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CITY BAR

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The Honorable Bill Frist
United States Senate Majority Leader
509 Hart Senate Office Building
Washington, DC 20510

Dear Senator Frist:

I am writing on behalf of the Association of the Bar of the City of New York¹, to urge you to speak out and act in opposition to the Administration's apparently imminent issuance of a revised Army Field Manual on Intelligence Interrogation. Late last year, the Congress passed the McCain Amendment on treatment of enemy detainees in H.R. 2863, the Fiscal Year 2006 Department of Defense Appropriations Conference Report. President Bush signed the Defense Authorization Act, including the amendment, into law in January. The Amendment sought to preserve long-established basic standards of treatment for enemies detained by the United States Government in times of war, and was an important step forward in the fight to protect our servicemen and women, American values, and America's relationships and reputation around the world.

By all appearances, the Department of Defense intends, imminently, to issue a new Field Manual and accompanying directive which will fundamentally undercut the McCain Amendment by rewriting the document which the amendment sought to enshrine as the "gold standard" for prisoner treatment. The Department's position is founded on the premise that a class of "unlawful combatants" is not entitled to Geneva Convention protections. This premise relies upon a misapprehension of the law and has distorted the debate. Although there often are, in any conflict, detainees who are not entitled to the full complement of prisoner of war protections provided in the Geneva Convention Relative to the Treatment of Prisoners of War, all those we detain are, first and foremost, entitled to the substantial fundamental protections guaranteed by Article 3, common to all four Geneva Conventions and most are "protected persons" under the Fourth Geneva Convention which provides further protections. The question, thus, is not whether certain detainees are entitled to "Geneva" protection, but what sort of Geneva protection. By 1965, the Vietnam-era field manual explicitly acknowledged the distinction between prisoners of war and insurgents, the latter being subject to the lesser, but still substantial protections of Common Article 3. Article 3 provides that detainees "shall in all

¹ The Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City, but also from around the United States and from 50 other countries.

circumstances be treated humanely” and prohibits the following acts “at any time and in any place whatsoever”: “violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;” and “outrages upon personal dignity, in particular humiliating or degrading treatment.”

Although Secretary Rumsfeld, in a May 17 appearance before the Senate Appropriations Committee’s defense subcommittee, acknowledged an ongoing debate about the classification of detainees as prisoners of war or unlawful combatants as it relates to the revision, there has pointedly been no guarantee by the Administration of the applicability of Common Article 3 to all detainees.

Putting aside the Administration’s willingness to disregard the Congress’ clear legislative message expressed in the McCain Amendment, the willingness to precipitously modify settled, effective practices -- derived from decades of experience and reflected in the historical development of the predecessor manuals -- will further chip away at our nation’s moral high ground in the War on Terror.

Moreover many commentators within and without the Armed Services have attributed the notorious mistreatment of detainees to the confusion and misunderstandings among the troops on the receiving end of ambiguous orders and rules of engagement. Then they are the first to be penalized for abuses that emerge. Men and women under the stress of combat need the clear guidance most effectively provided by a single standard of treatment for all detainees. That standard would have to be the POW gold standard.

As you consider this matter, the Association would be pleased to provide advice and historical perspective on the rule of law with respect to treatment of detainees. In that regard, we refer you to our report, “Human Rights Standards Applicable To The United States’ Interrogation of Detainees,” (published just before public disclosure of the Abu Ghraib prison scandal) and its Supplement (published just after Abu Ghraib), in which our Committees on International Human Rights and Military Affairs and Justice discussed at length the legal standards applicable to the interrogation of detainees (both available online at http://abcny.org/Publications/record/Vol_59_%20no_1.pdf, at pp. 183 and 271.)

Thank you for considering our views. If you have the need for further information in your consideration of this important matter, we would be glad to provide assistance.

Respectfully,



Barry Kamins