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Subcommittee on Terrorism and Homeland Security

"Prosecuting Terrorists: Civilian and Military Trials for GTMO and Beyond"

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I. Introduction

Mr. Chairman and distinguished members of the Subcommittee, thank you for the opportunity to testify on the subject of terrorism prosecutions. This hearing is particularly timely in light of the preliminary report issued on July 20, 2009, by the Detention Policy Task Force.

I am currently a partner at the law firm of Kelley Drye & Warren, where I concentrate on representing individuals and corporations who are the subject of government investigations. The vast majority of my career, however, has been in public service, and a substantial portion of my time in government was in the national security arena, beginning with my tenure as a military and political analyst at the Central Intelligence Agency in the early 1980s.

The views I express today are based predominantly on my service with the Department of Justice preceding my return to private law practice in 2007. From May 2001 through February 2003, I served as Chief of Staff to the Deputy Attorney General, a position in which I assisted in coordinating the Justice Department's responses to the terrorist attacks of September 11. From March 2003 until August 2007, I then served as an Assistant U.S. Attorney in the U.S. Attorney's Office for the Eastern District of Virginia, where I prosecuted several terrorism cases, including *United States v. Abu Ali*, the "Virginia Jihad" case *(United States v. Khan), United States v. Chandia,* and *United States v. Biheiri.* Through my work on these cases, I obtained first-hand experience with the range of legal issues presented by bringing prosecutions of

terrorism cases in Article III courts, including detention; charging options; allegations of coercive interrogations; the challenge of meeting evidentiary requirements with respect to evidence obtained overseas; working with foreign intelligence and law enforcement agencies; and the use and protection of classified information.

II. A Flexible Architecture for Prosecution

As the Obama Administration and Congress grapple with resolving the detention of prisoners at the U.S. Naval Station in Guantánamo Bay, Cuba, it is essential to create a durable and dynamic legal architecture that affords the government flexibility for determining whether and where to bring terrorism prosecutions. One option that must be preserved -- with respect to both Guantánamo detainees and future cases -- is the criminal prosecution of detainees in federal courts. As more fully discussed below, not every terrorism case will be suitable for adjudication in an Article III court. Based on my own experience in prosecuting terrorism cases, however, and the growing historical record, the courts have demonstrated their ability to adjudicate these cases and resolve the complex constitutional and procedural issues that they often present. Moreover, the empirical record demonstrates that the government has been mostly successful in using the criminal justice system to detain and convict individuals who present a threat to U.S. national security, without compromising intelligence sources or methods or the fundamental due process rights of defendants.[1]

[1] *See generally* Zabel & Benjamin, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments* (July 2009); Zabel & Benjamin, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (May 2008).

The Obama Administration therefore should be commended for establishing a presumption "where feasible," that cases of Guantanámo detainees will be prosecuted in Article III courts.[2] At the same time, Congressional restrictions on the Administration's ability to transfer Guantanámo detainees to the United States for criminal prosecution are unwise, contrary to the national interest, and should be eliminated.

In its preliminary report, the Detention Policy Task Force ("Task Force") recognized the importance of preserving both criminal prosecution and military commissions as options for prosecuting individuals accused of engaging in terrorism. The Task Force identified three "broad sets of factors" that the government will employ in determining the appropriate forum for a terrorism prosecution, denominated as "Strength of Interest," "Efficiency," and "Other Prosecution Considerations."

- With respect to "Strength of Interest," the government will consider "the nature of the offenses to be charged or any pending charges; the nature and gravity of the conduct underlying the offenses; the identity of victims of the offense; the location in which the offenses occurred; the location and context in which the individual was apprehended; and the manner in which the case was investigated and evidence gathered, including the investigating entities."
- With respect to "Efficiency," the government will consider the "protection of intelligence sources and methods; the venue in which the case would be tried; issues related to multiple-defendant trials; foreign policy concerns; legal or evidentiary problems that might attend prosecution in the other jurisdiction; and efficiency and resource concerns."

[2] Memorandum from the Detention Policy Task Force for the Attorney General and Secretary of Defense, June 20, 2009 (Tab A).

- With respect to "Other Prosecution Considerations," the government will consider "the extent to which the forum, and the offenses that could be charged in that forum, permit a full presentation of the wrongful conduct allegedly committed by the accused, and the available sentence upon conviction of those offenses."

Although the meaning of the factors listed in the Task Force's preliminary report is not clear in each instance, and their prospective application is uncertain, they collectively represent a reasonable initial approach to resolving choice-of-forum issues in terrorism cases. The factors reflect an understanding that while criminal prosecutions are generally desirable, certain terrorism cases either should not, or cannot, be brought in Article III courts. In my judgment, these include cases where the defendant is accused of committing crimes against humanity or war crimes; where evidence was gathered on the battlefield by U.S. or foreign military forces; where the government's key inculpatory evidence is based on sensitive intelligence sources and methods that either should not be disclosed to the defense, or cannot be revealed in a public trial; or where statements critical to the government's case were obtained through coercive means.

In such cases, where the government, through a robust interagency process, has made a finding that the evidence against an accused is both probative and reliable – and that release, repatriation, or adjudication in an appropriate third country is not an option -- the government must have recourse to an alternative legal forum such as a military commission, subject to oversight and rules that balance a defendant's right to a fair proceeding with the government's legitimate right to protect national security interests. President Obama therefore was prudent to retain the system of military commissions, pending various procedural reforms.

III. The Importance and Success of Article III Prosecutions

Our success in preventing acts of terrorism, and in holding accountable those who commit or plan such attacks, is enhanced by building and sustaining a domestic and international consensus about the legitimacy of our approach. Prosecutions in the criminal justice system under well established Constitutional standards and rules of procedure and evidence confer greater credibility on the government's handling of these cases. Domestically, that credibility helps to foster political consensus about the legitimacy of the government's approach to counterterrorism; overseas, it helps to promote critical cooperation by foreign intelligence and law enforcement authorities.

In addition, by their public exposition of evidence through the crucible of the adversarial system, criminal prosecutions play an important role in educating the American people -- and the world -- about the true nature of the continued threat we face. In the case of Ali al-Marri case, for example, the defendant's guilty plea in April 2009 to conspiracy to provide material support to al-Qaeda resulted in the revelations that he had been recruited by Khalid Sheikh Mohammed ("KSM"), then the operations chief of al-Qaeda, to assist with al-Qaeda operations in the United States; that he had been directed to come to the United States no later than September 10, 2001, to operate as a sleeper agent; and that he had received sophisticated codes for communicating with KSM and other al-Qaeda operatives. Similarly, the guilty plea of American-born al-Qaeda recruit Bryant Neal Vinas, unsealed in July 2009, revealed that al-Qaeda was interested in details about the Long Island Railroad system, and that as recently as 2008, Vinas and other recruits were receiving training in weapons, plastic explosives, and techniques for making explosives-rigged jackets for suicide bombers.

Four arguments have been principally advanced by those who disfavor bringing terrorism cases in Article III courts: (1) that sensitive intelligence cannot be protected; (2) that existing rules of evidence and criminal procedure are inadequate; (3) that terrorism prosecutions place an undue burden on the court system; and (4) that terrorists cannot be safely incarcerated in civilian detention facilities in the United States. None of these arguments withstand scrutiny.

Protecting Intelligence Information. It is true that the criminal prosecution of terrorists opens the door to defense efforts to obtain sensitive classified information to develop potentially exculpatory information. It is also true that information shared confidentially with the United States by foreign intelligence and law enforcement authorities can be at risk of disclosure under discovery rules. What critics of Article III prosecutions often fail to acknowledge, however, is that the Classified Information Procedures Act ("CIPA") provides a statutory mechanism for protecting sensitive intelligence information from disclosure.

CIPA provides the government with numerous procedural advantages. Prior to trial, the government has the opportunity, for example, to make an *ex parte*, *in camera* submission to the court in which it brings information to the court's attention for a ruling on whether the information is discoverable, explains the source and sensitivity of the information, and makes arguments as to relevance and the damage to national security that would result if the information were disclosed to the defense. In the case of Ahmed Omar Abu Ali case, for example, which I prosecuted, the court agreed with the government that certain categories of classified documents sought by the defense were irrelevant and precluded their use at trial by the defense.

If the court determines that the information is discoverable, CIPA authorizes the government to propose a substitute for the specific classified information -- which the court

may accept, reject, or modify -- that masks the information's most sensitive elements while substantially enabling the defendant to prepare his defense. Where classified material is deemed discoverable, its pretrial disclosure may be restricted to cleared defense counsel, and the government has an opportunity in a sealed hearing to contest the defense's interest in using specific classified information at trial. The government may not win every skirmish, but courts usually fashion compromise disclosure orders that protect the government's core security interests.

Nor are trials a forum for the reckless disclosure of classified information. With the government's close attention and exhortation, courts police their pretrial orders regarding the handling of classified information and the questioning of witnesses -- and defense counsel abide by them. Despite claims to the contrary, there are no proven examples of disclosures at trial resulting in the compromise of sensitive intelligence sources and methods.

Arguments that U.S. discovery rules and due process requirements cause foreign governments to refrain from sharing intelligence with U.S. authorities also are overstated. Since September 11, intelligence-sharing and cooperation between U.S. and foreign intelligence authorities has increased dramatically. Perhaps in no case was information-sharing and cooperation better demonstrated than in the Abu Ali prosecution, where the defendant - who originally was arrested and detained in Saudi Arabia -- claimed that his detailed confessions were the result of torture by Saudi authorities. For the first time in Saudi history, the Saudi Government permitted Saudi security officers to testify in an American criminal proceeding and face rigorous cross-examination by U.S. defense attorneys, thereby enabling prosecutors both to obtain direct testimony about the defendant's admissions and to rebut his claims of mistreatment by Saudi authorities.

Courts have also shown a willingness to accommodate the security concerns of foreign governments cooperating in U.S. terrorism prosecutions. In the Abu Ali case, U.S. District Judge Gerald Bruce Lee issued an order protecting the identities of Saudi security officers who testified and shielding their images from public view when videos of their testimony were played at trial. Similar orders have been issued in other terrorism cases.

Rules of Evidence and Procedure. Existing rules also have proven adequate to resolve difficult evidentiary and procedural issues in terrorism cases. Rather than adopting new rules or relaxing the application of existing ones, the courts have simply applied traditional standards of analysis to the specific factors in a given case. In the Abu Ali case, for example, the Saudi Government declined to permit its security officers to come to the United States to testify at a pretrial hearing. On the government's motion, the court agreed to permit the Saudi officers to testify in Saudi Arabia under circumstances where they would be subject to in-person cross-examination by the defendant's lead trial attorney, the defendant (then in Alexandria, Virginia) and the witness could observe each other on video screens, the defendant was accompanied by one of his trial attorneys in the courtroom in Alexandria, and the defendant could communicate with his counsel in Saudi Arabia during breaks in the testimony. After hearing testimony from the Saudi officers and considering related evidence, the court applied traditional standards of analysis to determine that Abu Ali's confessions were voluntary and admissible. So, too, the court applied customary standards in finding that the government had authenticated and established a chain of custody for physical evidence seized at al-Qaeda safehouses in Saudi Arabia by Saudi security officers.

Administrative Burdens. Trying terrorism cases in federal courts does impose additional logistic and security demands on courthouse personnel and the U.S. Marshals Service. But given what is at stake, they are not unreasonable demands. Other than the Southern District of New York, no judicial district has handled a more demanding series of terrorism cases than my former district, the Eastern District of Virginia, and I am unaware of any presiding judge there who questioned the importance or appropriateness of trying those cases in federal court. Rather, they looked upon these cases as an opportunity to shoulder their coordinate responsibility for meeting a national challenge, and to demonstrate the strength and adaptability of the American criminal justice system.

Homeland Security Considerations. The issue of whether Article III prosecutions present a risk to homeland security involves an examination of the government's authority to detain terrorists – either before or after they are charged with a crime -- and its authority to impose conditions of confinement after conviction that minimize security risks.

Under existing law, the government has three criminal options for detaining individuals suspected of terrorist activity: (1) pretrial detention under the Bail Reform Act; (2) detention of foreign nationals under an alien removal statute; and (3) detention pursuant to a material witness warrant. These authorities illustrate both the adaptability and limits of the criminal justice system, and the importance of retaining the option of military detention where prosecution in the criminal justice system is not viable or appropriate and the laws of war permit such detention.

The rules regarding the detention of a person who has been charged with a federal crime are favorable to the government in terrorism cases. Under the Bail Reform Act, a court can order a defendant detained pending trial if, after a hearing, the court finds probable cause that "no condition or combination of conditions will reasonably assure the appearance of the [defendant]

as required and the safety of any other person and the community."[3] In support of a request for detention, the government can submit hearsay and other information that would be inadmissible at trial because the Federal Rules of Evidence do not apply at a detention hearing.[4] Accordingly, the government can present summary testimony by an agent rather than presenting testimony by a witness with first-hand knowledge.

A court must take into account several factors in determining whether to detain a defendant pending trial, including (1) the nature and circumstances of the alleged offense, including whether the offense is a federal crime of terrorism; (2) the weight of the evidence against the defendant; (3) the history and characteristics of the defendant; and (4) the nature and seriousness of danger to any person or to the community if the defendant were released.[5] A finding that the defendant presents a danger to a person or the community must be supported by "clear and convincing evidence,"[6] but there is a rebuttable presumption in favor of detention if there is probable cause that the defendant committed a "federal crime of terrorism" such as material support to terrorists;[7] material support to a designated terrorist organization;[8] financing terrorism;[9] the receipt of military-type training from a designated terrorist organization;[10] and acts of terrorism transcending national boundaries.[11]

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[3] 18 U.S.C. § 3142(e).
[4] *Id*. § 3142(f)(2).
[5] *Id*. §3142(g).
[6] *Id*. § 3142(f)(2).
[7] *Id*. § 2339A.
[8] *Id*. § 2339B.
[9] *Id*. § 2339C.
[10] *Id*. § 2339D.
[11] *Id*. § 2332B.

More often than not in terrorism cases, courts have either ordered pre-trial detention or authorized release subject to restrictive conditions. The government successfully has obtained pretrial detention in numerous terrorism cases, including the case of September 11 co-conspirator Zacarias Moussaoui; the recent Fort Dix, New Jersey case; the case of Ahmed Omar Abu Ali, an American citizen and Falls Church, Virginia, resident who joined an al-Qaeda cell in Saudi Arabia; and the East Africa embassy bombings case (where defendant Wadih al-Hage was initially detained for 15 months on a perjury charge, then for more than two years following a superseding indictment). The courts are not rubber stamps for the government, however: the magistrate judge in the "Virginia Jihad" case denied the government's motion for pretrial detention for a few of the defendants despite the government's seizure of AK-47-style weapons at their residences, and in a recent case in Ohio, the court granted the defendant's motion for pretrial release even though the defendant was accused of having expressed interest in manufacturing improvised explosive devices from household substances, had been recorded discussing his training in weapons and tactics, had expressed concerns about maintaining security and secrecy, and had watched pro-*jihad* videos and expressed a desire to target the U.S. military.[12]

While the standards are favorable to the government regarding detention pending trial of an individual who *already* has been charged with a terrorism-related offense, existing legal authority to detain persons *prior* to charge is limited. Under the Constitution and the Federal Rules of Criminal Procedure, arrest warrants may be issued only upon a showing of probable cause by the government that the individual committed an offense,[13] and an individual who has been arrested must be presented to a Federal magistrate "without unnecessary delay" (typically

[12] *United States v. Mazloum*, 2007 WL 2778731, *1 (N.D. Ohio 2007) (unpublished decision).

[13] Fed. R. Crim. P. 4(a).

within 48 hours) and advised of the charges against him. Otherwise, the government's current authority for detention in terrorism-related cases outside of the military detention model is limited to the material witness statute,[14] and, in the case of foreign nationals, immigration detention.

Terrorism investigations are often driven by threat analysis, and threat assessments often are based on intelligence information such as communications intercepted under the Foreign Intelligence Surveillance Act and information provided by foreign law enforcement and intelligence authorities. Sometimes the government has the luxury of building a case over a period of months to develop evidence that would be admissible in a criminal prosecution. But sometimes it does not because of the nature of the threat, the credibility of information regarding a potential attack, and the perceived imminence of an attack. And in those cases, the government needs options for detaining individuals before it is ready to bring criminal charges in order to protect the public safety.

Under the material witness statute, a court may authorize an arrest warrant if the government files a sworn affidavit establishing probable cause that the testimony of a person is "material in a criminal proceeding" and that "it may become impracticable to secure the presence of the person by subpoena." There is "no express time limit" in the statute for the length of detention,[15] but the Federal Rules of Criminal Procedure provide for close judicial oversight of detention under the statute. Specifically, in each judicial district the government must report biweekly to the court, list every material witness held in custody for more than 10 days pending

[14] 18 U.S.C. § 3144.

[15] *United States v. Awadallah*, 349 F.3d 42, 62 (2nd Cir. 2003).

indictment, arraignment, or trial, and "state why the witness should not be released with or without a deposition being taken…."[16]

After September 11, the government aggressively used the material witness statute to detain individuals in connection with terrorism investigations, several of whom were subsequently charged with crimes. José Padilla, for example, initially was arrested on a material witness warrant when he arrived in Chicago on a flight from Pakistan, in order to enforce a subpoena to secure his testimony before a grand jury. He was held for one month on the warrant before he was designated an enemy combatant and transferred to military custody. Nor has the statute's use been limited to foreign terrorism cases: prior to September 11, Terry Nichols was arrested and detained on a material witness warrant three days after the bombings of the Federal building in Oklahoma City.

Although some individuals have been detained for several weeks and months on a material witness warrant, the statute was not intended to serve as a substitute for pretrial detention when the government is not yet ready to charge. In the case of *United States v. Awadallah*, the defendant's name and telephone number had been found on a piece of paper in a car abandoned at Dulles Airport by September 11 hijacker Nawaf al-Hazmi.[17] (The number subsequently was traced to an address in San Diego where al-Hazmi and fellow hijacker Khalid al-Mihdhar had lived.) Reversing the district court, the U.S. Court of Appeals for the Second Circuit found that the defendant's detention for several weeks on the material witness warrant was not "unreasonably prolonged,"[18] but it cautioned that "it would be improper for the

[16] Fed. R. Crim. P. 46(h)(2).

[17] *United States v. Awadallah*, 349 F.3d at 45.

[18] *Id*. at 62.

government to use [the material witness statute to detain] persons suspected of criminal activity for which probable cause has not yet been established."[19]

The government has additional tools to detain foreign nationals in terrorism cases. Upon a warrant issued by the Attorney General, "an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States."[20] The Attorney General has broad discretion in exercising this authority, and detention is mandatory where the alien is reasonably believed to have engaged in terrorist activity or "any other activity that endangers the national security of the United States.[21] In the immediate wake of the September 11 attacks, the Department of Justice utilized the removal statute to arrest and detain numerous foreign nationals suspected of engaging in terrorist activity.

Utilizing the alien removal statute can buy the government substantial additional time to determine whether to pursue criminal charges against an alien defendant. In *Zadvydas v. Davis*, a case decided a few months before the September 11 attacks**,** the Supreme Court construed the law to limit the period of detention to the time reasonably necessary to secure the alien's removal – with six months presumed to be a reasonable limit.[22] But the Court noted that the case did not involve "terrorism or other special circumstances where special arrangements might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."[23]

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[19] *Id*. at 59.

[20] 8 U.S.C. § 1226(a).

[21] *Id*. §§ 1226(c)(1), 1226a(a)(3).

[22] *Zadvydas v. Davis*, 533 U.S. 678, 691-97 (2001).

[23] *Id*. at 696.

IV. Congressional Restrictions on Transferring Guantanámo Detainees to United States

Congress unwisely has restricted President Obama's flexibility to pursue the criminal option in the Guantanámo cases. In legislation that will be in effect through the end of September 2009, no funds may be used to transfer Guantanámo detainees to the United States for criminal prosecution unless the President submits a detailed classified report to Congress on the detainee forty-five days in advance. Now similar legislation is pending that would extend the funding prohibition indefinitely unless the President submits a required report to Congress on each detainee proposed for transfer, including a risk assessment and a plan for risk mitigation. Even then, no funds may be used for a detainee transfer to the United States until four months after the President's report to Congress.

These legislative restrictions appear to be based on the myth that terrorists cannot be safely detained on U.S. soil. Both before and after the attacks of September 11, 2001, a rogues' gallery of dangerous terrorists successfully have been detained for long periods in the United States in localities across the country. For example, Egyptian radical Sheikh Omar Abdel Rahman was held for approximately four years at the Federal Medical Center in Rochester, Minnesota following his conviction in 1995 for plotting to bomb the Lincoln Tunnel and other New York City landmarks. Ahmed Ressam, an Algerian who had trained at an al-Qaeda camp in Afghanistan, was long incarcerated at a federal detention center near Seattle after his arrest for planning to bomb Los Angeles International Airport on New York's eve in 1999. Ramzi Yousef, who masterminded the 1993 bombing of the World Trade Center, was detained for approximately three years at the Metropolitan Detention Center in New York.

After September 11, al-Qaeda operative Richard Reid was held at a county correctional facility in Plymouth, Massachusetts, after his arrest for attempting to blow up a passenger airliner in mid-air. The municipal detention center in Alexandria, Virginia – located only a few miles from the White House and U.S. Capitol -- has housed both Zacarias Moussaoui, who trained to fly commercial aircraft in connection with the September 11 plot, and Ahmed Omar Abu Ali, an American citizen who joined an al-Qaeda cell in Saudi Arabia and conspired to commit various terrorist attacks in the United States, including the assassination of President George W. Bush.

None of these facilities was ever attacked while a defendant was incarcerated there on terrorism-related charges, and no such detainee has ever escaped. Moreover, most of these terrorists are now safely serving their sentences at the impregnable "Supermax" facility operated by the federal Bureau of Prisons in Florence, Colorado.

Congress irresponsibly has ignored this history of experience. It has also ignored the Department of Justice's regulatory authority to tighten security for individuals who either are being detained pending trial on terrorism-related charges, or have been convicted of such an offense. Under federal regulations, the Attorney General has broad discretion to impose "Special Administrative Measures" (SAMs) that severely restrict a detainee's ability to engage in conduct while incarcerated that could present a national security risk.

The restrictions the government can impose under its SAMs authority include solitary confinement; severe limitations on telephone communications, correspondence, and visits by family and friends; and a prohibition on contact with the news media. The government even can prohibit participation in group prayer with other Muslim inmates. In a case where "reasonable suspicion" exists to believe that a particular inmate may use communications with attorneys to facilitate acts of terrorism, the government also can monitor and review communications that

otherwise would be confidential under the attorney-client privilege. Inmates make seek judicial review of SAMs restrictions if they have first exhausted administrative appeals within the Bureau of Prisons, but the courts generally have been deferential to the government's security concerns.