Speech of
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Thank you for inviting me to speak at this inaugural lunch of the ABA's Center for Human Rights. It is a special pleasure for me to be introduced by Jerry Shestack, a champion of human rights both within the ABA and around the world. As Jerry told you, he and Jim Silkenat hired me in 1978 to become the first Director of the Lawyers Committee for Human Rights, now Human Rights First, and I am grateful to both of them for giving me the opportunity to get involved in this work. Jerry has been a great friend over the years. He is a true public citizen -- a teacher, lawyer, bar leader, diplomat, and human rights activist. We are very lucky to have someone with Jerry's remarkable energy and ability on our side.

I also want to say a special thanks to Steve Walther for inviting me here and for giving me an opportunity to address these issues before such a prestigious audience. Steve has worked long and hard with Jerry to create the ABA's Center for Human Rights. He has a long-standing and passionate commitment to protecting human rights and has played a pivotal role in advancing many important human rights issues within the ABA over the years. Thank you, Steve.

I welcome the creation of the Center for Human Rights which helps to coordinate and reinforce the good work of the American Bar Association. Over the last 20 years, we have been privileged to work with many of you as the ABA has increased its involvement in these issues. Initially, we worked closely with a series of ABA Presidents to prepare "rule of law" letters, through which the ABA registered its concerns with foreign governments in cases where lawyers or judges face persecution and harassment for carrying out their professional duties. In the 1980's, the ABA adopted its Goal VIII which formally acknowledged as one of its core commitments and goals to "advance the rule of law in the world." In 1990, following the commencement of the remarkable transformation in Eastern Europe and the former Soviet Union, the ABA created the Central and East European Law Initiative, now known as the Central European and Eurasian Law Initiative ("CEELI"). Many people in this room, including Jerry, Steve, Bill Ide, and others, played a central role in CEELI's development. Today, CEELI's accomplishments are well recognized and appreciated by lawyers and others throughout Eastern Europe and the Former Soviet Union.

Globally, the ABA continues to speak out on the issues of the day. Most recently, for example, many of you helped lead the successful effort to adopt an ABA resolution on the Darfur crisis, which included a recommendation that the Darfur situation be referred to the International Criminal Court. On these and other critical global issues, the ABA plays a pivotal role in shaping our national debate.

On a parallel track, since the September 11 attacks, as our own country debated appropriate responses to the serious threat posed by Al Qaeda, the ABA has urged that this country maintain its commitment to human rights and the rule of law. Neal Sonnett, for example, who is here today, has played a very important public role in challenging procedural defects in the military commissions authorized by President Bush in late 2001. The ABA has also been outspoken on issues relating to enemy combatants, the Patriot Act, and U.S. detention and interrogation practices overseas. As a mainstream voice of the legal community, the ABA has been and continues to be a vital voice in these debates. There is no organization better placed to do so. I want to thank you for the leadership role you play. We need you.

My focus today is an assessment of the state of human rights and civil liberties in the U.S. three and a half years after the September 11 attacks. I aim to provide a snapshot of where things now stand on a range of related issues, and then to offer several suggestions on how the ABA can and should address these concerns in the future.

Let me start this discussion by recognizing that our world did change on September 11, 2001. The threats we face from Al Qaeda and other violent, extremist groups are very real. Al Qaeda, as we know, has developed a broad global network that is well financed and well organized. They have a long term strategy, a key element of which is to violently attack U.S. targets, both in this country and abroad. Al Qaeda and groups like it have adopted a Ju-Jitsu type of approach. They turn our modern systems of transportation, communication, and sophisticated weapons technology against us. And the results, as we have seen, can be devastating.

So it is vitally important for the United States Government to adopt an effective national security strategy that will reduce the threats we face from Al Qaeda and other similar groups. The Bush administration has taken a number of important measures to help ensure our security for which they deserve credit. In the last year, the Administration has helped create the National Counterterrorism Center, and in December worked with Congress to create a new senior government position, the Director of National Intelligence. The President's FY 2006 budget includes significant new resources aimed at detecting and preventing the transportation of nuclear materials into the country, and the Administration has worked hard to encourage better sharing of intelligence information among government agencies.

Yet much remains to be done. The bi-partisan National Commission on Terrorist Attacks in the United States, the so-called 9/11 Commission, did an excellent job of identifying a number of areas where improvements must be made. These "rights-neutral" measures include the need for more extensive security measures for ports, trains, chemical plants, and our cyber-network, among other things. In particular, we need to do more to guard against biological and radiological attacks. And we need to devote greater financial and other support for our front-line responders - police, fire fighters, and emergency medical service workers. Enhancements in these areas are prudent and sensible, and pose no threat to out civil liberties, human rights, or the rule of law.

Assessing the New Normal

At the same time, the Administration has undertaken a number of policy changes which have drastically changed the relationship between the government and its people. I will focus today on some of these measures which have resulted in a loss of liberties have undermined the rule of law. Shortly after the September 11 attacks Vice President Cheney referred to these changes as part of a "new normalcy" that reflects "an understanding of the world as it is."

Human Rights First has evaluated this "new normal" and its impact on human rights in four key areas: the detention and interrogation of security detainees; policies towards immigrants, non-citizens, and minorities; personal privacy; and openness in government. While the erosion of rights in these areas should concern everyone, they are central to what we stand for as lawyers.

The broad theory that underlies all of these changes is the Administration's assertion that we are fighting a global "war against terrorism" that extends throughout the United States and to every nation in the world, and must be fought outside the constraints of law. To some in the Administration, even the mention of the rule of law belittles the threat we face and constrains the executive branch's need for broad authority to wage this fight successfully. This was the view expressed last year by Alberto Gonzales, then White House Counsel, and now Attorney General. Speaking to the ABA's Standing Committee on Law and National Security last February, Mr. Gonzales urged that criminal charges, access to legal counsel and trials are neither "necessary [n]or appropriate" in cases involving enemy combatants. Secretary of Defense Rumsfeld said that we are now operating under "different rules" which only the executive branch should determine and which "have to apply when the threat of terrorism arises."

In the view of these and other senior Administration officials, there is law on the one side, war on the other. And when fighting the "global war on terrorism," law becomes a luxury, not a necessity, which we may not be able to afford. In effect these officials have implied that the United States – and indeed, the rest of the world – is now in a permanent state of emergency, where traditional notions of human rights and civil liberties do not apply. Operating in that framework, some Administration officials have suggested that the detainees now being held at Guantanamo or in Afghanistan or Iraq are in "law-free zones" or the "legal equivalent of outer space."

As lawyers, we must forcefully challenge these assertions at every turn. In a society rooted in justice and the rule of law, there can be no such thing as a law-free zone.

The American "Enemy Combatants"

The Administration's approach to these issues has played out most starkly in two "enemy combatant" cases involving U.S. citizens detained in the United States. The first case is that of Yaser Hamdi. Hamdi was born in Louisiana and later moved to Saudi Arabia. He went to Afghanistan in 2001 and was arrested by the Northern Alliance. They handed him over to U.S. officials who subsequently transferred him to Guantanamo. In April, 2002, the U.S. Government realized Hamdi was a U.S. citizen and transferred him to a military brig in South Carolina. For more than two years, Yaser Hamdi was held without charges as an "enemy combatant" and denied access to his lawyer. Last spring, his application for habeas corpus was heard by the U.S. Supreme Court. By a vote of 8-1, a majority of the Justices ruled in Hamdi's behalf. Writing for the plurality, Justice O'Connor held that Hamdi was entitled to a "meaningful opportunity to contest the factual basis for detention before a neutral decision-maker." Justice Scalia went further, concluding Hamdi should be criminally charged and tried, or released. In October, the Government finally released Hamdi and allowed him to return to Saudi Arabia after requiring him to renounce his U.S. citizenship.

The second enemy combatant case involves Jose Padilla. Padilla was born and raised in the United States. In May 2002, he was arrested at O'Hare Airport in Chicago upon returning to the U.S. from Pakistan. The government alleges that he had contact with members of Al Qaeda who were plotting to detonate a radioactive "dirty" bomb in this country. A month after his arrest, Padilla was transferred from his civilian prison cell to Defense Department control and taken to the military brig in South Carolina where Hamdi was being held. Almost three years later he remains in the same military detention facility. Padilla has never been charged with a crime. He was also denied access to his lawyer until the Supreme Court took up his case last year. The Supreme Court declined to review the merits of Padilla's habeas corpus petition, deciding that he had brought his petition in the wrong court. Padilla's lawyers are now pursuing his case in the District Court in South Carolina. In all likelihood, his case will again reach the Supreme Court sometime in the Court's next term, four years after his arrest. When the Supreme Court re-hears this case, they will have little choice but to address how much process he is due.

The Detainees at Guantanamo Bay

A second broad category of cases concerns those of the captives being held at Guantanamo Bay, Cuba. Currently there are roughly 550 detainees from about 40 countries. Many have been held there for more than three years without charge or trial and only a handful of them have had access to legal counsel. For much of the world the detentions at Guantanamo have become the most disturbing symbol of the "new normal," a lightning rod for anti-American sentiment. Last month, the Washington Post reported that the Defense Department is considering building a permanent 200-bed facility at Guantanamo, a proposal that will surely fuel the global antipathy towards the Guantanamo detentions.

The indeterminate legal status of those held at Guantanamo has become the subject of four separate tracks of proceedings that have occupied the military and the courts for the

past three years. A number of the detainees at Guantanamo first challenged the legality of their detention through habeas corpus proceedings in the U.S. federal courts. Last June, the United States Supreme Court ruled, in a 6-3 decision called *Rasul/Odah*, that the federal courts have jurisdiction over these cases, and that these detainees should be allowed to challenge the legality of their detention. That decision – which has now led to nearly 60 pending habeas petitions from Guantanamo detainees – was remanded to the lower federal courts for hearings on the merits of the detainees' habeas claims. This year, the federal district courts hearing the cases on remand reached split decisions. In one case, Judge Richard Leon found that he had "no viable legal theory" to support the detainees' U.S. and international law challenges to the legality of their detention. Two weeks later, Judge Joyce Hens Green ruled that under the 5th Amendment these detainees do have rights involving access to counsel and the opportunity to confront evidence which is the basis for their detention. These decisions are on their way through lower court appeals. There is no question they will eventually reach the Supreme Court.

In the meantime, just after the Supreme Court handed down its Rasul/Odah decision, the Defense Department set up a status review process ostensibly aimed at complying with the Supreme Court's decision. In fact, the status tribunals didn't comply in any meaningful way. The detainees' cases were heard at Guantanamo by a military panel; the detainees were denied access to material evidence; the detainees' allegations of torture were not considered sufficiently; and detainees were denied access to legal counsel for the proceedings. In the end, of the 458 cases that have now been finalized, 18 individuals were determined not to be "enemy combatants," and only one has been repatriated pursuant to the review process. In most cases, the hearings were minimal at best. For example, in January 2002, on a U.S. tip, Bosnian authorities arrested six Muslims of Algerian descent residing in Bosnia. After the Bosnian Supreme Court released the men for lack of evidence, the six were kidnapped and flown to Guantanamo. At his status review hearing, Hadj Boudella, one of the six, requested the tribunal to read the Bosnian Supreme Court opinion. The panel rejected the request, however, claiming they were unable to locate the opinion – which, in fact, has been widely distributed on the internet. The panel found Boudella to be an "enemy combatant."

That leaves the vast majority of the detainees still held at Guantanamo with one of two existing options (apart from a writ of habeas corpus) for challenging their detention. Shortly before the Supreme Court took up the Guantanamo habeas cases last spring, the Defense Department announced the creation of annual review tribunals at Guantanamo. These annual review tribunals are also a novel creation, but separate from the status review tribunals created after the Supreme Court's ruling. The annual review tribunals will not afford detainees trials, but are designed to provide those expected to be held there for the long term an annual chance, without a lawyer, to have their status reviewed by a military panel. If the panel concludes they are no longer of intelligence value, or no longer pose a threat to the United States, they could be released. The first of these review panels began late last year.

Guantanamo detainees' last option for legal resolution is the chance for a trial before specially-created military commissions. These military commissions – unlike the

standard military justice court martial trials the military has used for the past half-century – were created pursuant to the President's military order of November 2001. To date, the administration has relied on these commissions in only a handful of cases – four of which began pretrial proceedings last summer. One of the defendants, Salem Ahmed Hamdan, challenged his trial in federal court, arguing among other things that he had been denied access to the evidence against him, and that his prolonged detention in solitary confinement – at that point, almost 11 months – risked depriving him of any chance to help defend himself at trial. Last November, a federal judge, James Robertson, ruled in Hamdan's favor holding that the tribunals violate both the Uniform Code of Military Justice as well as the Geneva Conventions. In his opinion, Judge Robertson objected strongly to the fact that the defendants do not have access to evidence used to justify their detentions. The Hamdan case will also eventually reach the U.S. Supreme Court.

Even as they struggle to untangle what is by any measure an extraordinarily complex set of issues, the federal courts have demonstrated independence and dedication to the principle that where basic liberty interests are at stake, the judicial branch must have a role. The world is watching these cases closely, and it has never been more important for the U.S. justice system to show itself capable of doing the right thing.

Detention and Interrogation Beyond Guantanamo

International concerns about Guantanamo were exacerbated in December when a U.S. Government summary of a confidential International Committee of the Red Cross (ICRC) report was leaked to the press. It revealed a pattern of serious abuses against detainees during the interrogation process. The ICRC report reinforced the findings of internal U.S. Government reports which similarly found a pattern of humiliation and abuse of detainees at Guantanamo.

It is sadly this issue of torture and abuse that has been and remains at the center of concerns about the ongoing detention of thousands of detainees by U.S. military and intelligence services in Iraq, Afghanistan and elsewhere. Although the government has not been fully forthcoming in disclosing the number of these detainees, we estimate that there are more than 9000 security detainees in U.S. custody in Iraq, and hundreds more in Afghanistan and other countries. Last year, Human Rights First published a report, entitled "Ending Secret Detentions," identifying some two dozen facilities in U.S. control where detainees are held worldwide. In addition to facilities in Iraq and Afghanistan, we identified secret facilities in Pakistan, Jordan, and on U.S. ships at sea. Recent news reports have also noted similar facilities in Qatar and Thailand. An unknown number of individuals in this system have been held off the books and without access to visits by the ICRC. These people have been dubbed "ghost detainees."

Last April, the disclosure of pictures showing the torture of prisoners at Abu Ghraib prison in Iraq provoked a public controversy about U.S. detention and interrogation practices. It is now clear that the pictures from Abu Ghraib represent the tip of the iceberg. In the last two years there have been more than 300 allegations of abuse by U.S.

military and security forces, and U.S. authorities are now investigating at least 37 deaths in U.S. custody.

Official memos that were leaked to the press after the Abu Ghraib scandal broke reveal a shocking willingness by senior government lawyers in the White House, the Justice Department, and the Defense Department to interpret the law in a manner aimed at justifying clearly illegal and abusive treatment of detainees. To this day, some senior U.S. officials defend the use of certain coercive interrogation techniques and quibble over whether these practices are "torture" or "cruel, inhuman or degrading treatment" – both of which are prohibited under U.S. and international law. This is the area where the reality of an unrestrained executive, fighting a global war on terrorism, has led to the most troubling violations of human rights. It was because of these issues that the nomination of Alberto Gonzales to be Attorney General generated such heated debate.

Related to these deeply troubling practices of coercive interrogation carried out by U.S. officials directly is the ongoing practice of "extraordinary rendition" – turning security suspects over for questioning to other countries known to use torture and other unlawful tactics. In a recent article on renditions in the New Yorker magazine, Jane Mayer reviewed the case of Maher Arar, a Canadian who was arrested at JFK Airport in September 2002. He was apparently apprehended because U.S. officials believed he had ties to terrorist suspects. Arar was placed on a small plane by U.S. agents who referred to themselves as being part of a "special removal unit." They flew Arar through Italy to Jordan. From there he was handed over to Syrian security forces, who tortured him repeatedly over the next 13 months. Arar was finally released in October 2003 and allowed to return to Canada; he is now pursuing claims against the United States and Canada in proceedings underway in both countries. While those cases are pending, the practice of rendition appears to continue unabated. It is believed that there have been over 150 renditions, with destinations of Egypt, Morocco, Jordan, and Kuwait in addition to Syria.

What Law Applies in These Cases?

Does any law apply in these cases, or are these people really in "law free zones" as some in the Administration suggest? At an absolute minimum, two bodies of law do indeed apply. First are the 1949 Geneva Conventions – the core documents of international humanitarian law to which the United States has long been a party. One of the most controversial memos from the White House in January 2002 argued that the Geneva Conventions are obsolete in the struggle against terrorism. Then-Secretary of State Colin Powell objected sharply to this conclusion. He wrote that by rejecting the application of the Geneva Conventions, we "will reverse over a century of U.S. policy and practice… and undermine the protections of the rule of law for our troops."

The second set of legally binding obligations emanates from international human rights law, including the U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, to which the United States is also a party. In 2002,

Jay Bybee, then in the Office of Legal Counsel in the Justice Department, prepared an extensive memo interpreting the criminal statute which outlaws torture. This law, enacted in 1994, implements the United States' obligation under the Torture Convention make torture a crime. The memo construed the statutory definition of torture very narrowly: "physical pain amounting to torture must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function or even death." In April 2003, the Defense Department's Working Group on Detainee Interrogations in the Global War on Terrorism employed the same logic and virtually the same language. This interpretation has been so widely recognized as a strained reading of U.S. obligations that the Administration was forced to withdraw it on the eve of the confirmation hearings of then-Attorney General nominee, Alberto Gonzales. One need not suffer "organ failure" to be considered as having been subject to torture.

Five Myths Underlying the Administration's Approach

In contrast, those in the Administration that continue to advocate for "law free zones" rely on five myths which have been repeated so often that they have gained political currency in the public debates.

1. Myth Number One: "While torture is banned, cruel, inhuman and degrading treatment is permissible." The Convention Against Torture prohibits torture and all forms of cruel, inhuman and degrading treatment. While U.S. ratification of the treaty defined cruel, inhuman and degrading treatment as those practices prohibited under the 5th, 8th and 14th Amendments, clearly the U.S. Constitution does not permit the kind of coercive and humiliating interrogation practices we all saw at Abu Ghraib.

2. Myth Number Two: "The Geneva Conventions don't apply in the 'War Against Terrorism.'" While a number of combatants in Afghanistan or elsewhere may not qualify as "prisoners of war," under Common Article Three of the Geneva Conventions *all* are entitled to be treated humanely.

3. Myth Number Three: "The Geneva Conventions preclude us from interrogating Prisoners." This is simply not true. While those designated prisoners of war may not be coerced to answer questions other than their name rank and serial number, the U.S. military has extensive instructions on how to interrogate both POWs and other prisoners within the constraints of U.S. and international law, and indeed has done so effectively under that guidance for the past sixty years.

4. Myth Number Four: "U.S. obligations pursuant to human rights treaties like the Convention Against Torture (CAT) have no extra-territorial application." To the contrary, human rights treaties bind states to respect their obligations wherever they exercise effective control. Indeed, that is one reason Congress passed

sections 2340 and 2340A of the criminal code to fulfill U.S. obligations under CAT requiring the criminal jurisdiction over extraterritorial acts of torture.

5. Myth Number Five: "Current rules governing interrogations are inadequate to fight the 'war against terrorism' – we don't have clear standards and therefore need new rules." The Army Field Manual on interrogation practices has been developed over the last sixty years and tested extensively in the field. It reflects the best thinking of professional military officers, committed both to ensuring our national defense, and abiding by the rule of law. Here is what the Field Manual says about coercive interrogation practices: "U.S. policy expressly prohibits acts of violence or intimidation, including physical or mental threats, insults or exposure to inhuman treatment." The Field Manual prescribes criminal sanctions against members of the military who violate this prohibition. In explaining the rationale for this strict prohibition, the Field Manual states: "Revelation of the use of torture by U.S. personal will bring discredit upon the United States and its armed forces." The Field Manual goes on to say "it also may place U.S. personnel in enemy hands at greater risk of abuse by their captors."

It is in part on the basis of this training that the strongest negative reactions to these actions have come from within the military, especially senior retired military officers. They are deeply concerned that the relaxed interrogation standards lead to abuses and seriously tarnish the military's reputation. In January twelve retired Generals and Admirals, including the former head of the Joint Chiefs of Staff John Shalikashvili, wrote to members of the Senate Judiciary Committee concerning the nomination of Alberto Gonzales as Attorney General. In challenging the relaxation of legal controls on coercive interrogation practices, the military leaders wrote that these new rules "have fostered greater animosity toward the United States, undermined our intelligence gathering efforts, and added to the risks facing our troops around the world."

Treatment of Immigrants, Non-Citizens and Refugees

Beyond the conduct of detention and interrogation operations most broadly, the United States has also struggled with issues relating to the treatment of non-citizens, minorities and immigrants since September 11. Often in times or war or national emergency, foreigners, minorities and immigrants are the most vulnerable targets for high profile federal crackdowns. We all remember the Mitchell Palmer raids after World War I and the internment of the Japanese during the Second World War. In retrospect, we have come to regret these rash, discriminatory actions. But in moments of crisis, they were widely popular. This helps explain why governments are inclined to carry them out.

A number of actions taken over the past three and a half years, and directed against people from South Asia and the Middle East, fall into this pattern. I include in this category the immigration sweeps immediately after September 11th in which more than 1200 people were arrested and detained, mostly on dubious grounds. I also include the special registration program directed at young men from 25 predominantly Arab and

Muslim countries. During the life of this program, more than 82,000 people went through that process resulting in little, if any, valuable intelligence. What the program did do was strain an already fragile relationship between U.S. law enforcement agencies and the South Asian and Middle Eastern communities throughout United States, communities whose cooperation could be helpful in combating terrorism. I assume that future generations will look back at us and ask why there wasn't a more robust debate about these discriminatory practices.

Yet just last week, the U.S. House of Representatives passed the Real ID Act, which includes a number of draconian restrictions on the right of refugees to seek political asylum in this country. To cite one example, under this proposed law, immigration judges could deny asylum claims based on any prior inconsistent statements of the applicant, even if they are immaterial to the asylum claim. So if a women fleeing Darfur was raped by soldiers as she tried to escape and failed to disclose this fact to airport inspectors but later mentioned it to an immigration judge, that "inconsistency" could be used to deny her asylum. Another provision allows the Government to deport an asylum applicant while his or her appeal is pending in the federal courts. The ABA has been an important voice for the rights of immigrants and asylum seekers over many years. In the coming months, as this legislation is debated in the Senate, this voice will be more vital than ever.

Openness in Government / Protecting Personal Privacy

In framing the picture of post 9/11 erosion of civil liberties in the world, there are two other related areas that I want to touch on very briefly. These are openness in government and privacy. Historically, our country has operated on the presumption that our government should be largely open to public scrutiny. As James Madison wrote two centuries ago, "popular government without popular information or the means of acquiring it, is but a prologue to farce or tragedy or both." Similarly, the United States has also operated on the premise that the personal lives of individuals in our society should be protected from government intrusion, and our personal privacy subject only to narrow and carefully regulated exceptions.

Since September 11, the government has taken a number of steps to turn these two fundamental principles on their heads. Today, the government is asserting a growing need for official secrecy while demanding ever greater access to our personal records and information about each of us.

With respect to openness in government, the administration has sought and continues to seek to curtail the Freedom of Information Act. It even continues to restrict access to information by members of Congress and other public officials. Former Governor Thomas Kean, who chaired the 9/11 Commission, said afterward that "three quarters of what I read that was classified, shouldn't have been." A number of members of Congress, including former Senate majority Leader Trent Lott, are now urging the establishment of an independent board within the executive branch to make recommendations on

overhauling the current classification system with a view toward allowing greater openness. We should support their efforts.

With respect to personal privacy, much of the debate in the last three years has focused on the USA Patriot Act, which was passed in the fall of 2001. To date, four states and more than 300 cities and towns across the country have passed resolutions affirming their commitment to civil liberties in the face of encroachments by the Patriot Act. A number of key provisions were passed with sunset provisions that will run out in December. This means that there will be congressional debate later this year on their renewal. Among the key provisions that will be up for renewal are Section 214, which eases restrictions on wiretaps, and Section 215, which allows the FBI greater access to information about U.S. citizens by reviewing library and bookstore records without having to demonstrate any suspicion that the target had been involved in any illegal acts. It is critical for the ABA to be engaged in this debate as it unfolds.

Recommendations for the American Bar Association

Given the wide range of issues now needing the attention of those who care about human rights and the rule of law, I see six important areas where the leadership of the American Bar Association can make a meaningful difference.

1. The ABA should stay the course in challenging the Administration's approach to the enemy combatant cases. In the Padilla case, and the cases relating to the status of the Guantanamo detainees, the ABA should encourage the continued involvement of the courts.

2. The ABA should step up its advocacy for the creation of an independent commission to review the detention and interrogation practices in Iraq, Afghanistan and elsewhere. This commission should be similar in scope to the recently completed 9/11 Commission, which did a truly excellent job. To do its job properly, this commission will need subpoena power and a broad mandate to examine illegal practices, not just at Abu Ghraib, but wherever people are being held in U.S. custody. Earlier this month, ABA President Robert Grey, Jr. urged the creation of such a Commission in a letter to President Bush. This letter provides an excellent foundation from which the ABA can carry out its future advocacy with members of Congress. It is an issue of particular importance to Human Rights First, and we will be eager to work closely with you to advance our shared goal.

3. The ABA should actively engage in the upcoming congressional debate on legislation to allow preventive detention and coercive interrogations – measures now being contemplated by members of Congress on both sides of the aisle. One contemplated measure would allow the President to order highly coercive interrogation methods in extreme cases. Experience in other countries has shown that these sorts of emergency measures create a slippery slope where the exceptional becomes the routine. With respect to interrogations, the Israeli experience following the Landau Commission recommendations is particularly instructive. In 1987, that commission proposed the

legalization of moderate physical force in interrogations, a recommendation subsequently adopted by the government. After almost 10 years, it became clear that coercive interrogations had become the rule, and the practice was challenged in court. In 1999, the Supreme Court of Israel courageously declared that the Israeli security services had overstepped their authority in carrying out such practices, and ordered them stopped.

4. The ABA should take a lead in evaluating the capacity of our own criminal justice system to prosecute national security cases. If we, as lawyers , believe that the criminal justice system can and should handle these cases, then we bear the responsibility of assessing the practical constraints on that system that lead policy-makers to seek alternative ways to handle such cases. Thus, for example, if there are fears about the safety of judges, witnesses, and jurors in such cases, we in the legal profession should be working to address those concerns in practical ways that are consistent with our commitment to the rule of law. I believe the ABA can play an important leadership role in examining these issues and making practical recommendations.

5. The ABA should help governments develop a global legal definition of terrorism. The United Nations has considered a comprehensive Convention Against Terrorism for more than 40 years. They cannot finish the task because governments have not come to an agreement on the definition of the term "terrorism." The UN has now promulgated a dozen other treaties relating to terrorist acts, all of which are derivative of this main unfinished treaty. The result is the absence of legal basis for developing international legal enforcement strategies. As lawyers we know the importance of defining and codifying illegal actions, a critical first step in effective law enforcement. This is an area where lawyers, and the ABA in particular, can play an important role. Fortunately, the debate is beginning to shift. In December, a high level panel appointed by the UN Secretary General made a series of recommendations for UN reform. One of their recommendations addressed this point. The high level panel called on the UN member states to define terrorism and ratify the comprehensive Convention Against Terrorism. They proposed that the definition should be based on two key elements: one, that the action is intended to cause death or serious bodily harm to civilians or non-combatants; and two, that the purpose of the act is to intimidate the population or force a government to act or abstain from an act. If a definition with these or similar elements can be adopted, it will strengthen the international community's hand in combating terrorism through international collective action.

6. The ABA also has a critically important educative role with respect to these issues. As the nation's largest and most prominent legal organization, the ABA should enhance its efforts to educate lawyers, judges, as well as the broader public on the importance of the rule of law to a free society. As leaders of the legal community, you play a vital role in generating debate on these issues, as well as helping inform and guide that debate. In the coming months and years, we all have our work cut out for us. But I remain hopeful and confident that an informed and engaged public will help restore our nation's proud tradition as a beacon of freedom and human rights.

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The changes I have been discussing are having profound effects around the world as well as here at home. Repressive governments in places like Zimbabwe, Egypt, China, and Russia increasingly cite the "American Model" of detention and interrogation to justify their own actions. The world is watching closely to see how we respond to the challenges posed by this erosion in civil liberties of our own society.

Thirty years ago, Justice William Douglas wrote to a group of young lawyers in the State of Washington. His comments seem particularly apt today. He wrote: "As nightfall doesn't come at once, neither does oppression. In both instances there is a twilight when everything remains seemingly unchanged. And it is in such twilight that we must be aware that a change is in the air – however slight – lest we become unwitting victims of the darkness."

Today we find ourselves in the twilight, and it is incumbent on all of us to respond in whatever ways we can to fend off the darkness. I am an optimist, and believe that we can and will correct our course. But to do so, all of us must be ready to play an active role, and to engage in a series of politically contentious and controversial debates. The U.S. legal community, and the American Bar Association, need to be at the center of this debate and can make a real difference. I look forward to working with you as this debate unfolds and in our collective effort to uphold the rule of law in our own society.

Thank you.