NEW YORK CITY BAR

STATEMENT OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

To

SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS AND HUMAN RIGHTS

Regarding

CLOSING GUANTANAMO: THE NATIONAL SECURITY, FISCAL AND HUMAN RIGHTS IMPLICATIONS

July 24, 2013

The Association of the Bar of the City of New York applauds Senator Durbin for convening this hearing to focus attention on the closing of the detention facility at Guantanamo. We are a professional association of over 24,000 members, founded in 1870. Since the September 11th attacks, this Association has issued numerous thoroughly researched and thoughtfully reasoned reports and letters to promote America's long-term security through respect for lawful and humane policies.[1]

We have closely monitored developments in Guantanamo from the time the detention facility was opened, raising our serious concerns about this facility and the handling of detainees, and have urged that it be closed. In addition, this Association was one of the first to address the shortcomings of using military commissions to try detainees, issuing a report promptly after President George W. Bush's November, 2001 Military Order establishing the Commissions. We continue to have observer status and regularly send our committee members to military commission proceedings.

The continued use of the Guantanamo detention facility is a major failing that has long-term repercussions. The history of the facility as a site where abusive interrogation methods amounting to torture were used, and its continued role detaining individuals who cannot hope to see justice done even though in many cases they have been cleared for release, undermine much of what this nation has done to be world's most respected democracy. Guantanamo also serves

[1] Many of these works are collected in James R. Silkenat and Mark R. Shulman, eds., *The Imperial Presidency and the Consequences of 9/11: Lawyers Respond to the Global War on Terror* (2007); more recent works are collected online at http://www2.nycbar.org/Publications/reports/reportsbycom.php?com=138.

as a galvanizing symbol for recruiting legions of young potential terrorists who focus their anger and actions against the United States. As President Obama said in his May 23, 2013 speech, "GTMO has become a symbol around the world for an America that flouts the rule of law. Our allies won't cooperate with us if they think a terrorist will end up at GTMO."

This image has been exacerbated by the hunger strikes that have been ongoing at Guantanamo for the last months. The strikes reflect the suffering and hopelessness inflicted by a policy of unjustified indefinite detention that undermines the rule of law. Many of the detainees have been incarcerated for more than 11 years and see no hope of leaving the prison alive.

In 2009, President Obama announced his decision to close the Guantanamo facility and he reiterated that intention this year. The decision was sound in 2009 and the passage of time has only weakened the arguments for keeping the facility open. As a nation we have made substantial progress in the struggle against al Qaeda, the Taliban, and associated forces; our country is safer and more secure today than it was in 2009; the Iraq war is over and a concrete timetable has been announced for the end of the combat mission in Afghanistan; and the Guantanamo facility remains a recruiting tool for forces hostile to the United States even as it has become an expensive drain on the public fisc in a time of austerity and budget discipline.

We welcome legislative proposals that would facilitate closing the Guantanamo facility. To assist in moving toward that closure, we offer the following recommendations regarding the detainees:

- In the short term, the top priority should be to release or transfer the 86 detainees (representing more than half of the current population) who have been cleared for release by the Guantanamo Review Task Force.[2] Each day of continued detention is a grave injustice for these individuals and a real moral problem for our country. Our ideals of fairness and justice cannot abide the detention of individuals who have never been charged with any offense, yet who remain in captivity, for many years, despite having been cleared for release or transfer after a thorough review. In addition, this indefinite detention remains, in the words of 25 retired military flag officers, "an effective recruiting tool for our enemies."[3]

- Recognizing the practical and political obstacles to immediate closure, we suggest that the strategy should be to reduce the prison population steadily and incrementally, adamantly resisting any suggestion to add new detainees, with the goal of winnowing the population down to a small number of detainees who ultimately can be handled through transfers, prosecutions, and/or other arrangements.

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[2] U.S. Gen. Accountability Office, *Guantanamo Bay Detainees: Facilities and Factors for Consideration if Detainees Were Brought to the United States* (Nov. 2012) at 9, available at http://www.gao.gov/assets/660/650032.pdf (hereinafter, "November 2012 GAO Report").

[3] Letter from Retired Generals and Admirals to President Barack Obama (Jan. 9, 2012), available at http://www.humanrightsfirst.org/wp-content/uploads/Retired-Generals-Admirals-on-Ten-Year-Anniversary-of-GTMO.pdf.

- For many of the 86 individuals who have been cleared for release, a continuing obstacle to transfer is Section 1028 of the National Defense Authorization Act, which establishes significant obstacles preventing detainee transfers to foreign countries. This ill-advised statute infringes on executive authority, unwisely micromanages the difficult task of dealing with individual detainees, and results in a freeze in which the clear losers are the human beings who remain locked up, day after day, long after they have been cleared for release. In September, 2012, one such individual, Adnan Farhan Abdul Latif, committed suicide, apparently out of desperation. There remains some risk of recidivism by some of the detainees – as is the case whenever any prisoner is released from any prison – but those risks have been overstated and they should not paralyze the entire mechanism of detainee transfer and release.[4] However, while Section 1028 imposes significant obstacles to release and should be repealed, it provides a path for release or transfer of detainees through Executive action that culminates in a national security waiver by the Secretary of Defense. We urge the Administration to direct the Secretary of Defense to take actions to satisfy the requirements, wherever possible, for issuing waivers as specified in Section 1028.

- Another significant problem with detainee transfers is the unsettled situation in Yemen, which according to the U.S. Government Accountability Office affects 30 of the 86 detainees who have been cleared for transfer.[5] There is no easy solution to this problem, but the case of the Uighurs shows that creative solutions are possible. President Obama's lifting of the ban on transfers to Yemen is a constructive first step, welcomed by the Yemeni government, which has indicated an interest in cooperation. The detainees from Yemen should not be treated as a monolithic group; those among them who have been judged to present the lowest risk should be repatriated or transferred to a third country. A gradual process of transfers would be better than no process at all. More broadly, we suggest that a priority of the newly-appointed senior envoy Clifford Sloan should be to develop a concrete, sustainable plan to allow for the release of all of the Yemeni detainees who have been cleared for release.

- For those detainees who have engaged in criminal conduct, we urge prosecutions in each case where in the professional judgment of DOJ prosecutors, the admissible evidence would support a prosecution. We agree with the Obama Administration that there be a strong presumption in favor of civilian-court prosecutions, and we believe the NDAA prohibition on prosecutions in U.S.

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[4] In a report dated September 5, 2012, the Director of National Intelligence found only three confirmed cases of "reengagement" among the 70 detainees who have been released since January 2009. This is a rate of only 4.3%. *See* Director of Nat'l Intelligence, *Summary of the Reengagement of Detainees Formerly Held at Guantanamo Bay, Cuba* (Sept. 5, 2012) at 1, available at http://www.dni.gov/files/documents/Newsroom/Reports%20and%20Pubs/Reports%20and%20Pubs%202012/Summary%20of%20the%20Reengagement%20of%20Detainees%20Formerly%20Held%20at%20GTMO.pdf.

[5] *See* November 2012 GAO Report at 9.

courts, Section 1027, is profoundly misguided. The one Guantanamo detainee who to date has been transferred to New York for prosecution, Ahmed Ghailani, was convicted in 2010 for his role in the 1998 East Africa embassy bombings, and is now serving a sentence of life without possibility of parole at the "Supermax" prison in Florence, Colorado.[6] The legitimacy of Ghailani's conviction and sentence are unquestioned. Despite the hyperbole, there were no disruptions or problems at the courthouse in lower Manhattan during his trial.

- A particular challenge is how to deal with the 46 detainees at Guantanamo who, based on the findings of the 2009 Task Force, cannot safely be released but also cannot feasibly be prosecuted.[7] In his National Archives speech of May 2009, President Obama described this as "the toughest single issue that we will face."[8] Although the legality of detaining these individuals has generally been affirmed by our courts, and the 2009 Task Force found that they pose a real threat, it is unrealistic and legally untenable for them to be held indefinitely without charge or trial. As former Defense Department General Counsel Jeh Johnson observed in a thoughtful address at Oxford University, the armed conflict against al Qaeda is *not* perpetual and indefinite; to the contrary, "'[w]ar' must be regarded as a finite, extraordinary and unnatural state of affairs," and "[p]eace must be regarded as the norm toward which the human race continually strives."[9] While we recognize that terrorist threats from a variety of sources can be expected to continue, at some point, hopefully sooner than we expect, the armed conflict against al Qaeda will be over and the legal justification for continued long-term detention without trials will evaporate.[10] We suggest that the planned drawdown of combat troops in Afghanistan in 2014 could provide the impetus, politically and legally, to re-examine the cases of the long-term detainees, whether through Periodic Review Boards – which the Obama Administration has just announced it will activate – or otherwise, with a view toward eventual prosecution, transfer, or release as appropriate.

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[6] See U.S. Att'y's Office for the S. Dist. of N.Y., *Ahmed Khalfan Ghailani Found Guilty in Manhattan Fed. Court of Conspiring in the 1998 Destruction of United States Embassies in E. Africa Resulting in Death* (Nov. 17, 2010), available at http://www.fbi.gov/newyork/press-releases/2010/nyfo111710a.htm.; Transcript of Sentencing at 71, *United States v. Ghailani*, S10 98 Cr. 1023 (LAK) (No. 1098).

[7] *See* November 2012 GAO Report at 9. This number now may be substantially higher since the Chief Prosecutor has determined that at least 15 additional detainees cannot be prosecuted on charges of "material support" for terrorism. See page 6, *infra.*

[8] *Remarks by the President on Nat'l Sec*., Nat'l Archives (May 21, 2009), available at http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

[9] Jeh Charles Johnson, Gen. Counsel of the U.S. Dep't of Def., *The Conflict Against Al Qaeda and its Affiliates: How Will It End?*, Address at the Oxford Union, Oxford Univ. (Nov. 30, 2012), available at http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/.

[10] Although the question is settled as a matter of domestic U.S. law, there is today a lack of consensus in some quarters as to whether the United States is currently engaged in an armed conflict with global reach under international law.

- As noted in a recent study by the General Accountability Office, moving Guantanamo detainees to secure prison facilities in the United States may be a viable option for the future.[11] To date, political opposition and statutory prohibitions have prevented such a step, *see, e.g*., NDAA Sections 1026 and 1027, but it should be explored as a cost-efficient alternative that would help achieve the goal of closing Guantanamo. However, moving detainees to the U.S., in the long run, should not be a substitute for the eventual prosecution, transfer, or release of such detainees.

- It is essential that Guantanamo detainees continue to have reasonable access to counsel and to the federal courts to test the legality and circumstances of their detention. Such access is mandated by the Supreme Court's decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), which affirmed the constitutional rights of Guantanamo detainees to petition Article III courts for a writ of habeas corpus. In 2012, the Justice Department sought to impose new restrictions on counsel access for detainees whose habeas cases have been terminated. The government's position was rejected by Chief Judge Lamberth of the U.S. District Court for the District of Columbia. *See* Memorandum Opinion, *In re: Guantanamo Bay Detainee Continued Access to Counsel*, Miscellaneous No. 12-398 (RCL) (Sept. 6, 2012) (No. 1009). On December 14, 2012, the DOJ abandoned its appeal of Chief Judge Lamberth's well-reasoned decision, but the government continues to throw up roadblocks to counsel access for the Guantanamo detainees. Chief Judge Lamberth's recent decison directing the cessation of invasive groin searches of detainees in connection with meetings with their attorneys (a decision that was recently stayed by the D.C. Circuit).[12] offers pointed criticism of the government's continuing interference with reasonable counsel access at Guantanamo.

- Finally, we recommend that the section of the Military Commisions Act of 2006 that bars judicial review relating to any aspect of the detainees' detention, treatment or conditions of confinement (28 U.S.C. §2241(e)(2)) be repealed. As the detainees face endless imprisonment, many without trial, it becomes more important to permit judicial review of the conditions under which they are kept. The current hunger strike, the resulting force-feeding of many of the strikers, and other aspects of the conditions at Guantanamo should have the benefit of judicial scrutiny, as do criminal penal institutions in the United States.

Inexorably tied with the Guantanamo facility is the military commission system installed there. We believe that the heavy reliance being placed on these tribunals to try detainees is seriously misplaced. The record of the past 20 years overwhelmingly demonstrates that the

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[11] *See* November 2012 GAO Report.

[12] *In re Guantanamo Bay Detainee Litigation*, Miscellaneous No. 12-mc-398 (RCL) (D.D.C, July 11, 2013).

Article III courts are up to the challenge of handling even the most complex terrorism cases.[13] The lengthy roster of just, credible, and, when appropriate, tough Article III prosecutions is a testament to the dedication and professionalism of the judges, prosecutors, defense counsel, and agents who have handled these cases. Another strength of civilian prosecutions is that they integrate our citizenry as jurors and trial observers. Our justice system is recognized at home and abroad as a bulwark of due process and procedural fairness and, indeed, as one of the central hallmarks of our democratic system of government. We should continue to make full use of it as a proven, effective part of our nation's counterterrorism strategy.

Although military commissions have a long history going back to the Revolutionary War, the attempt to re-introduce them as they were constituted after 9/11 was fundamentally flawed, culminating in the Supreme Court's 2006 decision finding that the commissions regime was unlawful under the Geneva Conventions.[14]

In 2009, Congress enacted legislation which significantly improved the discredited predecessor system. We commend Brigadier General Mark Martins for his efforts as Chief Prosecutor to promote due process, transparency, and professionalism in the reformed military commissions.[15] In our observations of the proceedings, we have found the prosecution, defense counsel and the tribunal officials are working hard to achieve these aims. Nevertheless, and although it is premature to render any judgment about the legitimacy and effectiveness of the reformed commissions, it must be acknowledged that there continue to be problems with this parallel system of justice:

- The commissions have proceeded at an agonizingly slow pace. It is hard to believe, for example, that the individuals accused of perpetrating the 9/11 attacks have still not been brought to justice.

- Because of their novelty, the commissions are still, in some areas, "making it up as they go along." In contrast with the Article III courts, which rely on a robust body of precedent and a deep and experienced group of lawyers and judges, the

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[13] In a 2011 article, former Assistant Attorney General David S. Kris compiles voluminous evidence documenting the proven effectiveness of the criminal justice system in dealing with accused terrorists. David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. Nat'l Security L. & Policy 1, 13-26 (Jun. 26, 2011), available at http://www.jnslp.com/2011/06/26/law-enforcement-as-a-counterterrorism-tool/. Mr. Kris' paper cites example after example in which the civilian court system, and FBI and DOJ investigators, developed critical intelligence; thwarted ongoing plots; and secured credible, just convictions and severe sentences. *Id*. at 14-17 (citing prosecutions of, among others, Ouassama Kassir, Ahmed Omar Abu Ali, Zacarias Moussaoui, Iyman Faris, John Walker Lindh, Hosam Maher Husein Smadi, Najibullah Zazi, David Headley, Tahawwur Rana, Faisal Shahzad, and Ahmed Ghailani); *see also* Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts* (2008) (citing and discussing statistical data and scores of examples of successful Article III terrorism prosecutions dating back to the 1980s); Richard B. Zabel & James J. Benjamin, Jr., Human Rights First, *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts, 2009 Update and Recent Developments* (2009) (same).

[14] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

[15] *See* Brigadier Gen. Mark Martins, Chief Prosecutor, Military Comm'ns, *Legitimacy and Comparative Law in Reformed Military Comm'ns*, Remarks at the N.Y.C. Bar Ass'n (Jan. 10, 2012), available at http://www2.nycbar.org/pdf/2190_001.pdf.

reformed military commissions sometimes find themselves in uncharted waters. This is a real problem, especially where the cases are so difficult.

- The commissions are hobbled by their limited jurisdiction. In *Hamdan v. United States*, the D.C. Circuit reversed the conviction of a military commission defendant on grounds that the offense of conviction – material support for terrorism – was not a war crime under international law and thus was not amenable to prosecution before a military commission for conduct predating the 2006 MCA's passage.[16] A similar issue is presently before the D.C. Circuit in the case of Ali Hamza Ahmad Suliman al Bahlul, where the principal charge— conspiracy—is also not a war crime under international law. By contrast, in a civilian court prosecution, there would be no doubt about the court's jurisdiction to adjudicate these charges against a terrorism suspect. As a result of *Hamdan*, General Martins felt compelled to reduce the number of detainees who are expected to be charged through the military commissions system from 35 to no more than 20, including the 14 detainees already charged, thus exacerbating the problem of prolonged indefinite detention discussed above.[17]

- Defense counsel – who are of course essential to any legitimate system of justice – have been subjected to particular burdens and difficulties in the military commissions proceedings. Due in part to the security restrictions, defense counsel have struggled with basic requirements such as having privileged communications with their clients and managing the difficult challenges of pretrial preparation and mounting a defense. Some of the most problematic restrictions were imposed by a prior Guantanamo commander, illustrating the impracticality of carrying out high-profile, complex prosecutions in a remote location.[18]

- Notwithstanding the good intentions and dedicated efforts of the military and civilian lawyers handling the commissions, we believe there will be continuing suspicions that the commissions remain a form of "second class" justice and that the decisions about whom to prosecute in commissions are based on dubious considerations. In short, it will be a real challenge for military commissions to earn the same legitimacy as civilian courts or courts martial.

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[16] *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. Oct. 16, 2012).

[17] Jane Sutton, *United States scales back plans for Guantanamo prosecutions*, Reuters (June 11, 2013) (http://www.reuters.com/article/2013/06/11/uk-usa-guantanamo-idUKBRE95A0P320130611).

[18] *See* Letter from Samuel W. Seymour, President, New York City Bar Association, to Jeh C. Johnson, Gen. Counsel, United States Dep't of Def. (Apr. 18, 2011), available at http://www2.nycbar.org/pdf/report/uploads/20072108-LettertoDeptofDefensereProtectiveOrderGoverningCounselAccesstoDetainees.pdf (objecting to Protective Order and Procedures for Counsel Access to Detainees Subject to Military Comm'n Prosecution at the United States Naval Station in Guantanamo Bay, Cuba, dated Mar. 4, 2011).

Although we recognize the need to continue with the military commissions cases that are now pending, we are gravely concerned about the prospect of military commissions becoming institutionalized as a parallel system of justice for the long term. The current armed conflict is bound to end – and hopefully sooner rather than later. Accordingly, we urge that no new cases be referred to military commissions (including any new cases against existing Guantanamo detainees) and that, instead, efforts focus on completing the existing cases promptly, fairly, and in a manner that as nearly as possible comports with the procedures and norms applicable to civilian courts and/or courts martial. Should there be any future military commission prosecutions, we recommend that they occur within the United States, and not at Guantanamo, and that they be limited to a very small number with a clear and overriding nexus to armed conflict and international war crimes.

In conclusion, we urge Congress and the Obama Administration to take all necessary actions to close the Guantanamo detention facility and provide due process and fair treatment to all detainees in accordance with the basic principles on which this nation was founded.