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United States Senate
Committee on the Judiciary
Washington, DC 20510-6275
[via e-mail]

Dear Senator Feingold:

Thank you again for the opportunity to testify before the Subcommittee on the Constitution regarding the legal, moral, and policy implications of prolonged detention. Enclosed are my responses to the written questions that were submitted after the hearing. Please let me know if you have any questions, or if I may be of any further assistance.

Sincerely yours,



Sarah H. Cleveland

Louis Henkin Professor of Human and Constitutional Rights

Senate Judiciary Committee

Subcommittee on the Constitution

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

Tuesday, June 9, 2009

Responses of Sarah H. Cleveland to Written Questions

Questions submitted by U.S. Senator Russell D. Feingold to Sarah Cleveland

1. In his testimony, Mr. Klingler is concerned that prosecuting suspected terrorists in the criminal justice system "risk[s] watering down defendants' rights" and "stretch[ing] the criminal process." He argues that "those who invoke or apply Constitutional protections in aid of foreigners who fight against us are likely in practice to erode the rights of the citizens we seek to defend." How do you respond to that argument?

It is important to remember that our Constitution's procedural protections for persons facing criminal prosecution are not limited to citizens; they apply to foreigners and citizens alike. Our existing criminal justice system has repeatedly demonstrated that it is fully capable of handling prosecutions of domestic and international terrorism suspects, as the Human Rights First report, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts,* demonstrates. Our existing criminal laws for combating terrorism, including the crimes of conspiracy and material support, and our existing procedures for the protection of classified information, time and again have proven adequate to the task.

Concerns about watering down the existing criminal justice system are frequently raised in an effort to justify establishing an alternative system of detention without trial for terrorism suspects. But the creation of an extraordinary system for detaining people without criminal charge or conviction, on the grounds that they are believed to be dangerous but cannot be criminally prosecuted, would be unprecedented in our nation's history and would do much greater damage to our constitutional fabric. Such a system would establish a dangerous precedent that could be used in the future to justify the detention of American citizens. It could also be extended beyond suspected terrorists to cover other categories of criminal suspects.

I also want to respond to Mr. Klingler's argument that requiring criminal prosecutions of terrorism suspects in the United States will encourage the "outsourcing" of prosecution or detention of terrorism suspects to countries where they are likely to be treated worse. As

long as countries exist that have weaker procedural protections than the United States, there will always be a temptation to outsource criminal prosecutions to countries that are less protective. But the response to this problem should not be to water down our own constitutional protections—to seek the lowest common denominator—but rather for us to work to raise the legal standards in other countries, as the United States has done through its rule of law programs for many years. Our longstanding procedural protections do not exist simply to protect people potentially facing detention. They also legitimate governmental actions in the eyes of the public and protect the government by promoting accuracy in its decisions.

2. At the hearing, I asked you about the experience of other countries with prolonged detention and the practical effect it has had on their ability to combat terrorism. Please provide any additional information you have that is responsive to that question.

In addition to the information referenced in the draft white paper that I submitted with my testimony, *The Company We Keep: Comparative Law and Practice Regarding the Detention of Terrorism Suspects,* studies repeatedly have found that efforts by states to combat terrorism threats with indefinite detention and abusive treatment have been counter-productive and have recruited new supporters to terrorism. Indeed, one reason that our European allies have resisted any resort to long-term detention outside their criminal justice systems is that they have previously experimented with such policies and found them to be counterproductive.

In an empirical study of the impact of the United Kingdom's repressive legal policies on the IRA, Professor Colm Campbell and Ita Connolly concluded that the use of mass detention without trial and torture figured centrally in the mobilization of Northern Ireland to join the IRA movement.[1] Other studies have confirmed that the British government's tactics alienated large sections of the Catholic community and broadened support for the IRA.[2] The British government abandoned its internment policy in January 1998, in recognition that the policy had been counterproductive.[3] Announcing the decision, the Junior Northern Ireland Minister Lord Dubs told the House of Lords: "The Government have long held the view that internment does not represent an effective counter-terrorism measure . . . The power of internment has been shown to be counter-productive in terms of the tensions and divisions which it creates."[4]

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[1] See Colm Campbell & Ita Connolly, *War on Terror Symposium: A Deadly Complexity: Law, Social Movements and Political Violence*, 16 MINN. J. INT'L L. 265 (2007).

[2] Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism, in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1680 (2003) ("[T]he brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary organizations."); David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 HUM. RIGHTS 261, 267 (1976) ("[T]he hostility engendered by counter-terror tactics made the Catholic ghettos a safe haven for the Provisional I.R.A.").

[3] See Philip A. Thomas, September 11th and Good Governance, 53 N. IR. LEGAL Q. 366, 385 (2002) (quoting British MP during Parliamentary debate on 1998 bill revoking internment power: "Frankly it has not worked ...we believe that the use of internment would strengthen the terrorists.").

[4] Id.

Studies of India's use of emergency measures similarly have found that long-term detention contributed to widespread abuses and cycles of violence and provided recruitment tools for terrorist organizations.[5] With respect to Israel, Lisa Hajjar's book on the West Bank military tribunals demonstrates that many Palestinians were mobilized to fight Israelis by the system of preventive detention and military tribunals – particularly by "natural" deaths of Palestinians in Israeli custody.[6]

3. Senator Coburn asked the following question at the hearing: "Are we, the United States, under any international obligation which would require us to try or release the detainees that we have?" What is your response to that question?

Yes. Any persons detained at Guantanamo who are not properly classified as battlefield detainees seized in a traditional armed conflict cannot lawfully be detained under the laws of war, and must be criminally prosecuted or released by the United States. Although international humanitarian law recognizes the authority of a state to detain persons who take up arms against it, it does so within the narrow confines that I outlined in my oral and written testimony. International human rights law also prohibits arbitrary detention. These human rights and humanitarian law principles are binding through treaties that the United States has ratified, including the International Covenant on Civil and Political Rights and the 1949 Geneva Conventions, as well as through customary international law.

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[5] *See* Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 105-106 (2006) (describing the pattern); *see also* Hiren Gohain, *Chronicles of Violence and Terror*, 42(12) ECON. & POL. WEEKLY 1012 (Mar. 30, 2007); Sanjay Barbora, *Rethinking India's Counter-Insurgency Campaign in the North-East*, 41(35) ECON. & POL. WEEKLY 3805 (Sept. 8, 2006).

[6] See Lisa Hajjar, *Courting Conflict: The Israeli Military System in the West Bank and Gaza* (2005).

Questions of Senator Tom Coburn, M.D.

1. You, along with several other scholars, filed an amicus brief in the case of *Boumediene v. Bush*. The brief asserted: "The fact that Gitmo is occupied as a military naval base does not prevent the application of fundamental constitutional rights to aliens detained there." Do you believe that detainees at Guantanamo Bay should receive the same constitutional rights as U.S. citizens?

Neither the fact that the Guantanamo detainees are foreign nationals, nor the fact that they are detained on Guantanamo rather than in the United States, materially alters the relevant constitutional protections governing their detention. The constitutional rights of foreign nationals differ from those of U.S. citizens in certain limited respects, primarily with regard to their entry or departure from the country. For over 100 years, however, the U.S. Supreme Court has recognized that foreign nationals in the United States are protected by the due process and criminal procedural protections of the Fifth and Sixth Amendments. And although constitutional rights may apply differently outside the United States in certain circumstances, as the Supreme Court recognized in *Boumediene,* the Supreme Court has now held twice that Guantanamo is effectively U.S. territory for the purpose of applying U.S. law, in the cases of *Rasul v. Bush* and *Boumediene v. Bush*. Thus, for all relevant purposes, the nationality and location of the Guantanamo detainees should not alter the constitutional protections to which they are entitled.

2. Do you accept President Obama's determination that there are terrorist detainees who should not—and cannot—be prosecuted?

I accept the possibility that some detainees should not be prosecuted. However, I do not agree that the fact that the executive branch may believe that some detainees cannot be successfully prosecuted can be used to justify the indefinite detention of such persons. Our criminal justice system routinely confronts the problem that persons who are believed to be dangerous may not be able to be successfully prosecuted, but that is the hallmark of a system of credible justice and the rule of law. A legitimate criminal justice system is not designed to guarantee convictions for the prosecution, and our country has never before accepted the idea that the possibility that a person cannot be successfully convicted can justify their indefinite detention. Moreover, information extracted through torture or cruel, inhuman or degrading treatment cannot be used to justify indefinite detention any more than it can be used as the basis for a criminal prosecution.

That said, a number of alternatives to prosecuting the Guantanamo detainees are available to the United States. As I have testified, persons who were, in fact, battlefield belligerents in a traditional armed conflict against the United States can be detained until the end of that conflict, consistent with international humanitarian law, so long as appropriate procedural protections are in place. Persons whom the United States believes cannot be successfully prosecuted for directly perpetrating acts of terrorism may nevertheless be able to be prosecuted under other criminal laws. Some persons on Guantanamo may not have violated U.S. criminal laws but their conduct may subject them to criminal liability in other

countries that respect the rule of law, in which case they could be transferred to those states for trial.

Furthermore, it is important to note that the problems the United States is confronting in prosecuting the Guantanamo detainees are largely of the United States' own making, caused by the use of torture and abusive interrogation, and the failure to collect and preserve adequate evidence at the time of capture to support prosecutions for violations of U.S. criminal laws. These *sui generis* problems should not justify the establishment of a system of detention without criminal trial for persons who are seized in the future. Persons seized outside the battlefield by the United States in the future can and should be captured with the expectations that they will be prosecuted and that they must be treated humanely.

3. Do you take President Obama at his word, that there are some detainee terrorists who "pose a clear danger" to the American people and who "remain at war with the United States"? If so, would you agree that the United States should do everything possible to keep them from being released?

Outside of the context of a traditional armed conflict, it is precisely the role of the criminal justice process, our rules of evidence, and the adversarial system, to determine whether or not persons are, in fact, sufficiently dangerous to our society to be incarcerated or are deserving of the label of "terrorist." For centuries, the Anglo-American legal system has rejected the proposition that a determination by the executive branch that a person is dangerous is adequate to justify that person's incarceration. In contrast, countries like Libya, Syria, Iran and China have frequently relied on such justifications for indefinite detention.

4. Would you consider supporting a legal framework that allows for prolonged detention without trial?

I do not support, and U.S. law and international law and state practice do not support, a legal framework that allows for the prolonged detention without trial of persons outside the confines of the law of armed conflict. In other words, detention must be limited to persons who were seized in the battlefield zone and who were either direct participants in the conflict or otherwise posed a serious security threat.

5. Do you believe that the United States is engaged in an ongoing war against terrorism?

The United States is engaged in an armed conflict against non-state groups in Afghanistan, Iraq, and other contiguous areas. The United States is not engaged in a "war on terrorism," and the law of war cannot validly be stretched to allow for the detention of persons seized in a global "war on terrorism."

6. If the United States develops a "charge or release" policy for enemy combatants, wouldn't that give those unlawful fighters more rights than legitimate POWs receive?

No. As I have previously testified, enemy belligerents in an armed conflict can be detained until the end of that conflict, regardless of whether they qualify as POWs, so long as they are properly identified and are afforded appropriate procedural guarantees. Persons cannot be detained who were seized in a battlefield zone but were not participants in an armed conflict, or who are seized outside the battlefield.

Even if the possibility exists of continuing to lawfully detain some of the Guantanamo detainees as battlefield detainees, however, there is a serious question whether it is wise policy nearly eight years later to continue to detain these persons rather than to criminally prosecute them. Given Guantanamo's history—including the fact that detainees were never provided the hearings required under the Geneva Conventions, that many detainees were physically abused, and that others were detained based on evidence obtained abusively—the United States would be better off closing the door on this episode by ending the indefinite detention of all of the men held there.

7. Some of you referenced in your testimony more than 100 terrorism cases successfully prosecuted in federal courts since 9/11. Did any of those cases involve terrorists captured overseas on the battlefield after 9/11?

Since the September 11 terrorist attacks, the U.S. government has largely avoided bringing suspects captured overseas to justice in the federal courts. (In the past, in contrast, terrorists such as Ramzi Yousef and Mohamed Rashed Daoud al-'Owhali were captured overseas, brought to the United States for trial, convicted in fair proceedings, and sentenced to long prison terms.) In January 2002, however, the U.S. did decide to bring Taliban volunteer John Walker Lindh, who was captured in Afghanistan, to the United States for trial; he pled guilty and was sentenced to 20 years of imprisonment. Also, notably, in 2007 the United States successfully prosecuted Jose Padilla, who had been held for three and a half years as an "enemy combatant" after his arrest in 2002.

8. How would you deal with the concerns raised by FBI Director Robert Mueller that terrorists moved to U.S. prisons will recruit from inside U.S. prisons, as was the case with the recent New York synagogue bombers?

The federal prison system has security measures adequate to deal with any prisoner who shows signs of being a security risk, including by attempting to recruit other prisoners to join terrorist networks. There has never been any indication that Ramzi Yousef, Zacarias Moussaoui, or other such terrorist operatives have been able to carry out recruitment efforts while incarcerated.

9. Do you believe that any detainees captured by the United States are entitled to *Miranda* rights? Please explain.

Persons arrested in the United States are entitled to *Miranda* warnings. Persons who are captured and detained as battlefield detainees in a theater of armed conflict are not entitled to *Miranda* protections, although they can only be detained consistent with the procedures required by international humanitarian and human rights law. The extent to which *Miranda* applies to persons who are seized both outside the United States and outside of any battlefield zone is unsettled, but under the Supreme Court's decision in *Boumediene,* it is likely that *Miranda* would apply in this context, though perhaps in somewhat modified form.

10. Do you believe there is any role for military commissions for detainees currently held by the United States?

As a matter of both law and policy, I believe it is unwise for the United States to prosecute the current detainees before military commissions. Under U.S. and international law, military commissions exist for the purpose of prosecuting persons for violations of the laws of war, since the exigencies of the battlefield often make ordinary criminal trials impossible. While some small number the Guantanamo detainees may qualify as battlefield combatants who have violated traditional laws of war, most of them do not, and persons who did not violate the laws of war cannot be validly prosecuted before military commissions.

Even for persons who are properly charged with violations of the laws of war, the military commissions established by the prior administration have been irredeemably de-legitimated in the eyes of the international community. The military commissions invariably will be perceived as a forum that was created to secure the convictions of detainees whom the United States thought it could not successfully convict in an ordinary criminal trial, and thus inevitably will look like rigged justice to the outside world. No amount of modifying their structure or procedures will cause convictions before the military commissions to be viewed as equally legitimate as either Article III criminal trials or ordinary court martials. At the same time, the greater the procedural protections that are afforded by the military commissions, the fewer procedural advantages they will provide the United States government over ordinary criminal trials, further undermining their utility.

11. If the evidence needed to prosecute a Guantanamo Bay detainee has been acquired from enhanced interrogation techniques, do you believe he should be released?

Evidence acquired through the use of torture or cruel treatment is inherently unreliable and offensive to human dignity, and cannot be the basis for either detention or prosecution. Such persons need not necessarily be released, however. They can be prosecuted for crimes that would not rely on the coerced evidence, either by the United States or another country,

so long as the requirements of due process and international human rights law are respected.

12. Should detainees be subject to charges of conspiracy?

Detainees may be subject to charges of conspiracy in ordinary criminal trials in the United States. As four members of the Supreme Court recognized in *Hamdan v. Rumsfeld*, however, conspiracy, without more, is not recognized as a violation of the laws of war, and thus cannot be the basis for a prosecution before a military commission. A majority of the Supreme Court did not need to reach the question in *Hamdan*, but the four-member plurality strongly signaled that a conspiracy charge before a military commission is legally infirm.

13. If Guantanamo Bay detainees are moved to the United States, do you believe the prison system is equipped to handle them? Do you believe that these detainees could be housed in the same U.S. prison facility, or would they need to be scattered among various facilities to avoid any perceived image problems?

If the United States decides to continue detaining some of the Guantanamo detainees, the greatest image problem that the United States will confront will derive from that very decision. The U.S. prison system, however, is more than adequately equipped to house the Guantanamo detainees. The system has successfully incarcerated convicted mass murderers and terrorists for many years.

Question for the Record for Sarah Cleveland

from Senator Sheldon Whitehouse

1. At the hearing, you advocated the use of the criminal justice system for the detention of individuals who are believed to be associated with terrorist organizations or that are otherwise a danger to the United States. As you know, the criminal justice system is not the only method the United States recognizes for detaining individuals, since states can quarantine individuals for public purposes or commit individuals who are dangers to themselves or others. Do such civil law approaches provide a useful analogy or starting point for the detention of enemy combatants or other individuals who are determined to harm the United States?

As I stated in my oral and written testimony, the U.S. constitution establishes an extremely strong presumption that persons cannot be incarcerated without being convicted through the criminal justice system, with all the procedural protections that that system affords. The constitutionally-tolerated exceptions to the criminal justice system that you mention are very narrow and longstanding. They include the authority to detain battlefield detainees until the end of a traditional armed conflict, as the Supreme Court recognized in *Hamdi v. Rumsfeld.*

This and other exceptions to the criminal justice system, however, cannot lawfully be stretched to justify the indefinite detention without trial of persons seized outside the battlefield whom the executive branch considers dangerous, be they terrorism suspects, communists, anarchists, or otherwise.