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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

KOLAN L. DAVIS, Chief Counsel and Staff Director
KRISTINE J. LUCIUS, Democratic Chief Counsel and Staff Director

January 15, 2016

VIA ELECTRONIC TRANSMISSION

The Honorable Loretta Lynch
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

The Honorable Channing D. Phillips
Acting U.S. Attorney for the District of
Columbia
U.S. Department of Justice
555 4th Street, NW
Washington, DC 20530

Dear Attorney General Lynch and Mr. Phillips:

On June 22, 2015, the Department of Defense announced that the U.S. had killed the Tunisian terrorist Ali Awni al Harzi in an airstrike against ISIS targets in Mosul, Iraq.¹ On July 1, 2015, I wrote to Attorney General Lynch and FBI Director Comey regarding prior efforts by the FBI and the Department of Justice (DOJ) to bring al Harzi to justice. According to the United Nations' official designation of al Harzi as a terrorist, he "[p]lanned and perpetrated the attack against the Consulate of the United States in Benghazi, Libya on 11 Sep. 2012."²

In October of 2012, al Harzi was detained in Turkey as a suspect in the attacks and sent to Tunisia on charges of membership in a terrorist organization.³ After initial reluctance by the Tunisian government to let the FBI speak with al Harzi, and the subsequent intervention by Senators Graham and Chambliss, the FBI questioned al Harzi in Tunisia in December of 2012.⁴ In response, members of al Harzi's al Qaeda-linked group reportedly released pictures of the interviewing FBI agents to jihadist websites.⁵ Nonetheless, rather than being tried for any offense by the Tunisian court or transferred to U.S. custody, al-Harzi was released from Tunisian

¹ <http://www.defense.gov/news/newsarticle.aspx?id=129101>.

² <http://www.un.org/press/en/2015/sc11856.doc.htm>.

³ Bouazza Ben Bouazza, *FBI Questions Benghazi Consulate Attack Suspect*, ASSOCIATED PRESS, Dec. 22, 2012, available at <http://news.yahoo.com/fbi-benghazi-consulate-attack-suspect-154510084.html>.

⁴ *Id.*; Larry Margasak, *Senators: U.S. Gets Access to Libya Attack Suspect*, THE SEATTLE TIMES, Nov. 2, 2012, available at <http://www.seattletimes.com/seattle-news/politics/senators-us-gets-access-to-libya-attack-suspect/>.

⁵ Thomas Joscelyn, *Ansar al Sharia Tunisia Releases Pictures of FBI Agents*, THE LONG WAR JOURNAL, Dec. 23, 2012, available at http://www.longwarjournal.org/archives/2012/12/ansar_al_sharia_tuni_1.php.

custody in January of 2013.⁶ His al Qaeda-linked group posted a celebratory video of his release online.⁷

In multiple Congressional hearings that same month, then-Secretary of State Clinton acknowledged that al Harzi was a suspect in the Benghazi attacks and stated that his release stemmed from an issue at the time regarding the availability of evidence “that could be provided in an open court” in Tunisia.⁸ She testified that, despite al Harzi’s release, the Tunisian government had assured the U.S. government that it was monitoring him and that he was forbidden to leave Tunis.⁹ Secretary Clinton further assured Congress that the State Department would hold the Tunisians to that pledge and would monitor the situation carefully.¹⁰

But that was not to be the case.

As noted in press reports, after being questioned by the FBI about the Benghazi attacks and released from Tunisian custody, al Harzi became an ISIS operative, was responsible for planning hundreds of suicide attacks around the world, and was responsible for recruiting foreign fighters and sending them to the fight in Syria.¹¹ According to the New York Times, “[h]e recruited fighters from Europe and North Africa, helped them travel to Iraq and Syria, procured weapons and other matériel, and organized attacks. [...] His links with ISIL recruitment and financial networks in such locations as Europe, Africa and the Persian Gulf helped ISIL expand from a local group to a more globalized organization.”¹² Then, on June 22, 2015, the Department of Defense announced that al Harzi had been killed in a U.S. airstrike in Mosul, Iraq on June 15, 2015, further stating that “[h]is death degrades ISIL’s ability to integrate North African jihadists into the Syrian and Iraqi fight and removes a jihadist with long ties to international terrorism.”¹³

In light of these circumstances, my July letter asked a number of questions in an attempt to get more information to evaluate the situation. In response, on September 30, 2015, the FBI provided a classified briefing to members of my Committee staff.¹⁴ That briefing answered a

⁶ Thomas Joscelyn, *Why is Ali Harzi Still at Large?*, THE WEEKLY STANDARD, Oct. 21, 2013, available at http://www.weeklystandard.com/articles/why-ali-harzi-still-large_762276.html.

⁷ *Id.*

⁸ *Benghazi: The Attacks and The Lessons Learned: Hearing Before the Senate Foreign Relations Committee*, 113th Cong. (2013), available at <http://www.c-span.org/video/?310496-1/senate-hearing-benghazi-consulate-attack> (56:16-57:14); *Hearing on the Terrorist Attacks in Benghazi, Libya: House Foreign Affairs Comm.*, 113th Cong. (2013), available at <http://www.c-span.org/video/?310545-1/house-hearing-benghazi-consulate-attack> (1:48:32-1:50:45, 2:50:42-2:51:39).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *US Says IS Suspect in Benghazi Attack Killed in Airstrike*, ASSOCIATED PRESS, June 22, 2015, available at <http://bigstory.ap.org/article/354649d910734b40af3f4aca5f2d0a9c/us-says-suspect-benghazi-attack-killed-airstrike>.

¹² Helene Cooper and Eric Schmitt, *U.S. Says Drone Killed an ISIS Operative*, THE NEW YORK TIMES, June 23, 2015, available at http://www.nytimes.com/2015/06/23/world/middleeast/us-says-drone-killed-an-isis-operative.html?_r=0.

¹³ *Supra* note 1.

¹⁴ At his confirmation hearing, CIA Director Brennan testified that “we didn’t have anything” on al Harzi at the time of his release by the Tunisians. That assertion is inconsistent with information Committee staff received in the FBI briefing. Nor does his assertion comport with Secretary Clinton’s testimony that the issue involved the availability of evidence “that could be provided in an open court” in Tunisia.

few of the questions I raised in my letter, but left the majority unaddressed. The FBI declined to discuss then-Director Mueller's reported discussions with the Tunisian government or the State Department regarding al Harzi. Moreover, the FBI personnel declined to speak to issues involving other parts of the Department of Justice or other government agencies, even on matters involving the FBI's interaction with those other DOJ components or other agencies. Instead, the FBI requested that the Committee direct its inquiry to officials from the Department of Justice and other involved agencies.

On October 16, 2015, Assistant Attorney General Kadzik sent a response letter that merely referenced the FBI briefing, but did not provide any responses to my questions. It did state that I should "not hesitate to contact this office or the FBI[] ... if we may provide additional assistance regarding this [] matter." Because so many of my initial questions have not been answered, I am contacting you to raise them again, along with some new ones.

As reported by the New York Times, within 24 hours of the Benghazi attack, Attorney General Holder assigned the Benghazi cases to the U.S. Attorney for the District of Columbia, although the FBI agents leading the investigation were in New York.¹⁵ According to the article:

Early in the Benghazi investigation, the [FBI] agents and [DOJ] prosecutors clashed about whether there was enough [evidence] to file charges. Agents from New York traveled to Washington to make their arguments that they had enough evidence. The prosecutors disagreed. Ultimately, senior Justice Department officials sided with the prosecutors, and charges were filed months later.¹⁶

1. Did FBI agents ask DOJ attorneys to file charges against al Harzi? If so, when? Did DOJ attorneys refuse to do so at that time? Did senior Justice Department officials agree that no charges should be filed at that time? If so, which senior Department officials made this determination? Did the DOJ attorneys or officials determine that the evidence against al Harzi at the time did not establish probable cause?
2. Section 9-27.270 of the U.S. Attorneys' Manual requires that "[w]henver the attorney for the government declines to commence or recommend Federal prosecution, he/she should ensure that his/her decision and the reasons therefore are communicated to the investigating agency involved and to any other interested agency, and are reflected in the office files." Please provide all records related to FBI's request, if any, that DOJ initiate a prosecution of al Harzi, DOJ's refusal, and any concurrence by senior DOJ officials.

¹⁵ Michael S. Schmidt, *Holder Decision on Benghazi Case Reverberates*, THE NEW YORK TIMES, Oct. 17, 2014, available at <http://www.nytimes.com/2014/10/18/us/holder-decision-on-benghazi-case-reverberates.html>; see also Adam Goldman and Carol D. Leonnig, *Benghazi Case a Big Test For D.C. Lawyers Who Lack Experience Prosecuting Terror Suspects*, THE WASHINGTON POST, June 21, 2014, available at https://www.washingtonpost.com/world/national-security/benghazi-case-a-big-test-for-dc-prosecutors-who-lack-experience-in-terrorism/2014/06/21/a4e3c8a6-f6fe-11e3-a606-946fd632f9f1_story.html

¹⁶ Schmidt, *supra* note 15. The article does not specify whether the requested charges were to be against al Harzi and/or other suspects.

3. Did anyone from the US Attorney's Office, DOJ's National Security Division (NSD), or any other component of the Justice Department ever seek authorization to prosecute al Harzi? If not, why not? If so, when? Please provide all records related to that request.
4. Did anyone from the U.S. Attorney's Office, NSD, or any other component of the Justice Department prepare a prosecution memorandum related to al Harzi? If so, please provide a copy of that memorandum and all records relating to any decision on the issue. If not, why not?
5. Did anyone from the U.S. Attorney's Office, NSD, or any other component of the Justice Department ever request to use classified or declassified information as evidence in a criminal case against al Harzi, either in support of his prosecution in Tunisia or a prosecution in the United States? If so, was such a request granted? If not, why not? Please provide copies of all such evidence, all documents relating to requests to use the evidence in a criminal case, and all documents relating to discussion and decisions on the issue.
6. Did the Department of Justice ever seek or obtain an arrest warrant, criminal complaint, or indictment against al Harzi? If so, when? Please provide copies of all related documents.
7. Did the Department of Justice ever seek or obtain any red, blue, or green notice with INTERPOL related to al Harzi?
8. Was al Harzi ever considered for law-of-war detention pursuant to the Authorization for Use of Military Force, rather than an Article III prosecution? If so, please provide all records relating to such consideration. If not, why not? Was the sufficiency of the evidence against al Harzi ever considered under the burden of proof for *habeas corpus* challenges to law-of-war detention rather than that of Article III prosecution? Were DOJ attorneys with expertise in *habeas corpus* challenges to law-of-war detention consulted about al Harzi's case?
9. Did the United States government seek to extradite al Harzi from Turkey? If so, please provide all records relating to the request and the response. If not, why not?
 - a. Did anyone from the U.S. Attorney's Office, NSD, or other DOJ component consult with DOJ's Office of International Affairs (OIA) regarding OIA's review and approval of a formal request for extradition from Turkey? If so, please provide copies all records relating to such communication.

- b. Did anyone from the U.S. Attorney's Office, NSD, or other DOJ component request that OIA or the State Department ask Turkey to provisionally arrest al Harzi? If so, please provide all related records. If not, why not?
 - c. According to Section 9-15.225 of the U.S. Attorneys' Manual, "[i]f the decision is made to not seek extradition in a particular case, the prosecutor and the Office of International Affairs (OIA) will make a record to document why extradition was not possible." If al Harzi's extradition was not sought from Turkey, please provide this record.
10. Regardless of the absence of an extradition treaty, did the government request al Harzi's extradition from Tunisia? If so, please provide all records relating to the request and the response. If not, why not?
- a. Did anyone from the U.S. Attorney's Office, NSD, or other DOJ component consult with DOJ's Office of International Affairs (OIA) regarding OIA's review and approval of an extradition request to Tunisia? If so, please provide copies all records relating to such communication.
 - b. Did anyone from the U.S. Attorney's Office, NSD, or other DOJ component request that OIA or the State Department ask Tunisia to provisionally arrest al Harzi? If not, why not? If so, please provide all related records.
 - c. As noted above, according to Section 9-15.225 of the U.S. Attorneys' Manual, "[i]f the decision is made to not seek extradition in a particular case, the prosecutor and the Office of International Affairs (OIA) will make a record to document why extradition was not possible." If al Harzi's extradition was not sought from Tunisia, please provide this record.
11. As noted above, it was publicly reported that FBI agents interviewed al Harzi in Tunisia in December of 2012. Please provide all records relating to the United States government's request to interview al Harzi in Tunisia and the interview itself.
12. If the government requested extradition from Turkey and Tunisia, but they refused, did DOJ consider, or was DOJ aware of other government agencies' consideration of, securing al Harzi via an *Alvarez-Machain* type rendition? As stated in Section 9-15.610, prosecutors may pursue such rendition if given the advance approval of the Department of Justice and if OIA is notified before any such operation is undertaken. Indeed, it appears al Harzi's fellow Benghazi attacker Abu Khattala was seized in Libya in 2014 in

such an operation.¹⁷ If considered, why was an *Alvarez-Machain* rendition rejected? If it was not considered, why was it not?

13. After al Harzi was released from Tunisian custody, did any component of the Justice Department receive updates from Tunisia about al Harzi's whereabouts and activities? If so, when did they cease? Please provide copies of any such reports.

14. After al Harzi was released from Tunisian custody, when did DOJ prosecutors involved in his case learn of his subsequent terrorist activities with ISIS? What actions did they take in response to this information?

Please provide your response by January 29, 2015, and please number your answers according to their corresponding questions. If any of these documents are classified, please deliver them to the Office of Senate Security. If you have any questions about this request, feel free to contact Patrick Davis of my Committee staff at (202) 224-5225. Thank you for your attention to this important matter.

Sincerely,



Charles E. Grassley
Chairman
Senate Committee on the Judiciary

cc: The Honorable Patrick J. Leahy
Ranking Member
Senate Committee on the Judiciary

The Honorable Lindsey O. Graham
Chairman, Subcommittee on Crime and Terrorism
Senate Committee on the Judiciary

¹⁷ Karen DeYoung, Adam Goldman, Julie Tate, *U.S. Captured Benghazi Suspect in Secret Raid*, THE WASHINGTON POST, June 17, 2014, available at: https://www.washingtonpost.com/world/national-security/us-captured-benghazi-suspect-in-secret-raid/2014/06/17/7ef8746e-f5cf-11e3-a3a5-42be35962a52_story.html