

June 1, 2004

To the Honorable John Warner, Chairman of the United States Senate Committee on Armed Services, the Honorable Orrin Hatch, Chairman of the United States Senate Committee on the Judiciary, the Honorable Carl Levin, Ranking Member of the United States Senate Committee on Armed Services, and the Honorable Patrick Leahy, Ranking Member of the United States Senate Committee on the Judiciary

On behalf of our clients, David Hicks of Australia, Salem Ahmed Hamdan of Yemen, Ali Hamza Ahmed Sulayman al Bahlul of Yemen, and Ibrahim Ahmed Mahmoud al Qosi of Sudan, we respectfully request that the Senate Armed Service and Judiciary Committees, in conjunction with probes into alleged prisoner abuses in Iraq, Afghanistan and Guantanamo, consider whether military commissions, as currently proposed under the Presidential Military Order of November 13, 2001, and subsequent orders and instructions by the Department of Defense, constitute a violation of the Geneva Conventions, other applicable International Law, the Constitution of the United States, and the Uniform Code of Military Justice.

Without an inquiry by this Body as to the rules governing the commissions, it is likely that evidence obtained from prisoners abused while in U.S. custody will be introduced as evidence in these military commissions at Guantanamo Bay, and that neither defense counsel nor the members of the commission would ever be told about the circumstances under which such evidence was obtained.

The need for investigation by this Body has become more acute in light of recently released memoranda drafted by the Executive Branch regarding the applicability of international law to the conflict in Afghanistan and the potential for habeas jurisdiction over the Guantanamo detainees. We have attached copies of these memoranda, which have been made publicly available via the media.

The Department of Defense at the direction of the Secretary has sought to place our clients and hundreds of others outside the law of the United States, and, indeed the world by:

- 1) eviscerating the time-honored protections of judicial review by deliberately confining the above persons at Guantanamo Bay in an effort to evade the jurisdiction of the federal courts,
- 2) unilaterally deciding to disregard provisions of the Geneva Conventions and other applicable international laws, and laws of war, which have historically guided members of the United States Armed Forces in battle; and
- 3) proposing the unconstitutional prosecution of our clients, with what may be capital offenses, in violation of the Separation of Powers and Article 1 Section 8 of the Constitution, which gives this Body, and not the President, the power to “define and punish Piracies and Felonies committed on the high Seas, and offences against the

law of nations, . . . make Rules for the Government and Regulation of the land and naval Forces”

The Department of Defense’s confinement of our clients at Naval Station Guantanamo Bay can only be viewed as a deliberate attempt by the Department of Defense to avoid review of its procedures in federal courts. At the time the detainees were first brought to Guantanamo Bay there were no existing facilities for their detention, and the Naval Station did not offer a unique security environment. To the contrary, as this Body knows, significant logistical costs were associated with its use and development as a detention center that would not have been present had detainees been housed within the United States. The key advantage behind the choice of Guantanamo Bay was that it was potentially beyond the jurisdiction of the federal courts to review the legality of detentions and subsequent military commissions, as confirmed by the December 28, 2001, memorandum from the Office of Legal Counsel of the Department of Justice (“OLC”) to the General Counsel, Department of Defense.

In short, the Department of Defense has sought and attempted to build a legal black hole wherein it can conduct both physically and psychologically abusive interrogations and impose penal and potentially capital sanctions subject only to the will of the Executive and the Department of Defense and not the rule of law. Such a purpose is in no way in keeping with our country’s fundamental tenet, enshrined by our nation’s great Chief Justice John Marshall in 1803, that we are a “government of laws, and not of men.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). The United States Senate should carefully consider whether it is appropriate for the Congress to commit funds and members of the Armed Forces of the United States in support of such a purpose.

The Department of Defense and the Department of Justice have also sought to eradicate the laws that govern armed conflict. OLC in its detailed draft legal memorandum, dated January 9, 2002, concludes that Al Qaeda and the Taliban can be prosecuted under the laws of war, while unabashedly proclaiming that the Geneva Convention and other international laws do not or should not apply to Al Qaeda or the Taliban. Notwithstanding the dubious lack of logic inherent in such an argument, the sheer audacity of proclaiming the enemy subject to the rule of law, while relieving U.S. forces from like obligations under the laws of war is a course of action that this Body should reject.

In a subsequent memorandum to the President, the White House Counsel endorses OLC’s findings, despite the objections of the Legal Advisor to the Secretary of State. According to the White House Counsel, the war on terror is a “new kind of war” which “renders obsolete Geneva’s strict limitations on questioning of enemy prisoners.” He further opines that declaring the Geneva Convention inapplicable to Al Qaeda and the Taliban would provide a “solid defense” to prosecutions of U.S. citizens under the War Crimes Act, 18 U.S.C. § 2441. Advocating interrogation methods of the enemy that go beyond the “strict limitations” of the Geneva Convention, while immunizing our own citizens from potential war crimes charges is not in the best interests of our Armed Forces or the United States. The abuses of Abu Ghraib and other Iraqi detainees is a recent reminder of the importance of upholding the rule of law, even in our most desperate moments.

A chief argument the White House Counsel makes in his memorandum to the President is that, if the prisoners are given Geneva Convention protections, then American personnel one day might be prosecuted in American civilian courts, under domestic law, for violations of the laws of war. The White House Counsel goes on to advise the President that offenses for grave breaches of international law are defined vaguely and capable of abuse by a prosecutor. The White House Counsel states that these offenses are capable of abuse, even in a context when the full panoply of American civil law applies to guard against exactly that kind of prosecutorial abuse, including all of the protections given to defendants in the Bill of Rights, such as the *Miranda* rules and the like. But when it comes to foreigners, the Administration is content to set up a half-hearted system of military justice that flouts the most basic international and domestic standards of decency, and it does not worry about the vagueness of those very same war crimes offenses when used to bring charges at Guantanamo Bay. To the contrary, the General Counsel of the Department of Defense has adopted a list of offenses that is even more opaque for use at Guantanamo Bay, and coupled that list of offenses to a ramshackle list of procedural “protections” in faux-military trials. See Instruction No. 2, Crimes and Elements for Trials by Military Commission, available at <http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>. This is not the tradition of the United States military, it certainly is not the tradition of the United States civilian justice system, and it does not come close to complying with basic principles of treaties that the United States Senate has ratified.

These recently revealed memoranda highlight the unfairness of the military commission system as devised by the President and the Department of Defense. Commission rules allow the introduction of unsworn statements and summaries of such statements to be introduced at trial. There is no right to confront the witnesses, or even to confront the witnesses’ interrogators for that matter. Such a flawed system of justice is ripe for abuse and fails to conform to domestic and international standards for a fair trial.

Lawful criminal proceedings against persons held in the Administration’s Global War on Terrorism are one of the essential safeguards in ensuring that interrogations of such persons comply with both international laws and the laws of the United States. Our domestic and military courts have historically stood as a powerful disincentive to the unlawful interrogation and torture of persons suspected of criminal activity, as well as other witnesses, by barring the ultimate use of such evidence and thereby eliminating the practical utility of these practices.

Additionally the memoranda reveal that the White House Counsel proposed that prosecutions could be conducted under what he termed common international law instead of proceeding under the most universally recognized treaty in international law and the very same treaty that this Body recently incorporated into defining what the law of war actually means, namely, the Geneva Convention. See War Crimes Act of 1996 and Expanded War Crimes Act of 1997, now codified at 18 U.S.C. 2441 *et seq.* Such an approach unconstitutionally permits the Executive to define and punish violations of international law and permits the introduction of evidence in such proceedings that has

been obtained in violation of law. The Senate should consider whether it is appropriate to continue to fund military commissions that purport to try Offences that are nowhere defined by Congress (in violation of Section 8 of Article 1 of the Constitution) and within a tribunal whose rules do not forbid the introduction of evidence obtained through coercive and torturous practices (in violation of domestic and international law).

On behalf of our clients we implore your committee to consider not only the abuses connected to the detainees in Iraq, Afghanistan, and Guantanamo; but to consider the military commission system created for the express purpose of insulating military and civilian interrogators from criminal sanction and utilizing evidence obtained through unlawful methods for trial, including through the abuses present at various military detention facilities including Abu Ghraib. Declining to hold public hearings on the legality and appropriateness of military commissions could be perceived by the global community as de facto approval of Military Commissions. This will significantly undermine the deterrent value of military and domestic justice systems as a prophylactic against future abuses of detainees.

At the Committee's discretion the undersigned are available to provide evidence in support of this letter.

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