



# American Bar Association Resolutions

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## *Anti-Terrorism and Preservation of Civil Liberties*

### **Selected Policy Statements**

Last Updated: 3/09

#### **Military Commissions, adopted 2/02**

RESOLVED, That the American Bar Association urges that, with respect to the November 13, 2001, Military Order Regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," or any similar military order that is issued, the President and Congress should assure that the law and regulations governing any tribunal will:

1. Not be applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the United States;
2. Not be applicable to persons apprehended or to be tried in the United States, except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of such law of war;
3. Not be applicable to cases in which violations of federal, state or territorial laws, as opposed to violations of such law of war, are alleged;
4. Not permit indefinite pretrial detention of persons subject to the order;
5. Require that its procedures for trials and appeals be governed by the Uniform Code of Military Justice except Article 32 and provide the rights afforded in courts-martial thereunder, including, but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases; and
6. Require compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

FURTHER RESOLVED, That the American Bar Association urges the Executive and Legislative branches, in establishing and implementing procedures and selecting venues for trial by military tribunals, to give full consideration to the impact of its choices as precedents in (a) the prosecution of U.S. citizens in other nations and (b) the use of international legal norms in shaping other nations' responses to future acts of terrorism.

#### **Military Commissions – Access to Civilian Defense Counsel, adopted 8/03**

RESOLVED, That the American Bar Association calls upon Congress and the Executive Branch to ensure that all defendants in any military commission trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC), and opposes any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances, and

FURTHER RESOLVED, That the American Bar Association endorses the following principles for the conduct of any military commission trials that may take place:

1. The government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client;

2. The government should ensure that CDC who have received appropriate security clearances are permitted to be present at all stages of commission proceedings and are afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence, whether or not used, or intended to be used, at a trial;

3. The government should ensure that CDC are able to consult with other attorneys, seek expert assistance, advice, or counsel outside the defense team, and conduct all professionally appropriate factual and legal research, subject to their duty not to reveal or disseminate classified or protected information or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing;

4. The government should not limit the ability of CDC to speak publicly, consistent with their obligations under the Model Rules of Professional Conduct, and subject to their duty not to reveal or disseminate classified or protected information, or to such other conditions as the presiding officer of a military commission may determine are required by the circumstances in a particular case after notice and hearing;

5. The government should provide for travel, lodging, and required security clearance background investigations for CDC, and should consider the professional and ethical obligations of CDC in scheduling of proceedings.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

7. To the extent that the government seeks modification of any of the foregoing on the basis of national security concerns, it should be required to do so on a case-by-case basis in a proceeding before a neutral officer and with defense participation.

FURTHER RESOLVED, That Congress and the Executive Branch should develop rules and procedures to ensure that any military commission prosecution in which the death penalty may be sought complies fully with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

### **Incommunicado Detention by the Immigration and Naturalization Service, adopted 8/02**

RESOLVED, That the American Bar Association opposes the incommunicado detention of foreign nationals in undisclosed locations by the Immigration and Naturalization Service (INS) and urges protection of the constitutional and statutory rights of immigration detainees by:

1. Disclosing the names, detention facilities and charges against detainees and ensuring their immediate access to attorneys and family members;

2. Promptly charging detainees and releasing detainees when charges are not brought or removal orders are not effectuated within a constitutionally permissible time period;

3. Providing prompt custody hearings before immigration judges with meaningful administrative review and judicial oversight;

4. Holding public removal hearings except when required to protect the individual's safety or welfare or when a judge finds that a portion of any such hearing must be closed because (a) information that would pose an imminent threat to national security is likely to be disclosed and (b) there is no other reasonably available alternative to closure that would adequately protect the government's national security interest; and

5. Promulgating into regulation the four INS detention standards relating to access to counsel and legal information, and permitting independent organizations to visit the detention facilities and meet privately with detainees to monitor compliance.

### **Enemy Combatants, adopted 2/03**

RESOLVED, That the American Bar Association urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" be afforded the opportunity for meaningful judicial review of their status, under a standard according such deference to the designation as the reviewing court determines to be appropriate to accommodate the needs of the detainees and the requirements of national security; and

FURTHER RESOLVED, That the American Bar Association urges that U.S. citizens and residents who are detained within the United States based on their designation as "enemy combatants" not be denied access to counsel in connection with the opportunity for such review, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainees and the requirements of national security; and

FURTHER RESOLVED, That the American Bar Association urges Congress, in coordination with the Executive Branch, to establish clear standards and procedures governing the designation and treatment of U.S. citizens, residents, or others who are detained within the United States as "enemy combatants;" and

FURTHER RESOLVED, That the American Bar Association urges that, in setting and executing national policy regarding detention "enemy combatants," Congress and the Executive Branch should consider how the policy adopted by the United States may affect the response of other nations to future acts of terrorism.

### **Torture, adopted 8/04**

RESOLVED, That the American Bar Association condemns any use of torture or other cruel, inhuman or degrading treatment or punishment upon persons within the custody or under the physical control of the United States government (including its contractors) and any endorsement or authorization of such measures by government lawyers, officials and agents;

FURTHER RESOLVED, That the American Bar Association urges the United States government to comply fully with the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions of August 12, 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions, to take all measures necessary to ensure that no person within the custody or under the physical control of the United States government is subjected to torture or other cruel, inhuman or degrading treatment or punishment;

FURTHER RESOLVED, That the American Bar Association urges the United States government to: (a) comply fully with the four Geneva Conventions of August 12, 1949, including timely compliance with all provisions that require access to protected persons by the International Committee of the Red Cross; (b) observe the minimum protections of their common Article 3 and related customary international law; and (c) enforce such compliance through all applicable laws, including the War Crimes Act and the Uniform Code of Military Justice;

FURTHER RESOLVED, That the American Bar Association urges the United States government to take all measures necessary to ensure that all foreign persons captured, detained, interned or otherwise held within the custody or under the physical control of the United States are treated in accordance with standards that the United States would consider lawful if employed with respect to an American captured by a foreign power;

FURTHER RESOLVED, That the American Bar Association urges the United States government to take all measures necessary to ensure that no person within the custody or under the physical control of the United States is turned over to another government when the United States has substantial grounds to believe that such person will be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment;

FURTHER RESOLVED, That the American Bar Association urges that 18 U.S.C. §§2340(1) and 2340A be amended to encompass torture wherever committed, and regardless of the underlying motive or purpose;

FURTHER RESOLVED, That the American Bar Association urges the United States government to pursue vigorously (1) the investigation of violations of law, including the War Crimes Act and the Uniform Code of Military Justice, with respect to the mistreatment or rendition of persons within the custody or under the physical control of the United States government, and (2) appropriate proceedings against persons who may have committed, assisted, authorized, condoned, had command responsibility for, or otherwise participated in such violations;

FURTHER RESOLVED, That the American Bar Association urges the President and Congress, in addition to pending congressional investigations, to establish an independent, bipartisan commission with subpoena power to prepare a full account of detention and interrogation practices carried out by the United States, to make public findings, and to provide recommendations designed to ensure that such practices adhere faithfully to the Constitution and laws of the United States and treaties to which the United States is a party, including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and related customary international law, including Article 75 of the 1977 Protocol I to the Geneva Conventions;

FURTHER RESOLVED, That the American Bar Association urges the United States government to comply fully and in a timely manner with its reporting obligations as a State Party to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

FURTHER RESOLVED, That the American Bar Association urges that, in establishing and executing national policy regarding the treatment of persons within the custody or under the physical control of the United States government, Congress and the Executive Branch should consider how United States practices may affect (a) the treatment of United States persons who may be captured and detained by other nations and (b) the credibility of objections by the United States to the use of torture or other cruel, inhuman or degrading treatment or punishment against United States persons.

#### **Foreign Intelligence Surveillance Act, adopted 2/06**

RESOLVED, that the American Bar Association calls upon the President to abide by the limitations which the Constitution imposes on a president under our system of checks and balances and respect the essential roles of the Congress and the judicial branch in ensuring that our national security is protected in a manner consistent with constitutional guarantees;

FURTHER RESOLVED, that the American Bar Association opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA), and urges the President, if he believes that FISA is inadequate to safeguard national security, to seek appropriate amendments or new legislation rather than acting without explicit statutory authorization;

FURTHER RESOLVED, that the American Bar Association urges the Congress to affirm that the Authorization for Use of Military Force of September 18, 2001, Pub.L. No. 107 40, 115 Stat. 224 § 2(a) (2001) (AUMF), did not provide a statutory exception to the FISA requirements, and that any such exception can be authorized only through affirmative and explicit congressional action;

FURTHER RESOLVED, that the American Bar Association urges the Congress to conduct a thorough, comprehensive investigation to determine: (a) the nature and extent of electronic surveillance of U.S. persons conducted by any U.S. government agency for foreign intelligence purposes that does not comply with FISA; (b) what basis or bases were advanced (at the time it was initiated and subsequently) for the legality of such surveillance; (c) whether the Congress was properly informed of and consulted as to the surveillance; (d) the nature of the information obtained as a result of the surveillance and whether it was retained or shared with other agencies; and (e) whether this information was used in legal proceedings against any U.S. citizen.

FURTHER RESOLVED, that the American Bar Association urges the Congress to ensure that such proceedings are open to the public and conducted in a fashion that will provide a clear and credible account to the people of the United States, except to the extent the Congress determines that any portions of such proceedings must be closed to prevent the disclosure of classified or other protected information; and

FURTHER RESOLVED, that the American Bar Association urges the Congress to thoroughly review and make recommendations concerning the intelligence oversight process, and urges the President to ensure that the House and Senate are fully and currently informed of all intelligence operations as required by the National Security Act of 1947.

### **Torture Prohibition for Civilian Agencies, adopted 8/07**

RESOLVED, That the American Bar Association urges Congress to enact legislation that would:

- (a) Supersede the Executive Order of July 20, 2007, which authorizes the Central Intelligence Agency to operate a program of detention and interrogation that is inconsistent with U.S. obligations under Common Article 3 of the Geneva Conventions of August 12, 1949 (Common Article 3); and
- (b) Ensure that whenever foreign persons are captured, detained, interned or otherwise held within the custody or under the physical control of the United States, or interrogated in any location by agents of the United States (including private contractors), they are treated in accordance with the minimum protections afforded by Common Article 3 and in a manner fully consistent with the standards of treatment and interrogation techniques contained in FM 2-22.3, the U.S. Army Field Manual on Intelligence Interrogation of September 2006.

## **State Secrets Privilege, adopted 8/07**

RESOLVED, That the American Bar Association supports procedures and standards designed to ensure that whenever possible, federal civil cases are not dismissed based solely on the state secrets privilege; and

FURTHER RESOLVED, That in furtherance of this objective the American Bar Association urges congress to enact legislation governing federal civil cases implicating the state secrets privilege (including cases in which the government is an original party or an intervenor) that:

- a. Permits the government to plead the privilege in its answer to particular allegations in the complaint without admitting or denying those allegations, and without having adverse inferences drawn against the government for doing so;
- b. Requires the government to provide a full and complete explanation of its privilege claims and to make available for *in camera* review the evidence the government claims is subject to the privilege;
- c. Requires a judicial assessment of the legitimacy of the government's privilege claims and deems evidence privileged only if the court finds, based on specific facts, that the government has reasonably determined that disclosure of the evidence would be significantly detrimental or injurious to the national defense or to cause substantial injury to the diplomatic relations of the United States;
- d. Permits the discovery of non-privileged evidence that may tend to prove the plaintiff's claim or the defendant's defense, provided that such evidence can be effectively segregated from privileged evidence, and where appropriate, provides for protective orders, *in camera* hearings, special masters to assist (including when the claim of privilege involves voluminous records), or other measures where necessary to protect the government's legitimate national security interests;
- e. Requires the government to produce a non-privileged substitute for privileged evidence, consisting of a summary of the privileged evidence, a version of the evidence with privileged information redacted, or a statement admitting relevant facts that the privileged evidence would tend to prove, provided that:
  - (i) The court finds that the evidence is essential to prove a claim or defense in the case;
  - (ii) The court finds that it is possible, without revealing privileged evidence, for the government to produce a substitute that provides a substantially equivalent opportunity to litigate the claim or defense as would the privileged evidence; and
  - (iii) In cases in which the government is a party asserting a claim or defense that implicates the privilege, the government is given the opportunity to elect between producing the non-privileged substitute and conceding the claim or defense to which the privileged evidence pertains;
- f. Provides that a ruling on a motion to dismiss, or for summary judgment, based on the state secrets privilege be deferred until the parties complete discovery of facts relevant to the motion and the court resolves any privilege claims asserted as to those facts under the procedures described above, except when the court finds that there is no credible basis for disputing that the state secrets claim inevitably will require dismissal;
- g. Provides that, after the court takes these steps and reviews evidence proffered by both parties, judgment for the defendant based on the state secrets privilege is denied if the

court finds that the plaintiff is able to prove a *prima facie* case with non-privileged evidence (including non-privileged evidence from sources outside the U.S. government), unless the court also finds, following *in camera* review, that the defendant's ability to defend against the plaintiff's case would be substantially impaired because the defendant is unable to present specific privileged evidence; and

- h. Entitles the government to take an expedited interlocutory appeal from a district court decision authorizing the disclosure of evidence subject to a claim under the state secrets privilege, imposing sanctions for nondisclosure of such evidence, or refusing a protective order to prevent disclosure of such evidence.

### **Review and Disposition of Guantanamo Detainees, adopted 2/09**

RESOLVED, that consistent with the Supreme Court's directive in *Boumediene v. Bush* and President Obama's January 22, 2009 Executive Order on "Review and Disposition Of Individuals Detained At The Guantanamo Bay Naval Base And Closure of Detention Facilities," the American Bar Association urges the U.S. Government to ensure that:

(a) All individuals who have been or are expected to be charged with violations of criminal law should be prosecuted in Article III federal courts, unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice;

(b) All individuals currently detained at Guantanamo who, upon review, are determined to have been improperly classified as or no longer considered to be "enemy combatants" should be promptly released or resettled; and

(c) All remaining individuals currently detained as enemy combatants at Guantanamo are granted a prompt habeas corpus hearing with full due process rights and provided access to counsel and the right to review and confront the evidence against them, including potential exculpatory evidence within the government's possession, whether or not used, or intended to be used at trial, subject to appropriate conditions as may be set by the court to accommodate the needs of the detainee and the requirements of national security; and

(d) No individual should be detained as an "enemy combatant" except pursuant to an act of Congress defining this term.