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The Honorable Carl Levin
Chairman
Committee on Armed Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your and Senator Feingold's September 5, 2002 letter concerning the designation of enemy combatants in the ongoing war against terrorism. Secretary Rumsfeld has asked me to answer your questions on behalf of the Department of Defense ("DoD"). I am sending a substantially identical letter to Senator Feingold.

Your letter addresses important issues that we take very seriously. Detaining enemy combatants is critical to winning any war, and Presidents have detained enemy combatants in every major conflict in the Nation's history, including recent conflicts such as the Gulf, Vietnam, and Korean wars. We are careful, however, to ensure that detainees are indeed enemy combatants, and we treat them humanely. In all wars, the fundamental purpose of our detention of enemy combatants remains the same: to prevent hostile forces from returning to assist our enemies and again posing a threat to the United States. As in other conflicts, our purpose in detention is not to punish, but to protect.

Where you submitted identical questions to both the Department of Justice ("DOJ") and DoD, we have sought to avoid duplication. DoD's responses to your questions are as follows:

1. *What is the operative definition of "enemy combatant" and what are the criteria used to determine whether a United States citizen will be designated an enemy combatant? If that definition is contained in a document, please provide a copy of that document and identify the source of the document as well as the agency or person responsible for maintaining the document. Please describe the basis for the definition and the process followed to arrive at the definition.*

An "enemy combatant" is an individual who, under the laws and customs of war, may be detained for the duration of an armed conflict. In the current conflict with al Qaida and the Taliban, for example, the term includes a member, agent, or associate of al Qaida or the Taliban. In applying this definition, we note our consistency with the observation of the Supreme Court of the United States in *Ex parte Quirin*, 317 U.S. 1

(1942): "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts are enemy belligerents within the meaning of the Hague Convention and the law of war." *Id.* at 37--38. There are no criteria for designating enemy combatants that are unique to United States citizens.

Please refer to DOJ's responses to questions 1 and 3 for further discussion of these issues.

2. *What is the process for designating a person an "enemy combatant"? What agency or individual has the responsibility to make such a designation? Is the ultimate authority to designate a United States citizen as an enemy combatant reserved for the President? If not, who else holds that authority? What role does the Department of Defense play in this process? Please describe the process that was used to designate Jose Padilla and Yaser Esam Hamdi as enemy combatants.*

The determination of enemy combatant status has traditionally resided with the military commander who is authorized to engage the enemy with deadly force. In this regard, the task ultimately falls within the President's constitutional responsibility as Commander in Chief to identify which forces and persons to engage or capture and detain during an armed conflict. Of course, there is no requirement that the President make such determinations personally, and in the vast majority of cases he does not do so. Rather, consistent with longstanding historical practice and applicable rules of engagement, the task is normally a function of the military command structure.

In the current conflict, military personnel ordinarily make enemy combatant determinations during combat operations, under the combatant commander's direction. As was the case with Mr. Hamdi, such determinations normally would not take into account the enemy combatant's citizenship. Under the laws of war and federal court precedent, enemy combatants who are United States citizens are subject to detention to the same extent as non-citizens.

With respect to individuals captured in the United States, to date DoD has detained only Abdullah al Muhajir, also known as Jose Padilla. The President, as Commander in Chief, determined that Mr. Padilla is an enemy combatant.

As the United States is in active habeas corpus litigation concerning the detention of Messrs. Hamdi and Padilla, it is more appropriate for DOJ to provide information about those cases. Accordingly, I refer you to the response from DOJ for additional explanation.

3. *Do the criteria for determining enemy combatant status vary depending upon whether an individual is a citizen of the United States? Do the criteria vary if*

the person is taken into custody outside the United States? Do they vary if the person is taken into custody on the battlefield?

Please see the DOJ response to this question, as well as my response to questions 1 and 2.

4. *What rights does a United States citizen designated as an enemy combatant have to challenge that designation other than the right to habeas corpus review? What is the scope of the detainee's right to counsel if the detainee seeks to challenge the enemy combatant designation?*

In this armed conflict against the al Qaida and the Taliban, a United States citizen designated as an enemy combatant may challenge his detention only by a petition for habeas corpus. Enemy combatants have no *right* to counsel to challenge their detention. During World War II, the United States detained hundreds of thousands of prisoners of war in the United States (some of whom were U.S. citizens). Providing access to counsel as a matter of right in such circumstances would set a potentially unsustainable precedent due to sheer numbers alone.

More importantly, giving enemy combatants a right of access to counsel for the purpose of challenging detention could threaten national security by interfering with active military operations. Collecting intelligence from detained enemy combatants during war provides critical information about the enemy's capabilities, operations, and plans. Providing such access to counsel could thwart our ability to collect this information and could imperil efforts to prevent further terrorist attacks.

Nevertheless, enemy combatants would of course receive access to counsel if they were made subject to criminal charges. As you may know, the rules of procedure for military commissions provide defendants with access to counsel at the expense of the government. *See* Military Commission Order No. 1, § 4(C) (Mar. 21, 2002).

Moreover, DoD reviews the status of all enemy combatants on a case-by-case basis to determine whether they should continue to be detained. Indeed, since we first captured or came to control detainees in Afghanistan, we have released many thousands, and we recently released additional detainees from the United States Naval Base in Guantanamo Bay, Cuba.

5. *What are the time limits on the government's authority to detain United States citizens designated as enemy combatants? The government has argued that "the authority to detain enemy combatants in time of war . . . is well established." Under the current circumstances, who determines when this time has expired and how will that determination be made?*

The United States may detain enemy combatants throughout the conflict (and thereafter if they are convicted of war crimes or other criminal offenses). Detaining enemy combatants during a conflict removes them from the battlefield, prevents them from waging war against the United States, and protects them from harm. It also provides us an opportunity to gather intelligence that may be vital to preventing further attacks. This detention is distinct from incarceration as punishment for violations of the laws of war or other crimes.

Military commanders may release enemy combatants before the conflict ends. Reasons for such a decision include determinations that enemy combatants no longer pose a threat, that they possess no further intelligence value, and that they have not committed any crimes. A "parole" or other agreement could prohibit these enemy combatants from fighting against the United States and subject them again to detention if they violate the agreement.

The government's political (as opposed to judicial) branches decide when hostilities have ended.

6. *According to published reports, the Administration is considering establishing a committee to determine whether United States citizens should be designated as enemy combatants. What is the timetable for establishing such a committee? What is the membership of the committee expected to be? What is the legal authority and basis for the use of such a committee? What procedures are being established to guide this committee?*

Military commanders normally determine enemy combatant status. The Administration has no plans to entrust this responsibility to a committee. Due to the gravity of such determinations, however, and due to the complexities posed by this war and our adversaries, we continually seek better ways to coordinate efforts and to facilitate accurate, timely communication of relevant information.

7. *Are U.S. citizens other than Hamdi and Padilla being held as enemy combatants? If so, how many and who are they? In each case, please describe the process that was used to designate each person as an enemy combatant. What are the Administration's procedures for notifying Congress and the American people that someone has been designated an enemy combatant?*

As you know, John Walker, evidently a United States citizen, was captured in Afghanistan and eventually detained by the United States Armed Forces as an enemy combatant. He was, of course, subsequently indicted on Federal criminal charges, transferred to the custody of Federal law enforcement officials, and convicted. He is currently serving a criminal sentence in a Federal penitentiary.

I am not aware that the United States is detaining any United States citizens other than Messrs. Hamdi and Padilla solely on the basis of their status as enemy combatants. The Administration is keeping Congress and the public appropriately informed with respect to the Hamdi and Padilla cases. We will continue to keep Congress appropriately informed with respect to enemy combatants who are United States citizens, should more such cases arise.

8. Has the Defense Department made any related changes to existing U.S. military regulations implementing the Geneva Conventions of 1949?

No. DoD has not changed its policies regarding treatment of individuals who qualify for a particular status under the Geneva Conventions of 1949.

Capturing and detaining a United States citizen, or any other human being, is not an activity DoD takes lightly. As in other armed conflicts in which our Nation has been engaged, the detention of enemy combatants serves a vitally important protective function. Equally important, however, the deliberate, conscientious, and humane manner in which we designate and detain enemy combatants reflects our values and character as a Nation. We are committed to defending the United States in accordance with our constitutional responsibilities, while preserving the constitutional rights of United States citizens. I believe that our actions are fully consistent with both commitments.

Sincerely,

William J. Haynes II

cc:
The Honorable John Ashcroft,
Attorney General of the United States
The Honorable John W. Warner, Ranking Member
Committee on Armed Services