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MEMORANDUM

To: Members of the ASIL-CFR Roundtable

From: William J. Haynes II, General Counsel of the Department of Defense

Subject: Enemy Combatants

There is no doubt that the attacks of September 11, 2001 constituted acts of war. They possessed the intensity and scale of war. They involved at least one military target, the Pentagon, and they came on the heels of a decade of attacks by al Qaida on U.S. military and civilian targets. Congress on September 18, 2001 authorized the President to use force in response to the attacks. And both the United Nations and NATO recognized that the attacks were "armed attacks" within the meaning of the UN Charter and NATO treaty. Since September 11th (and perhaps before then), we have been at war - both legally and in fact.

War implicates legal powers and rules that are not available during peacetime. Among other things, the war context gives the President the authority to detain enemy combatants at least until hostilities cease.

Enemy Combatant

An "enemy combatant" is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, the term includes a member, agent, or associate of al Qaida or the Taliban. In applying this definition, the United States government has acted consistently with the observation of the Supreme Court of the United States in *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942): "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war."

"Enemy combatant" is a general category that subsumes two sub-categories: lawful and unlawful combatants. See *Quirin*, 317 U.S. at 37-38. Lawful combatants receive prisoner of war (POW) status and the protections of the Third Geneva Convention. Unlawful combatants do not receive POW status and do not receive the full protections of the Third Geneva Convention. (The treatment accorded to unlawful combatants is discussed below).

The President has determined that al Qaida members are unlawful combatants because (among other reasons) they are members of a non-state actor terrorist group that does not receive the protections of the Third Geneva Convention. He additionally determined that the Taliban detainees are unlawful combatants because

they do not satisfy the criteria for POW status set out in Article 4 of the Third Geneva Convention. Although the President's determination on this issue is final, courts have concurred with his determination.

Authority to Detain

The President has unquestioned authority to detain enemy combatants, including those who are U.S. citizens, during wartime. See, e.g., *Quirin*, 317 U.S. at 31, 37 (1942); *Colepaugh v. Looney*, 235 F. 2d 429, 432 (10th Cir. 1956); *In re Territo*, 156 F. 2d 142, 145 (9th Cir. 1946). The Fourth Circuit recently reaffirmed this proposition. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 281, 283 (4th Cir. 2002). The authority to detain enemy combatants flows primarily from Article II of the Constitution. In the current conflict, the President's authority is bolstered by Congress's Joint Resolution of September 18, 2001, which authorized "the President . . . to use all necessary and appropriate force" against al Qaida and against those nations, organizations, or persons he determines "committed or aided in the September 11 attacks." Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (emphasis added). This congressional action clearly triggers (if any trigger were necessary) the President's traditional authority to detain enemy combatants as Commander in Chief.

Presidents (and their delegates) have detained enemy combatants in every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. During World War II, the United States detained hundreds of thousands of POWs in the United States (some of whom were U.S. citizens) without trial or counsel. Then as now, the purposes of detaining enemy combatants during wartime are, among other things, to gather intelligence and to ensure that detainees do not return to assist the enemy.

Who Decides

The determination of enemy combatant status has traditionally resided with the military commander who is authorized to engage the enemy with deadly force. In this regard, the task ultimately falls within the President's constitutional responsibility as Commander in Chief to identify which forces and persons to engage or capture and detain during an armed conflict. Of course, there is no requirement that the President make such determinations personally, and in the vast majority of cases he does not do so. Rather, consistent with longstanding historical practice and applicable rules of engagement, the task is normally a function of the military command structure.

In the current conflict, military personnel ordinarily make enemy combatant determinations during combat operations, under the combatant commander's direction. With respect to individuals captured in the United States, to date DoD has detained only Abdullah al Muhajir, also known as Jose Padilla. The President, as Commander in Chief, determined that Mr. Padilla is an enemy combatant.

Detainee Rights

All of the detainees are unlawful combatants and thus do not as a matter of law receive the protections of the Third Geneva Convention. However, the United States armed forces are treating, and will continue to treat, all enemy combatants humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949. Among many other things, this means that they receive: three meals a day that meet Muslim dietary laws; medical care; clothing and shoes; shelter; showers; soap and toilet articles; the opportunity to worship; the means to send mail and receive mail, subject to security screening; and the ability to receive packages of food and clothing, also subject to security screening. In addition, the International Committee of the Red Cross has visited and will continue to visit the detainees

privately. The detainees will be permitted to raise concerns about their conditions, and we will attempt to address those concerns consistent with security.

The non-citizen detainees in Guantanamo have no right to habeas corpus relief in U.S. courts. See, e.g., *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), affirmed on other grounds, 2002 U.S. App. LEXIS 23705 (9th Cir. Nov. 18, 2002). As noted above, however, we have permitted the ICRC access to the detainees, and we have notified each detainee's country of origin that the detainee is in DoD control.

U.S. citizen enemy combatants who are detained in the United States may challenge their detention by a petition for habeas corpus. In the view of the U.S. government, enemy combatants have no right to counsel to challenge their detention. Providing enemy combatants a right of access to counsel could thwart our ability to collect critical information and could imperil efforts to prevent further terrorist attacks. It might also enable detained enemy combatants to pass concealed messages to the enemy.

In *Padilla v. Bush*, 2002 U.S. Dist. LEXIS 23086 (S.D.N.Y. December 4, 2002), the U.S. District Court for the Southern District of New York recently upheld the government's ability to detain U.S. citizen enemy combatants in the United States but required the government to provide access to Padilla by his attorneys for limited purposes. We are currently reviewing the court's decision.

Length of Detention

Many have claimed that enemy combatants are being detained "indefinitely." The suggestion appears to be that they are being detained lawlessly and without limit. That is not true. As explained above, the constitutional power to detain during wartime is well settled. In addition, international law - including the Third Geneva Convention - unambiguously permits a government to detain enemy combatants at least until hostilities cease. There may be uncertainty about when hostilities cease in the novel conflict with al Qaida. But disquiet about indefinite detention is misplaced for two reasons.

First, the concern is premature. In prior wars combatants (including U.S. POWs) have been legally detained for years. We have not yet approached that point in the current conflict. Second, the government has no interest in detaining enemy combatants any longer than necessary, and the Department of Defense reviews the status of all enemy combatants on a case-by-case basis to determine whether they should continue to be detained. Since we first captured or came to control detainees in Afghanistan, we have released many thousands, and we recently released additional detainees from the United States Naval Base in Guantanamo Bay, Cuba. But as long as hostilities continue and the detainees present a threat or retain intelligence or law enforcement value, no law requires that the detainees be released, and it would be imprudent to do so.

Capturing and detaining a U.S. citizen, or any other human being, is not an activity DoD takes lightly. As in other armed conflicts in which our Nation has been engaged, the detention of enemy combatants serves a vitally important protective function. Equally important, however, the deliberate, conscientious, and humane manner in which we designate and detain enemy combatants reflects our values and character as a Nation. We are committed to defending the United States in accordance with our constitutional responsibilities, while preserving the constitutional rights of United States citizens.

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