



Department of Justice

STATEMENT OF
BRUCE SWARTZ
DEPUTY ASSISTANT ATTORNEY GENERAL

BEFORE THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE

ENTITLED
“THE AL-MEGRAHI RELEASE: ONE YEAR LATER”

PRESENTED
SEPTEMBER 29, 2010

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Bruce Swartz
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Mr. Chairman, Ranking Member Lugar, members of the Committee, and family members of the victims of Pan Am Flight 103, thank you for inviting me to testify on behalf of the Department of Justice about the Scottish Cabinet Secretary for Justice’s release on compassionate grounds of Abdel Basset Ali Mohamed al-Megrahi.

I would like today to make three points. First, the Justice Department has relentlessly pursued justice for the victims and families of Pan Am Flight 103 for over two decades. Second, throughout that time, the U.S. Government – through the Department of State and the Department of Justice – consistently took the position that Megrahi, *if* tried before a Scottish court, should serve his sentence in Scotland and under no circumstance be transferred to or allowed to return to Libya prior to the conclusion of any such sentence. And third, when Megrahi was released from a Scottish prison on compassionate grounds and allowed to return to Libya, the Attorney General and the Director of the FBI immediately and publicly expressed their profound disagreement with, and distress over, the decision by the Scottish Cabinet Secretary for Justice – disagreement and distress that continues to this day.

BACKGROUND

Before turning to these three points, I would like to provide some background to this matter. On January 31, 2001, following an eight-month trial before the Scottish Court in the Netherlands, Megrahi was convicted by a unanimous panel of judges of the murder of the 259 passengers and crew on Pan Am Flight 103, and of the eleven residents of the Scottish town of Lockerbie, Scotland. Megrahi was immediately sentenced to life imprisonment by the Scottish Court, with the minimum period that he was required to serve before becoming eligible to apply for parole set at 27 years. The following year, an appeal by Megrahi was rejected as not well founded by the Lord Justice General of Scotland, who presided over a unanimous appellate panel of five Scottish High Court of Justiciary judges. Pursuant to the terms of arrangements jointly proposed by the United States and the United Kingdom – also incorporated into United Nations Security Council Resolution 1192 – Megrahi was immediately removed from Kamp van Zeist in the Netherlands to a prison in Scotland to serve his life sentence.

THE DEPARTMENT'S PURSUIT OF JUSTICE

The Department of Justice has actively pursued justice in this matter for over twenty years. The Justice Department became involved in the investigation of the bombing of Pan Am Flight 103, and ultimately in Megrahi's prosecution, on December 21, 1988 – the very day of the bombing. The Federal Bureau of Investigation (FBI), via its Legal Attaché in London, quickly established contact with the Scottish Police, and the following day – December 22 – dispatched a team of U.S. agents to Lockerbie to begin what rapidly evolved into a joint investigation

conducted by the Scottish police assigned to the Lockerbie Incident Control Center and FBI agents stationed in Lockerbie and Washington, D.C.

The Scottish Police combed a crime scene that spanned 845 square miles and collected every possible item that might have come from the aircraft. The Scottish Police then sifted through this mass of debris for items of forensic significance. During this difficult time, the Scottish Police, and the residents of the town of Lockerbie, were also gracious hosts to the numerous American relatives of the victims who came to Lockerbie in the bombing's immediate aftermath.

For our part, in addition to the extensive investigation being conducted by the FBI in the United States in response to Scottish requests, the U.S. Attorney's Office for the District of Columbia and the Criminal Division of the Department of Justice each assigned experienced attorneys to provide legal guidance to the FBI, and to coordinate with their Scottish counterparts.

After many months of relentless, tireless effort by the FBI, DOJ prosecutors, and their Scottish counterparts, prosecutors in the Criminal Division and the D.C. U.S. Attorney's Office presented the case to a grand jury enpaneled in the U.S. District Court. On November 14, 1991, an indictment was unsealed charging Libyan Intelligence Service member Megrahi and Libyan national, Lamin Khalifah Fhimah, with the bombing of Pan Am Flight 103. That same day, the Lord Advocate of Scotland announced the filing of parallel charges in Scotland. The personal involvement, dedication, and compassion for the victims of the many career employees within the Justice Department who labored to hold to account all those who participated in this horrendous act has informed each action the Justice Department has taken in investigating and prosecuting this case and continues to the present day.

NON-REPATRIATION TO LIBYA

Throughout this twenty-plus year period, both the Department of Justice and the Department of State have consistently taken the position that Megrahi should serve the entirety of his life sentence in Scotland and not be transferred or allowed to return to Libya before its conclusion. This was one of the earliest issues raised by the United States in connection with the negotiations for a trial before a Scottish court in the Netherlands, and the United States continued to raise it following Megrahi's conviction and incarceration.

Mr. Chairman, in your letters of July 29, and September 22, 2010, you have asked that I discuss the 1998 agreement reached between the United States, the United Kingdom, and Libya that required individuals convicted in the Pan Am 103 bombing to serve their sentence in Scotland, and DOJ's communication with the Scottish Government about this agreement. As Principal Deputy Assistant Secretary McEldowney has testified, there was no binding agreement under international law that would have required Megrahi to serve his entire sentence in Scotland. Nonetheless, the Justice Department participated in extensive negotiations between the U.S. Department of State and the U.K. Foreign Office, which led to the joint United States-United Kingdom proposal for a trial under Scottish law and before a Scottish court sitting in the Netherlands. Following these negotiations, the United States took the position that there was a political understanding between the United States and the United Kingdom that Megrahi would serve the entirety of his sentence in Scotland, and would not be transferred, or allowed to return, to Libya before its conclusion.

Because the trial of Megrahi in a third country outside of the United States raised numerous questions, further negotiations between Justice Department representatives and the British government were held in London in 1998 on matters such as the location of any convicted individual's service of sentence and the potential for future prisoner transfer agreements with Libya. With respect to service of sentence, the Department of Justice representatives maintained that any sentence must be served in Scotland. With respect to a prisoner transfer agreement, the Department's representatives learned that no prisoner transfer agreement then existed in 1998 between the United Kingdom and Libya, but that Prime Minister Tony Blair's incumbent government would not bind successor governments by giving the United States a commitment that the UK would not enter into a prisoner transfer agreement with Libya. Our representatives also learned that the Secretary of State for Scotland had the statutory power to release terminally ill prisoners on compassionate grounds (a power which would later transfer to the Scottish Executive under devolution) and that this discretion could not be fettered in advance by agreement. Nonetheless, the Department's representatives made it clear that we were unalterably opposed to the accused being returned to Libya, prior to the conclusion of his sentence, under any circumstances.

MEGRAHI'S RELEASE ON COMPASSIONATE GROUNDS

Seven years after Megrahi's 2001 conviction, in October of 2008, the Department of State was informed that Megrahi had been diagnosed with stage four prostate cancer. The Department of Justice also learned at that time that the Scottish administrative practice was to consider the release of terminally ill prisoners who have a prognosis of three months or less to

live. In addition, the United Kingdom signed a Prisoner Transfer Agreement (PTA) with Libya in November 2008, negotiation of which had begun in 2007. This agreement was anticipated to come into effect sometime in 2009. The power to grant or deny an application under either the Prisoner Transfer Agreement, or for compassionate release, rested with the Scottish Executive. Although the United States had no say in actions undertaken by the Scottish Government in compliance with their own regulations in governing authorities regarding prisoner transfer or granting of compassionate release, the Department of Justice and the Department of State were once again adamant that Megrahi not be allowed to return to Libya.

In 2009, both Secretary of State Hillary Clinton and Attorney General Eric Holder personally conveyed to the Scottish Executive the U.S. Government's vehement opposition to Megrahi's transfer or release to Libya. To be sure, the Scottish Executive's discretion to release terminally ill prisoners on compassionate grounds was statutory and could therefore not be limited in advance by agreement. Nonetheless, the United States was equally adamant that *if* any such compassionate release took place, Megrahi must remain in Scotland, as the Department of State made clear in a demarche on the issue.

REACTION TO MEGRAHI'S RELEASE

As I have described today, the Department of Justice, at every opportunity, restated its opposition to Megrahi's release and return to Libya. After Megrahi was in fact released in August of 2009, Attorney General Eric Holder condemned the decision as unjustified and publicly reiterated that it continued to be the Justice Department's position that Megrahi should have been required to serve the entire sentence handed down on him for his heinous crimes.

Similar views were stated by the FBI Director, Robert Mueller, who, in his former position as Assistant Attorney General for the Criminal Division, had led the investigation that resulted in Megrahi's U.S. indictment in 1991. On August 21, 2009 – the day after Megrahi was released – Director Mueller wrote a letter to Scottish Justice Secretary Kenny MacAskill stating that the release is “as inexplicable as it is detrimental to the cause of justice” and “makes a mockery of the rule of law.” “[M]ost importantly,” Director Mueller poignantly continued in the letter, “your action makes a mockery of the grief of the families who lost their own on December 21, 1988.”

The sentiments expressed a year ago by Attorney General Holder and Director Mueller remain those of the Department today: The dedicated men and women at the Justice Department understand that it is impossible to measure what was lost when the lives of these 270 people were taken by this act of state-sponsored terrorism or the traumatic and sometimes debilitating grief of the families left behind. We know that this grief continues to this day and appreciate the outrage and anguish over Megrahi's release and return to Libya that the families continue to share with the Justice Department through our Office of Justice for Victims of Overseas Terrorism and the FBI's Office for Victim Assistance, among others. Please be assured that since that tragic day in December of 1988, all of the FBI agents, victim-witness counselors, and prosecutors who have observed this grief have done everything in their power to provide whatever relief possible.

This concludes my prepared remarks, and I will try to answer any questions that the Committee has for the Department of Justice.