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April 18, 2003

Inspector General Joseph E. Schmitz
Inspector General
Department of Defense
400 Army Navy Drive
Arlington, VA 22202-4704

Re: Enemy Prisoners of War and Other Detainees

Dear General Schmitz:

The Committee on Military Affairs & Justice of the Association of the Bar of the City of New York is a committee of attorneys, judges and law students engaged on a pro bono basis in matters of policy and law relating to the United States Armed Forces. Our objective is to assist the Association in sharing with its 22,000 members and the general public a balanced view of such matters.

As you know, the legal status of detainees in the custody of the Armed Forces at Guantanamo Bay Naval Station in Cuba is an active concern of bar associations both in this country and in other nations that have ratified the Geneva Convention III Relative to the Treatment of Prisoners of War. The legal status of detainees is also a matter of much public interest and media attention. An article, dated March 24, 2003, in *The New York Times*, reports 21 men detained at Guantanamo Bay were repatriated to Afghanistan by the Armed Forces and 660 others remain in detention at Guantanamo Bay. A subsequent *Times* article of April 8, 2003 reports that officials described detainees as falling loosely into three categories -- "people who were probably needlessly detained, a few Qaeda members and a group of people about whom they know little."

It does not appear that those detained by the Armed Forces at Guantanamo Bay have been afforded the right to a formal determination of their status, *if any doubt arises as to their status*, as provided in paragraph (b) of Section 1-6, entitled *Tribunals*, of Army Regulation 190-8 (and identical regulations prescribed by the other services) (the "Regulation") and Article V of such Geneva Convention. In this connection, we have not had a reply to our letter, dated March

7, 2003, to Hon. Steven J. Morello, General Counsel of the Department of the Army, a copy of which is enclosed.

In view of the large number of detainees and the history of releasing some detainees, we believe that it is likely that there remain some detainees concerning whom some doubt exists regarding their legal status. On that basis, the mandate of Section 1-6 (b) is clear: "A competent tribunal shall determine the status of any person . . . concerning whom any doubt . . . exists." Moreover, Section 1-6(a) of the Regulation and Article V of such Geneva Convention require that pending such determination, such detainees are to be treated as prisoners of war. This requirement suggests that competent tribunals should be convened at the earliest opportunity in the detention process in order to accord each detainee from the beginning the treatment appropriate to his circumstances.

In making this comment, we do not intend to refer to blanket determinations as to the status of Al Qaeda or the Taliban as entities, but rather to the individual status of detainees as persons who may or may not be "enemy combatants" and members of Al Qaeda or the Taliban. It has been suggested that certain detainees were innocent civilians found on or near the battlefield, exactly the type of person whose status should be considered by a "competent tribunal" under such Geneva Convention and the Regulation.

We are cognizant of the national security considerations affecting the confidentiality of information relevant to the status of detainees and believe that administrative tribunals could function consistently with such considerations.

We appreciate that the Regulation provides for an administrative determination and not for a judicial proceeding, and that administrative proceedings would determine solely the status of detainees and not culpability for any alleged violation of the law of war. We do not express a view as to any possible constitutional requirement of a judicial proceeding to determine the legality of the detention of individuals who may be entitled to constitutional protections based on such factors as citizenship, residence, or place or circumstances of detention.

Accordingly, we wish to call your attention to the apparent violation of the Regulation and such Geneva Convention in the detentions at Guantanamo Bay without the benefit of status determinations by competent tribunals when applicable. On behalf of those detained without the status determinations to which they are entitled, and in the interest of the good repute of the Armed Forces and the rule of law, we ask you to investigate.

Respectfully submitted,

Miles P. Fischer, Committee Chair
Committee on Military Affairs & Justice

cc: Hon. Steven J. Morello, General Counsel