

**ADDENDUM TO NEW YORK STATE BAR ASSOCIATION REPORT 10A**  
**SUBMITTED TO THE AMERICAN BAR ASSOCIATION**

**I. INTRODUCTION**

This Addendum supplements the New York State Bar Association's Report 10A on the due process rights to be afforded Guantánamo detainees in their habeas proceedings after *Boumediene v. Bush* (the "Report"). The Report was initially submitted to the American Bar Association ("ABA") for its August 2008 annual meeting.<sup>1</sup> The Report was withdrawn and subsequently re-submitted for consideration at the ABA midyear meeting in February 2009.<sup>2</sup> In light of the significant changes in the legal and political landscape since the initial submission of the Report six months ago, this Addendum provides an update on the Guantánamo habeas proceedings, as well as summarizes the recent presidential executive orders concerning the Guantánamo detainees. The NYSBA has also submitted a revised Resolution 10A based on the Addendum.

**II. HABEAS PROCEEDINGS IN THE D.C. DISTRICT COURT**

The lion's share of the habeas cases were consolidated before D.C. District Court Judge Thomas F. Hogan for determination of common procedural issues. However, a few judges retained their habeas cases, most notably Judge Richard J. Leon who has kept approximately two dozen cases. Between August and December 2008, Judges Hogan and Leon issued three case management orders addressing the process due to Guantánamo detainees in their habeas proceedings.<sup>3</sup>

---

<sup>1</sup>The Report was prepared by the NYSBA's Committee on Civil Rights (the "Committee"). In June 2008, the NYSBA House of Delegates passed a resolution accepting the Committee's *Report on Executive Detention, Habeas Corpus and the Military Commissions Act of 2006*, and supporting the recent United States Supreme Court decision in *Boumediene v. Bush*, 128 S.Ct. 2229, 2233-35 (U.S. 2008), which granted Guantanamo Bay detainees the right to bring habeas corpus challenges in federal court. The report is available at [http://www.nysba.org/AM/Template.cfm?Section=Executive\\_Detention\\_Habeas\\_Corpus\\_and\\_MCA\\_Report&Template=/CM/ContentDisplay.cfm&ContentID=17326](http://www.nysba.org/AM/Template.cfm?Section=Executive_Detention_Habeas_Corpus_and_MCA_Report&Template=/CM/ContentDisplay.cfm&ContentID=17326). The resolution also directed the Committee to prepare a supplemental report on the procedural rights due to Guantanamo detainees in their habeas proceedings. The Report and Addendum were prepared in response to the House resolution. This Addendum presumes familiarity with the contents of the Report.

<sup>2</sup>*NYSBA Report*, in REPORTS WITH RECOMMENDATIONS TO THE HOUSE OF DELEGATES 10A (American Bar Association, 2009 Midyear Meeting ed. 2008).

<sup>3</sup>On August 27, 2008, Judge Leon, issued the first case management order in the Guantánamo detainee habeas proceedings. *Boumediene v. Bush*, No. 04-1166 (D.D.C. Aug. 27, 2008) (Case Management Order), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/08/leon-case-manage-order-8-27-08.pdf>. On November 6, 2008, Judge Hogan, who is coordinating 113 habeas cases involving over 200 detainees, issued a case management order that paralleled Judge Leon's order in several respects. In re Guantánamo Bay Detainee Litigation ("Guantánamo Detainee Litigation I"), No. 08-0442, 2008 WL 4858241, at \*1-2 (D.D.C. Nov. 6, 2008). However in response to the Government's motion for clarification and reconsideration, Judge Hogan issued a revised case management order on December 16, 2008. In re Guantánamo Bay Detainee Litigation ("Guantánamo Detainee Litigation II"), Misc. No. 08-0442, 2008 WL 5245890, at \*1 (D.D.C. Dec. 16, 2008). The Report's recommendations were largely consistent with Judge Leon's and Hogan's case management orders, although the details differed in several respects as discussed below.

First, both judges allowed petitioner's limited discovery. Judge Leon ruled that discovery may only be obtained by leave of court with good cause shown and must be narrowly tailored.<sup>4</sup> Judge Hogan initially ordered that upon petitioner's request the Government must disclose: "(1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted."<sup>5</sup> In response to the Government's motion for clarification and reconsideration, Judge Hogan amended his order to limit the Government's discovery obligations to disclosure of documents or other materials in the Government's possession that the Government relies on to justify detention and all statements made or adopted by the petitioner that the Government relies upon to justify detention.<sup>6</sup>

Second, both judges provided Guantánamo detainees with some access to exculpatory evidence within the Government's control. Judge Leon ruled that the Government must provide on an ongoing basis any evidence contained in the material reviewed developing the return for the petitioner, and in preparation for the hearing for the petitioner, that tends to materially undermine the Government's theory as to the lawfulness of detention.<sup>7</sup> Judge Hogan initially ordered the Government to disclose on a continuing basis to the petitioner all reasonably available evidence in its possession, if any, that tends to materially undermine the information presented to support the Government's justification for detention.<sup>8</sup> However, Judge Hogan later substantially amended his ruling to be consistent with Judge Leon's order, instructing that the Government may discharge its obligation by providing exculpatory evidence reviewed by Government lawyers when preparing the factual returns, or discovered or gathered while preparing for the habeas cases.<sup>9</sup>

Third, although Judges Leon and Hogan both allowed the possible admission of hearsay evidence, they departed in the process and the threshold burden placed upon the Government. Judge Leon ruled that hearsay evidence relevant and material to the lawfulness of detention may

---

<sup>4</sup> *Boumediene*, No. 04-1166 at 2 (requiring discovery applications to specify the relevance and materiality to petitioner's case and address whether the request is unfairly disruptive or unduly burdensome to the Government).

<sup>5</sup> *Guantánamo Detainee Litigation I*, 2008 WL 4858241, at \*2. The merits judge, for good cause, may allow the petitioner to obtain limited additional discovery if presented to the merits judge by written motion and is narrowly tailored (not open-ended), specific, likely to produce evidence that demonstrates the petitioner's detention is unlawful, and will allow the petitioner to factually rebut the Government's factual basis for the petitioner's detention without unfairly disrupting or burdening the Government. *Id.* Judge Hogan did not amend this provision of his initial case management order.

<sup>6</sup> *Guantánamo Detainee Litigation II*, 2008 WL 5245890, at \*1 (subsection (3) remained unchanged). Compare the Committee's Report, which stated district courts should rely on Habeas Rule 6 "good cause" standard in determining whether and what discovery to allow in Guantánamo habeas proceedings. *NYSBA Report, supra* note 2, at 10A 11-12.

<sup>7</sup> *Boumediene*, No. 04-1166 at 2.

<sup>8</sup> *Guantánamo Detainee Litigation I*, 2008 WL 4858241, at \*1-2.

<sup>9</sup> *Guantánamo Detainee Litigation II*, 2008 WL 5245890, at \*1. Compare the Committee's Report, which argued that the district court should apply well established *Brady v. Maryland* jurisprudence to limit the habeas petitioner to material information favorable to the accused which is known to the Government agents or officers involved in the investigation, apprehension or detention of the petitioner. *NYSBA Report, supra* note 2, at 10A 12. However, in recognizing that the production of all traditional *Brady* material in a particular case may prove to be burdensome, the Report suggested that in certain instances the court could properly limit *Brady* material to information readily available and already in the possession of the Government. *Id.*

be admissible, but granted the opposing party an opportunity to challenge its credibility and weight.<sup>10</sup> Judge Hogan ordered that the merits judge may admit and consider hearsay evidence relevant and material to the legality of the petitioner's detention *if* the movant establishes that the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the Government's efforts to protect national security. If hearsay evidence is admitted, the party opposing admission will then have the opportunity to challenge the credibility of, and weight to be accorded, such evidence.<sup>11</sup>

Finally, both judges settled on a preponderance burden of proof standard across the board.<sup>12</sup> Significantly, a preponderance standard of proof is less demanding than a clear and convincing standard, which courts have adopted in other administrative detention contexts. Given the substantial liberty interest, the nature of the apprehension, and precedent in administrative detention, the Report departed from the case management orders, proposing a clear and convincing standard for at least non-battlefield captures.<sup>13</sup>

Judge Hogan's case management order is currently being applied by the "merits" judges on the specific habeas applications. Judge Leon has applied his order and released several detainees while rejecting applications of others.<sup>14</sup>

### III. PRESIDENT OBAMA'S EXECUTIVE ORDERS

On January 22, 2009, two days after taking office, President Obama issued three executive orders and a presidential memorandum concerning Guantánamo Bay and executive detention. President Obama's executive orders signal a dramatic departure from the previous Administration's policies on these issues.

The first executive order, entitled *Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities* ("Review and Disposition Executive Order"), directs the closure of the Guantánamo Bay detention facilities within a year.<sup>15</sup> The order also commands an immediate review of all available information in the Government's possession pertaining to the estimated 245 Guantánamo prisoners to determine who can be transferred or released, as well as who should be prosecuted and whether prosecution is feasible

---

<sup>10</sup> *Boumediene*, No. 04-1166, at 3.

<sup>11</sup> Guantánamo Detainee Litigation I at \*3. Compare the Committee's Report, which argued that the Government should be charged with producing indicia of a hearsay statement's reliability before such statement is admitted into evidence and the petitioner should have the opportunity to respond to the submission of such evidence. *NYSBA Report*, *supra* note 2, at 10A 13-14.

<sup>12</sup> *Boumediene*, No. 04-1166, at 3; Guantánamo Detainee Litigation I at \*3.

<sup>13</sup> *NYSBA Report*, *supra* note 2, at 10A 8-9.

<sup>14</sup> *Al Bihani v. Obama*, No. 05-1312, 2009 WL 221938 (D.D.C. Jan. 28, 2009) (holding that alien was being lawfully detained as an enemy combatant); *el Gharani v. Bush*, No. 05-429, 2009 WL 88056 (D.D.C. Jan. 14, 2009) (ordering release of detainee whose detention was based primarily on unreliable statements of other detainees); *Al Alwi v. Bush*, No. 05-2223, 2008 WL 5412289 (D.D.C. Dec. 30, 2008) (dismissing habeas petition); *Sliti v. Bush*, No. 05-429, 2008 WL 5411121 (D.D.C. Dec. 30, 2008) (same); *Boumediene v. Bush*, 579 F.Supp.2d 191 (D.D.C. Nov. 20, 2008) (ordering release of five detainees (but not a sixth) because the Government's submission of a classified document from an unnamed source was insufficient to show by a preponderance of the evidence that those detainees planned to travel to Afghanistan to fight U.S. forces).

<sup>15</sup> Exec. Order 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009).

before an Article III Court.<sup>16</sup> Although the preference is for prosecution in Article III courts or under the Uniform Code of Military Justice, media reports have suggested that the order indirectly leaves military commissions as a viable option, possibly under revised procedures.<sup>17</sup> The review will also examine lawful options for the disposition of detainees who may not be transferred, released, or prosecuted.<sup>18</sup> Additionally, the order directs the Secretary of Defense to immediately halt military commission proceedings pending the results of the review.<sup>19</sup>

In connection with the order, President Obama has sought and obtained a stay of evidentiary hearings in pending habeas proceedings for three detainees, Abu Rawda, Abdul Aziz Najj, and Karim Bostan before U.S. District Court Judge Reggie B. Walton.<sup>20</sup> Although the Administration has yet to seek an across the board stay of all habeas cases, more than 200 detainees' habeas corpus cases have been filed in federal court, and lawyers anticipate all of the cases will be stayed.<sup>21</sup>

The second executive order - *Review of Detention Policy Options* - creates a special task force, co-chaired by the Attorney General and the Secretary of Defense, to conduct a review of detention policy options.<sup>22</sup> More specifically, the task force will identify lawful options for the disposition of individuals who, in the future, are captured or apprehended in connection with armed conflicts and counterterrorism operations.<sup>23</sup> Its mission is to consider policy options for apprehension, detention, trial, transfer, or release of such detainees.<sup>24</sup> The special task force is required to submit its report to the President within 180 days, unless the co-chairs determine an extension is necessary, and provide periodic preliminary reports during this time period.<sup>25</sup>

President Obama's third Executive Order, referred to as *Ensuring Lawful Interrogations*, revokes the Bush Administration's legal re-interpretations of interrogation methods permitted under the Geneva Conventions.<sup>26</sup> It requires all interrogators, including the C.I.A., to adhere to the U.S. Army Field Manual, which bars techniques considered torture such as waterboarding. The order also abolishes the C.I.A.'s secret detention program and requires the International Committee of the Red Cross to be granted access to all prisoners in U.S. custody.<sup>27</sup> Moreover, the directive creates a second task force, led by the Attorney General, and with the Director of National Intelligence and the Secretary of Defense as co-vice chairs, to study whether the Army

---

<sup>16</sup> *Id.*; see also Editorial, *First Steps at Guantánamo*, NY TIMES, at A32, January 22, 2009, available at <http://www.nytimes.com/2009/01/22/opinion/22thu3.html>.

<sup>17</sup> Associated Press, *A look at Obama's latest executive orders*, [http://www.google.com/hostednews/ap/article/ALeqM5gVkhCC0G9SdsUWnUmq\\_3GspQGTegD95SE4282](http://www.google.com/hostednews/ap/article/ALeqM5gVkhCC0G9SdsUWnUmq_3GspQGTegD95SE4282) (last visited Feb. 9, 2009).

<sup>18</sup> Exec. Order 13,492, *supra* note 15.

<sup>19</sup> *Id.*

<sup>20</sup> *Bostan et al. v. Obama et al.*, No. 05-883 (D. Col. Jan. 20, 2009).

<sup>21</sup> See Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, NY TIMES, Jan. 22, 2009, available at [http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html?pagewanted=2&\\_r=1&hp](http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html?pagewanted=2&_r=1&hp).

<sup>22</sup> Exec. Order 13,493, 74 Fed. Reg. 4901 (Jan. 22, 2009).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Exec. Order 13,491, 74 Fed. Reg. 4893 (Jan. 22, 2009).

<sup>27</sup> *Id.*; see also Jess Bravin & Siobhan Gorman, *Obama Closes Detention Network: President Orders Guantánamo Shut, Sets Up Prisoner Review, Bans Secret CIA Prisons*, WALL STREET JOURNAL, at Jan. 23, 2009, available at <http://online.wsj.com/article/SB123263732904506281.html?mod=relevancy>.

Field Manual should remain the only standard for interrogators as well as review the practice of extraordinary rendition in which captured terrorist suspects are transferred to other countries.<sup>28</sup>

Finally, the President issued a memorandum to the Attorney General, Secretary of Defense, Secretary of State, Secretary of Homeland Security, and Director of National Intelligence, directing immediate review of Ali Saleh Kahlah al-Marri's status—the only enemy combatant detainee held within the U.S.<sup>29</sup> The review of Al-Marri's case will be consistent with the Review and Disposition Executive Order of Guantánamo detainees.<sup>30</sup> The Administration also sought an extension on the Government's brief in *al-Marri v. Pucciarelli* pending before the Supreme Court.<sup>31</sup> The Supreme Court granted the Government's extension request from February 20, 2009, to March 23, 2009; oral argument will not likely be heard until after April 20, 2009.<sup>32</sup> The question presented to the Supreme Court is whether the AUMF authorizes—and if so whether the Constitution allows—the seizure and indefinite military detention of a person lawfully residing in the United States, without criminal charge or trial, based on government assertions that the detainee conspired with al Qaeda to engage in terrorist activities.<sup>33</sup>

#### IV. REVISED RESOLUTION

The Committee applauds the President's executive orders. They collectively mark a triumphant return to our country's founding first principles of freedom and respect for the rule of law. As welcome as the orders are, however, they still leave more questions than answers, among the most challenging are: (1) which detainees can be freed and which can be prosecuted, what kind of court to try them in and where to hold them inside the U.S.; (2) what to do with detainees who are considered terrorist threats but cannot be tried because of a lack of evidence against them or because evidence is tainted by interrogation; and (3) what to do with detainees held in other extra-territorial detention centers such as Bagram Air Force base in Afghanistan.

Further, the current orders do not change the fact that many at Guantánamo have been detained for almost seven years without a fair opportunity to challenge the grounds for their detention. The Report set a standard for procedural habeas review—and although the new administration may have stayed certain habeas cases—the vast majority are proceeding without delay. The Report also serves as a reminder of the basic hallmarks of due process habeas courts should apply when dealing with executive detention and the rules the Administration should consider when crafting policy. We have submitted a revised resolution taking into account the most recent changes in the ongoing constitutional dialogue concerning Guantánamo detainees, and affirming our support of the core due process rights expressed in the Report for those held in executive detention at Guantánamo.

---

<sup>28</sup> Exec. Order 13, *supra* note 26; See also Scott Shane, *Obama Orders Secret Prisons and Detention Camps Closed*, NY TIMES, Jan. 22, 2009, available at <http://www.nytimes.com/2009/01/23/us/politics/23GITMOCND.html?>

<sup>29</sup> Memorandum on Review of the Detention of Ali Saleh Kahlah al-Marri, [http://www.whitehouse.gov/the\\_press\\_office/ReviewoftheDetentionofAliSalehKahlah/](http://www.whitehouse.gov/the_press_office/ReviewoftheDetentionofAliSalehKahlah/) (last visited Jan. 22, 2009).

<sup>30</sup> *Id.*

<sup>31</sup> See Joe Palazzolo, *Eric Holder Confirmed as Attorney General*, Legal Times, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202427947535> (last visited Feb. 7, 2009).

<sup>32</sup> SCOTUSblog, *Court extends time for U.S. brief in Al-Marri case*, <http://www.scotusblog.com/wp/court-extends-time-for-us-brief-in-al-marri-case/> (Jan. 23, 2009).

<sup>33</sup> Supreme Court of the United States, <http://origin.www.supremecourtus.gov/docket/08-368.htm> (last visited Jan. 14, 2009).