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Introduction

Mr. Chairman and distinguished members of the Subcommittee, it is an honor to appear before you to testify about the issue of detention in terrorism cases and the role that Article III courts have played, and can continue to play, in adjudicating these cases.

I am currently a partner at the law firm of Kelley Drye & Warren, where I concentrate on representing individuals and corporations who are the subject of government investigations. The vast majority of my career, however, has been in public service, and a substantial portion of my time in government was in the national security arena, beginning with my tenure as a military and political analyst at the Central Intelligence Agency in the early 1980s.

The views I express today are based predominantly on my service with the Department of Justice preceding my return to private law practice in 2007. From May 2001 through February 2003, I served as Chief of Staff to the Deputy Attorney General, a position in which I assisted in coordinating the Justice Department's responses to the terrorist attacks of September 11. From March 2003 until August 2007, I then served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the Eastern District of Virginia, where I prosecuted several terrorism cases, including *United States v. Abu Ali*, the "Virginia Jihad" case *(United States v. Khan), United States v. Chandia,* and *United States v. Biheiri*. Through my work on these cases, I obtained first-hand experience with the range of legal issues presented by bringing prosecutions of terrorism cases in Article III courts, including detention; charging options; allegations of coercive interrogations; the challenge of meeting evidentiary requirements such as authentication

and chain of custody with respect to evidence obtained overseas; working with foreign intelligence and law enforcement agencies; and the use and protection of classified information.

Based on my experience, I believe that terrorism prosecutions should be brought in Article III courts whenever possible. Our success in preventing acts of terrorism, and in holding accountable those who commit or plan such attacks, is enhanced by building and sustaining a domestic and international consensus about the legitimacy of our approach. Bringing terrorism cases in Article III courts under well established Constitutional standards and rules of procedure and evidence confers greater legitimacy on these prosecutions. In addition, criminal proceedings play an important role in educating the American people – and the world – about the nature of the threat we face. In the al-Marri case, for example, it was the defendant's guilty plea in April 2009 to conspiracy to provide material support to al-Qaeda which resulted in the public admissions, nearly six years after he was originally apprehended, that al-Marri had been recruited by Khalid Sheikh Mohammed ("KSM"), then the operations chief of al-Qaeda, to assist with al-Qaeda operations in the United States; that he had been directed to come to the United States no later than September 10, 2001, to operate as a sleeper agent; and that he had received sophisticated codes for communicating with KSM and other al-Qaeda operatives. Finally, the record demonstrates that the government has been mostly successful in using the criminal justice system to detain, convict, and obtain lengthy sentences for individuals who present a threat to U.S. national security, without compromising intelligence sources or methods or the fundamental due process rights of defendants.

Existing Non-Military Detention Options

In the criminal justice system, the issue of detention is inextricably intertwined with the strength of the government's case on the merits. Under the *Principles of Federal Prosecution* set

forth in the U.S. Attorneys' Manual, which all federal prosecutors are required to follow, a prosecutor can commence or recommend Federal prosecution only if he or she "believes that the person's conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction."[1] That means that before the government can proceed criminally against an individual, it must determine both that it possesses admissible evidence under the Federal Rules of Evidence, and that the evidence will likely be sufficient to prove, beyond a reasonable doubt, that the individual committed the offense charged.

These requirements can be challenging to meet in an ordinary criminal case. But in a terrorism case, they can be especially formidable. Terrorism investigations are often driven by threat analysis, and threat assessments often are based on intelligence information such as communications intercepted under the Foreign Intelligence Surveillance Act and information provided by foreign law enforcement and intelligence authorities. Sometimes the government has the luxury of building a case over a period of months to develop evidence that would be admissible in a criminal prosecution. But sometimes it does not because of the nature of the threat, the credibility of information regarding a potential attack, and the perceived imminence of an attack. And in those cases, the government needs options for detaining individuals before it is ready to bring criminal charges in order to protect the public safety.

Pretrial Detention. The rules regarding the detention of a person who has been charged with a federal crime are favorable to the government in terrorism cases. Under the Bail Reform Act, a court can order a defendant detained pending trial if, after a hearing, the court finds probable cause that "no condition or combination of conditions will reasonably assure the appearance of the [defendant] as required and the safety of any other person and the

[1] USAM § 9-27.220.

community."[2] In support of a request for detention, the government can submit hearsay and other information that would be inadmissible at trial because the Federal Rules of Evidence do not apply at a detention hearing.[3] Accordingly, the government can present summary testimony by an agent rather than presenting testimony by a witness with first-hand knowledge.

A court must take into account several factors in determining whether to detain a defendant pending trial, including (1) the nature and circumstances of the alleged offense, including whether the offense is a federal crime of terrorism; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of danger to any person or to the community if the defendant were released.[4] A finding that the defendant presents a danger to a person or the community must be supported by "clear and convincing evidence,"[5] but there is a rebuttable presumption in favor of detention if there is probable cause that the defendant committed a "federal crime of terrorism" such as material support to terrorists;[6] material support to a designated terrorist organization;[7] financing terrorism;[8] the receipt of military-type training from a designated terrorist organization;[9] and acts of terrorism transcending national boundaries.[10]

More often than not in terrorism cases, courts have either ordered pre-trial detention or authorized release subject to restrictive conditions. The government successfully has obtained

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[2] 18 U.S.C. § 3142(e).
[3] *Id*. § 3142(f)(2).
[4] *Id*. §3142(g).
[5] *Id*. § 3142(f)(2).
[6] *Id*. § 2339A.
[7] *Id*. § 2339B.
[8] *Id*. § 2339C.
[9] *Id*. § 2339D.
[10] *Id*. § 2332B.

pretrial detention in numerous terrorism cases, including the case of Zaccarias Moussaoui; the recent Fort Dix, New Jersey case; the case of Ahmed Omar Abu Ali, an American citizen and Falls Church, Virginia, resident who joined an al-Qaeda cell in Saudi Arabia; and the East Africa embassy bombings case (where defendant Wadih al-Hage was initially detained for 15 months on a perjury charge, then for more than two years following a superseding indictment). The courts are not rubber stamps for the government, however: the magistrate judge in the "Virginia Jihad" case denied the government's motion for pretrial detention for a few of the defendants, and in a recent case in Ohio, the court granted the defendant's motion for pretrial release even though the defendant was accused of having expressed interest in manufacturing improvised explosive devices from household substances, had been recorded discussing his training in weapons and tactics, had expressed concerns about maintaining security and secrecy, and had watched pro-*jihad* videos and expressed a desire to target the U.S. military.[11]

Detention Without Charge. While the standards are favorable to the government with respect to detention pending trial of an individual who *already* has been charged with a terrorism-related offense, existing legal authority to detain persons *prior* to charge is limited. Under the Constitution and the Federal Rules of Criminal Procedure, arrest warrants may be issued only upon a showing of probable cause by the government that the individual committed an offense,[12] and an individual who has been arrested must be presented to a Federal magistrate "without unnecessary delay" (typically within 48 hours) and advised of the charges against him. Otherwise, the government's current authority for detention in terrorism-related cases outside of

[11] *United States v. Mazloum*, 2007 WL 2778731, *1 (N.D. Ohio 2007) (unpublished decision).

[12] Fed. R. Crim. P. 4(a).

the military detention model is limited to the material witness statute,[13] and, in the case of foreign nationals, immigration detention.

Material Witness Warrants. Under the material witness statute, a court may authorize an arrest warrant if the government files a sworn affidavit establishing probable cause that the testimony of a person is "material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena." There is "no express time limit" in the statute for the length of detention,[14] but the Federal Rules of Criminal Procedure provide for close judicial oversight of detention under the statute. Specifically, in each judicial district the government must report biweekly to the court, list every material witness held in custody for more than 10 days pending indictment, arraignment, or trial, and "state why the witness should not be released with or without a deposition being taken…."[15]

After September 11, the government aggressively used the material witness statute to detain individuals in connection with terrorism investigations, several of whom were subsequently charged with crimes. José Padilla, for example, initially was arrested on a material witness warrant when he arrived in Chicago on a flight from Pakistan, in order to enforce a subpoena to secure his testimony before a grand jury. He was held for one month on the warrant before he was designated an enemy combatant and transferred to military custody. Nor has the statute's use been limited to foreign terrorism cases: prior to September 11, Terry Nichols was arrested and detained on a material witness warrant three days after the bombings of the Federal building in Oklahoma City.

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[13] 18 U.S.C. § 3144.

[14] *United States v. Awadallah*, 349 F.3d 42, 62 (2nd Cir. 2003).

[15] Fed. R. Crim. P. 46(h)(2).

Although some individuals have been detained for several weeks and months on a material witness warrant, the statute was not intended to serve as a substitute for pretrial detention when the government is not yet ready to charge. In the case of *United States v. Awadallah*, the defendant's name and telephone number had been found on a piece of paper in a car abandoned at Dulles Airport by September 11 hijacker Nawaf al-Hazmi.[16] (The number subsequently was traced to an address in San Diego where al-Hazmi and fellow hijacker Khalid al-Mihdhar had lived.) Reversing the district court, the U.S. Court of Appeals for the Second Circuit found that the defendant's detention for several weeks on the material witness warrant was not "unreasonably prolonged,"[17] but it cautioned that "it would be improper for the government to use [the material witness statute to detain] persons suspected of criminal activity for which probable cause has not yet been established."[18]

Immigration Detention. The government has additional tools to detain foreign nationals in terrorism cases. Upon a warrant issued by the Attorney General, "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[19] The Attorney General has broad discretion in exercising this authority, and detention is mandatory where the alien is reasonably believed to have engaged in terrorist activity or "any other activity that endangers the national security of the United States.[20] In the immediate wake of the September 11 attacks, the Department of Justice utilized the removal statute to arrest and detain numerous foreign nationals suspected of engaging in terrorist activity.

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[16] *United States v. Awadallah*, 349 F.3d at 45.

[17] *Id*. at 62.

[18] *Id*. at 59.

[19] 8 U.S.C. § 1226(a).

[20] *Id*. §§ 1226(c)(1), 1226a(a)(3).

Utilizing the alien removal statute can buy the government substantial additional time to determine whether to pursue criminal charges against an alien defendant. In *Zadvydas v. Davis*, a case decided a few months before the September 11 attacks**,** the Supreme Court construed the law to limit the period of detention to the time reasonably necessary to secure the alien's removal – with six months presumed to be a reasonable limit.[21] But the Court noted that the case did not involve "terrorism or other special circumstances where special arrangements might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[22]

Terrorism Trials

Enmeshed with the debate over detention policy is the question of whether Article III courts have proven to be an effective and sensible forum for adjudicating complex terrorism cases. Although these cases sometimes present difficult evidentiary and procedural issues -- and the government does not win every case -- the courts have demonstrated that they are fully up to the challenge of handling them.

Three arguments have been principally advanced by those who disfavor bringing terrorism cases in Article III courts: (1) that sensitive intelligence cannot be protected; (2) that existing rules of evidence and criminal procedure are inadequate; and (3) that terrorism prosecutions place an undue burden on the court system. None of these arguments withstand scrutiny.

Protecting Intelligence Information. It is true that the criminal prosecution of terrorists opens the door to defense efforts to obtain sensitive classified information to develop potentially exculpatory information. It is also true that information shared confidentially with the United

[21] *Zadvydas v. Davis*, 533 U.S. 678, 691-97 (2001).

[22] *Id*. at 696.

States by foreign intelligence and law enforcement authorities can be at risk of disclosure under discovery rules. What critics of Article III prosecutions often fail to acknowledge, however, is that the Classified Information Procedures Act ("CIPA") provides a statutory mechanism for protecting sensitive intelligence information from disclosure.

CIPA provides the government with significant procedural advantages. Prior to trial, the government has the opportunity, for example, to make an *ex parte* submission to the court in which it unilaterally brings information to the court's attention for a ruling on whether the information is discoverable, explains the source and sensitivity of the information, and makes arguments as to relevance and the damage to national security that would result if the information were disclosed to the defense. In the Abu Ali case, for example, which I prosecuted, the court agreed with the government that certain categories of classified documents sought by the defense were irrelevant and precluded their use at trial by the defense.

If the court determines that the information is discoverable, the government can propose a 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. Where classified material is deemed discoverable, its pretrial disclosure may be restricted to cleared defense counsel, and the government has an opportunity in a sealed hearing to contest the defense's interest in using specific classified information at trial. The government may not win every skirmish, but courts usually fashion compromise disclosure orders that protect the government's core security interests.

Nor are trials a forum for the reckless disclosure of classified information. With the government's close attention and exhortation, courts police their pretrial orders regarding the handling of classified information and the questioning of witnesses -- and defense counsel

abides by them. Despite claims to the contrary, there are no proven examples of disclosures at trial resulting in the compromise of sensitive intelligence sources and methods.

Arguments that U.S. discovery rules and due process requirements cause foreign governments to refrain from sharing intelligence with U.S. authorities also are overstated. Since September 11, intelligence-sharing and cooperation between U.S. and foreign intelligence authorities has increased dramatically. Perhaps in no case was information-sharing and cooperation better demonstrated than in the Abu Ali prosecution, where the defendant - who originally was arrested and detained in Saudi Arabia -- claimed that his detailed confessions were the result of torture by Saudi authorities. For the first time in Saudi history, the Saudi Government permitted Saudi security officers to testify in an American criminal proceeding and face rigorous cross-examination by U.S. defense attorneys, thereby enabling prosecutors both to obtain direct testimony about the defendant's admissions and to rebut his claims of mistreatment.

Courts have also shown a willingness to accommodate the security concerns of foreign governments cooperating in U.S. terrorism prosecutions. In the Abu Ali case, U.S. District Judge Gerald Bruce Lee issued an order protecting the identities of Saudi security officers who testified and shielding their images from public view when videos of their testimony were played at trial.

Rules of Evidence and Procedure. Existing rules also have been adequate to resolve difficult evidentiary and procedural issues in terrorism cases. Rather than adopting new rules or relaxing the application of existing ones, the courts have simply applied traditional standards of analysis to the specific factors in a given case. In the Abu Ali case, for example, the Saudi Government declined to permit its security officers to come to the United States to testify at a pretrial hearing. On the government's motion, the court agreed to permit the Saudi officers to

testify in Saudi Arabia under circumstances where they would be subject to in-person cross-examination by the defendant's lead trial attorney, the defendant (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 in Saudi Arabia during breaks in the testimony. After hearing testimony from the Saudi officers and considering related evidence, Judge Lee applied traditional standards of analysis to determine that Abu Ali's confessions were voluntary and admissible. So, too, he 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.

Administrative Burdens. Trying terrorism cases in federal courts does impose additional logistic and security demands on courthouse personnel and the U.S. Marshals Service. But given what is at stake, they are not unreasonable demands. With the possible exception of the Southern District of New York, no judicial district has handled a more demanding series of terrorism cases than my former district, the Eastern District of Virginia, and I am unaware of any presiding judge there who questioned the importance or appropriateness of trying those cases in federal court. Rather, they looked upon these cases as an opportunity to shoulder their coordinate responsibility for meeting a national challenge, and to demonstrate the strength and adaptability of the American criminal justice system.

Conclusion

It should be recognized that certain terrorism cases either should not, or cannot, be brought in Article III courts under the criminal justice system. From a policy standpoint, these may include cases where the defendant is accused of committing crimes against humanity or war

crimes. From a pragmatic standpoint, they may include cases where evidence was gathered on the battlefield by U.S. or foreign military forces but not preserved in a way that meets the exacting standards of a criminal prosecution; where the government's key inculpatory evidence is based on sensitive intelligence sources and methods that either should not be disclosed to the defense, or cannot be revealed in a public trial; or where statements critical to the government's case were obtained through coercive means. In some of these cases, where the government has made a finding that the evidence against an accused is both probative and reliable – and that release, repatriation, or adjudication in an appropriate third country is not an option -- it is essential that the government have recourse to an alternative legal forum such as a military tribunal, subject to judicial oversight and under rules that balance a defendant's right to a fair proceeding with the government's legitimate right to protect national security interests.

In the main, however, experience has shown that terrorism prosecutions in Article III courts work. They will not be feasible or appropriate for all of the remaining detainees at Guantanamo and other military detention sites -- or in every future counterterrorism case -- but they must remain a central part of the government's counterterrorism strategy.

The issue of non-military preventive detention must be approached with enormous care and skepticism given the inherent tension between our core Constitutional values and detaining someone without charge. Congress should recognize, though, that cases sometimes arise where the most responsible course of action may be to detain an individual before the government has sufficient admissible evidence to initiate a criminal prosecution, and that, to some extent, the government since September 11 has been using the material witness and alien removal statutes as a substitute for formal preventive detention authority. Particularly because of existing limitations on detaining U.S. persons who may present an exigent threat to homeland security,

Congress should work closely with the Obama Administration to reexamine the adequacy of existing authorities. Any legislative proposal to authorize preventive detention, however, should be narrowly structured to impose strict conditions on the government's detention authority, including time limitations, and to establish robust judicial oversight. In that regard, Congress should reject any proposal to establish a legal regime authorizing indefinite detention without charge or trial.