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September 27, 2006

Hon. Bill Frist
United States Senate Majority Leader
509 Hart Senate Office Building
Washington, DC 20510

Re: Military Commission Act of 2006

Dear Majority Leader Frist:

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.

The Association has now reviewed the amended version of this legislation introduced on September 22, 2006, following the compromise agreement between Senators Warner, McCain and Graham, on one side, and the Administration on the other. The compromise addresses two distinct aspects of the Administration's proposal: first, the operation of the military commissions which have been envisioned, and second, aspects of United States enforcement of its treaty obligations under the Geneva Conventions. We will address our concerns in this order, keeping in mind particularly the position of our members who may be called upon to serve as defense counsel, prosecutors and judges in the commissions process, and the interests of our members who presently or may in the future serve their nation in the uniformed services or in the intelligence services.

The compromise clarifies many of the most important failings of the prior draft by bringing the military commissions process far closer to the standards established by the Uniform Code on Military Justice and the Manual on Courts-Martial. The Association shares the view presented by the service judge advocates general that the existing court-martial system, which in many respects is exemplary, provides an appropriate process for trial of traditional battlefield detainees as well as the command and control structures of terrorist organizations engaged in combat with the United States, and that the commissions should closely follow that model. The changes produced here in that regard are therefore welcome.

However, the bill gives the military judge discretion to admit coerced testimony if, as will presumably be the case, the coercion occurred before the enactment of the Detainee Treatment Act on December 31, 2005. Hearsay can also be admitted into evidence unless the accused carries a burden (traditionally accorded to the party offering the evidence, i.e., the prosecution) to show that the hearsay is not probative or reliable. This shift of burden is inconsistent with historical practice and would probably taint the proceedings themselves, particularly if the accused is not given access to the facts underlying the evidence. Admission of evidence in this circumstance would discredit the proceedings, undermine the appearance of fairness, and might, if it was critical to a conviction, constitute a grave breach of Common Article 3. These provisions do not serve the interests of the United States in demonstrating the heinous nature of terrorist acts, if such can be established in the military commissions.

The enforcement provisions raise far more troubling issues. In particular, we are concerned by the definition of "cruel treatment" which does not correspond to the existing law interpreting and enforcing Common Article 3's notion of "cruel treatment." The definition incorporates a category of "serious physical pain or suffering," but defines that category in a way that does not encompass many types of serious physical suffering that can be and are commonly the result of "cruel treatment" prohibited by Common Article 3. The Common Article 3 offense of "cruel treatment" will remain prohibited, even if not specifically criminalized by this provision. There is really no basis to doubt that Common Article 3 prohibits techniques such as waterboarding, long-time standing,

and hypothermia or cold cell if indeed they are not precluded as outright torture. However, the language of the current draft would create a crime defined in terms different from the accepted Geneva meanings, thereby introducing ambiguity where none previously existed.

This ambiguity produces risks for United States personnel since it suggests that those who employ techniques such as waterboarding, long-time standing and hypothermia on Americans cannot be charged for war crimes. Moreover, Common Article 3 contains important protections for United States personnel who do not qualify for prisoner of war treatment under the Third Geneva Convention. This may include reconnaissance personnel, special forces operatives, private military contractors and intelligence service paramilitary professionals. Erosion of Common Article 3 standards thus directly imperils the safety of United States personnel in future conflicts. We strongly share the perspective of five former chairs of the Joint Chiefs of Staff in their appeal to Congress to avoid any erosion of these protections.

The draft also seeks to strike the ability of hundreds of detainees held as "enemy combatants" to seek review of their cases through petitions of habeas corpus. The Great Writ has long been viewed as one of the most fundamental rights under our legal system. It is an essential guarantor of justice in difficult cases, particularly in a conflict which the Administration suggests is of indefinite duration, possibly for generations. Holding individuals without according them any right to seek review of their status or conditions of detention raises fundamental questions of justice. This concern is compounded by the draft's provision that the Geneva Convention is unenforceable, thus leaving detainees with no recourse should they receive cruel and inhuman treatment.

On July 19, 2006, Michael Mernin, the chair of our Committee on Military Affairs and Justice, testified before the Senate Armed Services Committee concerning this legislative initiative. He appealed at that time for caution and proper deliberation in the legislative process and urged that a commission of military law experts be convened to advise Congress on the weighty issues presented. The current legislative project continues to show severe flaws which are likely to prove embarrassing to the United

States if it is enacted. We therefore strongly urge that the matter receive further careful consideration before it is acted upon and that the advice of prominent military justice and international humanitarian law experts be secured and followed in the bill's finalization.

Very truly yours,

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