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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

July 7, 2021

The Honorable Merrick B. Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530

Dear Attorney General Garland:

I urge you to ensure that the Department of Justice's approach to ongoing detention at U.S. Naval Station Guantanamo Bay reflects the values of our nation. Indefinite detention is antithetical to the ideals of liberty that the United States of America was founded upon. Every day that the prison remains open, its existence calls into question our commitment to human rights and the rule of law.

Unfortunately, for nearly two decades, executive branch lawyers, policymakers, and the courts have continued to rationalize indefinite detention at Guantanamo with numerous legal theories and justifications. The result of this approach is that we have continued to hold dozens of men without charge, trial, or access to due process. Eleven of these men have reportedly been approved for transfer—in some cases more than a decade ago—and yet they still languish there.¹

For years, the Department has sought to advance legal theories to justify detention until the end of a war with no definite end; the detention as “enemy combatants” of individuals who are not alleged to have taken up arms against us; and the denial of even the basic protections of due process. Further, the Department has frequently opposed the habeas petitions of detainees who are elderly, ill, or already approved for transfer.

The Department's legal positions should reflect our nation's commitment to liberty and the rule of law, recognizing that our nation is strongest when it adheres to its core values. Legal positions or arguments that may have once seemed justified to some in the aftermath of 9/11 must be viewed in light of current circumstances. As we approach the 20th anniversary of those attacks and the withdrawal of U.S. forces in Afghanistan, the Department should revisit its positions and arguments regarding the continued authority to detain men without charge or trial—and without due process—at Guantanamo.

¹ Carol Rosenberg, *Two More Guantánamo Detainees Are Cleared for Transfer to Other Nations*, N.Y. TIMES (June 17, 2021), <https://www.nytimes.com/2021/06/17/us/politics/guantanamo-detainees-transfer.html>.

Most imminently, the Department should revisit its argument that detainees have no right to due process. For nearly two decades, our nation has failed to provide due process to detainees held at Guantanamo, resulting in the use of unreliable hearsay and coerced or torture-derived evidence and a shamefully low burden of proof for depriving men of their liberty.² These inadequate standards and procedures have made it nearly impossible for detainees to prevail in litigation challenging their detention,³ and have significantly hindered efforts to close the prison.⁴ With the issue squarely before the full U.S. Court of Appeals for the District of Columbia Circuit,⁵ the Department has the opportunity and the responsibility to adjust course.

In its 2008 decision in *Boumediene v. Bush*, the Supreme Court held that the Suspension Clause of the Constitution applies to Guantanamo, enabling detainees to challenge the legality of their detention through habeas corpus.⁶ In reaching this conclusion, the Supreme Court applied its longstanding functional approach to determine the applicability of the Constitution to non-citizens outside of the United States and held that “[i]n every practical sense Guantánamo is not abroad; it is within the constant jurisdiction of the United States.”⁷

The Supreme Court did not directly rule on the applicability of the Due Process Clause to Guantanamo detainees in *Boumediene*, but the Court’s reasoning applies with equal force to that issue, given the close relationship between habeas and due process rights.⁸ As the Court noted in *Hamdi v. Rumsfeld*, the writ of habeas corpus can be employed “as a mechanism of judicial review” and the Due Process Clause “informs the procedural contours of that mechanism in [those instances].”⁹

It is well past time for the Department to reconsider its approach to the applicability of the basic safeguards of due process to the men who remain imprisoned without charge or trial at Guantanamo, as well as other positions that help perpetuate this moral stain on our nation.

Sincerely,



Richard J. Durbin

Chair

U.S. Senate Committee on the Judiciary

² Petition for a Writ of Certiorari, *Ali v. Biden*, No. 20-888 (U.S. Dec. 28, 2020).

³ *Id.* at 22-24.

⁴ Jonathan Hafetz, *Upcoming Cases Provide Opportunities to Reassess the Application of the Due Process Clause at Guantanamo*, JUST SEC. (Mar. 3, 2021), <https://www.justsecurity.org/75106/due-process-at-guantanamo/>.

⁵ Order, *Al-Hela v. Biden*, No. 19-5079 (D.C. Cir. Apr. 23, 2021).

⁶ *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

⁷ *Id.* at 768-69.

⁸ Hafetz, *supra* note 4.

⁹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004).