



U.S. Department of Justice

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Washington, D.C. 20530

The Honorable Frank R. Wolf
Chairman
Subcommittee on Commerce, Justice,
Science, and Related Agencies
Committee on Appropriations
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

The Statement of Managers accompanying the Consolidated and Further Continuing Appropriations Act, 2012 (P.L. 112-55) directs the Department of Justice, in consultation with other appropriate Federal agencies, to provide to the Committees on Appropriations, not later than 120 days after the enactment of this Act, an unclassified report on U.S. detention policy, including the legal basis for such a policy, as it applies to current and future terrorism detainees.

The report is enclosed for your review. This report was drafted in consultation with the following federal agencies: Central Intelligence Agency, Department of Defense, Department of State, Office of the Director of National Intelligence, and White House National Security Staff. The Office of Management and Budget does not object to transmittal of this report. Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read "Lee J. Lofthus".

Lee J. Lofthus
Assistant Attorney General
for Administration

Enclosure

Detention Policy Report

This report is submitted in response to the Statement of Managers associated with the Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, which calls for “the Department [of Justice], in consultation with other appropriate federal agencies, to provide to the Committees on Appropriations, not later than 120 days after the enactment of this Act, an unclassified report on U.S. detention policy, including the legal basis for such policy, as it applies to current and future terrorism detainees.”

Introduction

The protection of the American people from the ongoing terrorist threat posed by al Qaeda, its affiliates, and other terrorist organizations is of paramount importance and is a principal goal of U.S. national security policy. Detention of suspected terrorists serves this objective both by preventing the individuals detained from engaging in, planning, or supporting terrorist activity and by enabling U.S. Government officials to question them to obtain intelligence about terrorist networks and plots. Whenever it is possible to capture suspected terrorists, it is our preference that they be taken into custody by appropriate authorities so that they can be questioned to obtain intelligence that is vital to national security. For the United States to take custody of a suspected terrorist, however, we must have the legal authority to do so. Thus, as early as possible, we must carefully assess the facts and circumstances of each case in order to determine whether the U.S. Government has the legal authority to apprehend and detain the individual and to evaluate the potential for prosecution of that individual in our federal courts or a military commission. Where capture can be accomplished consistent with the security of our counterterrorism professionals, we use whatever personnel and authorities are best positioned and equipped to accomplish the mission, irrespective of the individual’s ultimate disposition.

Over the last several years, the Administration has developed an effective, sustainable policy for the detention, interrogation and trial of suspected terrorists, whether these individuals are captured in the United States or abroad. As the President has explained, we will use all legally available tools at our disposal – military, law enforcement, intelligence, diplomatic and economic – as part of a practical, flexible, results-driven approach that maximizes intelligence collection and preserves and enhances our ability to incapacitate terrorists, in a manner consistent with our national values and the rule of law. Indeed, our considerable success against al Qaeda and its affiliates has derived in significant measure from providing our counterterrorism professionals with the flexibility they need to adapt to changing circumstances and to use whichever authorities – or combination of authorities -- best protect the American people.

The legal authorities for detention of terrorist suspects include our criminal laws and procedures and, in some cases, the 2001 Authorization for Use of Military Force, as informed by the law of war and affirmed by the National Defense Authorization Act for Fiscal Year 2012. Individuals may be prosecuted either in federal courts or, where the jurisdiction to do so exists, in reformed military commissions. In some cases, our foreign partners may be best positioned to capture and detain or prosecute their nationals or other terrorists operating within their borders. In addition to working with key partners to assist them in those efforts, we must also maintain the ability to obtain critical intelligence from suspected terrorists, whether they are questioned by

foreign government personnel or U.S. Government personnel. Intelligence collection from detained individuals – in U.S. or foreign custody – may be conducted by the Federal Bureau of Investigation, our military personnel, other members of the Intelligence Community, or the High-Value Detainee Interrogation Group, an interagency group that is able to bring all the relevant resources of the U.S. Government to bear on the interrogation of the most dangerous terrorists.

In selecting from among the various options, we will continue to employ a flexible approach that takes into account all the facts and circumstances, in order to choose the course of action that best protects national security, consistent with our values and the rule of law.

Detention

Suspected terrorists may come into the custody of the United States in a variety of ways, including through U.S. military operations overseas; through an arrest by law enforcement personnel under traditional criminal procedures; or through transfer to the United States, *e.g.*, by extradition or expulsion, by foreign governments that have apprehended them. When the opportunity arises to take custody of a suspected terrorist, counterterrorism professionals, including from the Intelligence Community, the U.S. military, and federal law enforcement, routinely consult and coordinate on the best approach to ensure effective intelligence collection and long-term detention – both of which are necessary to protect national security.

Detention of Terrorist Suspects by Law Enforcement Authorities

The criminal statutes passed by Congress provide the broadest set of authorities for capturing and detaining suspected terrorists, since they encompass, but are not limited to, the activities of those terrorist groups with whom we are currently at war. Under federal law, the Attorney General has “primary investigative responsibility for all Federal crimes of terrorism[.]” 18 U.S.C. § 2332b(f), and the FBI is the lead counterterrorism investigative agency in the United States. *See* Homeland Security Presidential Directive 5 (HSPD-5) ¶ 8; 28 C.F.R. § 0.85(l). The FBI also has intelligence collection responsibilities under a variety of authorities, including Executive Order 12333 (as amended by Executive Orders 13284 (2003), 13355 (2004) and 13470 (2008)). FBI investigation and intelligence collection may, consistent with relevant international legal principles and other Intelligence Community activities overseas, take place both domestically and overseas by virtue of the extraterritorial reach of many U.S. criminal statutes passed by Congress and the FBI’s intelligence collection authorities. On the basis of an indictment or criminal complaint, law enforcement authorities may arrest terrorism suspects in the United States or request transfer from the military or foreign authorities for purposes of arrest and prosecution.

Our longstanding practice is to use criminal law authorities to detain terrorist suspects in the United States. The criminal justice system is very effective because those authorities are unquestionably lawful in a broad range of circumstances, they are time-tested, and the results are predictable. Constitutional concepts such as probable cause to arrest and indictment by a grand jury, as well as constitutional and statutory requirements for pre-trial detention, for example, are well-settled in the courts, understood by law enforcement officers, and accepted by the American people. Outside the United States, procedures to bring terrorist suspects into the custody of U.S. law enforcement authorities for purposes of charging and prosecution – such as extradition – are

recognized by the vast majority of nations. It is critical to ensure that foreign governments continue to cooperate in our counterterrorism efforts. Moreover, the procedural clarity of the criminal justice system and the stringent penalties available under our terrorism laws create strong inducements for suspects to cooperate, and often provide the greatest assurance of long-term incapacitation.

Military Detention of Terrorist Suspects

The ongoing armed conflict with al Qaeda, the Taliban, and associated forces triggers additional authorities that can be used to capture and detain members of those organizations and those who provide substantial support to them. Specifically, the U.S. military detains unprivileged enemy belligerents captured in the war against al Qaeda, the Taliban, and associated forces consistent with long-established principles of the law of war. The well-established statutory basis for our military to capture and detain certain suspected terrorists is the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF), as informed by the law of war and “affirm[ed]” by Section 1021 of the National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, 125 Stat. 1561 (2011) (NDAA). The AUMF expressly authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” The Supreme Court in *Hamdi v. Rumsfeld* found that the AUMF’s authorization to use “necessary and appropriate force” includes detention authority. The United States Court of Appeals for the District of Columbia Circuit, in the context of the habeas litigation brought by Guantanamo Bay detainees, has repeatedly recognized that this detention authority encompasses not only individuals who planned, authorized, committed, or aided the September 11 attacks, and persons who harbored those responsible for those attacks, but also individuals who were part of, or substantially supported al Qaeda, Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners. Thus, the Supreme Court and other federal courts have affirmed that the U.S. Government may detain persons who are subject to the AUMF during the continuation of the present hostilities, consistent with the law of war.

In the years since the enactment of the AUMF, the United States military has captured and detained thousands of individuals in Afghanistan in the ongoing conflict. Some of these individuals have been affiliated with al Qaeda; the majority has been affiliated with the Taliban, Hizb-I Islami Gulbuddin, and other associated armed groups. Several thousand individuals remain in U.S. custody in Afghanistan;¹ thousands of others have over time been transferred to the custody of Afghan authorities or released. For those who remain in U.S. custody in Afghanistan, the Secretary of Defense has put into place an administrative review process. Detainees in the Detention Facility in Parwan, Afghanistan, may challenge the basis and need for their detention before Detainee Review Boards, which provide a robust set of substantive and procedural rules designed to ensure a fair and transparent review process. Section 1024 of the

¹ On March 9, 2012, the United States and Afghanistan signed a Memorandum of Understanding under which the vast majority of these detainees are scheduled to be transferred to Afghan custody and control by September 9, 2012.

NDAA requires military lawyers and judges for certain status determinations involving detainees designated for long-term detention.

We have made clear that the authority to use military force against al Qaeda, the Taliban, and associated forces – and thus to detain certain suspected terrorists – is not restricted to the battlefields of Afghanistan. This does not mean, however, that we can and will use military detention whenever and wherever we choose. Significantly, international legal principles, including respect for another state’s sovereignty, constrain our ability to act unilaterally in foreign territory. Outside Afghanistan, our military is focused on those individuals who are a threat to the United States and whose capture would cause a significant – even if only temporary – disruption of the plans and capabilities of al Qaeda and its affiliates. As a practical matter, in the last several years – spanning two Administrations – the U.S. Government has generally relied on law enforcement authorities to take custody of terrorist suspects outside Afghanistan and Iraq. Foreign governments have increasingly assumed responsibility for terrorist suspects in their territories, and when terrorists have been transferred to the United States, it has occurred through law enforcement channels.

Detention of terrorist suspects found in the United States presents additional legal and policy questions. Since the September 11 attacks, the practice of the U.S. Government, under both the current and prior Administrations, has been to arrest and detain under federal criminal law all terrorist suspects who are apprehended in the United States. The previous administration placed only two individuals apprehended on U.S. soil in detention under the law of war – Ali al-Marri and Jose Padilla – and both were initially arrested using criminal law authorities. Following transfer to military detention and extensive litigation concerning the legality of the government’s actions, both were eventually returned to the criminal justice system, where they were convicted and sentenced for their crimes. Those cases did not definitively resolve complicated statutory and constitutional questions about whether and in what circumstances U.S. citizens and lawfully resident aliens apprehended in the United States may be detained under the law of war as enemy belligerents without charges. The President has since made clear that this Administration, as a matter of policy, will not authorize the indefinite military detention without trial of American citizens, regardless of their place of capture.

Section 1021 of the NDAA affirms that the authority granted by the AUMF includes the authority to detain, consistent with the laws of war, any “person who was part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners,” language that tracks the standard applied by the courts for who may be detained under the AUMF. The law also provides that it is not “intended to limit or expand the authority of the President or the scope of the [AUMF],” and that it “shall [not] be construed to affect existing law or authorities relating to the detention of United States citizens, lawful resident aliens of the United States, or any other persons who are captured or arrested in the United States.” The NDAA leaves open, and does not affect, the questions raised in the *Padilla* and *al-Marri* cases, *i.e.*, whether and in what circumstances the AUMF or the U.S. Constitution authorizes military detention of U.S. citizens and lawfully resident aliens who are apprehended in the United States.

The NDAA's Military Custody Requirement

Section 1022 of the NDAA, the so-called "military custody" provision, generally requires military custody for a narrowly defined group of terrorist suspects, at least for a temporary period, pending disposition under the law of war. Section 1022 applies only to individuals captured in the course of hostilities authorized by the AUMF who are determined both (1) to be members or part of al-Qaeda or "an associated force that acts in coordination with or pursuant to the direction of al-Qaeda," *and* (2) to have participated in the course of planning or carrying out an attack or attempted attack against the United States or its coalition partners. Military custody is mandated only until a disposition is made. Section 1022 makes clear that the disposition options may include, and are not limited to, transfer for trial by military commission or a federal court. The military custody requirement can also be waived in the interest of U.S. national security. United States citizens are specifically excluded from the reach of this provision, and it extends to lawful resident aliens, on the basis of conduct taking place within the United States, only to the extent permitted by the U.S. Constitution. Section 1022 invests in the President broad authority and discretion to design implementing procedures.

On February 28, 2012, the President issued Presidential Policy Directive 14 (PPD-14), which sets forth policies and procedures implementing Section 1022 in a manner that preserves our ability to disrupt or respond to terrorism threats and ensures that counterterrorism professionals have clear guidance and appropriate tools at their disposal to accomplish their mission effectively. As required by Section 1022, PPD-14 contains procedures for determining when the military custody requirement of Section 1022 applies to non-citizens detained by the United States; when and how any such determination will be implemented; and when and how to waive the requirements of Section 1022(a)(1) when it is in the national security interests of the United States to do so. If the Attorney General concludes that there is probable cause to believe that an individual is covered by the statute, a careful review commences to determine whether there is clear and convincing evidence that the military custody requirement applies, and to determine whether the requirement should be waived in the interest of national security. The Attorney General may issue a final determination that an individual is a covered person who must be transferred to military custody only with the concurrence of the Secretary of State, Secretary of Defense, Secretary of Homeland Security, Chairman of the Joint Chiefs of Staff, and Director of National Intelligence. Before any transfer of an individual to military custody occurs, the Director of the FBI must determine that the transfer will not disrupt any ongoing intelligence collection or compromise any national security investigation, as is expressly contemplated by the statute.

PPD-14 also issues several categorical waivers based on the President's finding that it is in the national security interest of the United States to do so and that it would be impractical, unnecessary, or overly burdensome to rely on individualized waivers. For example, the military custody requirement of Section 1022(a)(1) is waived when placing a foreign country's nationals or residents in U.S. military custody would impede counterterrorism cooperation or when transferring an individual to military custody could interfere with efforts to secure an individual's cooperation or confession. It is also waived when an individual is a lawful permanent resident who is arrested in this country or who is arrested by a federal agency on the basis of conduct taking place in this country. The President's procedures also make clear that the Attorney General, in consultation with other senior national security officials, has the authority

to issue additional waivers for categories of conduct, or for categories of individuals, or on an individual case-by-case basis, when doing so is in the interest of U.S. national security. Finally, PPD-14 states that a waiver is appropriate if the Attorney General determines, in consultation with other senior national security officials, that prosecution of the individual in federal, state, or a foreign court will best protect the national security interests of the United States.

Guantanamo Bay Detention Facility

Since the September 11 attacks, 779 individuals have been detained at our military detention facility in Guantanamo Bay, Cuba. Most of these individuals were captured in the Afghanistan/Pakistan region, although some were captured elsewhere. The majority of these individuals have since been transferred to other countries or released from U.S. custody; 171 individuals remain in U.S. custody at Guantanamo Bay. The President has determined that it is in the national security interests of the United States to close the detention facility at Guantanamo Bay and remains committed to doing so. This position has been supported by U.S. military leadership and many in both political parties, as well as the international community upon whom we often rely for cooperation in our counterterrorism operations. It is based on the judgment that maintaining the Guantanamo Bay facility, or sending additional detainees to it, would undermine international terrorism cooperation and continue to be used by al Qaeda to justify terrorist acts. Nonetheless, statutory restrictions in place since 2009 have effectively prohibited the closure of the Guantanamo Bay detention facility.

In 2009, under the aegis of Executive Order 13492, an interagency Guantanamo Review Task Force rigorously reviewed the status of 240 individuals then detained at Guantanamo Bay, on the basis of an unprecedented consolidation of U.S. Government information concerning each detainee. Based on the work of the Task Force, by January 2010, the Attorney General, the Secretaries of Defense, State, and Homeland Security, the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff, had reached consensus on the disposition of all 240 detainees subject to the review, including: (1) lawful, safe and humane transfer to a foreign country consistent with national security; (2) prosecution in a federal court or military commission; or (3) continued detention under the 2001 AUMF, as informed by the law of war, for those detainees who cannot be prosecuted but are too dangerous to release.²

Over the past three years, however, Congress has imposed restrictions on the discretion of the Executive Branch to transfer or prosecute individuals who continue to be held at Guantanamo Bay, regardless of the detainees' status or the threat they pose. The FY12 NDAA continues prohibitions on the use of funds for the transfer of Guantanamo Bay detainees to the United States for criminal prosecution (or any other purpose) and the construction of detention facilities in the United States to house Guantanamo Bay detainees. The NDAA also maintains "certification" requirements that, with limited exceptions, must be met before a Guantanamo Bay detainee can be transferred to a foreign country. Ultimately the Administration seeks repeal of these restrictions so that disposition of the remaining Guantanamo Bay detainees can move forward as appropriate, consistent with the national security interests of the United States and the interests of justice.

² The Task Force also designated certain detainees for "conditional" detention because, among other things, the security environment in their home country prevented their repatriation.

The Administration remains committed to maintaining a lawful, sustainable and principled regime for the review of the need for continued detention of the remaining detainees at Guantanamo Bay. Pursuant to Executive Order 13567, and consistent with NDAA Section 1023, the Secretary of Defense will coordinate an interagency periodic review process to ensure that the Government continues to hold detainees only as long as necessary to protect against a significant threat to our national security. Separately, the Supreme Court has made clear that all Guantanamo Bay detainees have the right to challenge the legality of their detention in a federal habeas corpus action. Dozens of such actions have been ruled on in federal court in the District of Columbia, and many other cases remain pending. In the Guantanamo litigation, the government has successfully established a strong legal basis for its detention authority under the AUMF, and has established a procedural regime that appropriately balances the important interests of the government and the detainees.

Interrogation

Intelligence can be critical to disrupting terrorist plots, thwarting attacks and saving lives, and one of our greatest sources of intelligence about al Qaeda, its plans, and its intentions has been the members of its network who have been apprehended by the United States and our foreign partners. It therefore remains the unqualified preference of this Administration to take custody of terrorist suspects so that we can obtain information that is vital to our national security and the safety of the American people. Where we succeed in capturing a suspected terrorist, our primary goal is to maximize intelligence collection. To that end, our policy is to begin the process of interrogation as soon as possible after capture, and we are committed to using the most effective means to collect intelligence from captured terrorists, consistent with our laws and values.

Interrogation Authorities

A number of federal agencies have the authority to interrogate suspected terrorists, including terrorist suspects who are in the custody of another department or agency of the U.S. Government or in the custody of a foreign government. For example, the FBI interrogates international terrorism suspects in the United States and abroad, in connection with its law enforcement and intelligence collection authorities, including the National Security Act of 1947, 28 U.S.C. § 533, and 18 U.S.C. § 2332b(f). The CIA conducts interrogation activities for the purpose of collecting foreign intelligence pursuant to the National Security Act of 1947, as amended, Executive Order 12333, as amended, and Executive Order 13491. The Department of Defense conducts intelligence interrogations as necessary to carry out its mission and functions, including management of human intelligence activities and intelligence collection, also pursuant to the National Security Act of 1947 and other authorities such as Executive Order 12333, as amended. For more detail regarding the legal authorities, along with other rules governing, the execution of these authorities, please see Report on Detention and Interrogation Activities (December 16, 2010), provided pursuant to Section 333 of the Fiscal Year 2010 Intelligence Authorization Act, Pub. L. No. 111-259, to various Committees of the House of Representatives and the Senate. The report enumerates policies and procedures of the United States Government governing participation by an element of the U.S. intelligence community in the interrogation of individuals detained by the United States who are suspected of international terrorism with the objective, in whole or in part, of acquiring intelligence.

Executive Order 13491 Review

In 2009, in Executive Order 13491, the President directed a review of U.S. interrogation practices in order to improve the effectiveness of human intelligence-gathering; to promote the safe, lawful and humane treatment of individuals in United States custody, and of United States personnel who are detained in armed conflicts; and to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions, and domestic law. The Executive Order also prohibited torture and other cruel, inhuman and degrading treatment and directed the use of only those interrogation techniques set forth in the Army Field Manual and other authorized federal law enforcement techniques.

At the same time, the President directed that a Task Force be established to evaluate whether the interrogation practices and techniques in the Army Field Manual, when employed by departments and agencies other than the U.S. military, provide an appropriate means of acquiring the intelligence necessary to protect the Nation. The Task Force was also charged with recommending any additional, or different, guidance for other departments or agencies. The Task Force consisted of representatives from the relevant national security agencies, including representatives of the Intelligence Community responsible for, and having experience with, interrogation of terrorist detainees. After extensive consultation with representatives of the U.S. Armed Forces, the Intelligence Community, and some of the Nation's most experienced and skilled interrogators, the Task Force concluded that the Army Field Manual provides appropriate guidance for military interrogators and that no additional or different guidance was necessary for other agencies. These conclusions rested on the Task Force's *unanimous* assessment that the practices and techniques identified by the Army Field Manual or currently used by law enforcement provide adequate and effective means of conducting interrogations.³

High-Value Detainee Interrogation Group

In order to improve further our ability to collect intelligence from the most dangerous terrorists, the President approved the creation of the High-Value Detainee Interrogation Group (HIG), which brings together resources from across the government – experienced interrogators, subject matter experts, intelligence analysts, behavioral specialists, and linguists – to prepare for and conduct or assist in the interrogation of those terrorists with the greatest intelligence value. The Mobile Interrogation Teams (MITs) of the HIG, whose primary goal is to gather intelligence from captured terrorists, are used flexibly, both domestically and abroad, and, where feasible, collect intelligence information in a manner that preserves its use as evidence in a criminal prosecution. Over the course of fourteen HIG deployments, we have successfully brought together the capabilities that are essential to effective interrogation and ensured that they can be mobilized quickly and in a coordinated manner, in almost any environment. This interagency approach to interrogation proved extremely successful prior to the creation of the HIG, and through its creation, we have focused on institutionalizing and strengthening these capabilities.

³ The Task Force identified a need for further research on interrogation methods. The High-Value Detainee Interrogation Group, described below, was subsequently charged with sponsoring and coordinating that research, which is the subject of a separate report requested by the Appropriations Committees.

Miranda and Public Safety Interrogation

Our first priority in terrorism cases is intelligence collection to prevent terrorist attacks, whether the interrogation is conducted by law enforcement, intelligence or military personnel. At the same time, it is critical that interrogations of terrorist suspects be conducted in a manner that facilitates their lawful detention, so that they do not pose a threat to our communities. We have had great success in obtaining intelligence information from terrorist suspects in criminal investigations, even where suspects have been read their *Miranda* rights, just as our intelligence and military personnel have obtained information without providing *Miranda* warnings. Many years of experience have demonstrated that *Miranda* warnings are not a significant impediment to intelligence collection, and that the question whether a terrorist suspect will cooperate depends principally on the individual, the facts and circumstances of the case, and the skill of the interrogators. Regardless of the custodial entity or the procedure employed, however, some individuals refuse to provide information, and this is as true of detainees held by our military in Afghanistan and Guantanamo Bay as it is for some criminal defendants. Indeed, there is danger in failing to provide a *Miranda* warning where it is appropriate to do so because the issuance of such warnings prior to custodial questioning of a criminal suspect ensures that any statements made by a suspect may be used against him in a prosecution – eventually leading to conviction and sentencing.

In the law enforcement context, we have also worked to ensure that the rules on interrogation are applied in a manner that reflects the unique nature of terrorist organizations and the complex, diverse, threats that we confront today. The Supreme Court, in *New York v. Quarles*, has recognized a limited exception to *Miranda*, allowing custodial statements to be admitted into evidence if the unwarned interrogation was reasonably prompted by a concern for public safety. In order to provide clarity to law enforcement agents, the FBI issued guidance on the use of the public safety exception in operational terrorism cases in 2010. Under this guidance, agents are instructed to ask any and all questions that are reasonably prompted by an immediate concern for the safety of the public or the arresting agents, before advising the arrestee of his *Miranda* rights. Only after all applicable public safety questions have been exhausted are agents instructed to advise the arrestee of his *Miranda* rights and seek a waiver of those rights before any further interrogation occurs, absent exceptional circumstances.⁴

Agents have used the public safety exception to obtain important intelligence information about terrorist activity in a number of cases, including during the questioning of Faisal Shahzad, the so-called Times Square bomber. Recently, in a major terrorism case involving the attempted Christmas Day 2009 attack on an airliner, a federal judge ruled that statements obtained from the defendant under the public safety exception – prior to *Mirandized* questioning – were admissible at trial. The defendant in that case, Umar Farouk Abdulmutallab, subsequently pleaded guilty to all charges and was sentenced to life in prison.

⁴ For example, there may be exceptional cases in which, although all relevant public safety questions have been asked, unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat, and the government's interest in obtaining this intelligence outweighs the disadvantages of proceeding with unwarned interrogation.

Prosecution

Where we succeed in capturing suspected terrorists, our preference is to bring them to justice for their crimes after conducting a comprehensive interrogation to gather intelligence. As noted above, consistent with longstanding practice and policy, suspected terrorists arrested inside the United States will be prosecuted in our federal courts. Similarly, when U.S. citizens involved in terrorist-related activity are apprehended, regardless of the place of capture, we will prosecute them in our criminal justice system. Under current law, U.S. citizens may not be tried by military commission.

The choice of prosecution forum is guided by the factual and legal complexities of each case, and the relative advantages and disadvantages of each system. The ultimate decision about whether and where to prosecute a suspected terrorist is made by the agencies authorized to carry out such prosecutions – the Department of Justice and the Department of Defense. Prosecutors are often obliged to make such forum decisions in other contexts where there may be concurrent jurisdiction, *e.g.*, when choosing between prosecution in federal or state court or when choosing between federal court and a court-martial.

Prosecution in Federal Court

Federal courts have a long and established history of successfully handling prosecutions of suspected terrorists, regardless of where those individuals are apprehended. Over the past decade, the Department of Justice has successfully and securely used the criminal justice system to convict and incarcerate hundreds of defendants for terrorism and terrorism-related offenses that occurred both in the United States and overseas, including plots involving both civilian and military targets. Congress has recognized the importance of prosecuting accused terrorists in federal court by incorporating into the U.S. criminal code numerous terrorism offenses, such as providing material support to terrorism or receiving terrorist training, and long ago it enacted the Classified Information Procedures Act to protect classified information in federal court trials where necessary.

After September 11, 2001, Congress also helped strengthen our laws and our legal system to better enable the Department of Justice to investigate, prosecute, convict and incapacitate terrorists. For example, in 2006, Congress created the Department's National Security Division, which had been proposed by the bi-partisan Weapons of Mass Destruction Commission as a critical means of combining intelligence and law enforcement tools to address terrorism and other national security threats more effectively. Congress also added new terrorism offenses, enhanced existing offenses, expanded extraterritorial jurisdiction and stiffened penalties. Thus, a broad range of terrorism offenses, some with extraterritorial reach, are available in the criminal code to prosecute terrorists, and these offenses carry stringent, and, in some cases mandatory, sentences that are used by federal prosecutors to incentivize cooperation on the part of defendants. As a consequence, federal prosecution of a terrorist suspect is a powerful intelligence collection tool that can be used to help us identify and detain other dangerous terrorists.

In the last three years, we have successfully prosecuted many terrorists apprehended both in the United States and abroad in response to increasingly diverse and decentralized threats by an expanding universe of groups and individuals targeting our country, including al-Qaeda in the

Arabian Peninsula, the Pakistani Taliban and other organizations, as well as an increasing number of self-radicalized U.S. citizens and residents. Convictions for serious crimes have resulted in long sentences, including life imprisonment in the most serious cases, and many individuals have cooperated with law enforcement authorities, providing valuable information about al Qaeda's methods, plots and plans. Well-known examples include: Faisal Shahzad, who pleaded guilty and was sentenced to life imprisonment for attempting to detonate a car bomb in Times Square in 2010; Ahmed Ghailani, who was found guilty and sentenced to life in prison for his role in the 1998 attacks against U.S. embassies in Kenya and Tanzania; Umar Farouk Abdulmutallab, who pleaded guilty to all charges in connection with his attempt to bomb Northwest Airlines flight 253 on Christmas Day in 2009 and was sentenced to life imprisonment; David Headley, who participated in planning the November 2008 terrorist attacks in Mumbai, India, pleaded guilty in federal court and is awaiting sentencing; and Najibullah Zazi, who admitted plotting to bomb the New York subway system in 2009, pleaded guilty in 2010 and is awaiting sentencing.

These and many other post-9/11 terrorism prosecutions have proceeded without any terrorist suspect escaping federal custody or a terrorist group launching a retaliatory attack against a judicial district. Those who are convicted in federal courts are held safely and securely in our federal prisons.

Prosecution in Military Commissions

Military commissions are an important and effective forum for prosecuting violations of the law of war or offenses traditionally triable by military commission, and play a critical role in this Administration's counterterrorism policy alongside federal prosecutions. The bi-partisan efforts that culminated in passage of the Military Commissions Act of 2009 (2009 MCA) have ensured that reformed military commissions provide all of the core protections that are necessary to a fair trial and are in line with our principles and values, thus enhancing the credibility of that system. Most fundamentally, the 2009 reforms expressly prohibit the use of any statement obtained by torture, or cruel, inhuman, or degrading treatment, and no statement of the accused is admissible at trial unless the military judge finds that the statement is reliable and sufficiently probative to warrant admission. The reformed military commission system includes other attributes fundamental to a fair trial: the presumption of innocence; proof beyond a reasonable doubt; an impartial decision-maker; the right to counsel, including the accused's right to choose his counsel; government-provided representation for those who cannot afford to pay; a right to be present during court proceedings; a right to exculpatory evidence; a right to present evidence, compel witnesses, compel favorable testimony, and to challenge the government's evidence; and a right to an appeal.

There are many similarities between the reformed military commissions and the federal courts, but at times, military commissions may be better suited to trying accused terrorists. For example, under the 2009 MCA, military commissions have more flexible standards than federal courts for admitting custodial statements made by the accused so that an admission not preceded by a *Miranda* warning may be admissible against the accused if it was voluntarily given or given in certain battlefield capture situations; hearsay is permitted in somewhat broader circumstances, which could allow better protection of sensitive sources and methods in some cases; and the rules for the use of classified evidence, though modeled on the Classified Information Procedures Act used in the federal courts, contain some explicit modifications and improvements which

might offer more certainty in protecting sensitive information. Where our counterterrorism professionals believe trying a suspected terrorist before a military commission would best protect the full range of U.S. security interests, we will not hesitate to do so.

On the other hand, only foreign nationals may be prosecuted in a military commission and, in addition to proving that the accused committed an unlawful act, the government must prove the accused is an unprivileged enemy belligerent (as defined by the 2009 MCA), *i.e.*, that he (1) engaged in hostilities against the United States or its coalition partners, (2) purposefully and materially supported such hostilities, or (3) was a part of al Qaeda at the time of the alleged offense. This jurisdictional standard can be more difficult to meet in some cases than proving criminal charges in federal court.

Charges under the 2009 MCA are also limited to violations of the law of war and other offenses traditionally tried by military commission. Accordingly, in some cases, there will not be a military commission charge available for conduct that violates federal law. Federal prosecutors may use a much broader range of offenses, including non-terrorism offenses such as gun charges, immigration charges, or false statements charges, to punish the defendant and to neutralize the threat that the defendant may pose. In addition, sentencing in a military commission is done by the military members – essentially the jury – rather than by the judge, and without the benefit of sentencing guidelines. Therefore, sentences may be less predictable than in federal court, where the U.S. Sentencing Guidelines are typically applied and statutory mandatory minimums may be available. Thus, there are some cases when federal courts are the only available forum to prosecute a terrorist suspect, and others in which it is the preferred forum for a variety of reasons.

To date, military commission cases have been completed against six individuals: four are serving sentences, one of which is for life; and two have served their sentences and have been released. Two of these cases are on appeal to the United States Court of Appeals for the District of Columbia Circuit. In addition, in February 2012, Majid Shoukat Khan pleaded guilty to all of the charges against him, including conspiracy, murder and attempted murder, and admitted, among other things, his role in the bombing of the J.W. Marriott Hotel in Indonesia in 2003 and the attempt to assassinate former Pakistani President Pervez Musharraf. In September 2011, the convening authority for military commissions referred charges against Abd Al-Rahim Hussein Muhammed Abdu Al-Nashiri, for his alleged role in the October 2000 attack on the USS COLE. Some of the charges are capital, or “death eligible,” empowering the military commission to impose the death penalty following a conviction if military jurors unanimously agree. Pursuant to the reforms in the 2009 MCA, Al-Nashiri has been provided with additional counsel, learned in the applicable law relating to capital cases, to assist in his defense. The pending charges against five September 11, 2001 co-conspirators, including Khalid Sheikh Mohammed, are awaiting a decision by the Convening Authority whether to refer those charges to a military commission.

Flexibility – Using Multiple Authorities Together

The determination to prosecute a terrorist suspect, whether in a federal court or a military commission, is fact-based and case-specific and is not susceptible to bright-line rules. In some cases, a combination of military and criminal justice authorities may best serve our national security interests. For example, when the U.S. military captured Ahmed Warsame, a member of

al-Shabaab with close ties to al Qaeda in the Arabian Peninsula, he was initially held under the authority of the 2001 AUMF, and military interrogators conducted a comprehensive intelligence interrogation to the satisfaction of the Intelligence Community. After careful consideration of all the options, the decision was then made to prosecute Warsame in federal court based on the unanimous assessment of the President's national security team that this option best protected national security. Prosecution by military commission was carefully considered, but there were significant litigation risks in establishing military commission jurisdiction. Specifically, establishing that Warsame fit squarely within the definition in the 2009 MCA of those individuals eligible for trial by military commission would have raised novel legal questions and could have required the use of classified evidence not needed in federal court. Moreover, if convicted of certain charges available in federal court, Warsame faces a mandatory life sentence which is not available in a military commission. Thus, based on the available evidence and offenses, it was decided that prosecuting Warsame in federal court was the best option. This case provides a good example of how military and law enforcement authorities and resources can be used in concert to achieve our counterterrorism objectives.

Conclusion

In sum, the Administration takes a practical, flexible, and results-driven approach to detention, interrogation, and trial of terrorist suspects that maximizes both our ability to collect intelligence and to incapacitate dangerous individuals and that is consistent with our laws and our values. We believe it is imperative that the U.S. Government continue to employ all of the authorities available to it to detain, question, and prosecute terrorist suspects in the manner that best protects national security.