By Joanne Mariner

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Too Unfair to be Used on Americans--or Anyone

In late October , President Obama signed the 2010 National Defense Authorization Act, which included a package of changes to the rules governing military commission proceedings. Called the Military Commissions Act of 2009, the new law replaces — and somewhat improves upon — the Bush-era military commissions legislation known as the Military Commissions Act of 2006.

In 2006, Obama was one of 34 senators -- 32 Democrats, one independent and one Republican -- who voted against the military commissions law. He called it a “flawed document” that betrayed American values.

In what ways does this new legislation, which will be remembered as the Obama system of military commissions, differ from the earlier version? And in what ways does it stick with the Bush-era model? Let’s start by looking at who can be brought before a military commission for trial.

Unlawful Enemy Combatant vs. Unprivileged Enemy Belligerent

The new law begins by tweaking the definition of individuals eligible for trial before military commissions -- most obviously by scrapping the phrase "unlawful enemy combatant," and replacing it with "unprivileged enemy belligerent." This is a cosmetic change, not a real improvement, which mirrors the administration's decision to drop the enemy combatant formula in habeas litigation at Guantanamo Bay.

In addition, the new definition sets out three separate grounds on which a person might be deemed an "unprivileged enemy belligerent," which vary somewhat from the grounds for eligibility included in the previous definition. The third ground, now separate from the previous two, is membership in Al Qaeda, whether or not the member has engaged in or supported hostilities against the US. (Under the previous definition, membership in "Al Qaeda, the Taliban, or associated forces" was relevant to the determination of whether a person had engaged in or supported hostilities, but was not itself a distinct ground for eligibility.)

Notably, the Taliban is no longer specifically named in the new definition. This suggests, perhaps, that the administration is acknowledging a meaningful difference between the Taliban and Al Qaeda, and wants to leave open, at least for the future, the possibility that the Taliban is not the enemy.

Purposeful and Material Support

What overshadows all of these differences is, however, a key similarity with the Bush-era definition. Just as, in the Guantanamo habeas litigation, the Obama administration has adopted the Bush-era position of claiming that persons who provide support to hostilities can be treated just like persons who engaged in hostilities, the new law's "unprivileged enemy belligerent" definition takes the same tack.

While in the Guantanamo litigation, the Obama administration has taken a slightly less aggressive approach to support than the Bush administration did (stating that the support has to be "substantial"), this new law uses the same language regarding support as the previous law did. The test, in both laws, is whether a person has "purposefully and materially supported hostilities against the United States." (This is the law's second ground for eligibility for trial before a military commission; the first ground is that the person actually engaged in hostilities against the U.S. or its allies.)

The claim that support alone is functionally equivalent to participation in hostilities has been rejected by several federal judges hearing the Guantanamo litigation, including Judge Bates, Judge Lamberth and Judge Kollar-Kotelly. As these judges have recognized, there is no basis in the laws of war for treating people who merely support hostilities as belligerents.

So in this sense, the law is clearly overbroad.

In another important way, however, the new law does limit the class of people subject to military commission trials: It entirely eliminates section 948a(1)(ii) of the prior definition. That provision had said that any person who had been deemed an unlawful enemy combatant by a Combatant Status Review Tribunal – the summary hearings held at Guantanamo – could be subject to trial before a military commission. Devoid of any substantive standard, the provision was an invitation to abuse.

The Overbroad "War on Terror" (or War on Al Qaeda, the Taliban and Associated Groups)

While the statutory language is important, the more important problem lies in how these definitions have been interpreted. The "war on terror," although the new administration now specifies that it is a war against Al Qaeda, the Taliban, and associated groups, has been consistently understood, by both administrations, to be far broader than any traditional armed conflict. People who have committed terrorist acts outside of any war zone, who were in the past prosecuted as criminals, are now labeled combatants or belligerents, and brought to trial in military proceedings.

Notably, the new legislation does not attempt to limit the scope of the commission's jurisdiction to traditional notions of armed conflict. Indeed, like the previous legislation, it seems to take an extremely broad view of the "hostilities" with Al Qaeda, suggesting that the armed conflict may have begun even before the September 11, 2001 attacks. In its section 948d, covering the commissions' jurisdiction, the law specifically states that it covers offenses committed "before, on or after September 11, 2001." (It's worth noting, moreover, that some detainees have been charged in military commissions with offenses dating back to 1996.)

Aliens and Children

The law is also overbroad in that it fails to exempt from its jurisdiction the class of children – or, more specifically, the class of those people who allegedly committed the relevant offenses when they were under the age of 18.

A concern for such cases is not hypothetical. The government has already brought two prosecutions before military commissions involving defendants who were children at the time of the alleged offense. Because international law requires that the trial of any person who was younger than 18 at the time of the crime be conducted in a manner that takes account of the person's age and of the desirability of promoting rehabilitation, the use of military commissions in such cases is inappropriate.

Finally, there is one area in which the new law's scope is not too broad, but rather too limited: It only covers aliens. Why is this a problem? By singling out only aliens to be subject to the jurisdiction of military commissions, the law arbitrarily discriminates on the basis of citizenship, violating U.S. international human rights obligations and contravening the Equal Protection Clause of the Constitution.

Equally important, barring U.S. citizens from being tried in commissions may have saved the law from critical public scrutiny. Were citizens – voters – to face possible trial before commissions, the law's flaws might have been subject to greater debate, and the democratic process might have worked.

But the fact that the commissions only cover aliens is telling. And if the truth is that the commissions are too unfair to be used on U.S. citizens, they're really too unfair to be used on anyone.

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