

DISSENTING VIEWS OF MINORITY MEMBERS

The Oversight and Investigations Subcommittee is charged with oversight of the Defense Department and related agencies to ensure America's national security. We take this responsibility seriously and believe that an assertive, bipartisan approach is the best means to achieving this objective. Detainee issues remain among the most challenging we face as a nation and we are committed to supporting a careful and comprehensive approach that promotes the national security of the United States. We appreciate the assistance of all members of the subcommittee in working towards this common goal. However, we believe the report is incomplete and we disagree with several of the key findings and recommendations. For that reason we will not sign the report.

The national security of this country remains the number one priority of this subcommittee and of the full committee. We believe both the Administration and all of the members of this subcommittee are united in the agreement that it is not in the best interest of the United States to release or transfer anyone from GTMO who would endanger our national security.

The report states that the subcommittee was directed by the Chairman and Ranking Minority Member of the full committee to conduct a "comprehensive bipartisan investigation of past and present procedures governing efforts to dispatch detainees..." As the report states, this necessarily included an examination of mechanisms intended to prevent former detainees from reengaging in terror-related activities; however, we also believe that the report should include an equally rigorous examination of the risk of continuing to incarcerate individuals at GTMO who are no longer determined to be a risk to the security of the United States, our allies, and our troops abroad. While efforts were made to address our concern on this matter, they did not go far enough. We agree with former Defense Secretary Donald Rumsfeld on the importance of not detaining individuals unnecessarily. He stated "the United States doesn't want to keep any of them any longer than we have to." Senior policy leaders of the current Administration also agree on the importance of appropriate alternatives to detention, "The United States cannot expect to detain its way out of this problem."¹

We appreciate efforts by the subcommittee to be bipartisan and to accommodate our concerns. In particular, we appreciate the resolution of issues regarding the use of media reports that referenced Wikileaks documents. We believe that every member had sufficient time to review and comment on the report. We also appreciate the subcommittee giving the Administration an opportunity to comment on a draft of the report. However, we remain concerned that the Department of Defense believes it has not been able to provide a comprehensive response.²

We will not provide a line-by-line analysis of the report; however, we will highlight our concerns regarding the following key issues:

¹ John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, *Remarks at the Brennan Center for Justice*, March 18, 2010.

² Department of Defense correspondence with committee staff, January 31, 2012 (in committee possession).

Comprehensiveness: we believe the report does not sufficiently cover the directed topic. Many of the key policy makers regarding this issue were not interviewed and only a smattering of government documents were reviewed (about 2000 pages). At a minimum, the subcommittee should hold a hearing or briefing with the key departments to obtain their comments on the report on record. Finally, as stated above, the Department of Defense has indicated that its comments were not comprehensive and would like the opportunity to make further recommendations.³ In addition, the Department of State has asked for the opportunity to discuss the findings in the report. The bottom line is that we still do not know with any degree of credibility how many GTMO detainees have reengaged.

Balance: in order to accurately assess the threat of reengagement, the report must include more than only the worst detainee transfer cases. By only assessing the selected cases, the report presents an unbalanced, one-sided view of the consequences of current transfer policy. The report should acknowledge that the vast majority of detainee transfers have not increased the threat to the national security of the United States and present a non-skewed sample of cases on which to base findings and recommendations.

Strategic Risk: the report fails to thoroughly assess the strategic-risk in not adjudicating detainees for transfer or release. Although the report accurately acknowledges that both the Bush and Obama administrations sought to close GTMO, it fails to comprehensively identify and assess the strategic-level conclusion by the national security professionals in both administrations that it is in the strategic and national security interests of the United States to transfer lower risk detainees out of GTMO as part of a process to close the facility.

Findings: we agree with the basic theme of findings 1-3, but do not agree with all the supporting arguments. We believe the facts set forth in the report do not support finding 4. Under the Obama transfer process only 2 detainees are confirmed reengagers to date (about 3.3%) and there is no evidence in the report to support the finding that the higher-levels of reengagement under the Bush Administration process will continue.

Recommendations: in principal, we agree with recommendations 1 and 2, but not with all the underlying conclusions. We do not support recommendation 3. We support giving the Executive Branch more flexibility regarding detainee transfers than under the current statutory scheme. We recommend further study of reengagement prior to the closure of the detention facilities in Afghanistan.

Classified annex: while we do not agree with all of the analysis and conclusions reached in the classified annex, we support the recommendations for further study and reporting. The Department of Defense has raised concerns with the methodology and conclusions in the classified annex and we believe these concerns should be further studied as well.

Comprehensiveness

We do not believe the report is as comprehensive or as thorough as stated in the Executive Summary. It represents a good faith start, but much remains to be done in order to provide a complete examination of this issue. At best, this should be labeled as an “interim” report, as an acknowledgement that the conclusions, findings, and recommendations are

³ Department of Defense correspondence, January 31, 2012.

preliminary. Going forward, we should work with other congressional committees, in particular the House Permanent Select Committee on Intelligence and the House Foreign Affairs Committee.

We do not believe “nearly every senior official involved in these matters in both the Bush and Obama administrations” was interviewed. We acknowledge the report includes a useful effort to interview many mid-level officials, but the record indicates only one senior policy maker, former Deputy Secretary of Defense Gordon England, was interviewed. At a minimum, to obtain a comprehensive view of this subject we would like to hear the views of former Secretary of Defense Rumsfeld, former Secretary of Defense Robert Gates, former Secretary of State Colin Powell, former Secretary of State Condoleezza Rice, and senior members of the National Security Council and the Intelligence Community.

Only an unspecified number of “several thousand pages” of government documents were reviewed, while it is known there is a much larger volume of relevant documents. While much of the information regarding detainees is known to reside with the Intelligence Community and with the Department of State, the report primarily focuses on the Department of Defense. Much work lies ahead if the report can accurately be labeled as “comprehensive.”

The report acknowledges reliance on “some secondary sources.” These secondary sources rely extensively on unverified media reports containing unsubstantiated quotes. We believe the report gives the erroneous impression that it is based primarily on reliable government information.

However, we don’t want to quibble over the data collection. Our basic understating is that despite the efforts of the subcommittee, we still don’t have a definitive answer on the number of GTMO detainees who have reengaged. We support continued efforts to resolve this issue.

Balance

We agree that detainees have been released or transferred who have reengaged, however the snapshots provided do not provide an accurate or comprehensive overview of the detainee transfer process. We do not want to release a detainee who poses an unacceptable risk to the national security of the United States. These three early “snapshots” make generalizations about the detainee transfer process as it existed prior to the current process and fail to indicate improvements with the current detainee transfer process. The snapshot section is an example of the significant use of unverified media reports.

We believe there are numerous additional success stories that should be noted. Detainees have been successfully resettled in Bermuda, Albania, and Palau to name just a few countries, although we note the difficulty of discussing this issue comprehensively in an unclassified document. However, given that at least 73%, if not more (see below), of the detainees have not been found to have reengaged (confirmed or suspected), citation to more than one success story would provide a more balanced view.

It is misleading to conflate the number of “confirmed” and “suspected” reengagers together. We disagree with the statement in the public version of the final report that 27% of detainees are confirmed or suspected of reengaging. There are important distinctions between the

two categories and the level of evidence required to add an individual to the list of suspected reengagers is very low, often based on single-source reporting or unverified information that is merely “plausible” and not proven. As indicated in the report, the latest publically available information states that 81 individuals (13.5%) are confirmed reengagers. Thus, we believe 13.5% is the more accurate statistic if only one number is highlighted. As also stated in the report, about 44% of the combined number of confirmed and suspected reengagers are imprisoned or dead. Thus, while the methodology is not precise, the more accurate number of active and confirmed reengagers may be significantly lower, perhaps about 9%.⁴

In addition, only 66 persons have been transferred from GTMO by the current Administration, with only 2 confirmed as reengagers, a figure of about 3.3%.

We believe the entire issue of reengagement merits further study and support the recommendations to do so. This is a complicated subject and we need to look at both government assessments and the academic research that has been done.⁵ We have continuing questions about DIA methodology and look forward to working with them, and other congressional committees, see above, as they continue to examine this issue.

We have a number of concerns regarding the report’s characterization of the Saudi Rehabilitation program. While the majority has worked hard to address our concerns regarding the report’s analysis of the Saudi program, we believe the report does not offer an accurate view of the program. . While we acknowledge the Saudi program allowed a group of detainees to reengage, which was an extremely serious incident, the Department of Defense has indicated to the subcommittee that this issues raised by the incident have been addressed.⁶ The Department of Defense has indicated to the subcommittee that the Saudi program provides transferred detainees a controlled and structured post-detention environment, which as the report indicates, is a significant factor regarding a detainee’s potential for reengagement.⁷ In fact, the Department continues to believe the Saudi program “is among the best available.”⁸ We also agree with the Department that no single measure is sufficient and the program should be closely monitored as part of our larger assurance package with Saudi Arabia.⁹ This is another area we need to continue looking at and note that much of the most important data is classified.

Another example of lack of balance is the section on “litigation pressures.” In discussing the congressional debate on this issue, it cites one senator. The diverse set of views on this issue should have been referenced. The report complains about the cost in time and hours of defending our values. We believe they are worth it. In addition, the report neglects to include an analysis of the habeas cases in this Administration. Jeh C. Johnson, the General Counsel of the Department of Defense recently stated to the Heritage Foundation:

⁴ The figures are imprecise because the 44% figure includes suspected reenagers. Also, there is more up to date information in the classified annex.

⁵ We appreciate the work done by Professor Mark Denbeaux and his students at Seton Hall Law School Center for Policy and Research. While their research is based only on open-source documents, we have been assisted by their analysis. See, *Revisionist Recidivism: A New Analysis of the Government's Representations of Alleged "Recidivism" of the Guantanamo Detainees*, (June 2009).

⁶ Department of Defense correspondence, January 31, 2012.

⁷ Department of Defense correspondence, January 31, 2012.

⁸ Department of Defense correspondence, January 31, 2012.

⁹ Department of Defense correspondence, January 31, 2012.

“Third, the government is seeing consistent success in the habeas cases brought by Guantanamo detainees. The courts have largely recognized and accepted our legal interpretation of our detention authority, and the government has now prevailed at the District Court level in more than 10 consecutive habeas cases brought by Guantanamo detainees. We are seeing similar good results in the D.C. Circuit.”¹⁰

Strategic Risk

Although the report accurately acknowledges that both the Bush and Obama Administrations have sought to close GTMO, it fails to analyze in depth the strategic issues and concerns that resulted in each Administration separately reaching the same conclusion: that it is in the strategic and national security interest of the United States to transfer low-risk detainees out of GTMO as part of a process to close the facility and develop a long-term military detention policy. . The professional assessment of our military commanders and civilian leaders in both these Administrations was that closing the detention facilities at Guantanamo is a national security imperative in the war against Al Qaeda. Former Secretary Gates, former Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, and current CIA Director, General David Petraeus, each of whom served under both Administrations, also concluded that closing Guantanamo will help our troops by eliminating a potential recruiting tool.

Finding 4

We believe the EOTF process constitutes an improvement over the transfer process of the previous Administration. We see little in Finding 4 regarding the Obama EOTF relating to domestic political pressure. In fact, as noted by the report on page 59, the former Director of the EOTF, Matthew G. Olsen, who currently runs the National Counterterrorism Center, stated in his NCTC confirmation hearing that the EOTF process undertook “independent, professional and rigorous threat assessments of every detainee,” which yielded “impartial and objective analysis.” This was provided, he said, “to senior decision makers, “free from any improper influence” and it allowed officials to have “full, candid and open deliberations,” about transfers and releases.¹¹ Olsen also noted that the EOTF review process was based on “a more complete set of information.”¹²

The report also states, “For the Obama administration’s procedures to yield lower reengagement rates, detainee assessments must have been substantially improved and arrangements instituted by other nations made far better. There is little evidence of this.” We disagree. It is misleading to predict detainee reengagement based on assessments that have changed as more data has become available. Regardless of the length of time between release and reengagement, the detainees transferred by the current Administration left GTMO under a different process and with different results, to date, than the previous process. The current public data supports this, with only 2 confirmed reengagers and 3 suspected reengagers out of the 66 transfers publically reported by the Obama Administration. We see no evidence to support the

¹⁰ Jeh Johnson at Heritage Foundation, October 18, 2011.

¹¹ Matthew G. Olsen, “Statement for the Record,” Senate Select Committee on Intelligence, July 26 2011, p. 5.

¹² NCTC confirmation hearing, p 5.

speculation in the report that the EOTF transfers will follow the same trends as earlier. As noted earlier, there are additional details in the classified annex.

We find the current Administration has acted responsibly regarding problematic transfers. We note that because of concerns about Kuwait's record discussed in the report, no additional transfers (other than one court-ordered release) have been made to Kuwait, despite diplomatic pressure and legal challenges.¹³ Similarly, once legitimate concerns were raised about the capacity of the Yemeni government, there have been no further transfers to Yemen, despite the determination by both the Bush and Obama Administrations that there are Yemeni detainees eligible for transfer.¹⁴ As noted in the report, there are humane treatment concerns in Russia, and no detainee has been transferred to Russia by this Administration.¹⁵

In addition, as noted in the report, the Obama Administration has not transferred a detainee without the agreement of the Department of Defense, the Joint Chiefs of Staff, and the Office of the Director of National Intelligence.¹⁶

We disagree with the suggestion in the report that DHS officials serving on the EOTF were not equipped to assist the review process.¹⁷ DHS officials serving on the EOTF and subsequent GTMO review panel included a Senior Intelligence Analyst and other Senior Executive Service officials.¹⁸ As a member of both the Intelligence Community and the Law Enforcement Community, DHS is qualified to evaluate if an individual detainee posed a security threat to the United States.

The report also questions if staffers from the Department of Justice "had the necessary training and experience to" properly analyze detainee reports. We note that since 9/11, the FBI now has a National Security Branch, comprised of the Counterterrorism Division, the Counterintelligence Division, a Directorate of Intelligence, and a WMD Directorate, as well as field intelligence groups in each of its 56 field offices, all of which put into practice FBI priorities and the emphasis on integration of criminal and intelligence efforts. As is well documented, the FBI and DOJ have coordinated counterintelligence and law enforcement functions and increased the FBI's resources and focus on intelligence collection and analysis.¹⁹ David S. Kris, the former Assistant Attorney General for the National Security Division of the Department of Justice from 2009-2011, has stated, "the FBI has long been the Intelligence Community element with primary responsibility for collecting and coordinating intelligence about terrorist threats in the United States, and since 9/11 it has made this mission its highest priority."²⁰ We have no reason to doubt the ability of the DoJ officials assigned to the EOTF.

¹³ Department of Defense correspondence, January 31, 2012.

¹⁴ Department of Defense correspondence, January 31, 2012. See, Wittes, *infra*.

¹⁵ It should be noted that once issues were raised regarding Russia, the Bush Administration also declined further transfers to that country.

¹⁶ Report at 63.

¹⁷ Report at 63.

¹⁸ Executive Order 12333 as amended. See 50 U.S.C. §401a; Homeland Security Act of 2002, P.L. 107-296.

¹⁹ See, David Kris, *Law Enforcement as a Counterterrorism Tool*, 5 Journal of National Security Law & Policy 9, footnote 35, January 2011.

²⁰ Kris, at 9, fn 35 (citations omitted).

In both the Executive Summary and the Conclusion the report states the Obama Administration sought to release detainees in response to “domestic political pressures.”²¹ We see no evidence in the report to support this conclusion.

Recommendations

We do not support recommendation 3. While agreeing that no dangerous detainee should be transferred, we continue to believe the current statutory provisions regarding detainees unnecessarily limit the President’s flexibility to bring terrorists to justice and in some circumstances undermine our values and traditions of due process.

Benjamin Wittes, a fellow at the Brookings Institute, stated the following in comments regarding Yemeni detainees at GTMO prepared for the subcommittee:

The present risk, in our judgment, lies, rather, in the other direction. It is that overbroad legislative transfer restrictions intended to prevent releases of Yemenis—who, with or without such restrictions, are not going to leave Guantánamo—are encumbering reasonable repatriation and resettlement efforts for detainees from countries that do not pose challenges remotely comparable to those presented by Yemen. There are a number of current opportunities for the resettlement of Guantánamo detainees, opportunities which the legislative restrictions in place tend to frustrate. These restrictions are maintained largely out of fear of the situation in Yemen, but the chief effect is not felt by the Yemeni detainees. It is felt by others who, unlike the Yemenis, might plausibly be removed from U.S. custody to other countries where they would pose little risk of reengagement with the enemy.²²

Going forward we need to apply the lessons learned from the detainees transferred from GTMO to the remaining detainees at GTMO and in Afghanistan. We agree with recommendations 1 and 2 and with others in the classified annex that the issues raised in the report merit coordinated reporting and study by the Executive Branch.

- We need to continue the study started by this report and definitively answer the question: “How many GTMO detainees have reengaged?”
- We need to find out why they reengaged.
- We need to find out the best way to prevent reengagement for the remaining detainees in GTMO and those in Afghanistan.

²¹ Report, at 2 and 66.

²² *Transfer of Guantanamo Detainees to Yemen: Policy Continuity between Administrations*, June 15, 2011.

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