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Responses to Questions for the Record Concerning June 9, 2009, Hearing by Subcommittee on the Constitution Entitled "The Legal, Moral, and National Security Consequences of Prolonged Detection.'"

Questions Submitted by Senator Russell D. Feingold

1. You testified that "there are no proven examples of disclosures at trial resulting in the compromise of sensitive intelligence sources and methods." Can you explain how our courts have achieved that record?

The courts have protected against the improper disclosure of intelligence information at trial by utilizing the statutory authority conferred by the Classified Information Procedures Act ("CIPA"), 18 U.S.C. app. 3, and by fashioning protective orders to regulate what may be disclosed in open court. Prior to trial, the government has the opportunity under CIPA to make an *ex parte* submission to the court in which it describes the source and sensitivity of classified information potentially subject to disclosure, makes arguments regarding the information's relevance and the damage to national security that would result if the information were disclosed to the defense, and requests a ruling that the information is not discoverable. Typically, an official from a U.S. intelligence agency submits a classified, *ex parte* declaration to the court, and is available to answer the court's questions, regarding the sensitivity of the information.

In many instances, the court finds in a sealed proceeding or order that the information is not relevant and therefore must not be disclosed to the defense. If the court determines that the information is discoverable, CIPA affords the government the opportunity to propose a summary substitute for the specific classified information -- which the court may accept, reject, or modify -- that masks the information's most sensitive elements while substantially enabling the defendant to prepare his defense. If the court rejects the government's request for a substitution for the specific classified information at issue, or the court orders a substitution that is unacceptable to the government, the government retains the option of shutting down the case – and thereby protecting intelligence sources and methods – by moving to dismiss the indictment.

It should also be noted that the use of classified information at trial is highly regulated to guard against improper disclosures. At the government's request, courts often issue protective orders that regulate the conduct of the parties with respect to the treatment of classified information in open court. Courts police these orders, and defense counsel are careful to abide by them.

2. Some critics of terrorist criminal trials have claimed that our rules of discovery and due process will make foreign governments think twice before sharing critical intelligence with the United States. Based on your experience, do our federal courts successfully accommodate the intelligence concerns of foreign governments?

My own experience in prosecuting terrorism cases represents only a small percentage of the totality of cases where the intelligence interests of foreign governments have been at issue. In my experience, however, the courts responsibly have balanced the due process rights of defendants with the government's interest in preventing the disclosure of sensitive information obtained from foreign governments. In the case of Ahmed Omar Abu Ali, for example, the district court in the Eastern District of Virginia granted the government's request for a protective order to protect the names of cooperating Saudi intelligence officers from disclosure to the defense or the public, and provided for the officials' video testimony at trial to be visible only to participants in the trial. Courts in other cases have similarly protected the identity of foreign intelligence officers testifying in U.S. criminal proceedings.

It is true that foreign governments often express concern to U.S. authorities about the treatment of intelligence information they might share, and that there is sometimes a reluctance to share information because of the possibility of its subsequent disclosure. In general, however, intelligence-sharing by foreign governments has increased dramatically since September 11, 2001.

Intelligence-information sharing by foreign governments typically is subject to well-established rules of engagement, including an agreement by U.S. authorities that the information may not be used for purposes other than intelligence, or law enforcement "lead" purposes, without the express agreement of the foreign government. Occasionally, U.S. prosecutors aware of material inculpatory information provided by a foreign government are simply told that the information may not be used in support of the government's case.

In some instances, foreign governments have cooperated to an unprecedented extent in U.S. criminal prosecutions. In the Abu Ali case, for example, the Saudi Government had never in its history permitted Saudi intelligence or law enforcement officers to testify in a foreign criminal proceeding. Subject to a protective order issued by the district court, several Saudi officers testified at length, and were subject to rigorous cross-examination by defense counsel. Their testimony was critical not only to proving the government's case on the merits against Abu Ali, but also to refuting Abu Ali's claims that he had been mistreated while in Saudi custody before being returned to the United States.

3. You highlighted the scenario of a sealed pretrial hearing before a federal judge where the government prosecutor argues against the security-cleared defense counsel about whether to use certain classified information at trial. In these hearings, sometimes the government loses. How would you respond to those who question the courts' competence to evaluate the government's determination of what information must remain classified to protect the public?

The issue in these circumstances is not the competence of the courts to assess the legitimacy of government arguments that certain information should not be disclosed. Rather, the issue is whether the government has first conducted a thorough risk assessment -- in advance of bringing criminal charges -- of whether certain intelligence information likely would have to be disclosed to the defense, and potentially aired at trial, under constitutional standards and applicable rules of evidence and criminal procedure. That assessment largely depends on the willingness of U.S. intelligence and law enforcement authorities to share with prosecutors the full range of information that is favorable to the defense in a given case. In some cases, the likelihood that sensitive information will have to be disclosed to the defense -- and the consequences of such disclosure -- may outweigh the government interest's in criminal prosecution. In such cases, the responsible course of action for the government may be to forego criminal prosecution altogether. In other cases, the government may be forced to narrow the charges brought against a particular defendant in order to contain the range of exculpatory information and thereby minimize the potential for the disclosure of sensitive intelligence.

4. The Classified Information Procedures Act (or CIPA) can be used to prevent the disclosure of classified information that defendants might seek in discovery, but it is generally not a tool to allow the government to use secret evidence to prove its case. At the same time, of course, classified information might be the best evidence to gain a conviction. Can you discuss the tools available to prosecutors for working around this problem and the need for the cooperation of the intelligence community to obtain convictions?

Where potential government evidence critical to a criminal prosecution is based on classified material, it is imperative for U.S. intelligence agencies, working with prosecutors, to determine whether the disclosure of that material truly would result in the compromise of sensitive U.S. or foreign intelligence information. Sometimes the manner in which the government acquired the information, and the prospects for continued intelligence collection or foreign cooperation, fairly support a determination that it would be inappropriate to utilize that information under any circumstances in a criminal proceeding. In other cases, prosecutors may obtain a protective order from the court that enables them to utilize a procedural device called the "silent witness rule" to offer classified evidence at trial -- typically documentary evidence. Under this procedure, prosecutors and cleared defense counsel may question a witness in a structured manner to elicit testimony pertinent to the admissibility of the evidence without revealing information that would compromise sensitive sources and methods.

Cleared defense counsel is provided with a copy of the classified evidence, may question the witness within the limitations imposed by the court, and classified exhibits may be admitted into evidence and maintained by the court clerk's office under seal.

The silent witness rule has been used in both terrorism and espionage prosecutions, including the Abu Ali case. In that case the rule was employed to admit into evidence two critical communications between Abu Ali and a senior member of the al-Qaeda cell in Saudi Arabia that he had joined. The admission of this evidence played an important role in obtaining Abu Ali's conviction. The communications demonstrated Abu Ali's relationship to the cell and his use of coded communications to communicate with cell members. In addition, they helped to refute his claim that the confessions he gave to Saudi authorities after his arrest in Saudi Arabia were the product of physical coercion, as the communications occurred prior to his arrest.

5. Are there particular cases that you believe demonstrate the courts' ability to deal with the difficult procedural and evidentiary questions that arise in terrorism cases?

Several cases reflect the courts' ability to resolve the unique types of procedural and evidentiary issues that arise in terrorism cases. In my own experience, the Abu Ali case stands out. In that case, the Saudi Government declined to permit its security officers to come to the United States to testify at a critical pretrial hearing. On the government's motion under Rule 15 of the Federal Rules of Criminal Procedure, the district court agreed to procedures aimed at accommodating the Saudi government's concerns while protecting Abu Ali's rights under the Confrontation Clause of the U.S. Constitution. Specifically, the court permitted the Saudi officers to testify in Saudi Arabia under circumstances where they would be subject to personal cross-examination by the defendant's lead trial attorney, the defendant (by then in Alexandria, Virginia) and the witness could observe each other on video screens, the defendant was accompanied by one of his trial attorneys in the courtroom in Alexandria, and the defendant could communicate with his counsel at breaks in the testimony.

Abu Ali's defense hinged on his claim that detailed confessions he gave to Saudi officers while in custody in Saudi Arabia were the result of torture, and his pre-trial motion to suppress his confessions was, in many respects, the pivotal procedural juncture of the criminal prosecution. After hearing testimony from the Saudi officers and considering extensive other evidence at odds with Abu Ali's claims, the district court applied traditional standards of analysis to determine that Abu Ali's confessions were voluntary and admissible. So, too, the court applied customary standards in finding that the government had authenticated and established a chain of custody for physical evidence seized at al-Qaeda safehouses in Saudi Arabia by Saudi security officers.

Questions Submitted by Senator Tom Coburn, M.D.

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

   Criminal prosecutions in Article III courts are not viable options in cases where the government's case-in-chief is based upon on defendant statements obtained through coercion, or where the government's case depends heavily on sensitive intelligence information that cannot be declassified, shared with the defense, or masked through the substitution procedures afforded under the Classified Information Procedures Act. As a policy matter, it is my belief that individuals accused of committing crimes against humanity or other war crimes are more appropriately prosecuted in U.S. military tribunals under rules comparable to those employed in established international tribunals, rather than in civilian courts.

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?

   There are detainees in custody at Guantánamo Bay and elsewhere who, if released, would pose a significant threat to the national security of the United States as well as other countries. Where appropriate and feasible, I favor prosecuting as many of these detainees as possible in civilian courts in the United States. Where criminal prosecution is not an option and other domestic or international legal authority permit, the government should utilize that authority to seek the continued detention of these individuals, at least until such time that they are judged by an appropriate arbiter to no longer present a threat, or they may be transferred to the custody of a third country where continued detention is likely.

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

   In the military context, a legal framework already exists for the detention of enemy combatants for the duration of a conflict. In the civilian context, I do not support any modifications to existing laws governing the detention of individuals for criminal prosecution.

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

   The United States is engaged in a global conflict against organizations and individuals committed to the use of terror.

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?

Yes.

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?

If the term "battlefield" refers to circumstances where an individual was captured by U.S. or other foreign military forces, one case that comes to mind is John Walker Lindh, who was criminally prosecuted and (pursuant to a plea agreement) convicted in the Eastern District of Virginia.

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?

Whether transferring current detainees to civilian authority for incarceration would foster prison radicalization depends on the controls instituted for regulating the detainees. Under federal regulations (28 C.F.R. § 501.3), the Attorney General may authorize the Director of the Bureau of Prisons ("BOP") to implement "Special Administrative Measures" ("SAMs") upon written notification by the Attorney General, the head of a U.S. law enforcement agency, or the head of a U.S. intelligence agency, that there is a "substantial risk" that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. SAMs may be imposed on individuals who have been charged and are pending trial as well as on individuals who have been convicted and are serving their sentence.

SAMs include housing the inmate in "administrative detention" (i.e., solitary confinement) and "limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and the use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism." Further, in any case where "reasonable suspicion" exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the BOP can institute additional measures. Specifically, BOP may implement "appropriate procedures" to monitor or review communications between the inmate and attorneys or agents who traditionally would be covered by the attorney-client privilege, for the purpose of "deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.

Typical SAMs restrictions include some combination of the following:

- **No visitors except attorneys and immediate family**
- **Restricted contact with attorneys**
- **No telephone calls**
- **Limits on contact with family**
- **Separation from remainder of inmate population**
- **Prohibitions on communications with other inmates**
- **Delays in mail (and monitoring of mail)**
- **No contact with news media**
- **Restricted access to television, radio, newspapers, and magazines**
- **Restrictions on participation in Muslim group prayer**

Numerous terrorist detainees are currently under SAMs, including :

- **Sheikh Omar Abdel Rahman ("the Blind Sheikh" who headed a plot to destroy New York City landmarks);**
- **Ramzi al-Yousef (mastermind of the first World Trade Center bombing);**
- **Ahmed Omar Abu Ali (an American citizen who joined an al-Qaeda cell in Saudi Arabia and plotted to commit terrorist attacks in the United States);**
- **Wadih el-Hage (involved in the bombing U.S. embassies in east Africa);**
- **Zacarias Moussaoui (involved in the September 11 plot); and**
- **Richard Reid (the "shoe bomber" who tried to destroy a civilian airliner in mid-air).**

I am unaware of any cases where inmates under SAMs have been found to be contributing to prison radicalization.

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

As a general rule, individuals captured on an overseas battlefield by U.S. military forces are not entitled to *Miranda* rights. If, however, they were subsequently questioned in a custodial setting after their capture by U.S. intelligence or law enforcement officers, and the government later sought to use statements obtained in such questioning (other than volunteered statements) in a criminal prosecution against the detainee, such statements would be subject to suppression in a criminal proceeding.

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

Yes, I believe that military commissions should be retained as an option for resolving the cases of detainees who either cannot or should not be prosecuted in civilian criminal courts.

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

In a case where the government's key evidence against a detainee was based on statements obtained through coercive interrogation, criminal prosecution would not be a viable option because the statements would likely be suppressed prior to trial. However, depending on the circumstances of the individual's capture and the quality and magnitude of the government's information regarding the individual, it may still be lawful to detain the individual under the laws of war. In such a case, release (at least in the near term) would be irresponsible if there were credible, reliable evidence that the individual continued to present a significant security threat.

11. Should detainees be subject to charges of conspiracy?

If sufficient admissible evidence exists, detainees considered for criminal prosecution could be subject to conspiracy charges.

12. If Guantanamo 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?

As a general rule, the U.S. prison system is equipped to handle Guantánamo detainees transferred to civilian custody. Both before and after the attacks of September 11, 2001, a rogues' gallery of dangerous terrorists successfully have been

detained for long periods in the United States in localities across the country. For example, Egyptian radical Sheikh Omar Abdel Rahman was held for approximately four years at the Federal Medical Center in Rochester, Minnesota, following his conviction in 1995 for plotting to bomb the Lincoln Tunnel and other New York City landmarks. Ahmed Ressam, an Algerian who had trained at an al-Qaeda camp in Afghanistan, was long incarcerated at a federal detention center near Seattle after his arrest for planning to bomb Los Angeles International Airport on New York's eve in 1999. Ramzi Yousef, who masterminded the 1993 bombing of the World Trade Center, was detained for approximately three years at the Metropolitan Detention Center in New York.

After September 11, al-Qaeda operative Richard Reid was held at a county correctional facility in Plymouth, Massachusetts, after his arrest for attempting to blow up a passenger airliner in mid-air. The municipal detention center in Alexandria, Virginia -- located only a few miles from the White House and the U.S. Capitol -- has housed both Zacarias Moussaoui, who trained to fly commercial aircraft in connection with the September 11 plot, and Ahmed Omar Abu Ali, an American citizen who joined an al-Qaeda cell in Saudi Arabia and conspired to commit various terrorist attacks in the United States, including the assassination of President George W. Bush.

None of these facilities was ever attacked while a defendant was incarcerated there on terrorism-related charges, and no such detainee has ever escaped. Moreover, most of these terrorists are now safely serving their sentences at the formidable "Supermax" facility operated by the federal Bureau of Prisons in Florence, Colorado.