Dear Senator:

I am writing on behalf of the American Bar Association to urge you to support provisions in S. 1197, the National Defense Authorization Act for Fiscal Year 2014 (NDAA), as reported by the Senate Armed Services Committee, that would modify current law by permitting the transfer of Guantanamo Bay detainees to the United States for trial and clarifying the requirements for transfers to different countries. These transfer provisions are found in Sections 1031 and 1033 of Title X, Subtitle D of S. 1197. (Section 1032 contains additional provisions that would allow the transfer of detainees to a Department of Defense (DoD) facility for the sole purpose of emergency medical treatment; the ABA takes no position on these provisions.)

The on-going hunger strikes at Guantanamo Bay, our failure to transfer 84 detainees cleared for transfer over three years ago, and the continuing problems with, and the slow pace of, military commission trials provide mounting evidence that it is time to adopt a more flexible and commonsense approach with regard to detainee transfers.

While the ABA supports Section 1031, this letter will focus on Section 1033 and explain why our federal courts are well equipped to handle terrorism trials, no matter how complex, and why it is in our national interest to permit determinations regarding the best venue for prosecuting alleged terrorists detained at Guantanamo Bay to be made on a case-by-case basis.

**Restoring the Option of Prosecuting Guantanamo Detainees in Article III Courts**

Section 1033 would amend the blanket restriction in effect since 2010 that has foreclosed civilian court prosecutions of Guantanamo detainees by prohibiting the use of DoD funds to transfer detainees to the United States for any purpose. The new provision would authorize the Secretary of Defense to waive this prohibition for the limited purposes of detention and trial if the Secretary:

1. determines that such a transfer is in the national security interest of the United States;
2. determines that appropriate actions have been taken, or will be taken, to address any risk to public safety that could arise in connection with the detention and trial in the United States; and
3. notifies the appropriate committees of Congress not later than 30 days before the date of the proposed transfer.

The ABA supports this provision. By making it possible to try alleged terrorists currently held at Guantanamo Bay in Article III courts, Section 1033 would restore prosecutorial discretion to the
attorney general by enabling him, in consultation with the Secretary of Defense, to choose the forum for prosecution, based on the individual circumstances presented by each case.

To date, only seven of the 779 prisoners who have been held at Guantanamo Bay have been convicted by military commissions. Five of those convictions were the result of plea bargains. The convictions in the two cases that were tried to judgment before military commissions were vacated by the U.S. Court of Appeals for the D.C. Circuit (technically one has been reinstated pending further appeal) because they were based on charges of conspiracy to commit war crimes, material support for terrorism, and soliciting others to engage in terrorism, which were codified as war crimes by the 2006 Military Commissions Act years after the defendants allegedly committed them. None of these crimes are recognized as violating the international law of war.

The government was granted a rehearing en banc on September 30, 2013, in the case involving Al Bahlul, a videographer for Al Qaeda, and there is speculation that the court may decide to rule on the broader question whether a military commission has jurisdiction to try detainees accused of committing statutorily created war crimes not recognized by the law of war. If the court rules against the government and holds that the military commissions have no jurisdiction over these 2006-created crimes, this case would seriously undermine the viability of the Military Commission system, given the prevalence of these charges in military commission cases to date.

Of the 164 detainees currently housed at Guantanamo, six are facing Military Commission trials: Al Nashiri, who is accused of being the architect of the October 2000 suicide bombing of the USS Cole off Yemen, and Khalid Sheik Mohammed (KSM) and four alleged co-conspirators, accused of masterminding the September 11, 2001, attacks. Approximately three dozen additional detainees could face future prosecution.

Even though military commissions have now been in existence for 12 years, litigation over access to counsel and breaches of the attorney-client privilege, in addition to uncertainty over rules governing procedural matters, continue to mire down proceedings and contribute to delays in moving forward with these trials. For example, during a pretrial hearing in September, defense lawyers for KSM urged the military judge to put proceedings on hold because of concerns over the security of their computer network at Guantanamo Bay. And just last week, issues that arose more than two years ago over the interception and review of privileged communications between defense lawyers and their high-value Guantanamo clients were finally resolved by military commission order, enabling defense attorneys, after a two-year hiatus, to resume using Guantanamo’s mail system to confidentially communicate with their clients about case-related information.

By contrast, since the terrorist attacks of September 11, 2001, more than 400 individuals have been prosecuted and convicted of jihadist terrorism-related crimes in our federal courts. Many of these cases were prosecuted by the Bush administration’s Justice Department, and none of these prosecutions has resulted in harm to an innocent bystander. Since President Obama took office, many additional high profile terrorism cases have been prosecuted successfully in federal courts, including Najibullah Zari, the 2009 “New York subway bomber,” Richard Reid, the “shoe-bomber,” Umar Abdulmutallallah, the 2009 Christmas Day “underwear bomber,” and Faisal
Shahzad, the 2010 “Times Square bomber.” These prosecutions have resulted in convictions with life sentences and, according to numerous accounts, also have generated valuable intelligence about our enemies.

The federal prosecution of Ahmed Khalfan Ghailani deserves special mention because he is the only former Guantanamo detainee to be tried in civilian court. Captured in Pakistan and held in a secret overseas detention facility by the CIA for two years before being transferred to Guantanamo in 2006, Ghailani was tried in the District Court for the Southern District of New York four years later and convicted of conspiring to destroy government buildings and property for his role in Al Qaeda’s 1998 bombings of the U.S. embassies in Kenya and Tanzania. Serving a life sentence in the maximum security prison in Colorado, he recently was unsuccessful in his appeal to overturn his conviction on speedy trial grounds. Last month, the Court of Appeals for the Second Circuit affirmed his conviction, stating that the U.S. Constitution’s “Speedy Trial Clause protects defendants against prejudice caused by delays in their trials, not against the harms of interrogation of enemy combatants.”

This case is important to this discussion for two reasons: first, had Ghailani been tried in a military commission, his conviction on conspiracy grounds likely would now be in jeopardy; and second, the Second Circuit’s decision is responsive to concerns that Guantanamo detainees who are tried in federal court will be acquitted because of speedy trial violations.

Our Article III federal courts, praised around the world, have successfully handled the prosecution of hundreds of terrorists, many of whom were convicted of material support offenses. They are an established and respected tool in upholding the rule of law and bringing terrorists to justice.

The ABA recognizes that not all terrorism cases can or should be prosecuted in federal courts. We do, however, firmly believe that those responsible for our national security should retain the option of prosecuting in Article III courts if doing so is in the national security interest of the United States.

We urge you to support Sections 1031 and 1033 of S. 1197.

Sincerely,

James R. Silkenat