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AMERICAN BAR ASSOCIATION

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October 17, 2002

Hon. William J. Haynes II
General Counsel
The Department of Defense
1600 Defense Pentagon
Washington, D.C. 20301-1600

Dear Mr. Haynes:

Thank you for your September 23, 2002 letter to ABA President Alfred P. Carlton, Jr. commenting on the Preliminary Report of the American Bar Association Task Force on Treatment of Enemy Combatants. It is helpful and important to have the administration's views on these serious matters. President Carlton has asked me, as Chair of the Task Force, to respond to your letter.[1]

As you observe, there are points of agreement and disagreement between your position and those in the Task Force's Report, and there is even disagreement over what we agree on. For example, the Task Force Report did not take a position on when the detention of U.S. citizens as enemy combatants is legal or illegal, and other broad, general issues were assumed arguendo but were not intended to serve as findings or conclusions of the Report.

Rather, the major point of the Task Force Report was that U.S. citizens who are detained as enemy combatants should have **access to judicial review** and **should not be denied access to counsel** in pursuit of such review.

In promulgating its Report, the Task Force carefully reviewed the competing legal and policy issues involved in detaining citizens as enemy combatants. In the course of its analysis, the Task Force considered arguments advanced by the Administration in court pleadings and briefs, including many of the positions articulately set forth in your letter. The recommendations made by the Task Force,

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[1] The Report has not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

comprised of a balanced group of highly respected constitutional, military, and criminal law experts, were reached after due consideration to various positions and arguments.

Basis and Scope of Authority to Detain U.S. Citizens as Enemy Combatants

The Task Force Report recognized (see pp. 7-10) that there is authority to detain enemy combatants in war. However, the Report also observed that, in the present conflict, determining whether an individual belongs to the enemy or is a combatant may be particularly difficult – much more so than in a "traditional" war between states in which combatants wear uniforms. Thus, an already broad power becomes potentially almost limitless, absent some standards and procedures to ensure its careful exercise.

It was in recognition of these complex and controversial questions, that the report urged greater exposition by the Executive Branch of the bases for detention – and we appreciate your letter as a step in that direction. However, your letter did not specifically discuss the nature of the ***U.S. citizen*** detentions[2] addressed in the Report, that "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so,"[3] particularly when a citizen is detained on U.S. soil far from any battlefield.[4]

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[2] We acknowledged that *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2 (1942), provides limited precedent for treating U.S. citizens as enemy combatants, but the defendants in *Quirin* were **formally charged, able to seek review, and represented by counsel**. Thus, *Quirin* does not stand for the proposition that detainees may be held incommunicado and denied access to counsel. Moreover, in *Quirin*, the defendants were quite easily distinguished as combatants because they acknowledged their affiliation with the German armed forces. The Task Force Report should not be read to suggest that "the President may detain only enemy combatants who wear uniforms," or may do so only in a declared war. Rather, the Report points up the distinction noted above, i.e., when dealing with a stateless enemy whose members do not wear uniforms, determining who is an enemy combatant is much less clear – and therefore the power to make such determinations much more easily subject to mistake or abuse.

[3] Since you took issue with that quote in your letter (p.3), I should note that it came directly from the opinion of the United States Court of Appeals for the Fourth Circuit in *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002).

[4] See also *Ex parte Milligan*, 71 U.S. 2 (1866), for the proposition that a U.S. citizen who, although a confederate sympathizer, was not a combatant and was not subject to detention and trial by military authority when civilian courts were open.

Indeed, we have found no precedent in U.S. or international law which allows for *incommunicado* detention and *absolute denial of counsel* to a United States citizen.[5] To the contrary, our Report observed that both United States and international laws call such detentions into question. For example, the legislative history of 18 U.S.C. § 4001 makes it clear that the statute was passed specifically to repeal a law -- the Emergency Detention Act of 1950 -- which authorized the establishment of detention camps under circumstances not dissimilar to the present day actions.

Your letter also did not address "what procedures . . . should be required to assure that detentions are consistent with Due Process, American tradition, and international law" as suggested in the Report's first recommendation. As we observed, it "cannot be sufficient for a President to claim that the Executive can detain whomever it wants, whenever it wants, for as long as it wants as long as the detention bears some relationship to a terrorist act once committed by somebody against the United States." Report, p. 21.

Meaningful Judicial Review

The Report also recommended that citizen detainees "who have not been charged with violations of United States criminal laws or the law of war should . . . be afforded a prompt opportunity for judicial review of the basis for their continued confinement." Report, p. 23.

We appreciate your statement that "the government welcomes meaningful judicial review," but the Administration has thus far taken a restrictive position on the scope of judicial review in the pending litigation. As the Fourth Circuit observed:

> In its brief before this court, the government asserts that "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such." The government thus submits that we may not review at all its designation of an American citizen as an enemy combatant--that its determinations on this score are the first and final word.

Hamdi v. Rumsfeld, supra at 283. While the Task Force has not yet taken a position on what the scope of such review should be, we will continue to monitor developments in this area.

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[5] It is true, of course, that prisoners of war have no right to counsel vis-a-vis their detention as POWs. However, POWs are entitled to other procedural protections and rights, including a right to correspond with others. The detainees in the current conflict have not been accorded POW status – an issue the Task Force did not discuss.

Access to Counsel

With respect to the Report's fourth recommendation, your letter questioned whether a detainee should be "given" counsel or be "entitled" to counsel. However, the Task Force carefully recommended only that **"Citizen Detainees Should Not be *Denied Access* to Counsel"** (Report, p. 23, emphasis added), which is consistent with basic due process concerns and comports with established international human rights laws and Treaties.

For example, Principle 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the United Nations General Assembly in 1988, provides that a "detained or imprisoned person shall be allowed to communicate and consult with his legal counsel." Report, p. 15.

The Task Force carefully considered the arguments, reiterated in your letter (p. 3), that access to counsel could "interfere with ongoing efforts to gather and evaluate intelligence" and might enable detainees to "pass concealed messages to the enemy" but found they were not "so compelling that they justify denial of access to assistance of counsel" and that "our nation's lawyers can provide effective representation without breaching security." Report, p. 23-24. Legitimate security concerns may affect the nature and scope of such access, but should not foreclose all access to counsel.

Our Report did acknowledge that the 6th Amendment does not technically attach to uncharged enemy combatants (Report, p. 24), and we recognized "that there may be circumstances in which providing a detainee with access to counsel could be unwise, impractical, or dangerous." [footnote omitted]. However, we said "we do not believe that citizens detained within the United States, far from the battlefield fall within that category." Indeed, there is no dispute that individuals who have been criminally charged do have a 6th Amendment **right** to counsel. As the Report noted, "it is both paradoxical and unsatisfactory that uncharged U.S. citizen detainees have fewer rights and protections than those who have been charged with serious criminal offenses." Report, p. 19.

While we obviously still have areas of disagreement, we appreciate your willingness to engage on these issues and believe that this dialogue makes an extremely valuable contribution to the public discussion and debate. We have honored your request to publicize your letter to our membership.

We have posted a notice regarding our receipt of your letter on the ABA Website at http://www.abanet.org/poladv/new.html and the full text of your letter has been posted on the Website at http://www.abanet.org/poladv/new/enemycombatantresponse.pdf.

No one doubts that the struggle against terrorism necessitates steps few would have thought possible before September 11, 2001. Nevertheless, when an American citizen is deprived of his or her liberty, access to the courts and to counsel must not be sacrificed

Again, thank you for your reply. We may not always agree, but we seek common goals – security and justice – and the ABA looks forward to continuing to contribute to the national discourse on these matters.

Sincerely,

NEAL R. SONNETT
Chair, ABA Task Force on
Treatment of Enemy Combatants

NRS:ns
cc: Alfred P. Carlton, President
American Bar Association

Members of the Task Force