

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

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October 10, 2017

President Donald Trump  
The White House  
600 Pennsylvania Ave NW  
Washington, DC 20500

Dear Mr. President,

On behalf of the New York City Bar Association, we write to express concern with the fact that your Administration has not yet publicly articulated clear policies regarding several critical counter-terrorism and use of force issues. Specifically, we call upon your Administration to clarify its positions relating to the detention and treatment of accused terrorists and the conduct of military and paramilitary operations. Such clarity is vital for at least three reasons: to ensure that our nation observes fundamental rights and the rule of law even as it fights against terrorism, to provide the guidance that our soldiers and others need and deserve as they carry out this important mission, and to avoid the strategic drift that would otherwise accompany *ad hoc* decision-making by our armed and intelligence services and any associate forces.

Since its founding in 1870, the City Bar has worked to advance and defend the rule of law. And particularly since 9/11, the City Bar has issued thoroughly researched and reasoned reports and letters to promote America's long-term security in part through respect for lawful and humane policies.<sup>1</sup> The principal lesson we have derived from our work is that full and faithful respect for the rule of law strengthens our country. Based on time-tested constitutional and international norms, it is a source of strength, not vulnerability. It is with this conviction that we urge you to clarify your Administration's positions on these life and death issues.

#### **DETENTION AND TREATMENT OF DETAINEES**

The current lack of clarity in U.S. policies surrounding the interrogation and conditions of detention of detainees is troubling. In January, reports surfaced that the Administration had prepared a draft Executive Order on Detention and Interrogation of Enemy Combatants (the "draft EO"). As described in these reports, the draft EO appeared to contemplate several significant policy changes that raise concerns, including the reopening of so-called CIA Black

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<sup>1</sup> See Appendix of prior City Bar reports and letters related to topics discussed in this letter.

Sites.<sup>2</sup> Because of its troubling content, it is important that the Administration release and announce what has become of this draft EO.

Without any published guidance in this area, the public is at a loss to know how the Administration holds people thought to be plotting or engaging in terrorist activities, and how it intends to detain them going forward. This kind of ambiguity in the past has led to the indefensible legal limbo at Guantanamo. The issue takes on particular urgency when a U.S. citizen is taken into U.S. custody (as reports indicate recently happened in Syria) presumably without access to counsel or charges being filed.<sup>3</sup> If confirmed, this lack of due process would appear to violate the individual's constitutional rights and undermine our criminal justice system. We believe it is incumbent upon your Administration to inform the American public of what you plan to do with this person and any future detainees thought to have been engaged in terrorist acts so that appropriate public discussion can take place.

Moreover, we understand that you have not yet appointed a Defense Department Special Envoy for Guantanamo Closure, leaving the future of this facility and the detainees housed there entirely open to question. As described in detail in multiple prior City Bar reports and communications, we believe that the continuing existence of the detention facility at Guantanamo itself serves as a symbol of lawlessness, brutality and unilateralism.<sup>4</sup> It remains a blight on America's reputation, an impediment to international cooperation and a recruiting tool for terrorists. It also makes it more difficult for the U.S. to pursue its diplomatic agendas with other nations around the world. We urge you to submit any detainees to the criminal justice system (or to the military justice system, as appropriate) and to close the facility at Guantanamo. Particularly, as to those cleared for release – where the U.S. does not claim to have a legal basis to continue to hold them – we urge you to immediately work to arrange their transfers out of Guantanamo.

## **DRONES AND THE RULES OF ENGAGEMENT**

While operational secrecy and tactical flexibility are essential instruments of military programs, the lack of clarity in U.S. military and paramilitary operations is also a matter of public concern. In particular, unofficial reports suggest that your Administration may loosen the rules of engagement for soldiers and may withdraw or loosen the 2013 Presidential Policy Guidance outlining Procedures for Approving Direct Action against Terrorist Targets.<sup>5</sup> One apparent consequence is that civilian casualties have already been increasing throughout the Middle East.<sup>6</sup> While the House of Representatives considers measures to require reporting on

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<sup>2</sup> We discuss the draft EO in greater detail at page 2 of our *Recommendations Respectfully Submitted to the Trump Administration Regarding National Security Policies* (see Appendix).

<sup>3</sup> Spencer Ackerman, "[A Captured American ISIS Fighter Could Undermine the Whole War](#)," *Daily Beast* (Sept. 9, 2017).

<sup>4</sup> See Appendix for the City Bar's long record of calling for the closure of Guantanamo and the use of the federal criminal justice system to prosecute terrorism.

<sup>5</sup> Charlie Savage and Eric Schmitt "[Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids](#)," *New York Times*, (Sept. 21, 2017).

<sup>6</sup> *Combined Joint Task Force – Operation Inherent Resolve Monthly Civilian Casualty Report Release No: 17-295*, Cent. Com, August 4, 2017, available at <http://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/1267466/combined-joint-task-force-operation-inherent-resolve-monthly-civilian-casualty/>

civilian casualties from strikes inside and outside of areas of active hostilities, we believe that the nation's interests would be best served by greater transparency and more explicit rules and policies guiding the use of force.<sup>7</sup>

Ultimately, clear rules of engagement are essential for ensuring the legal protections that allow operators the necessary clarity of purpose and conscience, and within the limits of the laws of armed conflict; we owe them this much. To that end, the City Bar calls on your Administration to make public, at the earliest feasible time and in as much detail as possible, any existing or proposed rules for the conduct of drone operations and for other direct action as well as any studies of their impact on non-combatants.

#### **AUTHORIZATION FOR THE USE OF MILITARY FORCE**

The vitality of the republic relies on transparency in government so the people may hold their representatives responsible. At the same time, people risking their lives on our behalf rely, in turn, on their civilian leaders to provide moral and legal leadership to ensure that their service remains honorable and sensible. To that end, the City Bar believes that, absent the need to defend against actual or imminent threats of attack against the U.S., the use of armed force requires clear authorization from Congress. The 2001 Authorization for the Use of Military Force – which requires, at a minimum, some connection to the 9/11 attacks – has been stretched beyond reasonable intent. We do not believe that it extends, for instance, to allow any strike against North Korea. For the protection of our service members, for the integrity of the republic and in order to build stronger coalitions, we urge you to seek new authorization for any uses of force beyond our borders, and only to seek such authorization, or to engage in military intervention abroad, when the U.S. is also in full compliance with the requirements of international law.

In sum, while ambiguity and secrecy play key roles in promoting national security, they must also be weighed against the costs to securing a meaningful rule of law system and effectively guiding our military. At this point in your Administration, we do not see evidence that this balance has been fairly struck.

Respectfully,

John S. Kiernan  
President, New York City Bar Association

Mark R. Shulman  
Chair, Task Force on National Security and the  
Rule of Law

cc:

Hon. James N. Mattis  
US Department of Defense

Hon. Michael R. Pompeo  
Central Intelligence Agency

Hon. H.R. McMaster  
National Security Council

Hon. John Kelly  
White House Chief of Staff

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<sup>7</sup> See Appendix for City Bar's record of calling for transparency with respect to the use of drones and targeted killings.

Hon. Bob Corker  
Chair, Senate Committee on Foreign Relations

Hon. Ben Cardin  
Ranking Member, Senate Committee on Foreign Relations

Hon. John McCain  
Chair, Senate Committee on Armed Services

Hon. Jack Reed  
Ranking Member, Senate Committee on Armed Services

New York Congressional Delegation

## APPENDIX

December 2001 Report, *Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? A Report on The President's Military Order of November 13, 2001 Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," available at*

[http://www.nycbar.org/pdf/report/should\\_the\\_laws.pdf](http://www.nycbar.org/pdf/report/should_the_laws.pdf)

August 2002 Report, *The Legality and Constitutionality of the Presidential Authority to Initiate an Invasion of Iraq, available at*

<http://www.nycbar.org/pdf/report/uploads/2002640-ReportonLegalityandConstitutionalityofthePresidentsAuthoritytoInitiateanInvasiononIraq.pdf>

April 1, 2004 Report, *Human Rights Standards Applicable to the United States' Interrogation of Detainees, available at*

[http://www.nycbar.org/pdf/report/Human\\_Rights.pdf](http://www.nycbar.org/pdf/report/Human_Rights.pdf)

September 15, 2006 letter from City Bar President Barry M. Kamins to Senate Majority and Minority Leaders Frist and Reid opposing the Administration's proposed Military Commissions Act of 2006 (the "Act"), *available at*

<http://www.nycbar.org/pdf/report/CommissionsActLetterSenatorsSept15.pdf>

November 24, 2008 letter from City Bar President Patricia M. Hynes to President-Elect Barack Obama calling on the new Administration to close the detention facility at Guantanamo and to prosecute criminal wrongdoers in U.S. federal courts; to disclose and ensure transparency of the policies and procedures governing any U.S. detention operations abroad; and to comply with international law with respect to the treatment of detainees abroad, *available at*

[http://www.nycbar.org/pdf/report/TransitionLetter\\_President\\_Obama.pdf](http://www.nycbar.org/pdf/report/TransitionLetter_President_Obama.pdf)

December 15, 2010 letter from City Bar President Samuel W. Seymour to Senate Majority and Minority Leaders Reid and McConnell opposing legislation which would terminate funding to transfer a non-citizen to the U.S. for any purpose and establishing that the federal criminal justice system is well-equipped to prosecute terrorism, *available at*

<http://www.nycbar.org/pdf/report/uploads/20072024-LettertoUSSenateresection1116reTransferofNon-CitizenstoUS.pdf>

October 11, 2011 letter from City Bar President Samuel W. Seymour to Attorney General Eric H. Holder calling on the Administration to provide information and clarification on the position of the U.S. Government on the law governing targeted killings, *available at*

[http://www2.nycbar.org/pdf/report/uploads/8\\_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf](http://www2.nycbar.org/pdf/report/uploads/8_200721892011-10-09TaskForceletterreLawofTargettedKillings.pdf)

December 19, 2012 letter from City Bar President Carey R. Dunne to President Barack Obama calling on the Administration to close the detention facility at Guantanamo and to prosecute in U.S. courts those that have engaged in criminal conduct; applauding the January 2009 Executive Order banning enhanced interrogation techniques; and urging greater transparency regarding the use of drones and targeted killings, *available at* <http://www2.nycbar.org/pdf/report/uploads/LettertoPresidentre.NationalSecurity12.19.12.pdf>

May 3, 2013 letter from City Bar President Carey R. Dunne to President Barack Obama urging that the Administration take immediate steps to release or transfer the 86 Guantanamo detainees who were cleared for release, *available at* <http://www2.nycbar.org/pdf/report/uploads/20072476-LettertoPresidentObamaonReleaseofGuantanamoPrisoners.pdf>

July 24, 2013 Statement of the Association of the Bar of the City of New York to the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights regarding Closing Guantanamo: The National Security, Fiscal and Human Rights Implications, *available at* <http://www2.nycbar.org/pdf/report/uploads/20072550-ClosingGuantanamo--TheNationalSecurityFiscalHumanRightsImplications.pdf>

January 2017 Recommendations Respectfully Submitted to the Trump Administration Regarding National Security Policies, *available at* [http://s3.amazonaws.com/documents.nycbar.org/files/20073228\\_NatISecurityTrumpTransition\\_FINAL\\_1.30.17.pdf](http://s3.amazonaws.com/documents.nycbar.org/files/20073228_NatISecurityTrumpTransition_FINAL_1.30.17.pdf)