The Association of the Bar of the City of New York

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Hon. Arlen Specter
Chair, Committee on the Judiciary
United States Senate
Washington, DC 20510

Hon. Patrick Leahy
Ranking Member, Committee on the Judiciary
United States Senate
Washington, DC 20510

Nomination of William J. Haynes II

Dear Senators Specter and Leahy:

I am writing on behalf of the Association of the Bar of the City of New York. 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 throughout the United States and from 50 other countries. Founded in 1870, the Association has a long history of engagement in issues of legal policy of concern to the profession and has been a continuous advocate of the Rule of Law at home and around the world. The Association has been a long-standing advocate of international humanitarian law. Indeed, one century ago officers of the Association represented the United States at the Hague conferences which produced an important forerunner to the Geneva Conventions. Today we remain committed to the preservation of this legacy.

I am writing to you with respect to the President's nomination of Mr. William J. Haynes II, who currently serves as General Counsel of the Department of Defense ("DOD"), to a seat on the United States Court of Appeals for the Fourth Circuit. The Association does not, as a matter of policy, take positions on nominees for federal courts outside of the Second Circuit and the Supreme Court, and thus is not taking a position with regard to Mr. Haynes' nomination. Nevertheless, in the course of the Association's work on questions concerning detention and interrogation policy for the Global War on Terror, and arrangements for the creation of military commissions to try detainees, the Association has communicated with Mr. Haynes, and has developed some concerns regarding his actions as DOD General Counsel. We hope that the Judiciary Committee can take these concerns into account in the review process in eliciting comments and clarifications from Mr. Haynes.

(1) *Assurances Concerning Torture, and Cruel, Inhuman and Degrading Treatment.* In correspondence to Senator Leahy dated June 25, 2003, Mr. Haynes furnished assurances that the United States does not "permit, tolerate or condone" torture as defined in the Federal anti-torture statute. He further provided assurance that United States policy is to treat all detainees consistent

with its commitment not to use "cruel, inhuman and degrading treatment ("CID")" as precluded in article 16 of the Convention Against Torture. A copy of this correspondence was furnished to the Association in response to an inquiry that raised similar concerns to those voiced in Senator Leahy's letter of June 2, 2003 to Condoleezza Rice. Documents subsequently surfacing, including in particular the Department of Defense Working Group Report and a November 27, 2002 memorandum from Mr. Haynes to the Secretary of Defense cause us to question these assurances. In particular, it appears that the administration adopted a posture qualifying the application of the commitment not to use CID in DOD detention facilities, notably including Guantánamo. We believe that Mr. Haynes' views on the legal standards applicable should be explored and that he should have an opportunity to explain the apparent discrepancies between his assurances and the internal policy formulation process he oversaw.

(2) *Specific Advice Concerning Use of Interrogation Techniques.* Mr. Haynes issued a memorandum to the Secretary of Defense dated November 27, 2003 in which he recommended approval of a series of "extreme" interrogation techniques, while limiting the general application of the most aggressive techniques.[1] The approved extreme techniques included threats to kill a detainee's family members, waterboarding, forced nudity and the use of dogs to induce stress. The Secretary of Defense apparently relied upon Mr. Haynes' recommendation in approving the techniques in question. The Secretary of Defense subsequently rescinded this approval. The list of techniques approved by Mr. Haynes raise profound questions of compliance with United States law, including the Uniform Code of Military Justice, as well as policy articulated by the Congress, policy statements of the President, and assurances given by Mr. Haynes. We believe that Mr. Haynes should be given an opportunity to explain his reasoning in issuing this memorandum and the entire policy formulation process associated with it.

(3) *Commander-in-Chief Authority.* Mr. Haynes commissioned the preparation of a special Working Group Report on Detainee Interrogations (the "Working Group Report") and provided guidance in its preparation. The Working Group Report, issued on April 4, 2003, contains a discussion of commander-in-chief authority which includes the assertion that applicable "constitutional principles preclude an application of Section 2340A [the anti-torture statute] to punish officials for aiding the President in exercising his exclusive constitutional authorities."[2] The discussion is legally incompetent, particularly in that it fails to cite passages of the Constitution (art. I, sec. 8, cls. 10-11) which contradict this conclusion, or to discuss controlling Supreme Court precedent which dictate a contrary conclusion, most significantly *Youngstown Sheet & Tube Co. v. Sawyer*. We believe that Mr. Haynes should explain his reaction to the quoted statement and why he apparently accepted the report and allowed authorized its further dissemination notwithstanding the professional incompetence that characterizes it. Alternatively, if Mr. Haynes stands by the position taken by the Working Group, he should explain the legal rationale and authority for that position, which would be helpful in understanding his views on the separation of powers.

(4) *Definition of Torture.* The Working Group Report also contains an extensive passage defining torture in an impermissibly restrictive fashion. This language appears largely derived from a memorandum issued by Jay Bybee at the Department of Justice to Alberto Gonzales dated August 1, 2002. This memorandum has since been repudiated by the Department of Justice and replaced by a memorandum dated December 30, 2004. We believe Mr. Haynes should explain his role in the redefinition of torture contained in the Working Group Report, the

[1] By "extreme interrogation techniques" we mean techniques beyond the scope authorized in Department of the Army Field Manual 34-52 (1992), which is widely accepted as a legally correct statement of the rules governing interrogation as required by the Law of Armed Conflict.
[2] *Reproduced in* Greenberg & Drahtel, eds., THE TORTURE PAPERS at 304 (2005).

subsequent withdrawal of the Bybee memorandum, and how it is that the Working Group Report stayed in place in light of that withdrawal and subsequent repudiation.

(5) *Availability of Specific Defenses.* The Working Group Report also discusses at length the availability of certain criminal law defenses as possible bases for the avoidance of criminal law liability by interrogators applying new interrogation guidelines. The defenses discussed include necessity, self-defense, military law enforcement action and superior orders. This discussion also appears substantially derived from the withdrawn and repudiated Department of Justice memorandum. Mr. Haynes should explain his reaction to the Working Group's claim of the availability of certain defenses.

(6) *"Unlawful Combatant."* From several documents, it appears that Mr. Haynes embraced a concept of "unlawful combatants" as individuals who are outside the scope of the Geneva Conventions, and, essentially without legal protections of any kind. While precedent does support a concept of "unlawful combatants," the suggestion that such individuals lack protection under the Geneva Conventions and other law seems highly questionable, and a number of district courts have declined to follow it. Some of those cases appear headed for the Fourth Circuit (*e.g., Padilla v. Rumsfeld*, decided earlier this week). We believe it would be useful for Mr. Haynes to explain his views on this issue. Considering Mr. Haynes' advocacy of the "unlawful combatant" concept and his position as counsel to a party, we believe it important to clarify his intention to recuse himself from cases in which this issue is raised.

(7) *Military Commissions.* Mr. Haynes played a key role in DOD arrangements for the creation of a special Military Commission to try detainees in the Global War on Terror pursuant to the President's Military Order. The Association and the American Bar Association have previously articulated reservations concerning these arrangements, which appear to us to undermine the basic due process assurances provided by the United States' exemplary court martial system. Mr. Haynes should explain why he believes derogations from the court martial system were necessary and appropriate and why they were adopted after minimal consultation with the Judge Advocates of the services and without consultation with Congress.

(8) *Public Release of Documents Relevant to Legal Policy Formulation.* Finally, we at the Association believe that transparency promotes informed public assessment and decision making. Accordingly, we urge that you secure as complete an account as possible of both Mr. Haynes' legal position and supporting analysis with respect to the issues identified above. Such an account would include a more complete disclosure of documents both prior and subsequent to the memoranda referred to in this letter, as well as similar memoranda that have also been made public. A complete and relevant disclosure would also include any and all documents seeking and granting authorization for the practices that this letter discusses. Such disclosure, we believe, is far preferable for all concerned to the piecemeal press leaks that we have seen in the past year.

I wish to stress that the Association has not undertaken a review of Mr. Haynes' performance in prior positions, including as General Counsel at DOD or of his qualifications generally, nor does the Association express any view as to his suitability to serve as a federal judge. However, we feel strongly that the public interest would be served by a full inquiry into the matters identified above as his qualifications are reviewed by the Committee.

Respectfully submitted,

Bettina B. Plevan