United States Senate
WASHINGTON, DC 20510

July 12, 2011

The Honorable Leon Panetta
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Dear Secretary Panetta:

Media reports last week about the capture, interrogation on board a Navy ship for more than two months, and decision to transfer a detainee from military custody overseas to the United States for civilian trial raise a number of serious policy issues.

We are very concerned that this policy appears to be a circumvention of the clear intent of many in Congress that terrorists captured abroad under the Authorization for Use of Military Force should not be brought into the United States for trial. Further, there appears to be no precedent for this action. In addition to the concerns listed below, the American people must be assured that terrorists are not brought into the United States for trial only to be released as a result of an acquittal, a short sentence, or some other action such as inability of the United States to deport an individual that allows the terrorist in the United States to remain here and be released into the general population.

Recent testimony by Vice Admiral William H. McRaven before the Senate Armed Services Committee highlighted these issues even before the decision to transfer Ahmed Abdulkadir Warsame to New York for civilian trial was announced last week. According to Admiral McRaven, detention of high-value terrorists who are captured by U.S. military forces outside Afghanistan and Iraq is subject to case-by-case decisions about where detention could be carried out because the United States lacks an overarching policy for how to handle such detainees. Admiral McRaven was not the first to note the obvious negative impacts of the lack of such a policy. Your predecessor, Secretary Gates, the Chairman of the Joint Chiefs of Staff, Admiral Michael Mullen, and you, have all recently testified before Congress that the United States lacks a clear answer to this question. We believe this is an intolerable situation.

In answers to questions at his nomination hearing, Admiral McRaven testified, "In many cases, we will put them on a naval vessel and we will hold them until we can either get a case to prosecute them in U.S. court or…." In response to a follow-up question concerning how long detainees could be held at sea, Admiral McRaven replied, "Sir, I think it depends on whether or not we think we can prosecute that individual in a U.S. court or we can return him to a third-party country." McRaven concluded by saying, "If we can't do either one of those, then we'll release that individual and that becomes the—the unenviable option, but it is an option."

In light of this testimony as well as that of other senior officials, and the specific circumstances of the Warsame case, we ask that you provide answers to the following questions.

Does the United States have an established, consistent policy for detaining terrorists captured or turned over to U.S. military forces outside the United States, particularly those captured outside Afghanistan or Iraq?

Do disposition options differ based whether a detainee may be held under the Authorization for Use of Military Force or the President's constitutional authority as Commander-in-Chief? If so, how and why?

Is transferring such a detainee to the detention facility at Guantanamo Bay an option that is presented for consideration to the President's senior national security advisors?

If not, what prevents that option from being considered given that the detention facility at Guantanamo was created to house law of war detainees and the closure of Guantanamo is unlikely to be achieved until a broader solution to the disposition of existing long-term detainees held there is developed?

In how many cases since January 2009 have captured terrorists been held on Navy ships, excluding those who were captured as part of anti-piracy operations?

How many such detainees held at sea were transferred to a third-party country?

What were the terms of such transfers, if they occurred, and did such transfers result in trial, incarceration, or other measures to mitigate the threat to the United States and its allies?

How many such detainees have been released; to which countries or foreign entities were such detainees released; and what were the terms and mitigation measures applied to such releases? We note that at least one individual captured with Warsame was released within a few days, according to media reports.

If a detainee who has been held and interrogated under the law of war is acquitted as a result of a civilian trial in the United States, will that individual return to military custody for detention under the law of war?

Would individuals who have served a modest criminal sentence or those awaiting deportation be returned to military custody?

If such a return to military custody takes place, where will the detainee be held?

Thank you for your prompt attention on this matter.

Sincerely,

John McCain
United States Senator

Mitch McConnell
United States Senator

Jon Kyl
United States Senator

John Thune
United States Senator

Joseph Lieberman
United States Senator

James Inhofe
United States Senator

Jeff Sessions
United States Senator

Saxby Chambliss
United States Senator

Roger Wicker
United States Senator

Scott Brown
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Rob Portman
United States Senator

Kelly Ayotte
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Susan Collins
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Lindsey Graham
United States Senator

John Cornyn
United States Senator

David Vitter
United States Senator

Orrin Hatch
United States Senator

Tom Coburn
United States Senator

James Risch
United States Senator

Daniel Coats
United States Senator

Marco Rubio
United States Senator

Jim Webb
United States Senator

Richard Burr
United States Senator