

December 7, 2005

Dear Conferee:

On behalf of the American Bar Association, I write in regard to several provisions included in the Senate version of the Fiscal Year 2006 Defense Authorization Act that impact the treatment of individuals detained by the government as a part of the “war on terror.” Our position on these issues is based on policies adopted by the ABA’s 550-member House of Delegates, after full debate and passed by a substantial majority vote.

The Senate bill, in Sections 1074-1075 (the “McCain Amendment”), would prohibit the cruel, inhuman or degrading treatment of individuals in U.S. custody and establish uniform standards for interrogations. We strongly support these provisions and urge conferees to ensure that they are included in the final conference report. We would also urge that no modifications be accepted that would weaken the measure, such as providing an exemption for the CIA or other civilian employees or contractors of the U.S. government.

America, and the world, watched with dismay as pictures surfaced of the abusive detention practices at Abu Ghraib, and other allegations of torture and inhumane treatment continue to be raised. Such practices undermine our nation’s moral credibility and place our servicemembers at risk of equivalent treatment by our enemies. Adopting the McCain Amendment, which provides for a consistent and transparent policy on the treatment of detainees, will help to restore our nation’s standing as a leader in promoting international human rights and the rule of law.

Unfortunately, a separate provision added to the Senate bill threatens to undermine these very principles. Section 1092(d) (the “Graham-Levin Amendment”) of the Senate-passed bill places new restrictions on the ability of detainees to challenge the legality of their detention in federal court. It does so by eliminating habeas corpus review for individuals detained at Guantanamo Bay. Both the substance of these provisions and the expedited process in which they were drafted and adopted raise serious concerns.

The writ of habeas corpus, which ensures protection against unjust government imprisonment, is one of the pillars of our constitutional system. It serves as an important check on the power of executive detention and embodies the fundamental principle that one should not be imprisoned by the government without opportunity for a fair and impartial determination that the detention is in accordance with the Constitution and laws of the United States. In 2004, the U.S. Supreme Court, in *Rasul v. Bush*, ruled that federal courts have jurisdiction to consider petitions for writs of habeas corpus from Guantanamo detainees under the federal habeas statute. If enacted, the Graham-Levin amendment would effectively reverse this decision.

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The Graham-Levin Amendment does provide for limited judicial review of combatant status determinations and for convictions by military commissions. While certainly an improvement over the original proposal, we believe this is not an adequate substitute for habeas review. As an example, under the Graham-Levin Amendment, an individual detained at Guantanamo who does not receive a status determination, but is detained nonetheless, would not be eligible for review. Conceivably, such detainees could be held in detention indefinitely with no opportunity to challenge the legality of their continued imprisonment.

There have been many other serious questions raised regarding the interpretation and impact of these provisions, particularly on pending habeas cases. The Graham-Levin Amendment was drafted shortly before its adoption, with no consideration by the committees of jurisdiction, and with little debate. Removing federal court jurisdiction over habeas cases and creating a new, exclusive mechanism for judicial review are serious and complex matters which deserve thoughtful examination and consideration by Congress. We therefore urge conferees to exclude the Graham-Levin habeas-stripping provision from the conference report and address these issues through the appropriate congressional process.

We are encouraged that Congress has begun to address issues related to individuals being detained as enemy combatants, but believe that any such actions must be firmly grounded in the basic principles of justice and with due consideration given to the standards we would desire be applied to U.S. citizens in the custody of other nations. We therefore urge you to retain the McCain Amendment and eliminate the Graham-Levin Amendment from the final version of the conference report.

Thank you for your consideration of these important issues.

Sincerely,

A handwritten signature in cursive script that reads "Michael S. Greco". The signature is written in dark ink and is positioned below the word "Sincerely,".

Michael S. Greco