NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

28 June 2004

Hon. Gordon England
Secretary of the Navy
The Pentagon
Washington, D.C. 20301

VIA TELEFAX (703) 697-8921

Re: Draft Administrative Review Procedures for Enemy Combatants and Other Detainees in Custody at Guantanamo Bay Naval Base, Cuba

Dear Secretary England:

This letter constitutes the comments by the National Association of Criminal Defense Lawyers ("NACDL") regarding the Department of Defense's proposed Administrative Review Procedures for Enemy Combatants at Guantanamo Bay, Cuba ("ARP") that were published last Wednesday, June 23, 2004.

As a threshold matter, the time frame for comment is too short to permit comprehensive comment. NACDL previously submitted comments, dated March 29, 2004, to a prior proposal, and those comments are incorporated by reference herein. Also, a copy of those comments is enclosed herewith. Generally, the ARP still do not address several important issues, such as the self-incrimination problems for detainees, their right to counsel, the burden of proof and which side (government or detainee) shoulders it, and timing of decisions.

Be advised that the Supreme Court's decision earlier today in *Rasul v. Bush*, 542 U.S. ___ (2004), in conjunction with the Court's decision (also today) in *Hamdi v. Rumsfeld*, 542 U.S ___ (2004), makes it clear that the ARP as presently constituted cannot pass muster, and must be substantially revised, if not eliminated altogether in favor of review by the courts, in order to provide the appropriate measure of due process.

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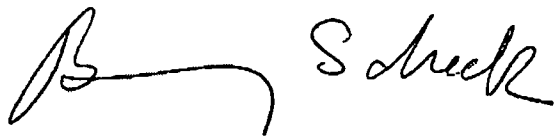
In addition, as discussed during our meeting last Wednesday, evaluating and verifying the integrity of information upon which the government relies in the ARP process is essential. In that context, and in light of the revelations of abuse of prisoners, and use of coercive interrogation techniques, the reliability of not only the statements of the detainee under review, but of those detainees (and/or others) whose statements form the basis for accusations against the detainee under review, is of critical importance. Thus, inquiry into, and public disclosure of, the methods used to obtain such statements is necessary if the ARP process is to be both transparent and credible to both domestic and international observers.

Indeed, only this week there has been a dramatic example of the dangers of basing factual findings on information generated by torture or other coercive methods of interrogation. The July 5, 2004 issue of *Newsweek* reports that a detainee who, under "aggressive interrogation techniques," had previously claimed that the Iraqi government (of Saddam Hussein) had provided *al Qaeda* with training in "poisons and deadly gases" has since recanted his account. Thus, the dangers of basing decisions on a detainee's liberty on the statements of persons subject to "aggressive interrogation methods" is manifest, and must be avoided.

Another crucial defect in the ARP is the failure to require written findings with respect to the review of a decision to continue to detain any particular detainee. Again, any process that fails to provide a public explanation for its conclusions lacks any credibility and, ultimately, viability in the world community.

I want to thank you for the opportunity to meet with you last week, and offer NACDL's continued availability for purposes of providing commentary and analysis with respect to the ARP's procedures and implementation.

Yours sincerely,



Barry C. Scheck
President-Elect

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

March 29, 2004

VIA FACSIMILE (703) 614-6745
Mr. William J. Haynes, II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

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

Dear Mr. Haynes:

The following are the National Association of Criminal Defense Lawyers' comments regarding the draft administrative review procedures for detainees at the Guantanamo Bay Naval Base:

First, we are deeply troubled by the Department's failure to address these four critical issues:

- The Memorandum fails to set forth any criteria for making the determination whether the detainee remains a danger sufficient to warrant further detention. The Memorandum should do so in order to create uniform standards that will give both detainees and the government guidance with respect to what type of information will be most relevant to the Board's determination, and just what arguments will be most relevant to the Board's determination.

- The Memorandum fails to set forth any time frames for decisions by the Board (other than the review itself should occur at least annually). A time limit for decisions should be imposed in order to ensure that determinations, and the release of detainees who qualify, are not inordinately delayed.

- The Memorandum does not set any limits on the length of a detainee's detention without charge and/or disposition, and should do so. Thus, a detainee still could be in custody indefinitely without any proceedings or charges instituted against him. The Memorandum should provide that at some point, the presumption shifts to release, requiring the government to shoulder the burden of establishing the need for continued detention.

- There should be a provision that preserves a detainee's rights against self-incrimination. Thus, any statements by the detainee or his attorney, or documents or materials provided to the Administrative Review Board (hereinafter the "Board"), should not be admissible against him in any military commission or other proceeding. Indeed, the prosecution should not have access to information that the detainee provides to the Board in order to secure release pursuant to the annual review. *See, e.g.,* Section 1, Section 3(A)(iii), Section 3(C) & Section 3(D)(ii) & (iii).

I. PURPOSE

A. Section 1, "Purpose," provides that the detainee "explain why he is no longer a threat . . ." The burden, however, should be reversed and instead imposed on the government explicitly to establish that the detainee remains a danger to the extent that continued detention is required. The detainee should not be required to "prove" anything.

B. The Memorandum, in Section 1, asserts that "[t]he law of war permits the detention of enemy combatants until the end of an armed conflict." That is true only if the combatants are detained pursuant to the provisions of the Geneva Conventions. Thus, all detainees are entitled to presumptive Prisoner of War ("P.O.W.") status unless and until a "competent tribunal" determines otherwise.

C. Similarly, also in Section 1, the Memorandum contends that detention during armed conflict "does not require the use of a review process to support that continued detention." That, too, is inaccurate, since the Geneva Convention entitles each detainee to an Article V hearing before a "competent tribunal." None of the detainees has yet been afforded that right, and the Board does not appear to be constituted to perform that necessary function.

II. ESTABLISHMENT OF AN ADMINISTRATIVE REVIEW BOARD

A. Ironically, at Section 2(B)(i), the appointment process for the "designated civilian official," in requiring Senate confirmation of the Presidential appointee, affords more independence in the selection of that official than for the composition of the military commissions that will adjudicate whether the detainees have violated any laws.

B. Section 2(B)(ii)(b) requires that "[a]t least one of the members of a review board shall be experienced in the field of intelligence." That requirement has the capacity to skew the review if that person has had access to information that the detainee does not have the opportunity to confront and rebut, or if institutional pressures exist to validate (and continue) detentions in order to vindicate the decision-making of intelligence agencies with respect to the initial detention and/or continued detention of a detainee. The Memorandum should require disclosure by review board members - particularly the member with intelligence experience - in order to resolve any such conflicts and ensure that each review panel is completely impartial and conflict-free.

III. ADMINISTRATIVE REVIEW BOARD PROCEEDINGS

A. The provision soliciting information from "other relevant U.S. government agencies[,]" Section 3(B), should be expressly subject to the notice requirements that appear in Section 3(A)(iii)(d), and which explicitly apply to the information provided pursuant to Sections 3(A)(i) and 3(A)(ii).

B. Section 3(C) should explicitly permit the detainee to have civilian counsel of his choice represent him before the Board (subject to relevant and appropriate security clearance issues). This is particularly true for detainees who, for whatever reason, already have civilian counsel (*i.e.*, due to their having been charged in the commissions, or designated for such prosecution, or because they have filed civil actions in the federal courts).

C. Section 3(D)(ii) should be modified to permit the detainee to have a mental health professional perform a "behavioral assessment" to present to the Board. This would provide reciprocity and a fairer procedure.

D. Section 3(D)(iii) should be modified to permit the detainee to request further questioning of "other combatants who have had contact with the enemy combatant under review while in detention." Again, this would establish a reciprocal and fairer process.

IV. OTHER

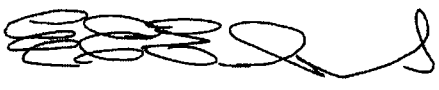
A. Section 5 should be modified to provide that notwithstanding the Secretary of Defense's authority under the Memorandum to "suspend the procedures set forth in this Memorandum at any time[,]" such suspension will not operate to deprive a detainee of release by operation of ex post facto suspension, and/or of the benefit of any particular procedures used in the context of any prior, ongoing, or scheduled review of that detainee's continued detention. In addition, any such "suspension" that operates to the detriment of any particular detainee would be contrary to any notion of fairness under either United States or international legal norms.

V. AMENDMENT

A. Section 6 should be modified to prohibit any amendments that would operate to deprive a detainee of release by operation of ex post facto provisions.

Thank you for considering our views. Please regard Joshua L. Dratel (212-732-0707) as the point of contact regarding this matter.

Sincerely,



E.E. (Bo) Edwards, III
President

Joshua L. Dratel
Co-Chair, NACDL Committee on
Military Tribunals & Terrorism