May 22, 2012

The Honorable Carl Levin
Chair, Armed Services Committee
United States Senate
Washington, D.C. 20510

The Honorable John McCain
Ranking Member, Armed Services Committee
United States Senate
Washington, D.C. 20510

Dear Chairman Levin and Ranking Member McCain:

For nearly a century, the American Bar Association, representing nearly 400,000 members, has been an aggressive proponent of civil legal protections for the men and women of America’s military, helping service members stabilize the home front and focus on mission. I write today to warn you of the harm that Section 564 of HR 4310, concerning military child custody and which was the subject of a proposed Senate Armed Services Committee amendment last year, would have on military parents if enacted.

The ABA opposes Section 564 of HR 4310 because it would open the federal courthouse doors to military child custody cases, creating uncertainty and extraordinary expense for military members and their families. Language suggesting that the provisions create no new cause of action is ineffective. In fact, Section 564 would not prevent removal to federal court under 28 USC § 1442a, and it cannot prevent federal review of the enforcement of a right conferred under federal statute, let alone the constitutionally protected interests between parents and children. Each attempt to seek federal jurisdiction in a custody case would delay final resolution by months and potentially create a changing body of law affecting custody laws in every state. Parties to these emotionally charged cases can be counted on to exploit any potential loophole, practically ensuring high-conflict litigation in the courts with the least experience or services to handle such cases. We cannot risk undermining the security of military families in this way, especially where there appears little likelihood of the kind of harm proponents envision.

We also oppose this legislation’s unwarranted intrusion into matters best reserved to the states. More than 40 states have enacted legal protections for military child custody cases. The laws are diverse and robust, enacted to respond to specific challenges historically presented to and experienced by state courts. In July 2012, the Uniform Law Commission will release its comprehensive Deployed Parents Visitation and Custody Act, which will be circulated to all
states, including those that have already enacted similar legislation. The absence of an affirmative threat and broad state vigilance clearly undermines the call for federal intervention in an area of family law that has historically been reserved to the state judicial systems.

Today, the Servicemembers Civil Relief Act (SCRA) provides military parents protections in harmony with state laws and without federal litigation. The SCRA prevents any permanent change in parental rights until a reasonable time following an absent service member’s return. Only the best interests of a child would prevent a child’s return to the military parent, which is the same standard proposed by this legislation. Unlike the proposed legislation, however, the SCRA applies to all cases, including support and visitation rights, those involving custody over an incapacitated adult and the considerable number of cases where there is no original custody order in place. We can always do more to support and assist military families; the proposed legislation does not achieve this objective.

Other organizations that support strong legal protections for military service members, but that also oppose this legislation, include: the National Governors Association, the Adjutants General Association of the United States, the National Military Family Association, the Conference of Chief Justices and State Court Administrators, the American Academy of Matrimonial Lawyers, the National Council of Juvenile and Family Court Judges, the Uniform Law Commission, and many state bar associations.

We applaud the proponents for their respect for military personnel and their awareness of how difficult military custody cases can be. As a matter of policy, the American Bar Association supports state laws providing that military service alone—including deployment or the threat of deployment—may not be used to permanently deny custody to a military parent or to change parental custodial rights. These custody rights can best be assured by state laws enforced in state courts that are already equipped to provide the protections needed.

We stand ready to discuss this matter with you and your staff. Thank you for your consideration.

Sincerely,

Wm. T. (Bill) Robinson III

Cc: Members of the U.S. Senate Armed Services Committee