

Dear Senator:

We write to urge that the Senate adopt the amendment of Senator Bingaman removing the court-stripping provisions of the Graham Amendment to the Department of Defense authorization bill. As deans of American law schools, we believe that immunizing the executive branch from review of its treatment of persons held at the U.S. Naval Base at Guantánamo strikes at the heart of the idea of the rule of law and establishes a precedent we would not want other nations to emulate.

At the Guantánamo Naval Base, the Government has subjected foreign nationals believed to be linked to Al Qaeda to long-term detention and has established military commissions to try a small number of the detainees for war crimes. It is entirely clear that one of the Executive Branch's motivations for detaining noncitizens at Guantánamo was to put their treatment beyond the examination of American courts.

The Supreme Court rejected the Government's claim in *Rasul v. Bush* that federal habeas corpus review did not extend to Guantánamo. The extent of the rights protected by federal habeas law is now before the Federal Court of Appeals for the D.C. Circuit. Another challenge has been filed to the authority of the President, acting without congressional authorization, to convene military commissions at Guantánamo. Just last week the Supreme Court announced that it would review the case, *Hamdan v. Rumsfeld*.

The Graham Amendment would attempt to stop both of these cases from proceeding; and unwisely interrupt an ongoing judicial process in midcourse. If nothing else, congressional respect for the constitutional principle of separation of powers should counsel against such legislative interference in the ongoing work of the Supreme Court and its independent justices.

Unfortunately, the Graham Amendment would do much more. With a minor exception, the legislation would prohibit all challenges to detention practices, treatment of prisoners, adjudications of their guilt and their punishment.

To put this most pointedly, were the Graham Amendment to become law, American officials would be free to arrest a person deemed to be linked to Al Qaeda anywhere in the world, transfer him to Guantánamo, hold him indefinitely (provided that it has followed its procedures in deciding that the person is an "enemy combatant"), subject him to torture and cruel and inhuman punishment, try him before a military commission and sentence him to death *without any express authorization from Congress and without review of any kind by any independent federal court*. The American form of government was established precisely to prevent this kind of unreviewable exercise of power over the lives of individuals.

We do not object to the Graham Amendment's procedural requirements for determining whether or not a detainee is an enemy combatant and providing for limited

judicial review of such decisions. This kind of congressional involvement in and structuring of the detention of military prisoners is long overdue, and highlights the absence of congressional regulation of standards of detainee treatment and of the establishment of military commissions. Curiously, the Graham Amendment recognizes the need for judicial review of the determination of enemy combatant status, but then explicitly bars judicial review of far more momentous commission rulings regarding determinations of guilt and imposition of punishment.

We cannot imagine a more inappropriate moment to remove scrutiny of Executive Branch treatment of noncitizen detainees. We are all aware of serious and disturbing reports that our Government is running secret overseas prisons, authorizing extraordinary renditions, and condoning the torture and abuse of prisoners in Guantánamo, Iraq and Afghanistan. The Graham Amendment will simply reinforce the public perception that Congress approves Executive Branch decisions to act beyond the reach of law. As such, it undermines two core elements of the rule of law: congressionally sanctioned rules that limit and guide the exercise of Executive power and judicial review to ensure that those rules have in fact been honored.

Whenever dictatorships have passed laws stripping their courts of power to review executive detention or punishment of prisoners, our government has rightly challenged such acts as fundamentally lawless and undemocratic. The same standard should apply to our own government. We urge you to vote to remove the Graham Amendment from the pending legislation.

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