Senate Judiciary Committee
Subcommittee on the Constitution
"The Legal, Moral, and National Security Consequences of Prolonged Detention"
Tuesday, June 9, 2009

Questions submitted by U.S. Senator Russell D. Feingold to Tom Malinowski

Can you elaborate on your suggestion that President Obama's proposal for a prolonged detention regime should be unnecessary for future al Qaeda suspects? How much is this perceived need for a prolonged detention regime caused by the missteps of the Bush administration in creating the system at Guantanamo?

I believe that the perceived need for a preventive detention regime, to the extent it is based on practical rather than ideological considerations, is caused entirely by the missteps of the Bush administration. The previous administration coerced testimony from prisoners through the use of torture. It reportedly made no effort to maintain coherent and complete files on detainees. It assumed that detainees would not have to be tried, and therefore did not always make an effort to gather evidence against them after capture that could be used in a federal civilian trial, or insist that foreign law enforcement and intelligence partners cooperate in the gathering of such evidence. Indeed, I believe it consciously sought to make it harder for any future administration to return to a criminal justice model for dealing with suspected terrorists (for example, by refusing to Mirandize detainees at any stage of the investigatory process).

There is no reason for any of these mistakes to be made in the future. An administration committed to bringing terrorists to justice could ensure that evidence of criminal activity is gathered and preserved when suspected terrorists are taken into custody, interrogate such individuals using reliable, lawful methods that would hold up in a court, Mirandize suspects at the appropriate time, and use all diplomatic tools at its disposal to secure the cooperation of foreign governments in gathering evidence and interviewing witnesses overseas. If we take into account that the federal courts have strong and well established procedures for admitting classified evidence and have dealt pragmatically with evidence obtained under complex circumstances overseas, there is no reason to believe that terrorist suspects captured in the future cannot be prosecuted, so long as the government has a strong case against them.

Questions of Senator Tom Coburn, M.D.
Hearing: *"The Legal, Moral, and National Security Consequences of 'Prolonged Detention'"*
Subcommittee on the Constitution
United States Senate Committee on the Judiciary
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Do you accept President Obama's determination that there are terrorist detainees who should not—and cannot—be prosecuted?

I agree that there are detainees in Guantanamo who cannot be prosecuted. In some cases, this is because there is no evidence that they ever committed a crime – the decision to detain such persons was based either on allegations of past activity that cannot be substantiated, or a prediction of future dangerousness based on their associations and beliefs. The United States should not be holding prisoners indefinitely on either basis. Such a policy would be inconsistent with America's values and the law; it would inevitably result (as it has in the past) in the mistaken imprisonment of innocent people; it would ensure that people around the world remain focused on how the United States is treating its prisoners rather than on the crimes of the terrorists; it would likely create more enemies than it takes out of circulation.

The more difficult question is whether there are detainees who cannot be prosecuted because the evidence of their crimes has been tainted by the use of torture or mishandled or lost because of the policies of the last administration. I think that it is premature to conclude that such problems would preclude the prosecution of significant terrorist suspects in U.S. federal courts. Given the successful track record of the courts in dealing with sensitive and highly complex terrorism cases, and the variety of prosecutorial tools available to the Justice Department in the fight against terrorists, we should have confidence that the system will do its job and not dismiss that system until it has been fully employed. That every alternative system of detention has failed thus far is another strong argument for giving established institutions of justice a chance.

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?

I agree that there are some detainees who pose a clear danger – among them are the admitted planners of the 9/11 attacks, and others suspected of involvement in terrorist acts and of having significant roles within al Qaeda. But the reason these detainees are considered dangerous is that there is evidence that they committed acts – whether involvement in a terrorist attack or providing material support for a terrorist group – that are crimes. And if they indeed committed these acts, our criminal justice system is capable of putting them away.

Indeed, criminal prosecution is the most effective way of ensuring that dangerous people are not released, because when terrorists are convicted by a system of unquestioned legitimacy, they have no hope of winning release by challenging the legality of their imprisonment, or of winning sympathy from those concerned about justice and due process. By contrast, the system in Guantanamo has lacked legitimacy and invited constant legal and political challenge from within the United States and from US allies. That is one reason why the Bush administration released over 500 detainees, some of whom probably would be in prison today had they instead been prosecuted in the federal courts.

That said, I do not believe it is in the U.S. national interest to detain every young Muslim man who may be captured around the world who may appear, based on his associations and views, to be dangerous. If U.S. troops swept through a city like Karachi in Pakistan or Kandahar in Afghanistan or Sana'a in Yemen and arrested the first thousand young men they encountered, they would likely find dozens who appear dangerous, with profiles similar to some of those held in Guantanamo. To detain a meaningful portion of people who consider themselves at war with the United States would require building hundreds of Guantanamos. This is obviously not possible. And the detention of a couple of hundred such men in Guantanamo has probably made the larger pool of potential terrorists in the world larger, not smaller.

The U.S. military understands that seeking to detain indefinitely every potentially dangerous person is neither possible nor wise. In Iraq, where U.S. forces have been fighting an insurgency that has claimed over 4,000 American lives, the U.S.-run detention system has recently been releasing an average of 560 detainees a month – the equivalent of one Guananamo population every two weeks. All of these people were at one point deemed to pose a clear danger to Americans and to Iraqis. But the United States has recognized that to win such a struggle, you have to reduce the total number of enemies committed to fighting you. Detaining people in a manner that is seen as illegitimate and unjust makes that task harder, not easier.

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

Such a legal framework already exists with respect to combatants captured as part of an international armed conflict. The Geneva Conventions allow for the detention without trial of such people for the duration of the conflict in which they were captured. But this situation is different, for the reasons I outlined in my testimony:

First, in a traditional war between states, it is easy to place boundaries around the extraordinary power to detain without charge, so that governments do not take it as a license to detain preventively anyone who they think poses a national security threat. In a traditional war, it is clear where the battlefield is, who enemy fighters are, and how to define the conflict's endpoint. But in this fight with international terrorists, which has no geographic boundaries or clear distinction between civilians and combatants, it is hard to limit preventive detention to people who are plainly soldiers in a war.

I hope that as a Senator who has long championed limits on government, you would be wary of giving our government the extraordinary power to hold without trial anyone the president deems to be "dangerous" or a threat to national security.

Second, in a traditional war, preventive detention is allowed because it is the only way to keep enemy fighters from returning to the battlefield. If those fighters are lawful combatants, they have not committed a crime, and therefore cannot be prosecuted. But terrorists have committed a crime – there is another, more certain way of putting them behind bars.

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

U.S. forces in Afghanistan are clearly engaged in a war against the Taliban. They are fighting on a defined battlefield against an organized, armed enemy. They are inflicting, and taking casualties. They are operating under wartime rules of engagement, rather than the rules that would govern a law enforcement operation.

But I do not believe it is wise to extrapolate from the war in Afghanistan to declare a global "war against terrorism."

First of all, it does not make sense to say that the United States is at war with an "ism." Wars are fought against specific enemies, not against a phenomenon.

Second, if the fight against terrorists really were a global war, on a global battlefield, then governments waging that war would have the authority not only to detain suspected terrorists without charge, but to kill them wherever they were found. The United States would be legally justified in firing missiles at suspected terrorist safe houses in Paris and London, and shooting suspected terrorists arriving at JFK airport. China and Russia would be legally justified in killing suspected Uighur and Chechen terrorists found on the streets of New York. That is what calling something a "war" means.

Third, and most important, calling this a "war" gives terrorists what they want. One thing all terrorists have in common is the desire not to be seen as ordinary criminals. Al Qaeda members want to be thought of as soldiers, as part of a great army at war with a superpower on a global battlefield. They crave the attention and, in their own minds, the glory that comes with that status, and they use it to recruit more misguided young men to join their cause. We saw this when Khalid Sheikh Mohammed was brought before a Combatant Status Review Tribunal at Guantanamo, and spoke with pride about being called an "enemy combatant," comparing himelf to George Washington. We saw it when the convicted "shoe bomber," Richard Reid, demanded to be treated as a combatant during his federal trial in Boston.

Terrorists do not deserve the honor of military detention and military tribunals. They deserve to be treated like the common killers they are.

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?

Not at all. Legitimate POWs have the right not to be treated as criminals. They cannot be prosecuted for the act of taking up arms and shooting at US troops. They have to be held under conditions defined by the Geneva Conventions, accorded the respect due to their rank, and released as soon as the conflict in which they were captured was over.

A "charge or release" policy recognizes that detainees are accused of committing crimes. If they indeed engaged in or supported acts of terrorism – or even if they merely engaged in combat as unprivileged belligerents – they can be treated as common criminals, prosecuted, and imprisoned, even after the conflict in which they were captured has ended.

Also, keep in mind that no one is advocating a "charge or release" policy for combatants captured in an active zone of combat like Afghanistan – though a more clear and legitimate legal framework is needed to hold fighters captured there as well.

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?

Yes. For example, there is the case of Daniel Maldonado, who was captured in the Horn of Africa, and sentenced in 2007 to ten years in prison for having trained at a terrorist camp alongside al Qaeda members seeking to overthrow the government of Somalia. http://seattletimes.nwsource.com/html/nationworld/2003799281_terrordig21.html

The Bush administration chose to prosecute Maldonado in federal court because he was a US citizen. Several other non-citizen suspects were captured alongside him and sent to Guantanamo. But if they committed the same underlying crimes, there is no reason why they could not have been prosecuted as well.

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?

I believe that U.S. prisons are fully capable of dealing with such concerns. If this were a major problem, I imagine that Congress would have acted long ago to correct it, as federal prisons have been holding extremely dangerous convicted terrorists, including al Qaeda members, for years. Director Mueller certainly did not suggest that we stop using federal prisons to detain convicted terrorists.

Moreover, as virtually any counter-terrorism expert will attest, it is the existence of Guantanamo and the perception that the United States is detaining people in an unlawful way that has fueled terrorist recruitment around the world. This is not an abstract concern –

military commanders have said that Guantanamo was a major spur to recruitment among insurgents in Iraq, and thus a major cause of U.S. combat fatalities there.

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

No court has ever held that combatants captured on an overseas battlefield are entitled to Miranda warnings upon capture, or when they are being interrogated for intelligence purposes. So the notion that Miranda is an obstacle to prosecution, or that soldiers will have to read enemy fighters their rights, is a straw man in this debate. The Miranda requirement only kicks in away from the battlefield, when it is feasible to give such a warning, and when authorities begin to interview a suspect for the purpose of criminal prosecution.

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

The United States has used military commissions to prosecute violations of the laws of war in the past (though not after the adoption of the Uniform Code of Military Justice following World War II). But that doesn't mean it is wise to use them today.

If military commissions are established with standards of due process that are lower than those guaranteed by federal civilian courts, all the attention at trial will be on those diminished standards. The world will continue to focus on America's treatment of suspected terrorists, rather than on the crimes they committed. The commissions will be subject to more years of legal challenges and delays. The verdicts will lack legitimacy, and may ultimately be overturned. The risk that dangerous people will be released might actually be higher.

If, on the other hand, Congress raises the due process standards in military commission trials so that they are identical or similar to trials by federal court, or military court martial, then the commissions will lose their utility. There is no reason to go to the immense trouble of establishing yet again a new and experimental system of justice if it is going to look essentially like the system we already have.

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

No one should be detained or prosecuted solely on the basis of evidence obtained through torture. That is a basic principle of American and international law, and a core tenet of our values as a civilized society. It would also be profoundly unwise for the U.S. government to make any decisions affecting the security of American citizens solely on the basis of "evidence" obtained through a method as unreliable as torture.

But the choice in the real world is rarely between using tortured evidence and releasing a detainee. For most of the high level al Qaeda suspects in Guantanamo, there is a great deal of

evidence available to prosecutors, including non-coerced statements, the testimony of other witnesses, intercepts, travel records, financial transactions, and material evidence, such as documents and computer disks, captured with the detainees. If such evidence doesn't exist, or has been lost, then efforts can be made to obtain it, including by exerting pressure on foreign governments to turn over information and to allow witnesses to be interviewed.

Should detainees be subject to charges of conspiracy?

Conspiracy to commit terrorism is a crime that can be prosecuted in federal court. But it is not a violation of the laws of war. This is an additional argument for using civilian courts to prosecute, and to secure the long-term detention of, suspected terrorists.

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?

The federal prison system has for many years held convicted terrorists, including al Qaeda members, with no adverse consequences. If this were not the case, I assume Congress would have been seized with this issue long ago. I am not qualified to say whether one or more facilities would need to be used.

Question for the Record for Tom Malinowski
from Senator Sheldon Whitehouse

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?

I do not believe it is a useful analogy. The courts have indeed allowed civil commitment of certain categories of people, but they have been careful to limit such detention to people who are both dangerous and who suffer from a mental illness or mental abnormality that makes them unable to control their behavior. This second element is essential. In a 2002 case, Kansas vs. Crane, the Supreme Court ruled that Kansas could not detain someone as a sexually violent predator, no matter how dangerous he might be, without this lack-of-control showing. This showing is necessary, the Court said, to distinguish those subject to civil commitment from those who are "more properly dealt with exclusively through criminal proceedings," and to prevent "civil commitment" from becoming a "mechanism for retribution or general deterrence."

In other words, there is no precedent suggesting that a finding of dangerousness alone is enough to permit preventive detention.