



September 29, 2017

Hon. General James N. Mattis
Secretary of Defense
United States Department of Defense
1000 Defense Pentagon
Washington, DC 20301-1000

Hon. Jefferson B. Sessions III
Attorney General
United States Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-2001

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SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT B. REMAR
TREASURER

Dear General Mattis and Attorney General Sessions:

On behalf of the American Civil Liberties Union and its more than 1.6 million members, I write to express deep concern about the detention by the Department of Defense of an American citizen as an “enemy combatant,” and to urge immediate action to ensure that the United States’ conduct with respect to this citizen complies with the Constitution, and domestic and international law. The Defense Department has reportedly been detaining the U.S. citizen, who is suspected of fighting with ISIS, since on or around September 14, after Syrian forces transferred him to U.S. custody, and the U.S. has transferred him to a facility in Iraq. The U.S. government has not publicly disclosed the citizen’s identity, nor has it apparently yet determined whether it will continue to detain the citizen in U.S. military custody, transfer him to another country’s jurisdiction, or transfer him to the federal criminal justice system for prosecution.

If the reports about the U.S. citizen are accurate, his ongoing military detention is unlawful as a matter of domestic law, and his constitutional rights to habeas corpus and to a lawyer must be respected. If the government has legitimate grounds to suspect the citizen fought with ISIS, he should immediately be transferred to the federal criminal justice system for criminal charges. On no account should the Defense Department resurrect the past policy of “enemy combatant” detention of U.S. citizens, which proved to be a legal and moral failure.

As a threshold matter, the United States does not have the legal authority under its own laws to hold alleged ISIS fighters in military detention. That is because the 2001 Authorization for Use of Military Force (AUMF) and the National Defense Authorization Act of 2012, on which the U.S. military has relied to detain

terrorism suspects, by their own terms at most authorize the military to capture and detain persons who were part of or who substantially supported al-Qaida, the Taliban, or associated forces engaged in hostilities against U.S. or allied forces.¹ The AUMF, which Congress passed days after and in direct response to the September 11, 2001 attacks, cannot be stretched to cover individuals allegedly fighting for ISIS, a group that did not exist at the time and that has publicly opposed al-Qaida. Therefore, military detention of the U.S. citizen, whether in the United States, at the U.S. Naval Base at Guantánamo, or anywhere else in the world, is unlawful. Nor may the U.S. citizen continue to be detained for the purposes of interrogation.²

Relatedly, the detained individual has a statutory and constitutional right to habeas corpus, the right to counsel, and must be able to challenge the lawfulness of his detention.³ To that end, as discussed below, my staff is available to assist the citizen in securing access to counsel, and I urge you to provide us with access to him.

As you no doubt are aware, indefinite military detention without charge has proven to be unlawful and illegitimate, resulting in prolonged (and ongoing) legal battles, human suffering, and the erosion of the United States' moral standing in the world. The detention of alleged "enemy combatants" at Guantánamo, for example, has violated human rights guarantees, resulted in widespread international condemnation, and created a still-existing category of "forever" prisoners that is an affront to fundamental constitutional and international law norms.

If the U.S. citizen is indeed alleged to have fought with ISIS, the only lawful and legitimate option is to transfer him immediately to the federal criminal justice system for prosecution. The prosecution of terrorism suspects by federal courts is superior to any military option in every respect. Federal courts have convicted more than 620 individuals on terrorism-related charges since the tragedy of September 11, 2001, in proceedings governed by the guarantees of the U.S. Constitution—to which all criminal defendants are, of course, entitled. Prosecution in the Guantánamo military commissions is not an option because the Military Commissions Act authorizes such prosecutions only for non-citizens.⁴ Even if the commissions system were an option, it would not be a legitimate one. The military commissions remain stymied by legal controversy that stems from their underlying illegitimacy. Commission prosecutions have resulted in the conviction of eight individuals, and four of those convictions have been

¹ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1298, 1562 (2011) (codifying authority granted under the AUMF).

² *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

³ *Id.* at 533, 535–37, 539.

⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006); Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (provision codified at 10 U.S.C. §§ 948a, 948c).

overturned on appeal in whole or in part. In short, continued U.S. military detention is unlawful and military prosecution would be illegitimate and fraught with legal challenges.

Finally, I remind you that domestic and international law impose certain clear requirements with respect to the U.S. citizen's treatment, regardless of his location or custodian. First, secret incommunicado detention is prohibited under U.S. and international law.⁵ The U.S. government must accordingly release the individual's name and the place of his location immediately. Second, torture and other cruel, inhuman and degrading treatment are prohibited under U.S. and international law,⁶ and federal law expressly limits interrogation techniques to those specified in the U.S. Army Field Manual.⁷ Third, we understand the International Committee of the Red Cross has been notified of the detention of the U.S. citizen in U.S. custody, but it must also be provided with prompt access to him.⁸ Fourth, the United States may not transfer the citizen to another country for detention or prosecution if there is a likelihood that he will face abuse or an unfair trial.⁹ Failure to adhere to these requirements not only would violate the United States' legal obligations, but also would further undermine its values and reputation in the world.

The course you take with respect to the U.S. citizen in Defense Department custody is a critical test for this administration's adherence to the rule of law. I accordingly urge you transfer him to the United States and the federal criminal justice system without any further delay. Because the U.S. citizen has a right to

⁵ Exec. Order No. 13,491, Ensuring Lawful Interrogations, § 4, 74 Fed. Reg. 4893, 4894 (Jan. 27, 2009); Restatement (Third) of the Foreign Relations Law of the United States § 702(c) (1987).

⁶ Exec. Order No. 13,491 § 3(a); Detainee Treatment Act of 2005, Pub. L. 109-148, § 1003, 119 Stat. 2739 (2005); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) ("Convention Against Torture").

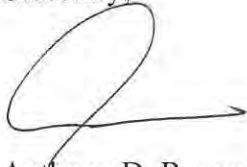
⁷ National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 1045(a), 129 Stat. 726, 977-78 (2015) (2016 NDAA); Exec. Order No. 13,491 § 3(b).

⁸ Exec. Order No. 13,491 § 4(b); Dep't of Defense, DoD Directive 2310.01E, DoD Detainee Program (Aug. 19, 2014), *available at* www.jag.navy.mil/distrib/instructions/DoDD2310.01E_Detainee_Program.pdf; 2016 NDAA § 1045(b) (requiring notification and prompt access); Stephanie Nebehay, *U.S. more open on detainees in Iraq, Afghanistan: ICRC*, Reuters, Jan. 11, 2011, <http://www.reuters.com/article/us-iraq-detention-cross/u-s-more-open-on-detainees-in-iraq-afghanistan-icrc-idUSTRE70R2KI20110128>.

⁹ *See, e.g.*, Convention Against Torture, art. 3; Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242(a), 112 Stat. 2681-761, 2681-822; *Munaf v. Geren*, 553 U.S. 674, 706 (2008) (Souter, J., concurring).

counsel, my staff is available to help inform him of his rights and assist him in securing legal assistance. I look forward to hearing from you.

Sincerely,

A handwritten signature in black ink, consisting of a large, stylized 'A' followed by a horizontal line that ends in an arrowhead pointing to the right.

Anthony D. Romero
Executive Director

cc:

Hon. Rex Tillerson, Secretary of State
François Stamm, Head, ICRC Regional Delegation for the United States and
Canada