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September 15, 2006

The Honorable Bill Frist
Majority Leader
United States Senate
509 Hart Senate Office Building
Washington, DC 20510

The Honorable Harry Reid
Minority Leader
United States Senate
528 Hart Senate Office Building
Washington, DC 20510

Re: Administration's Military Commissions Bill

Dear Majority Leader Frist and Minority Leader Reid:

I am writing on behalf of the New York City Bar Association to urge you to oppose the Administration's proposed Military Commissions Act of 2006 (the "Act"). The Association is an independent non-governmental organization of more than 22,000 lawyers, judges, law professors and government officials. Founded in 1870, the Association has a long history of dedication to human rights and the rule of law, and a particularly deep historical engagement with the law of armed conflict and military justice.

In the wake of the Supreme Court's decision in *Hamdan*, the Association had expected legislation that would reflect a respect for due process, our nation's obligations under the Geneva Conventions, and the rule of law generally. Instead the Act, as proposed, runs afoul of *Hamdan*. It reflects a pointed disregard of the opinions of the senior judge advocates general and other military leaders. And, in our view, it undercuts this nation's well-earned role as the chief proponent of human rights and the rule of law around the world. The Administration's bill has drawn

criticism from a broad array of distinguished American military leaders and legal experts, and we join them in urging its rejection. Set forth below are the New York City Bar's three most significant concerns with the Act.

First, with respect to Common Article 3 of the Geneva Conventions ("CA3"), the Act's purported effort to "clarify the standards imposed by common Article 3" does no such thing. Instead, it ignores the plain language and long-accepted meaning of CA3. Section 7 rejects CA3's prohibition of "outrages upon personal dignity, in particular, humiliating and degrading treatment" and seeks to overlay the standards of last year's Detainee Treatment Act. If such a statutory scheme were to become law, this nation would be rightly viewed as turning its back on its Geneva treaty obligations. Henceforth America's enemies could logically claim the same right to revise the meaning of CA3's treatment standards. The unambiguous testimony of our military's senior judge advocates, and the public statements of a score of retired general officers, have articulated the harmful effects that would result if we depart from the CA3 standards which our armed forces have taught, trained to, and applied for decades. Our military's experience-driven policy and practice is derived, first, from the knowledge that our troops are at risk of capture. Our detainee policies are premised on the expectation of reciprocal treatment for our captured troops. We should not take steps that heighten the risk of maltreatment of our servicemen and women without any demonstrable benefit.

Second, under Section 6 of the Act, even pending habeas cases brought by current detainees would be halted. Hundreds of those held as "enemy combatants" would be deprived of any legal recourse. This wholesale removal of habeas rights for detainees would constitute a sweeping departure from a fundamental right recently reaffirmed in *Rasul*. As a group of distinguished retired federal judges noted, this provision creates a perverse incentive to detain indefinitely. Hundreds of detainees who have not been and will never be charged must be provided some recourse, if our respect for due process and human dignity has any meaning. Moreover, the Act's broad definition of "unlawful enemy combatant" does not exclude American citizens. Thus, even citizens could be subject to the unlimited detention possible under the Act.

The United States has long served as a beacon of hope for those whom other governments have "disappeared." We would lose this moral authority and respect if we reserve for ourselves the right to hold individuals without recourse.

Lastly, Section 3 of the Act, which authorizes the military commissions, reflects a stunning disregard for *Hamdan*'s citation to CA3's requirement of a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." To begin with, in Section 3, § 948b(b), the Act rejects the applicability of the Uniform Code of Military Justice and related courts-martial procedure as a source for the application or construction of the commission provisions. The Administration has made no serious effort to show why accused terrorists require a wholly different judicial system. The UCMJ has long provided capable and fair trials for a wide variety of defendants and under a wide array of circumstances. Commissions created without respect for military tradition and American notions of due process would consider classified evidence never made available to the accused. They would permit the broad introduction of hearsay evidence, rejecting the fundamental right to confrontation. They would allow introduction of evidence obtained by coercive methods long forbidden by the Army Field Manual on Intelligence Interrogation. They would establish a review process that inappropriately narrows the right to appeal and compels appellate jurisdiction in the District of Columbia Circuit Court of Appeals. We believe that appeals from any military commissions should be heard by the Court of Appeals for the Armed Forces, a well respected Article I court of civilian judges versed in the conditions, customs and laws of armed conflict. The proposed labyrinthine system, with its cramped rights to appeal, disregards the judicial guarantees recognized as indispensable by civilized peoples. This system is sure to be regarded by observers around the world as a mockery of justice. Convictions secured by it would thereby be discredited. This approach ill serves our demand for justice, both for the benefit of the victims of the events of 9/11 and our nation as a whole.

Lawyers and lawmakers are the stewards of the legal system. The integrity of the American legal system is built on the consistency of application of fundamental

constitutional values. The Act, among its flaws, establishes a chutes and ladders system of justice that defies these values. This tampering with fundamental rights compels us to speak out. We oppose this Act, and respectfully ask that you oppose it as well.

Sincerely,

Barry Kamins

CC: Hon. John Warner, Chair, Armed Services Committee
Hon. Carl Levin, Ranking Member, Armed Services Committee
Senator Arlen Specter
Senator Charles Schumer
Senator Hillary Clinton
Senator Robert Menendez
Senator Frank Lautenberg
Senator Joseph Lieberman
Senator Christopher Dodd
Senator Pat Roberts
Senator John McCain
Senator Lindsey Graham