

United States Senate
WASHINGTON, DC 20510

January 8, 2010

President Barack Obama
The White House
Washington D.C. 20500

Dear Mr. President:

We write to express our concern about the decision to prosecute in an Article III criminal court Umar Farouk Abdulmutallab, the 23 year old Nigerian who attempted to detonate an explosive device aboard Northwest Flight 253 on December 25, 2009. We fear this decision has resulted in a missed opportunity to collect timely intelligence, and is indicative of a troubling pre-9/11 mentality that treats terrorism as a law enforcement rather than intelligence matter.

As we now know, Abdulmutallab managed to evade scrutiny by our Intelligence Community and smuggle explosives onto a plane bound for the Homeland. As you stated, “when a suspected terrorist is able to board a plane with explosives on Christmas Day the system has failed in a potentially disastrous way. And it’s my responsibility to find out why, and to correct that failure so that we can prevent such attacks in the future.” If we are to ensure that similar failures never occur again, it is imperative that we understand what the U.S. government knew about Abdulmutallab prior to his attempted attack and where there was a failure to take appropriate action or connect the information. We cannot fully answer these questions, however, unless we examine the methods and means Abdulmutallab used to avoid detection by U.S. officials. Unfortunately, our ability to get these answers has been and will continue to be severely hampered by the decision to put Abdulmutallab almost immediately into a civilian judicial forum with all the rights, protections, and privileges afforded American citizens.

After Abdulmutallab failed to detonate an explosive device on Northwest Flight 253, he was taken into custody by law enforcement. Other than the Federal Bureau of Investigation (FBI), no member of the Intelligence Community—in particular the Central Intelligence Agency—had the opportunity to question Abdulmutallab and gather intelligence. As a foreseeable consequence of the decision to prosecute him as a criminal, Abdulmutallab stopped disclosing information to the FBI upon being informed of all his rights under U.S. criminal law. At a time when our vigilance should be heightened, our Intelligence

Community is now entirely dependent on the willingness of Abdulmutallab and his lawyer to cooperate with investigators. In fact, it is likely that in order to get any information from him, the government will now have to resort to bargaining with this terrorist, perhaps offering a potential reduction in jail time. In interviews this past Sunday, your National Security Council Advisor, John Brennan, stated “that he doesn’t have to [speak to the government], but he knows that there are certain things that are on the table, and if he wants to, in fact, engage with us in a productive manner, there are ways that he can do that,” and “[a] lot of people, as they understand what they’re facing and their lawyers recognize that there is advantage to talking to us in terms of plea agreements, we’re going to pursue that.” While engaging with a defendant in a productive manner may be an acceptable course in an ordinary criminal matter, it is entirely unacceptable when our focus should be on gathering potentially life-saving intelligence. Put simply, deciding to prosecute Abdulmutallab in a criminal court has limited our tools “on the table” to offering a terrorist who tried to murder almost 300 passengers on a plane less time behind bars.

While the Department of Justice spends scarce time bargaining with a terrorist, there are still many unanswered questions that demand answers: Do we know where Abdulmutallab obtained money for this operation? Do we know the identities of all the individuals who assisted him? Do we understand fully the details about who, where, and how he was trained for this operation? Do we know if he was aware of other terrorist plots or operatives? What was the extent of his involvement in al-Qaeda in the Arabian Peninsula? Despite these and other questions, the Intelligence Community has now lost any chance to gain real, actionable intelligence from Abdulmutallab because criminal charges were brought against him and he was afforded the rights of our criminal justice system, including the right to remain silent.

Prosecuting Abdulmutallab, as well as your decision to prosecute other terrorists such as the five 9/11 conspirators currently detained at the Guantanamo Bay detention facility, in an Article III criminal court indicates a disturbing tendency by your Administration to make terrorism a law enforcement priority rather than an intelligence priority. As the 9/11 Commission found, “Terrorist plots were disrupted and individual terrorists were captured. But, the United States did not, before 9/11, adopt as a clear strategic objective the elimination of al Qaeda.” *National Commission on Terrorist Attacks upon the United States*, p. 108. The 9/11 Commission also found that “an unfortunate consequence of this superb investigative and prosecutorial effort was that it created an impression that the law enforcement system was well-equipped to cope with terrorism.” *National*

Commission on Terrorist Attacks upon the United States, p. 72. As we know from an examination of events before 9/11, law enforcement means alone cannot eliminate the threat from overseas.

Gathering intelligence from all sources, including those whom we capture, that will lead us to other unknown terrorists is vital to eliminating al-Qaeda. Under your Constitutional authority as Commander in Chief, along with the Congressional Authorization for the Use of Military Force (P.L. 107-40), you have the authority—and, we believe, the responsibility—to detain Abdulmutallab because of his actions on behalf of al-Qaeda and associated groups. Had you ordered Abdulmutallab to be detained under this authority rather than criminally prosecuted, the Intelligence Community would have had a clear opportunity to collect intelligence from him, potentially leading to the discovery of other unknown terrorists before they, too, attempt to attack our nation or allies.

Detaining Abdulmutallab under your Constitutional authority also would give your Administration the time necessary to determine the full extent of his hostile and unlawful activities for punishment, and to pursue trial by military commission—an option you have determined appropriate for other terrorists, such as Abd al-Rahim al-Nashiri who was responsible for the U.S.S. Cole bombing. Instead, by prosecuting Abdulmutallab and the 9/11 conspirators in criminal court, and Nashiri and others by military commission, it creates the impression that terrorists are rewarded with the full panoply of rights and privileges of an American if they attack defenseless civilians at home, but not if they attack our government or military interests abroad. This will only further incentivize terrorists to attack our Homeland.

It is important to note that the Intelligence Community had a key piece of information specific to Abdulmutallab only because it had been volunteered by his family. Without this vital information, it is unlikely the Intelligence Community could have identified him even if they had they pieced together other intelligence indicating a threat to the U.S. As such, it is critical that our Intelligence Community have every opportunity to gain information so we can stay one step ahead of any related terrorist threats. Obtaining intelligence first rather than affording constitutional rights to a foreign terrorist is an obvious solution. So, too, we must ensure that our Intelligence Community has all the tools and capabilities at its disposal, such as those provided by the USA PATRIOT Act, so that we may detect terrorists before they ever have another chance to blow up a plane full of passengers.

We urge you to reconsider using the civilian criminal justice system to prosecute Abdulmutallab and other terrorists in U.S. custody. As al-Qaeda continues its quest to destroy the U.S. Homeland and our interests abroad, it is imperative that we use every intelligence-gathering means possible to deny them this opportunity and protect our citizens from harm.

Sincerely,

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