

**THE WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET**

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PAGE 1

DATE RECEIVED: 12/19/2001

NAME OF CORRESPONDENT: MR. J. GORDON FORESTER JR. 2001 DEC 21 14 10:16

SUBJECT: EXPRESSES CONCERN REGARDING THE PRESIDENT'S MILITARY ADDRESSING "DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM"
OEOB
WHITE HOUSE SECTION

ROUTE TO: OFFICE/AGENCY	(STAFF NAME)	ACTION		DISPOSITION		
		ACTION CODE	DATE YY/MM/DD	TYPE RESP	C D	COMPLETED YY/MM/DD
DJ MILITARY OFFICE		ORG	2001/12/19			
ACTION COMMENTS ATTN: [REDACTED]						
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1819 H Street, N.W. - Suite 1250 Washington, D.C. 20006 (202) 223-6600 FAX (202) 293-3388

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December 13, 2001

The Hon. George W. Bush, President
The White House
1600 Pennsylvania Avenue
Washington D.C. 20500

Dear Mr. President:

On November 13, 2001, the President of the United States issued a military order addressing "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order authorizes trial, exclusively by military commission, of "individuals subject to this order." An individual becomes subject to the order if that individual is not a United States citizen, and the President personally makes two determinations concerning the person's involvement in terrorism.

The Bar Association of the District of Columbia (BADC), like many other persons and organizations, has been concerned with the implications of the President's military order. After careful study, BADC has concluded that the military order can be supported, but only if certain modifications are implemented. Accordingly, BADC is today making three recommendations to the President and the Congress:

— that the order should be revised, and the regulations to be issued by the Secretary of Defense to implement the order should be crafted, to insure that such military commissions are structured and implemented in a manner that meets the requirements of fundamental fairness as that concept is generally recognized both in the United States and among our principal allies in the fight against terrorism;

— that to accomplish fundamental fairness, the principles of law, and the rules of procedure and evidence employed by these commissions, should conform to those established for general courts-martial conducted pursuant to the Uniform Code of Military Justice; and

— that the judgments of such commissions should be made subject to some sort of meaningful judicial review, and we suggest that such review be by an appropriate independent civilian reviewing authority designated by the President, with authority to approve, disapprove, or modify findings and sentence.

BADC believes that implementing these recommendations will provide for public safety, and for the protection of national security interests, while at the same time allowing the commissions to be and be seen as fundamentally fair. As

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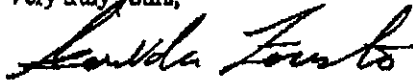
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Americans we believe that no nation better upholds the principles of freedom and justice than does ours. The proposed military commissions have been challenged by loyal Americans as well as our friends abroad for failing to meet those standards and principles. Our national credibility, and our continued position as a nation that stands on the world's legal and moral high ground are now at risk. We can retain military commissions and all their benefits if we but modify them to meet our own and world standards of fundamental fairness. BADC believes that if we are to continue to hold our high moral and legal position, implementing these recommendations is mandatory.

The text of the Recommendation, and a Report further explaining and supporting the Recommendation, are attached.

Very truly yours,



J. Gordon Forester, Jr.
President

The Bar Association of the District of Columbia

Resolution

RESOLVED, That The Bar Association of the District of Columbia supports the President's November 13, 2001 military order authorizing trial of non-US citizens accused of acts of terrorism before military commissions, provided:

- (a) that all proceedings pursuant to the military order be undertaken and conducted with a view to ensuring that they meet the requirements of fundamental fairness as generally recognized both in the United States and among our principal allies in the fight against terrorism;
- (b) that rules adopted to implement the military order conform to the rules and procedures applicable to trials by general court-martial conducted pursuant to the Uniform Code of Military Justice; and
- (c) that trials conducted pursuant to the order be made subject to review by an appropriate independent civilian reviewing authority designated by the President, with authority to approve, disapprove, or modify findings and sentence.

Adopted: December 10, 2001

SecDef

ACLU (DP) 1317

DOD 059631

The Bar Association of the District of Columbia

REPORT

To Accompany Resolution Adopted December 10, 2001

Introduction

On November 13, 2001, the President of the United States issued a military order addressing "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order authorizes trial, exclusively by military commission, of "individuals subject to this order." An individual becomes subject to the order if that individual is not a United States citizen, and the President personally determines, in writing, that

(1) there is "reason to believe" that such individual, at the relevant times

- (I) is or was a member of the organization known as al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
- (iii) has knowingly harbored one or more individuals described in subparagraphs (I) or (ii) [above] and

(2) it is in the interest of the United States that such individual be subject to this order.

The order has raised great controversy. By its terms, it authorizes trials with substantially fewer protections for those accused than would apply were such individuals tried in federal district court, an option available for all terrorists prior to the issuance of the order on November 13th, and which remains available for all terrorists except for those made subject to this order.

This Resolution by The Bar Association of the District of Columbia (BADC) urges—by modification to the military order, and by the issuance of appropriate implementing regulations by the Secretary of Defense—that the protections to be afforded to an accused in any military tribunal be raised to the level that would satisfy the requirements of fundamental fairness.

In adopting this Resolution, BADC takes no position on any of the issues raised by the military order except as stated in the Resolution. That is to say, we assume that the President has authority to order military commissions for the trial of terrorists, but we submit that such commissions nevertheless must be conducted in such a manner as to meet standards generally recognized as fundamentally fair in the United States and by civilized nations of the world. Thus for purposes of this Resolution, BADC recognizes that military commissions have been used in the past in this country in certain times and under certain circumstances, and that the Manual for Courts-Martial (MCM), the regulation promulgated by the President to implement the Uniform Code of Military Justice (UCMJ) (10 U.S.C. 801-846), states in its Preamble that military commissions constitute one of the agencies of military jurisdiction under United States law. BADC further recognizes that a number of legal scholars believe that the full panoply of constitutional due process rights do not apply to trials of non-citizen war criminal terrorists brought to trial before military commissions.

Having said this, BADC is greatly concerned that the use of military commissions, in the terms authorized in the military order, stands to undermine the stature of the United States as the leader of the free world both in ensuring fair and just tribunals for trials conducted in our own country, and in calling for other nations around the world to respect civil liberties and ensure independent and impartial tribunals and fair processes in their own justice systems.

Commentators questioning the military order have raised several concerns. Some have particularly questioned the breadth of the order, asserting that it encompasses millions of persons, including millions of resident aliens with green cards, people heretofore undoubtedly protected by the Constitution. *See e.g.*, Anthony Lewis, "Right and Wrong," *New York Times*, Nov. 24, 2001. Many, including Senator Patrick J. Leahy, have questioned the military tribunals because the structure of the tribunals does not present the appearance of an independent and unbiased tribunal, or because the procedures are so favorable to the government as to raise doubts that trials before such commissions would be deemed fundamentally fair. Senator Leahy particularly questioned how the United States would be able in the future to challenge the use of secret military courts by other countries against U.S. citizens, and voiced fears that these tribunals "could become a model for use by foreign governments against Americans overseas." *See, e.g.*, George Lardner, Jr., "Democrats Blast Order on Tribunals," *Washington Post*, Nov. 29, 2001, at A22. At least one noted commentator has labeled military commissions as "kangaroo courts." William Safire, "Kangaroo Courts," *New York Times*, Nov. 26, 2001. Others have written that meaningful judicial review of the commissions is "the most important change needed in the President's military order," and that "it cannot be constitutional to exclude the courts altogether." Walter Dellinger & Christopher H. Schroeder, "The Case for Judicial Review," *Washington Post*, Dec. 6, 2001, at A39.

With due regard to the fact that the United States is now involved in an armed conflict, and that public safety and national security concerns are of unquestioned priority and importance, BADC believes that the interests of public safety and national security can well be protected by the use of military commissions which do not so depart from accepted norms of due process in this country, or of fundamental fairness overseas. There are several particulars addressed in the Resolution.

Resolution

The Resolution seeks to balance practical and legal concerns regarding trials of terrorist war criminals, and to preserve traditional core values of the American justice system. It recognizes the very real need to protect a variety of national security interests, including the protection of sources of intelligence and evidence, but believes that the provisions of federal law currently applied in courts-martial, which parallel provisions for protection of classified information applicable in federal district court, including authorizing closing portions of proceedings, already strike a fair and workable balance between a fair process and the protection of national security. These recommendations are not intended or envisioned to require the disclosure of information which would compromise national security. Should there be instances where compliance with the principles enumerated herein would inadequately protect national security interests, such non-compliance should be documented in the record to facilitate appropriate review.

Part (a)

In the first section of the Resolution, BADC recommends that in all aspects of these commissions, care be taken to ensure that the proceedings are conducted in a manner which meets a standard of

fundamental fairness. Issues raised that fall into this category include the composition of the military commissions and the independence of individuals sitting on these commissions, as well as the procedures and rules of evidence addressed primarily in Part (b) of the Resolution. The perception of lack of independence and impartiality of military officers, who are dependent on their superiors for promotion, sitting on the commissions, has been raised in the United States. See, e.g., Lewis, *supra*.

This perception is particularly troublesome abroad, due to the provision that the Commander-in-Chief will personally determine who will be subject to these trials, and that the commissions are convened and reviewed by only two persons—the Secretary of Defense and finally the President. The following exemplifies our allies' concern.

In *Findlay v. United Kingdom*,¹ the European Court of Human Rights considered the propriety of the United Kingdom's court-martial process which (at the time) was quite similar in many respects to the U.S. court-martial system, with strong parallels to the military commissions at issue, in that the same officer (the "convening officer") who exercised prosecutorial discretion and decided who goes to trial and for what charges, also appointed the members, (as well as appointing the prosecutor and defense counsel). The same officer thereafter served as "confirming officer" to approve the court, a step necessary before the decision of the court-martial could have any effect.

The European Court determined that this organizational structure violated Mr. Findlay's right to a fair hearing before an independent and impartial tribunal, under Article 6 § 1 of the "Convention for the Protection of Human Rights and Fundamental Freedoms," and that under the above scenario, "Mr. Findlay's doubts about the tribunal's independence and impartiality could be objectively justified."²

The military commissions envisioned in the President's military order raise the very same issues regarding the "independent and impartial tribunal" as did the case of *Findlay*. Our allies who are signatory to the European Convention on Human Rights are only too aware of cases such as *Findlay* and their implications. They look at the order for these military commissions and they do not see a tribunal with adequate independence or structural integrity.

If the world is to deem these military commissions as "independent and unbiased tribunals," and if these trials are to be viewed as the "full and fair trial" required by the military order, some serious attention needs to be paid to these concerns in particular. Similar attention needs to be paid to all other aspects of these trials which might be deemed to render them less than fundamentally fair.

Part (b)

¹ *Findlay v. United Kingdom*, 24 EUR. CT. H.R. 221 (1997)

² *Id.* at Pre-¶1 and ¶ 76.

In Part (b) of the Resolution we call for the application of principles of law and rules of procedure and evidence which comport with the principles and rules applied in courts-martial conducted pursuant to the UCMJ. For more than 150 years, military commissions have been conducted in this country, and at all times they have been guided in their operation by the rules applicable to courts-martial.³ In the current Manual for Courts-Martial, the President has required—consistent with MCM regulations ever since the UCMJ was adopted more than 50 years ago—that military commissions “shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.”⁴ This provision is consistent with Article 36 of the UCMJ, which requires that “pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, . . . may be prescribed by the President by regulations which shall, 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.” Article 36(a), UCMJ, 10 U.S.C. § 836(a).

The November 13th order is a clear departure from those longstanding regulatory requirements, and carves out for these military commissions a blanket exception to the presumptive statutory requirement. The President specifically exempted these military commissions, finding that compliance with the usual statutory requirement was impracticable: “I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” This is a crucial finding, allowing the abandonment of those principles of law and rules of procedure and evidence that generally apply in district court, and that underlie the provisions of the MCM for trials by courts-martial. BADC notes the absence of any specific reasons supporting this finding. If there are reasons to support a complete withdrawal from the district court model, rather than more tailored and specific departures, they are not specified in the military order.

The rules set out in this military order may possibly be consistent with rules applied by military commissions (and by courts-martial) during World War II or earlier. But courts-martial in World War II were found to raise questions of fairness, and to be overly subject to unlawful command influence, and in 1950 Congress replaced the Articles of War with the UCMJ. The UCMJ implemented a variety of protections, often derived from civilian practice, many based on the Bill of Rights, and established for the first time a civilian court to oversee the military justice system and to review court-martial convictions. The protections deemed appropriate for courts-martial have further evolved and expanded since 1950, and now include the requirement for military judges to preside at general courts-martial, and provide in many cases the opportunity to petition for a writ of certiorari to the United States Supreme Court.

By establishing and authorizing commission rules which—subject to further regulations to be prepared by the Secretary of Defense—differ markedly from the principles and rules currently prescribed for courts-martial, and which afford far less protection to those accused before such commissions than would have been the case under the previously required court-martial principles and rules, the military order has raised worldwide concerns that the United States is operating an unjust system. Spain has already indicated it may not extradite suspected terrorists unless the U.S. agrees to an alternative forum. Such international impressions detract from our national image, and are avoidable. By returning to the

³ “In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. William Winthrop, *Military Law and Precedents*, 841 (1886, 1920 Reprint).

⁴ *Manual for Courts-Martial*, 2000 Edition, Part I, ¶ 2.(b)(2).

longstanding rule, and requiring that military tribunals follow recognized and established military court martial procedures, much of the concern of the critics will be allayed, and the commissions can be the type of forum that all are seeking: namely independent and impartial tribunals providing full and fair trials.

Among the specific concerns that have been raised are that the trials would be able to be held in secret, the accused could be barred from seeing evidence against him, only a two-thirds vote would be needed to impose the death penalty, that the presumption of innocence would not apply, that the standard for conviction would be something less than the "beyond a reasonable doubt" standard that applies for a criminal trial under U.S. civilian law or under the UCMJ, and that the rules of evidence and privilege would not apply, but would be replaced by a lesser standard of "probative value to a reasonable person." All these issues may be addressed with reference to principles and rules now contained in the MCM for trials by courts-martial. Writing rules for military commissions which complied with Article 36 would resolve many of the concerns now being expressed.

Part (c)

In the final section of the Resolution, BADC calls for the President to establish an independent civilian review tribunal, which BADC suggests might appropriately be comprised of civilian jurists, to review all trials by military commission, and to have power to approve, disapprove, or modify (but not to increase) findings or sentence. When commissions were used during World War II, it appears that some sort of review mechanism, in addition to the review by the convening authority, was employed—initially based on the review function established for courts-martial in the 1920 Articles of War, and set forth in the then applicable Manual for Courts-Martial (1928). A variety of later review bodies were also used. However, the World War II review mechanisms were found insufficient, and in 1950 a distinct appellate review structure for courts-martial was put in place, capped with the civilian Article I Court of Military Appeals (now the United States Court of Appeals for the Armed Forces (CAAF)). No serious court-martial sentence, including death, can today be carried out without extensive judicial review, including the opportunity for petition for certiorari to the United States Supreme Court for cases reviewed by CAAF, and including as well, where appropriate, the opportunity for habeas corpus petitions in federal civilian courts, including the Supreme Court.

In contrast, the military order issued by The President purports to preclude any judicial review:

the individual [subject to this order] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in

- (i) any court of the United States, or any State thereof,
- (ii) any court of any foreign nation, or
- (iii) any international tribunal.

Thus, the order not only does not allow judicial review of the conviction, but it may also amount to a suspension of the writ of habeas corpus for these individuals. As such it purports to leave the authority to execute sentences, even to death, to the President alone, after review by the Secretary of Defense, without any review by anyone not involved in the decision to prosecute. This cannot be considered fundamental fairness and it will not be accepted worldwide as a fair or just process.

While military commissions are not subject to direct review in Article III courts, or in the military

appellate courts established in the UCMJ, if the President has inherent power to authorize such commissions, then it follows that the President has inherent authority to establish a review function clothed with sufficient power and sufficient indicia of independence to be accepted as meaningful judicial review of these convictions and sentences. BADC urges that he do so.

Conclusion

BADC has noted, but does not accept uncritically, the assertion by those who defend the military commissions as currently structured that practical concerns regarding the difficulty of trying terrorists override traditional American (and world) principles of justice. To sacrifice one's principles as a justification for preserving those same principles is a logical contradiction.

The United States is a great nation, proclaiming "truth, justice, and the American way" to the world. We believe that no nation better upholds the principles of freedom and justice than does ours. The proposed military commissions have been challenged by our friends abroad as failing to meet those standards and principles. It is our national credibility, and our continued position as a nation that believes it stands on the world's legal and moral high ground, that are now at risk. We can, with reasoned argument, retain military commissions, and all their benefits, if we but modify them to meet our own and world standards of fundamental fairness. If we are to continue to hold the high moral and legal position, implementing these recommendations is mandatory.

It is also important that these issues be addressed prior to the promulgation of rules by the Defense Department implementing the President's military order. Much can be done in those rules themselves to alleviate current concerns, and to make appropriate principles of law and rules of procedure and evidence applicable. In addition, modest modifications of the President's military order are also appropriate. With such action, these commissions will be able to be viewed as independent tribunals providing full and fair trials, and to quickly and with reasonable safety adjudicate the charges against these war criminal terrorists in consonance with our nation's traditional principles of justice and fundamental fairness.