

October 22, 2009

Dear Senator:

As the Senate moves to conclude its action on the Fiscal Year 2010 Commerce-Justice-Science appropriations bill (H.R. 2847), I write on behalf of the American Bar Association to urge you to oppose the Graham Amendment (Amdt. No. 2669) that would prohibit the use of appropriated funds to prosecute Guantanamo detainees in Article III courts.

The Graham Amendment provides that no funds appropriated through H.R. 2847 may be used to “to commence or continue the prosecution in an Article III court of the United States of an individual suspected of planning, authorizing, organizing, committing, or aiding the attacks on the United States and its citizens that occurred on September 11, 2001.” As stated by Senator Graham in introducing his amendment, the purpose of the amendment is to ensure that the perpetrators of the September 11 attacks are prosecuted through the military commission system.

The proposed revisions to the military commission system in the conference version of the National Defense Authorization Act for Fiscal Year 2010 represent some improvements. Nonetheless, even if these revised procedures are enacted into law, we believe that military commission trials still will not provide the level of fairness that is consistent with our core legal values and essential to our nation’s credibility in the rest of the world.

In February 2009, the ABA adopted a resolution urging the United States government to ensure that:

All individuals [detained at Guantanamo Bay] who have been or are expected to be charged with violations of criminal law should be prosecuted in Article III federal courts, unless the Attorney General certifies, in cases involving recognized war crimes, that prosecution cannot take place before such courts and can be held in other regularly constituted courts in a manner that comports with fundamental notions of due process, traditional principles of the laws of war, the Geneva Conventions and the Uniform Code of Military Justice.

This policy was adopted shortly after the Supreme Court invalidated the habeas-stripping provisions of the Military Commissions Act of 2006 as an unconstitutional suspension of the writ of habeas corpus. The policy expresses the Association’s clear preference for criminal prosecution of detainees in Article III courts while recognizing that there may be

some cases requiring prosecution in another forum. Non-Article III forums should be used only as a last resort and only if they comport with due process and standards of international and military law; as constituted and even proposed to be improved by the 2010 Defense Authorization Act, military commissions fall short of these standards.

We urge you to vote against the Graham Amendment, and any similar amendment that would prohibit prosecution of Guantanamo detainees in Article III courts. If you have questions about the ABA position on this subject, please contact Thomas Susman at [susmant@staff.abanet.org](mailto:susmant@staff.abanet.org) or Kirra Jarratt at [jarratk@staff.abanet.org](mailto:jarratk@staff.abanet.org). Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Thomas M. Susman". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Thomas M. Susman  
Director, ABA Governmental Affairs Office