United States Senate Committee on the Judiciary
Subcommittee on the Constitution

Hearing on "The Legal, Moral and National Security Consequences of 'Prolonged Detention'"

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Chairman Feingold, Ranking Member Coburn, and esteemed Members of this Subcommittee: Thank you for inviting me to testify at this hearing on the legal, moral and national security consequences of prolonged detention without trial, and for your leadership on this important issue facing our country.

Last week, another detainee, Mr. Muhammad Salih, committed suicide in protest of his seven-year detention without criminal charge on Guantanamo, bringing to six the total number of deaths on the base.

To the world, Guantanamo is not a place. Guantanamo stands for prolonged detention outside accepted standards of the rule of law and fundamental justice. "Closing Guantanamo" therefore requires more than simply closing a particular prison facility. It requires fundamentally redirecting U.S. policy regarding terrorism suspects. If this Administration closes Guantanamo by creating another system of prolonged detention without trial – even a system with substantially more extensive procedural protections – to the world Guantanamo will have been remade in its own image.

I am a scholar of U.S. constitutional law, international law and human rights law, and co-coordinator of the Working Group on Detention Without Trial, a group of legal and other experts who were convened to examine the legal and policy implications of the detention and trial of terrorism suspects. The Working Group is a joint project of the Human Rights Institute at Columbia Law School, the International Law and the Constitution Initiative at Fordham Law School, and the National Litigation Project at Yale Law School. We submitted written testimony regarding detention before this Committee at the rule of law hearing last fall,[1] and I am attaching

[1] Reprinted in slightly revised form as *Scholars' Statement of Principles for the New President on U.S. Detention Policy: An Agenda for Change*, 47 COLUM. J. TRANSNAT'L L. 339 (2009) (Catherine Powell, Reporter).

a recent draft report of our Working Group regarding comparative detention practices to my testimony today.[2]

I am here to ask this Congress to resist any effort to authorize the United States to establish an indefinite detention system for terrorism suspects seized outside a traditional battlefield. Neither our Constitution nor international law contemplates such a power; this Congress has never authorized such a power, and the power is not recognized by our allies in North America and Europe.

I would like to emphasize up front that I am not testifying primarily regarding the power of our military to seize and detain Taliban or al Qaeda fighters in Afghanistan. The U.S. Supreme Court concluded in *Hamdi v. Rumsfeld*[3] that international law allows states to apprehend enemy troops in a traditional conflict and to hold them until the end of that conflict. The United States urgently needs to adopt procedural protections for such detentions consistent with our Constitution, the law of the territorial state, and international humanitarian and human rights law,[4] through a status of forces agreement with Afghanistan or equivalent regime. But rather than detentions in Afghanistan, it is the claim of a roving power to detain persons seized outside a traditional theater of combat that has brought the United States widespread international condemnation, eroded our moral authority, and inspired new converts to terrorism.

My testimony today makes three points: (1) that prolonged detention outside the battlefield is unwarranted as a matter of law and policy; (2) that such detention is not supported by our democratic allies and undermines both their cooperation in counterterrorism and our moral authority as a leader in human rights, and (3) that the problems on Guantanamo, as challenging as they are, do not justify the creation of a new detention regime.

I. Prolonged Detention is Unwarranted as a Matter of Law and Policy

Our Constitution does not recognize a roving power to detain dangerous persons as a substitute for criminal trial. "Liberty is the norm"[5] under our legal system, and the protection of personal liberty against arbitrary confinement is one of the hallmarks of our Constitution. The "charge and

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[2] *The Company We Keep: Comparative Law and Practice Regarding the Detention of Terrorism Suspects*, A Draft White Paper of the Working Group on Detention Without Trial (2009) (Hope Metcalf, Reporter) (Appendix A).

[3] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

[4] E.g., Jelena Jejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Convlic and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375 (2005).

[5] *U.S. v. Salerno*, 481 U.S. 739, 755 (1987).

conviction" paradigm – with its network of constraints on governmental power – is the norm. Predictions of future dangerousness, unlike proof of past criminal acts, are notoriously unreliable.[6] While the government has been recognized as having authority to confine persons without criminal charge in certain historically circumscribed exceptions, such as civil commitment[7] and quarantine for public health purposes,[8] these exceptions have been "carefully limited" and "sharply focused."[9] Danger alone has never sufficed; nor has the government's understandable desire to overcome the barriers imposed by the Constitution on prosecution or conviction.

The power to detain enemy belligerents until the end of an armed conflict, long recognized under international humanitarian law, is one such exception. This authority is based on the presumption that the exigencies of armed conflict require a power to detain – because privileged belligerents cannot be criminally prosecuted for waging war; because even where criminal prosecution is available, evidence is difficult to properly preserve and an obligation to prosecute would be disruptive to ongoing military operations, and because from a humanitarian perspective, incapacitating killing enemy soldiers through detention is preferable to killing them.

Such detention, however, traditionally has been constrained by four presumptions: (1) Enemy belligerents are easy to identify, thus limiting the possibility of error. In a traditional international armed conflict, enemy belligerents are generally identifiable through objective indicia: they wear the uniform or insignia of the enemy state; they carry the passport or

[6] Empirical studies demonstrate that "preventive" detention determinations that rely on assessment of future dangerousness generate unacceptably high levels of false positives (i.e., detention of innocent people). *See, e.g.*, Jeffrey Fagan & Martin Guggenheim, *Preventive Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 438 (1996); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 386 (1990) ("The high level of false positives demonstrates that the ability to predict future crimes—and especially violent crimes—is so poor that such predictions will be wrong in the vast majority of cases. Therefore, judges should not use them as an independent justification for major deprivations of liberty such as detention.").

[7] *Addington v. Texas*, 441 U.S. 418 (1979).

[8] *O'Connor v. Donaldson*, 422 U.S. 563, 582–83 (1975) (Burger, J., concurring). Detention based on dangerousness in the immigration context is permitted only during the pendency of immigration proceedings, not as a free-standing authority to detain immigrants who are not in proceedings. *Carlson v. Landon*, 342 U.S. 524, 536 (1952). *See also* Immigration and Nationality Act (INA) § 236A, 8 U.S.C. § 1226A (2008) (added by the Patriot Act and permits detention based on certification by the Attorney Generally, but expressly requires that immigration or criminal charges be filed within seven days, and that habeas be available to challenge the certification.) For further discussion, see *Scholars' Statement*, *supra* note 1, at 350-51.

[9] *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992) (discussing *Salerno*, 481 U.S. at 755).

identification of that state; they are captured while waging war on behalf of the enemy state. (2) The conflict will be limited to a geographically defined space. (3) Detention may last only until the end of the conflict. (4) Detention may only be for the purpose of preventing return to the battlefield.

Although in a conflict with non-state forces the enemy may not be in uniform, these principles generally still apply. The detention authority recognized by the Supreme Court in *Hamdi* was based on these traditional criteria: Yaser Hamdi was allegedly detained while taking up arms against the United States during a traditional conflict in Afghanistan.

This authority to detain becomes stretched impossibly, however, when extended to persons seized outside a theater of armed conflict. The risk of error becomes exponentially greater. Persons who are seized outside the area of conflict, while not directly participating in armed conflict, but while in their homes, at work, or on the street, lack any objective indicia of combatency, making the lack of criminal process to determine their culpability all the more problematic. The military imperatives that justify tolerating detention in armed conflict also do not pertain. Outside of the theater of combat the regular criminal justice system is more readily available. Ordinary courts presumably are open and functioning at the locus of the arrest, as well as in the United States. Military exigencies do not complicate the preservation of evidence, and pursuing such a criminal prosecution does not disrupt ongoing military operations.

These considerations are further compounded if the claimed conflict is a "global" conflict against al Qaeda, the Taliban and affiliated groups -- participants are much harder to identify, the enemy is not geographically contained, and an "end" to the conflict may not occur in our lifetime. The President recognized in his May 21 speech that “we know this threat will be with us for a long time.” Under these circumstances even if non-battlefield detentions could be contemplated under the international law of armed conflict, they likely would be unconstitutional.[10] Falling far outside any traditional exceptions to the charge-and-conviction paradigm, the circumstances of non-battlefield criminal acts simply do not provide a compelling justification for permitting the government to circumvent the traditional constraints of the criminal law.

II. Comparative Prolonged Detention is Not Supported by Our Democratic Allies

Prolonged detention of non-battlefield detainees is viewed as illegitimate by the advanced democracies who are our allies and undermines their cooperation with our global counterterrorism efforts. Proponents of a new U.S. system of “preventive detention” often claim

[10] Cf. *Hamdi*, 542 U.S. at 521 (“If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.”).

that other countries employ similar tactics. But as detailed in the white paper that I have appended to this testimony,[11] no other European or North American democracy has resorted to long-term detention without charge outside of the deportation context. Our closest allies—including the United Kingdom, France, Spain, Germany, Australia, and Canada—do not resort to such detention. Preventive detention in these countries is a matter of days, not months or years. France restricts detention of terrorism suspects without charge to 6 days; Spain limits pre-charge detention to 13 days. Germany, Denmark, and Norway apply ordinary criminal procedures to suspected terrorists. Australia limits detention without charge to 14 days and bars interrogation in that period, while Canada narrowly restricts detention to the immigration context for aliens who have been ordered removed but cannot be deported. In the United Kingdom, which has the lengthiest term of preventive detention in Europe, detention without charge is limited to 28 days, and still must be conducted as part of a criminal investigation. An effort last year to extend the detention period to 42 days was vigorously opposed by members of both parties.

Although the U.K. and Canada have both held suspected terrorists for extended periods of time pending deportation, neither country detained anyone for as long as the US has already detained people at Guantanamo, and neither country is currently holding anyone in such detention. The U.K. detention scheme pending deportation, which covered a total of 17 suspects, was invalidated by the House of Lords in 2004. The Canadian scheme of detention pending deportation covered fewer than 10 people post-September 11, with most of them being held for fewer than two years.

Among advanced democracies, only Israel and India have adopted long-term detention systems for terrorism suspects. Both countries have done so based on an emergency security regime inherited from British colonial rule, and Israel has done so in the context of an ongoing threat since the country's inception. Both regimes are highly controversial, and the United States State Department consistently has criticized the practices of both countries. (See Appendix B).

Adoption of a prolonged detention regime in the face of rejection of such a system by our European and Canadian allies will undermine their willingness to cooperate with the United States in intelligence sharing and the transfer of terrorism suspects, as well as in the relocation of Guantanamo detainees. European allies participating in the conflict in Afghanistan already transfer persons who are seized directly to Afghan custody, rather than transfer them to the United States. And Germany has agreed to extradite terrorism suspects to the United States only with assurances that the suspect will not be transferred to prolonged detention on Guantanamo. Last week, our European allies took steps toward assisting the United States in closing Guantanamo by facilitating the acceptance of detainees into European countries, but they did so

[11] See *The Company We Keep*, *supra* note 1. See also Stella Burch Elias, *Rethinking 'Preventive Detention' from a Comparative Perspective: Three Frameworks for Detaining Terrorist Suspects* (2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1406814.

with the expectation that the United States would conduct "a thorough review of U.S. counter-terrorism policies consistent with the rule of law and international law in the expectation that the underlying policy issues would be addressed."[12] Our European allies have clearly signaled that they do not want to see business as usual. The adoption of prolonged detention for some of the Guantanamo detainees thus will not help close Guantanamo. It instead would make European states less willing to accept some of the burden in receiving detainees, leaving us still more individuals to detain.

Most important, there is no evidence that preventive detention works. As detailed in our draft white paper, comparative studies of terrorism stretching back more than twenty years have concluded that draconian measures—such as prolonged detention without trial—are not proven to reduce violence, and can actually be counterproductive. The United Kingdom, in particular, renounced the use of long-term detention of terrorism suspects in Northern Ireland in 1975 after concluding, in the words of a former British Intelligence Officer, that "[i]nternment barely damaged the IRA's command structure and led to a flood of recruits, money and weapons" to the IRA.[13]

Mr. Chairman, in your May 22 letter to President Obama, you correctly observed that prolonged detention "is a hallmark of abusive systems that we have historically criticized around the globe." Indefinite detention is indeed a hallmark of repressive regimes such as Egypt, Libya, and Syria, which presently hold hundreds of people in prolonged detention, as well as notorious past regimes such as apartheid-era South Africa, which held tens of thousands of government opponents in preventive detention as security threats during the last decades of white rule. The use of prolonged detention also commonly goes hand-in-hand with other forms of human rights abuse such as the use of torture and cruel, inhuman or degrading treatment.

Since their establishment in the 1970s, our State Department's annual Country Reports on Human Rights Practices have consistently highlighted and critiqued the use of preventive detention in the absence of criminal charge or trial by other states around the globe. In Appendix B to this testimony, I have collected examples of the State Department's critiques of the use of preventive detention for terrorism and other purposes in the period since September 11, 2001. In the 2008 Report, which was issued by the Obama Administration in February of this year, the State Department criticized the use of short or long term detention for terrorism-related purposes in Australia, India, Italy, Nepal, Pakistan, Singapore, and Syria. The Nepal report, for example, notes that for security purposes, "the government may detain persons in preventive detention for

[12] Council of the European Union, Conclusions of the Council and of the representatives of the Governments of the Member States on the closure of the Guantanamo Bay Detention Center, June 4, 2009.

[13] *The Company We Keep*, *supra*, at 5 & n. 21.

up to six months without charging them with a crime," and that a "court may order an additional six months of detention before the government must file official charges." Singapore law "gives broad discretion to the minister for home affairs, at the direction of the president, to order detention without filing charges if it is determined that a person poses a threat to national security. The initial detention may be for up to two years and may be renewed without limitation for additional periods of up to two years at a time." And in Syria, persons arrested for political or national security reasons "were detained incommunicado for prolonged periods without charge or trial."

The U.S. detentions on Guantanamo for the past seven years have severely hampered the United States' ability to credibly criticize such practices. The critical question for our country going forward is whether we will break with these past practices sufficiently to restore our credibility as an international leader in human rights. By contrast, if United States accepts the premise that we may incarcerate people without trial in order to keep us safe, we would encourage other government's use of prolonged detention in response to security threats, both real and perceived. This could be equally true for a country like Mexico in addressing violent drug-related activities and for Russia in dealing with Chechen rebels.

We have already seen repressive governments emulate our past policies. In Egypt, President Mubarak cited U.S. post-9/11 security measures to justify renewing that country's state of emergency. In Libya, during his 2002 address to the nation, Libyan head of state Mu'ammar Qaddafi bragged to the Libyan public that he was treating [terrorist suspects] "just like America is treating [them]." And in December 2007, when U.S. officials criticized Malaysia's decision to arrest and detain five Hindu rights activists under that country's administrative detention law, Malaysia's deputy prime minister pointed immediately to the detention of terrorist suspects at Guantanamo, saying that he would not feel the need to explain his country's detentions as long as Guantanamo detainees were still being held without trial.

In sum, should the United States take the unprecedented step of implementing indefinite detention without trial for terrorism suspects, it would have profound consequences for the rule of law globally and for U.S. foreign policy. By acting outside accepted legal standards, we would embolden other nations with far worse human rights records to adopt sweeping regimes for long-term detention. Further erosion of the rule of law in nations such as Egypt and Pakistan could further destabilize these states, with dire consequences for global security. Moreover, taking a position so far out of step with our European and North American allies would undermine our ability to gain their critical cooperation in international counterterrorism efforts.

III. Closing Guantanamo Does Not Warrant Establishing a New Detention Regime

Guantanamo should never have happened, and the fundamental errors of law and policy that led to its creation are well known: the Administration claimed a sweeping power to detain terrorism suspects from around the globe; detainees were denied relevant protections of the Geneva conventions, including the protection of Common Article III; detainees were denied any legal process to determine the validity of their detention – including habeas corpus and the minimal determination required under Article V of the Third Geneva Convention; detainees were denied the protection of the U.S. Constitution and international human rights law; and torture and cruel, inhuman or degrading treatment were employed to justify detention and to extract information.

Guantanamo has created massive problems not of this Administration's creation. But given the fundamental violations of basic rights that have occurred on Guantanamo, we cannot "close" Guantanamo without making a sharp break with the past and renouncing prolonged detention of the Guantanamo detainees, regardless of any procedural trappings that might now be provided.

So what alternatives are available to us? The path for closing Guantanamo has been well hewn by others. We should criminally prosecute those who have violated our criminal laws. Persons whom we decide not to prosecute but who have violated the laws of other states may be transferred to those countries for trial, with meaningful assurances that due process and international human rights law will be respected. Persons found eligible for release whose home country will not take them or who cannot be returned due to a fear that they will be tortured may be transferred to a third country, if necessary with assurances protecting their security (including monitoring by multiple parties such as U.S. embassy personnel and the International Committee of the Red Cross). If necessary, others may be transferred to third countries with conditions that they will be placed under some form of monitoring, subject always to due process and human rights guarantees. And as controversial as this is for some segments of the American public, some of the detainees will need to be accepted by the U.S. The European Union, for example, has made it clear that U.S. acceptance of some responsibility for the Guantanamo detainees is a condition for its assistance.

We must continue to challenge the premise that there is a fifth category of detainees who are "too dangerous to be released, but who cannot be tried." The proposal for prolonged detention remains a solution in search of a problem. As other witnesses are attesting at this hearing, there is no evidence that our criminal justice system is not up to the task of trying terrorism suspects.

The premise of a fifth category of detainees itself is deeply problematic. On what basis is the determination that a person "cannot be tried" to be made? How is such a determination to be reviewed? On what basis do we determine that a person is "too dangerous" to be released?

Certainly, the fact that a person was tortured in detention, or that a person was detained on the basis of information extracted by torture, cannot be a proper basis for prolonged detention, given that we have renounced coerced evidence as a basis for prosecution. To conclude that a person who could not be prosecuted as a result of torture could nevertheless be detained indefinitely on that basis would illegitimate U.S. efforts in the struggle to abolish torture and to promote fair trial process around the world.

The fact that a detention may be based on hearsay similarly highlights the unreliability of the basis for detention. Our rules of evidence excluding hearsay, entitling defendants to confront the evidence against them, and requiring proof beyond a reasonable doubt, are designed to ensure accuracy and to prevent people from being incarcerated in error. On the other hand, if the option of long-term detention without trial is available, the temptation will always exist for the government to decide that difficult cases "cannot be tried," and thus to skirt the strictures of the criminal process. But a legal regime that allows a government to guarantee that persons it fears will be incarcerated is not a regime based on the rule of law.

Protection of intelligence sources and methods is a serious concern, but the criminal justice system has well-established procedures for addressing classified information. There are also other contexts in which the government wishes to convict people without revealing intelligence sources and methods, or wishes to rely on the testimony of (potentially uncooperative) foreign agents. A principle that would allow these difficulties to redirect a terrorism suspect into a prolonged detention system would not be limited to the terrorism context.

I understand that federal criminal trials of Guantanamo detainees might be fraught for any number of evidentiary reasons, might be embarrassing, might result in acquittals, and might provide the accused with legal and public relations leverage they may not enjoy in a different forum. But many of these inconveniences will arise in any judicial process, including one designed to implement prolonged detention, and most have proven not to be deal breakers in the more than 100 international terrorism cases tried in our federal courts.

Even if a category five person does exist, the overall costs to our national security of establishing a scheme of indefinite detention without trial are greater than any potential benefit, given the departure from historic American legal protections against arbitrary detention, and the fact that such detentions will likely apply to a disproportionately Islamic population and will complicate the ability of allies to cooperate in intelligence sharing and the transfer of terrorism suspects.

Finally, and perhaps most critically, our mistakes of the past must not be allowed to drive mistakes of the future. There are at least three reasons why the problems we confront today on Guantanamo should not be problems going forward:

1. *Torture will not be used.* The President has reaffirmed that the United States renounces torture and cruel treatment. To the extent that criminal prosecutions of the current detainees is complicated by the fact that they were detained based on testimony coerced from themselves or others, this should not be a problem in the future.

2. *Future evidence can be preserved.* The Guantanamo detainees were seized and transferred to Guantanamo with the erroneous expectation that they would never appear before any court, let alone be criminally prosecuted. If terrorism suspects are seized in the future with the expectation that they must be criminally tried, evidence and the chain of custody can be properly preserved.

3. *The criminal law is available.* We now have broader laws criminalizing terrorist activity outside the United States than existed prior to September 11, 2001. Given the breadth, flexibility and extraterritorial reach of our criminal laws in the context of counterterrorism, including our material support and conspiracy laws, it is hard to imagine conduct that could justify administrative detention in accordance with a properly circumscribed interpretation of our Constitution and international humanitarian or human rights law, and yet fall below the threshold for prosecution. If the evidence we have against someone is insufficient to prosecute under these standards, it is an insufficient basis for detention.

Guantanamo, in short, is a *sui generis* phenomenon that must not be allowed to dictate a model for future detention.

Conclusion

My eight year old daughter campaigned energetically for President Obama and is one of the President's most enthusiastic supporters. But when I told my daughter that I had to go to Washington to testify because President Obama was proposing that the government should be able to lock people up without proving that they had done something wrong, she looked at me astonished and said, "*Obama* wants to do that?" My 85 year-old father, who lives alone in rural Alabama, has unsubscribed from the Democratic Party listserv as a result of the President's prolonged detention proposal.

Prolonged detention without trial offends the world's most basic sense of fairness. Our government acquires its legitimacy, and its moral authority as a leader in both counterterrorism efforts and human rights, by acting in accordance with law. President Obama proposes to establish prolonged detention within the rule of law. But skating at the edge of legality was the hallmark of the counterterrorism policies of the past Administration; it should not be the hallmark of this one. For the United States to ratify the principle that our government may hold people indefinitely based on the claim that they cannot be tried but are too dangerous to be

released, would be, as Justice Robert Jackson warned in his dissent in *Korematsu*, to leave a loaded weapon lying around ready to be picked up by any future government, at home or around the globe.