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October 20, 2006

MG John D. Altenburg, Jr. USA (Ret.)
Appointing Authority
Office of Military Commissions
Department of Defense
1600 Defense Pentagon, Room 3B688
Washington, DC 20301-1600

Re: Draft Manual for Military Commissions

Dear General Altenburg:

On behalf of the American Bar Association and its more than 400,000 members, I write to urge that a public notice and comment rulemaking procedure be utilized with respect to the draft Manual for Military Commissions to be promulgated pursuant to the Military Commissions Act signed into law earlier this week.

The American Bar Association has taken an active interest in the legal and policy issues arising from the efforts to prosecute those suspected of being enemy combatants or otherwise engaged in terrorist activities against our country. In February 2002, for example, our House of Delegates adopted a set of carefully crafted resolutions regarding the use of military commissions, and the House has addressed these and related issues on three occasions since. Copies of these resolutions are enclosed.

The ABA has long favored notice and comment procedures in federal rulemaking including rulemaking in the military establishment. For example, ABA policy adopted several years ago by its House of Delegates urges that courts-martial rulemaking procedures and changes to the Manual for Courts-Martial should not be finally promulgated until after there has been public notice and an opportunity for comments and analysis of comments as is done with other changes to important federal government rules and regulations published pursuant to the Administrative Procedure Act and the Federal Register Act. More specifically, ABA policy recommends a method of adopting rules for procedure and evidence at courts-martial which is generally consistent with the court rulemaking procedures in federal courts.

We believe that the use of such notice-and-comment procedures is in the general public interest, will undoubtedly generate thoughtful and constructive comments from a variety of perspectives that will be helpful to the Department, and will lead to improved public confidence in the result both in our own country and internationally.

Please do not hesitate to contact me or Bob Evans, director of the Washington office (202/662-1765), if you would like to discuss this matter further.

Sincerely,

A handwritten signature in black ink that reads "Karen J. Mathis". The signature is written in a cursive style with a small dot above the 'i' in Mathis.

Karen J. Mathis

Enclosures

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

February 4-5, 2002

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.

**AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
February 10, 2003**

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 detainee 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 detainee 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 of "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.

**AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
August 11-12, 2003**

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. (rev. ed. 2003).

Adopted by Voice Vote

**AMERICAN BAR ASSOCIATION
Adopted by the House of Delegates
August 9, 2004**

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.