Written Testimony of Jamil N. Jaffer[1]
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Subcommittee on the Constitution, Civil Rights, and Civil Liberties

on

Civil Liberties and National Security

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Good morning, Chairman Conyers, Chairman Nadler, Ranking Member Sensenbrenner, and Members of the Subcommittee. Thank you for the opportunity to testify today regarding civil liberties and national security. I want to note, at the outset of my testimony, that the views I present today are my own and do not represent the views of my law firm nor the views of any client of the firm.

The topic of today's hearing—civil liberties and national security—bears a great deal of importance, particularly in a time of war. The question how the federal government should balance its protection of civil liberties of Americans with national security needs in a time of war is amongst the most difficult issues the government confronts. Since this war was brought to our shores on the morning of September 11, 2001, Congress has taken a leadership role in ensuring that, as the Executive Branch prosecutes the War on Terror on battlefields across the globe, the civil liberties of

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Americans, as guaranteed by the United States Constitution, are respected and protected at all times. It is, in my view, a true testament to the greatness of this nation, that members of Congress have remained vigilant defenders of both the nation's security and the constitutional rights of Americans during this time of great import.

The topic of today's hearing is broad and potentially covers a wide range of issues relating to the prosecution of the War on Terror. It is my understanding, however, that today's hearing is likely to focus on how the government can best protect national security and the civil liberties of Americans while it considers the ongoing detention and potential trial of foreign detainees currently held at Guantanamo Bay, Cuba. As such, my written testimony briefly addresses—at a broad level of generality—some of the issues that Congress may wish to consider in evaluating how to move forward on the detention and potential trial of such individuals.

The current Administration, the previous Administration, and each successive Congress that has served since that fateful (and terrible) day that al Qaeda terrorists attacked our country, killing thousands of Americans, have all grappled mightily with finding a reasonable approach to the difficult matter of what to do with individuals detained by the United States military in the War on Terror. While these issues may perhaps be more vexing when they involve American citizens or nationals, or individuals captured or detained within the United States, my testimony today is limited to the situation of the foreign nationals captured abroad and currently detained in Cuba.

With respect to these individuals, it is important to note that no court has ever held that they possess the full panoply of constitutional rights enjoyed by Americans in the United States. For example, no court has held—and in my view, there can be no real

argument—that foreign enemy fighters, captured abroad on the battlefields of Afghanistan and elsewhere, have a *right* to a criminal trial in the federal courts or, truth be told, to *any* of the particular rights or remedies that come along with such trials, such as the right to a trial by jury, the right to confront witnesses, and the judicially-created exclusionary rule, which bars the introduction of certain evidence obtained in violation of law. While the Supreme Court has, in recent years, extended certain rights to Guantanamo Bay detainees with respect to the review of their status as enemy combatants, *see, e.g., Boumediene v. Bush*, 553 U.S. 723 (2008), these cases cannot accurately be read as suggesting that these detainees have a right to be tried in criminal court or to have many of the benefits to which Americans are otherwise entitled. Indeed, a plurality of the Supreme Court has held that the Executive Branch has the right to detain—for the duration of the conflict—individuals captured on the battlefield of the War on Terror. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (plurality op.); *see also Boumediene*, 553 U.S. at 733 (noting that five Justices in *Hamdi*—the O'Connor plurality plus Justice Thomas in dissent—"recognized that detention of individuals who fought against the United States in Afghanistan '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 has authorized the President to use.'") (quoting *Hamdi*, 542 U.S. at 518). Of course, if the Executive Branch can detain properly-designated enemy combatants for the duration of the conflict, there can be little argument that these individuals then have the *right* to a criminal trial with all of the protections and remedies that come along with a trial. Thus, the question before the committee is fundamentally one of policy, not law.

And if we do give such individuals—foreign fighters captured on the battlefield abroad—the right to a federal trial as matter of policy, we run the risk of creating larger problems. For example, trying Guantanamo Bay detainees in federal court raises serious questions about what to do if the government fails to convict a given detainee. The American criminal justice system, it almost goes without saying, is designed to separate out the innocent from the guilty, and convict and incarcerate the latter, and exonerate and free the former. As such, in the typical scenario, if a suspected criminal is arrested and tried in federal court, and the government fails to convict him, the firm expectation is that the individual will be released forthwith. But in the context of an ongoing war, if a Guantanamo Bay detainee is placed in the criminal justice system for trial, the question of what might happen if the government fails to obtain a conviction becomes more difficult. Can the government simply transfer the individual back to military custody and continue to detain him indefinitely for the remaining duration of the conflict? Must the individual be released? And more troublingly, must the individual be released into the United States?

And this concern isn't simply hypothetical. Recent events serve to highlight the importance of considering these questions. In testimony before Congress in late 2009, at time when the current Administration had resolved itself to try key al Qaeda operative Khalid Sheikh Mohammed ("KSM") in federal court in New York, Attorney General Eric Holder expressed confidence that KSM would be convicted and opined that failure to convict KSM was "not an option." Putting aside the issues this might raise for a criminal justice system whose rubric, at its core, includes a presumption of innocence, and whose essential function is separating the innocent from the guilty, it is clear that the

Administration's then-current decision to try KSM in federal court put a bright spotlight on the potential for an acquittal. When pressed on the question of what might happen if KSM was not convicted, the Attorney General indicated that the government had options available to it, including continuing to detain KSM as needed. And while this position may indeed be correct, it raises further questions about the very purpose of trying these detainees in federal court and the potential impact on our criminal justice system of conducting trials under such circumstances.

For example, given that we are currently detaining KSM for the duration of the hostilities, the benefits of trying him in federal court are unclear at best. One might think that a federal conviction would provide increased legitimacy to our ongoing detention of KSM. One might also think that a federal conviction might allow us to incarcerate KSM beyond the duration of the hostilities or permit the imposition of the death penalty. And one might even think that a federal conviction could showcase America as a land of laws and true justice, while providing the families of al Qaeda's victims an opportunity to express their righteous anger and grief. The fundamental problem with this approach is that it only takes one major failure to convict a key al Qaeda operative and his continued detention by the Executive Branch, to undermine most, if not all, of these benefits. This is because, at that point, even if the continuing detention is held to be lawful (which it very well might), the entire project to earn legitimacy for the detention of enemy combatants, to provide legitimate justification for the imposition of penalties, and to provide a forum for the expression of forthright anger and grief through the criminal justice system is, essentially, at sea. And moreover, such a decision would inevitably harm the criminal justice system itself by undermining one of the key principles the

system is based upon, namely the incarceration of the duly convicted; and the release of the duly exonerated. Given the recent outcome of the New York trial of another key al Qaeda operative (and former Guantanamo Bay detainee), Ahmed Khalfan Ghailani, where the defendant was acquitted of 284 of the 285 counts brought against him, the question what might happen when the next Guantanamo Bay detainee is transferred to the civilian system for trial is even more forcefully presented; indeed, it becomes much harder to just assume that the government will be able to easily obtain a conviction.

Indeed, the Ghailani case also highlights the procedural difficulties with using the criminal justice system to try Guantanamo Bay detainees. The rules of criminal procedure applicable to such trials, and other statutory and constitutional requirements, can make the prosecution of individuals captured on a battlefield—particularly if they are interrogated to obtain critical, time-sensitive intelligence—much more difficult. So, for example, in the Ghailani case, the government stipulated for the purposes of the case that certain information leading to the identification of a witness against Ghailani had been obtained through coercive methods. As might be expected in a typical criminal setting, the judge excluded the key evidence from the witness, including barring his testimony. Many have pointed to this ruling—and the resulting dearth of direct evidence on certain counts—as one of the key reasons why the government failed to convict Ghailani on a number of charges. Others laid the blame for the Ghailani verdict elsewhere, and have further noted that the same evidence may have likewise been excluded in other proceedings, *e.g.*, under the current military commission rules. But whether the contentions regarding the Ghailani verdict are accurate or not, and whether the evidence may also have been excluded in another type of proceeding because of a policy judgment

about the applicable rules, is not really the point; the key point here is that when federal courts apply their strict rules—required by law and designed to protect innocent Americans from being wrongfully deprived of their liberty under the Constitution—critically important evidence *may* end up staying out and the guilty *may* end up being exonerated. While we might be willing to accept this outcome in the criminal context in order to preserve our presumptions and rules designed to protect the innocent,[2] it is far from clear why the same presumptions and rules should be applied to foreign fighters, captured on the battlefield, and held outside the United States during a time of war. Moreover, as Jack Goldsmith and Ben Wittes pointed out almost exactly two years ago, the decision to make federal courts the key venue for detainee prosecution (and the concomitant imposition of strict presumptions and rules on such cases) can actually create an incentive for the government to try fewer detainees and to instead simply hold them in long-term detention.[3] Similarly, there is a possibility (perhaps somewhat more remote) that the government will be less willing to take risks in the interrogation process while seeking to obtain intelligence information from new detainees, in an effort to preserve the government's ability to effectively prosecute the individual down the road. And the problems don't just stop with interrogation and intelligence gathering; the reality is that many evidentiary rules, including, for example, keeping a chain of custody for evidence to be introduced at trial or the hearsay rule, simply make little sense when the key evidence or witness comes from the battlefield in Kandahar or similar locales.

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[2] *See In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring) ("[A] fundamental value determination of our society [is] that it is far worse to convict an innocent man than to let a guilty man go free[.]"); *see also* T. Starkie, LAW OF EVIDENCE 756 (1824) ("The maxim of law is that it is better that ninety-nine . . . offenders should escape than that one innocent man should be condemned.").

[3] *See* Jack Goldsmith and Ben Wittes, *A Blueprint for the Closure of Guantanamo Bay*, Slate.com (Dec. 8, 2008), available online at <http://www.slate.com/id/2206229/> (visited Dec. 6, 2010).

Even beyond the impact of the decision to try the Guantanamo Bay detainees in federal court on the principles underlying the justice system and the ability of prosecutors to obtain valid convictions, there are also very real operational impacts of such a decision on the participants in the trial and the system itself, as well as the general public. The debate over the KSM trial previously planned for New York City highlighted many of these issues, including the physical security of the civilians living in the area, the judges and staff working these cases, and the jurors selected for trial. And beyond all of this, there remains the issue whether the highly classified information often necessary to convict these detainees can be adequately protected in open, public trials, even under the existing Classified Information Procedures Act.

Finally, it is important to note that there are many options available in lieu of holding criminal trials. Some have advocated for simply detaining the fighters at Guantanamo Bay without trial for the duration of the conflict; *i.e.*, no commissions, no trials, just detention. Others have argued for the exclusive (or at least increased) use of military commissions. And still others have called for the creation of a national security court, employing regular federal judges and federal prosecutors, but specially designed to address many of the issues raised above. While none of these alternate approaches has yet taken hold, the current approach of trying some cases in the federal courts and some in the commissions, when combined with the seeming inability of the government to land a solid detainee conviction in the federal courts (including in the Ghailani case), seems unwise and reflects a process that has become perhaps irretrievably broken.

Thank you very much for the opportunity to present my views today.