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United States Senate
Washington, DC 20510

Dear Senator:

I write to express the views of the American Bar Association as you consider the military commission provisions in S. 1390, the National Defense Authorization Act for Fiscal Year 2010 (NDAA).

The ABA has a long history of urging the President and Congress to ensure that military commissions provide detainees the rights afforded in courts-martial under the Uniform Code of Military Justice (UCMJ) and comply fully 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.

When the Military Commissions Act of 2006 was considered by Congress, the ABA expressed its concerns regarding various provisions. And since its enactment, the ABA has continued to urge the federal government to establish fair procedures that comport with due process and justice. Despite some improvements, the proposed revisions embodied within the NDAA fail to address a number of significant concerns, including those related to the use of coerced evidence, the admission of hearsay evidence, and the resource constraints under which defense counsel must operate.

First, the proposed revision to §948r of Chapter 47A of title 10, U.S. Code, would still permit the consideration of coerced evidence in military commission proceedings. The Supreme Court has held that coerced evidence is unreliable and its use unconstitutional, and the UCMJ prohibits its use.

Second, under 949a(b)(3)(D), the proposed revision to the Military Commissions Act would still permit the use of hearsay evidence. Such evidence would be excluded before any court in the United States, including courts-martial proceedings.

Third, the proposed revisions do not address any of the resource issues identified by defense counsel at the military commissions who have operated under constraints that violate the right to effective assistance of counsel guaranteed by the Sixth Amendment. The office of the Chief Defense Counsel is seriously understaffed. Legitimate requests for funding for investigators, experts, and mitigation specialists have been denied, and

even pro bono independent experts cannot participate unless the government determines that they have a "need to know." There are restrictions on the ability of defense lawyers communicating with each other and with experts, and there are still substantial problems with defense translators. Thus, there remains a serious and unfair imbalance compared to prosecution resources.

In August 2003, the ABA adopted a policy calling upon the Congress and the Executive Branch to insure that all defendants before any military commission receive the zealous and effective assistance of counsel. The importance of this representation is even greater when the death penalty is sought. 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 were revised in 2003 to apply specifically to military commission proceedings.

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. 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.

Because of the flaws discussed above, we do not believe military commission trials as currently envisioned will provide the level of fairness that is consistent with our values and essential to our credibility in the rest of the world. Indeed, in February 2009, the ABA called for "all individuals who have been or are expected to be charged with violations of criminal law" to 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."

The ABA believes that federal courts have proved themselves fully capable of handling these prosecutions. However, if new military commissions are established, we urge that the provisions governing the commissions and their proceedings be amended in accordance with the issues raised above.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman