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American Bar Association

ANTITERRORISM AND THE PRESERVATION OF CIVIL LIBERTIES

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The Constitution must guide us in our efforts to combat terrorism. Our system of separated powers and checks and balances provides us with the tools to preserve essential liberties and formulate sound policies. To effectuate this, the executive and legislative branches need to work together with common purpose while respecting their separate roles and guarding against abuses of power by the other branch. Likewise, our national security initiatives need to preserve the role of our federal judiciary to resolve disputes between the branches, rule on constitutional questions and protect individual liberties.

The American Bar Association shares the goals of the government – and all Americans – of bringing to justice the perpetrators of global terrorism and assuring that our Justice Department and intelligence community have the tools they need to protect the United States from another terrorist attack. But our views are tempered by our acute awareness that in times of national crisis, there is danger that in the rush to protect our security as a nation we will be swayed to enact measures and authorize procedures that sidestep our constitutional values. Our national experience has taught us that we must vigilantly guard against the dangers of overreaction and undue trespass on individual rights, lest we lose the very freedoms we are fighting to protect.

Since the 2001 terrorist attacks, the ABA has adopted policies on many of the issues that have come into focus as the justice system and our lawmakers have adopted new strategies to meet changing circumstances and new threats. The Association's policy positions are predicated on

respect and support for our constitutional system of separated powers and reflect a commitment to ensuring that our government achieves the proper balance in protecting both the Nation's security and the people's constitutional values.

These policies lay the foundation for ongoing dialogue with the Department of Defense, the Justice Department and Congress. The recommendations in these policies have proved helpful to policy makers and, in some cases, have provided the impetus for change.

With this framework in mind, the ABA urges consideration of the following legislative and executive branch actions to strengthen the protection of constitutional rights and civil liberties while supporting the government's efforts to pursue its antiterrorism objectives.

MILITARY COMMISSIONS

1. Military Tribunal Process. *The new Administration should reexamine the military tribunal process currently underway for detainees at Guantanamo Bay and reevaluate whether to continue to use military commissions to try suspected terrorists.*

There can be no argument that detainees who plotted terrorist attacks against the United States should be brought to justice and held fully accountable for their horrific crimes. At the same time, no matter how horrific the alleged crimes, these detainees should receive fair trials that meet the highest standards of due process and justice for which this Nation has long been respected throughout the world. To provide less undermines the stature of the United States as the leader of the free world in calling upon other nations around the world to adhere to the rule of law by assuring government accountability; enacting laws that are fair, understandable and transparent; and assuring justice to all through independent and fair tribunals.

The ABA believes that the current military commission system, established by the Military Commissions Act (MCA), Pub. L. No. 109-366, violates established principles of due process fundamental to our Nation's concept of justice, even though the Supreme Court, in *Boumediene et. al. v. Bush*, 553 U.S.____ (2008), remedied one egregious provision by restoring the right of Guantanamo detainees to petition a federal court for habeas corpus review of their detention. The ABA applauds this ruling and hopes that it reaffirms to the world that we are a government of laws and helps restore the credibility of the United States as a leading advocate and model for the rule of law across the globe. The ABA also applauds the rapidity with which the federal courts have developed procedures to handle the new cases in an expeditious and just manner.

Unfortunately, restoration of habeas corpus rights has not cured the MCA of other fundamental flaws, including the admissibility of evidence based on hearsay or secured through coercion, and detainees' limited access to counsel.

If the new Administration intends to continue trying suspected terrorists before military commissions, the ABA urges the President and Congress to assure that military tribunals are governed by the Uniform Code of Military Justice and provide the rights afforded in courts-martial proceedings, including provisions for certiorari review by the Supreme Court, the presumption of innocence, proof beyond a reasonable doubt and unanimous verdicts in capital cases. The President and Congress also should assure that military tribunals comply with international treaty obligations (under Articles 14 and 25(1) of the International Covenant on Civil and Political Rights), including prompt notice of charges, representation by counsel of choice, respect for the attorney-client privilege, adequate time and facilities to prepare the defense, the ability to examine all evidence and confront witnesses, and an independent and impartial tribunal.

2. Civilian Defense Counsel. *The Administration and Congress should assure that all defendants in military commission trials have an opportunity to receive the zealous assistance of Civilian Defense Counsel.*

Rules should be adopted to assure that the government does not monitor privileged conversations or interfere with confidential communications between defense counsel and client. In addition, rules should provide that Civilian Defense Counsel who have received appropriate security clearances are permitted to be present at all stages of commission proceedings, to consult with outside experts, and to have full access to all information necessary to prepare a defense.

The Department of Defense's current procedural rules for defense counsel representing detainees being held at Guantanamo Bay do not adhere to these standards. We urge the new Administration to review and revise them.

3. Defense Counsel in Death Penalty Cases. *Adherence to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases should be mandatory for any military commission trial in which the death penalty is sought.*

The ABA's concerns about the MCA's lack of due process and failure to assure access to counsel are heightened in cases where prosecutors may seek the death penalty for detainees charged with offenses related to the September 11, 2001, terrorist attacks. At present, a number of individuals at Guantanamo are facing death penalty trials.

Recognizing the complex and extraordinary demands of capital cases, the ABA developed Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the "Guidelines") in 1989. These Guidelines have become the preeminent national standard on this subject and are widely relied upon by the bench and bar as setting forth the

minimal requirements for defense counsel in capital cases.

The Guidelines call for defense teams (consisting of at least two qualified attorneys, one investigator, and one mitigation specialist) with sufficient experience and training to provide high-quality legal representation to those who face execution if convicted. These Guidelines must be adhered to in any capital proceedings to ensure a fair process and public confidence in the outcome.

Before the commencement of any military commission death penalty prosecution, we urge that adequate resources be provided to the defense in compliance with the Guidelines. We specifically point this out because we are concerned that there still exists a significant imbalance between the resources allocated to the prosecution, including assistance from experienced Department of Justice prosecutors, and those provided to the Office of the Chief Defense Counsel. Under such circumstances, we do not believe military commission trials can provide the level of fairness that is consistent with our Nation's values and essential to our credibility in the rest of the world.

TORTURE

1. Interrogation Standards. *The new Administration and Congress should unequivocally condemn the use of torture or other cruel, inhuman or degrading treatment of detainees in U.S. custody and should act immediately to establish a uniform standard for interrogation that abides by the principles of humane treatment contained in Common Article 3 of the Geneva Conventions and the Army Field Manual.*

The revelations of abuses by U.S. personnel of prisoners detained in the fight against terrorism dismayed the American public and severely damaged our Nation's reputation as a leader in promoting human rights and the international rule of law. American interrogation standards

must adhere to the Constitution and to U.S. and international laws regarding the treatment of detainees. The ABA condemns the use of torture or other cruel, inhuman or degrading treatment or punishment of persons within the custody or physical control of the U.S. government.

The U.S. military has moved to correct the policies and practices that led to abuses, most notably with the adoption in September 2006 of the U.S. Army Field Manual on Human Intelligence Collector Operations. However, Executive Order 13440, issued in July 2007, permits civilian agents, such as those employed by the Central Intelligence Agency, to engage in the use of "enhanced interrogation techniques" on individuals imprisoned in their custody. This double standard is deeply troubling. The ABA urges Congress and the President to require that anyone acting under the color of U.S. authority abide by the principles of humane treatment contained in Common Article 3 of the Geneva Conventions and the Army Field Manual.

The new Administration could accomplish this immediately by rescinding the July 2007 Executive Order and issuing a new one requiring adherence to the Army Field Manual for all individuals (including private contractors) performing interrogations for the United States. Alternatively, Congress and the President could codify this requirement by enacting legislation similar to the corrective legislation that was passed by both chambers but vetoed by President Bush during the 110th Congress.

2. Rendition. *The new Administration and Congress should take all measures necessary to ensure that no person within the custody or under the physical control of the United States is turned over to another government when there are substantial grounds to believe that such person will be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment.*

An essential element of the ABA's policy condemning torture urges the U.S. government to renounce the practice of extraordinary

rendition of prisoners suspected of criminal or terrorist activities to nations where they are at a substantial risk of being subjected to torture or other cruel or inhuman treatment. As defined by the Congressional Research Service in its report, *Renditions: Constraints Imposed by Laws on Torture* (October 12, 2007), extraordinary rendition refers to the extrajudicial transfer of a person from one state to another. The report states: "Although the particularities regarding the usage of extraordinary renditions...are not publicly available, various U.S. officials have acknowledged the practice's existence." Under current regulations, the Administration has relied on assurances of the government of the country to which the prisoner is being sent that torture will not be used. However, individuals being transferred have no opportunity to challenge the reliability of those assurances, and the American public has no ready access to information regarding the program.

The issue has become prominent here and abroad. Journalists from around the world have published articles highlighting individual cases of rendition involving torture, and multiple days of congressional hearings have been held to examine the practices of the United States with regard to extraordinary rendition. Two significant cases pending in the federal courts have heightened the public's awareness of, and concern over, the program. In *Mohamed v. Jeppesen Dataplan, Inc.*, five plaintiffs filed a lawsuit in the District Court for the Northern District of California alleging that they were illegally rendered to secret prisons and detention sites where they were tortured by and on behalf of the United States. They seek to hold Jeppesen Dataplan accountable for providing aircraft, pilots and logistical support for CIA rendition flights. The court dismissed the case at the pleadings stage on the basis of the state secrets privilege. The case is now on appeal before the Ninth Circuit Court of Appeals awaiting oral arguments.

In the case of *Arar v. Ashcroft*, Mr. Maher Arar, a Canadian citizen, brought a lawsuit in U.S. District Court for the Eastern District of New

York, alleging that he was unlawfully detained during a layover at JFK Airport in New York and subsequently rendered to Syria, where he was tortured and held for more than a year without being charged with a crime. Upon releasing him, Syrian authorities publicly stated that they had found no connection to any criminal or terrorist activity. The District Court dismissed the case on grounds that national security concerns prevented it from holding officials liable for carrying out an extraordinary rendition even if such conduct violates our treaty obligations or international law. The case was appealed to the Court of Appeals for the Second Circuit, which affirmed the lower court's conclusion that adjudicating his claims would interfere with national security and foreign policy. However, in August 2008, the Second Circuit *sua sponte* announced that the case would be heard *en banc*, and oral arguments are scheduled for December 9, 2008.

The United States' obligation to prohibit and prevent torture and cruel, inhuman or degrading treatment of detainees in its custody is set forth in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT), to which the United States is a party. Under CAT, there are no exceptional circumstances that warrant torture, and extradition or rendering of a person to a country that would likely subject that person to torture is prohibited.

This practice must cease. Extraordinary rendition not only violates our own cherished principles as a Nation, but also treaty obligations that make clear that a nation cannot avoid its obligations by having other nations conduct unlawful interrogation in its stead. Moreover, the practice works to undermine our moral authority in the eyes of the rest of the world. The new Administration and Congress should renounce the practice and immediately dismantle any U.S. program involved in extraordinary renditions.

STATE SECRETS PRIVILEGE

Congress and the President should enact legislation establishing uniform procedures and standards to govern consideration of claims that may be subject to the state secrets privilege.

The state secrets privilege is a common law privilege that shields sensitive national security information from disclosure in civil litigation. Although the privilege has existed since the beginning of the Republic, it has received heightened public scrutiny recently because the government has asserted the privilege and sought dismissal at the pleadings stage in a number of cases involving fundamental rights and serious allegations of government misconduct, including recent litigation regarding the Administration's warrantless wiretapping program. In the past, the privilege usually has been invoked during the discovery phase of the litigation. When the government asserts the privilege at the pleadings stage, it, in effect, is trying to close the court house doors to litigants alleging injury. Courts have been required to rule on claims of privilege without the benefit of statutory guidance or precedent establishing a standard of review to be applied. In the absence of guidance, and particularly in the wake of 2001 terrorist attacks, there have been instances where courts have deferred to the government without first engaging in sufficient inquiry into the veracity of the government's assertion that information is subject to the privilege. As a result, courts may be dismissing meritorious civil litigation claims, leading to potentially unjust results. They also may be abdicating their responsibility under the constitutional system of checks and balances to review and reverse executive branch excesses.

The ABA urges the President and Congress to enact legislation governing federal civil cases in which the state secrets privilege is asserted to assure that: courts vigorously evaluate privilege claims in a manner that protects legitimate national security interests while permitting litigation to proceed with non privileged evidence; and dismissal of cases based on the

state secrets privilege is granted only as a last resort. Legislation that embodies these goals will promote meaningful independent judicial review, preserve the right of individuals who believe that their rights have been violated by the federal government to their day in court, and assure that the government's responsibility to protect our national security is not compromised.

To assist Congress and the President, the ABA has developed a detailed blueprint for legislation that, in large measure, was incorporated into legislation introduced in the 110th Congress as S. 2533, the State Secrets Protection Act. See http://www.abanet.org/poladv/priorities/elec_surveill/statesecretsreport.pdf

Enactment of similar legislation in the 111th Congress will bring greater transparency and predictability to the process and facilitate the ability of the federal courts to act as a meaningful check on governmental assertions of the privilege.

DOMESTIC SURVEILLANCE OF U.S. CITIZENS

Congress should conduct vigilant oversight of the domestic surveillance activities of the Executive Branch to ensure effectiveness and compliance with the U.S. Constitution. Congress should review the intelligence oversight process and make recommendations to strengthen it.

One of our fundamental liberties includes a reasonable expectation of privacy in certain personal communications. However, developments in communications technology continue to expand rapidly, and the laws governing surveillance have undergone significant changes in recent years as our intelligence capabilities have been modernized to keep up with new technologies and threats.

The ABA believes that it is critically important for Congress to be actively engaged in overseeing the implementation of laws such as

the FISA Amendments Act of 2008, Pub. L. No. 110-261, and the U.S.A. Patriot Act, Pub L. No. 107-56, that authorize the gathering of intelligence within the United States for the purpose of protecting national security. For example, Congress should regularly evaluate government investigations undertaken pursuant to the Foreign Intelligence Surveillance Act to ensure compliance with the First, Fourth and Fifth Amendments to the U.S. Constitution. Timely, rigorous oversight will enhance public confidence that the government's national security objectives are being pursued in a manner consistent with constitutional framework of government.

The ABA also urges Congress to undertake a comprehensive review of the intelligence oversight process and to develop approaches strengthening the oversight system to improve its effectiveness. The new Administration should ensure that the U.S. House and Senate are fully informed of all intelligence operations as

required by the National Security Act of 1947. Vigorous oversight will lessen the risk that constitutionally protected liberties will be circumscribed as the government pursues its national security initiatives.

The recommendations discussed above are among a wide range of issues endorsed by the ABA and are by no means exhaustive. We emphasize these issues because of their timeliness and importance to our nation.

For more information, please contact Thomas M. Susman, Director of the ABA's Governmental Affairs Office, at susmant@staff.abanet.org or (202) 662-1765.

For more information on ABA Legislative Priorities, visit <http://www.abanet.org/polady>.

American Bar Association

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ABA Governmental Affairs Office

The ABA Governmental Affairs Office (GAO) serves as the focal point for the Association's advocacy efforts before Congress, the Executive Branch and other governmental entities on diverse issues of importance to the legal profession on which the ABA House of Delegates has adopted policy. The GAO concentrates its advocacy efforts on the Association's Legislative and Governmental Priorities that are selected annually by the ABA Board of Governors from a list of over 1,000 policy positions adopted by the ABA House of Delegates. When appropriate, the GAO calls upon the Grassroots Action Team for grassroots advocacy assistance. The GAO also works closely with ABA member entities to communicate the views of the Association to numerous governmental entities on a broad range of issues of concern to policy makers and the legal profession. In total, each Congress, the GAO lobbies on approximately 100 different legislative issues.

