

William H. Neukom
President

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The President of the United States
The White House
Washington, D.C. 20500

Dear Mr. President:

I write to restate the strong concerns of the American Bar Association (ABA) that the military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation's concept of justice.

There can be no argument that detainees who plotted terrorist attacks against our country and killed thousands of innocent Americans should be brought to justice and be held fully accountable for their horrific crimes. At the same time, no matter how outrageous the conduct, we must insure that these detainees receive fair trials that meet the highest standards of due process and justice for which this nation long has been respected throughout the world. We believe that the established principles of due process must be followed, and the ABA is prepared to assist.

Since 2002, the ABA has urged that military tribunals be governed by the Uniform Code of Military Justice, provide the rights afforded in courts-martial proceedings, including the right to habeas corpus review, and comply with our international treaty obligations. These obligations include representation by counsel of choice, respect for the attorney-client privilege, adequate time and facilities to prepare the defense, the ability to examine all evidence and confront witnesses, and an independent and impartial tribunal. Longstanding ABA policy calls for zealous and effective assistance of counsel in any case, including military commission trials.

Under the current system, we believe that detainees will not receive due process or fair trials. Detainees cannot challenge their detention by habeas corpus, and the standards for

admissibility of evidence could allow for convictions based on rank hearsay. Similarly, statements secured through coercion could be introduced against a defendant. Indeed, the Legal Advisor to the Convening Authority recently declined to reject the use of evidence acquired through waterboarding. Further, detainees' access to their counsel is limited, and the access of a detainee's counsel to fundamental information pertaining to the defense of that detainee is restricted.

Our concerns about lack of due process and access to counsel have been heightened by the recent announcement that prosecutors are seeking the death penalty for six detainees charged with offenses related to the September 11, 2001 terrorist attacks. While the fundamental protections discussed above are important in any prosecution, the extreme nature of the sanction and the extraordinary complexity and demands of capital cases require a significantly greater degree of skill and experience on the part of defense counsel than in non-capital cases.

In recognition of the unique demands upon counsel in death penalty cases, the ABA promulgated Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (the "Guidelines") in 1989. These Guidelines have become the preeminent nationally recognized standards on this subject, have been adopted by numerous jurisdictions, and are widely relied upon by the bench and bar in setting forth the minimal requirements for defense counsel in capital cases.

The Guidelines call for defense teams -- consisting of at least two qualified attorneys, one investigator, and one mitigation specialist -- with sufficient experience and training to provide high quality legal representation to those who face execution if convicted. These principles are so important that, since 1997, the ABA has urged a moratorium on executions in death penalty jurisdictions until procedures consistent with the Guidelines can be implemented to ensure that capital cases are administered fairly, accurately and impartially. The Guidelines were revised in 2003 to apply specifically to military commission proceedings.

Before the commencement of any death penalty prosecution, we urge that adequate resources be provided to the defense in compliance with the Guidelines. We are concerned that there still exists a significant imbalance between the resources allocated to the prosecution, including assistance from experienced Department of Justice prosecutors, and those provided to the Office of the Chief Defense Counsel. Under such circumstances, we do not believe military commission trials can or will provide the level of fairness that is consistent with our values and essential to our credibility in the rest of the world.

To this end, the ABA is prepared to help ensure adherence to the Guidelines in these capital cases. We also stand ready to consult on how we might engage the most able legal minds to ensure that these cases comport with the rule of law, so precious to our democracy. By these means, we can further assure the American people and the free world that those who seek to abrogate the rule of law are held accountable for their crimes.

Sincerely,

A handwritten signature in black ink, appearing to read "W. Neukom". The signature is fluid and cursive, with a large initial "W" and a long, sweeping underline.

William H. Neukom

cc: The Honorable Susan J. Crawford
Convening Authority, Office of Military Commissions

The Honorable Fred F. Fielding
Counsel to the President

The Honorable Robert M. Gates
Secretary of Defense

The Honorable William J. Haynes II
General Counsel, U.S. Department of Defense

The Honorable Michael B. Mukasey
Attorney General of the United States