



4801 MASSACHUSETTS AVE, NW  
Washington, DC 20016-8181

(202) 274-4322  
www.wcl.american.edu/nimj

Michelle M. Lindo McCluer  
*Director*

Jonathan Tracy  
*Assistant Director*

Irina Vayner  
*Program Coordinator*

#### BOARD OF DIRECTORS

Eugene R. Fidell  
*President*

Prof. Elizabeth L. Hillman  
*Vice-President*

Hardy Vieux  
*Secretary-Treasurer*

Prof. Stephen A. Saltzburg  
*General Counsel*

Ronald W. Meister  
*Board Chair*

Brig. Gen. David M. Brahms  
*Director*

Cdr. Philip D. Cave  
*Director*

Prof. Mary M. Cheh  
*Director*

Prof. Victor M. Hansen  
*Director*

Melissa Epstein Mills  
*Director*



April 12, 2011

Hon. Robert M. Gates  
Secretary of Defense  
United States Department of Defense  
100 Defense Pentagon  
Washington, DC 20301-1600

Re: *Military Commission Rulemaking*

Dear Mr. Secretary:

In light of Attorney General Holder's April 4, 2011, announcement regarding the prosecution of the alleged planners and co-conspirators of the 9/11 terrorist attacks, the undersigned organizations request that the Department of Defense open the process for issuing regulations for the military commissions to allow meaningful pre-promulgation public participation. Certainly, future commissions will result in intensive public scrutiny of the system. Therefore, the Department should uphold the President's promise of openness in government by reforming the military commission rule-making process.

The process leading to the issuance of the 2007 and 2010 Manuals for Military Commissions and the 2007 Regulation for Trial by Military Commission lacked transparency because they excluded the public and interested non-DoD parties from the discussion. Such a process needlessly detracts from public confidence in the administration of justice by military commissions. The undersigned organizations are particularly concerned with the case against Khalid Sheikh Mohammed and his co-conspirators. It will be a commission closely followed around the globe. In light of that fact, the Department should allow for public notice and comment on proposed rules. There are particular issues of significant importance in this commission because it will virtually certainly be a capital case, and certain protections must be in place to ensure the fair administration of justice where the death penalty could be the sentence.

As you know, changes to the Manual for Courts-Martial (MCM) are subject to public announcement and comment. Under DoD Directive 5500.17 (May 3, 2003), DoD policy is to encourage public participation in the review of the MCM. Proposed changes are published in the Federal Register, and the public has 60 days to comment. A public meeting is held within those 60 days. Agencies across the government rely on similar notice-and-comment procedures when promulgating new regulations.

Notice-and-comment rule making exists because public participation and openness in government are cornerstones of our democracy. Allowing public input also adds legitimacy to the regulations, while avoiding potential pitfalls before proposed rules take effect. Rule making for military commissions, like courts-martial, should be open for the same reasons. The considerable public interest in military commissions provides further justification for this reform.

The undersigned organizations welcome an opportunity to discuss this issue with your staff.

Sincerely,

National Institute of Military Justice  
National Association of Criminal Defense Lawyers  
American Civil Liberties Union  
International Justice Network  
Center for Constitutional Rights  
The Constitution Project

CC: Honorable Jeh Johnson, General Counsel, Department of Defense