.

Libi eventually told his interrogators exactly what the administration wanted to hear: that Saddam Hussein was helping al Qaeda obtain chemical weapons. This false information became one of the most powerful arguments for the war in Iraq, and the closing argument in Colin Powell's presentation to the UN Security Council in February, 2003. One of the greatest intelligence failures in American history came about in part because the administration believed in the CIA program and the tortured confessions it produced.

How much more good intelligence was lost because of the use of these methods? How many false leads have intelligence agencies wasted their time following as a result? How many innocent people have been detained, and how many guilty people have escaped capture? We will probably never know. But the damage has surely been great. And the United States did not have to endure it.

Talk to the military interrogators who are using the professional, humane interrogation methods outlined in the US Army Field Manual on Intelligence Interrogation. They will tell you that these methods are far



more reliable in obtaining truthful, useful intelligence than the amateurish and cruel methods the CIA used in its facilities. As for detention of dangerous terrorists -- talk to the career prosecutors at the Justice Department. They will tell you that they know how to bring terrorists to justice in ways that showcase America's commitment to the rule of law.

Consider this: in the six years since September 11<sup>th</sup>, the administration's system of holding terrorists in secret detention while creating an entirely new system of military justice to handle terrorism crimes has resulted in exactly zero prosecutions of anyone remotely connected to those attacks. Only one man has been convicted in this system -- an Australian former kangaroo trapper who was at best a bit player in al Qaeda, and who got just nine months in prison, which he's serving in Australia.

Meanwhile, U.S. federal courts have successfully tried and convicted dozens of persons for international terrorist offenses, sentencing many to long prison sentences.

What's more, no one is complaining that the men sentenced in the federal courts were treated unjustly. No one is clamoring for their release. Al Qaeda cannot exploit their fate to recruit more terrorists to its ranks. To use one of President Bush's favorite phrases, those terrorists who got justice with due process are no longer a problem for the United States of America. Every single person who's been held in Guantanamo, or in a secret prison, or subject to extraordinary rendition remains a profound problem for the United States.

### **Legislative Solutions**

The legislation you've proposed, Senator Biden, addresses a major part of this problem. Human Rights Watch strongly supports the fundamental goals of your bill -- to protect legitimate intelligence activities, while getting the CIA out of the detention business, limiting rendition to cases where a prisoner is sent to face justice with due process, and having an independent court review transfers to ensure that no one is sent to face torture or detention without charge.

Drafting language to accomplish these goals is extraordinarily difficult, especially when we have an administration that believes that Congress's job is to enact loopholes, not laws. This administration has a long track record of interpreting what appear to be clear prohibitions on outrageous government conduct in ways that allow the president to do virtually whatever he wants -- and of keeping these interpretations secret so that no one can challenge them. As your bill moves forward, Mr. Chairman, I

trust that you will continue to look carefully at the language, and to make any adjustments that may be necessary to ensure that it definitively shuts the door on the extraterritorial detention and rendition to torture that you seek to prohibit.

Based on our initial reading of the bill, there are a few adjustments I would encourage you to make:

First, while your bill requires the FISA court to evaluate humane treatment assurances from a foreign government in light of that government's overall record on torture and the individual circumstances of the detainee – rather than simply accepting humane treatment assurances -- the detainee himself has no opportunity to raise fears of torture or persecution to the court. As we've seen in the case of Guantanamo detainees, each of these cases is highly individualized. Some prisoners from countries with poor human rights records very much want to go home; others have legitimate, personal reasons to fear mistreatment, based on their own past activities and dealings with their home governments. The process you seek to create should give prisoners an opportunity to make such concerns known to the court, with proper representation, so that they can be fairly evaluated, and to challenge assurances the United States receives from their home countries.

Second, this raises the question of whether the FISA court provides the best oversight mechanism for this process. While I understand your desire to respect the sensitive nature of intelligence activities, it may prove very difficult to design a process in the FISA court, which operates on an ex parte basis, that allows prisoners a fair chance to raise legitimate concerns about torture and persecution before their transfer. An alternative would be to mandate a special Article III court to sit by designation – abroad if necessary – on cases involving overseas detention. Designated panels of federal judges, with existing rules of procedure and experienced in trials, fact-finding, and strong, tested rules for dealing with classified evidence, could well prove better able to handle the hearings envisioned in your legislation, and to give the process the legitimacy it needs. Congress has created numerous courts in the past to sit on cases involving particular topics or places, even courts in foreign countries.

I would add that the prisoners in Guantanamo Bay also need a process that gives them advance notice of transfers to other countries and an opportunity to raise concerns about torture. I know your legislation is not intended to deal with the special issues raised by Guantanamo – but that is an important piece of the larger puzzle that Congress needs to address somewhere.

Third, while your bill requires prisoners taken into custody by the CIA to be transferred in a timely manner to face justice with due process -- as soon as a rendition order is received from the oversight court -- it doesn't set a time limit within which such an order must be issued. A limit would be important to prevent the government from deliberately prolonging CIA detention by, for example, not providing the court with the information it needs in a timely manner.

Even if the process is conducted in a "timely" manner, prisoners would still spend some period of time in CIA detention. This raises a number of important legal concerns. At the very least, I would urge you to require that the International Committee of the Red Cross have access to all detainees in US custody, including those held by the CIA. There is simply no logical reason why any prisoner should be hidden from the ICRC, unless the CIA wants to use interrogation techniques that are in any case illegal, immoral, and unreliable. Allowing ICRC access to all detainees would not interfere with any legitimate intelligence gathering activities, while assuring the world that the United States is abiding by its values and the law, and preserving America's ability to demand ICRC access to its own soldiers and citizens being held in conflicts abroad.

I would also recommend that your bill require the administration to report on the fate of rendered prisoners in a public way, rather than in classified form to the Intelligence committees. The clear intent of the legislation is for rendered detainees to be prosecuted in their home countries in accordance with international due process standards. The United States would have no need to keep the fate of these people secret if it were asking the receiving governments to settle their fate in an open, transparent process -- as you intend.

Finally, Mr. Chairman, I want to commend you for including a provision in your bill that limits all agencies of the U.S. government to the interrogation techniques described in the Army Field Manual on Intelligence Interrogation.

Ever since the Congress passed the McCain Amendment in 2005, the CIA has reportedly limited itself to those humane techniques. In that time, it has repeatedly claimed that it was getting good intelligence from prisoners in its custody.

The Executive Order President Bush issued July 20th appears to prohibit torture and cruel treatment. But the administration has not released the actual guidance it is giving the CIA. Administration officials have said that

guidance is designed to allow the CIA to return to at least some aspects of the old "enhanced" interrogation program. The administration clearly believes that the CIA now has the authority to go beyond the guidelines the U.S. military lives by. Officials -- including Attorney General Alberto Gonzales testifying to the Senate two days ago -- have categorically refused to rule out interrogation techniques like water boarding that clearly constitute torture. The Director of National Intelligence, Admiral John McConnell, even acknowledged on "Meet the Press" on Sunday that he would not want to see American citizens subjected to the techniques the CIA can now use again. All he could say by way of reassurance was that those subject to these methods would not suffer "permanent harm."

Admiral McConnell seems to be missing an elementary point: If the U.S. government does not want American citizens or soldiers to be subjected to these techniques, then it cannot employ them itself. Remember: everyone now agrees that Common Article 3 of the Geneva Conventions governs all interrogations conducted by all agencies. If the CIA is allowed to use a particular method under the new Executive Order, that means the U.S. government considers that method to be compliant with Common Article 3. And if it's compliant, that means U.S. enemies can use it against captured Americans in any situation governed by Common Article 3.

Your legislation fixes this problem in the right way. The United States government should not have two different standards of morality and lawful behavior, depending on which agency is holding a prisoner. It cannot teach its soldiers in Iraq and Afghanistan that harsh interrogation techniques are counterproductive and wrong, while telling its intelligence agencies that the same techniques are productive and right. And it can't expect the techniques the CIA is using to remain secret. Eventually, these methods always come to light. And America will not regain its moral authority unless it can speak with absolute moral clarity on the issue of torture.

Mr. Chairman, that we are even having this discussion in America is profoundly sad. How this country treats its enemies ought to be what distinguishes it from its enemies. The story of how it has actually done so in the last few years is not one of which we can be proud. But the full story has not yet been written. And when historians tell it many years from now, a more hopeful narrative may emerge. It will, I hope, go like this. That America was hit hard on September 11<sup>th</sup>, 2001. It tried to react in ways that were honorable and smart, but also made some terrible mistakes out of fear. But in a relatively short period of time, its democratic institutions

corrected those mistakes, just as they were designed to do. That is a story of which, on balance, I would be proud. I'm glad to see that this Committee wants to play its part in writing it.