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 Elisa Massimino

1. Some proponents of indefinite detention deride concerns about the rights of detainees under international and domestic law as amounting to "requiring terrorists to be given *Miranda* warnings." What is the applicability of the *Miranda* ruling on the battlefield and in other countries and what is the relationship between *Miranda* requirements, the collection of intelligence, and the successful prosecution of terrorist suspects?

Human Rights First published a report *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* in 2008, updated in 2009, authored by two former U.S. federal prosecutors which addressed the issue of *Miranda* and how it arises in international terrorism cases. The report concluded that in the intelligence context, *Miranda* does not prevent intelligence officers from interrogating a prisoner, without warnings, after his arrest or capture. *See In Pursuit of Justice*, at 102 (discussing *United States v. Bin Laden*, 132 F. Supp. 2d 168, 189 (S.D.N.Y. 2001)).

If the government later decides to prosecute the detainee, statements elicited during custodial interrogation but without *Miranda* warnings may or may not be admissible. *Miranda* does generally apply when U.S. agents question a detainee outside the United States. *See United States v. Bin Laden*, 132 F. Supp. 2d 168, 173-79 (S.D.N.Y. 2001). However, statements elicited by foreign law enforcement are generally admissible in U.S. courts, regardless of whether any *Miranda*-type warnings were given, as long as the statements were voluntarily made. *See United States. v. Yousef*, 327 F.3d 56, 145 (2d Cir. 2003); *see also United States. v. Abu Ali*, 395 F. Supp. 2d 338, 373-74 (E.D. Va. 2005); *United States v. Abu Ali* , 528 F.3d 210, 227-28 (4th Cir. 2008).

Moreover, in the event that a person is put on trial in a U.S. federal court following capture in battle and the government seeks to offer the defendant's statements following his capture, it is likely that the courts would permit the statements to come in under the "public safety" exception to *Miranda* first articulated in *New York v. Quarles*, 467 U.S. 649 (1984), or, more generally, based on the argument that civilian law-enforcement principles such as *Miranda* simply do not apply in battlefield conditions. *See Id*.; *see also United States v. Khalil*, 214 F.3d 111, 121-22 (2d Cir. 2000). (Permitted the introduction of incriminating statements made prior to the administration of Miranda warnings to individuals suspected of planning to detonate pipe bombs in a subway station or bus terminal).

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

June 9, 2009

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

   I do not have access to the government's files on all detainees in U.S. custody. However, if there is sufficient admissible evidence that an individual has committed an act of terrorism, such an individual should be brought to justice in our regular proven Article III courts that have handled hundreds of international terrorism cases since 9/11.

2. 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 do not have access to the government's files on all detainees in U.S. custody. If the U.S. government has reliable, admissible evidence that a detainee has committed a crime against the United States then it should bring that detainee to justice in our regular proven Article III courts.

   In determining whether to transfer or repatriate individuals that will not be prosecuted, the U.S. government needs to consider steps that can be taken to mitigate any potential risk, through monitoring and re-integration programs, as well as the national security costs of continuing to detain individuals without trial, including by aiding the recuperative power of the enemy, weakening the support of our allies and damaging support among local populations for our military effort.

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

   Continued prolonged detention of terrorist suspects without trial is counterproductive in that it strengthens the recuperative powers of U.S. enemies, weakens our relationships with our allies and damages the support of local communities for our military efforts. A new legal framework for indefinite detention would also be vulnerable to constitutional challenges and would also lead to costly errors. The Supreme Court has never allowed preventive detention based solely upon a perceived risk of future dangerousness, nor has it permitted the use of preventive detention to

bypass the criminal justice system altogether. Moreover, as three retired senior military officers stated in a letter to the President last year:

> "The Guantánamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not great enough to warrant departure from hundreds of years of western criminal justice traditions." Letter from Vice Admiral Lee F. Gunn, USN (Ret.), Rear Admiral John D. Hutson, USN (Ret.), & Brigadier General James P. Cullen, USA (Ret.) to Barack Obama, President of the United States (May 14, 2009).

Finally, a new detention scheme is simply unnecessary. Human Rights First published the report *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* in 2008, authored by two former federal prosecutors who conclude that they "do not believe that the need for a brand-new scheme of administrative detention has been established." Instead the report demonstrates that existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases. In fact:

> [g]iven the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable.

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

   The United States is currently engaged in a war on two fronts in Iraq and Afghanistan. The war in Afghanistan is against al Qaeda and Taliban insurgents.

5. 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. Prisoners of War receive the privileges provided under the Third Geneva Convention relative to the Treatment of Prisoners of War, August 12, 1949. Under this convention, Enemy Prisoners of War cannot be tried for acts of violence that constitute participation in hostilities in a manner consistent with the rules of armed conflict and that would be considered legal if committed by U.S. troops. However, individuals who are not Prisoners of War — civilians — can be tried for violent acts that violate our criminal code, including for acts that constitute participation in hostilities, regardless of whether or not they violate the laws of war. In this

manner, civilians, including those facing criminal charges, have fewer rights than Prisoners of War because civilians do not enjoy the immunity that a Prisoner of War does for certain violent acts.

6. 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, a number of the cases successfully prosecuted in U.S. federal courts since 9/11 involved terrorists captured overseas in a zone of armed conflict after 9/11. According to the Department of Justice, as of June 9, 2009, sixty-seven of the 216 inmates in Bureau of Prisons (BOP) custody who have a history of/or nexus to international terrorism were extradited to the United States for prosecution. Those prosecutions have included:

   - Wesam al-Delaema an Iraqi-born Dutch citizen was extradited to the United States to stand trial for terrorist acts committed against U.S. troops in Iraq. In February 2009, al-Delaema plead guilty to conspiring with others to murder Americans overseas, including by planting roadside bombs targeting U.S. soldiers in Fallujah.

   - Aafia Siddiqui, was found guilty on February 3, 2010 of two counts of attempted murder, armed assault, using and carrying a firearm, and three counts of assault on U.S. officers and employees for drawing a gun on U.S. personnel while in custody in Afghanistan in July 2008.

   - Afghan heroin trafficker linked to the Taliban, Baz Mohammad, was extradited from Afghanistan in 2005 to stand trial in the United States. Mohammad's organization was closely aligned with the Taliban and supported them financially through his organization's heroin trafficking. In return, the Taliban provided Mohammad's organization with protection for its opium crops, heroin laboratories, drug-transportation routes, and members and associates.

   - In a related case, Bashir Noorzai, who Baz Mohammad testified was a member of the Taliban's ruling *shura* council, was not extradited but in 2005 was lured to the United States where he admitted that he had provided weapons and "400 fighters" to the Taliban and was eventually sentenced to life in prison.

7. 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 am not an expert in prison security. However, on July 21, 2009 Harley Lappin, Director of the Justice Department's Bureau of Prisons testified about additional controls in place in U.S. federal prisons for international terrorism cases to prevent radicalization including "through a classification

system that places them in a more restrictive environment -- that is, in cells, more staff control, greater oversight of phone calls, less access to other inmates."

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

Once a suspect is arrested and taken into U.S. custody for a suspected criminal offense that arrested suspect has the right to remain silent, to consult with an attorney, to have that attorney present during questioning, and, if the suspect is indigent, to have an attorney provided. *Miranda v. Arizona*, 384 U.S. 436 (1966). The Fifth Amendment right against self-incrimination, which the rule on informing an arrested suspect his *Miranda* rights is intended to protect, is a right that attaches at trial when the government attempts to introduce evidence, not when an individual is taken into custody.

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

Military commissions lack the legitimacy of regular federal criminal courts and their continued use threatens to perpetuate the legacy of failed trial and detention policies at Guantánamo. The military commissions also have a poor track record, yielding only three convictions during a period of time when Article III courts convicted hundreds of international terrorists. Moreover, trying terrorism suspects before military commissions elevates them to the warrior status they crave rather than exposing them as the criminals that they truly are.

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

Evidence obtained by torture or cruel, inhuman or degrading treatment is inadmissible in both U.S. Article III Courts and the Military Commissions, in large part because statements obtained by such abusive measures are deemed to be inherently unreliable. If the only evidence that the government has against an individual is a statement that was tortured out of the person through waterboarding or other such cruelty, then there is a serious question as to whether the information is reliable as evidence that the individual has, in fact, engaged in any criminal activity that would justify their continued detention.

11. Should detainees be subject to charges of conspiracy?

Article III courts have clear jurisdiction under a number of specific conspiracy provisions contained in statutes outlining substantive offenses, such as conspiracy to commit air piracy and conspiracy to provide material support to terrorism, as well as under the general conspiracy statute, which makes it a crime to conspire to "commit any offense against the United States." 18 U.S.C. § 371. There is

considerable debate, however, over whether or not conspiracy has traditionally been recognized as a war crime and therefore whether conspiracy convictions in the military commissions will be upheld as constitutional. This issue is currently on appeal in the case of Ali Hamza Ahmed Suleiman Al Bahlul.

12. If Guantánamo 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?

In July 21, 2009 Harley Lappin, Director of the Justice Department's Bureau of Prisons testified about our federal prisons' ability to handle individuals convicted in international terrorism cases, including any prisoners transferred from Guantánamo. In August 2009, the oldest and largest corrections association in the world, the American Correctional Association, resolved that America would be safe if terrorist suspects are transferred to our prison institutions. The Federal Bureau of Prisons would have a number of options in determining which facilities were most appropriate for housing any prisoners transferred for prosecution in Article III courts. Human Rights First does not take a position on which facility or facilities would be most appropriate.

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Question for the Record for Elisa Massimino
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?

A new law providing for indefinite detention of terrorism suspects without trial would be counterproductive, is unnecessary, and would be more vulnerable to constitutional challenge than the laws referenced in the question.

Continued prolonged detention of terrorist suspects without trial is counterproductive in that it strengthens the recuperative powers of U.S. enemies, weakens our relationships with our allies, and damages the support of local communities for our military efforts. A new legal framework for indefinite detention would also be vulnerable to constitutional challenges and would also lead to costly errors. The Supreme Court has never allowed preventive detention based solely upon a perceived risk of future dangerousness, nor has it permitted the use of preventive detention to bypass the criminal justice system altogether. Moreover, as three retired senior military officers stated in a letter to the President last year:

> "The Guantánamo detentions have shown that assessments of dangerousness based not on overt acts, as in a criminal trial, but on association are unreliable and will inevitably lead to costly mistakes. This is precisely why national security preventive detention schemes have proven a dismal failure in other countries. The potential gains from such schemes are simply not great enough to warrant departure from hundreds of years of western criminal justice traditions." Letter from Vice Admiral Lee F. Gunn, USN (Ret.), Rear Admiral John D. Hutson, USN (Ret.), & Brigadier General James P. Cullen, USA (Ret.) to Barack Obama, President of the United States (May 14, 2009).

A new law for detention of terrorism suspects is also unnecessary. As Human Rights First outlined in *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* in 2008, a report authored by two former U.S. federal prosecutors, there are four means of detention useful in complex terrorism cases under existing law:

- Under the Bail Reform Act, the government may arrest and seek to detain suspected terrorists when it files criminal charges against them by promptly bringing the defendant before a magistrate judge, who decides whether the defendant should be detained or released on bail. The government is entitled to a presumption that terrorism defendants should be detained.

- Immigration law permits the government to arrest—and in many circumstances detain—aliens alleged to be unlawfully present in the United States, pending a decision whether they should be removed from the country.

- When a grand jury investigation is underway, the government may apply to a federal judge for authority to arrest an individual who is deemed to be a "**material witness**" in the investigation.

- As discussed above, the **law of war**, or International Humanitarian Law (IHL), authorizes detention during international armed conflict for the duration of hostilities to prevent those who participate in hostilities or pose a serious security threat from rejoining the fight.

In Pursuit of Justice closely studies each of these tools and the authors conclude that they "do not believe that the need for a brand-new scheme of administrative detention has been established." Instead the report demonstrates that existing criminal statutes and immigration laws provide an adequate basis to detain and monitor suspects in the vast majority of known cases. In fact:

> [g]iven the breadth of the federal criminal code, the energy and resourcefulness of law enforcement agents and federal prosecutors, and the fact that terrorists, by definition, are criminals who often violate many laws, we believe that it would be the rare case indeed where the government could not muster sufficient evidence to bring a criminal charge against a person it believes is culpable.

Moreover, a new detention statute will be vulnerable to constitutional challenge. While the American legal system, as the question recognizes, tolerates some administrative detention in certain circumstances, the Supreme Court has never allowed preventive detention based solely upon a perceived risk of future dangerousness, nor has it permitted the use of preventive detention to bypass the criminal justice system altogether. Indeed, what would be the limits of a new system of preventive detention based on the possibility of future dangerousness; could someone be held for 15 years, or 20 years? A new preventive detention system would be highly vulnerable to constitutional attack and can not be considered a durable solution to problems presented by the Guantánamo detentions.

The Supreme Court has approved pretrial detention on a risk of future dangerousness only where probable cause of a suspect's criminal conduct has already been established. *United States v. Salerno*, 481 U.S. 739, 749 (1987). Civil commitment of the mentally ill is also permitted, but only where the State is able to prove both mental illness and therefore dangerous beyond their control. *Foucha v. Louisiana*, 504 U.S. 71, 82-83 (1992). In *Foucha v. Louisiana*, the Court said that a dangerous person who recovers his sanity must be released, otherwise "[i]t would also be only a step away from substituting confinements for dangerousness for our present system which, with only narrow exceptions and aside from permissible confinements for mental illness, incarcerates only those who are proved beyond reasonable doubt to have violated a criminal law." Likewise, some state laws permit the civil commitment of charged or convicted sex offenders, but again the Supreme Court has held that such detention is permitted only where the risk of dangerousness accompanies "mental abnormality." *Kansas v. Hendricks*, 521 U.S. 346, 346-47 (1997).