

Congress of the United States
House of Representatives
Washington, DC 20515

July 19, 2011

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. President:

We are writing concerning the case of Ahmed Warsame, who was captured off the coast of Somalia and transferred to New York for prosecution in U.S. federal district court. While there are several aspects of this particular case that are of great interest to our committees, we are also extremely concerned about the larger policy questions that this example again brings into focus.

In the “Statement of Administration Policy” regarding the National Defense Authorization Act for Fiscal Year 2012, which passed the House on May 26, 2011, the Administration suggests that Congress is attempting to limit disposition options for the handling of terrorism suspects. Yet, as the Warsame case proves, it is the Administration that has foreclosed options that are absolutely critical during a time of war: namely, non-criminal detention for future captures and prosecution by military commission. By foreclosing these options and failing to create a long-term detention regime that puts a priority on intelligence collection and keeping terrorists out of the United States—combined with reluctance to consult or collaborate with Congress on these issues—the Administration has forced Congress to take action on these issues. These concerns are only heightened given the decision to handle Warsame’s case in a manner that directly contradicts pending legislation.

While the primary focus in the media on the Warsame case has been about forum selection for purposes of prosecution, our overarching concern is the lack of a comprehensive detention system to incapacitate and interrogate terrorists captured outside of Afghanistan. Vice Admiral William H. McRaven recently highlighted this problem in testimony before the Senate Armed Services Committee. In response to a question about what would happen if a detainee could not be prosecuted in a U.S. court or transferred to a third country, Admiral McRaven said

President Obama
July 19, 2011
Page 2

that the individual would instead be released. Admiral McRaven also confirmed that the Administration will not consider bringing new detainees to U.S. Naval Station, Guantanamo Bay, Cuba.

We are concerned that the lack of a comprehensive military detention system will continue to have numerous detrimental results, including: incentivizing lethal operations over law of war detention; the loss of critical detainee-provided intelligence; forcing the United States to be wholly dependent on foreign governments to hold and provide access to detainees; and, as in Warsame's case, bringing terrorists to the United States.

We recognize that there are significant reasons for not bringing detainees to Afghanistan from other areas of ongoing hostilities. However, this is the very reason another location for detention must be used. Such a location is already available at Guantanamo Bay. The facilities at Guantanamo, which are state-of-the-art and the result of millions of U.S. taxpayer dollars, make it unnecessary to bring terrorists to the United States.

As you know, apart from issues related to whether detainees can be prosecuted successfully in federal court, there are serious immigration-related issues that are triggered by bringing detainees to the United States. In *Zadvydas v. Davis*, the U.S. Supreme Court held that an individual can file for a writ of habeas corpus when the government has ordered their removal but cannot find a country to accept them. The Supreme Court further held that six months is presumed to be the maximum period permissible for confinement without charge. *Zadvydas* and other immigration-related laws could result in serious difficulties with removing terrorists who are either acquitted or who conclude their sentences. These difficulties are further escalated in cases like Warsame, where it could be extremely dangerous to remove detainees to unstable countries such as Somalia.

One need only look to our closest ally for examples of the possible consequences of bringing detainees to the United States. European courts have prevented the United Kingdom from deporting suspected terrorists whom their Government cannot otherwise prosecute. Lord Alex Carlile, the UK's Independent Reviewer of Terrorism Legislation, has said that such outcomes have resulted in the UK becoming a "safe haven" for terrorists.

While we agree that Warsame and other individuals like him are certainly eligible for detention pursuant to the 2001 Authorization for Use of Military Force, we also think that they are prosecutable under the Military Commissions Act of 2009. Although prosecution is not

President Obama
July 19, 2011
Page 3

necessary to detain terrorists under the laws of war, military commissions should be preferred over prosecution in federal court.

Our committees have a responsibility to ensure that the Administration's lack of a comprehensive detention system does not force it to take unnecessary legal and security risks in refusing to send foreign terrorists captured abroad to Guantanamo Bay or releasing those currently there. Accordingly, we request a briefing from the Administration related to the policies, procedures, guidance, criteria, or standards governing decisions regarding the detention, interrogation, or trial of terrorists captured outside Afghanistan and an explanation as to why detention at Guantanamo Bay is considered "off the table."

These are matters of grave importance. As charged by the Constitution and our constituents, we will continue to conduct rigorous and thorough oversight of these issues. We stand ready to work with you in addressing them, as they are fundamental to the protection of our national security.

Sincerely,



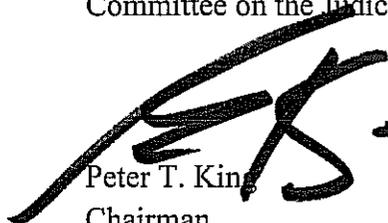
Howard P. "Buck" McKeon
Chairman
Committee on Armed Services



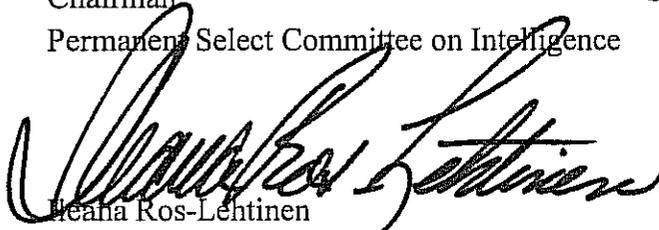
Lamar Smith
Chairman
Committee on the Judiciary



Mike Rogers
Chairman
Permanent Select Committee on Intelligence



Peter T. King
Chairman
Committee on Homeland Security



Heather Ros-Lehtinen
Chairman
Committee on Foreign Affairs