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March 21, 2011

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 Sections 1112 and 1113 of the 2011 Full-Year Continuing Appropriations Act, bill number H.R. 1, which passed in the House of Representatives on February 19, 2011. If passed into law, Section 1112 would prohibit the use of appropriated funds for the transfer of a non-citizen held at Guantanamo Bay to the United States for any purpose, thereby preventing Guantanamo detainees from being tried in Article III courts. A similar provision was adopted, over the strong objection of the Executive Branch, as part of the defense appropriations bill in December 2010. *See* Pub. L. No. 111-383 (Jan. 7, 2011). The Association opposed that provision and we believe that it should not be renewed in the current Appropriations Act.

Section 1113 would (subject to narrow exceptions) prohibit the use of appropriated funds to transfer any Guantanamo detainee to any foreign country (including the detainee's country of origin) unless the Secretary of Defense submits a detailed and intrusive "certification" to Congress 30 days before the transfer occurs. The Secretary of State must concur in the certification. The certification requires the Secretary of Defense to state that the country to which the detainee is to be transferred "maintains effective control over each detention facility in which an individual is to be detained," "is not, as of the date of the certification, facing a threat that is likely to substantially affect its ability to exercise control over the individual," and "has agreed to share any information with the United States that is related to the individual or any associates of the individual; and could affect the security of the United States, its citizens, or its allies." In addition, Section 1113(c) would, subject to narrow exceptions, prohibit the use of appropriated funds to effect any transfer of a Guantanamo detainee to any foreign country (even if the above-described certification is provided) if "there is a confirmed case of" even one former Guantanamo detainee "who was transferred to the foreign country . . . and subsequently engaged in any terrorist activity."

These provisions do not comport with the separation of powers upon which our Constitution is based and would reflect an unwarranted and unwise intrusion by Congress into areas of decision making that are properly left to the sound judgment of the Executive Branch. We urge the Senate to reject both provisions.

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.

I. Section 1112: Restriction on use of funds to transfer non-citizen Guantanamo detainees to the United States

Enactment of Section 1112 would deprive the federal government of what has proven to be its most effective enforcement weapon to prosecute and bring suspected terrorists to justice – criminal prosecutions in the Article III courts. It would raise grave questions under our system of separation of powers. Moreover, for Congress to dictate the means for prosecuting a specified person or group of persons may raise serious constitutional issues. Further, 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.

In addition, trials in Article III courts permit prosecution under the full range of criminal laws prohibiting terrorism without limitation to the customary law of war. It is not clear whether the key offenses of conspiracy (*see Hamdan v. Rumsfeld*, 548 U.S. 557, 598-613 (2006) (plurality opinion)), murder by unlawful combatant, or material support of terrorism are chargeable under the law of war against individuals detained at Guantanamo. Indeed, the validity of conspiracy and material support charges is a key issue in the pending appeal from a military commission conviction in the *al Bahlul* case, *see United States v. Al Bahlul*, Case No. 09-001 (Ct. Mil. Comm’n Review), and after-the-fact legislation on the substantive law of war would be *ex post facto* with respect to many of the Guantanamo detainees. Thus, prosecution under the law of war may, from the government’s standpoint, actually favor defendants accused of terrorism as compared with prosecutions under federal criminal law.

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

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. Conspiracy, in particular, is a potent charge.

The federal criminal justice system has proved its ability to protect the secrecy of classified information, even in the most sensitive cases. Claims to the contrary misinterpret the extensive statutory framework created by Congress in the Classified Information Procedures Act ("CIPA") to handle classified material in a judicial setting. 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 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 criticized in some quarters, but the attacks on the *Ghailani* prosecution are ill-informed and without foundation. Ghailani was convicted of a serious offense – conspiracy to destroy property and buildings of the United States (possibly not an offense under the law of war as in effect at the time of those events) – and was sentenced to life in prison without the possibility of parole. *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); Transcript of Sentencing at 71, *United States v. Ghailani*, S10 98 Cr. 1023 (LAK) (No. 1098).

Contrary to dire predictions from some quarters, no significant courthouse security or business interruption issues arose during the *Ghailani* trial. 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 1112 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 Executive Branch 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 Cases

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 11, 2001, over 300 individuals charged with terrorism crimes have been successfully prosecuted and sentenced in federal court, with more than 30 convicted in 2009 alone.

The Secretary of Defense has recently rescinded his prior order suspending the filing of new military commission charges. *See* Statement by Defense Secretary Robert Gates on Resumption of Military Commission Charges (Mar. 7, 2011). In his public statement announcing this development, however, the Secretary recognized the necessity and vitality of federal-court prosecutions of suspected terrorists:

> For reasons of national security, we must have available to us all the tools that exist for preventing and combating international terrorist activity, and protecting our nation. For years, our federal courts have proven to be a secure and effective means for bringing terrorists to justice. To completely foreclose this option is unwise and unnecessary.

Id. The Association agrees with the Secretary's comments.

II. Section 1113: Restriction of the Use of Funds to Transfer Guantanamo Detainees to a Foreign Country

Section 1113 would complicate and undermine the Executive Branch's efforts to deal with the challenging task of transferring particular Guantanamo detainees to foreign countries. The detainees who would be affected by Section 1113 are those who have been found, after an exhaustive review process, to be neither amenable to prosecution nor sufficiently dangerous to

warrant continued detention by the United States. For a number of years, dating back to the Bush Administration, detainees have been transferred to foreign countries for release, monitoring, or continued detention as the case may be.

Such transfers have been important, as they are essentially the only way the military can remove an individual from Guantanamo if it has been determined that the individual is not subject to prosecution or further detention by the United States. The transfers are matters of sensitivity requiring careful negotiation and coordination with foreign governments around the world. Section 1113 would be an unwarranted intrusion into the discretion of the Executive Branch to discharge its responsibilities regarding Guantanamo and would undermine the administration's efforts to adhere to a lawful system of detention and release there.

In *Hamdi v. Rumsfeld*, 542 US 507, 518 (2004), the Supreme Court held that the detention of enemy fighters "for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress authorized the President to use" in the Authorization for Use of Military Force, Public Law 107-40 (Sept. 18, 2001). If detention is within the Executive Branch's authority, then it surely follows that decisions to release or transfer prisoners must likewise be made by the President subject, in appropriate cases, to habeas review by the courts. *See Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (recognizing constitutional privilege of habeas corpus for Guantanamo detainees). By requiring the Secretary of Defense to make detailed certifications – which may be difficult or impossible in some instances – Section 1113 would impinge on the executive's authority and disrupt the delicate balance of foreign policy and national security questions that the executive is in the best position to address.

In Executive Order 13492 on January 22, 2009, the President was careful to avoid hamstringing the Secretary of Defense in determining the appropriate disposition of Guantanamo detainees. That Executive Order vested the Secretary of Defense and other participants in the detainee review process with determining "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release." *See* Executive Order No. 13492, 74 Fed. Reg. 4898 at § 4 (Jan. 22, 2009). The Secretary's determinations must comport with other fundamental principles of U.S. law, including United States policy not to involuntarily transfer persons to countries in which there are substantial grounds to believe they would be in danger of torture. *See* Foreign Affairs Reform and Restructuring Act of 1998, P. L. 105-277 at § 2242(a).

The President has stated that "restrictions on the transfer of detainees to the custody or effective control of foreign countries interfere with the authority of the executive branch to make important and consequential foreign policy and national security determinations … in the context of an ongoing armed conflict." Statement by the President on H.R. 6523 (January 7, 2011) (The White House, Office of the Press Secretary). Aside from the restrictiveness of the certifications, they are also duplicative in that, "[c]onsistent with existing statute, the executive branch has kept the Congress informed about these assurances and notified the Congress prior to transfer [of detainees]." *Id*. Such assurances currently provided by the executive branch include that the foreign country "will take or have taken measures reasonably designed to be effective in preventing, or ensuring against, returned detainees taking action to threaten the United States or engage in terrorist activities." *Id*.

If Section 1113 were enacted into law, there would be a very real risk that innocent individuals – persons not facing prosecution for any violation of law and not deemed by the military to be subject to ongoing detention under the AUMF – might nevertheless be held at Guantanamo for an extended period of time, and perhaps indefinitely, if the Secretary of Defense cannot jump through the hoops that Section 1113's "certification" requirement would impose. Such a scenario would be unacceptable.

Conclusion

In light of the foregoing, the Association urges the Senate to reject Sections 1112 and 1113 as unwise, impractical, and inconsistent with our nation's principles of justice.

Very truly yours,

Samuel W. Seymour

cc: Hon. Daniel K. Inouye, Chairman, Senate Appropriations Committee
Hon. Thad Cochran, Vice Chairman, Senate Appropriations Committee

Hon. Carl Levin, Chairman, Senate Armed Services Committee
Hon. John McCain, Ranking Member, Senate Armed Services Committee

Hon. John F. Kerry, Chairman, Senate Foreign Relations Committee
Hon. Richard G. Lugar, Ranking Member, Senate Foreign Relations Committee

Hon. Patrick J. Leahy, Chairman, Senate Judiciary Committee
Hon. Chuck Grassley, Ranking Member, Senate Judiciary Committee

Hon. Charles E. Schumer
Hon. Kirsten E. Gillibrand