

September 11, 2006

Dear Senator:

We are writing to express our strong opposition to the proposed Military Commissions Act of 2006. While this long draft bill will require detailed analysis and our organizations will provide additional commentary, we thought it was important to immediately identify at least some of its most deeply troubling provisions. As the Congress considers various alternatives to the Administration's draft it should bear in mind that we would strongly oppose these or similar provisions in any proposed bill.

The Administration's decision to issue a new policy directive on detainees in military custody that unequivocally applies Common Article 3 of the Geneva Conventions as a minimum standard in all circumstances is welcome. Likewise, the new Field Manual on interrogation contains strong and welcome prohibitions on abusive interrogation techniques. The decision to transfer prisoners previously held in secret facilities without access by the International Committee of the Red Cross to DOD operated facilities – however belated – is also welcome as is the belated decision to seek legal accountability for those alleged to have participated in planning and carrying out the 9/11 attacks.

In this context, however, the Administration's draft legislation on military commissions and enforcement of Common Article 3 is shockingly radical and at odds with these other actions. The Administration's draft would violate fundamental notions of due process by authorizing military commissions to try individuals seized anywhere in the world even when they can and should be prosecuted in civilian courts. Moreover, it is disappointing that the Administration chose to ignore the many experts – including distinguished military lawyers – urging that the starting point for new military commission legislation should be the Uniform Code of Military Justice and the Manual for Courts Martial. The refusal to start with a well-established and respected system and the decision to try to construct a new process from the ground up led to many of the flaws in the previous system and now creates the risk of further delay in moving forward with trials capable of withstanding judicial scrutiny. Consequently, the Administration's draft legislation may not lead to closure for families of 9/11 victims, but instead to additional and unnecessary delay.

Moreover, as the Administration moves forward with high profile prosecutions of alleged Al Qaeda leaders it is strongly in the US national interest for these trials to be seen by the world to have been conducted in a manifestly fair manner. As Justice Jackson said in his celebrated opening statement as chief US prosecutor at the Nuremberg trials of leading Nazis: “[W]e must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow.”

Again, while this letter does not attempt to identify all of the flaws in the proposed legislation – or even all of the very serious flaws – it represents a quick effort to identify some of the draft's most problematic provisions.

Enforcement of the Geneva Conventions – It is ironic, to say the least, that the Administration proposed a radical reduction in the scope of the War Crimes Act enforcing Common Article 3 of the Geneva Conventions on the very day that it issued a policy directive on detainees and a new Field Manual on interrogation which both strongly affirm the applicability and importance of Common Article 3.

The Administration claims that clarity and certainty are needed in enforcing Common Article 3 and a proposal which actually provided strong and clear prohibitions would be welcome. But the Administration's draft actually creates greater ambiguity. The only thing that it does clearly is to create loopholes for abusive conduct. The new Field Manual on Interrogation is very clear about specific prohibited conduct under international law. The War Crimes Act must be equally clear that waterboarding and other cruel and abusive interrogation techniques are illegal. The Administration's draft appears calculated to do just the opposite.

The United States has long recognized that a strong, broad interpretation of Common Article 3 is vital to the safety of US personnel. Now the Administration appears to have switched sides in that debate. Indeed, if the proposed bill is passed, it is doubtful that the Administration would have the legal authority to prosecute members of Al Qaeda for using such abusive techniques on US service personnel.

Retroactive Repudiation of Geneva Convention Obligations and Immunization of Previous Conduct – In a truly extraordinary move, the Administration's draft proposes to retroactively interpret and limit the scope of US obligations under Common Article 3 – more than half a century after the US ratified the Geneva Conventions. By asserting that US obligations would be satisfied by meeting the standards of the Detainee Treatment Act, the Administration is effectively proposing a post-ratification reservation to the Geneva Conventions, a truly radical and dangerous idea.

This is not the only area in which the bill attempts to reach back in time to alter previously existing standards and obligations. It also purports to immunize all previous violations of the War Crimes Act and other laws. Indeed, Section 9 contains a wholesale application of the Act to events since the 9/11 attacks.

Definition of Enemy Combatants and Indefinite Detention – One of the most troubling aspects of the Administration's conduct has been its assertion of the right to sweep up individuals off the streets of Milan, or Chicago for that matter, and hold them indefinitely without charge under a newly invented system of rules purporting to implement the laws of war. US allies and countless experts have urged the Administration to abandon this approach. Military detention and trials should be limited to Al Qaeda leaders and others who were directly involved in armed conflict. The Administration's draft rejects these pleas despite the President's pledge to seek a common understanding with US allies on the proper means of defeating terrorism. As noted above, the Administration's draft would authorize military commissions to try individuals seized anywhere in the world even when they can and should be prosecuted in

civilian courts. In addition, the Congress should understand that it is highly likely that the Administration will argue that by adopting definitions of lawful and unlawful enemy combatants the Congress has given its implicit assent to the indefinite detention without trial of persons designated as unlawful combatants.

Due Process – The host of due process problems with the Administration’s draft legislation requires its own extensive letter. But among the most obvious and egregious problems are the Administration’s deeply troubling decision to create a presumption in favor of admitting coerced evidence and the continued insistence that persons can be fairly convicted using evidence that they are not allowed to see or effectively challenge. A detainee could face conviction and even execution on the basis of such secondhand summaries of a witness’s statements, despite having no opportunity to question the witness about the voluntariness or accuracy of any statement. And in some cases, the defendant could be prevented from seeing even these secondhand summaries.

Eliminating Judicial Oversight – By seeking to remove the courts from playing an oversight role, the Administration’s bill seeks to fundamentally alter the role of the courts in interpreting and implementing US adherence to the Geneva Conventions. Moreover, the only automatic right of appeal would be to an entirely new appellate court of military commission review, with all of the judges appointed by, and under the chain of command of, the Secretary of Defense.

The bill also proposes to implement retroactive jurisdiction-stripping which would deny one of the most basic and historic requirements of due process. The Administration bill would deny habeas and all other judicial relief to any alien – including a legal permanent resident of the US arrested in the US – designated as an unlawful enemy combatant and placed in military custody in Guantanamo or elsewhere. This goes far beyond the Detainee Treatment Act. Under the Administration bill there would be no habeas, no requirement of DC Circuit review, and the courts would be stripped of jurisdiction even for cases which are already pending. The aliens designated as unlawful enemy combatants could be held forever without any due process.

In sum, we urge you to oppose any legislation containing such provisions and to work to produce legislation which enhances US national security while at the same time reflecting American values and complying with international norms vital to protecting US interests.

Sincerely,

Center for National Security Studies
Physicians for Human Rights
Open Society Policy Center
American Progress Action Fund
American Civil Liberties Union
Washington Office on Latin America

Center for Victims of Torture
Center for Constitutional Rights
Human Rights First
Human Rights Watch
Amnesty International USA