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The Senate Should Reject Another Investigation Into the Treatment of Detainees

Executive Summary

- The amendment offered to the FY06 National Defense Authorization Bill to establish an independent commission to investigate the U.S. treatment of detainees is an unnecessary use of limited resources.
- First, it duplicates the thorough investigation of the matter that has already taken place.
 - The Department of Defense has conducted 12 probes of detainee operations in the last 18 months, including a wholly independent review by the Schlesinger panel.
 - The independent Schlesinger panel specifically found that “there is no evidence of a policy of abuse promulgated by senior officials or military authorities.”
- Next, Congress has already extensively reviewed the issue.
 - At least 100 Members of Congress have visited the Guantanamo detention facility.
 - There have been more than 25 hearings and Member briefings in the Senate, and at least 20 hearings and Member briefings in the House on the matter.
 - There have been more than 40 briefings for Congressional staff.
- Finally, the Department of Defense has already implemented substantial reforms in response to its interactions with Congress and these investigations. It has established the following positions:
 - Deputy Assistant Secretary of Defense for Detainee Affairs;
 - Detainee Affairs Division on the Joint Staff; and
 - Two-star officer responsible for detention operations in Iraq.
- In addition to being unnecessary, the proposed commission carries too great a risk that sensitive operational information will be compromised.
 - Rendition policy, one of the topic areas of the proposed commission, is more appropriately addressed by the Senate Select Committee on Intelligence.
- The proposed commission would actually harm national security by redirecting resources away from the war effort and into the necessary responsive effort to commission inquiries.
 - It would literally pull commanders from the field back to Washington.

Introduction

Senator Levin (D-MI) has proposed an amendment to the FY06 National Defense Authorization Bill to establish an independent commission to investigate the U.S. treatment of detainees.¹ This amendment would create a large, public inquiry, much like the 9/11 Commission, into some of the most sensitive operations of the Global War on Terrorism.

The Bush Administration strongly opposes such a commission because it would be an “unnecessary” and “duplicative” inquiry, and would harm national security efforts by diverting resources from the war to such an inquiry. In fact, the Administration made known this past summer that it would consider a veto if the bill included such a provision.² The Senate should reject the Levin Amendment.

The Senate Should Reject a 9/11-style Commission for Detainee Treatment

In a wartime context, the Supreme Court has cautioned against Congressional action that “interferes with the command of the forces and the conduct of [military] campaigns.”³ Congress likely has the power to enact such legislation, but it should consider the wisdom of doing so, because such action could actually detract from the national security of the United States.⁴ The Administration has made clear that it strongly opposes an effort to establish a national commission on detainee operations because the inquiry “would interfere with the protection of Americans from terrorism by diverting resources from the war to answer [an] unnecessary or duplicative inquiry.”⁵ A commission like the one Senator Levin seeks to create is unnecessary and duplicative because: (1) it replicates the thorough investigation of the matter by the Department of Defense (DOD) and by an independent panel; (2) Members of Congress are already well informed of the issues the commission would investigate; and (3) DOD has already implemented substantial reforms and improvements in response to the findings of individual fault from the previous investigations and oversight.

The Department of Defense Has Thoroughly Investigated Detainee Operations

The Defense Department, including an independent panel it appointed, has conducted 12 probes of detainee operations in the last 18 months, including a wholly independent review. Some of the major reports include the following:

- Former Secretary of Defense James Schlesinger led an independent and comprehensive examination of Department of Defense detention operations. The panel submitted its

¹ S. Amdt. No. 2430 to S. 1042, the FY06 National Defense Authorization Bill (creating the National Commission on United States Policies and Practices Relating to the Treatment of Detainees Since September 11, 2001).

² Statement of Administration Policy for S. 1042 – National Defense Authorization Act for Fiscal Year 2006, pp. 2-3, July 21, 2005, available at <http://www.whitehouse.gov/omb/legislative/sap/109-1/s1042sap-s.pdf>.

³ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866).

⁴ Raoul Berger, *Executive Privilege* 114-15 (1974) (stating that arguments addressing the impracticability of certain legislation in this area “go to the wisdom of the exercise, not the existence, of the congressional power”).

⁵ Statement of Administration Policy for S. 1042, p. 2.

report, titled “Final Report of the Independent Panel to Review DoD Detention Operations,” in August 2004 (“Schlesinger Panel”).⁶

- Major General Antonio M. Taguba submitted one of the first DOD reports following his investigation of the conduct of operations within the 800th Military Police (MP) Brigade at Abu Gharib prison (“Taguba Report”).
- Major General George R. Fay, General Paul J. Kern, and Lieutenant General Anthony R. Jones issued another key report following their investigation of intelligence activities at Abu Gharib (“Fay/Kern/Jones Report”).⁷
- Vice Admiral Albert T. Church, the Navy’s Inspector General, led a “comprehensive review” of Department of Defense detention operations, and submitted his report on March 10, 2005 (“Church Report”).⁸

The most recent investigation was led by Air Force Lieutenant General Randall Schmidt and Army Brigadier General John T. Furlow (“Schmidt-Furlow Report”). Even though their investigation was originally directed to investigate only particular allegations by FBI personnel of abuse at the Guantanamo Bay detention facility, Schmidt and Furlow subsequently were directed not to limit themselves to the particular FBI allegations.⁹ Also, the Schmidt-Furlow report independently researched and verified the Department’s interrogation and detention policies at the Guantanamo Bay detention facility, as outlined in the Church report.¹⁰ These five reports are illustrative of the comprehensive nature of the 12 investigations that have been conducted.

This set of 12 reports, conducted within and outside of the Defense Department, all reach the same conclusion: there simply is no policy within the United States government to abuse detainees. The Church report specifically found no link between interrogation policies and incidents of abuse.¹¹ As the independent Schlesinger panel succinctly concluded, “There is no evidence of a policy of abuse promulgated by senior officials or military authorities.”¹² The most recent official to report on the matter, Lieutenant General Schmidt, confirms this finding in stating that he found “no torture.” Instead, he reported, “Detention and interrogation operations were safe, secure, and humane.”¹³ The President has stated that it is the policy of the United

⁶ The Honorable James R. Schlesinger, et al., *Final Report of the Independent Panel to Review DoD Detention Operations*, August 24, 2004, available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

⁷ *Investigation of Intelligence Activities at Abu Gharib*, available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>.

⁸ Vice Admiral Albert T. Church, Navy Inspector General, Executive Summary, p. 1, available at <http://www.defenselink.mil/news/Mar2005/d20050310exe.pdf>.

⁹ *Investigation into FBI Allegations of Detainee Abuse at Guantanamo Bay, Cuba Detention Facility*, p. 2, June 9, 2005, available at <http://www.defenselink.mil/news/Jul2005/d20050714report.pdf>.

¹⁰ Schmidt-Furlow Report, p. 4.

¹¹ Church Report, Executive Summary, pp. 13-15. As another example of the comprehensive nature of these investigations, this report did not rest with that finding, however, as it specifically went on to investigate what in fact did cause the incidents of abuse. Church Report, Executive Summary, pp. 15-16.

¹² Schlesinger Panel, p. 5.

¹³ Air Force Lieutenant General Randall Schmidt, remarks before Senate Armed Services Committee hearing regarding treatment of Guantanamo Bay detainees, July 13, 2005.

States to treat detainees “humanely,” and all the investigations into the matter confirm that policy.¹⁴

In his amendment, Senator Levin acknowledges these numerous reviews, but then asserts, among other things, that none of the reviews has been independent and comprehensive, and that the reports omit key findings, such as those related to the role of contract employees and intelligence personnel in detainee interrogation and detention. Yet, these assertions clearly do not comport with the facts. First, the Schlesinger panel was an *independent* investigation of DOD detention operations, which the title of its report makes clear. Next, as to the assertion of omitting the role of contract employees, the Church report has a specific section titled “Use of Contract Personnel in Interrogation Operations.”¹⁵ Finally, as one illustration of the comprehensive nature of this body of investigations, the Taguba report specifically recommended that the Department investigate interrogation procedures by military intelligence and contractor personnel at the prison. The Department acted on this recommendation with the Fay/Kern/Jones investigation of intelligence activities at Abu Gharib.

Even without these investigations, the Department of Defense has a disciplinary process in place to hold individuals accountable for their behavior when misconduct occurs in detainee operations in transgression of the policy to treat detainees humanely. For example, there have been within the military justice system referrals to trial by court martial, non-judicial punishments (such as fines and reduction in rank), and administrative actions (namely relief from duty, or discharge). Moreover, this disciplinary process takes place wholly outside of the findings of these investigations. The Schmidt-Furlow report places these disciplinary measures in proper context. In the course of its investigation, it uncovered three incidents that were contrary to regulations that went unpunished by the normal military disciplinary process. These three incidents are out of 24,000 interrogations at the Guantanamo detention facility, or 0.0125 percent of all interrogations there.¹⁶ Moreover, these incidents all took place three years ago under a guidance regime for interrogation practices that is no longer in place. The Schmidt-Furlow report illustrates how the U.S. military is competent to investigate and discipline its own.

Congress Has Extensively Reviewed Detainee Operations

In addition to the Defense Department conducting its extensive review of detainee operations, Members of Congress have had ample opportunity to become well informed on the matter. For example, more than 100 Senators and Representatives have visited the Guantanamo detention facility. Since detention operations began, the Senate has conducted more than 25 hearings and briefings, and the House has conducted at least an additional 20 hearings and briefings. In particular, Secretary Rumsfeld himself has appeared before Congress on this issue. Additionally, Brigadier General Jay Hood, who is the individual with operational responsibility for the Guantanamo Bay detention facility, as well as his superior officer, General Bantz

¹⁴ Memo from President to Vice President, et al., regarding Humane Treatment of Al Qaeda and Taliban Detainees ¶ 3 (Feb. 7, 2002). On the contrary, it is important to recognize that it is the policy of Al Qaeda operatives, as outlined in their training manual (commonly referred to as the Manchester Manual), to allege torture and abuse should they be captured. The Al Qaeda Training Manual, lesson 18, available at http://www.usdoj.gov/ag/manualpart1_4.pdf.

¹⁵ Church Report, Executive Summary, p. 17.

¹⁶ Senator Pat Roberts (R-KS), remarks during Senate Armed Services Committee hearing regarding treatment of Guantanamo Bay detainees, July 13, 2005 (noting an “incident rate of 0.000125”).

Craddock, commander of U.S. Southern Command, have both appeared before Congress on this issue. Finally, there have been more than 40 briefings for Congressional staff on the matter.

The Department of Defense Has Implemented Reforms & Improvements

The Department of Defense has taken action in response to the investigations and oversight. In fact, the Department has methodically reviewed over 400 reforms recommended by the various investigations, and an oversight council regularly reviews the recommendations and detention practices.¹⁷ Most notably, the Department has established a Deputy Assistant Secretary of Defense for Detainee Affairs responsible for detainee policy across the Department, a Detainee Affairs Division on the Joint Staff, and a two-star officer responsible for detention operations in Iraq. Moreover, interrogation and detention procedures have been made standard across theatres. Finally, U.S. troops receive extensive training in religious and cultural practices, such as how to treat the Koran reverently and consistently with the Muslim faith. These actions demonstrate how the Department continually strives to improve its detention practices and procedures.¹⁸

Another Commission Would Hinder the War Effort

Not only does the commission Senator Levin proposes duplicate past inquiries, it poses a great risk to national security in that it will force a political calculus that may result in the public release of very sensitive information. For example, in the course of the numerous and extensive investigations of the detention issue, over 16,000 pages of documents regarding detainee operations have been released. The release of documents in and of itself does not directly harm national security, but the content of the release has included classified interrogation techniques, which only puts Al Qaeda on notice of U.S. interrogation procedures. A Presidential Commission studying this country's intelligence capabilities specifically found that the public disclosure of interrogation techniques is "counterproductive."¹⁹

Senator Levin's amendment also directs the commission to investigate the rendition of detainees, which is a wholly inappropriate topic area for an outside commission to investigate, due to the extreme sensitivity of the matter. First, there is essentially no way to address a matter of such operational sensitivity in a public forum. In that regard, the more appropriate venue of oversight into this matter is the Senate Select Committee on Intelligence. Second, exposing more individuals to the details of this most highly sensitive governmental action only increases the chances that such crucial information will become known to the enemy. This is simply not a risk that should be borne in the global war on terrorism. Finally, the disposition of individuals captured during military operations is the "essence of executive action."²⁰ Since it is the role of

¹⁷ American Forces Press Service, "DoD Constantly Striving to Improve Detainee Operations," June 27, 2005, available at http://www.dod.gov/news/Jun2005/20050627_1866.html.

¹⁸ American Forces Press Service, "DoD Constantly Striving to Improve Detainee Operations," (quoting Matthew C. Waxman, Deputy Assistant Secretary of Defense for Detainee Affairs).

¹⁹ Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Final Report to the President, p. 373 (March 31, 2005).

²⁰ John Yoo, *Transferring Terrorists*, 79 Notre Dame L. Rev. 1183, 1200 (2004).

Congress to conduct oversight, and it has appropriate vehicles for such oversight, Congress should not insert a commission into such matters during wartime.

In addition, the proposed commission would actually harm national security by redirecting resources away from the war effort and into the effort to respond to commission inquiries. The response to such an inquiry would place a heavy burden on key civilian and military personnel both in and out of theatre. It would literally pull commanders from the field back to Washington. This redirection of resources is another unacceptable risk to take in the middle of a war.

Finally, the mere creation of such a public commission would further fuel the propaganda efforts of the enemy. By way of example, Abu Musab al-Zarqawi, the head of Al Qaeda in Iraq, has deliberately misrepresented certain statements regarding the war by U.S. officials in the past by asserting that “even some Members of Congress have announced that the U.S. is losing the war in Iraq.”²¹ There is no reason to risk the possibility that the unnecessary creation of the commission, or any processes it may undertake, could be distorted to provide a propaganda tool to the enemy.

Conclusion

While the Department continually works to improve its policies and operations based on the findings of its vigorous internal assessments and reviews, the amendment by Senator Levin to create a 9/11-style commission to investigate past transgressions is nothing more than a look-back/blame strategy, rather than a look-forward/solution strategy. The proposed commission is unnecessarily duplicative and repetitive of the extensive oversight by Congress and the numerous investigations by the Department of Defense. Moreover, the risk that highly sensitive operational information could be compromised by such a public commission is simply not a risk that should be taken in the middle of a war. In the end, the commission would merely make recommendations for change, but the Department has already responded, and continues to do so, based on its own investigations and Congressional oversight.

Many of these past investigations were completed prior to the 2004 Presidential election. In this regard, the issue of detainee operations and the conduct of the war was clearly before the American public in 2004. The public has had its referendum on this issue, and President Bush won. It is time to move forward, not back. The Senate should reject the amendment to the Defense Authorization bill creating a national commission to investigate detainee operations.

²¹ FBIS report, *Al-Zarqawi Justifies Operations Against Iraqi Forces, Derides President Bush's 'Holy War'*, July 5, 2005.