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March 12, 2008

Hon. Patrick Leahy
Judiciary Committee, Chair
United States Senate
433 Russell Office Building
Washington, D.C. 20510

Hon. Arlen Specter
Judiciary Committee, Ranking Member
United States Senate
711 Hart Office Building
Washington, D.C. 20510

Hon. Carl Levin
Armed Services Committee, Chair
United States Senate
269 Russell Office Building
Washington, D.C. 20510

Hon. John McCain
Armed Services Committee, Ranking Member
United States Senate
241 Russell Office Building
Washington, D.C. 20510

Hon. John Conyers
Judiciary Committee, Chair
United States House of Representatives
2426 Rayburn Office Building
Washington, D.C. 20515

Hon. Lamar S. Smith
Judiciary Committee, Ranking Member
United States House of Representatives
2409 Rayburn Office Building
Washington, D.C. 20515

Hon. Ike Skelton
Armed Services Committee, Chair
United States House of Representatives
2206 Rayburn Office Building
Washington, D.C. 20515

Hon. Duncan Hunter
Armed Services Committee, Ranking Member
United States House of Representatives
2265 Rayburn Office Building
Washington, D.C. 20515

Dear Senators Leahy, Specter, Levin and McCain and Representatives Conyers, Smith, Skelton and Hunter:

I am writing on behalf of the Association of the Bar of the City of New York (the "Association") to urge that your committees promptly convene hearings to consider charges - raised by the former chief prosecutor for military commissions at Guantanamo - that trials of detainees for war crimes may be subject to improper political influence, and that the chain of command for the military commissions process has been improperly centralized. The hearings should also consider amending the process for trying detainees, given the serious substantive and procedural defects of the military commissions system as established by the Military Commissions Act of 2006 ("MCA"), which would deny the accused the safeguards universally recognized as indispensable to a fair trial.

The urgent need for prompt hearings is heightened by the recent announcement by the Department of Defense ("DoD") that six detainees will be tried before military commissions in which the death penalty will be sought. The Association fully endorses the need to bring to justice the persons who perpetrated the barbaric attacks of September 11, 2001. But the United States must do so in a just and fair manner that protects the fundamental rights of the accused to a full and fair opportunity to defend themselves, and demonstrates to the world that our Nation adheres to the highest requirements of the rule of law.

There are a number of issues which require Congressional attention at this point, but our immediate concern—and the one which leads us to urge you to consider convening hearings—goes to the independence and integrity of the military commissions system itself. The former military commissions chief prosecutor, Col. Morris Davis, resigned his position and made a number of extremely troubling accusations. His charges about the proceedings' lack of fairness are serious. Indeed, it has been reported that Col. Davis has agreed to testify about the proceedings defects for the defense at the trial of Salim Ahmed Hamdan. Col. Davis is the fourth prosecutor to resign while questioning the integrity of the commission's process. (The others are Maj. Robert Preston and Capts. John Carr and Carrie Wolf.) Of equal concern, changes have been made that place the General Counsel of the Defense Department at the apex of the command structure for the military commissions process. These developments focus our attention on the question of whether the provisions of the MCA, which seek to insulate the process from political influence and assure the independence of the prosecution, defense and judges, are being evaded.

After Col. Davis's resignation, he gave a number of interviews of which two demand immediate attention. The first was published by The Washington Post, on October 20, 2007:

> Senior defense officials discussed in a September 2006 meeting the "strategic political value" of putting some prominent detainees on trial, said Air Force Col. Morris Davis. He said that he felt pressure to pursue cases that were deemed "sexy" over those that prosecutors believed were the most solid or were ready to go.
> Davis said his resignation was also prompted by newly appointed senior officials seeking to use classified evidence in what would be closed sessions of court, and by almost all elements of the military commissions process being put under the Defense Department general counsel's command, something he believes could present serious conflicts of interest.
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> "There was a big concern that the election of 2008 is coming up," Davis said. "People wanted to get the cases going. There was a rush to get high-interest cases into court at the expense of openness."

The second was published by *The Nation*, on February 19, 2008:

> When asked if he thought the men at Guantánamo could receive a fair trial, Davis provided the following account of an August 2005 meeting he had with Pentagon general counsel William Haynes–the man who now oversees the tribunal process for the Defense Department. "[Haynes] said these trials will be the Nuremberg of our time," recalled Davis, referring to the Nazi tribunals in 1945, considered the model of procedural rights in the prosecution of war crimes. In response, Davis said he noted that at Nuremberg there had been some acquittals, something that had lent great credibility to the proceedings.

> "I said to him that if we come up short and there are some acquittals in our cases, it will at least validate the process," Davis continued. "At which point, [Haynes's] eyes got wide and he said, 'Wait a minute, we can't have acquittals. If we've been holding these guys for so long, how can we explain letting them get off? We can't have acquittals, we've got to have convictions.'"
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> The Pentagon has reacted to Col. Davis's statements by "disputing" them without further explanation.

On December 11, 2007, DoD blocked the testimony of Col. Davis before the Senate Judiciary Committee by "ordering him not to appear," according to a statement by Senator Dianne Feinstein. On November 8, 2007, DoD blocked the testimony of Lt. Col. Stuart Couch, another former Guantánamo prosecutor, by ordering him not to appear before the House Judiciary Committee. In both cases, it appears that DoD General Counsel William J. Haynes II was the Pentagon official who delivered those orders. The orders were an obstruction of the Congressional oversight function.

Although Mr. Haynes has now resigned as DoD General Counsel, the Association's concern has not diminished, for it was not merely Mr. Haynes' obstruction that presents a problem; rather, it was, and is, the supervisory structure underlying the military commissions, which establishes a blueprint for conflict and political influence on the prosecution and conduct of the military commissions. On October 3, 2007, Deputy Secretary of Defense Gordon England issued a memorandum of appointment for Chief Prosecutor Col. Davis, which directed that he "reports to the Legal Advisor to the Convening Authority." On the same date, Deputy Secretary England also issued a second memorandum of appointment for Brig. Gen. Thomas Hartmann, the Legal Advisor to the Convening Authority, directing that he reports to Paul Ney, the DoD Deputy General Counsel (Legal Counsel), who, in turn, reports to the DoD General Counsel. A third memorandum of appointment directed that the Chief Defense Counsel report to Paul Koffsky, another DoD Deputy General Counsel, who, like Mr. Ney, reports to the General Counsel. In sum, this restructuring places the General Counsel at the apex of the military commissions system with the power to influence and direct it from every perspective.

This reporting structure is extremely troubling. It presents the prospect that the independence and professional autonomy of the judge advocates participating as prosecutors and defense counsel will be impaired. Further, the requirement that the Legal Advisor to the Convening Authority report to a Deputy to the General Counsel, raises questions about the impartiality of the Convening Authority in carrying out her responsibility to review sentences imposed by military commissions and the power to reject, modify or commute them.[1] These structural concerns are heightened significantly by the remarks that Col. Davis has attributed to Mr. Haynes, by the Department's bland "dispute" of Col. Davis's account, and by Mr. Haynes's failure to date to rebut them.

The Association believes it would be inappropriate to formulate any final conclusions about the above charges on the basis of press interviews. But we consider it to be a matter of paramount importance that your committees call Mr. Haynes, Col. Davis, Lt. Col. Couch and other potential witnesses to testify under oath about these matters—using the Committee's subpoena power, if witness invitations are again resisted. The commissions are proceeding apace now, and it would cast a pall over any proceedings that were to advance without these charges being fully probed and acted upon or laid to rest.

We also note that the issues raised involve uniformed military officers -- judge advocates -- and Office of Secretary of Defense civilian appointees. It does not appear to us that such issues can be resolved by DoD through an internal investigative process. The ultimate question raised here is

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[1] *See* 10 U.S.C. § 950b.

what Congress intended in the MCA, which provides ‘‘(2) No person may attempt to coerce or, by any unauthorized means, influence—. . . (C) the exercise of professional judgment by trial counsel or defense counsel”[2] and whether the restructuring carried out in the October 3rd memoranda is consistent with the guarantee of professional independence envisioned by the Act.

We also believe that attention should be given to the paucity of resources with which defense counsel in the commission proceedings must operate. Col. Steven David, Chief Defense Counsel at Guantanamo, has stated that his office lacks the attorneys and staff necessary to handle the defense of the announced cases. This is of particular importance as a result of the Government’s announced intention to seek the death penalty in at least some of the cases, should a conviction result. Moving toward capital tribunals without sufficiently addressing the right to counsel will only discredit the proceedings.

By way of example only, the current military commissions system raises the following issues, which again are heightened by the government's seeking the death penalty[3]:

- Considering the rarity of capital cases within the military justice system, we question whether defense counsel with suitable experience are available to the accused. This consideration militates in favor of great latitude to allow the participation of experienced death penalty practitioners in private practice to act as defense counsel or co-counsel.

- The military commission rules inappropriately shift the burden of proof to the accused to establish the unreliability of hearsay evidence. The MCA provides that hearsay evidence will only be excluded “if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.”[4] Manual for Military Commissions ("MMC") Rule 806 echoes the MCA. Given that the sources and methods by which the government acquired evidence are likely to be classified and hence unavailable to the accused and his counsel, that the hearsay evidence will include the statements of foreign nationals, and the enormous differences in resources, the ability of the defense to mount serious challenges to the reliability of hearsay evidence is very doubtful.

- Under MCA section 948r and MMC Rule 304, military commissions are given wide discretion to admit coerced testimony, calling into question the fairness of any proceeding relying on such evidence.

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In sum, there are grave concerns about the military commissions process, and the recent questions raised regarding the basic integrity of the process highlight the need for congressional action. The Association, therefore, urges that your committees immediately convene hearings to

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2 10 U.S.C. § 949b(a)(C); *see also id.* at § 949b(b).

3 For an extensive list of the constitutional and international law issues raised by the current military commissions system, see generally, Jennifer K. Elsea, CRS Report for Congress, The Military Commissions Act of 2006: Analysis of Procedural Rules and Comparison with Previous DOD Rules and the Uniform Code of Military Justice (September 27, 2007), available at: http://fas.org/sgp/crs/natsec/RL33688.pdf; Human Rights First, Analysis of Proposed Rules for Military Commissions Trials (2007), available at http://www.humanrightsfirst.info/pdf/07125-usls-hrf-rcm-analysis.pdf.

4 10 U.S.C. § 949a(b)(2)(E)(ii).

inquire into the charges that political influence has impaired the independence, impartiality and integrity of military commissions proceedings and to identify the substantive and procedural flaws in the MCA that deny the accused "all the judicial guarantees" which, in the words of the Geneva Conventions as adopted by the MCA, "are recognized as indispensable by civilized peoples," and to consider how best to prosecute terrorism suspects in accordance with this Nation's historic commitment to the rule of law.[5]

Sincerely,

Barry Kamins

[5] 10 U.S.C. § 948b(g).