

March 2, 2004

MEMORANDUM FOR [to be inserted]

SUBJECT: Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantanamo Bay Naval Base, Cuba

1. PURPOSE

The purpose of this Memorandum is to establish an administrative review process to reassess the need to continue to detain an enemy combatant at least annually during the course of hostilities. This process will operate in a manner that permits each enemy combatant in the custody of the Department at Defense at the Guantanamo Bay Naval Base to explain why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or to explain why it is otherwise in the interest of the United States and its allies that he be released.

The law of war permits the detention of enemy combatants until the end of an armed conflict. It permits that detention for the practical purpose of precluding the enemy from rejoining the conflict. It does not require the use of a review process to support that continued detention. The process provided in this Memorandum is established solely as a matter of discretion and does not confer any right or obligation enforceable by law.

2. ESTABLISHMENT OF AN ADMINISTRATIVE REVIEW BOARD

- A. *Role of an Administrative Review Board.* An administrative review board ("review board") will assess whether the detainee remains a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters. Based on that assessment, the review board will make a recommendation on whether the enemy combatant should continue to be detained in the custody of the Department of Defense.
- B. *Administrative Review Board Composition.*
 - i. A review board shall be composed of three military officers reporting to a President-appointed Senate-confirmed civilian in the Department of Defense who has been designated by the Secretary of Defense ("designated civilian official") to operate and oversee the administrative review board process.
 - ii. *Qualifications of Review Board Members.*
 - a. Military officers assigned to serve as review board members shall be those who are, in the designated civilian official's view, best qualified for the duty by reasons of age, education, training, experience, length of service, temperament, and objectivity.

- b. At least one of the members of a review board shall be experienced in the field of intelligence.
- C. *Presiding Officer.* For the purposes of its deliberations and any hearing held pursuant to this Memorandum, the senior member of a review board shall be the presiding officer. The sole role of the presiding officer as presiding officer shall be to ensure the orderliness of board proceedings. The presiding officer's vote in board determination will be accorded the same weight as the votes of other members of the review board.

3. ADMINISTRATIVE REVIEW BOARD PROCEEDINGS

- A. *Review Board Proceedings.* The proceedings before a review board shall be non-adversarial.
 - i. Provision of threat information by the government of the State of which the enemy combatant is a national.
 - a. To the extent consistent with national security, the government of the State of which the enemy combatant is a national ("the State") may present information of any nature, including information related to the threat posed by the enemy combatant to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters.
 - b. Where it is determined national security permits the presentation of information by the State, the review board shall request that the Department of State notify the State of the proceedings.
 - 1) The notice shall be provided in advance of the proceeding date(s) in order permit the State to prepare and present information.
 - 2) The notice to the State shall provide that information submitted by the State shall be in writing, except as otherwise deemed appropriate by the review board, on or before a date specified by the review board.
 - 3) To the extent consistent with national security, the notice shall also include a request for that State to notify the enemy combatant's next of kin of the proceedings and inform the next of kin that the next of kin may provide information relevant to the proceedings through the State's written submissions.
 - c. In the event that the submission of a State is not received by the date established by the review board, the review board may disregard the State's submission.
 - ii. Provision of information by a designated military officer.
 - a. A designated military officer shall provide to the review board all reasonably available threat information regarding the enemy combatant under review and any other information indicating

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whether it would be in the interest of the United States and allies to release the enemy combatant.

- 1) It is the designated military officer's responsibility to provide to the review board information in the possession of the Department of Defense that tends to demonstrate the need for continued detention as well as information that tends to mitigate the need for continued detention.
 - 2) The designated military officer is not an advocate for or against the continued detention of the enemy combatant under review.
- b. The designated military officer shall be selected by the designated civilian official and he must meet the same qualifications set forth for members of the review board under section 2.B.ii.a of this Memorandum.
- c. The designated military officer shall present the requisite information through written submissions, including supporting documentation. When the review board deems it appropriate, the designated military officer may present that information orally. Such oral presentation may include witnesses when the review board deems it appropriate.
- iii. Presentation of information by the enemy combatant
- a. The enemy combatant shall be permitted to present to the review board information on why he is no longer a threat to the United States and its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters or why it is otherwise in the interest of the United States and its allies that he be released.
 - b. The enemy combatant will be permitted to present this information at a hearing before the review board.
 - c. A member of the board may question the enemy combatant during the hearing.
 - d. Prior to this stage of the proceedings, the review board shall make available to the enemy combatant the information provided under sections 3.A.i. and 3.A.ii. to the extent it is both necessary to his presentation of information to the review board and consistent with national security.
 - 1) This information shall be made available to the combatant in a language he understands.
 - 2) In the event the provision of information is necessary but provision of that information is inconsistent with national security, the review board shall make available to the combatant summaries of the information so long as such summaries can be provided consistent with national security.
 - 3) This information shall be provided to the combatant sufficiently in advance of his presentation to the review

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board so as to permit him to prepare to respond to that information.

- e. If necessary, an interpreter shall be supplied for enemy combatant's presentation of information to the review board.

B. *Information from Other Relevant U.S. Government Agencies.* The review board shall provide to other relevant U.S. government agencies—the Department of Justice, the Central Intelligence Agency, and the Department of Homeland Security—notice of the proceedings for the enemy combatant.

- i. That notice shall be provided in advance of the proceeding date(s) for that enemy combatant so as to permit those relevant agencies sufficient time to provide to the board any information they deem relevant prior to the hearing for the enemy combatant.
- ii. Any submissions that these agencies elect to provide shall be in written form except in extraordinary cases.
- iii. In the event that the information to be provided to the enemy combatant pursuant to 3.A.iii.d. includes information that originated in U.S. government agencies other than the Department of Defense, the review board shall receive the originating agency's permission to use that information in order for it to be shared with the enemy combatant in any form.

C. *Assistance to the Enemy Combatant.* The review board shall assign a military officer to assist the enemy combatant in preparing his presentation to the board. That military officer may also serve as the spokesperson for the enemy combatant in presenting his information to the board.

- i. That assistant shall meet the same qualifications established for members of the review board under section 2.B.ii.a of this Memorandum.
- ii. That assistant shall be responsible for explaining to the enemy combatant the nature of his hearing before the review board.
- iii. If so assigned, that assistant shall be provided the same information that is to be provided to the enemy combatant.
- iv. That assistant shall be permitted to meet with the enemy combatant prior to the enemy combatant's presentation to the board. If necessary, an interpreter shall be supplied for those meetings.

D. *Additional Fact-Gathering.* If, after the initial presentation of information, the review board believes additional information is necessary before it can make a recommendation, the board may seek additional facts. It may, among other things:

- i. submit written questions to the designated military officer;
- ii. request further behavioral assessments of the combatant;
- iii. request further questioning of any other combatants who have had contact with the enemy combatant under review while in detention; and
- iv. seek other information that may be obtained readily.

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- F. *Review Board Recommendations.* A review board shall provide a written assessment of whether and to what extent each enemy combatant poses a threat to the United States or its allies in the ongoing armed conflict against al Qaida and its affiliates and supporters as well as any other factors bearing upon the need for continued detention. Based on that assessment, the review board shall provide a written recommendation on whether detention should be continued to the designated civilian official.
- i. The review board's assessment and recommendation shall be an independent judgment based on the review board's review of all reasonably available information.
 - ii. The review board's assessment and recommendation shall be reached by a majority of the board. In the event that a recommendation is not unanimous, the dissenting board member may submit a minority recommendation to the designated civilian official. That recommendation shall take the same form as the written recommendation to be submitted by the majority.
 - iii. The review board's assessment and recommendation shall include:
 - a. the review board's conclusion regarding the threat posed by the enemy combatant;
 - b. the supporting reasons for that conclusion regarding threat, including, but not limited to, any information relied upon in reaching that conclusion; and
 - c. the supporting reasons for the recommendation.
 - iv. The written recommendation shall be forwarded to the designated civilian official along with the record of the hearings.
 - v. The determination to continue to detain, release, or seek the transfer of the enemy combatant to the control of another government rests with the designated civilian official.
 - vi. Notification of the designated civilian official's determination will be provided to the enemy combatant, the relevant government agencies, and to the extent consistent with national security, the State.
- G. *Frequency of Review.* A review board shall examine the need for the continued detention of each combatant at least annually. The first such review shall take place no later than _____.

4. DESIGNATED CIVILIAN OFFICIAL

- A. The administrative review board process shall be overseen by and operate under the designated civilian official.
- B. The designated civilian official may establish as many review boards as he deems necessary to ensure that each enemy combatant is reviewed at least annually.

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- C. The General Counsel of the Department of Defense shall provide assistance to the designated civilian official in his oversight and operation of the review board process as appropriate.

5. OTHER

This Memorandum is neither intended to nor does it create any right, benefit, or privilege, substantive or procedural, enforceable by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person. No provision in this Memorandum shall be construed to be a requirement of the United States Constitution or a requirement of any other body of law. Because the procedures described in this Memorandum have been instituted as a matter of discretion, the Secretary of Defense may suspend the procedures set forth in this Memorandum at any time.

6. AMENDMENT

The Secretary may amend this Memorandum from time to time.

7. IMPLEMENTING GUIDANCE

The designated civilian official may, as he deems appropriate, issue guidance to implement this Memorandum.