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Rubber stamping violations in the “war on terror”: Congress fails human rights

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By passing the Military Commissions Act, the United States Congress has, in effect, given its stamp of approval to human rights violations committed by the USA in the “war on terror”. This legislation leaves the USA squarely on the wrong side of international law, and has turned bad executive policy into bad domestic law.

On 27 September, the House of Representatives passed the Military Commissions Act by 253 votes to 168. On 28 September, the Senate passed the Act by 65 votes to 34. After any discrepancies between the Senate and House bills are reconciled, the legislation will go to President Bush for signing into law. If President Bush signs the bill, as expected, Amnesty International will campaign for repeal of the Act. The constitutionality of the legislation is also likely to be challenged in the courts.

In the “war on terror”, the US administration has resorted to secret detention, enforced disappearance, prolonged incommunicado detention, indefinite detention without charge, arbitrary detention, and torture or other cruel, inhuman or degrading treatment. Thousands of detainees remain in indefinite military detention in US custody in Iraq, Afghanistan and Guantánamo Bay. Congress has failed these detainees and their families. President Bush has defended the CIA’s use of secret detention and in the debates over the Military Commissions Act, members of Congress have done the same. Yet this is a policy in clear violation of international law.

Accountability among higher officials for human rights violations authorized or committed by US personnel in the “war on terror” has been absent, as has been reparation for such abuses. Investigations into alleged war crimes and human rights violations have lacked independence and have not gone up the chain of command. Not a single US agent has been charged with war crimes under the USA’s War Crimes Act or torture under the extraterritorial anti-torture statute, despite compelling evidence that such offences have occurred.

Meanwhile, the Military Commissions Act provides for trials of the “enemy” in front of military commissions using lower standards of evidence than apply to US personnel, and with the power to hand down death sentences. Whether charged for trial or not, those detained by the USA as “enemy combatants” will not be able to challenge the lawfulness or conditions of their detention in *habeas corpus* appeals. *Habeas corpus* is a fundamental safeguard against enforced disappearance, arbitrary detention and torture or other cruel, inhuman or degrading treatment.

The legislation will lead to violations of international law and standards. Among other things, the Military Commissions Act will:

- Strip the US courts of jurisdiction to hear or consider *habeas corpus* appeals challenging the lawfulness or conditions of detention of anyone held in US custody as

an “enemy combatant”. Judicial review of cases would be severely limited. The law would apply retroactively, and thus could result in more than 200 pending appeals filed on behalf of Guantánamo detainees being thrown out of court.

- Prohibit any person from invoking the Geneva Conventions or their protocols as a source of rights in any action in any US court.
- Permit the executive to convene military commissions to try “alien unlawful enemy combatants”, as determined by the executive under a dangerously broad definition, in trials that would provide foreign nationals so labeled with a lower standard of justice than US citizens accused of the same crimes. This would violate the prohibition on the discriminatory application of fair trial rights.
- Permit civilians captured far from any battlefield to be tried by military commission rather than civilian courts, contradicting international standards and case law.
- Establish military commissions whose impartiality, independence and competence would be in doubt, due to the overarching role that the executive, primarily the Secretary of Defense, would play in their procedures and in the appointments of military judges and military officers to sit on the commissions.
- Permit, in violation of international law, the use of evidence extracted under cruel, inhuman or degrading treatment or punishment, or as a result of “outrages upon personal dignity, particularly humiliating or degrading treatment”, as defined under international law.
- Permit the use of classified evidence against a defendant, without the defendant necessarily being able effectively to challenge the “sources, methods or activities” by which the government acquired the evidence. This is of particular concern in light of the high level of secrecy and resort to national security arguments employed by the administration in the “war on terror”, which have been widely criticized, including by the UN Committee against Torture and the Human Rights Committee. Amnesty International is concerned that the administration appears on occasion to have resorted to classification to prevent independent scrutiny of human rights violations.
- Give the military commissions the power to hand down death sentences, in contravention of international standards which only permit capital punishment after trials affording “all possible safeguards to ensure a fair trial”. The clemency authority would be the President. President Bush has led a pattern of official public commentary on the presumed guilt of the detainees, and has overseen a system that has systematically denied the rights of detainees.
- Limit the right of charged detainees to be represented by counsel of their choosing.
- Fail to provide any guarantee that trials will be conducted within a reasonable time.
- Permit the executive to determine who is an “enemy combatant” under any “competent tribunal” established by the executive, and endorse the Combatant Status Review Tribunal (CSRT), the wholly inadequate administrative procedure that has been employed in Guantánamo to review individual detentions.
- Narrow the scope of the War Crimes Act by not expressly criminalizing acts that constitute “outrages upon personal dignity, particularly humiliating and degrading treatment” banned under Article 3 common to the four Geneva Conventions. Amnesty International believes that the USA has routinely failed to respect the human dignity of detainees in the “war on terror”.

- Prohibit the US courts from using “foreign or international law” to inform their decisions in relation to the War Crimes Act. The President has the authority to “interpret the meaning and application of the Geneva Conventions”. Under President Bush, the USA has shown a selective disregard for the Geneva Conventions and the absolute prohibition of torture or other ill-treatment.
- Endorse the administration’s “war paradigm” – under which the USA has selectively applied the laws of war and rejected international human rights law. The legislation would backdate the “war on terror” to before the 11 September 2001 in order to be able to try individuals in front of military commissions for “war crimes” committed before that date.

There appears to be little doubt that President Bush will sign the bill. He had sent a version of it to Congress on 6 September at the same time that he had announced the transfer of 14 “high value” detainees from years in secret CIA custody to detention in Guantánamo. He said that these detainees could be tried if Congress authorized military commissions acceptable to the administration.

Amnesty International deeply regrets that Congress failed to resist this executive pressure and instead has given a green light for violations of the USA’s international obligations.

See also:

USA: *Military Commissions Act of 2006 – Turning bad policy into bad law*, 29 September 2006 <http://web.amnesty.org/library/Index/ENGAMR511542006>.

USA: *Justice at last or more of the same? Detentions and trials after Hamdan v. Rumsfeld*, 18 September 2006 <http://web.amnesty.org/library/Index/ENGAMR511462006>.

USA: *Rendition – torture – trial? The case of Guantánamo detainee Mohamedou Ould Slahi*, 20 September 2006, <http://web.amnesty.org/library/Index/ENGAMR511492006>

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