

William H. Neukom
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, Illinois 60610-4714
(312) 988-5109
FAX: (312) 988-5100
E-mail: abapresident@abanet.org

September 27, 2007

Terry M. Henry
Senior Trial Counsel
Civil Division, Federal Programs Branch
U.S. Department of Justice
Washington, DC 20530

Dear Mr. Henry:

Denise Cardman, Acting Director of the ABA Governmental Relations Office, apprised me of your communications with her regarding the Department's desire to renew a 2005 agreement by the ABA, to identify, recruit and train pro bono counsel for unrepresented Guantanamo detainees who request the assistance of counsel in pursuing **habeas corpus petitions**.¹

The ABA agreed to participate in such a program because preserving access to the writ of habeas corpus long has been a core ABA concern, and because of the ABA's work to protect the habeas rights of persons deprived of their liberty by arrest or detention.² Moreover, in an April 29, 2005 letter to you, then-ABA President Robert Grey made it clear that:

We believe it is vitally important for all concerned, and particularly for our Nation's image as the leading exemplar of the fair administration of the rule of law, that every safeguard be provided to ensure the detainees receive the full access to counsel we have suggested above. Should we undertake this vital effort and subsequently find that barriers are presented which prevent meaningful representation, we would find it necessary to terminate our involvement.

Regrettably, two major barriers to providing effective assistance of counsel to detainees have arisen since July 2005 which make it necessary for the ABA to terminate its involvement, at least for the time being.

¹ See Letter from then-ABA President Robert J. Grey, Jr. to Deputy Assistant Attorney General Carl J. Nichols, dated July 19, 2005 (emphasis ours).

² See p. 2, Brief Amicus Curiae of the American Bar Association in Support of Petitioner in *Boumediene v. Bush*, No. 06-1195 and *Al Odah v. U.S.*, No. 06-1196, in the Supreme Court of the United States.

First, our 2005 agreement specifically contemplated the filing of habeas corpus petitions, and both the notification and request form were specific that a habeas corpus petition was the legal proceeding for which representation was being requested.

Since then, Congress has enacted two laws that have profoundly affected the legal rights of detainees. The Military Commissions Act (“MCA”), among other things, stripped all detainees of the right to file habeas corpus petitions in any court, and the highly limited appeal provided by the Detainee Treatment Act (“DTA”) from the administrative decision of a Combatant Status Review Tribunal (“CSRT”) cannot provide the full review contemplated in our 2005 agreement. As the ABA argued in its Amicus brief in *Boumediene*:

Finally, the government's argument that the Detainee Treatment Act (“DTA”) provides an adequate substitute for habeas should be rejected. As Petitioners and others have urged, review provided by the DTA fails to satisfy the minimum requirements of due process because it is limited to review by the Court of Appeals for the District of Columbia of whether Combatant Status Review Tribunal (“CSRT”) proceedings designating the detainee an “enemy combatant” conform to the standards and procedures of the Department of Defense (“DoD”).

In a CSRT proceeding, the detainee lacks assistance of counsel, and the tribunal consists of military officers who are informed at the outset that their DoD superiors have already determined these prisoners to be enemy combatants. Moreover, the detainee is denied access to classified information that forms the basis for the determination and is frequently denied any realistic opportunity to submit evidence or testimony in his defense. Conformance to such standards and procedures is not an adequate substitute for habeas corpus review.

See pp. 16-17, Brief Amicus Curiae of the American Bar Association in Support of Petitioner in Boumediene v. Bush, No. 06-1195 and Al Odah v. U.S., No. 06-1196, in the Supreme Court of the United States.

Pending legal challenges over the scope of the inquiry that is permissible in a CSRT appeal may be resolved in a manner that further eviscerates the opportunity for meaningful judicial review for detainees. Further, legal challenges to the MCA's habeas provisions have resulted in some courts staying pending detainee challenges and other courts dismissing them. This issue will not be resolved until the Supreme Court hears *Boumediene vs. Bush*, No. 06-1195 and *Al Odah v. U.S.*, No. 06-1196, during next term and renders its decision, which is likely to occur some time in 2008.

It would be inconsistent with the ABA's strong position against habeas stripping for us to lend support and credibility to such an inadequate review scheme, a position we expressed more fully in our *Boumediene* Amicus brief, which argues that the denial of habeas corpus to Guantanamo detainees is inconsistent with the Constitution and the Rule of Law.

Second, we have serious concerns about the Justice Department's recent attempts to modify the protective order in effect at the time of our original agreement by imposing additional restrictions on access by counsel to their clients (including both personal visits and written communications), to classified information relevant to the defense of their clients, and on attorney access to prospective detainee clients.


We are also concerned that the government, without any notice to or consultation with the ABA, unilaterally revised the notice and request forms that we negotiated and agreed to, and has been informing detainees that the ABA would provide lawyers for CSRT appeals, an entirely different structure than the full habeas corpus review that formed the basis for our 2005 agreement.

Moreover, we have been informed that at least two of those most recent requests for assistance that were forwarded to the ABA are from detainees who are already represented by competent counsel with appropriate security clearances, but who nevertheless have been denied any access to their clients. Under such circumstances, it makes little sense for the ABA to assist in recruiting *pro bono* lawyers only to have them face insurmountable obstacles to providing effective assistance of counsel.

The ABA is committed to pursuing activities that advance the rule of law and, to this end, we welcome the opportunity to further discuss this matter with you in order to address critical issues raised by these significantly changed circumstances. While these issues need to be resolved first, we hope that we can again enter into an agreement that will help you discharge your duties and obligations toward detainees in a fair and expeditious manner, and allow detainees to seek full and fair review of the lawfulness of their detention.

For those purposes, please feel free to contact Neal R. Sonnett, Chair of the ABA Task Force on Treatment of Enemy Combatants, at (305) 358-2000 in order to begin further dialogue. In the meantime, however, we respectfully request that you immediately halt the distribution of any further notices to detainees.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Neukom". The signature is written in a cursive, flowing style.

William H. Neukom