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INFO MEMO

February 5, 2002; 9:30 P.M.

FOR: SECRETARY OF DEFENSE  
FROM: William J. Haynes II, General Counsel *WJ Haynes 2/6/02*  
SUBJECT: American Bar Association (ABA) recommendations with respect to Military Commissions

- On Monday, February 4, 2002, the ABA passed a resolution (TAB A) urging the President and Congress to assure that the law and regulations governing military commissions will *(a comparison to draft commission rules is provided in italics)*:
  - Not be applicable to U.S. citizens and persons lawfully present in the United States. *(Commissions not precluded from trying persons in U.S.)*
  - Only be applicable to violations of the “settled and traditional law of war.” *(Draft commission rules do not list potential crimes in detail. We will be able to argue that most crimes to be charged meet this standard, though prosecution of statutory offenses is possible as well.)*
  - Not permit indefinite pre-trial detention of persons subject to the order. *(Draft commission rules require only a semi-annual “review” of need for detention.)*
  - Require that trials be governed by most court-martial procedures for trial and appeal. *(Draft commission rules vary substantially from court-martial procedures to promote efficiency, but fundamental fairness is preserved.)*
  - Require that trials be governed by procedures detailed in the International Covenant on Civil and Political Rights (ICCPR). *(Draft commission rules arguably comply with ICCPR requirements.)*
- The resolution lists some specific rights associated with courts-martial, presumably to highlight their importance. Rights where draft commission rules differ are:
  - Right to petition for habeas corpus review and review by Supreme Court. *(Not addressed; this is a matter for courts to decide.)*
  - Unanimous verdicts in capital cases. *(Slight variance, draft commission rules would require unanimous vote on sentence but not for a finding of guilt—presumably no one would vote for death if he or she thought accused to be innocent.)*



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- The resolution also lists some specific provisions of the ICCPR. Draft commission rules comply with these provisions. However, some criticism may be levied regarding the following:
  - ICCPR right to “counsel of choice.” (*Draft commission rules limit choice to active duty counsel or counsel who could be called to active duty.*)
  - Allowance for “trial observers” in closed proceedings. (*In ABA resolution, but not technically required by ICCPR. No provision in draft commission rules.*)
- The resolution further calls on the President and Congress to consider the precedent set by military commissions as it pertains to the prosecution of U.S. citizens in other nations and the use of international legal norms in shaping other nations’ responses to terrorism.

COORDINATION: NONE

Attachments:  
As stated



**THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA  
THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK  
THE BAR ASSOCIATION OF SAN FRANCISCO  
THE BEVERLY HILLS BAR ASSOCIATION  
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES**

**RECOMMENDATION**

*(The Revised Recommendation 8C was adopted by the American Bar Association House of Delegates on Feb. 4, 2002. Floor amendments that were adopted are underlined. The text is believed to be accurate, but should be checked against the final ABA version when issued. Additional floor amendments calling for the words "to the extent practicable" to be added both in the Resolved clause and in paragraph 5 were not adopted.)*

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 or state or territorial laws, as opposed to violations of such law of war, are alleged;
4. Not permit indefinite pre-trial detention of persons subject to the order;
5. Require that, (excluding Article 32), its procedures for trials and appeals be governed by the Uniform Code of Military Justice 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.

