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CITY BAR

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July 29, 2009

President Barack Obama
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear President Obama:

I write on behalf of the Association of the Bar of the City of New York (the "Association"), to express our profound concern with, and strong opposition to, any legislation you may be considering to authorize indefinite or prolonged detention without trial of persons considered by the Executive Branch to be dangerous to our nation's security.

Founded in 1870, the Association's membership includes more than 23,000 lawyers, judges and legal scholars from New York City and throughout the United States and many foreign countries. Through its Task Force on National Security and the Rule of Law and its Committees on Civil Rights and International Human Rights, among others, the Association vigorously advocates the preservation and enforcement of the rule of law and the principle that the preservation of civil liberties enshrined in the Constitution and our nation's traditions is not only consistent with, but vital to the protection of national security.

Like you, we “reject as false the choice between our safety and our ideals.”¹ The Association submits that enactment of preventive detention legislation, as suggested in your May 21, 2009 address at the National Archives, or as recently reported in the press² would be a radical departure from those ideals, would undermine the rule of law, and would harm, rather than advance, our national security.

As we understand it, such legislation is being considered both for application to Guantanamo detainees, and more broadly for suspected terrorists captured in the future, who are considered too dangerous to release, but who purportedly cannot be tried on criminal charges in Federal courts because of the absence of admissible evidence. We separately address the special circumstances of Guantanamo detainees and then, the more general case of future suspected terrorists.

Guantanamo Detainees

We recognize that Guantanamo detainees present the Administration with unique and difficult problems, particularly because the interrogation methods used on some of these detainees by the prior Administration may render all or most of the evidence against them inadmissible. The Association previously acknowledged in our letter to you dated November 24, 2008, that we accepted your authority to continue to detain some of these detainees to the extent authorized by the traditional laws of war, provided they had full due process rights in habeas proceedings challenging the basis for their detention under those laws.

The courts are currently examining the scope of the government’s detention authority under the Authorization for Use of Military Force (“AUMF”) and so far have held that you have sufficient authority under the AUMF to continue to hold Guantanamo detainees who may be too dangerous to release, but who cannot be tried.³ Ultimately, the scope of such authority is likely to be resolved by the Supreme Court. The approach taken to date by federal district judges in Guantanamo habeas litigation will surely be debated. One particular concern is that the difficulties of defining membership in al Qaeda or associated organizations and the absence of a

¹ President Barack Obama, Inaugural Address, January 20, 2009.

² Peter Finn, *Reports on U.S. Detention Policy Will Be Delayed*, Wash. Post, July 21, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/20/AR2009072003578.html?sub=AR>; David Johnston, *Panel Misses Deadline in Reviewing Guantanamo*, N.Y. Times, July 21, 2009, at A14.

³ See *Boumediene v. Bush*, 583 F. Supp. 2d 133, 135 (D.D.C. 2008); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 67 (D.D.C. 2009); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 69-77 (D.D.C. 2009); *Muttan v. Obama*, ___ F. Supp. 2d ___, No. 09-cv-00745, 2009 WL 1425212 at *1 (D.D.C. May 21, 2009).

foreseeable end to the conflict may heighten the risk and gravity of errors that could result in prolonged detentions. However, the main point is that the issue is currently being adjudicated in our federal courts. At a very minimum, it would be premature to cut short a process that may air valuable information and insight into these problems. Certainly, the decisions of the district courts and future opinions from the Court of Appeals and Supreme Court will critically illuminate hard legal and practical questions in a way that can only aid legislative and public debate. We urge the administration to allow the issue of the scope of authority conferred by the AUMF to be developed and resolved by the Courts, before considering legislation. Given recent experience, such legislation is likely to become enmeshed in the politics of fear and you may be confronted with legislation that confers broader detention authority and fewer safeguards than you would find acceptable.

Beyond Guantanamo

The Association urges you to reject proposals for even broader preventive detention legislation that would apply to suspected members of al Qaeda or other suspected terrorists captured in the future. Such a system of detention is contrary to our traditions and values and to the rule of law and raises serious constitutional questions. As the Supreme Court has emphasized: “In our society liberty is the norm” and detention without trial “is the carefully limited exception.”⁴ “Dangerousness” standing alone is not a sufficient basis to detain without charge or trial.⁵

Far from enhancing national security, such a system of detention is likely to undermine it. Like Guantanamo, an indefinite detention system could well become a recruiting tool for al Qaeda. It would also make it more difficult to obtain cooperation from the domestic and international Muslim communities, which otherwise could be a vital source of the intelligence needed to protect the American people. Such a system would also diminish our standing in the world community and our leadership role in promoting the rule of law. The effect of adopting a system of indefinite detention would simply cancel the benefits you seek by closing Guantanamo.

Finally, there is no demonstrable need for a system of preventive detention. Our criminal justice system provides ample means for detention pending trial under the Bail Reform Act. Given the wide variety of criminal charges available, it is difficult to imagine that the

⁴ *United States v. Salerno*, 481 U.S. 739, 755 (1987).

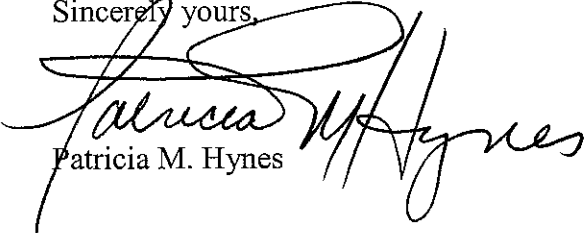
⁵ *Kansas v. Hendricks*, 521 U.S. 346, 358 (1997).

government cannot find a basis for holding suspected terrorists pending trial.⁶ Moreover, because you have forbidden the abusive interrogation techniques used by the prior administration that may have rendered inadmissible evidence relating to Guantanamo detainees, it seems unlikely that the government will be unable to prosecute suspected al Qaeda members or suspected terrorists in the future. Nor should concerns about the disclosure of classified evidence be an obstacle to charging and prosecuting such persons. The federal courts have ample flexibility to protect such information under the Classified Information Procedures Act, as has been proven in dozens of successful terrorism prosecutions. The government also has authority to detain aliens pending removal under the immigration laws. And persons can be detained as material witnesses for a limited period subject to close judicial supervision. Insofar as indefinite or prolonged detention is sought for interrogation purposes beyond what is available under the detention authority listed above, the Supreme Court has already indicated that such detention would be unlawful.⁷

In sum, there is no justification for creating a system of preventive detention that would undermine our values and the rule of law, become a symbol comparable to Guantanamo, and generate years of additional litigation challenging its legality.

For all of these reasons, Mr. President, the Association urges you to reject any proposal for the creation of a preventive detention system.

Sincerely yours,



Patricia M. Hynes

cc: Hon. Eric H. Holder, Jr.
 Hon. Robert M. Gates
 Hon. Gregory B. Craig
 Hon. Jeh C. Johnson
 Hon. Harold Koh
 Colonel Mark Martins
 Hon. Bruce Wiegmann
 Hon. J. Douglas Wilson

⁶ See generally *Richard B. Zabel and James J. Benjamin, Jr., In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (May 2008) and 2009 Update (July 2009).

⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (“Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized.”).