

STATEMENT OF BRUCE FEIN

RE: CHINESE INTERROGATION VS. CONGRESSIONAL OVERSIGHT: THE UIGURS AT
GUANTANAMO

BEFORE THE HOUSE COMMITTEE ON FOREIGN RELATIONS

JULY 16, 2009

Dear Mr. Chairman and Members of the Committee:

I am pleased to share my views on the authority of Members of Congress to interview Guantanamo Bay detainees for the purpose of detecting government interrogation or other abuses, enacting remedial legislation, for example, criminally punishing certain interrogation techniques, or casting sunshine on the conditions of detention for the sake of educating the public. Sunshine is the best disinfectant.

Congress is empowered to insure access for all its Members to Guantanamo Bay detainees for interviews by enacting an appropriations bill declaring as follows: "No monies of the United States shall be expended to detain any persons at Guantanamo Bay who is not made available for interviews to any requesting Member of Congress to obtain information relevant to disclosing executive branch abuses or maladministration, legislation, or the informing function of Congress." I would recommend the enactment of such a statute. It would clearly pass constitutional muster. Congress has routinely employed the power of the purse in furtherance of legitimate legislative objectives. For instance, the Clark Amendment enacted in 1975 clipped CIA covert operations in Angola. The various Boland amendments in the 1980s invoked appropriations bills to restrain executive branch efforts to overthrow Nicaragua's Sandinista regime. At present, Congress could require the release of all Guantanamo Bay detainees by enacting a law which declares: "No monies of the United States may be expended to detain any individual at Guantanamo Bay."

Congressional committees, like the House Foreign Relations Committee, are also empowered to subpoenas to individuals in the custody of the executive branch to testify in

public or for private interviews in furtherance of a legitimate legislative objective. Thus, Guantanamo Bay detainees could be subpoenaed by the Committee for public testimony or interviews. Even if the executive branch worried that the subpoenas might make its interrogation of the detainees less effective, the Constitution confers supremacy on the legislative oversight function. The President's various tools for faithfully executing the laws or protecting the nation from invasion or destruction are 100 percent dependent on congressional legislation. A prominent example is the congressional authority to grant immunity to witnesses—even if the immunity impedes or frustrates a federal prosecution. Ditto for congressional authority to pass amnesty legislation for war crimes or other violations of law as affirmed by the Supreme Court in *The Laura* (1885).

Without supporting legislation or sister official legislative authority, however, an individual Member does not have inherent authority to insist on access to executive branch facilities or persons in executive branch custody beyond that enjoyed by the general public. The Supreme Court has held that the First Amendment is not tantamount to a Freedom of Information Act in *Houchins v. KQED* (1978). That does not mean that comity among co-equal branches would not dictate the Pentagon's accommodating a Member's request to interview a Guantanamo Bay or other detainees in the custody of the United States. A separation of powers does not mean one branch treating the other as the enemy. As Justice Robert Jackson remarked in *Youngstown Sheet & Tube v. Sawyer* (1952): "The actual art of governing under our Constitution does not, and cannot, conform to judicial definitions of the power of any of its branches based on isolated clauses, or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will

integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”

The Pentagon’s spokesman scoffed in response to a Member’s request to interview Uighur detainees at Guantanamo Bay that “no congressman can interrogate or question detainees because it is not part of their oversight responsibilities.” That arrogant response betrays an attitude of executive supremacy at war with the Constitution’s checks and balances that has found expression in a spiraling number of arenas since 9/11. Neither the Pentagon nor even the President of the United States can delimit or define the legislative responsibilities of Congress. Correspondingly, Congress cannot define the executive powers of the President, for instance, declaring that the President cannot veto legislation enacted unanimously by the House and Senate. But Congress does enjoy authority to regulate the exercise of executive power through the Necessary and Proper Clause of Article I, section 8, clause 18.

In sum, the Constitution crowns Congress with ample power to insure that every Member possess an absolute right to access to detainees in United States custody for the purpose of interviewing in search of evidence of executive branch wrongdoing or crimes, the need for remedial legislation, or oversight for the purpose of education or deterrence. There is not a crumb of constitutional authority behind the Pentagon’s assertion that congressional interviewing of Guantanamo Bay detainees is beyond the legislative writ of Article I.