

Testimony of

Mr David Nahmias

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Mr. Chairman, Senators, I welcome the opportunity to appear before you today to participate in this hearing. My name is David Nahmias. For the seven years before the September 11 attacks, I was an Assistant United States Attorney in Atlanta, where I prosecuted a variety of violent crimes and fraud and public corruption cases, and worked for several years on the Olympic Park Bombing investigation that led to the indictment of Eric Robert Rudolph. After 9/11, I decided that I wanted to dedicate my efforts to the battle against international terrorism. I was fortunate enough to be selected by Michael Chertoff to serve him and the Department of Justice as Counsel to the Assistant Attorney General for the Criminal Division. I began shuttling between Atlanta and Washington in October of 2001 and have served full-time here since January of 2002. My work involves the supervision and coordination of terrorism investigations around the country and internationally, particularly those associated with the Al Qaeda organization.

I would start by recognizing the value of the Inspector General's (IG's) report. At a hearing before your colleagues in the House of Representatives on June 5, the Attorney General testified that the IG plays a valuable role in the Department of Justice in critiquing our performance and recommending ways we can improve.

To put the report into context, however, I would urge you to remember that we experienced a crisis of unprecedented proportions during the months that followed September 11, 2001. Beginning moments after the attacks on our nation, Department officials from numerous components, including employees of the Federal Bureau of Investigation (FBI), the former Immigration and Naturalization Service (INS), the United States Marshals Service, the Bureau of Prisons (BOP), the Criminal Division, and many United States Attorney's Offices, worked tirelessly to do everything within our legal authority to protect against another terrorist attack. The IG report properly recognizes that the Department was operating under the most difficult of circumstances, particularly in the New York City area, where there were enormous logistical issues resulting from the devastation surrounding the World Trade Center.

We had to take immediate steps to find out who had planned and executed the attacks, who had conspired with the terrorists, and who might be planning future acts of terrorism. As former Assistant Attorney General Michael Chertoff stated, in response to questions posed by Senator Leahy during this Committee's recent consideration of Mr. Chertoff's nomination to the federal bench, senior members of the Department formulated a general investigative strategy in response to the September 11 attacks. That strategy was:

First, to follow each of the many thousands of financial, communications, physical, and other leads generated from the September 11 investigation;

Second, to identify individuals linked by these leads with the hijackers or other terrorists; to investigate those persons fully; and to charge those persons if there was evidence that they had violated the law; and

Third, to make appropriate legal arguments in court to detain those charged persons until such time as we concluded that they were not part of the September 11 terrorist conspiracy or any other terrorist-related activity.

The strategy contemplated that either criminal or administrative immigration charges would be filed, as appropriate and supported by the evidence, against those who were encountered during the course of the investigation. The strategy was built on the recognition that it can be very difficult to detect terrorists and terrorist plots, and that every lead should therefore be pursued as far as possible, because one missed lead could prove to be the connection to another catastrophic attack.

The Inspector General's report focuses on 762 aliens who were detained, pursuant to this strategy, during the course of the investigation. All of the detained aliens were in the U.S. illegally and were lawfully detained while their ties to terrorism were investigated. They were all charged with criminal offenses or civil violations of federal immigration law.

It should be understood that, under the immigration law, an illegal alien in removal proceedings is not entitled to bond as a matter of right. Release on bond is a discretionary benefit. It would have been a disservice to the American people we work so hard to protect to release an illegal alien whom the FBI indicated it wanted to further investigate for connection with the September 11 attacks.

The report notes that the process of investigating and clearing each individual alien took some time. As the Attorney General stated during his testimony before the House Judiciary Committee on June 5, the Department of Justice had no interest in detaining people any longer than was necessary to investigate them. Cases were referred to an interagency working group that met daily at FBI Headquarters. The Criminal Division participated in that working group, and our attorneys were in daily contact with the various United States Attorney's offices that were working with the FBI on the investigation. Because the FBI and INS had centralized review of the cases, the Department's senior leadership and the interagency working group were in a position to monitor the progress of the overall investigation and determine connections among individuals. We saw the nationwide 9/11 investigation - as we now see our overall effort to prevent terrorist attacks - as a mosaic, with all of the local field offices providing information to put together as many pieces of the puzzle as possible.

The Attorney General has reaffirmed the judgment that this policy was and is sound. We did not know who these people were. If we had released or granted bond to an illegal alien who went on to commit another terrorist attack, we would have failed in our responsibilities to keep America safe. Indeed, in the past the Inspector General has issued such reports critical of the Department's failure to protect citizens from violence perpetrated by previously-detained illegal aliens who were then released, removed, or allowed to depart, such as the Texas railway serial killer, Rafael Resendez Ramirez and the 1997 "Brooklyn Bombers."

These two Inspector General reports reflect the reality that illegal aliens who are not detained are very likely to flee or abscond. In fact, just this February, the Inspector General issued a detailed report that found that aliens who are not detained usually flee and elude deportation. The report noted that 87% of nondetained aliens are not actually deported once their immigration proceedings are concluded and that high risk aliens were particularly unlikely to be found in order to be deported. The risk after our experience on September 11, 2001 was too great to take such chances.

Some people criticize us on the grounds that we did not charge any of the detainees with terrorism. But as you know, Zacarias Moussaoui was detained shortly before September 11 based on immigration charges, and he is among the aliens covered by the policy at issue here. After being detained for more than two months in INS custody, Moussaoui was indicted for participation in the terrorist conspiracy that led to the 9/11 attacks. How could we have answered to the American people we serve if Moussaoui had been deported or released on bond?

There is another simple answer to the criticism that we have not brought terrorism charges against these aliens. The detainees were all immigration law violators and thus removable on that ground alone. There are good reasons to pursue only the most easily proved immigration charge in the immigration system. Unlike in the criminal system, the sanction for immigration violations - removal - does not increase if more numerous or more serious violations are alleged. If the alien is removable for overstaying his visa, there is no need to prove that he engaged in terrorist activity, particularly if to do so may involve compromising sources or otherwise damaging ongoing investigations. Or, the underlying evidence on the security-related removal charge may be classified and cannot be declassified without harming national security. In the past, certain aliens who have been charged or detained based on security concerns have asserted claims for asylum based on the fact that they have been labeled as "terrorists" by the United States government, thus prolonging the proceedings. Therefore, it is often decided to forgo filing terrorism-related immigration charges because the result is the same: removal. The goal is to accomplish the result in a manner that best protects the national security and uses our limited resources most wisely.

Likewise, just because we do not charge someone criminally with terrorism, does not necessarily mean that there were no terrorist ties. There may be many reasons why we decide not to bring such a case. The decision not to charge in any criminal case may be made because there is insufficient evidence to prove terrorist activity beyond a reasonable doubt, but it also may be because we do not want to reveal sources or because other evidence is classified. Sometimes we charge suspected terrorists with non-terrorism related crimes when we have the evidence to do so. Other times we may be satisfied simply to remove the person from the United States and make sure that he does not return.

It is important to distinguish between our policy of detaining illegal aliens suspected of terrorism and the conditions of their confinement. As Mr. Lappin's testimony makes clear, we do not condone the abuse of anyone being held in federal custody. The Inspector General's report mentions allegations of abuse by specific detainees and other problems with the conditions of confinement at the Metropolitan Detention Center in Brooklyn. Some of these allegations remain under investigation and it would be premature to draw any conclusions. However, as the Attorney General stated on June 5: "We do not stand for abuse, and we will investigate those cases. . . We don't tolerate violence in holding individuals. That's not a policy of the department . . . [w]e'll seek to correct those situations."

The Inspector General has requested that the Department of Justice components with jurisdiction over issues raised by the report, as well as the Department of Homeland Security, provide a response to the 21 recommendations made in the report. As the Attorney General has stated, the Department of Justice welcomes constructive criticism. I understand that the Department is still in the process of reviewing the recommendations. I would note that, before the report was issued, the Department had already made adjustments in some areas that are consistent with the IG's recommendations. For example, in early March, the Attorney General signed a memorandum of understanding (MOU) that mandates the sharing with the Department of Homeland Security (DHS) of information sharing related to terrorism and threats to the national security. This MOU should provide the basis for making the sort of improvements recommended in the report. The Department of Justice, and the FBI in particular, will need to provide information to DHS for them to make an initial determination about whether to allow an illegal alien to be freed on bond.

In closing, I want to reiterate the following four points: (1) All detainees were illegally in the United States and their detentions were legal and constitutionally valid; (2) It is clear that non-detained illegal aliens, even those who are not suspected of having terrorist ties, flee; (3) Our central mission was and is to prevent another terrorist attack; and (4) The Department of Justice is always looking for ways to improve.

Thank you. I would be happy to attempt to answer your questions at this time.