Q and A: Military Commissions Act of 2006

Introduction

On September 28, the U.S. Congress passed the Military Commissions Act of 2006 (MCA). Though its title refers to military commissions, the new legislation does much more than authorize and establish procedures for military tribunals of foreign terrorist suspects. As Congress's first comprehensive foray into detainee policy, it affects an array of important issues, including the role of U.S. courts in protecting the fundamental rights of detainees, the implementation of the Geneva Conventions under U.S. law, and the prosecution of abuses by U.S. officials.

The MCA is Congress and the Bush administration's response to the Supreme Court's landmark ruling in *Hamdan v. Rumsfeld* on June 29, 2006. In that decision, the court struck down the system of military commissions that President George W. Bush had authorized in November 2001, finding that the president lacked congressional authorization to establish the commissions. The court also found that the commissions' procedures violated basic fair trial standards required by the Geneva Conventions of 1949, which it said mandated the humane treatment of all persons held by the United States in the "conflict with al Qaeda."

The *Hamdan* decision also called into question the legality of the Bush administration's secret CIA detention program. *Hamdan* made clear that the abusive interrogation techniques used by the CIA violated the United States' obligations under international law and that CIA operatives could be held criminally liable for such abuses.

In response to *Hamdan*, the administration pressed Congress to pass legislation that would have sharply limited the legal protections afforded detainees who were mistreated, and created military commissions little different from their discredited predecessors. While the administration did not get everything it wanted, the new legislation endorses several deeply troubling proposals that the administration wanted, some of which violate international human rights protections. Of primary concern, the legislation bars detainees from filing suit via the writ of habeas corpus to challenge the legality of their detention or to raise claims of torture and other mistreatment. The legislation also includes an overly broad definition of

"combatant" that, if generally accepted, could subject civilians who provide virtually any kind of support to an armed group, including far from any battlefield, to military detention and trial. Human Rights Watch is also concerned that the military commissions established do not meet the fair trial provisions required by the Geneva Conventions and human rights law.

The MCA does not redefine – as the Bush administration had demanded – U.S. obligations under Common Article 3 of the Geneva Conventions, which mandates humane treatment of all detainees at all times during armed conflicts. While the law narrows the scope of prosecutable offenses under the War Crimes Act, it still criminalizes – at least for the future – the most abusive interrogation techniques that the administration is believed to have authorized and that the CIA is believed to have employed.

Because numerous provisions of the MCA run counter to the protection of human rights, Human Right Watch believes the legislation should be amended or repealed. At the same time, we urge that all U.S. officials responsible for implementing the MCA do so in conformity with U.S. obligations under international human rights and humanitarian law. In the following questions and answers, we describe what the law does, and why we are so concerned about it.

Military Commissions

1. What are military commissions, and what did Congress authorize in the MCA?

Military commissions are criminal courts run by the U.S. armed forces. Traditionally, military commissions have been used to dispense battlefield justice – to try captured combatants for violations of the laws of war. They have also been used to replace or substitute civilian courts during periods of martial law or temporary military rule over enemy territory. It has been a longstanding U.S. practice that military commissions function as closely as possible to courts-martial.

The Military Commissions Act of 2006 legislates a new system of military commissions – giving the government authorization to try certain non-citizens before a military tribunal.

2. How do the military commissions authorized by Congress differ from those that were struck down by the Supreme Court in Hamdan v. Rumsfeld?

The new commissions differ from the old commissions in two important respects: the new commissions' rules provide that defendants cannot be convicted based on evidence that they cannot see or rebut, and that defendants can appeal all convictions to a civilian appellate court. (Under the Detainee Treatment Act, passed in December 2005, defendants could only appeal convictions that resulted in a sentence of death or more than 10 years imprisonment.)

Nonetheless, the MCA contains some of the same troubling provisions included in the old commissions' rules. The relaxed rules on hearsay and evidence obtained through coercion mean that defendants could be convicted based on second-hand summaries of statements obtained through coercive interrogations – without any opportunity for the defendant to confront his accusers. In addition, beyond the procedures and rules of evidence that it explicitly mandates, the new legislation allows the secretary of defense to establish further rules and procedures at odds from their courts-martial equivalent if the Secretary of Defense considers reliance on courts-martial rules and procedures to be "impracticable."

The Bush administration will likely publish detailed rules for these new military commissions by the end of this year. The administration should take this opportunity to improve the fairness of the commissions – and thus to limit the degree to which they are subject to court challenge and public censure.

3. Who can be tried by a military commission?

Any non-U.S. citizen – even a green card holder who has lived in the United States for decades – who is determined to be an "unlawful enemy combatant" can be tried by a military commission. (See section on enemy combatant definition).

The Bush administration has indicated that it has no intention of trying the vast majority of detainees held at Guantanamo Bay. Indeed, it is expected that only a few dozen Guantanamo detainees will ever be charged before a military commission, leaving the majority of detainees at Guantanamo in prolonged detention without charge, stripped of their habeas rights, and without ever being confronted with the evidence against them.

4. What crimes can by tried by military commissions?

Under the MCA, military commissions can try individuals for traditional war crimes and an array of terrorism-related and other crimes that have been always handled by criminal courts. Human Rights Watch is concerned that terrorism-related prosecutions of non-citizens will be shifted from federal courts to military commissions, where lax rules and procedures could deprive defendants of basic due process and fair trial rights. The law also allows for the prosecution of offenses during armed conflict, such as conspiracy, that are not considered war crimes.

5. What penalties may military commissions impose?

Military commissions can impose the death penalty if the offense resulted in the death of another, or any period of imprisonment, including life imprisonment.

6. What commission rules in the MCA are of primary concern?

Definition of Unlawful Enemy Combatant: [See below]

Use of Evidence Obtained Through Cruel, Inhuman, or Degrading Treatment: While barring evidence obtained through torture, the rules permit the use of testimony obtained through abusive interrogation techniques that were used prior to the passage of the Detainee Treatment Act in December 2005 if they are found to be "reliable" – an oxymoron – and if their admission is found to be in "the interests of justice." Presumably, most judges will find such statements inherently unreliable, but the very fact that they could be admitted raises significant concerns.

Lax Rules on Hearsay: The rules allow for the use of all hearsay evidence so long as it is deemed "reliable" and "probative." But the burden is placed on the defendant to prove that the evidence is unreliable, a burden that it will be almost impossible for a defendant with limited discovery rights to meet. As a result, defendants could be convicted based on second- and third-hand summaries of key witness statements, without any chance to confront their accusers or challenge the accuracy of their statements in any meaningful way.

Limited Discovery Rights: The rules allow the prosecution to withhold classified sources and methods of interrogations from both the defendant and his counsel. As a result, it will be extremely difficult for defendants to establish that evidence was obtained through torture or other coercive interrogation methods. Unless military commission judges are extremely vigilant, the prohibition on evidence obtained through torture could be become virtually meaningless.

Right to Exculpatory Evidence: Although defendants have a general right to the disclosure of any exculpatory evidence (evidence tending to show that they are not responsible for the crime of which they are accused), they are not allowed to see any classified evidence, even if it is exculpatory. Rather, they will be shown an "adequate substitute." If the source of the exculpatory evidence is classified – and not revealed as part of the "adequate substitute" – the defendant could be denied access to important evidence that would establish his innocence.

Death Penalty: The rules allow the death penalty for any crime that resulted in the death of another. Human Rights Watch opposes the death penalty as an inherently cruel and inhuman form of punishment that violates basic human rights.

Definition of Unlawful Enemy Combatant

7. What is the definition of "combatant" under international law?

International humanitarian law (the laws of war) draws a distinction between "combatants," defined as members of armed forces, and civilians. Civilians who are actively participating in hostilities can be treated as combatants. Deeming someone to be a combatant has important consequences: under international humanitarian law, combatants may be lawfully attacked and killed, and are subject to capture.

8. What is the definition of "unlawful enemy combatant" under the MCA and how does it comport with international law?

The MCA expands the definition of "combatant" to include those who have "purposefully and materially" supported hostilities against the United States, even if they have not taken part in the hostilities themselves, and even if they are arrested far from the battlefield. This turns ordinary civilians – such as a mother giving food to her combatant son, an individual who sends money to a banned group, or a U.S. resident who commits a criminal act unrelated to armed conflict – into "combatants" who can be placed in military custody and hauled before a military commission.

An additional – and circular – provision specifies that anyone who has been determined to be an "unlawful enemy combatant" by a Combatant Status Review Tribunal (the military boards convened to allow detainees at Guantanamo Bay to contest their status as combatants, called CSRTs) or "another competent tribunal" established by the president or the defense secretary is presumed to be an enemy combatant for the purposes of military commissions. This provision does not include any substantive criteria to guide the deliberations of such tribunals. And, notably, the definition of enemy combatant that has been used by the CSRTs at Guantanamo is even broader than the definition contained in the legislation, encompassing even the unknowing financier of a charitable arm of a terrorist organization. In at least one known case, a CSRT labeled a detainee an enemy combatant for precisely that reason.[1]

These definitions have essentially been invented by the administration and Congress. They have no basis in international law and undermine one of the most fundamental pillars of the Geneva Conventions – the distinction between combatants, who engage in hostilities and are subject to attack, and non-combatants.

[1] Combatant Status Review Tribunal Transcript of Detainee ISN #229, U.S. Department of Defense, Set 4, Page 390, Released March 3, 2006, http://www.dod.mil/pubs/foi/detainees/csrt/.

9. Does the legislation authorize the indefinite detention of anyone who falls within its definition of "unlawful enemy combatant"?

The MCA does not explicitly address the question of detention. Yet in detaining persons as enemy combatants, the administration may point to the definition of unlawful enemy combatant under the MCA to try to justify who may be so detained.

Senators John McCain, John Warner, and Lindsay Graham – three of the primary authors of this legislation – have argued that this definition "simply establishes the jurisdiction of military commissions" and does not, in any way, authorize the arrest and indefinite detention of those who fall within this broad category.[2] The legislation itself specifies that the definition of "unlawful enemy combatant" applies to the section of the U.S. code establishing military commissions.

Court-Stripping Provisions

10. How does the MCA impact detainees' ability to raise claims in U.S. courts regarding their treatment or detention?

The MCA strips all non-citizens (including longtime legal residents of the United States) in U.S. custody – anywhere around the world – of the right to file a claim for habeas corpus to challenge the legality of their detention before an independent court or to seek relief from mistreatment, including torture. While detainees who are brought before CSRTs or military commissions will still have a right of appeal to civilian courts, any detainee who is not brought before a CSRT or military commission has no way of getting a court to hear his claims.

The law's prohibitions apply even after a detainee has been released. As a result, detainees who have been tortured or otherwise mistreated are forever prevented – even once released – from going to a U.S. court to air what has happened to them and to seek some sort of redress or compensation.

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[2] John Warner, John McCain, Lindsay Graham, "Looking Past the Tortured Distortions", *Wall Street Journal*, October 2, 2006.

11. How do the court-stripping provisions in the MCA change current law?

In December 2005, Congress passed the Detainee Treatment Act, which prevents Guantanamo Bay detainees from bringing any future habeas challenges to their detention, as well as any other claims challenging their conditions of confinement or treatment. The MCA extends these court-stripping prohibitions and makes them retroactive and applicable to non-citizens in U.S. custody anywhere in the world. Unless found to be unconstitutional, these provisions could result in courts summarily dismissing more than 200 pending habeas cases brought on behalf of the Guantanamo detainees and a handful of detainees in Afghanistan.

12. Do these court-stripping provisions violate international law?

Yes. International law requires that persons subjected to human rights violations have a right to an effective remedy. The United States has ratified – and is therefore obligated to comply with – the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture). These multinational treaties require that detainees have access to independent courts to challenge the legality of their detention and to raise and seek redress for torture and other abuse.[3]

13. How does the MCA limit the use of the Geneva Conventions in U.S. courts?

The law prohibits anyone from ever raising claims under the Geneva Conventions in lawsuits against the United States or U.S. personnel. If this law had been in place previously, Hamdan would have been prevented from bringing one of the most important claims in his case – that the commissions set up by President Bush violated the fair trial requirements of Common Article 3 of the Geneva Conventions.

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[3] International Covenant on Civil and Political Rights (ICCPR), adopted December 16, 1966, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976, art. 9, para. 4.; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture), adopted December 10, 1984, G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), entered into force June 26, 1987, art. 13, art. 14, para. 1.

Interrogation Policy, Geneva Conventions, and the War Crimes Act

14. How does the MCA change the War Crimes Act?

The War Crimes Act makes certain violations of the laws of war felonies if they were committed against or by a U.S. citizen. The act was intended to be used to prosecute enemies of the U.S. who abused U.S. troops. Enacted in 1996, it was amended a year later to ensure that it covered non-international as well as international armed conflicts. The sponsors wanted to be sure that warlords in Somalia or other actors in non-international armed conflicts could be held accountable for abuse of U.S. troops. To date, no one has ever been prosecuted under the War Crimes Act.

Among U.S. personnel, CIA operatives, civilian officials, and civilian contractors responsible for abuses are most vulnerable to prosecution under the War Crimes Act. Members of the armed forces responsible for abuses face prosecution in courts-martial under the Uniform Code of Military Justice.

As discussed below, the legislation narrows the scope of the War Crimes Act, decriminalizing certain acts that were previously considered criminal offenses.

15. Are the CIA's most abusive "enhanced" interrogation techniques still criminal under this legislation?

According to the primary Senate authors of the legislation, the CIA's most abusive "enhanced" interrogation techniques are still criminal under the MCA.

The MCA specifies nine offenses that it defines as "grave breaches" of Common Article 3 that can be prosecuted as war crimes. Besides torture, the list includes "cruel and inhuman treatment," defined as conduct that causes serious or physical mental pain or suffering. The legislation unfortunately defines serious physical pain or suffering as existing only where there is "extreme" pain or other extreme injuries: substantial risk of death, burn or serious physical disfigurement, or significant impairment of a body part, organ or mental faculty. The MCA improves upon previous U.S. law by specifying that the infliction of mental pain need not be prolonged to be unlawful, at least with regard to future conduct.

This definition of "cruel and inhuman treatment" responds to the administration's claim that some of the "enhanced" interrogation techniques allegedly approved in the past – techniques like extended sleep deprivation, exposure to extreme cold, and waterboarding (mock drowning) were not cruel and inhuman because they did not cause "prolonged" suffering. While the administration may argue that such techniques are still allowed, Senators John McCain and John Warner, two of the MCA's primary authors, have stated that the legislation is specifically designed to criminalize these and other abusive interrogation practices allegedly used by the United States.[4] Such methods violate the international law prohibitions against cruel and inhuman treatment, and may amount to torture.

16. Does the MCA immunize U.S. personnel (including CIA personnel) from prosecution for past abuses?

To a large extent, yes. As amended in 1997, the War Crimes Act criminalized all violations of Common Article 3 of the Geneva Conventions, as well as grave breaches of the Geneva Conventions. Anyone responsible for the cruel, humiliating or degrading treatment of detainees captured during a non-international armed conflict could be prosecuted under the law. The MCA revises this portion of the War Crimes Act, replacing the blanket criminalization of Common Article 3 violations with a list of "grave breaches" of Common Article 3, which are specified and defined in the legislation. While torture and cruel and inhuman treatment qualify as "grave breaches," degrading and humiliating treatment do not. The MCA also eliminates as a war crime the passing of sentences by a court that does not meet international fair trial standards.

The legislation also includes two separate definitions of cruel and inhuman treatment, one that applies to abuses that occurred prior *to* the passage of the MCA and another that applies to future conduct. Whereas any non-fleeting mental pain or suffering is defined as cruel and inhuman treatment if committed after the passage of the MCA, the pain must be "prolonged" to qualify as cruel and inhuman treatment

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[4] Senator Warner of Virginia speaking for the Military Commissions Act of 2006, on September 28, 2006, to the United States Senate, S. 3930, 109th Cong., 2nd sess,. Congressional Record pt. 10390.

6. Bob Schieffer, Face the Nation with Senator John McCain, CBS News, September 24, 2006.

prior to the passage of the act. This may immunize from prosecution those officials and interrogators who have authorized or carried out abusive interrogation techniques – such as waterboarding and extended sleep deprivation – that cause time-limited but severe mental anguish.

17. Does the legislation authorize torture or other abusive interrogation practices?

No. The legislation does not authorize the use of torture or abusive interrogation practices. However, it narrows the definition of prosecutable war crimes under the War Crimes Act and makes it much more difficult for detainees to obtain relief from such abuses in court.

The United States, including all U.S. officials, remains bound by international law and the international treaties it has ratified – including the Geneva Conventions, the International Covenant on Civil and Political Rights, and the Convention against Torture – not to engage in torture or practices that amount to cruel, inhuman, and degrading treatment. In addition, the Detainee Treatment Act of 2005, which prohibits the use of cruel, inhuman, or degrading treatment, remains binding on all U.S. personnel operating anywhere in the world. In fact, the legislation explicitly states that the list of "grave breaches" of Common Article 3 does not represent the "full scope of U.S. obligations under that Article."

18. The legislation gives the president the authority to interpret the "meaning and application" of the Geneva Conventions. What does this provision mean?

This provision is arguably just a restatement of the president's existing interpretative powers under the Constitution. As the head of the executive branch, the president is charged with implementing U.S. legal obligations, including U.S. treaty obligations. The legislation makes clear that the president's interpretation carries no more weight than any other executive branch regulation, and can be overturned by a court.

Of concern, however, this provision appears to endorse President Bush's view that he has the authority to interpret and redefine the terms of the Geneva Conventions.

The additional provisions that preclude any person from invoking the Geneva Conventions as a source of rights in an action against any U.S. official will make it difficult, if not impossible, for individuals to challenge presidential interpretations of the Conventions.

The legislation does require the president to publish these interpretations in the Federal Register. Assuming that the president takes this obligation seriously – and issues detailed interpretations – this will provide much-needed transparency regarding how the U.S. interprets and plans to implement its international treaty obligations.