THE LEGAL ADVISER
DEPARTMENT OF STATE
WASHINGTON

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European Parliament
Committee on Foreign Affairs
Subcommittee on Human Rights
The Chairwoman

Dear Madame Flautre:

Thank you for your invitation to appear before the Committee on Civil Liberties and the Sub-Committee on Human Rights on February 28. I regret that because of a scheduling conflict I will not be able to attend, and appreciate the opportunity to submit this letter instead.

The United States Government is encouraged to see that a large portion of the discussion will be given over to the issue of detainee resettlement. As you know, the United States has made clear that it would like to move to the day that Guantanamo can be closed. The United States Government believes that other countries should take responsibility for their own nationals and for ensuring that they do not pose a threat to the international community. As the Foreign Affairs Committee of the United Kingdom's House of Commons concluded last year in its comprehensive report on Guantanamo, "many of those detained present a real threat to public safety and all states are under an obligation to protect their citizens and those of other countries from that threat. At present, that obligation is being discharged by the United States alone, in ways that have attracted strong criticism . . . ." (Conclusions and Recommendations at 9.) The Committee additionally concluded that "the international community as a whole needs to shoulder its responsibility in finding a longer term solution." (Id.)
(http://www.publications.parliament.uk/pa/cm200607/cmselect/cmfaff/44/4402.htm)

Part of any such solution will have to involve providing resettlement for some of the detainees who remain at Guantanamo. In recent years, the United States Government has transferred more than 500 detainees out of Guantanamo to countries all around the world, leaving a remaining

population of approximately 275. Among this group, however, are approximately 25 individuals who have been cleared for transfer or release, but cannot be repatriated because of longstanding human rights concerns with respect to their countries of origins. It is here that we most need your support.

Over the past year, the U.S. has approached European Union member states on a bilateral basis with the request that you consider taking some of these detainees into your own countries, but so far this effort has not resulted in any transfers. The United States understands the desire of the international community to see Guantanamo closed, and has been working diligently toward that goal, but we cannot do it by ourselves. We seek your help in developing appropriate resettlement options for these individuals, and we hope that Thursday's hearing will be a strong step in that direction.

With respect to the legal topics on Thursday's agenda, because the United States' positions on a number of these points are already widely known, I will just briefly touch on a number of key concepts that may be relevant to your discussion:

General Legal Framework: The first objective noted on your agenda is to "gain an understanding of U.S. international legal obligations in regards to GTMO and foreign detainees."

In reviewing the legal basis for detention it is important to recall that the majority of the detainees whom we have held at Guantanamo were captured in late 2001 or 2002 in or near Afghanistan by U.S. forces or our allies. These military operations constituted a use of military force as part of a legitimate action of self defense by the United States and its allies. Most legal experts no longer dispute that the United States was in a legal state of armed conflict during this period with al Qaeda and the Taliban, which was governed by the law of war, or international humanitarian law. The United States believes that the conflict with the Taliban and al Qaeda continues in Afghanistan and in certain other locations around the world. For this reason, the individuals detained at Guantanamo are held as enemy combatants within an international humanitarian law framework, rather than under the framework of laws that would apply if they had been detained as part of a law enforcement operation.

Our Supreme Court and Congress have established which rules within the law of war apply to our detention activities at Guantanamo. In 2006, the Supreme Court ruled in Hamdan v. Rumsfeld (2006) that the conflict with al Qaeda is of a non-international character and governed by Common Article 3 of the 1949 Geneva Conventions. The treatment and procedural safeguards contained in Common Article 3 are now implemented through the Detainee Treatment Act of 2005 (DTA), the Military Commissions Act of 2006 (MCA), and executive branch directives and orders. Among the protections that apply to Guantanamo detainees is a prohibition against the torture or other cruel, inhuman, or degrading treatment or punishment of individuals held in U.S. custody anywhere in the world. As discussed in greater detail below, detainees also have the right to contest their status as enemy combatants before combatant status review tribunals (CSRTs), and those charged before military commissions benefit from safeguards derived from our own court-martial system; moreover, both CSRT determinations and military commission convictions may also be appealed to federal court. Together these safeguards more than satisfy the requirements of Common Article 3.

As concerns the applicability of international human rights instruments, the United States has offered detailed explanations of our legal positions concerning the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment (CAT) to the U.N. Human Rights Committee and U.N. Committee Against Torture. With respect to the ICCPR, we have noted that Article 2, Paragraph 1 plainly establishes that States Parties are required to respect and ensure the rights in the Covenant only to individuals who are both within the territory of a State Party and subject to its jurisdiction. The negotiating record of the Covenant makes clear that the inclusion of the reference to "within its territory" in Article 2(1) was adopted as a result of a proposal made over fifty years ago by U.S. delegate Eleanor Roosevelt – specifically to ensure that States Parties would not be obligated to implement the Covenant outside their territories. With respect to the CAT, we have explained that the U.S. regards the law of war as furnishing the lex specialis for armed conflict detention operations, and noted that countries negotiating the Convention were principally focused on dealing with rights to be afforded to people through the operation of ordinary domestic legal processes and were not attempting to craft rules that would govern armed conflict. Indeed, at the conclusion of the negotiation of the Convention, the United States made clear "that the convention . . . was never intended to

apply to armed conflicts. . . ." The United States emphasized that having the Convention apply to armed conflicts "would result in an overlap of the different treaties which would undermine the objective of eradicating torture." No country objected to this understanding.

Whatever our technical understanding of these two instruments, however, the United States fully understands and accepts its humane treatment obligations under Common Article 3, and has as a matter of U.S. law prohibited any U.S. personnel, wherever located, from engaging in torture or cruel, inhuman, or otherwise degrading treatment of individuals in its custody.

Evidentiary Topics (use of statements allegedly made under torture): In addition to U.S. legal prohibitions against torture or other cruel, inhuman, or degrading treatment or punishment, there are additional safeguards that apply with respect to the use of coerced evidence in military commissions trials.

In particular, the MCA provides that any evidence obtained after December 30, 2005 either through torture or through cruel, inhuman, or degrading treatment or punishment is inadmissible in military commission proceedings. To the extent that allegedly coerced evidence was obtained prior to that date, it is inadmissible unless the military judge makes a specific finding that the statement is reliable and probative, and that the interests of justice would best be served by the statement's admission. Any proceedings in which such determinations are made will be open to the public.

It also bears mention that all military commission proceedings benefit from safeguards that are based on our own court-martial system, including that they are managed by experienced military judges (the independence of whom has already been well established) and that the accused are defended by experienced military counsel. Moreover, all MCA convictions (including any conviction based on evidence that has been alleged to be coerced) may be appealed to the U.S. Court of Appeals for the D.C Circuit and ultimately to the Supreme Court. In light of these considerations, it is important to wait to see how the commissions will operate in practice, rather than raise theoretical concerns.

Combatant Status Review Tribunals (CSRTs): In order to ensure that we are holding individuals who meet the criteria for detention, every detainee in Guantanamo has his case reviewed by a CSRT, which determines whether a detainee is properly classified as an enemy combatant.

Under the rules that govern CSRT proceedings, each detainee is given notice of the factual basis for his designation as a combatant, as well as an opportunity to testify, call reasonably available witnesses, and present relevant and reasonably available evidence. Each detainee receives assistance from a military officer designated as his "personal representative." The three voting members of a Tribunal are sworn to render an impartial decision, and cannot include officers who were previously involved in the apprehension, detention, interrogation, or determination of status of the detainee. A military officer designated the "recorder" is charged with presenting both evidence that the detainee should be designated as an enemy combatant and that he should not be so designated. The CSRT process has led to determinations that 38 detainees originally held at Guantanamo were no longer enemy combatants. These detainees have been transferred from Guantanamo.

In addition to these safeguards, CSRT procedures are subject to judicial review under the DTA. The DTA gives every detainee the right to appeal his CSRT determination to the U.S. Court of Appeals for the D.C. Circuit, and ultimately to the U.S. Supreme Court, for a determination regarding whether the CSRT practices and procedures were followed, and, to the extent applicable, whether those procedures are consistent with the laws and Constitution of the United States. The D.C. Circuit, ruling in Bismullah v. Gates, recently interpreted quite broadly the record it will review in these cases. Although the U.S. government has appealed this decision to the U.S. Supreme Court, regardless of the outcome of that litigation, the DTA's judicial review provisions are sufficiently broad to allow for meaningful review of CSRT determinations.

Habeas: The DTA and the MCA together remove the ability of detainees held at Guantanamo to bring habeas proceedings in U.S. court, replacing it with a judicial review mechanism that (as noted above) allows for appeal to the D.C. Circuit of both CSRT determinations and military commission convictions. The U.S. Supreme Court has taken up the question of whether this constitutes an unconstitutional suspension of the writ of habeas corpus in the pending Boumediene v. Bush case.

Whatever the outcome of that case, it should be noted that the procedural protections that we have created for purposes of the CSRT process—which afford the detainee notice of the case against him, an opportunity to rebut it with the assistance of a U.S. military officers, and a right to appeal to the civilian courts of the United States—are both substantial and to some degree unprecedented in the history of armed conflict. The D.C. Circuit's decision in Bismullah will, unless overturned by the Supreme Court, expand the scope of judicial review yet further.

As the United States Government has argued to the Supreme Court, even if the Court takes the unprecedented step of finding that the Constitution protects the rights of non-U.S. citizens detained as enemy combatants outside the territorial United States, we believe it should find that the DTA judicial review mechanism is a fully adequate and effective substitute for habeas.

Non-refoulement: While as a technical matter the U.S. government's non-refoulement obligations under the CAT do not reach Guantanamo transfers, it is the U.S. government's firm policy not to transfer detainees from Guantanamo to countries where we have determined it is more likely than not they will be tortured.

In the furtherance of this policy, the U.S. government will generally seek humane treatment assurances in any case where an individual is being transferred with the expectation that he will be subject to post-transfer detention or other security measures. We assess the credibility of the assurances we received in light of, among other things, a country's human rights record, its record of compliance with past assurances, and the risk factors presented by any particular detainee. We also give each detainee an opportunity to express individualized concerns about transfer to a third-party interviewer (and will halt transfer if we determine based on these concerns that he is more likely than not to be tortured by the receiving government) and conduct appropriate post-transfer follow-up in the receiving country. The information that we receive through the follow-up process informs decisions about future transfers. We have, in fact, not transferred detainees who we believe are more likely than not to be tortured upon their return.

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I hope the above information will be useful and look forward to progress on the important issue of European Union support for the resettlement of detainees.

Sincerely,

John B. Bellinger, III