



September 13, 2006

The Honorable Judd Gregg
Chairman
Subcommittee on
Homeland Security
135 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Robert C. Byrd
Ranking Member
Subcommittee on
Homeland Security
135 Dirksen Senate Office Building
Washington, D.C. 20510

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Re. ACLU Opposition to U.K.-Style Detention Without Charge

CAROLINE FREDRICKSON
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Dear Chairman Gregg and Senator Byrd:

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TREASURER

The ACLU strongly opposes any proposal to adopt the U.K. system of jailing suspects without charge for up to 28 days. While this nation shares a rich legal tradition with the United Kingdom, we also have a Constitution and Bill of Rights that were in many ways a direct response to the excesses England – or, as our Founders recognized, any government – was prone to without such enforceable limitations. The current U.K. practice of detention without charge would plainly violate our Constitution. The Fourth Amendment flatly prohibits unreasonable searches and seizures; an arrest is indisputably a “seizure” within the meaning of the Fourth Amendment, and is therefore only reasonable “upon probable cause.” Additionally, after arrest, the Fifth Amendment guarantee of due process prohibits the practice of holding suspects incommunicado, and without access to a lawyer.

We urge you to remember, as well, that there is a substantial human cost to detention without charge. A person detained without charge is immediately stigmatized as a criminal or a potential terrorist even though the government has provided no evidence indicating that the person has engaged in such conduct. Detention can focus community anger on an innocent person and the members of that person’s family, cause the person to lose a job or home, and permanently damage the person’s reputation. At the same time, detention without charge – which would invariably be used discriminatorily against targeted ethnic or religious subgroups – can damage the relationship of trust and communication that is the real key to discovering of terrorist plots in time to stop them.

As detailed below, we write today to specifically rebut the suggestion set forth in the testimony of Judge Richard A. Posner that County of Riverside v. McLaughlin provides justification for a system of jailing suspects incommunicado without charge. Additionally, we warn against proceeding on the basis of incomplete and self-serving comparisons to the procedures of the United Kingdom. We fully expect that if debate on this measure goes forward, the administration's lawyers – who have proven themselves nothing if not highly creative – might find in our two hundred years of Supreme Court jurisprudence any number of stray phrases to use in justifying jailing Americans incommunicado and without charge. But the simple reality is that such a practice is alien to our constitutional system. We request inclusion in any future hearings on this matter, in order to continue to correct erroneous and strained readings of our Constitution and laws.

County of Riverside v. McLaughlin

Judge Posner's entire proposed system of detention without charge appears to stem from a single line in County of Riverside v. McLaughlin, 500 U.S. 44 (1991). Riverside addresses run-of-the-mill criminal cases, and the "bona fide emergencies or other extraordinary circumstance[s]" referred to in that case are clearly matters of "practical reality" such as "unavoidable delays in transporting arrested persons from one facility to another" and "handling late-night bookings where no magistrate is readily available". It is creative indeed to read the Supreme Court's judicious recognition that transportation, weather, and sleeping judges might cause excusable delays as introducing a loophole allowing complete disposal of the Bill of Rights and our system of checks and balances solely on the stated need of the Executive branch.

Moreover, nothing in Riverside affects the police officer's *own* constitutional duty to arrest only upon probable cause. Although our system requires that a police officer's judgment that there is probable cause to arrest be confirmed by the independent judiciary (and Riverside requires that review to occur within 48 hours), that judicial safeguard does not relieve the police officer of his or her own clear constitutional duty to arrest only when he or she believes in good faith that there is probable cause. Finally, the Riverside decision in no way contemplates holding suspects *incommunicado* – which appears to be the key element in Judge Posner's proposal. The Fifth Amendment requires that suspects under custodial interrogation have access to a lawyer, and Riverside does not address that provision at all.

The United Kingdom

If Congress is to look to the United Kingdom for comparison, we urge that the comparison be a full and fair one. Congress must recognize that even the courts of the United Kingdom have now rejected at least two of the extreme measures Judge Posner points to in his testimony. The indefinite detention of aliens who have been ordered deported but cannot leave was rejected by Britain's highest court in a 2004 decision. The house arrest

“control orders” that Judge Posner cites were subsequently adopted by Parliament to replace that system – but the control orders themselves have now been rejected at the trial and appeals court level (and will likely go before the highest court as well). Additionally, in 2005, Parliament itself refused to adopt the government’s proposal to extend pre-charge detention to 90 days; the defeat of this measure was supported by members of all three of Britain’s major political parties.

Moreover, numerous factors that have driven the U. K. government’s push for ever-increasing powers of preventive detention do not pertain in the United States, and therefore counsel against adoption of such practices in the United States. A fair and complete comparison of the two systems of investigation and prosecution would reveal that, in fact, the United Kingdom operates under a variety of restrictions that our investigators and prosecutors do not face. The United Kingdom’s ban on the use of intercepted communications in court is widely considered a severe hindrance to that country’s ability to establish cause for charging suspects with a crime. U.K. investigators and prosecutors must also comply with a higher evidentiary threshold for bringing charges; that nation’s strong traditional opposition to the use of lesser “holding charges” to detain suspects while building a case against them; and greater restrictions on post-charge interrogation of suspects. Finally, the United Kingdom does not jail persons through “material witness” warrants, a mechanism our government has since September 11 used – and abused – to detain without charge at least seventy persons suspected of having knowledge of terrorist attacks.

The proposal to detain Americans incommunicado and without charge would represent a radical departure from our constitutional tradition. If history is any guide, such a measure will have a profound negative impact on the lives of innocent people. The ACLU opposes this proposal in the strongest terms possible.

Thank you for your consideration of our views.

Sincerely,



Caroline Fredrickson,
Director, Washington Legislative Office



Lisa Graves,
Senior Counsel for Legislative Strategy