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111TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 111–378

RESOLUTION OF INQUIRY REGARDING THE TRANSFER INTO THE UNITED STATES OF CERTAIN DETAINEES HELD AT NAVAL STATION, GUANTANAMO BAY, CUBA

DECEMBER 15, 2009.—Referred to the House Calendar and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

ADVERSE REPORT

together with

DISSENTING VIEWS

[To accompany H. Res. 920]

[Including Committee Cost Estimate]

The Committee on the Judiciary, to whom was referred the resolution (H. Res. 920) directing the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession regarding certain matters pertaining to detainees held at Naval Station, Guantanamo Bay, Cuba who are transferred into the United States, having considered the same, report unfavorably thereon without amendment and recommend that the resolution not be agreed to.

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89–006

PURPOSE AND SUMMARY

On November 19, 2009, Ranking Member Lamar Smith introduced H. Res. 920. The resolution directs the Attorney General to transmit to the House of Representatives all documents of the Department of Justice that refer or relate to:

(1) any legal guidance or recommendations made since January 20, 2009, regarding additional legal rights or protections, including under the Constitution, statutes, and treaties, detainees held at Naval Station, Guantanamo Bay, Cuba, receive when transferred into the United States from such Naval Station, Guantanamo Bay, Cuba; or

(2) pretrial detention, post conviction incarceration, or transportation within the United States, of detainees held at Naval Station, Guantanamo Bay, Cuba, who are to be transferred into the United States for prosecution and trial in the United States District Court of the Southern District of New York.

BACKGROUND

Under the rules and precedents of the House of Representatives, a resolution of inquiry is one of the methods that the House can use to obtain information from the Executive Branch.[1] It "is a simple resolution making a direct request or demand of the President or the head of an executive department to furnish the House of Representatives with specific factual information in the possession of the executive branch."[2] The typical practice has been to use the verb "request" when asking for information from the President, and "direct" when addressing Executive department heads.[3] Clause 7 of Rule XIII of the Rules of the House of Representatives provides that if the committee to which the resolution is referred does not act on it within 14 legislative days, a privileged motion to discharge the resolution from the committee is in order on the House floor.

While recognizing the importance of the underlying issue regarding timely closure of the Guantanamo Bay detention facility, for the reasons summarized below, the Committee believes that the resolution is unwarranted. In essence, the resolution seeks information that the Administration already has provided, or is required by law to provide, to the Congress.

First, the Attorney General, the Assistant Attorney General in charge of the Justice Department's National Security Division, the Director of the Federal Bureau of Investigation, and the General Counsel of the Defense Department have all testified before this Committee, as well the Senate Judiciary Committee, and the House and Senate Armed Services Committees, on these very subjects.[4]

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[1] Christopher Davis, House Resolutions of Inquiry, CRS Report, November 25, 2008, at 1 (quoting U.S. Congress, House, Deschler's Precedents of the United States House of Representatives, H. Doc. 94–661, 94th Cong., 2nd sess., vol. 7, ch. 24, § 8.

[2] Id.

[3] Id.

[4] Assistant Attorney General Kris and General Counsel Johnson testified before the Committee and addressed these subjects on July 30, 2009. Assistant Attorney General Kris and General Counsel Johnson also testified before the Senate Judiciary Committee on July 23, 2009, the House Armed Services Committee on July 24, 2009, and the Senate Armed Services Committee on July 7, 2009. Attorney General Holder testified before the Committee and addressed these subjects on May 14, 2009. Attorney General Holder also testified before the Senate Judiciary

Second, the Assistant Attorney General of the Justice Department's National Security Division has provided written answers to specific questions raised by the resolution, such as:

- "What are the advantages and disadvantages of holding trials in the United States?"
- "Would bringing the detainees into the United States for trial give them additional constitutional rights?"
- "What additional constitutional rights will a detainee gain if they are tried in the United States versus Guantanamo?"[5]

Third, in September 2009, in response to a Committee request, the Department of Justice provided the Committee with legal analysis of "baseline due process protections" that would apply to military commission proceedings if held in the United States or Guantanamo Bay.

Fourth, Committee staff have received several bipartisan briefings on the progress and findings of the several Administration task forces convened to address legal and operational issues regarding detention and transfer policy.

Fifth, the Congress and the Administration have negotiated—and enacted into law—a detailed set of reporting requirements obligating the Administration to transmit extensive information on the issues raised by the resolution to Congress *before* any detainee is transferred to the United States for trial.[6]

In light of these facts, the Committee approved adversely reporting H. Res. 920 to the House, without amendment.

HEARINGS

No hearings were held in the Committee on H. Res. 920.

COMMITTEE CONSIDERATION

On December 9, 2009, the Committee met in open session and ordered H. Res. 920 adversely reported, without amendment, by a rollcall vote of 20 yeas to 13 nays, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall vote occurred during the Committee's consideration of H. Res. 920:

1. H. Res. 920 was ordered reported unfavorably by a vote of 20 to 13.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman	X		

Committee on November 18, 2009, and June 17, 2009. FBI Director Mueller testified before the Committee and addressed these subjects on May 20, 2009. Director Mueller also testified before the Senate Judiciary Committee on March 25, 2009, and September 16, 2009.

[5] Responses of David S. Kris to Questions for the Record, July 7, 2009, Hearing of the Senate Armed Services Committee "To Receive Testimony on Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War."

[6] See, e.g., Section 319, Supplemental Appropriations Act of 2009, P.L. 111–32, Department of Homeland Security Appropriations Act of 2010, P.L. 111–83.

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Quigley	X		
Ms. Chu	X		
Mr. Gutierrez	X		
Ms. Baldwin			
Mr. Gonzalez	X		
Mr. Weiner			
Mr. Schiff	X		
Ms. Sánchez			
Ms. Wasserman Schultz	X		
Mr. Maffei	X		
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble		X	
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks		X	
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Rooney		X	
Mr. Harper		X	
Total	20	13	

Committee Oversight Findings

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

New Budget Authority and Tax Expenditures

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this resolution does not provide new budgetary authority or increased tax expenditures.

Committee Cost Estimate

In compliance with clause 3(d)(2) of rule XIII of the Rules of the House of Representatives, the Committee estimates that implementing the resolution would not result in any significant costs.

The Congressional Budget Office did not provide a cost estimate for the resolution.

PERFORMANCE GOALS AND OBJECTIVES

Clause 3(c)(4) of rule XIII of the Rules of the House of Representatives is inapplicable, because H. Res. 920 does not authorize funding.

CONSTITUTIONAL AUTHORITY STATEMENT

Clause 3(d)(1) of rule XIII of the Rules of the House of Representatives is inapplicable, because H. Res. 920 is not a bill or a joint resolution that may be enacted into law.

ADVISORY ON EARMARKS

Clause 9 of rule XXI of the Rules of the House of Representatives is inapplicable, because H. Res. 920 is not a bill or a joint resolution.

SECTION-BY-SECTION ANALYSIS

H. Res. 920 directs the Attorney General to transmit to the House of Representatives, not later than 14 days after the date of adoption, all documents of the Department of Justice that refer or relate to:

(1) any legal guidance or recommendations made since January 20, 2009, regarding additional legal rights or protections, including under the Constitution, statutes, and treaties, detainees held at Naval Station, Guantanamo Bay, Cuba, receive when transferred into the United States from such Naval Station, Guantanamo Bay, Cuba; or

(2) pretrial detention, post conviction incarceration, or transportation within the United States, of detainees held at Naval Station, Guantanamo Bay, Cuba, who are to be transferred into the United States for prosecution and trial in the United States District Court of the Southern District of New York.

DISSENTING VIEWS

We strongly support H. Res. 920 and oppose adversely reporting this resolution to the House. H. Res. 920 directs the Attorney General to transmit to the House of Representatives all information in the Attorney General's possession regarding certain matters pertaining to detainees held at Naval Station, Guantanamo Bay, Cuba, who are transferred into the United States.

Attorney General Holder recently announced his decision to try five plotters of the 9/11 terrorist attacks, including mastermind Khalid Sheikh Mohammad (KSM), in a domestic criminal trial in the U.S. District Court for the Southern District of New York. This decision threatens the safety of the American people and sets a dangerous precedent for future enemy combatants apprehended on the battlefield.

The majority accuses us of hypocrisy for opposing the New York trial of KSM and the others because we wholeheartedly supported the domestic prosecution of another 9/11 terrorist, Zacarias Moussaoui. While we did support the prosecution of Moussaoui in

the U.S. District Court for the Eastern District of Virginia, there is no hypocrisy. The majority fails to acknowledge several important distinctions between the Moussaoui case and the proposed trial of KSM and the other 9/11 plotters.

Most importantly, Moussaoui was apprehended inside the United States. He was taken into custody on August 16, 2001, in Minnesota on immigration violations. After his connection to the 9/11 attacks was established, the government tried him in Federal court because that was the only forum available—there were no military commissions in place at that time.

The case against KSM and his co-conspirators is entirely different. Never before in U.S. history has an enemy combatant—who was caught on the battlefield fighting and killing Americans—been tried in a U.S. civilian court. Importing terrorists into the United States for purposes of criminal prosecution grants them additional constitutional rights. Once on U.S. soil, terrorists can argue for additional rights that may make it harder for prosecutors to obtain a conviction in a criminal trial.

KSM recognized this advantage when he was first captured in 2003. According to CIA Director, George Tenet (appointed by President Clinton), KSM said "I'll talk to you guys after I get to New York and see my lawyer." KSM is not a common criminal who committed a homicide on the streets of New York. He is an enemy combatant who committed an act of war against the United States, killing thousands of innocent Americans.

At one time, General Holder himself recognized the need to be able to detain and interrogate terrorists outside the normal process of criminal prosecution, going so far as to recognize that terrorists are not even entitled to prisoner-of-war protections under the Geneva Conventions. In an interview on CNN in January 2002, General Holder said:

> It seems to me that given the way in which [the terrorists] have conducted themselves, however, that they are not, in fact, people entitled to the protection of the Geneva Convention. They are not prisoners of war. If, for instance, Mohamed Atta had survived the attack on the World Trade Center, would we now be calling him a prisoner of war? I think not. Should Zacarias Moussaoui be called a prisoner of war? Again, I think not.[1]

But now, the administration's Office of Legal Counsel has apparently concluded that even detainees tried by military commission on United States soil will be given constitutional protections against self-incrimination, without attracting much support elsewhere for holding trials by military commissions in the U.S. According to the Wall Street Journal:

> The Justice Department has determined that detainees tried by military commissions in the U.S. can claim at least some constitutional rights, particularly protection against the use of statements taken through coercive interrogations, officials said.

[1] See "2002 Video Flashback—Eric Holder: Terrorist Detainees Don't Fall Under Geneva Conventions," available at http://newsbusters.org/blogs/kerry-picket (also featuring video of Holder interview).

> The conclusion, explained in a confidential memorandum whose contents were shared with The Wall Street Journal, could alter significantly the way the commissions operate—and has created new divisions among the agencies responsible for overseeing the commissions.
>
> Defense Department officials warn that the Justice Department position could reduce the chance of convicting some defendants. Military prosecutors have said involuntary statements comprise the lion's share of their evidence against dozens of Guantanamo prisoners who could be tried.
>
> . . . "There is a school of thought . . . that if they actually convene these things in the [U.S.], the courts will quickly find that all the due process constitutional stuff we deal with in criminal courts will be applicable," said another military official familiar with the talks. "The main push for this argument comes out of" the Justice Department and the Office of Legal Counsel, the official said. "It hasn't gotten a lot of traction with other folks."
>
> This person said Pentagon officials preferred not to provide defendants additional rights unless courts forced them to.[2]

During testimony before the Senate Judiciary Committee, General Holder said he believes a U.S. court, rather than a military commission, gives the government its best chance for success. This is contrary to common sense. A military commission trial would likely take half as long, be more likely to succeed, and be less risky for the American people.

And, in the case of the 9/11 conspirators, success was already guaranteed. Before President Obama announced his plan to close Gitmo, KSM and his co-conspirators had planned to plead guilty to charges and proceed to execution. But the Obama administration decided to forgo the assured success of the military commissions and take its chances with a civilian criminal trial, giving the 9/11 conspirators a second chance.

Now, to no one's surprise, KSM and the others are expected to plead not guilty to forthcoming charges in New York, creating a public platform for the 9/11 terrorists to advertise their anti-American propaganda around the world. By trying the terrorists in civilian court, the Administration is granting the 9/11 conspirators rights far beyond those provided under the Geneva Conventions, namely the full rights of domestic criminal defendants.

ADDITIONAL CONSTITUTIONAL AND LEGAL RIGHTS

Supreme Court precedents indicate courts can bestow more constitutional rights on people simply in virtue of their being on U.S. soil. The Supreme Court has held, for example, that constitutional rights can protect people who have "developed sufficient connection" with the U.S. Clearly, if a terrorist detainee is housed on American soil, he could be deemed to have "sufficient connection" to the U.S. to be granted additional constitutional rights.

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[2] Jess Bravin, "New Rift Opens Over Rights of Detainees," The Wall Street Journal (June 29, 2009).

President Obama's own Solicitor General, Elena Kagan, signed a brief in the Supreme Court in a related case earlier this year in which she argued that only the President and Congress, and not the courts, had the authority to order the transfer of a non-citizen into the U.S. In that brief, Solicitor General Kagan recognized "the critical distinction" the Supreme Court has drawn "between an alien who has effected [sic] an entry into the United States and one who has never entered."

Solicitor General Kagan further cautioned the Supreme Court not to "blur the previously clear distinction between aliens outside the United States and aliens inside this country or at its borders." "This basic distinction," she elaborated, "serves as the framework on which our immigration laws are structured, and repeatedly has been recognized as significant not just under the Constitution but also as a matter of statutory and treaty law."

The President should not now make the mistake that his own Solicitor General argued the courts should not make, namely ordering non-citizen terrorists onto U.S. soil. Under existing law, the U.S. already gives terrorists more rights than any other country has given them in the history of the world. It should not grant them even more by placing them on U.S. soil.

By prosecuting KSM and the others in a U.S. civilian criminal court, the Obama Administration is guaranteeing these terrorists the ability to argue that certain constitutional rights have been denied or are afforded them including (1) 6th amendment speedy and public trial rights; (2) 4th amendment unreasonable search and seizure rights; (3) 5th amendment right against self-incrimination; (4) and 6th amendment right to counsel, trial by jury, and right to confront their accusers.

Thus, the detainees could succeed in suppressing certain evidence, such as statements or confessions made without proper Miranda warnings and a waiver of such warnings, or statements made as a result of interrogation techniques not used by criminal investigators, or any possible evidence seized without appropriate probable cause or warrant.

The detainees will also argue their right to call any number of witnesses from foreign or U.S. authorities who apprehended them overseas to high-ranking Bush Administration officials. Although this trial will focus on the 9/11 attacks, savvy defense attorneys could and likely will use it as a platform for denouncing Guantanamo Bay, interrogation techniques, or even the U.S. presence in Iraq and Afghanistan and a host of other perceived wrongs.

Any one of these could threaten the government's ability to obtain a conviction. The right to a public trial not only threatens the disclosure of classified information (discussed below) but will also provide a platform for the detainees to espouse their hatred for America and stir up renewed support for their jihad around the world.

In addition to constitutional rights, the detainees will be able to draw out this dramatic process with any number of challenges and motions including a motion for change of venue or a motion to sever the trial into separate trials.

"Welcome to New York, Now Die," was the headline of the *New York Post* the day after General Holder announced his decision to try these five terrorists in New York City. "Kill them without a

trial, just a bullet in the head and say, 'Goodbye.' Why waste taxpayer money?" This statement, from a 70-year-old truck driver from New York, and many others like it, as well as the numerous newspaper headlines and editorials, will all be admissible in a venue hearing.

Federal Rule of Criminal Procedure 18 and the "continuing offense venue provision" of 18 U.S.C. § 3237(a) provide that "any offense against the United States . . . committed in more than one district" may be prosecuted in "any district in which such offense was begun, continued, or completed."

Given this provision, Federal Rule of Criminal Procedure 21 allows the accused to unduly complicate the proceedings against them, because Rule 21 states that "the court must transfer the proceeding . . . if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there." (Emphasis added.)

Can the Department of Justice be confident that its choice of the Southern District of New York will even remain the venue since there is case law granting venue motions due to prejudicial pretrial publicity, and since there will be the inarguable difficulty of finding unbiased jurors from a pool of citizens in New York, who, as adults, will certainly have a living memory of this monstrous attack on their own city?

In early December, hundreds of people gathered outside the Federal courthouse in Manhattan to protest this trial. Many of these protestors are surviving family members and friends of those killed in the 9/11 attacks. With this protest and the extensive media coverage in the few weeks since General Holder's announcement, we have barely scratched the surface on the publicity that this trial of the century will attract.

In addition to a request for change of venue, it's not unreasonable to expect a request for severance of this trial, particularly from the other, lesser known defendants. The standard for severance under Federal Rule of Criminal Procedure 14 likewise concerns whether a particular defendant's own defense is compromised by prejudice as a result of his case being joined to those of other defendants. Prejudice can be shown when a joined defendant cannot receive a fair trial because publicity against another defendant will be prejudicial. In a typical trial, prejudicial pretrial publicity may demand that the court grant a severance motion.

What consideration has the Department of Justice given to the fact that having KSM as a co-defendant, someone who has shown a willingness to publicly declare his guilt and his desire to engage in militant jihad against Americans, will likely amount to prejudice for the other defendants?

PUBLIC DISCLOSURE OF CLASSIFIED INFORMATION

The New York City trial of KSM and four other 9/11 plotters threatens the disclosure of classified or sensitive information—potentially arming terrorists around the world with information to use in a future attack against America.

At trial, prosecutors may be forced to reveal U.S. intelligence on the detainees, along with the methods and sources used in acquiring it. This will put sensitive information directly in the hands of

al Qaeda to better understand our intelligence-gathering techniques and respond accordingly. For example, the trial of the 1993 WTC bombing disclosed information regarding the WTC's architectural design and structure and even what size plane it would take to bring down a WTC tower.

General Holder alleges that these concerns are not legitimate because the government can shield the public release of classified information through the Classified Information Procedures Act (CIPA). CIPA "provides pretrial procedures that will permit the trial judge to rule on questions of admissibility involving classified information before introduction of the evidence in open court." These procedures are intended to provide a means for the court to determine whether classified information is actually material to the defense.

But CIPA is not an outright bar to the disclosure of classified information. Rather, it precludes only that information which the judge determines is neither discoverable under the rules nor relevant to the trial. So, if it's discoverable and relevant—the judge can require its disclosure to the defense.

General Holder in his testimony before the Senate Judiciary Committee stated that the potential disclosure of classified information in a civilian trial is really no different from that of a military commission trial because the commission rules are based on CIPA. As former Federal terrorism prosecutor Andrew McCarthy has pointed out, however, the commission rules may be *based on* CIPA, but they are not *the same as CIPA*. On the contrary, the Military Commissions Act allows for (1) deletions of classified material from discovery documents made available to the accused; (2) the withholding of methods and sources of intelligence collection from the accused; and (3) the deletion of classified information from exculpatory evidence.

And unlike military commissions, where the presumption is to withhold classified information (especially if it involves sources and methods), in civilian trials under CIPA, the presumption is to disclose classified information if it is relevant.

CIPA is flawed in other respects as well—a fact the Justice Department has previously acknowledged and even offered amendments to correct. These revisions include (1) authorizing ex parte government requests for CIPA protective orders; (2) restricting access to classified information obtained from non-documentary sources; and (3) allowing interlocutory appeals from any order for access to classified information.

If General Holder is content to rely upon CIPA to protect the disclosure of classified information in this trial, then he must do the responsible thing and insist upon these much-needed revisions to the law, and we should enact them promptly.

CONFLICTS OF INTEREST WITHIN THE U.S. DEPARTMENT OF JUSTICE

Of great concern to us with the decision to bring KSM and the others to New York for a domestic trial is the number of senior Justice Department officials with the potential for serious conflicts or, at a minimum, the appearance of such conflicts of interest in the case, beginning with the Attorney General himself.

General Holder worked as a partner at Covington & Burling in Washington, D.C. before being appointed Attorney General. Accord-

ing to the firm's website, it represents 16 detainees at Guantanamo Bay. The head of the Department's Criminal Division, Lanny Breuer, is also a former partner at Covington & Burling, which reportedly owed Mr. Breuer many millions of dollars when he left for the Justice Department.

Deputy Attorney General David Ogden was a partner at Wilmer Hale, a firm whose website also boasts about its representation of multiple detainees at Guantanamo Bay. Associate Attorney General Tom Perrelli was a partner at Jenner & Block in D.C. This firm too has a website boasting of the firm's representation of multiple detainees. In Mr. Perrelli's case, the conflicts are more real than apparent, as he has had to recuse himself from 39 cases involving terrorism-related detainees.

As a professor at Georgetown, Principal Deputy Solicitor General Neal Katyal represented many detainees in ground-breaking cases before the Supreme Court. Mr. Katyal, a distinguished lawyer, is significantly responsible for getting us to the point at which these detainees enjoy certain constitutional rights. And he has been committed to getting these enemies of the United States as many rights as possible.

Assistant Attorney General Tony West, who runs the Civil Division, which defends the government in civil claims brought by the detainees, including habeas claims, was a partner at Morrison & Forester, which represents a Guantanamo Bay detainee in a habeas case brought in Federal court in Washington.

We do not have a complete list of lower level political appointees or of possible career appointees who might have some responsibility for terrorism prosecutions or policy and who have been hired by the Department since President Obama took office. But we note that serving under Deputy Attorney General are three former Wilmer Hale lawyers, Stuart Delery, Eric Columbus, and Chad Golder; serving with Associate Attorney General Perrelli are former Jenner lawyers Donald Verrilli and Brian Hauck.

Finally, we wish to highlight the Department's hiring of Jennifer Daskal, a harsh critic of U.S. policy towards detainees, as a senior advisor in the Department's National Security Division, where she serves on a task force for detainee policy.

The potential for conflicts of interest here is great, but the silence of the media and the Justice Department about this issue is deafening. Can you imagine what the media and the majority would be saying about Republican appointees whose firms had represented companies with interests before the Justice Department?

This Committee and this House have a duty to uphold our Constitution and we should demand answers from the Justice Department about these conflicts. Yet, here, with our national security at stake, we have a scene from a cartoon, where one hears only crickets chirping.

SECURITY DURING AND AFTER THE TRIAL

Trying Cases in New York City

According to Governor David Paterson (D–NY), "This is not a decision that I would have made. . . . It's very painful . . . We still have been unable to rebuild that site, and having those terrorists tried so close to the attack is going to be an encumbrance on all

New Yorkers." The Southern District Court House is within walking distance of Ground Zero, City Hall, the Brooklyn Bridge, NYPD Headquarters, Wall Street and the Battery Tunnel.

The trial of Zacarias Moussaoui in Alexandria, Virginia, demonstrated the risk posed to trial cities. Alexandria was a scene of rooftop snipers, bomb-sniffing dogs inspecting cars, identification checks, and heavily armed patrols. Replicating this security presence on a larger stage in New York will come at a huge cost to the Federal, State, and local governments and enormous inconvenience and risk to residents and taxpayers.

Pretrial Detention

The Bureau of Prisons (BOP) operates all Federal prison facilities in the United States. According to a 2007 letter from the BOP to Members of Congress, the BOP would "consider the individuals confined in Guantanamo Bay to be high security; therefore, they would require the highest level of escort staff, type of restraints, and other security measures if they were to be transferred into BOP custody."[3]

BOP operates 15 high security penitentiaries in ten states: Arizona, California, Colorado, Florida, Indiana, Kentucky, Louisiana, Pennsylvania, Virginia, and West Virginia.

New York does not have a high-security Federal penitentiary. It houses two medium security facilities, a community corrections program, and two administrative-level MCC facilities that function as jails (rather than prisons) by housing pretrial Federal defendants and material witnesses. These MCC facilities are NOT high-security facilities. The closest Federal high-security penitentiary is the Canaan Penitentiary in Pennsylvania, over 120 miles from New York City.

The Administration may then call upon state and city facilities near the U.S. District Courthouse in New York City to house the detainees. Sing Sing is the closest state maximum security prison to New York City and the U.S. District Courthouse and houses just over 1,700 inmates.

New York City's Rikers Island is not a prison—it is a city jail operated by the New York City Department of Corrections. The facility, which consists of ten jails, holds local offenders who are awaiting trial and cannot afford or cannot obtain bail or were not given bail from a judge, those serving sentences of one year or less, and those temporarily placed there pending transfer to another facility. Rikers Island is not a maximum security facility.

The costs associated with housing the detainees in either a Federal, State, or city facility with sufficient security protections for all of the pretrial motions, trial, sentence, and appeals is unknown. But given the potential length of all of these proceedings, it is fair to say it will be very costly to taxpayers.

Transportation for Court Appearances

The transportation of Federal inmates and detainees is coordinated through the Justice Prisoner and Alien Transportation System (JPATS) within the U.S. Marshals Service. JPATS transports

[3] Letter to Congressman Trent Franks from the Federal Bureau of Prisons, U.S. DEPARTMENT OF JUSTICE, Sept. 10, 2007.

sentenced prisoners who are in the BOP custody as well as ICE criminal/administrative aliens to hearings, court appearances and detention facilities. JPATS also provides regular international flights for the removal of deportable aliens. Military and civilian law enforcement agencies use JPATS to shuttle their prisoners between different jurisdictions at a fraction of what commercial sources would charge.

On average, JPATS completes over 300,000 prisoner/alien movements per year. A network of aircraft, cars, vans and buses accomplishes these coordinated movements. JPATS operates a fleet of aircraft which moves prisoners over long distances more economically and with higher security than commercial airlines. Nearly all air movements are done aboard large and small jets that JPATS owns or leases. Ground transportation is usually provided by the Marshals Service, ICE and the BOP.

As indicated by the 2007 BOP letter, the transport of the detainees to and from the courthouse will involve high security with high-level escort staff and additional security measures. The cost of such measures and the disruption to New York City traffic and regular courthouse business is unknown.

Post-conviction Incarceration

If the detainees are convicted, they will be incarcerated either to serve their sentence or while awaiting execution. Such incarceration would likely occur in one of the 15 Federal high-security penitentiaries. Even detention at a very high level of security may pose problems, including radicalization of other inmates, assaults on guards (routine at Guantanamo Bay), and efforts to escape or from the outside to free the inmates. As FBI Director Mueller has testified before this Committee, the prospect of keeping these offenders incarcerated in a regular Federal prison poses many challenges and causes concern.

Perhaps the most famous of these is the ADX facility in Florence, Colorado—the Nation's only Federal Supermax facility. ADX is home to some of the country's most notorious criminals including Theodore Kaczynski (the Unabomber), Eric Robert Rudolph (the Olympic bomber), Ramzi Yousef (1993 WTC bomber), Timothy McVeigh (deceased OK City bomber), Zacarias Moussaoui (9/11 co-conspirator), and Robert Hanssen (FBI agent turned spy).

Most inmates at ADX are kept for at least 23 hours each day in solitary confinement. They are housed in a 7 foot (2.1 meters) by 12 foot (3.7 meters) room, built behind a steel door and grate. Their free hour is spent exercising alone in a separate concrete chamber. Prisoners seldom see one another, and the inmates' only direct human interaction is with correctional officers or other prison staff. Visiting from outside the prison is conducted through glass, with each prisoner in a separate chamber. Religious services are broadcast from a small chapel.

The 2007 BOP letter stated that

> [T]here is not sufficient bedspace at any high-security Federal prison to confine these individuals. Our high-security institutions are operating at 55 percent above capacity. There are approximately 199,700 Federal inmates at present, and we are expecting the inmate population to increase to over 221,000 by the end of fiscal year 2011. The

> average yearly cost of confining a high-security inmate in the BOP is approximately $25,400.
>
> We would most likely confine these detainees in one or two penitentiaries. This would require us to transfer a sufficient number of inmates to other penitentiaries in order to create the necessary bedspace. Such transfers would add to the cost of confining the enemy combatants and would impose significant additional challenges to our agency (based [on] the level of crowding in all high-security BOP institutions).[4]

On December 15, 2009, the Administration announced the use of a state prison facility in Illinois to house many of the remaining detainees after the detention facility at Guantanamo Bay is closed.

The plan being considered for the Thomson Correctional Center, pitched by Illinois Governor Quinn in a meeting with President Obama earlier this year, calls for the Federal Bureau of Prisons to operate the Center as a high-security Federal penitentiary and lease a portion to the Defense Department to house fewer than 100 Guantanamo detainees.

The plans could include a purchase of the facility by the Federal Government, Quinn said. The Thomson Correctional Center, located about 150 miles (240 kilometers) west of Chicago, was built by the state in 2001 and has 1,600 cells, but houses only about 150 minimum-security prisoners. The facility sits on 146 acres (59 hectares) and is enclosed by a 12 foot (3.6 meter) exterior fence and 15 foot (4.6 meter) interior fence.

A preliminary economic impact analysis found that Federal operation of the facility could generate between 2,340 and 3,250 ongoing jobs. The analysis estimates that the overall injection of funds into the local economy would be between $790 million and $1.09 billion over the first four years.

The Federal high security penitentiary in Terre Haute, Indiana currently houses the death row for Federal inmates. If KSM and the four other plotters are sentenced to death, they will likely be detained in the Indiana prison. If they do not receive the death penalty, they may be housed in the ADX facility in Florence, Colorado, or perhaps the new facility in Illinois that is being proposed to house other Guantanamo Bay detainees.

IMMIGRATION AND DEPORTATION ISSUES

If the Administration brings foreign terrorists to our shores from Guantanamo Bay, we may never be able to deport them. Even worse, we may not be able to even keep them in immigration detention and off our streets. Even if we manage to convict these terrorists, they may one day become our constituents' new neighbors. How is this possible? Because of the confluence of two factors—1) the Convention against Torture and 2) the Supreme Court's 2001 decision in *Zadvydas v. Davis.*[5]

The Convention prohibits the return of aliens to countries where they may be tortured. The Department of Justice's regulations implementing the Convention made no exceptions whatsoever—rapists, murderers, participants in genocide and terrorists are equally

[4] Id.
[5] 533 U.S. 678 (2001).

protected. Hundreds of criminals have already received relief from deportation as a result of the Convention—and so has an alien involved in the assassination of Anwar Sadat.

Osama Bin Laden himself could probably frustrate deportation by making a Convention claim. After all, the more heinous a person's actions and consequently the more hated they are in their home countries, the more likely that they might be subject to torture.

The ability of terrorists to frustrate deportation might be barely tolerable if we were sure we could keep them detained. But even this may not be the case. Section 412 of the PATRIOT Act does wisely provide for the indefinite detention of terrorist aliens, regardless of whether they qualify under the Convention against Torture or have other available relief from removal. However, it is very possible that the Supreme Court will rule this provision unconstitutional.

In *Zadvydas,* the Supreme Court ruled that under a different law, aliens who had been admitted to the U.S. and then ordered removed could not be detained for more than six months if for some reason—such as the Convention against Torture—they could not be removed. In *Zadvydas,* the Supreme Court made a statutory interpretation. However, the Court stated that it was "interpreting the statute to avoid a serious constitutional threat." The Court believed that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem."

Already, the *Zadvydas* decision has resulted in the release of hundreds of alien criminals into our communities. Jonathan Cohn, former Deputy Assistant Attorney General, has testified that "the government is [now] required to release numerous rapists, child molesters, murderers, and other dangerous illegal aliens into our streets. . . . [V]icious criminal aliens are now being set free within the U.S."

It seems incredible that the Administration would intentionally bring alien terrorists into the United States, knowing that we may never be able to deport them, or even detain them on a long-term basis.

CONCLUSION

We introduced this Resolution of Inquiry to request Justice Department documents that would inform Congress what extra constitutional and legal rights will be afforded these terrorists once they are brought to the U.S. for criminal prosecution. This resolution also requests documents relating to the detention, transportation, and incarceration of these terrorists before, during, and after the trial.

The decision to try KSM and the other 9/11 plotters in New York is not based in legal precedent or grounded in national security considerations. It is based on the liberal ideology that terrorists deserve the same rights as citizens. We introduced this resolution because we fear the Justice Department failed to consider—or chose to ignore—the myriad of issues raised by this decision, only a handful of which are addressed herein. Unfortunately, the majority chose to reject its well-established oversight responsibilities and instead continue to blindly rely upon the assurances of General Holder that America will not regret this decision.

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