

July 16, 2009

Dear Senator:

As you consider the military commission provisions in the National Defense Authorization Act (NDAA), the undersigned organizations want to make clear our opposition to resuming the use of military commissions to try terrorist suspects, even with the changes in the NDAA, as reported out of the Senate Armed Services Committee. Military commissions would be incapable of delivering on the twin goals of any effective judicial system: ensuring that justice is fair, and ensuring that justice is swift.

The military commissions, even if revised by the NDAA, 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.

Unfair procedures not only taint trials and convictions, but also delay them. After more than seven years and two iterations of the military commissions at Guantánamo Bay, the government has secured only three convictions. If Congress revives the use of military commissions that differ from this nation's regularly constituted courts, past will become prologue: trials and convictions will be delayed by challenges in federal court, and any convictions will likely be reversed on appeal.

Instead of Congress and the Executive Branch setting up a third version of the discredited military commissions, the federal government should take advantage of 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 try and convict criminals every day. Experienced and highly-qualified federal judges are more than capable of delivering timely and legitimate trials of terrorist suspects, and dealing with sensitive classified evidence through use of the Classified Information Procedures Act (CIPA). Indeed, roughly 200 defendants have been convicted of international terrorism crimes in federal court in recent years.

Moreover, as reported out of committee, the military commission provisions of the NDAA do not meet the constitutional and policy concerns of the U.S. Department of Justice. The Justice Department testified before the Senate Armed Services Committee last week 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 provisions of the NDAA do not meet constitutional requirements. The Justice Department also articulated some compelling policy

concerns. It urged the Senate to address the following problems, among others, which were not resolved in the NDAA, as reported out of committee:

**Inadmissibility of evidence obtained by coercion:** The Justice Department testified that the 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 courts and courts-martial. The Supreme Court has held that coerced evidence is unreliable and its use unconstitutional. No forced confessions or other coerced evidence should be admitted. The Justice Department testified that any use of coerced evidence causes a serious risk that hard-won convictions will be reversed on appeal.

**Inadmissibility of hearsay evidence:** The military commission provisions of the NDAA would allow the commissions to admit hearsay evidence that would be excluded before any court in the United States, including courts-martial. The Sixth Amendment and military courts-martial rules limit the use of hearsay. The provisions should be revised to meet constitutional requirements. The Justice Department argued for additional restrictions on the use of hearsay than are included in the NDAA. However, these recommendations fall short of the hearsay rules used in federal criminal courts and courts-martial.

**Adequate provision of resources to the defense:** Defense teams at the military commissions have operated under resource constraints that would 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. Although the Defense Department and Justice Department made verbal commitments to provide adequate resources, including investigatory, legal, and translation support for defendants, there is no statutory guarantee included in the NDAA as reported out of committee.

**Classified evidence procedures:** The Justice Department asked Congress to replace the bill's classified evidence provisions with provisions similar to those used by federal criminal courts, which apply the Classified Information Procedures Act (CIPA). CIPA provides proven procedures governing the use of classified evidence, and there is no good reason for the commissions to deviate from it. The Justice Department testified that, "importing a modified CIPA framework into the statute will provide certainty and comprehensive guidance on how to balance the need to protect classified information with the defendant's interests."

**Sunset provision:** The Justice Department urged the Congress to add a sunset provision to the military commissions. Congress should add a three-year sunset provision. The commissions that the NDAA would establish represent a brand new and untested justice

system; they are, necessarily, an experiment. A sunset provision would set a date on which Congress must evaluate the commissions' performance and decide whether they should be continued, discontinued, or amended.

In addition to the problems raised by the Obama Administration with the NDAA, there are other significant problems. In particular, the definition of who can be tried before military commissions remains overly broad. The NDAA defines "unprivileged enemy belligerent" to include, not only those who have engaged in hostilities, but also those who have "purposefully and materially supported hostilities." Several recent district court opinions have held that there is no basis in the law of war for treating people who merely "support" hostilities as "belligerents." Indeed, if mere "support" were sufficient, Rosie the Riveter would have been a "belligerent" during World War II, subject to detention and trial by a military tribunal. In addition, the NDAA provisions continue to deny defendants the same opportunity that the prosecution has to obtain witnesses and other evidence. And, while the bill requires the Secretary of Defense to apply the rules of courts-martial except where otherwise specified, the bill also gives the Secretary of Defense broad authority to make exceptions – an exception that effectively swallows the rule.

While fixing the problems detailed above would improve the military commissions, it would not render them a sensible alternative to federal criminal courts under Article III of the Constitution. The reforms needed to make military commissions fair would result in commissions that are functionally identical to Article III courts or courts-martial. Under those circumstances, it makes little sense to use a duplicative system that, because it is new and untested, will be subject to protracted litigation and will be suspect in the eyes of the world.

Moreover, the commissions would lack the institutional competencies that our established courts have developed over the centuries. They would inevitably continue to be plagued with logistical "growing pains," even if their rules were scrupulously fair. Reviving the broken military commissions system once again cannot be justified when our federal criminal courts stand ready, willing, and able to dispense justice to our enemies in a manner that is consistent with the U.S. Constitution and American values.

Sincerely,

Alliance for Justice  
American Civil Liberties Union  
Amnesty International USA  
Appeal for Justice  
Arab-American Anti-Discrimination Committee  
Asian American Justice Center

The Brennan Center for Justice  
Center for Constitutional Rights  
Constitution Project  
Government Accountability Project  
Human Rights First  
Human Rights Watch  
International Justice Network  
Japanese American Citizens League  
National Association of Criminal Defense Lawyers  
National Institute of Military Justice  
Open Society Policy Center  
Religious Action Center for Reform Judaism  
Rights Working Group  
United Methodist Church, General Board of Church and Society