

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

AMERICAN BAR ASSOCIATION
TASK FORCE ON TREATMENT OF ENEMY COMBATANTS
SECTION OF CRIMINAL JUSTICE
SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
BEVERLY HILLS BAR ASSOCIATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

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;

- 1 5. The government should provide for travel, lodging, and required security
2 clearance background investigations for CDC, and should consider the
3 professional and ethical obligations of CDC in scheduling of proceedings.
4
5 6. The Government should permit non-U.S. citizen lawyers with appropriate
6 qualifications to participate in the defense.
7
8 7. To the extent that the government seeks modification of any of the foregoing
9 on the basis of national security concerns, it should be required to do so on a
10 case-by-case basis in a proceeding before a neutral officer and with defense
11 participation.
12

13 **FURTHER RESOLVED**, that Congress and the Executive Branch should develop
14 rules and procedures to ensure that any military commission prosecution in which the death
15 penalty may be sought complies fully with the provisions of the ABA Guidelines for the
16 Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).

REPORT

I. INTRODUCTION

In response to the horrific attacks of September 11, 2001, the President undertook a series of extraordinary steps to bring Al Qaeda terrorists to justice and protect the American homeland. One of the most controversial was a Military Order issued by the President on November 12, 2001, which authorized the detention and trial by military commissions of Al Qaeda terrorists and others.

The structure and procedures for the proposed military commissions drew immediate and widespread criticism. Senator Patrick Leahy (D-VT), who chaired Senate Judiciary Committee hearings on the Military Order, received a letter signed by over 400 law professors and noted that legal “experts around the country are concerned that the President’s Order does not comport with either constitutional or international standards of due process.”¹

The controversy intensified this year, as the Department of Defense (DoD) issued detailed procedural rules for the operation and conduct of military commission proceedings and named a military Chief Prosecutor and a Chief Defense Counsel. Media reports indicated that court facilities, more permanent prison facilities, and even an execution chamber, were being constructed at Camp X-Ray on the Guantanamo Bay Naval Base in Cuba, where more than 680 detainees from at least 40 countries were being held.²

On July 3, 2003, the White House announced that six Guantanamo detainees had been declared “eligible” for prosecution by a military commission.³ While the six detainees were not officially identified by name, reports quickly surfaced that at least two were British and Australian citizens. A firestorm of criticism erupted in both countries. Members of Parliament called the planned proceedings a “charade of justice” and a “kangaroo court”⁴ and 218 Members of Parliament -- one third of the lower House of Commons -- “signed a petition asserting that the British detainees could not get a fair trial from U.S. military tribunals and calling for their repatriation.”⁵

¹ Statement of Senator Leahy, “The Continuing Debate on The Use of Military Commissions” December. 14, 2001, at: <http://www.senate.gov/~leahy/press/200112/121401a.html>.

² See “U.S. prison camp may get death row,” MSNBC, June 2, 2003, at: <http://www.msnbc.com/news/919725.asp>.

³ See “Bush: 6 al-Qaida Captives for Tribunals,” Associated Press, July 3, 2003, at: <http://www.washingtonpost.com/wp-dyn/articles/A5877-2003Jul3.html>.

⁴ See Independent (UK), “Ministers condemn US treatment of suspects,” July 8, 2003, at: <http://news.independent.co.uk/world/americas/story.jsp?story=422737>; see also The Guardian (UK), “MPs' fury at secret US trials of 'terror' Britons,” July 8, 2003, at: http://www.guardian.co.uk/uk_news/story/0,3604,993746,00.html.

⁵ See Reuters, “Blair under pressure over Guantanamo,” July 11, 2003, at: http://www.reuters.co.uk/printerFriendlyPopup.jhtml?type=topNews&storyID=338051&basket=UK_TOPNEWS_PKG&item=PackageComponent.

One of the major criticisms of the military commissions is that the fate of each detainee is wholly in the hands of their captors. The military serves as accuser, jailer, prosecutor, defense lawyer, judge, jury, and appellate authority, and are not subject even to the *procedural* rules governing courts martial, which include the right of appeal to a higher court and, ultimately, to the Supreme Court of the United States.

The rules and procedures for military commissions do allow detainees to seek the assistance of Civilian Defense Counsel (CDC) but, unlike the military justice system, the detailed (military) defense lawyer cannot be discharged, regardless of the wishes of the detainee or the CDC.

Moreover the rules, as now drafted, do not sufficiently guarantee that CDC will be able to render zealous, competent, and effective assistance of counsel to detainees.

Indeed, on August 2, 2003, the Board of Directors of the National Association of Criminal Defense Lawyers (NACDL) -- a cosponsor of this Recommendation -- decided by a unanimous vote that it would be unethical for a criminal defense lawyer to represent an accused before these military commissions because the restrictions imposed upon defense counsel make it impossible for counsel to provide adequate or ethical representation.⁶

Because the unwarranted restrictions on CDC raise serious questions about whether military commissions will be, and will be perceived by the international community to be, fundamentally fair and consistent with the high standards of American justice, the ABA Task Force on Treatment of Enemy Combatants was asked to examine the issues.⁷

Our review of the relevant Military Commission Instructions convinces us that the American Bar Association should call 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 CDC, and should oppose any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances.

⁶ We do not, by these recommendations, question the dedication of military defense lawyers. Lawyers in the military, like their civilian counterparts, are expected to give independent and zealous representation, without regard to personal consequences. Rules for Courts Martial 502(b)(6)(B). In addition, rule 104(b)(1)(B) prohibits giving any defense counsel a less favorable rating or evaluation "because of the zeal with which such counsel represented any accused." Zealous criminal defense is a military tradition and duty.

⁷ The Task Force previously examined the detention of United States citizens designated as enemy combatants, resulting in policy approved by the House of Delegates in February, 2003.

II. BACKGROUND

A. The President's Military Order

On November 13, 2001, President Bush issued a "Military Order" regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism"⁸

The President's Military Order (hereafter "PMO") cited his authority as President and Commander in Chief of the Armed Forces, the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224), and Title 10 U.S.C. §§821⁹ and 836,¹⁰ and found that "for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof¹¹ to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."

The PMO directed the Secretary of Defense to "issue...orders and regulations... for the appointment of one or more military commissions"¹² as well as rules for the conduct of such proceedings, "including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and **qualifications of attorneys...**"¹³

The language of the PMO authorized a lower standard of admissibility of evidence,¹⁴ permitted secret evidence and closed proceedings, and allowed convictions -- including the imposition of the death

⁸ 66 F.R. 57833 (Nov. 16, 2001), at www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

⁹ 10 U.S.C. §821, which is Article 21 of the Uniform Code of Military Justice (UCMJ), provides that the "provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals."

¹⁰ 10 U.S.C. §836, Article 36 of the UCMJ, authorizes the President to prescribe procedures "in courts-martial, military commissions and other military tribunals" and "so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter."

¹¹ Pursuant to §2(a), any non-citizen whom the President determined was a current or former member of al Qaeda, or had aided or abetted terrorist acts against the United States, or had knowingly harbored such persons, would be subject to detention and prosecution.

¹² PMO, §4(b).

¹³ PMO, §4(c) (emphasis supplied).

¹⁴ Pursuant to §4(c)(3) of the PMO, evidence would be admissible if it has "probative value to a reasonable person."

penalty – by a less-than-unanimous vote. Moreover, the PMO excluded review by any state, federal, foreign, or international court.¹⁵

B. The ABA Response to the President's Military Order

1. ABA Task Force on Terrorism and the Law

Shortly after the 9/11 attacks, the ABA had formed a task force of experts in diverse areas of the law “to offer counsel to the country's political leaders as they consider legislation in the wake of the September 11 terrorist attacks.”¹⁶ Thus, the ABA Task Force on Terrorism and the Law (hereafter TFTL) was asked to examine the PMO, and it issued a Report on January 4, 2002.¹⁷

While the TFTL found historical authority supporting the establishment of military commissions in wartime under the Constitution and laws of the United States, and noted that military commissions had been used in periods other than declared war, its Report cautioned that:

Trying individuals by military commission would be a controversial step. Military commissions probably will not afford the same procedural protections as civilian courts. The United States has protested the use of military tribunals to try its citizens in other countries. If conducted under reasonable procedures, however, military commissions can deliver justice with due process. Nevertheless, regardless of their actual fairness, many will view the verdict of a military commission with skepticism.

TFTL Report, *supra*, at pp. 13-14. The TFTL Report urged that procedures for military commissions “be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial, Manual for Courts-Martial, Preamble, paragraph 2(b)(2), and . . . conform to Article 14 of the International Covenant on Civil and Political Rights”¹⁸ *Id.* at pp. 16-17.

¹⁵ *Id.* at §§4(c)(8) and 7(b)(2).

¹⁶ News Release, “ABA Names Task Force on Terrorism and Law,” September 20, 2001, at: <http://www.abanet.org/media/sep01/terrorismtaskforce.html>.

¹⁷ American Bar Association Task Force on Terrorism and the Law: Report and Recommendations on Military Commissions, January 4, 2002 (hereafter TFTL Report), accessible at: <http://www.abanet.org/leadership/military.pdf> .

¹⁸ The Report set forth the procedures in Article 14, which include: an independent and impartial tribunal, with the proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the defendant: presumption of innocence; prompt notice of charges, and adequate time and facilities to prepare a defense; trial without undue delay; to be present, and to be represented by counsel of choice; to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses in his behalf under the same conditions as the witnesses against him; to the free assistance of an interpreter; not to be compelled to testify against himself or to confess guilt; and to review of any conviction and sentence by a higher tribunal. *Id.*

2. Action of the ABA House of Delegates

Since the TFTL Report did not represent official policy of the ABA until approved by the ABA House of Delegates, a group of bar associations and ABA entities¹⁹ submitted a more formal Recommendation and Report to the House of Delegates at the 2002 MidYear Meeting the following month.

Report 8C²⁰ urged that “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.”

Report 8C also urged that procedures “comply 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.” *Id.*

C. Military Commission Order No. 1

The first implementation of the President’s Order took the form of a March 21, 2002 Department of Defense Military Commission Order No. 1, “Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism” (“MCO No. 1”).²¹

MCO No. 1 provided for some “choice of counsel” by allowing an accused to select a “Military Officer who is a judge advocate of any United States armed force to replace the Accused’s Detailed Defense Counsel...” and contained a further provision regarding civilian attorneys:

(b) The Accused may also retain the services of a civilian attorney of the Accused’s own choosing and at no expense to the United States Government (“Civilian Defense Counsel”), provided that attorney: (i) is a United States citizen; (ii) is admitted to the

¹⁹ The primary sponsoring entities included: 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; and the ABA Section of Individual Rights and Responsibilities.

²⁰ <http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf>.

²¹ <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

practice of law in a State, district, territory, or possession of the United States, or before a Federal court; (iii) has not been the subject of any sanction or disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct; (iv) has been determined to be eligible for access to information classified at the level SECRET or higher under the authority of and in accordance with the procedures prescribed in reference (c); and (v) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.* * * Representation by Civilian Defense Counsel will not relieve Detailed Defense Counsel of the duties specified in Section 4(C)(2). The qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed Commission proceedings or that person's access to any information protected under Section 6(D)(5).

See MCO No. 1, §4(C)(3)(b). The Order did not include the form of the “written agreement” required to be signed, nor did it elaborate on the provisions of the “applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings” with which civilian attorneys would have to comply.

The provisions of MCO No. 1, adopted many of the recommendations that had been made by the ABA House of Delegates in Report 8C a month earlier. As ABA Robert Hirshon observed,²² the improvements included “basic standards of due process such as the presumption of innocence, proof beyond a reasonable doubt, unanimous verdicts in capital cases and representation by counsel of choice.” However, President Hirshon stated:

We are concerned, however, with other provisions, most notably the relaxation of the rules of evidence and the lack of an appeal to an independent appellate body with the right to certiorari review by the U.S. Supreme Court. *** We urge the Department to work with the Congress to clarify these issues before actually implementing the regulations. ***We commend the Defense Department for its efforts and look forward to a continuing dialogue.

D. The Military Commission Instructions

On February 28, 2003, DoD released a draft Military Commission Instruction that detailed the crimes and elements for prosecutions before military commissions and invited public comment. A variety of organizations and individuals provided thoughtful comments in response.

²² <http://www.abanet.org/media/mar02/hirshoncomments.html>.

On April 30, 2003, thirteen months after the issuance of MCO No. 1, the DoD issued the final Military Commission Instruction for Trials and Elements for Trials by Military Commission to “facilitate the conduct of possible future military commissions.”²³ At the same time, the DoD issued seven other Military Commission Instructions (MCI) which had never been released in draft form for comments.²⁴ The full package of eight MCIs encompassed crimes and elements of offenses, administrative guidance, and procedures for Military Commission participants.²⁵

III. THE MILITARY COMMISSION INSTRUCTIONS DO NOT ENSURE THAT DETAINEES WILL HAVE THE OPPORTUNITY TO RECEIVE ZEALOUS AND EFFECTIVE ASSISTANCE OF CIVILIAN DEFENSE COUNSEL

These recommendations focus on the issue of whether MCI No. 5, “Qualification of Civilian Defense Counsel,” unduly restricts the ability of CDC to render zealous and effective assistance of counsel to detainees who may be tried by military commissions.²⁶

A. The Requirements of MCI No. 5

MCI No. 5 “establishes policies and procedures for the creation and management of the pool of qualified Civilian Defense Counsel” authorized by MCO No. 1.²⁷ It not only provides the basis for

²³ The MCIs were described by DoD Deputy General Counsel Whit Cobb as “another step... towards being prepared to conduct full and fair military commissions.” See, DoD News Release, May 2, 2003, at: http://www.dod.gov/news/May2003/b05022003_bt297-03.html.

²⁴ What had been draft MCO No. 1 appeared in final form as MCI No. 2. The National Institute of Military Justice (NIMJ) recently produced an authoritative analysis of all of the MCIs which includes copies of many of the comments submitted to DoD. In their discussion of MCI No. 2, Eugene R. Fidell and Michael F. Noone demonstrate that many of the comments were incorporated into the final Instruction. *See* Annotated Guide: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (2002), available from <http://www.nimj.org>.

²⁵ The full set of military instructions include: MCI No. 1 - Guidance on Military Commission Instructions; MCI No. 2 - Crimes and Elements for Trials by Military Commission; MCI No. 3 - Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors; MCI No. 4- Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel; MCI No. 5- Qualification of Civilian Defense Counsel; MCI No. 6 - Reporting Relationships for Military Commission Personnel; MCI No. 7 - Sentencing; and MCI No. 8 - Administrative Procedures.

²⁶ As noted above, the American Bar Association has previously urged that trials and appeals be governed by the UCMJ, with the rights afforded in courts-martial and 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, and that trials comply with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights. It is regrettable and unsatisfactory that the MCIs have failed to meet those standards of fairness and due process.

²⁷ MCI No. 5, §I.

civilian lawyers to establish their qualifications and eligibility to serve as CDC, it also enumerates critical limitations on lawyers who may seek to serve in that capacity.

The requirements for service as CDC are set forth in the Instruction and also in an “Affidavit and Agreement by Civilian Defense Counsel” attached as Annex B to MCI No. 5, which “shall be executed and agreed to without change (i.e., no omissions, additions, or substitutions).”²⁸ Those requirements, and the language of the Affidavit place unwarranted limitations upon the ability of lawyers to serve as CDC and render zealous and effective advocacy to their clients.

While the Affiant must acknowledge that “nothing in this Affidavit and Agreement creates any substantive, procedural, or other rights for me as counsel or for my client(s),”²⁹ a later violation of the terms of the Affidavit could support a federal criminal prosecution for violation of 18 U.S.C. §1001, as happened in the Lynne Stewart case.³⁰

We will deal with each of those unduly burdensome limitations in the context of each of the principles the Recommendation endorses 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 defense counsel and client

Section II (I) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following:

I understand that my communications with my client, even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means, for security and intelligence purposes. I understand that any such monitoring will only take place in limited circumstances when approved by proper authority, and that any evidence or information derived from such communications will not be used in proceedings against the Accused who made or received the relevant communication. I further understand that communications are not protected if they would facilitate criminal acts or a conspiracy to commit criminal acts, or if those communications are not related to the seeking or providing of legal advice.

²⁸ MCI No. 5, §3(A)(2)(e). MCI No. 5 and the Affidavit, Annex B, also reference other Instructions and Orders. We focus on this Instruction, however, because the Affidavit, a prerequisite to qualification, is what binds the CDC to abide by all of the other rules.

²⁹ MCI No.5, Annex B, §II(K).

³⁰ *United States v. Stewart*, 2002 WL 1300059 (S.D.N.Y. 2002), later opinion *United States v. Sattar*, 2003 WL 21698266, *16-17 (S.D.N.Y. July 22, 2003) (dismissal of §1001 count denied; even if the government could not have asked the question, it had to be answered truthfully or objected to before hand).

That provision, which forces CDC to agree to an “invasion of the defense camp” by the government as a condition of service, clearly violates the attorney-client privilege, chills the attorney-client relationship of trust and confidence, and forces CDC to contravene the requirements of the Model Rules of Professional Conduct.

The ABA has long played a leading role in developing policies and standards governing the attorney-client privilege, the attorney-client relationship, and the preservation of client confidences. The ABA Model Rules of Professional Conduct (e.g., MR 1.6 and 3.8) and the ABA Standards for Criminal Justice, Prosecution Function and Defense Function (e.g., Standard 4-3.1), as well as many other ABA policies, are premised upon the fundamental principle that the attorney-client relationship and the attorney-client privilege are essential elements of a system of justice and have real meaning only when clients are free to have full and frank communications with their lawyers.

The core purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). It is the oldest confidential communications privilege known to the common law. *United States v. Zolin*, 491 U.S. 554, 562 (1989).

The privilege serves the interests not only of those charged with crimes, but also of society as a whole. It reflects pragmatic considerations and serves utilitarian ends. It proceeds from the recognition that the interests of justice are best served when attorneys are fully informed of all facts relating to the legal issues confronting their client.

The privilege is necessary because many clients – both the innocent and the guilty – would be afraid to speak frankly with their attorneys if the information they provided could be disclosed to others. *See Upjohn Co. v. United States, supra*, (“assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure”); *United States v. Chen*, 99 F. 3d 1495, 1499 (9th Cir. 1996) (“[T]o get useful advice, [clients] have to be able to talk to their lawyers candidly without fear that what they say to their own lawyers will be transmitted to the government.”).

The guarantee of confidentiality afforded attorney-client consultations therefore serves not only the client's interest in receiving well-informed legal advice, but also the broader public interest in ensuring that the legal system produces just and accurate results.

CDC will already face daunting challenges in attempting to establish a relationship of trust and confidence with clients, because language and cultural barriers, and the clients' distrust of the military commission process.

These difficulties will be exacerbated if CDC must inform the client that even confidential and privileged conversations may be monitored without notice, and that the very officials who serve as their captors, jailers, accusers, and prosecutors will be listening to all their communications with their

attorneys.³¹ Under such circumstances, the barriers to effective representation may become virtually insurmountable.

Moreover, the monitoring provision in MCI No. 5 may actually be counterproductive to the purpose behind the decision to monitor these privileged conversations. In a letter commenting on a similar Bureau of Prisons (BOP) regulation promulgated by the Attorney General in October 2001, the ABA wrote:

. . . the monitoring will have a chilling effect on legitimate attorney-client communications that could actually harm public safety. Some detainees may well have valuable information concerning past or future terrorist activities that it would be important for the government to obtain. * * * If the detainee cannot be assured of a confidential consultation with his or her attorney, the detainee will likely not let the attorney know that he or she has this information. * * * As a result, the monitoring may cause the government to lose swift access to valuable information that could save lives or bring terrorists who are still at large to justice.

Those observations are equally relevant to the monitoring of military commission detainees. Such monitoring is unwarranted and unnecessary, and will severely limit the ability of civilian lawyers to serve as CDC and to effectively represent detainees. The government should not monitor privileged conversations, or interfere with confidential communications, between 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

Section I (B) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following provision:

I am aware that my qualification as a Civilian Defense Counsel does not guarantee my presence at closed military commission proceedings or guarantee my access to any information protected under Section 6(D)(5) or Section 9 of MCO No. 1.

This provision seriously hampers the ability of CDC to represent the client. He must acknowledge, and by the terms of the Affidavit, agree, that he can be excluded from critical portions of the trial and that the military defense counsel, who can not be so excluded, can not even inform him – or

³¹ CDC would be ethically bound to advise the client of the monitoring provision. ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed.), Standard 4-3.1 (Commentary) (“Because it is critical to a healthy lawyer client relationship that a client not be surprised by the revelation of confidences made by an attorney sometime in the future, counsel should fully and clearly explain to the client the applicable extent of (and limitations upon) confidentiality in the relevant jurisdiction.”).

the client – of what transpired. Moreover, pursuant to MCI No. 4, CDC can be denied access to “protected information” admitted against the client.

Such closed, secret proceedings are inconsistent with American standards of fairness and due process. As one prominent commentator observed:

. . . the civilian counsel is not guaranteed presence at closed sessions of the commission and may be denied access to “protected information” admitted against the client, which would be revealed only to the detailed defense counsel, who would be prohibited from sharing that information with the civilian counsel (and possibly with the client as well -- raising issues of conviction on the basis of information to which the accused has been denied access). This provision denying counsel of choice access to critical evidence is perhaps the most important of the limitations imposed by these instructions and one that clearly has an impact on the ability of counsel to provide effective representation.

See Kevin J. Barry, “Military Commissions: American Justice on Trial,” *The Federal Lawyer*, 50-JUL Fed. Law. 24, 27 (July 2003).

Since a fundamental prerequisite for service as CDC is that lawyers “must possess a valid current security clearance of SECRET or higher,” the need to exclude CDC from closed portions of trials and from access to “protected information” is not readily apparent.

Indeed, in federal criminal cases involving classified information, the Classified Information Procedures Act, 18 U.S.C. App. III. Sections 1-16 (“CIPA”), has been able to balance the need to protect classified information and the right to a full and fair defense. Adoption of the procedures employed in CIPA cases would strike a better balance between ding lawyers from proceedings or barring them from effectively defending against evidence admitted at 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 a military commission may determine are required by the circumstances in a particular case after notice and hearing**

Section I (B) of MCI No. 5, Annex B, the Affidavit, requires CDC to attest to the following provision:

I will not discuss, transmit, communicate, or otherwise share documents or information specific to the case with anyone except as is necessary to represent my client before a military commission. In this regard, I will limit such discussion, transmission, communication or sharing to: (a) persons who have been designated as members of the

Defense Team in accordance with applicable, rules, regulations, and instructions; (b) commission personnel participating in the proceedings; (c) potential witnesses in the proceedings; or (d) other individuals with particularized knowledge that may assist in discovering relevant evidence in the case.

At the outset, we should note with some approval that the above quoted language represents a recent and positive modification of the original provisions of MCI No. 5, which barred CDC from any communication with persons who were not “designated as members of the Defense Team”³²

In addition, the revision B no longer requires that CDC perform all “work relating to the proceedings, including any electronic or other research, at the site of the proceedings.”

Nevertheless, the language regarding “other individuals with particularized knowledge” is still unclear. Does it limit contact to potential fact or expert witnesses, or does it allow, as it should, that CDC are free to consult with other attorneys and seek expert assistance, advice, or counsel outside the defense team?

Based on our informal discussions with DoD officials, we are hopeful that there is no intent to unduly restrict the ability of CDC to prepare. However, because this provision is contained in an Affidavit that CDC must sign before being qualified to serve, it is important that the language is clarified -- and be precise -- in accordance with the principle set forth above.

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 a military commission may determine are required by the circumstances in a particular case after notice and hearing

Section II (F) of MCI No.5, Annex B, the Affidavit, requires the following attestation:

At no time, to include any period subsequent to the conclusion of the proceedings, will I make any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under MCO No. 1.

³² See Freedus, Barry, and Lattin, NIMJ Military Commission Instructions Sourcebook, *supra*, Supplemental Discussion of Military Commission Instruction No. 5 (“After releasing MCIs 1-8 on April 30, 2003, and publishing them in the Federal Register on July 1, 2003, 68 FED. REG. 39,374, DoD modified Annex B of MCI 5 without formally announcing that it had done so. Instead, it simply replaced the original version of MCI 5 on its website with a revised version that continues to bear the original April 30 date, despite the fact that it is actually Change 1).”

As Kevin J. Barry wrote in *The Federal Lawyer*, *supra*:

This seems to be a permanent gag order, covering a very wide range of material -- for example the definition of "protected information" in ¶ 6(D)(5)(a) of the PTMC includes classifiable information, a term both broad and vague. Regrettably, the provision is not further explained or justified.

And, as Freedus, Barry, and Lattin, *supra*, observed:

The civilian lawyer is further silenced by his promise, applicable even after the proceedings have ended, not to make any statement "public or private" "regarding" any closed sessions or any classified information. This is very broad language and could cover statements such as "I think there were far too many closed sessions," or "The Accused was unduly hampered from putting on a case because he wasn't able to see most of the evidence which was, in my opinion, unnecessarily classified."

We believe that 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 a military commission may determine are required by the circumstances in a particular case after notice and hearing. We urge DoD to modify this provision accordingly.

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.

As noted above, CDC must possess a valid security clearance of SECRET or higher. If the CDC applicant does not currently possess such clearance, he or she is required to "submit to a background investigation" and "to pay any actual costs associated with the processing of the same." MCI No. 5, § 3(A)(2)(d)(ii).

There is little doubt that most civilian lawyers who volunteer to serve as CDC will be doing so pro bono, as a public service, since few of the detainees currently at Camp X-Ray will have the financial ability to retain private civilian counsel. The costs of a background investigation can run thousands of dollars, and the cost of travel and lodging at Guantanamo may also incur substantial costs.

A DoD official has indicated that CDC will be housed at hotel quarters on the Guantanamo base, but that the hotel facility normally charges non-military personnel. Since security clearance investigations will be done for the benefit of the government, and since travel may well be by military transport and lodging will be in government facilities, it does not seem burdensome to suggest that the government should provide those "in kind" reimbursements to civilian lawyers, who will experience other financial hardships as a result of their service.

In addition, §I (B) of MCI No.5, Annex B, the Affidavit, requires CDC to attest to the following provision:

I will ensure that these proceedings are my primary duty. I will not seek to delay or to continue the proceedings for reasons relating to matters that arise in the course of my law practice or other professional or personal activities that are not related to military commission proceedings.

The implications for the private practitioner with existing professional obligations to other courts and clients cannot be overstated, since few lawyers would wish sign an Affidavit which binds them to jettison or ignore existing clients and pending trial obligations.

DoD officials, in informal conversations, have indicated that there was no intent to require CDC to forego or abandon his or her professional and/or family obligations. We hope and trust that is the case, but we strongly believe that the language must be clarified and amended so that it is clear that CDC can and should expect appropriate consideration will be given in scheduling proceedings to accommodating conflicting professional and ethical obligations of CDC.

6. The Government should permit non-U.S. citizen lawyers with appropriate qualifications to participate in the defense.

MCI No. 5 currently requires United States citizenship as a qualification to serve as CDC. We believe that a blanket ban on participation by non-U.S. citizen lawyers who otherwise possess appropriate qualifications is unwise. The Guantanamo detainees come from more than forty countries, and many may wish to have assistance from a lawyer who practices in their home country.

We recognize that the nature and extent of participation by non-citizen lawyers may be complicated in some instances by difficulties in processing security clearances, additional costs of travel and lodging, and even issues of education, training, and familiarity with the English language, and we acknowledge that the government should have discretion and flexibility in such circumstances. We note, however, that arrangements were recently made for British and Australian lawyers to participate in the trials of detainees from those countries and we believe that similar consideration should also be given to qualified foreign lawyers for other detainees.

Finally, 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.

B. 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).

In 1989, the ABA House of Delegates adopted Resolution 122, Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (“ABA Death Penalty Guidelines”) which were designed to “amplify previously adopted Association positions on effective assistance of counsel in capital cases [and to] enumerate the minimal resources and practices necessary to provide effective assistance of counsel.”³³

Guideline 1.1.B of the Revised Edition, adopted by the ABA House of Delegates in February, 2003, provides that:

These Guidelines apply from the moment the client is taken into custody and extend to all stages of every case in which the jurisdiction may be entitled to seek the death penalty, including initial and ongoing investigation, pretrial proceedings, trial, post-conviction review, clemency proceedings, and any connected litigation.

The Comment to that Guideline states:

The use of the term “jurisdiction” as now defined has the effect of broadening the range of proceedings covered. **In accordance with current ABA policy, the Guidelines now apply to military proceedings, whether by way of court martial, military commission or tribunal, or otherwise.**

* * *

These Guidelines, therefore, apply in any circumstance in which a detainee of the government may face a possible death sentence, regardless of whether formal legal proceedings have been commenced or the prosecution has affirmatively indicated that the death penalty will be sought. (emphasis supplied).

The ABA Death Penalty Guidelines represent a consensus within the profession regarding the essential principles to guide capital defense counsel, and have been widely recognized by the courts, including the United States Supreme Court this term in *Wiggins v. Smith*, 123 S.Ct. 2527 (June 26, 2003).

The United States has long been criticized for imposing the death penalty in criminal cases, and many of those who face prosecution for death penalty offenses are citizens of those nations that have

³³ See also ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-1.2 cmt. at 12 (3d ed. 1992) (“ABA Providing Defense Services Standards”) (“These guidelines are incorporated by reference into the [ABA Providing Defense Services Standards].”); ABA Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-1.2(c) (3d ed. 1993) (“ABA Prosecution Function and Defense Function Standards”) (“Defense counsel should comply with the [ABA Death Penalty Guidelines].”).

outlawed the death penalty. If, indeed, our government decides to proceed with death penalty prosecutions, every step must be taken to insure that those detainees will have competent lawyers who are qualified to defend capital cases, and that the ABA Death Penalty Guidelines are followed and honored.

IV CONCLUSION

The commencement of military commission trials will not only be a milestone in this nation's war against terror, it will be a pivotal moment in our nation's history. The world will be watching us as we bring these accused terrorists to trial.

In our Report concerning U.S. citizen enemy combatants, we observed that the United States is a great nation not just because it is the most powerful, but because it is the most democratic. We must not create military commission trials that are inconsistent with fundamental due process and the Bill of Rights, the very fabric of our great democracy.

The ABA House of Delegates should adopt the proposed Recommendations. Ensuring that we do not dishonor our cherished Constitutional safeguards in the name of our war against terror and that we continue to strengthen the rule of law is vital to our standing in the world community – and to our nation's very soul.

Respectfully submitted,

NEAL R. SONNETT

Chair

Task Force on Treatment of Enemy Combatants

August 2003

EXECUTIVE SUMMARY

A. Summary of Recommendation

These Recommendations relate to the conduct of military commission trials. They urge 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 they oppose any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances. They also endorse principles for the conduct of any military commission trials that would protect against unwarranted intrusion into the attorney-client privilege and ensure that CDC will be able to fully prepare and fully participate in the defense of their clients, consistent with the protection of classified and/or protected information. They also urge compliance with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (rev. ed. 2003) in any military commission prosecution in which the death penalty may be sought.

B. Summary of the Issue this Recommendation Addresses

The government has created military commissions to try non-U.S. citizens and will allow them to retain CDC. These Recommendations address the issue of whether the rules governing those proceedings should contain restrictions that would restrict the full participation of CDC who have received appropriate security clearances.

C. How the Proposed Policy Position will Address the Issue

It will extend the ABA's long history of protecting fundamental due process, the attorney-client privilege, and the ability of counsel to render zealous and effective assistance to those detainees who are tried before military commissions.

D. Summary of Minority Views

None known.

GENERAL INFORMATION FORM

Submitting Entity: **Task Force on Treatment of Enemy Combatants**

Submitted By: **Neal R. Sonnett, Chair**

1. Summary of Recommendation(s).

Through these Recommendations, the American Bar Association urges 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. The American Bar Association also endorses principles for the conduct of any military commission trials that may take place, including (1) The no government monitoring of privileged or confidential conversations between any defense counsel and client; (2) CDC with appropriate security clearances should be present at all stages of the proceedings and be afforded full access to all information necessary to prepare a defense, including potential exculpatory evidence; (3) CDC should be 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 a military commission may determine are required by the circumstances in a particular case after notice and hearing; (4) CDC should be able to speak publicly, consistent with their obligations under the Model Rules, 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; and (7) The government should seek 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. The American Bar Association further urges that death penalty prosecutions should fully comply with the provisions of the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. (rev. ed. 2003).

2. Approval by Submitting Entity.

The ABA Task Force on Treatment of Enemy Combatants, approved this Recommendation and Report by email votes during the week of August 4, 2003. The Criminal Justice and Individual Rights and Responsibilities Sections approved it at their August 8, 2002 and August 9, 2003 Council meetings. The Section of Individual Rights and Responsibilities approved it at its Council meeting on October 18, 2002.

3. **Has this or a similar recommendation been submitted to the House or Board previously?**

No similar Recommendations are known to have been previously submitted. A related Recommendation, Report 8C which dealt with other aspects of military commissions, was approved at the February 2002 MidYear meeting.

4. **What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?**

The ABA has a long history of protecting due process and the right to counsel. This Recommendation would complement and extend those existing policies to insure that detainees who are tried by military commission have access to the zealous and effective representation of lawyers opportunity to receive the zealous and effective assistance of CDC who are not bound by unwarranted restrictions.

5. **What urgency exists which requires action at this meeting of the House?**

Military commissions have been created, and plans are underway to try selected Guantanamo detainees. These circumstances present an important challenge to the rule of law on which the American Bar Association should speak out.

6. **Status of Legislation.**

On June 11, 2003, Rep. Joseph Hoeffel (D-PA) introduced H.R. 2428, "To Provide for Congressional Review of Regulations Relating to Military Tribunals. As of this date, no action has been taken on the proposed legislation, adoption by the House would lend support to this legislative effort.

7. **Cost to the Association.**

The adoption of the Recommendation would not result in any direct costs to the Association. The only anticipated costs would be indirect costs that might be attributable to lobbying to have the Recommendation adopted and implemented. Such costs should be negligible since lobbying efforts would be conducted by existing staff members who already are budgeted to lobby Association policies.

8. **Disclosure of Interest. (If applicable)**

No known conflict of interest exists.

9. Referrals.

Concurrently with submission of this report to the ABA Policy Administration Office, it is being circulated to the following:

Standing Committees/Task Forces:

Law and National Security

Sections, Divisions and Forums:

Administrative Law

Government and Public Sector Lawyers

International Law and Practice

Judicial Division

National Conference of Federal Trial Judges

Law Student Division

Litigation

Young Lawyers Division

Affiliated Organizations:

The Federal Bar Association

National Association of Criminal Defense Lawyers

10. Contact Person. (Prior to the meeting)

Neal R. Sonnett

Chair, ABA Task Force on Treatment of Enemy Combatants

One Biscayne Tower, Suite 2600

2 South Biscayne Boulevard

Miami, FL 33131-1804

Tel: 305-358-2000

Fax: 305-358-1233

Email: <nrs@sonnett.com>

11. Contact Person. (Who will present the report to the House)

Neal R. Sonnett

Chair, ABA Task Force on Treatment of Enemy Combatants

One Biscayne Tower, Suite 2600

2 South Biscayne Boulevard

Miami, FL 33131-1804

Tel: 305-358-2000

Fax: 305-358-1233

Email: <nrs@sonnett.com>