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Hon. Harry Reid
Majority Leader
United States Senate
522 Hart Senate Office Building
Washington, DC 20510

Hon. Mitch McConnell
Minority Leader
United States Senate
361-A Russell Senate Office Building
Washington, DC 20510

Dear Senators Reid and McConnell:

On behalf of the Association of the Bar of the City of New York (the "Association"), we write to express our profound concern with Section 1116 of the 2011 Full-Year Continuing Appropriations Act ("Section 1116"), which was passed in the House of Representatives on December 8, 2010 and will soon be scheduled for a Senate vote. If passed into law, Section 1116 would terminate funding for the transfer of a non-citizen to the United States for any purpose, thereby preventing Guantanamo detainees from being tried in Article III courts for offenses related to the events of September 11, 2001.

Enactment of this bill would deprive the Department of Justice of what has proven to be its most effective enforcement weapon to prosecute and bring suspected terrorists to justice. It would also be an unprecedented intrusion into the judgment and discretion of the Executive Branch to enforce federal law and would raise grave questions under our system of separation of powers. Moreover, for Congress to intervene to dictate the means for prosecuting a specified person or group of persons may raise serious constitutional issues. Finally, this bill would tend to prolong the stalemate over how and where to prosecute those Guantanamo detainees whom the Administration has identified as being subject to prosecution. Such a result — further delay in bringing accused terrorists to justice — would be at odds with our society's strong interest in prosecuting, punishing, and passing moral judgment on those who have engaged in terrorist acts in violation of our laws. It would also exacerbate the military and propaganda risks, and the damage to our nation's reputation, arising from continuing operations at Guantanamo.

The Association is a professional association of over 23,000 attorneys. Founded in 1870, it has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, the Association educates the bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees. The principal lesson we have derived from our work is that full and faithful respect for the

rule of law strengthens our country. Our system of justice – based on time-tested constitutional and international norms – is a source of strength, not vulnerability.

The Association believes that the federal system of civilian courts is well-equipped to try individuals who are accused of terrorist activities. The Association submits this letter to present the U.S. Senate with information about the capacity of the federal justice system to handle criminal cases against individuals suspected of complicity in terrorism. We believe that the Executive Branch should be equipped with the flexibility to use all available tools, including criminal prosecutions, as part of effective counterterrorism policy. As set forth in this letter, we urge the Senate to reject Section 1116.

The Federal Criminal Justice System is Well-Equipped to Prosecute Terrorism

In the past 20 years, federal courts have done an excellent job in handling scores of terrorism cases, including many that involved complex factual scenarios and difficult political entanglements. These federal-court prosecutions have yielded just, reliable results — and in most cases severe sentences — without any demonstrated leaks of classified information, all while maintaining our commitment to the due process of law.

Existing criminal statutes proscribe a broad range of potential terrorist conduct, providing prosecutors with a "well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit." *Hamdi v. Rumsfeld*, 542 U.S. 507, 547 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in judgment). These statutes allow for prosecutions based on a wide variety of threatening behavior, including but not limited to: material support of terrorism, 18 U.S.C. §§ 2339A & B; attacks against U.S. nationals abroad, 18 U.S.C. § 2332; serious attacks "transcending national boundaries," 18 U.S.C. § 2332b; harboring or concealing terrorists, 18 U.S.C. § 2339; and the handling of an explosive or lethal device with the intent to cause death, serious injury or major economic loss, 18 U.S.C. § 2332f.

Despite claims to the contrary, the federal criminal justice system adequately protects the secrecy of classified information, even in the most sensitive cases. Those who claim otherwise misunderstand the extensive statutory framework that has been put in place in order to handle classified material in a judicial setting, created by Congress itself in the Classified Information Procedures Act ("CIPA"). CIPA establishes procedures allowing judges and cleared counsel to determine, before trial, how to manage classified evidence so that the defendant receives a fair trial while secret information is protected. *See* 18 U.S.C. app. 3; *see also* Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts*, at 82-84 (2008) (summarizing CIPA's provisions). Since the late 1980s, when the statute was first used in the terrorism context, courts have applied CIPA in a large number of terrorism cases, and we have found no documented evidence of serious breaches when CIPA procedures have been invoked. *See id.* at 8-9 (summarizing findings); *id.* at 84-86 (collecting cases). Importantly, CIPA is neither exhaustive nor exclusive with respect to the use of classified evidence, as district judges can still be relied upon "'to fashion creative and fair solutions to these problems,' *i.e.*, the problems raised by the use of classified information in trials." *United States v. Rosen*, 520 F. Supp. 2d 786, 796 (E.D. Va. 2007) (quoting S. Rep. 96-283, *reprinted in* 1980 U.S.C.C.A.N. 4294).

In case after case, involving even the highest-profile individuals, federal courts have effectively pursued justice against terrorists. *See* Zabel & Benjamin, at 13-20 (discussing federal prosecution of the airline hijackings of the 1980s, the first World Trade Center bombing, and the East African embassy bombings, among others); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2005) (affirming conviction of Ahmed Omar Abu Ali, who conspired with Al Qaeda to hijack airplanes, blow up nuclear plants and assassinate President George W. Bush). During 2010, the Department of Justice has secured criminal convictions in our Article III courts against a number of high-profile terrorism defendants including the following:

- Najibullah Zazi, a former resident of New York City who traveled to Afghanistan, was recruited by al Qaeda, received training in constructing explosives for planned attacks in the United States, was instructed on targets including subway trains in New York City, traveled to New York with explosives and other materials to build bombs, and was days away from carrying out attacks against the New York City subway system. Zazi pled guilty and is awaiting sentencing. *See* Press Release, *Najibullah Zazi Pleads Guilty To Conspiracy To Use Explosives Against Persons or Property in U.S., Conspiracy to Murder Abroad, and Providing Material Support to al-Qaeda* (Feb. 22, 2010) (U.S. Attorney's Office for the Eastern District of New York);

- Faisal Shahzad, a naturalized U.S. citizen and resident of Connecticut who traveled to Pakistan, received bomb-making training from the Taliban, and then attempted to detonate a car bomb in the middle of Times Square. Shahzad pled guilty and was sentenced to life imprisonment. *See* Press Release, *Faisal Shahzad Sentenced In Manhattan Federal Court to Life in Prison for Attempted Car Bombing in Times Square* (Oct. 5, 2010) (U.S. Attorney's Office for the Southern District of New York);

- David Headley, a U.S. citizen who attended terrorist training camps in Pakistan on five separate occasions and conducted surveillance on multiple occasions as part of the plot leading up to the deadly terrorist attacks in Mumbai, India. Headley pled guilty and is awaiting sentencing. *See* Press Release, *Chicago Resident David Coleman Headley Pleads Guilty to Role in India and Denmark Terrorism Conspiracies* (March 18, 2010) (U.S. Attorney's Office for the Northern District of Illinois); and

- Aafia Siddiqui, an MIT-educated woman who was charged with attempted murder and assault of U.S. military personnel and FBI agents in Afghanistan after she had been detained by Afghan authorities. Siddiqui was convicted by a jury and was sentenced to 86 years' imprisonment. *See* Press Release, *Aafia Siddiqui Sentenced in Manhattan Federal Court to 86 Years for Attempting to Murder U.S. Nationals in Afghanistan and Six Additional Crimes* (Sept. 23, 2010) (U.S. Attorney's Office for the Southern District of New York).

Prosecution of these vitally important cases resulted in no significant leaks of confidential information or increased threat to the American public. Moreover, in three of the cases — *Zazi*, *Shahzad*, and *Headley* — the defendants have reportedly cooperated with the authorities and provided valuable intelligence after their respective arrests. Other accused terrorists prosecuted in the Article III courts have also yielded valuable intelligence, including, by way of example, Bryant Neal Vinas, who pled guilty to terrorism charges in 2009 in the Eastern District of New York. *See* William K. Rashbaum & Souad Mekhennet, *L.I. Man Helped Al Qaeda, Then Informed*, N.Y. Times, July 22, 2009 at A1.

Our federal courts have also successfully handled criminal prosecutions of two individuals who were previously held in military custody in the United States: Jose Padilla and Ali Saleh al-Marri. *See* Zabel & Benjamin, at 72-75 (discussing procedural history of *Padilla* and *al-Marri*); *see* Press Release, *Jose Padilla and Co-Defendants Convicted of Conspiracy to Murder Individuals Overseas, Providing Material Support to Terrorists* (Aug. 16, 2007) (U.S. Department of Justice); Press Release, *Ali Al-Marri Pleads Guilty to Conspiracy to Provide Material Support to Al-Qaeda* (Apr. 30, 2009) (U.S. Department of Justice).

The prosecution of Ahmed Ghailani, indicted for his part in the deadly attack on U.S. embassies in East Africa in 1998, has been derided in some quarters as a failure. However, critics of the *Ghailani* prosecution fail to acknowledge that Ghailani was convicted of an extremely serious offense — conspiracy to destroy property and buildings of the United States — and faces a mandatory minimum 20-year prison sentence with the very real possibility of a life sentence. *See* Press Release, *Ahmed Khalfan Ghailani Found Guilty in Manhattan Federal Court of Conspiring in the 1998 Destruction of Untied States Embassies in East Africa Resulting in Death* (Nov. 17, 2010) (U.S. Attorney's Office for the Southern District of New York). Nor, contrary to dire predictions from some quarters, did courthouse security or business interruption issues arise. No less important, the presiding judge, the Honorable Lewis A. Kaplan, fairly and conscientiously applied the law in adjudicating difficult pretrial motions arising from Ghailani's extended detention at Guantanamo and the "so-called enhanced interrogation methods" to which he was subjected while in CIA custody. *United States v. Ghailani*, S1098 Cr. 1023 (LAK), 2010 WL 4058043, at *1 (S.D.N.Y. Oct. 13, 1010). To the extent the prosecution team encountered difficulty in presenting all evidence of Ghailani's guilt, those problems stemmed largely from the coercive and since-repudiated interrogation techniques to which Ghailani was subjected as well as the delays in bringing him to trial. Moreover, as Judge Kaplan noted in his opinion, in a military commission prosecution, evidence derived from Ghailani's coercive interrogations might well have been ruled inadmissible just as it was stricken in federal court. *See id.* at *19 n.182. That the Department of Justice was able to secure a conviction of Ghailani on a serious charge, despite the obstacles resulting from his prior treatment, demonstrates the effectiveness, credibility, and independence of our civilian justice system and its value as part of an integrated, effective counterterrorism policy.

Section 1116 Would Cause Further and Unjustifiable Delays in Commencing Prosecutions of Guantanamo Detainees Whom the Executive Branch Has Deemed Amenable to Prosecution

In 2009, the Obama Administration conducted a painstaking review of the available evidence with regard to each individual detained at Guantanamo. *See* Executive Order No. 13492, 74 Fed. Reg. 4898 at § 4 (Jan. 22, 2009). As a result of that process, the Department of Justice determined that 44 Guantanamo detainees are amenable to prosecution. Final Report, Guantanamo Review Task Force, Jan. 22, 2010, at 19-22. As Attorney General Holder announced in late 2009, the Department of Justice has proposed to prosecute a number of these individuals in our Article III courts. *See* Press Release, *Attorney General Announces Forum Decisions for Guantanamo Detainees* (Nov. 13, 2009) (U.S. Department of Justice). For more than a year, however, stalemate has been the order of the day and not a single Guantanamo detainee, other than Ghailani, has been brought to justice in our federal courts. Recently, as a solution to the political problems of terrorism prosecutions, it has even been suggested that the best course of action is to keep the prisoners in indefinite custody and simply stand down from any effort to bring charges and impose punishment. *See* John Yoo,

The Ghailani Verdict and the War on Terror, Wall St. J., Nov. 20, 2010 at A15; Jack Goldsmith, *Don't Try Terrorists, Lock Them Up,* N.Y. Times, Oct. 9, 2010 at A21; Jack Goldsmith, *A way past the terrorist detention gridlock*, Wash. Post, Sept. 10, 2010 at A25.

We believe that this suggestion is both dangerous and wrong. As Judge Kaplan noted in his opinion denying Ghailani's motion under the Speedy Trial Clause of our Constitution, without commencing prosecutions of accused terrorists the United States "may not lawfully punish" those who carry out terrorist acts, nor can it "lawfully give vent to the outrage felt both here and [abroad] at these murderous attacks on innocent civilians." *United States v. Ghailani*, S1098 Cr. 1023 (LAK), 2010 WL 2756546, at *1 (S.D.N.Y. July 12, 1010). Further, indefinite military detention is an unstable foundation on which to detain individuals who are believed to be dangerous, because military detention is *not* indefinite – it lasts only as long as the conflict continues to exist, at which point the government would be obliged to belatedly commence prosecutions if it wished to continue to detain accused terrorists.

Continued delays in prosecution, moreover, will at some point jeopardize the government's ability to secure convictions, because of the risk of fading memories and lost evidence as well as the vulnerability to Speedy Trial arguments arising from prolonged detention without a compelling government purpose such as gathering useful intelligence. *See id.* at *16-17 (discussing Speedy Trial analysis in the context of extended detention of Ghailani at Guantanamo). More fundamentally, a call to leave accused terrorists who could be prosecuted to languish in prison without a trial for long-term indefinite detention offends American conceptions of justice and fair play and will exacerbate the controversies that continue to surround the prison camp at Guantanamo.

Military Commissions Should Not Be the Sole Means for Prosecuting Terrorism

Military commissions can be useful tools, but they were not intended to accommodate every criminal or terrorist defendant. Historically, military commissions were not intended to afford a venue for all possible grievances concerning war-related crimes.

In fact, military commissions have been largely unsuccessful in reaching any final verdicts or sentences in recent years. In contrast, the federal courts have established their fairness and effectiveness through their operation over more than two hundred years, and demonstrated their specific capacity to deal with terrorism crimes over the last two decades. Indeed, since September 11th, over 300 individuals charged with terrorism crimes have been successfully prosecuted and sentenced in federal court, with more than 30 convicted in 2009 alone. Accordingly, it would be self-defeating to foreclose them as an avenue for prosecuting terrorism.

Conclusion

The Association therefore urges the Senate to reject Section 1116 as unwise, impractical, and inconsistent with our nation's principles of justice.

Very truly yours,

Samuel W. Seymour