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Defending Liberty
Pursuing Justice

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The Honorable Carl Levin
Chairman
Senate Armed Services Committee
Washington, D.C. 20510

The Honorable John McCain
Ranking Republican
Senate Armed Services Committee
Washington, D.C. 20510

Dear Chairman Levin and Senator McCain:

Thank you for scheduling hearings regarding the Military Commissions Act (MCA) and the detention of individuals at Guantanamo Bay, Cuba. As part of your consideration of these issues, the American Bar Association (ABA) would like to share with you some of its concerns regarding these matters.

Since 2002, the ABA has worked actively on detainee issues and urged the federal government to establish fair procedures in its prosecution of alleged terrorists. We believe that the government can prevail in prosecuting terrorists without sacrificing the rule of law and the principles of justice that have historically guided our democracy. A significant departure from these traditions will harm our credibility worldwide.

The ABA was disappointed in January when the Pentagon issued new guidelines pursuant to the MCA without seeking prior public input. In October 2006, we requested that these regulations be subject to public notice and comment procedures because we believe that an open debate on such controversial legal and policy issues leads to a stronger final product. Because there was no public consideration, oversight of the military commission process by your committee is all the more important.

The ABA strongly opposes Section 7 of the MCA, which strips judicial review of habeas corpus claims for detainees in U.S. custody that were already pending at the time the law was enacted. 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.

The central importance of the writ of habeas corpus has been reaffirmed by two recent U.S. Supreme Court rulings. In 2004, the Supreme Court ruled in *Rasul v. Bush* that the federal courts have jurisdiction to consider petitions for writs of habeas corpus from Guantanamo detainees under the federal habeas statute. In *Hamdan v. Rumsfeld*, the Supreme Court held 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. Nonetheless, Congress enacted the MCA with the habeas-stripping provision, which has resulted in the dismissal of hundreds of habeas corpus claims from the federal courts.

The ABA believes that every person that is detained by the U.S. government should have the opportunity for a fair hearing that examines the basis for their detention. Executive Branch officials have acknowledged that of the approximately 385 detainees now at Guantanamo the government only intends to try approximately 60 to 80 of these individuals before a military commission. Thus far, only three individuals have been charged. Hundreds of remaining prisoners could be held indefinitely as "enemy combatants" without federal judicial review of the legitimacy of their detention. It is precisely the role of the courts to sort out which governmental claims have legal and factual support and which do not, and this is at the core of habeas corpus protections. To avoid an unjust result, the ABA believes that Congress should adopt legislation restoring habeas corpus review for non-citizens who are detained in U.S. custody at Guantanamo Bay.

For over five years, the ABA has urged the President and Congress to ensure that the rules for any military commissions comply with our international treaty obligations and are guided by the Uniform Code of Military Justice (UCMJ) providing the rights afforded in courts-martial. Our nation has the finest military justice system in the world and the 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 procedural framework set out in the MCA departs significantly from the practices of the UCMJ by limiting the opportunity for defendants to confront the evidence presented against them. We are particularly concerned about the treatment of hearsay evidence and evidence obtained by coercion. For example, the tribunals allow for consideration of evidence obtained by coercion in some circumstances if it was obtained prior to December 30, 2005. The military rules for courts-martial are used around the world and have built into the system superior means for dealing with these very types of issues in a fair manner that still meets the security needs required for terrorist suspects.

The ABA is also troubled by Section 6(a)(2) of the MCA, which provides that "no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States" in interpreting Common Article 3 violations under the War Crimes Act. The

provision unnecessarily intrudes on the independence of the judiciary, a co-equal branch of government. Respect for the separation of powers suggests that Congress should refrain from telling the federal courts how they should perform their core adjudicatory functions. The appropriate use of foreign sources by our federal courts is an evolving issue. It has wide-ranging implications that should be left open to discussion and debate so that a consensus over the relevant issues and guiding principles may emerge.

The ABA has consistently urged the U.S. government to observe the minimum protections of Common Article 3 of the Geneva Conventions and related customary international law. We welcomed the 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. We are perturbed that Section 6(a)(3) of the MCA authorizes the Executive Branch to define non-grave breaches of Common Article 3 by Executive Order. This provision would allow the administration to sanction civilian agencies to engage in harsh interrogation techniques that would be unacceptable for the military to conduct under U.S. law. Departures by the U.S. from a uniform approach to the treatment of detainees under Common Article 3 will affect both the treatment of Americans captured abroad and the credibility of our government in raising objections to the use of torture or other cruel, inhuman or degrading treatment or punishment against our citizens.

An ABA Observer attended the first military commission proceeding held in late March in the case of Australian detainee David Hicks and witnessed the inherent flaws in this new framework. Our Observer reported that the prospects for a fair and just process suffered a serious blow when the presiding military judge refused to allow two of Mr. Hicks' three lawyers to appear on his behalf. The military judge, interpreting a contested provision of the Manual for Military Commissions, dismissed the Assistant Defense Counsel because she was not on active military duty despite the fact that she had been assigned by the Chief Military Defense Counsel to represent Mr. Hicks in June 2006. The second attorney—a civilian lawyer—was barred because he would not sign a notice agreeing to obey regulations governing the conduct of civilian defense counsel that had not yet even been promulgated, although he did agree to abide by all existing rules. While Mr. Hicks later decided to plead guilty to one portion of the charges against him at a hastily called evening session of the Commission, the fact that he was first deprived of two-thirds of his defense team can only increase skepticism and further erode any confidence that the process will provide detainees with a full and fair hearing.

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 international standards for the treatment of detainees that 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.

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,

Karen J. Mathis