November 28, 2011


Dear Senator:

As the Senate considers the National Defense Authorization Act for Fiscal Year 2012 (S.1867), I write on behalf of the American Bar Association to urge that the Senate remove those provisions in the bill that authorize indefinite detention without habeas review of Guantanamo detainees, permit trial by military commission where trial in an Article III court would be possible, or permit trial by military commission of U.S. citizens or lawful residents.

Section 1031(c) of S.1867 would permit the detention without trial of individuals detained at Guantanamo Bay for an indefinite period without access to a habeas corpus hearing with full due process rights. Sections 1031 and 1032 would permit the disposition of a detainee's status pursuant to military commission in situations where trial in an Article III court would be possible. Sections 1032 and 1034 would make it difficult to transfer certain detainees to the United States for trial. The ABA opposes these provisions.

In February 2009, the ABA adopted a resolution urging the U.S. government to ensure that:

All individuals [detained at Guantanamo Bay] who have been or are expected to be charged with violations of criminal law should be prosecuted in Article III federal courts, unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice.

This policy expresses the Association's clear support for criminal prosecution of detainees in Article III courts while recognizing that there may be some cases requiring prosecution in another forum. Non-Article III forums should be used only as a last resort and only if they comport with due process and standards of international and military law; as presently constituted, military commissions fall short of these standards.

The ABA is particularly troubled by provisions that would enable the detention, pursuant to a disposition in a military commission, of U.S. citizens and lawful residents for conduct occurring outside the United States. The ABA opposes any provision authorizing disposition or trial by
military commission that does not expressly foreclose such trials or proceedings for U.S. citizens and lawful residents.

Our federal courts, respected around the world, are well-equipped to handle trials of this magnitude and consequence. They will provide a fair and impartial forum for bringing these accused persons to justice and will assure transparency and accountability to victims and the international community.

The ABA opposes indefinite pretrial detention and the continued detention of persons held in Guantanamo without trial or a habeas corpus hearing with full due process rights. Section 1031(c) would permit the detention, without trial or a habeas corpus hearing with full due process rights, of individuals detained at Guantanamo Bay for the duration of hostilities against al Qaeda and its affiliates. These hostilities may continue indefinitely. Therefore, the ABA is concerned that the practical effect of this provision would be to authorize indefinite detention of Guantanamo detainees that is not subject to the review of Article III courts.

We urge you to support efforts to strike these provisions from the bill.

Thank you for your consideration.

Sincerely,

Thomas M. Susman