

Karen J. Mathis
President

September 19, 2006

Dear Representative:

As the House begins consideration of H.R. 6054, the Military Commissions Act of 2006, the American Bar Association would like to express its views on legislation regarding the detention, treatment and trial of individuals in the custody of the United States.

Since February 2002, we have urged the President and the Congress to ensure that the rules for any military commissions be guided by the Uniform Code of Military Justice (UCMJ), to provide the rights afforded in courts-martial, and to fully comply with our international treaty obligations. As the Supreme Court found in *Hamdan v. Rumsfeld*, the prior Guantanamo military commission system was inherently flawed and violated the UCMJ and Common Article 3 of the Geneva Conventions.

Our nation has the finest military justice system in the world, and we therefore urge the Congress to insure that any legislation authorizing military commissions rely to the greatest extent possible on the respected and tested framework of the UCMJ. Also, UCMJ courts-martial substantially meet the security needs that are most acute for the type of defendants likely to be apprehended abroad for terrorist activities, including the foreign based command and control of al Qaeda.

The ABA cannot support H.R. 6054 because it departs significantly from the tried and true procedures established in the UCMJ. Specifically, we believe that a fair process requires the opportunity for a defendant to confront the evidence presented against him and are therefore concerned about the treatment of classified and hearsay evidence, as well as evidence obtained by coercion, in the commissions established by H.R. 6054. The military rules for courts-martial are used around the world and have built into the system means for dealing with these very issues. For example, Rule 505 of the Military Rules of Evidence provides procedures to protect classified information. Military commissions that are guided by the UCMJ would meet both the security and fairness needs that accompany the trial of detainees.

The ABA has also consistently urged the U.S. government to fully comply with the Geneva Conventions of August 12, 1949, and particularly to observe the minimum protections of Common Article 3 and related customary international law. We are deeply concerned about any efforts in this legislation to redefine our existing treaty obligations in the treatment of detainees. We welcome the recent Department of Defense directive reaffirming the military's obligation to meet these minimum standards and believe that U.S. civilian agencies should be held to the same standard. A departure by the U.S. from these long-standing practices may affect both the

treatment of Americans captured abroad and our government's credibility in objecting to the use of torture or other cruel, inhuman, or degrading treatment or punishment against our citizens.

The United States has long served as the model for the world of a civilized society that effectively blends security and human liberty. When we refuse to observe the very international standards for the treatment of detainees, which we were so instrumental in developing, we provide encouragement for others around the world to do the same. Our British allies have demonstrated that those traditional principles can be adhered to without diminishing the ability to provide for the security of its citizens. We must do likewise.

Additionally, the ABA opposes Section 5 of the legislation that strips judicial review of existing habeas corpus claims for detainees in U.S. custody. The writ of habeas corpus, which ensures protection against unjust government imprisonment, is one of the pillars of our constitutional system. It serves as an important check on the power of executive detention and embodies the fundamental principle that one should not be imprisoned by the government without opportunity for a fair and impartial determination that the detention is in accordance with the Constitution and laws of the United States.

In 2004, the U.S. Supreme Court, in *Rasul v. Bush*, ruled that federal courts have jurisdiction to consider petitions for writs of habeas corpus from Guantanamo detainees under the federal habeas statute. Furthermore, the U.S. Supreme Court held in *Hamdan v. Rumsfeld* that the framework for judicial review established by the Detainee Treatment Act did not apply to habeas corpus claims that were already pending in the U.S. courts.

If adopted, this legislation reverses those decisions and would effectively wipe out a large number of pending habeas cases filed by Guantanamo detainees. The result would be that an individual detained at Guantanamo who does not receive a status determination, but is detained nonetheless, would not be eligible for review. Conceivably, such detainees could be held in detention indefinitely with no opportunity to challenge the legality of their continued imprisonment. The ABA strongly opposes this provision and the retroactive removal of pending habeas corpus claims from the U.S. court system.

The ABA believes it is essential that we establish procedures that inspire public confidence in the system and that we would find acceptable if applied to our own service members. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Karen J. Mathis". The signature is written in a cursive, flowing style.

Karen J. Mathis