RESOLVED, That the American Bar Association urges the President and the Department of Defense to assure that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases required by the President’s Executive Order No. 13567, 76 Fed. Reg. 13277 (2011).
REPORT

Changes to the Manual for Courts-Martial ("MCM"), which take the form of Executive Orders, have for several decades been subject to public announcement and opportunity for comment facilitated through the Joint Service Committee on Military Justice (JSC). Under DoD Directive 5500.17 (May 3, 2003), 32 C.F.R. pt. 152 (2010), it is DoD policy "to encourage public participation in the review" of the MCM. Proposed changes are published in the Federal Register, and the public has 60 days to provide written comments. The JSC also holds a public meeting within those 60 days. Agencies across the government rely on similar notice-and-comment procedures before promulgating new regulations. This resolution urges the President and the Department of Defense to use a similar procedure in promulgating or revising rules for the periodic review of law of war detention cases as required by President Obama's Executive Order 76 Fed. Reg. 13,277 (March 10, 2011) dated March 7, 2011 Executive Order (Appendix A).

Permitting public participation would demonstrate the Administration’s continuing commitment to greater openness in government. Although, under the president’s Executive Order, the Periodic Review Boards will be a joint project with consultation from the Attorney General and the Secretary of State, the resolution focuses on the President and DOD because section 3 of the Executive Order requires that the Secretary of Defense “coordinate the process.” The process will lack transparency if it fails to involve the public and other interested stakeholders in the formation of the rules.

Public notice and comment rules exist because public participation and openness in government are cornerstones of our democracy. Allowing public input adds legitimacy to the regulations while avoiding potential pitfalls before proposed rules take effect. Rule making for the prolonged detention of individuals who are deemed unlawful enemy belligerents should be open for the same reasons. The considerable public attention brought to bear on how we deal with individuals deemed unsuitable to try in any type of court yet too dangerous to release provides further justification to give the public an opportunity to comment.

Some of the individuals who are within the jurisdiction of the Periodic Review Boards have been held for the better part of a decade, with no end date in sight. Any standing and regularized system of justice in a democratic society must proceed on an open and participatory basis if it is to foster public confidence in the administration of justice.

Given what is now a decade-long experience with detentions of law of war detainees, there are individuals and groups who have long involvement in detention issues and who could contribute useful ideas about how to assure fair and just procedures for reviewing detained individuals. These include members of the military commission defense bar, the military legal community, Guantanamo and Bagram “habeas counsel," and other individuals and groups that have witnessed proceedings at Guantanamo.
Other experts on military justice and the law of armed conflict also may have much to contribute. It might be useful if DOD were to make an effort to create a forum in which those with expertise on the issues could interact with each other and with government representatives – for example, in a town hall-style meeting.

Respectfully submitted,
Bruce Green, Chair
Criminal Justice Section
August 2011
Appendix A

Executive Order Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force

The White House

Office of the Press Secretary

For Immediate Release
March 07, 2011

Executive Order--Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force

EXECUTIVE ORDER

PERIODIC REVIEW OF INDIVIDUALS DETAINED AT GUANTÁNAMO BAY NAVAL STATION PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force of September 2001 (AUMF), Public Law 107-40, and in order to ensure that military detention of individuals now held at the U.S. Naval Station, Guantánamo Bay, Cuba (Guantánamo), who were subject to the interagency review under section 4 of Executive Order 13492 of January 22, 2009, continues to be carefully evaluated and justified, consistent with the national security and foreign policy interests of the United States and the interests of justice, I hereby order as follows:

Section 1. Scope and Purpose. (a) The periodic review described in section 3 of this order applies only to those detainees held at Guantánamo on the date of this order, whom the interagency review established by Executive Order 13492 has (i) designated for continued law of war detention; or (ii) referred for prosecution, except for those detainees against whom charges are pending or a judgment of conviction has been entered.

(b) This order is intended solely to establish, as a discretionary matter, a process to review on a periodic basis the executive branch's continued, discretionary exercise of existing detention authority in individual cases. It does not create any additional or separate source of detention authority, and it does not affect the scope of detention authority under existing law. Detainees at Guantánamo have the constitutional privilege of the writ of habeas corpus, and nothing in this order is intended to affect the jurisdiction of Federal courts to determine the legality of their detention.
(c) In the event detainees covered by this order are transferred from Guantánamo to another U.S. detention facility where they remain in law of war detention, this order shall continue to apply to them.

Sec. 2. Standard for Continued Detention. Continued law of war detention is warranted for a detainee subject to the periodic review in section 3 of this order if it is necessary to protect against a significant threat to the security of the United States.

Sec. 3. Periodic Review. The Secretary of Defense shall coordinate a process of periodic review of continued law of war detention for each detainee described in section 1(a) of this order. In consultation with the Attorney General, the Secretary of Defense shall issue implementing guidelines governing the process, consistent with the following requirements:

(a) Initial Review. For each detainee, an initial review shall commence as soon as possible but no later than 1 year from the date of this order. The initial review will consist of a hearing before a Periodic Review Board (PRB). The review and hearing shall follow a process that includes the following requirements:

(1) Each detainee shall be provided, in writing and in a language the detainee understands, with advance notice of the PRB review and an unclassified summary of the factors and information the PRB will consider in evaluating whether the detainee meets the standard set forth in section 2 of this order. The written summary shall be sufficiently comprehensive to provide adequate notice to the detainee of the reasons for continued detention.

(2) The detainee shall be assisted in proceedings before the PRB by a Government-provided personal representative (representative) who possesses the security clearances necessary for access to the information described in subsection (a)(4) of this section. The representative shall advocate on behalf of the detainee before the PRB and shall be responsible for challenging the Government's information and introducing information on behalf of the detainee. In addition to the representative, the detainee may be assisted in proceedings before the PRB by private counsel, at no expense to the Government.

(3) The detainee shall be permitted to (i) present to the PRB a written or oral statement; (ii) introduce relevant information, including written declarations; (iii) answer any questions posed by the PRB; and (iv) call witnesses who are reasonably available and willing to provide information that is relevant and material to the standard set forth in section 2 of this order.

(4) The Secretary of Defense, in coordination with other relevant Government agencies, shall compile and provide to the PRB all information in the detainee disposition recommendations produced by the Task Force established under Executive Order 13492 that is relevant to the determination whether the standard in section 2 of this order has been met and on which the Government seeks to rely for that determination.
In addition, the Secretary of Defense, in coordination with other relevant Government agencies, shall compile any additional information relevant to that determination, and on which the Government seeks to rely for that determination, that has become available since the conclusion of the Executive Order 13492 review. All mitigating information relevant to that determination must be provided to the PRB.

(5) The information provided in subsection (a)(4) of this section shall be provided to the detainee's representative. In exceptional circumstances where it is necessary to protect national security, including intelligence sources and methods, the PRB may determine that the representative must receive a sufficient substitute or summary, rather than the underlying information. If the detainee is represented by private counsel, the information provided in subsection (a)(4) of this section shall be provided to such counsel unless the Government determines that the need to protect national security, including intelligence sources and methods, or law enforcement or privilege concerns, requires the Government to provide counsel with a sufficient substitute or summary of the information. A sufficient substitute or summary must provide a meaningful opportunity to assist the detainee during the review process.

(6) The PRB shall conduct a hearing to consider the information described in subsection (a)(4) of this section, and other relevant information provided by the detainee or the detainee's representative or counsel, to determine whether the standard in section 2 of this order is met. The PRB shall consider the reliability of any information provided to it in making its determination.

(7) The PRB shall make a prompt determination, by consensus and in writing, as to whether the detainee's continued detention is warranted under the standard in section 2 of this order. If the PRB determines that the standard is not met, the PRB shall also recommend any conditions that relate to the detainee's transfer. The PRB shall provide a written summary of any final determination in unclassified form to the detainee, in a language the detainee understands, within 30 days of the determination when practicable.

(8) The Secretary of Defense shall establish a secretariat to administer the PRB review and hearing process. The Director of National Intelligence shall assist in preparing the unclassified notice and the substitutes or summaries described above. Other executive departments and agencies shall assist in the process of providing the PRB with information required for the review processes detailed in this order.

(b) Subsequent Full Review. The continued detention of each detainee shall be subject to subsequent full reviews and hearings by the PRB on a triennial basis. Each subsequent review shall employ the procedures set forth in section 3(a) of this order.

(c) File Reviews. The continued detention of each detainee shall also be subject to a file review every 6 months in the intervening years between full reviews. This file review will be conducted by the PRB and shall consist of a review of any relevant new information related to the detainee compiled by the Secretary of Defense, in coordination with other
relevant agencies, since the last review and, as appropriate, information considered during any prior PRB review. The detainee shall be permitted to make a written submission in connection with each file review. If, during the file review, a significant question is raised as to whether the detainee’s continued detention is warranted under the standard in section 2 of this order, the PRB will promptly convene a full review pursuant to the standards in section 3(a) of this order.

(d) Review of PRB Determinations. The Review Committee (Committee), as defined in section 9(d) of this order, shall conduct a review if (i) a member of the Committee seeks review of a PRB determination within 30 days of that determination; or (ii) consensus within the PRB cannot be reached.

Sec. 4. Effect of Determination to Transfer. (a) If a final determination is made that a detainee does not meet the standard in section 2 of this order, the Secretaries of State and Defense shall be responsible for ensuring that vigorous efforts are undertaken to identify a suitable transfer location for any such detainee, outside of the United States, consistent with the national security and foreign policy interests of the United States and the commitment set forth in section 2242(a) of the Foreign Affairs Reform and Restructuring Act of 1998 (Public Law 105-277).

(b) The Secretary of State, in consultation with the Secretary of Defense, shall be responsible for obtaining appropriate security and humane treatment assurances regarding any detainee to be transferred to another country, and for determining, after consultation with members of the Committee, that it is appropriate to proceed with the transfer.

(c) The Secretary of State shall evaluate humane treatment assurances in all cases, consistent with the recommendations of the Special Task Force on Interrogation and Transfer Policies established by Executive Order 13491 of January 22, 2009.

Sec. 5. Annual Committee Review. (a) The Committee shall conduct an annual review of sufficiency and efficacy of transfer efforts, including:

(1) the status of transfer efforts for any detainee who has been subject to the periodic review under section 3 of this order, whose continued detention has been determined not to be warranted, and who has not been transferred more than 6 months after the date of such determination;

(2) the status of transfer efforts for any detainee whose petition for a writ of habeas corpus has been granted by a U.S. Federal court with no pending appeal and who has not been transferred;

(3) the status of transfer efforts for any detainee who has been designated for transfer or conditional detention by the Executive Order 13492 review and who has not been transferred; and
(4) the security and other conditions in the countries to which detainees might be transferred, including a review of any suspension of transfers to a particular country, in order to determine whether further steps to facilitate transfers are appropriate or to provide a recommendation to the President regarding whether continuation of any such suspension is warranted.

(b) After completion of the initial reviews under section 3(a) of this order, and at least once every 4 years thereafter, the Committee shall review whether a continued law of war detention policy remains consistent with the interests of the United States, including national security interests.

Sec. 6. Continuing Obligation of the Departments of Justice and Defense to Assess Feasibility of Prosecution. As to each detainee whom the interagency review established by Executive Order 13492 has designated for continued law of war detention, the Attorney General and the Secretary of Defense shall continue to assess whether prosecution of the detainee is feasible and in the national security interests of the United States, and shall refer detainees for prosecution, as appropriate.

Sec. 7. Obligation of Other Departments and Agencies to Assist the Secretary of Defense. All departments, agencies, entities, and officers of the United States, to the maximum extent permitted by law, shall provide the Secretary of Defense such assistance as may be requested to implement this order.

Sec. 8. Legality of Detention. The process established under this order does not address the legality of any detainee's law of war detention. If, at any time during the periodic review process established in this order, material information calls into question the legality of detention, the matter will be referred immediately to the Secretary of Defense and the Attorney General for appropriate action.

Sec. 9. Definitions. (a) "Law of War Detention" means: detention authorized by the Congress under the AUMF, as informed by the laws of war.

(b) "Periodic Review Board" means: a board composed of senior officials tasked with fulfilling the functions described in section 3 of this order, one appointed by each of the following departments and offices: the Departments of State, Defense, Justice, and Homeland Security, as well as the Offices of the Director of National Intelligence and the Chairman of the Joint Chiefs of Staff.

(c) "Conditional Detention" means: the status of those detainees designated by the Executive Order 13492 review as eligible for transfer if one of the following conditions is satisfied: (1) the security situation improves in Yemen; (2) an appropriate rehabilitation program becomes available; or (3) an appropriate third-country resettlement option becomes available.
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(d) “Review Committee” means: a committee composed of the Secretary of State, the Secretary of Defense, the Attorney General, the Secretary of Homeland Security, the Director of National Intelligence, and the Chairman of the Joint Chiefs of Staff.

Sec. 10. General Provisions. (a) Nothing in this order shall prejudice the authority of the Secretary of Defense or any other official to determine the disposition of any detainee not covered by this order.

(b) This order shall be implemented subject to the availability of necessary appropriations and consistent with applicable law including: the Convention Against Torture; Common Article 3 of the Geneva Conventions; the Detainee Treatment Act of 2005; and other laws relating to the transfer, treatment, and interrogation of individuals detained in an armed conflict.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) Nothing in this order, and no determination made under this order, shall be construed as grounds for release of detainees covered by this order into the United States.

BARACK OBAMA

THE WHITE HOUSE,
March 7, 2011.
GENERAL INFORMATION FORM

Submitting Entity: The American Bar Association Criminal Justice Section

Submitted By: Bruce Green, Chair

1. **Summary of Resolution(s).**
The resolution urges the President and the Department of Defense to assure that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases required by President Obama's Executive Order dated March 7, 2011.

2. **Approval by Submitting Entity.**
The resolution was approved by the Criminal Justice Section Council at its regular Spring Meeting, held in Miami on April 16-17, 2011.

3. **Has this or a similar resolution been submitted to the House or Board previously?**
No.

4. **What existing Association policies are relevant to this resolution and how would they be affected by its adoption?**
At the 2009 Midyear Meeting, the House of Delegates approved Resolution 10A urging *inter alia*, that individuals currently detained at Guantánamo Bay Naval Base 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 that individuals not released or resettled be granted a prompt habeas corpus hearing with full due process rights, access to counsel, and the right to review and confront the evidence against them. The proposed policy seeks to ensure that the ABA and other stakeholders have a formal opportunity to transmit recommendations regarding the rules governing the “continued law of war detention” periodic reviews required for Guantánamo detainees under a March 2011 Presidential Executive Order on “Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force.”

5. **What urgency exists which requires action at this meeting of the House?**
The periodic reviews required by the March 2011 Executive Order referenced above are, according to the Order, to begin no later than one year from the date of the order, and it is important that the ABA and other relevant stakeholders have an early opportunity to participate whenever the rules for periodic reviews are being considered.

6. **Status of Legislation.** (If applicable)
None.
7. **Cost to the Association.** (Both direct and indirect costs)
   None, except those relating to ABA testimony on related matters.

8. **Disclosure of Interest.** (If applicable)
   None.

9. **Referrals.**
   Concurrently with the submission of this report to the ABA Policy Administration Office for calendaring on the August 2011 House of Delegates agenda it is being circulated to the following:

   - Task Force on Treatment of Enemy Combatants
   - Standing Committee on Armed Forces Law
   - Governmental Affairs
   - Law & National Security
   - Death Penalty Representation Project
   - Center for Human Rights
   - Individual Rights & Responsibility
   - International Law
   - Judicial Division
   - Litigation Division
   - Judge Advocates Association
   - National Association of Attorneys General
   - National Association of Criminal Defense Lawyers
   - National District Attorneys Association
   - National Legal Aid & Defender Association

10. **Contact Name and Address Information.** (Prior to the meeting)

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11. Contact Name and Address Information. (Stephen A. Saltzburg, Section Delegate will present the Report to the House of Delegates).

CJS Delegates to the House of Delegates

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges President Obama and the Department of Defense to assure that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases required by Executive Order No. 13567, 76 Fed. Reg. 13277 (2011).

2. Summary of the Issue that the Resolution Addresses

The resolution addresses the rule for the periodic review of continued law of war detention cases.

3. Please Explain How the Proposed Policy Position will Address the Issue

The proposed policy position will address the issue in assuring that there is an opportunity for public notice and comment with respect to the issuance of the rules for the periodic review of continued law of war detention cases.

4. Summary of Minority Views

None identified.