National Security Council

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Memorandum For:
WILLIAM MARRIOTT

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From: HEINRICH. RON
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Subject: CALL FOR CLOSURE OF THE DETENTION FACILITY AT GUANTANAMO BAY

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SecDef

ACLU (DP) 1448

Hon. George W. Bush
President of the United States of America
The White House
1600 Pennsylvania Avenue NW
Washington DC
20500
United States of America

17 March 2008

Dear Sir,

Re: Call for closure of the detention facility at Guantanamo Bay

I note the call for the closure of the detention facility at Guantanamo Bay made by the Canadian Bar Association, the Paris Bar Association and the Law Society of England and Wales in their letter to you of 25th February 2008.

As President of the Commonwealth Lawyers' Association (CLA), I too support that call.

The CLA is an international organisation which exists to promote and maintain the rule of law throughout the Commonwealth and ensure that an independent and efficient legal profession, with the highest standards of ethics and integrity, serves the people of the Commonwealth. In the pursuit of these objectives, the CLA participates in a wide range of activities including advocacy, undertaking research projects, organising the biannual Commonwealth Law Conference and providing services to our members.

The CLA has submitted a number of amicus briefs to the United States Supreme Court on important issues in relation to the detainees at Guantanamo Bay. Copies of these are available at www.commonwealthlawyers.com

In 2002, the English Court of Appeal described the detentions at Guantanamo Bay as contravening "fundamental principles recognised by both [the United States and English] jurisdictions and by international law" and as involving detention in a "legal black hole".

In February 2006, a joint report published by five United Nations Special Rapporteurs reached a similar conclusion and recommended that "the United States Government should either expeditiously bring all Guantanamo Bay detainees to trial or should release them without further delay" and that "The United States Government should close the Guantanamo Bay detention facility without further delay".

In February of last year the Supreme Court of Canada itself held that: "It is an ancient and venerable principle that no person shall lose his or her liberty without due process according to the law... This principle emerged in the era of feudal monarchy, in the form of the right to be brought before a judge on a motion of habeas corpus. It remains as fundamental to our modern conception of liberty as it was in the days of King John".

It is this core principle which has been flouted by the Guantanamo Bay detentions and the merit of these views remains as strong today as when they were first expressed. The whole purpose of the remedy of habeas corpus considered by each of the Courts referred to above and by the Special Rapporteurs is to provide a swift means of testing the legality of detention by the Executive. As the Guantanamo Bay facility enters its sixth year of existence

that purpose has manifestly not been satisfied. It is long past the time that those held there should have been charged and tried before an independent tribunal respecting full fair trial rights or should have been released. The detention facility does little credit to a country with the proud traditions of the United States and should be closed now.

In view of the recent publicity given to the Military Commission process now underway for a small number of individuals at Guantanamo Bay I should also like to raise a number of specific concerns in respect of this process. Taken together they give rise to a very serious doubt as to whether the process is compatible with international law, particularly in circumstances where it is capable of leading to the imposition of the death penalty. My principal concerns are the following: first, the absence of any explanation as to why it is necessary for the trials to be presided over by military rather than civilian judges and the concern that this in turn gives rise to in relation to the independence of the Commissions from the Executive; secondly, the absence of any bar on the admission of evidence obtained by torture; and thirdly the potential under the system for the admission of secret evidence and the denial of access to potentially exculpatory evidence.

As to the second of these matters, the concern is particularly acute given the recent admissions made by United States authorities as to the use of "waterboarding". You may be aware that the Judicial Committee of the House of Lords recently considered the use of evidence obtained by torture. Lord Hope had this to say: "The law will not lend its support to the use of torture for any purpose whatever. It has no place in the defence of freedom and democracy, whose very existence depends on the denial of the use of such methods to the executive. Once torture has become acclimatised in a legal system it spreads like an infectious disease, hardening and brutalising those who have become accustomed to its use".

I am confident that you too would endorse this view.

Yours sincerely

Ron Heinrich
President
Commonwealth Lawyers' Association

SecDef

ACLU (DP) 1450