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September 16, 2009

Sarah Guerrieri
Hearing Clerk
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Bldg.
Washington, DC 20510

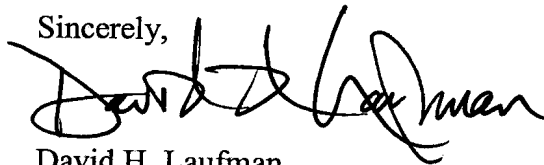
Re: Responses to QFRs

Dear Ms. Guerrieri:

Enclosed please find my responses to Questions for the Record concerning the July 28, 2009, hearing by the Subcommittee on Terrorism and Homeland Security entitled, "Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond."

Thank you for your assistance in this matter.

Sincerely,



David H. Laufman

Enclosure

David H. Laufman

Responses to Questions for the Record Concerning the July 28, 2009, Hearing by the Subcommittee on Terrorism and Homeland Security Entitled "Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"

Question from Senator Kyl

1. On page 11 of your written testimony, you said: "More often than not in terrorism cases, courts have either ordered pre-trial detention or authorized release subject to restrictive conditions." I was shocked by the fact that there is a substantial risk that a judge presiding in a civilian trial may release a suspected pending trial. Why is this not a compelling reason to favor military prosecutions over civilian trials?

There is always *some* risk that a federal magistrate judge will deny a government motion for pretrial detention in a terrorism case and order the release of the defendant subject to conditions. But it would be inaccurate to describe that risk as "substantial." In the overwhelming majority of cases -- both before and since September 11 -- defendants criminally charged with terrorism-related offenses have been detained pending trial. The risk of a terrorism defendant's release pending trial also has diminished since Congress established a rebuttable presumption against pretrial release in terrorism cases. Further, if a magistrate judge denied a government motion for pretrial detention, the government could pursue an immediate appeal to a United States District Judge while the defendant remained incarcerated.

Questions from Senator Sessions

1. At the subcommittee hearing on July 28, 2009, you indicated that the Classified Information Procedures Act (CIPA) provides an adequate statutory mechanism for protecting sensitive information from disclosure. Didn't prosecutors have many problems with CIPA in the Zacarias Moussaoui case? Do you support reforming CIPA to address those problems before additional detainees are transferred to Article III courts for prosecution?

CIPA can present challenges for prosecutors, particularly when a district court orders a wide-ranging search of intelligence community records for potentially exculpatory information. The CIPA proceedings in the Moussaoui case were extensive and complex. But the government found CIPA to be an effective mechanism for protecting against the improper disclosure of classified information. Based on my own experience litigating CIPA issues and the historical record to date of cases involving CIPA litigation, I have no present basis to believe that CIPA needs to be amended.

2. You are a member of the criminal defense bar. Don't some members of the criminal defense bar believe that certain aspects of CIPA – for example, using redacted summaries of witness testimony – violate the Confrontation Clause, in light of recent Supreme Court cases? Do you believe that any aspects of CIPA arguably violate the Confrontation Clause?

It is fair to say that some members of the defense bar do not regard CIPA as a sufficient mechanism for protecting their clients' constitutional rights at trial. Several courts have addressed legal challenges to CIPA proceedings; to my knowledge, the statute consistently has been found to be constitutional.

3. In the appendix to its July 20, 2009, memorandum, the Detention Policy Task Force stated that “[t]here is a presumption that, where feasible, referred cases will be prosecuted in an Article III court, in keeping with traditional principles of federal prosecution.” The administration can then overrule the presumption and proceed via military commission if there are “compelling factors” that “make it more appropriate to prosecute a case in a reformed military commission.” In response to questioning, you indicated that some types of cases should be tried before military commissions. Specifically, you stated that the Zacarias Moussaoui case possibly should have been tried before a military commission. In your view, which types or categories of cases should be handled by military commissions?

What I stated in my response to a question from Senator Kyl was that “the Moussaoui case *could* have probably been brought in a military commission.” (Tr. at 118 (emphasis added)) Although I generally favor bringing terrorism cases in Article III courts where practicable, in my judgment, crimes against humanity and war crimes, as a policy matter, more properly are adjudicated in a military commission under rules comparable to those employed in established international tribunals.