

HOLDER TO REPUBLICANS: STOP BEING SUCH WATBS ABOUT MIRANDA WARNINGS AND MUKASEY'S DECISIONS

Eric Holder just sent the following letter to a bunch of whiny Republican Senators trying to make an issue about Americans respecting the rule of law. (I'm posting the whole thing bc there's a lot of excellent smack down in it.)

Dear Senator McConnell:

I am writing in reply to your letter of January 26, 2010, inquiring about the decision to charge Umar Farouk Abdulmutallab with federal crimes in connection with the attempted bombing of Northwest Airlines Flight 253 near Detroit on December 25, 2009, rather than detaining him under the law of war. An identical response is being sent to the other Senators who joined in your letter.

The decision to charge Mr. Abdulmutallab in federal court, and the methods used to interrogate him, are fully consistent with the long-established and publicly known policies and practices of the Department of Justice, the FBI, and the United States Government as a whole, as implemented for many years by Administrations of both parties. Those policies and practices, which were not criticized when employed by previous Administrations, have been and remain extremely effective in protecting national security. They are among the many powerful weapons this country can and should use to win the war against al-Qaeda.

I am confident that, as a result of the hard

work of the FBI and our career federal prosecutors, we will be able to successfully prosecute Mr. Abdulmutallab under the federal criminal law. I am equally confident that the decision to address Mr. Abdulmutallab's actions through our criminal justice system has not, and will not, compromise our ability to obtain information needed to detect and prevent future attacks.

There are many examples of successful terrorism investigations and prosecutions, both before and after September 11, 2001, in which both of these important objectives have been achieved – all in a manner consistent with our law and our national security interests. Mr. Abdulmutallab was questioned by experienced counterterrorism agents from the FBI in the hours immediately after the failed bombing attempt and provided intelligence, and more recently, he has provided additional intelligence to the FBI that we are actively using to help protect our country. We will continue to share the information we develop with others in the intelligence community and actively follow up on that information around the world.

1. Detention. I made the decision to charge Mr. Abdulmutallab with federal crimes, and to seek his detention in connection with those charges, with the knowledge of, and with no objection from, all other relevant departments of the government. On the evening of December 25 and again on the morning of December 26, the FBI informed its partners in the Intelligence Community that Abdulmutallab would be charged criminally, and no agency objected to this course of action. In the days following December 25 – including during a meeting with the President and other senior members of his national security team on January 5 – high-level discussions ensued within the Administration in which the possibility of detaining Mr. Abdulmutallab under the law of war was explicitly discussed. No agency supported the use of law of war detention for Abdulmutallab, and no agency has since advised the Department

of Justice that an alternative course of action should have been, or should now be, pursued.

Since the September 11, 2001 attacks, the practice of the U.S. government, followed by prior and current Administrations without a single exception, has been to arrest and detain under federal criminal law all terrorist suspects who are apprehended inside the United States. The prior Administration adopted policies expressly endorsing this approach. Under a policy directive issued by President Bush in 2003, for example, "the Attorney General has lead responsibility for criminal investigations of terrorist acts or terrorist threats by individuals or groups inside the United States, or directed at United States citizens or institutions abroad, where such acts are within the Federal criminal jurisdiction of the United States, as well as for related intelligence collection activities within the United States." Homeland Security Presidential Directive 5 (HSPD-5, February 28, 2003). The directive goes on to provide that "(following a terrorist threat or an actual incident that falls within the criminal jurisdiction of the United States, the full capabilities of the United States shall be dedicated, consistent with United States law and with activities of other Federal departments and agencies to protect our national security, to assisting the Attorney General to identify the perpetrators and bring them to justice."

In keeping with this policy, the Bush Administration used the criminal justice system to convict more than 300 individuals on terrorism-related charges. For example, Richard Reid, a British citizen, was arrested in December 2001 for attempting to ignite a shoe bomb while on a flight from Paris to Miami carrying 184 passengers and 14 crewmembers. He was advised of his right to remain silent and to consult with an attorney within five minutes of being removed from the aircraft (and was read or reminded of these rights a total of four times within 48 hours), pled guilty in October 2002,

and is now serving a life sentence in federal prison. In 2003, Iyman Faris, a U.S. citizen from Pakistan, pled guilty to conspiracy and providing material support to al-Qaeda for providing the terrorist organization with information about possible U.S. targets for attack. Among other things, he was tasked by al-Qaeda operatives overseas to assess the Brooklyn Bridge in New York City as a possible post-9/11 target of destruction. After initially providing significant information and assistance to law enforcement personnel, he was sentenced to 20 years in prison. In 2002, the "Lackawanna Six" were charged with conspiring, providing, and attempting to provide material support to al-Qaeda based upon their pre-9/11 travel to Afghanistan to train in the Al Farooq camp operated by al-Qaeda. They pled guilty, agreed to cooperate, and were sentenced to terms ranging from seven to ten years in prison. There are many other examples of successful terrorism prosecutions – ranging from Zacarias Moussaoui (convicted in 2006 in connection with the 9/11 attacks and sentenced to life in prison) to Ahmed Omar Abu Ali (convicted in 2005 of conspiracy to assassinate the President and other charges and sentenced to life in prison) to Ahmed Ressaam (convicted in 2001 for the Millennium plot to bomb the Los Angeles airport and sentenced to 22 years, a sentence recently reversed as too lenient and remanded for resentencing) –which I am happy to provide upon request.

In fact, two (and only two) persons apprehended in this country in recent times have been held under the law of war. Jose Padilla was arrested on a federal material witness warrant in 2002, and was transferred to law of war custody approximately one month later, after his court-appointed counsel moved to vacate the warrant. Ali Saleh Kahlah Al-Marri was also initially arrested on a material witness warrant in 2001, was indicted on federal criminal charges (unrelated to terrorism) in 2002, and then transferred to law of war custody approximately

eighteen months later. In both of these cases, the transfer to law of war custody raised serious statutory and constitutional questions in the courts concerning the lawfulness of the government's actions and spawned lengthy litigation. In Mr. Padilla's case, the United States Court of Appeals for the Second Circuit found that the President did not have the authority to detain him under the law of war. In Mr. Al-Marri's case, the United States Court of Appeals for the Fourth Circuit reversed a prior panel decision and found in a fractured en banc opinion that the President did have authority to detain Mr. Al Marri, but that he had not been afforded sufficient process to challenge his designation as an enemy combatant. Ultimately, both Al-Marri (in 2009) and Padilla (in 2006) were returned to law enforcement custody, convicted of terrorism charges and sentenced to prison.

When Flight 253 landed in Detroit, the men and women of the FBI and the Department of Justice did precisely what they are trained to do, what their policies require them to do, and what this nation expects them to do. In the face of the emergency, they acted quickly and decisively to ensure the detention and incapacitation of the individual identified as the would-be bomber. They did so by following the established practice and policy of prior and current Administrations, and detained Mr. Abdulmutallab for violations of federal criminal law.

2. Interrogation. The interrogation of Abdulmutallab was handled in accordance with FBI policy that has governed interrogation of every suspected terrorist apprehended in the United States for many years. Across many Administrations, both before and after 9/11, the consistent, well-known, lawful, and publicly-stated policy of the FBI has been to provide Miranda warnings prior to any custodial interrogation conducted inside the United States. The FBI's current Miranda policy, adopted during the prior Administration, I provides explicitly that "[w]ithin the United

States, Miranda warnings are required to be given prior to custodial interviews. . . .² In both terrorism and non-terrorism cases, the widespread experience of law enforcement agencies, including the FBI, is that many defendants will talk and cooperate with law enforcement agents after being informed of their right to remain silent and to consult with an attorney. Examples include L'Houssaine Kherchtou, who was advised of his Miranda rights, cooperated with the government and provided critical intelligence on al-Qaeda, including their interest in using piloted planes as suicide bombers, and Nuradin Abdi, who provided significant information after being repeatedly advised of his Miranda rights over a two week period.

During an international terrorism investigation regarding Operation Crevice, law enforcement agents gained valuable intelligence regarding al-Qaeda military commanders and suspects involved in bombing plots in the U.K. from a defendant who agreed to cooperate after being advised of, and waiving his Miranda rights. Other terrorism subjects cooperate voluntarily with law enforcement without the need to provide Miranda warnings because of the non-custodial nature of the interview or cooperate after their arrest and agree to debriefings in the presence of their attorneys. Many of these subjects have provided vital intelligence on al-Qaeda, including several members of the Lackawanna Six, described above, who were arrested and provided information about the Al Farooq training camp in Afghanistan; and Mohammad Warsame, who voluntarily submitted to interviews with the FBI and provided intelligence on his contacts with al-Qaeda in Afghanistan. There are other examples which I am happy to provide upon request. There are currently other terrorism suspects who have cooperated and are providing valuable intelligence information whose identities cannot be publicly disclosed.

The initial questioning of Abdulmutallab was conducted without Miranda warnings under a

public safety exception that has been recognized by the courts.

Subsequent questioning was conducted with Miranda warnings, as required by FBI policy, after consultation between FBI agents in the field and at FBI Headquarters, and career prosecutors in the U.S. Attorney's Office and at the Department of Justice. Neither advising Abdulmutallab of his Miranda rights nor granting him access to counsel prevents us from obtaining intelligence from him, however. On the contrary, history shows that the federal justice system is an extremely effective tool for gathering intelligence. The Department of Justice has a long track record of using the prosecution and sentencing process as a lever to obtain valuable intelligence, and we are actively deploying those tools in this case as well.

Some have argued that had Abdulmutallab been declared an enemy combatant, the government could have held him indefinitely without providing him access to an attorney. But the government's legal authority to do so is far from clear. In fact, when the Bush administration attempted to deny Jose Padilla access to an attorney, a federal judge in New York rejected that position, ruling that Padilla must be allowed to meet with his lawyer. Notably, the judge in that case was Michael Mukasey, my predecessor as Attorney General. In fact, there is no court-approved system currently in place in which suspected terrorists captured inside the United States can be detained and held without access to an attorney; nor is there any known mechanism to persuade an uncooperative individual to talk to the government that has been proven more effective than the criminal justice system. Moreover, while in some cases defense counsel may advise their clients to remain silent, there are situations in which they properly and wisely encourage cooperation because it is in their client's best interest, given the substantial sentences they might face.

3. The Criminal Justice System as a National Security Tool. As President Obama has made clear repeatedly, we are at war against a dangerous, intelligent, and adaptable enemy. Our goal in this war, as in all others, is to win. Victory means defeating the enemy without damaging the fundamental principles on which our nation was founded. To do that, we must use every weapon at our disposal. Those weapons include direct military action, military justice, intelligence, diplomacy, and civilian law enforcement. Each of these weapons has virtues and strengths, and we use each of them in the appropriate situations.

Over the past year, we have used the criminal justice system to disrupt a number of plots, including one in New York and Colorado that might have been the deadliest attack on our country since September 11, 2001, had it been successful. The backbone of that effort is the combined work of thousands of FBI agents, state and local police officers, career prosecutors, and intelligence officials around the world who go to work every day to help prevent terrorist attacks. I am immensely proud of their efforts. At the same time, we have worked in concert with our partners in the military and the Intelligence Community to support their tremendous work to defeat the terrorists and with our partners overseas who have great faith in our criminal justice system.

The criminal justice system has proven to be one of the most effective weapons available to our government for both incapacitating terrorists and collecting intelligence from them. Removing this highly effective weapon from our arsenal would be as foolish as taking our military and intelligence options off the table against al-Qaeda, and as dangerous. In fact, only by using all of our instruments of national power in concert can we be truly effective. As Attorney General, I am guided not by partisanship or political considerations, but by a commitment to using the most effective course of action in

each case, depending on the facts of each case, to protect the American people, defeat our enemies, and ensure the rule of law.

I The Domestic Investigations and Operations Guide (DIOG) was finalized on December 16, 2008. It is the FBI's manual implementing the Attorney General's Guidelines for Domestic FBI Operations, which were issued by Attorney General Mukasey on September 29, 2008.

2 FBI policy also reminds agents that "[t]he warning and waiver of rights is not required when questions which are reasonably prompted by a concern for public safety are asked. For example, if Agents make an arrest in public shortly after the commission of an armed offense, and need to make an immediate inquiry to determine the location of the weapon, such questions may be asked, even of an in-custody suspect, without first advising the suspect of [his Miranda rights]." FBI Legal Handbook for Special Agents § 7- 3.2(6). The public-safety exception to *Miranda v. Arizona*, 384 U.S. 436 (1966), was recognized by the Supreme Court in *New York v. Quarles*, 467 U.S. 649 (1984).