

MEMORANDUM

TO: Conferees on National Defense Authorization Act

FROM: Alliance for Justice
American Civil Liberties Union
Amnesty International USA
Appeal for Justice
Brennan Center for Justice
Center for Constitutional Rights
Human Rights First
Human Rights Watch
Japanese American Citizens League
National Association of Criminal Defense Lawyers
National Institute of Military Justice
Open Society Policy Center
Physicians for Human Rights
United Methodist Church, General Board of Church and Society

DATE: August 21, 2009

RE: Concerns with Revisions to the Military Commissions Act in the Senate-Passed Version of the National Defense Authorization Act

As you consider the revisions to the Military Commissions Act of 2006 (“MCA”) in the Senate-passed version of the National Defense Authorization Act (“NDAA”), the undersigned organizations want to make clear both our opposition to resuming the use of military commissions to try terrorism suspects, and our concern with numerous provisions in the amendment to the MCA that we strongly urge you to consider. Even with the Senate-passed changes--and even if amended further to respond to the specific concerns raised by this letter--military commissions would still be incapable of delivering on the twin goals of any effective judicial system: ensuring that justice is fair, and ensuring that justice is swift.

Military Commissions Are the Wrong Forum for Trying Terrorism Suspects

After more than seven years of failed military commissions at Guantanamo, the United States should end their use. During this period, the first set of procedures was held by the U.S. Supreme Court to be illegal under the Geneva Conventions and inconsistent with the Uniform Code of Military Justice, and the second set of procedures was found to be deficient by President Obama. There is no reason to believe that a third set of military commission procedures would succeed in ensuring justice for either the

victims of terrorist acts or for the accused who have languished in extrajudicial detention for over seven years. It is equally clear that revamped military commissions will further harm the reputation of the United States as adhering to the rule of law, and will likely be unsuccessful in holding trials through to a verdict that will be upheld on appeal.

The military commissions, even if revised by the Senate-passed version of the NDAA and further improving amendments, would still depart in fundamental ways from the trial procedures that apply in Article III courts and courts-martial. These federal criminal court and court-martial procedures are designed to ensure fairness and to guard against erroneous convictions. Departing from them would result in a second-class system of justice that would lack legitimacy to the American public and around the world.

Continued use of military commissions perpetuate the legacy of Guantanamo. The President has committed to closing the Guantanamo detention facility as an important step to restoring the reputation of the United States as adhering to the rule of law. All of us support closing the Guantanamo prison. However, reviving the military commissions, in any form and in any geographical location, will render impossible the task of putting to rest the terrible legacy of Guantanamo. Americans and the world will not believe that Guantanamo is truly closed if the military commissions are simply dressed up and moved stateside. The international goodwill that came with the President's decision to close Guantanamo--goodwill that can result in improved national security for the United States--will be squandered if one of the most troubling aspects of Guantanamo does not end altogether.

Instead of relying on military commissions, the government should turn to the tried and true system of justice that has been available all along: the federal criminal courts, which are the same Article III courts that regularly try and convict criminals, including terrorists. A comparison of conviction statistics for military commissions and federal criminal courts is striking. Since 2001, only three defendants have been convicted under the military commissions (none of the convictions were for war crimes)—which stands in sharp contrast to the more than one hundred complex international terrorism cases successfully prosecuted in U.S. federal courts during this same period, including the conviction in federal criminal court of a co-conspirator in the 9/11 attacks.

If the government uses military commission procedures that differ from those used in federal criminal court or in court-martial, past will be prologue: trials and convictions will be delayed by confusion and chaotic decision-making by the military commissions, and any convictions could well be reversed on appeal. The result of reviving the military commissions is predictable. There will be many additional years of litigation with significant uncertainty of whether any verdicts will be upheld on appeal.

The Military Commission Procedures in the Senate-Passed Version of the NDAA Are Unconstitutional, Inconsistent with the Laws of War, and Unfair

The military commission procedures in the Senate-passed version of the NDAA fail to address numerous significant problems in the MCA. As a result, the military commission procedures in the Senate-passed bill would result in a military commission system that is unconstitutional, inconsistent with the laws of war, and unfair.

In fact, the Senate-passed version of the NDAA does not even meet the constitutional and policy concerns of the Obama Administration. The Justice Department testified before both of your committees this summer that the position of the Administration is that courts are highly likely to find that the Due Process Clause of the Constitution applies to military commissions, and that some of the military commission procedures of the Senate-passed version of the NDAA do not meet constitutional requirements.

The basis of the Administration's position appears to be a still undisclosed May 2009 Justice Department Office of Legal Counsel opinion that reportedly found that the Due Process Clause applies to the Guantanamo military commissions.¹ The Justice Department and Defense Department also articulated some additional policy concerns explained below.

Many of our concerns overlap with the concerns of the Administration, and several of them go beyond them to address additional problems with the legislation. Specifically, the Senate did not resolve the following problems (which are not necessarily listed in order of priority):

The Scope of Who Can Be Tried Before Military Commissions Is Inconsistent with the Laws of War: The Senate-passed version of the NDAA defines "unprivileged enemy belligerent" to include not only those who engaged in hostilities, but also those who have "purposefully and materially supported hostilities," as well as "members of al Qaeda." However, as several recent district court opinions have recognized, there is no basis in the law of war for treating people who "support" hostilities as "belligerents."

The Scope of Who Can Be Tried Should Not Extend Beyond the Guantanamo Detainees: Throughout the long history of the United States, military commissions never outlasted a particular conflict or a particular group of defendants. In fact, there were no military commissions or military commission procedures at all during the more than 55 years (which included the Korean War, the Vietnam War, and the Gulf War) from the end of World War II until 2001. While we oppose the use of military commissions for any terrorism suspects--and we emphasize specifically that it would be a serious wrong to try the Guantanamo detainees before military commissions--any procedures that the Congress essentially devises for Guantanamo should not be extended to future detainees.

¹ The House and Senate Armed Services Committees should join the Chairmen of the House Judiciary Committee and its Subcommittee on the Constitution in demanding the disclosure of the May 2009 OLC opinion to assist the conferees as you deliberate on the military commission legislation.

Children Are Not Excluded from Being Tried Before Military Commissions:

The Senate-passed version of the NDAA does not bar military commission trials of children. The concern is not hypothetical; the government has prosecuted before military commissions two defendants who were children at the time of the alleged offense. International law requires that trials of any person who was younger than 18 at the time of an offense be conducted in a manner that takes account of their age and the desirability of promoting rehabilitation, which would usually result in the use of juvenile courts. No one who was younger than 18 at the time of an offense should be triable before a military commission.

Discriminates on the Basis of Citizenship: By singling out only foreign nationals to be subject to the jurisdiction of military commissions, the Senate-passed version of the NDAA legislation arbitrarily discriminates on the basis of citizenship, violating U.S. obligations under international human rights law and contravening the Equal Protection Clause of the Constitution.

Admissibility of Evidence Obtained by Coercion: The Justice Department testified that, in conformity with the Due Process Clause of the Constitution, the Senate-passed NDAA provision permitting the use of at least some coerced evidence should be changed to a voluntariness standard, which is the standard that applies in federal criminal court and courts-martial. The Supreme Court has held that coerced evidence is unreliable and its use unconstitutional. No forced confession or other coerced evidence should be admissible—and no derivative evidence should be admissible. The Justice Department itself testified that any use of coerced evidence causes a serious risk that hard-won convictions would be reversed on appeal.

Lack of a Sunset Provision: The Justice Department urged the Congress to add a sunset provision to the military commissions. Consistent with more than 200 years of United States military law, military commission procedures should never be made a permanent part of the U.S. Code.

Inadequate Resources for the Defense, Particularly in Capital Cases:

Defense teams at the military commissions have operated under resource constraints that violate the right to effective assistance of counsel guaranteed by the Sixth Amendment, and would not be tolerated in any courtroom or court-martial in America. These problems are particularly acute in capital cases, where defendants are routinely and almost uniformly denied defense resources that are routinely approved as constitutionally required by federal and state judges across the country. Although the Senate committee report urges the Defense Department to be responsive to resource concerns raised by the military defense counsel and Administration witnesses testified that they would provide adequate resources, including investigatory, legal, and translation support for defendants, there is no binding statutory assurance of adequate resources in the Senate-passed version of the NDAA.

Admissibility of Hearsay Evidence: The Sixth Amendment and courts-martial rules limit the use of hearsay. The military commission provisions of the Senate-passed version of the NDAA, however, would allow the military commissions to admit hearsay evidence that would be excluded before any federal criminal court or court-martial in the United States. Although the Justice Department argued for additional restrictions on the use of hearsay than are included in the Senate-passed legislation, these recommendations fall short of the restrictions that apply in federal criminal courts and courts-martial. The NDAA's provisions on hearsay should be revised to meet constitutional requirements.

Overly Broad Discretion to Break from Courts-Martial Rules: Although the Senate-passed legislation requires the Secretary of Defense to apply the rules of courts-martial except where otherwise statutorily specified, it also gives the Secretary broad authority to unilaterally order deviations from the rules. This provision is the exception that swallows the rule. Congress alone should specify any exceptions to the rules of court-martial, particularly to avoid having additional deviations ordered by the Secretary of Defense, who has authority over the convening authority and military prosecutors.

Unequal Opportunity for Defense to Make Case: Court-martial procedures, in keeping with the rules in Article III courts, provide that the prosecution and the defense must have "equal opportunity" to obtain witnesses and evidence. The Senate-passed version of the NDAA, however, omits this rule of parity, instead providing only that defendants shall have a "reasonable" opportunity to obtain witnesses and evidence. In other words, the defendant is not assured of an opportunity to present a defense that is equal to the prosecution's opportunity to present its case. This "loading of the dice" on the side of the prosecution is both unconstitutional and unfair.

A Range of Other Significant Issues Remain: We have highlighted our principal concerns, but there are many other concerns with the military commission provisions in the Senate-passed legislation. Specifically, the Senate-passed legislation does not:

- narrow the crimes triable before military commissions to recognized violations of the laws of war;
- provide for the defendant to have a right equal to the government's right to an interlocutory appeal;
- provide a requirement that the Attorney General certify why a defendant cannot be prosecuted in an Article III court, and certify that the charged conduct is not covered by Title 18 of the U.S. Code;
- require a pretrial investigation or pretrial hearing on probable cause;
- provide the accused with a meaningful ability to choose his or her counsel, including the opportunity to choose as counsel an attorney who is not a U.S. citizen;
- impose statutes of limitations comparable to the limitations placed on similar crimes in the federal criminal code or under the Uniform Code of Military Justice;

- define the crime of “murder in violation of the law of war” to require that the method or manner of the killing violates the law of war, so that defendants will not be charged with this offense based on the mere status of being an “unprivileged enemy belligerent,” since unprivileged belligerency is not a violation of the laws of war so long as the target is a legitimate military objective;
- provide a requirement for public notice and a public comment period for changes to military commission procedures;
- give credit in sentencing for time in U.S. custody and give credit in sentencing for harsh treatment;
- permit use of Uniform Code of Military Justice case law in military commission proceedings and *vice versa*; and
- require prompt and user-friendly Internet publication of all decisions and orders of military commissions.

While fixing the problems detailed above would improve the military commissions, it would not render them a sensible alternative to federal criminal courts—and they would remain suspect in the eyes of Americans and the world. Reviving the broken military commission system yet again cannot be justified when our federal criminal courts stand ready, willing, and able to dispense justice to terrorism suspects in a manner that is consistent with the Constitution, the laws of war, and American values.

Thank you for your attention to this matter, and we would be pleased to meet with you or your staff to discuss our concerns further.