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BY TELEFAX (703) 614-4432
Honorable William J. Haynes II
General Counsel
Department of Defense
1600 Defense Pentagon
Washington, DC 20301-1600

Re: Comments on Military Commission Instruction – Crimes and Elements for Trials
by Military Commissions (the “Instruction”)

Dear Mr. Haynes,

We commend the General Counsel of the Department of Defense for making the Instruction available for public comment. Considering the brief time made available for comments on a subject encompassing nearly the full range of the law of war, we confine our remarks to the following salient points:

The Instruction “provides guidance” and is “declarative” of provisions of the common law of war, “illustrative of applicable principles” and not “an exclusive enumeration”. Nonetheless, it is entitled an “Instruction” and purports to “define” the elements of crimes. It should be made clearer that the Instruction is not intended as binding on the members of commissions or defendants with respect to the definition of crimes to the extent that it is determined that a provision is inconsistent with the common law of war, . Moreover, given the authority reserved to the Congress “to *define* and punish ...Offenses against the Law of Nations”, Article I, Section 8 of the Constitution (emphasis added), language stating that the Instruction “defines” the elements of crimes within the purview of military commissions should be amended in favor of language that characterizes the definitions as reflecting existing common law.

Beyond the classic crimes of the law of war within the traditional jurisdiction of military commissions trying members of an enemy force, the Instructions go on to define “related offenses” of Aiding and Abetting, Solicitation, Accessory after the Fact and Conspiracy. Such offenses are susceptible to expanding the subject matter jurisdiction of military commissions to conduct beyond the established purview of the law of war, especially where the defendant is not a member of an armed enemy. Such expansion would not only exceed the self-limitation of the Military Order to “violations of the law of war and all other offenses triable by military commissions”, Military Commission Order No. 1, Section 3B, but, if applied to non-combatant defendants found in the United States, would potentially violate the Constitutional right to trial by jury of civilians not members of an enemy force and triable by the regular courts. See *Ex parte Milligan*, 71 U.S. 2 (1866).

Three provisions are of particular concern with respect to potential overreaching. First, under the Instruction the offense of "terrorism", a relatively new offense to the law of war without substantial customary law, would be committed by causing property damage without regard to conduct causing or threatening loss of life. It is submitted that this offense be limited to the commission of "violent acts or acts dangerous to human life", as in 18 USC §2331. Property damage alone is properly covered by a distinct crime more familiar to the law of war. Secondly, because the offense of “aiding the enemy” would appear to extend to an individual, *e.g.*, a foreign national, owing no duty to the United States; we recommend that there be included a reference to such a duty. Finally, the clause in Paragraph 6.B.6)a(1) of the Instruction referring to persons who “joined an enterprise of persons who shared a common criminal purpose” could improperly extend to ordinary crimes beyond the law of war; it should be deleted or rephrased.

Given the unfamiliar and controversial nature of military commissions, which have not been used in any of America’s armed conflicts of the last fifty years, it is respectfully submitted that military commissions will be most effective and attain the greatest legitimacy under the rule of law if they are confined to the trial of defendants who are clearly enemy combatants charged with direct complicity in heinous crimes.

Subject to these comments, we believe that the Instructions will be a useful, and even essential, tool for members of commissions, and prosecutors and defense counsel practicing before them.

Very truly yours,

Miles P. Fischer, Chair
Committee on Military Affairs & Justice
Association of the Bar of the City of New York