human rights first

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ISSUE BRIEF

Detaining and Prosecuting Terrorism Suspects

Introduction

As the armed conflict with various organized terrorist groups stretches into its sixteenth year, the United States continues to wrestle with the most effective way to handle captured terrorism suspects consistent with American values and the rule of law.

Having an effective, humane, and sustainable detention policy is becoming more important by the day, as the United States continues to fight al Qaeda and the Islamic State in Iraq and Syria (ISIS). This issue brief sets forth the elements of an effective detention and prosecution policy that respects human rights.

There are numerous national security dangers of detention and prosecution policies that fail to uphold human rights and the rule of law. Terrorist and insurgent groups routinely use American abuses to bolster their propaganda and recruitment. Human rights violations also alienate local populations and potential allies on the ground, resulting in unwillingness to aid the United States' mission or encouraging local actors to actively work against the mission. Cooperation with allies is also complicated by policies that abuse human rights. Because these policies may run counter to the domestic laws of counterterrorism partner countries—as well as their international law obligations—the partners have been less willing and able to provide intelligence, grant extradition or other prisoner transfer requests, and otherwise aid in counterterrorism and other operations. With the prospect of continuing armed conflict, crafting a detention and prosecution policy that respects human rights is essential for successful counterterrorism.

The Trump Administration's stated preference for handling terrorism suspects has been detention and trial at the U.S. military prison at Guantanamo Bay. The prison now holds 40 detainees. It also hosts the military commissions, where cases against seven detainees, including the alleged 9/11 conspirators, are in the pre-trial phase. Prominent national security officials across the political spectrum, however, have supported closing the prison and legal experts have opposed using the military commissions.[1] It is also not clear whether detaining and trying ISIS members at Guantanamo is legal. The U.S. government has asserted that the 2001 Authorization for Use of Military Force (AUMF) covers the conflict against ISIS, but this claim has not been tested by the courts.[2]

Meanwhile, U.S. federal courts have successfully prosecuted more than 660 terrorism suspects since 9/11.[3] Of these, 113 were captured overseas, including al Qaeda spokesman and Osama bin Laden's son-in-law Suleiman Abu Ghaith, who is currently serving a life-sentence in U.S. federal

[1] http://www.humanrightsfirst.org/resource/former-top-us-officials-who-support-closing-guantanamo; http://www.humanrightsfirst.org/resource/quote-sheet-national-security-leaders-support-closing-guantanamo, http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2119&context=facpub, https://academic.oup.com/jicj/article-abstract/11/4/875/2188925/Hamdan-v-United-StatesA-Death-Knell-for-Military, http://www.msnbc.com/msnbc/the-unraveling-guantanamo-military-commissions.

[2] https://www.lawfareblog.com/practical-legal-need-isil-aumf.

[3] http://www.humanrightsfirst.org/sites/default/files/NSD-Terrorism-Related-Convictions.pdf

prison.[4] Other individuals held in U.S. prisons include Zacarias Moussaoui, the 20th 9/11 hijacker, "shoe bomber" Richard Reid, and eight men involved in the 1998 bombings of U.S. embassies in Kenya and Tanzania.[5]

Even if the Trump Administration decides not to close Guantanamo, it should use the U.S. federal court and prison systems, rather than military commissions, to try and detain new terrorism suspects, because they have proven to be a more efficient and effective policy option.

Key Elements of an Effective, Humane, and Sustainable Approach to Detaining and Prosecuting Terrorism Suspects:

- ☑ **Maximize use of the federal court system**
- ☑ **Hold terrorism suspects and individuals convicted of terrorism-related crimes in federal prisons.**
- ☑ **Transfer suspects to foreign ally custody** where appropriate and consistent with *non-refoulement* legal obligations.
- ☑ **Conduct lawful, humane interrogations** of terrorism suspects, including providing the International Committee of the Red Cross access to suspects detained in an armed conflict.
- ☑ **Continue to reassess the basis of detention for remaining Guantanamo detainees** via Periodic Review Board hearings and transferring detainees when appropriate.
- ☑ **Continue transfers of cleared Guantanamo detainees**

Maximize Use of the Federal Court System

Capturing, detaining, and prosecuting terrorism suspects are essential to preventing and deterring future terrorist attacks. The military commissions at Guantanamo, a hybrid trial system crafted from elements of the U.S. federal court and military justice rules, have been overhauled multiple times. Originally established in 2001, the commissions were found unconstitutional by the Supreme Court in 2006.[6] The current revised military commissions system was established in 2009 and its legality has not been reviewed by the Supreme Court.

Despite these revisions, the commissions system is still riddled with procedural problems that have hampered the government's ability to conclude cases there. The legality of the commissions process, even in its most recent iteration, has been repeatedly called into question by legal experts and observers.[7] Many other countries, including U.S. allies, have also expressed their concern about its compliance with international law. Many of these countries have refused to cooperate with intelligence sharing or extradition if information is to be used—or suspects charged—in the military commissions.[8]

The Guantanamo military commissions have also been an unnecessary impediment to justice. They have concluded only eight cases, three of which

[4] https://www.nytimes.com/2014/03/27/nyregion/bin-ladens-son-in-law-is-convicted-in-terror-trial.html?mcubz=0&_r=0; https://www.humanrightsfirst.org/sites/default/files/Trying-Terror-Suspects-In-Federal-Court.pdf; http://www.humanrightsfirst.org/sites/default/files/Identified-Foreign-Captures.pdf.

[5] http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf, https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-theamerican-constitution-society-convention.

[6] Hamdan v. Rumsfeld, 542 U.S. 557 (2006).

[7] http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2119&context=facpub, https://academic.oup.com/jicj/article-abstract/11/4/875/2188925/Hamdan-v-United-StatesA-Death-Knell-for-Military?redirectedFrom=PDF, http://www.msnbc.com/msnbc/the-unraveling-guantanamo-military-commissions.

[8] http://www.newyorker.com/magazine/2017/05/15/taking-down-terrorists-in-court, http://jnslp.com/wp-content/uploads/2011/06/01_David-Kris.pdf.

have been completely overturned and one partially overturned because courts determined that the crimes involved were actually not war crimes at the time they were committed.[9] No cases have gone to trial since the Obama Administration and the pre-trial hearings currently underway have been prolonged by unclear procedural guidelines, ethical questions, and repeated government interference.[10]

The most notable military commissions case, that against the alleged 9/11 conspirators, has been in pre-trial hearings since May 2012 and is unlikely to progress to trial anytime soon. By contrast, U.S. federal courts have handled terrorism prosecutions effectively and with ease (more than 660 convictions in 67 district courts for terrorism-related cases since 9/11), due to clear rules and decades of precedent. Federal courts should be the preferred venue for any future cases against terrorism suspects.

Hold Terrorism Suspects and Individuals Convicted of Terrorism-Related Crimes in Federal Prisons

As noted above, one problem with holding ISIS combatants indefinitely—whether at Guantanamo or elsewhere—is that the legal basis for detaining suspects in law of war detention may not apply to ISIS members as it does members of al Qaeda and the Taliban. The 2001 Authorization for Use of Military Force (AUMF)—the legislation authorizing force against al Qaeda, the Taliban, and their co-belligerents—is the basis for detaining members of those groups. The U.S. government has claimed that the 2001 AUMF also authorizes armed conflict against ISIS, since the group was once an al Qaeda affiliate (as Al Qaeda in Iraq and the Islamic State of Iraq), despite its formal split and open warfare with al Qaeda.[11]

A court may disagree with the executive branch's controversial interpretation, however, and conclude that the United States does not have legal authority to hold ISIS combatants indefinitely.[12]

The more reliable and effective option is holding terrorism suspects in U.S. federal prison. U.S. federal prisons currently hold over 400 individuals convicted of terrorism-related offenses,[13] and no prison or local jurisdiction has faced a terrorist threat from holding convicted terrorists. Federal prison officials have testified that the Bureau of Prisons is more than capable of handling dangerous prisoners.

The former American Correctional Association Executive Director James A. Gondles, Jr. testified to Congress about individuals convicted of terrorism-related crimes in 2016, stating that "[n]one has escaped. None has created security threats for the communities near the prison in their city, county, or state."[14]

Transfer Suspects to Foreign Ally Custody

Depending on the circumstances of their capture, it may be appropriate to turn some terrorism suspects over to local partner governments for trial, provided that all international legal obligations regarding their treatment can be met. The United States has a legal

[9] David Hicks pleaded guilty in 2007 and his conviction was annulled in 2015; Salim Hamdan was convicted in 2008 and his conviction was vacated in 2012; Ali Hamza al Bahlul was convicted in 2008, his conviction was vacated in 2015, and one of the charges was reinstated in 2016; Noor Uthman Mohammed pleaded guilty in 2011 and his conviction was disapproved in 2015. See: http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html.

[10] http://www.huffingtonpost.com/daphne-eviatar/fbi-infiltration-of-911-d_b_5679432.html, http://www.chicagotribune.com/news/nationworld/chi-guantanamo-trial-20150211-story.html.

[11] https://assets.documentcloud.org/documents/3911844/8-2-17-Corker-Response.pdf; https://fas.org/man/eprint/frameworks.pdf.

[12] https://www.lawfareblog.com/practical-legal-need-isil-aumf, http://www.heritage.org/defense/report/the-case-law-concerning-the-2001-authorization-use-military-force-and-its.

[13] https://www.nytimes.com/interactive/2016/04/07/us/terrorists-in-us-prisons.html.

[14] http://www.humanrightsfirst.org/sites/default/files/Gondles-statement-for-the-record-April-2016.pdf.

non-refoulement obligation to ensure that any prisoner it turns over to foreign government custody will be treated humanely. In the past, the United States violated this obligation by sending detainees to be interrogated by partner governments that used torture and abuse in a process known as "extraordinary rendition."

There is some evidence that the United States, under the Trump and Obama Administrations, has transferred suspects to allied custody (including to Somali,[15] Kurdish,[16] and Iraqi[17] custody) without adequately investigating their conditions of confinement and interrogation.

As part of a comprehensive detention policy, the administration must ensure that partner governments are not violating detainees' human rights. It can do this through effective and thorough monitoring of detention and interrogation of detainees post-transfer, and by insisting on accountability for any human rights abuses committed by partner security forces.

Conduct Lawful, Humane Interrogations

A successful national security policy depends on effective human intelligence gathering processes and interrogation methods. Any comprehensive detention policy for terrorism suspects must include an interrogation policy for these suspects that abides by domestic and international law, and reflects the consensus that coercive interrogation is unreliable, ineffective, immoral, and damages U.S. interests.

Professional interrogators and intelligence experts have resoundingly expressed their view that coercive methods are not as effective in procuring reliable intelligence and cooperation from suspects.[18]

U.S. law limits all national security interrogations to tactics approved by the Army Field Manual, the U.S. military's interrogation guidelines.[19] It also requires review of the Army Field Manual to ensure that the techniques it includes are lawful, effective, and humane. The law, spearheaded by Senators John McCain and Dianne Feinstein, also requires the U.S. government to provide the International Committee of the Red Cross (ICRC) notification of and access to individuals detained in an armed conflict in a timely manner when they are taken into U.S. custody.

Outside of armed conflict, terrorism suspects taken into custody should be provided a *Miranda* warning after any necessary questioning under the "public safety exception." This exception allows investigators to question a suspect without advising of his/her *Miranda* rights for a short period of time when there is an imminent threat to public safety. Despite these protections, terrorism suspects have provided valuable intelligence to interrogators after being warned of their *Miranda* rights. Interrogations and prosecutions in the federal court system have produced intelligence on terrorist recruiting techniques, finances, tradecraft, training and weapons programs, locations of safehouses and training camps, and vital information about past, current, and future attack plots. All of this information has contributed significantly to stopping terrorist attacks and to the apprehension of terrorism suspects.[20]

[15] https://www.thenation.com/article/cias-secret-sites-somalia/.

[16] http://www.thedailybeast.com/theyre-being-tortured-us-ally-accused-of-abusing-isis-prisoners.

[17] http://abcnews.go.com/International/deepdive/brian-ross-investigates-the-torture-tapes-47429895.

[18] http://www.humanrightsfirst.org/resource/statement-national-security-intelligence-and-interrogation-professionals.

[19] See section 1045 of the National Defense Authorization Act for Fiscal Year 2016: https://www.congress.gov/114/bills/s1356/BILLS-114s1356enr.pdf.

[20] http://jnslp.com/wp-content/uploads/2011/06/01_David-Kris.pdf, https://www.nytimes.com/2017/01/27/us/intelligence-gained-from-somali-terrorist-shows-value-of-civilian-prosecutions.html, https://www.nytimes.com/2017/02/22/us/politics/anwar-awlaki-underwear-bomber-abdulmutallab.html.

Continue to Reassess the Basis of Detention for Remaining Guantanamo Detainees

The Guantanamo Periodic Review Board (PRB), which was endorsed by Congress in the National Defense Authorization Act for the fiscal year 2012,[21] reviews the cases of detainees who have been slated for indefinite detention at Guantanamo. Continued reviews of detainees held in indefinite military detention is also essential to the legitimacy of the detention regime.

The PRB is made up of senior officials from the Departments of Defense, Homeland Security, Justice, and State; the Joint Chiefs of Staff; and the Office of the Director of National Intelligence. If the PRB unanimously determines that the detainee no longer poses a "continuing significant threat to the security of the United States," and other factors (such as the detainee's behavioral history and circumstances that would make reintegration on release more stable) also favor it, the Board may recommend the detainee's transfer out of Guantanamo. Since hearings started, the PRB has cleared 38 detainees (of which 36 have been transferred to their home or third countries) and has recommended 26 additional detainees for continued detention.

The PRB has reviewed the cases of all the remaining Guantanamo detainees who have not been charged in the military commissions. Those detainees whom the PRB has declined to clear for transfer after their first hearings are entitled to subsequent reviews at least once every three years, and their files are reviewed every six months. Only 21 detainees have had second hearings, and of these, almost half were recommended for transfer after their second hearing. Four detainees have also had a third hearing. The PRB process, by assessing the necessity of prisoners' continued detention, ensures that the United States is not holding detainees unnecessarily.

Continue Transfers of Cleared Guantanamo Detainees

Any legitimate detention policy must include the option of transferring detainees in appropriate cases. There are currently five Guantanamo detainees who have been cleared for transfer by all relevant U.S. government offices and agencies. All of these detainees have been held without trial for more than 14 years. Especially in light of the recommendation that transfer would not be a threat to the United States, their transfers should be arranged as quickly as possible.

Reportedly, the State Department plans to close the office of the envoy in charge of negotiating and coordinating transfers of cleared Guantanamo detainee.[22] This office and the resources devoted to its work should be maintained to continue diplomatic efforts to secure agreements to transfer cleared detainees. Transferring cleared detainees would demonstrate the United States' commitment to the rule of law, which in turn would strengthen future national security policies and counterterrorism efforts. It is possible to transfer cleared detainees while mitigating the risks associated with the transfer.[23]

Continuing transfers of cleared detainees also makes fiscal sense. Detention of prisoners at Guantanamo is exorbitantly expensive—the prison cost $445 million to run in 2015, which breaks down to nearly $11 million per detainee annually. This is partially because of the island prison's remote location, which makes everything—from repairs to

[21] See section 1023 of the National Defense Authorization Act for Fiscal Year 2012: https://www.congress.gov/112/plaws/publ81/PLAW-112publ81.pdf.

[22] https://www.bloomberg.com/news/articles/2017-08-28/tillerson-wants-to-cut-special-envoys-in-state-department-revamp.

[23] https://www.humanrightsfirst.org/resource/facts-about-transfer-guantanamo-detainees.

flights for prosecutors, defense teams, media, and observers of military commission proceedings—more expensive.[24] Continuing the transfer process is fiscally wise and strategically sound.

Conclusion

The Trump Administration should follow these guidelines to develop and formalize a detention and prosecution policy that is safe, effective, and respects human rights. The U.S. federal court system has proven itself clearly capable of handling terrorism cases, and effective interrogation (even after a *Miranda* warning) has a strong track record of garnering valuable intelligence that has helped stop terrorist attacks. Likewise, there is no question that federal prisons can safely hold dangerous prisoners, and indeed already do so. Respecting human rights in detention operations is not a hindrance; it is a critical part of an effective strategy to fight terrorism.

[24] http://www.humanrightsfirst.org/resource/cost-guantanamo.