

14 November 2005

Dear Senator:

We are a group of law professors writing in opposition to the Amendment, introduced by Senator Lindsey Graham, to the Department of Defense Authorization Act (S.1042). This Amendment, as currently drafted, seeks to eliminate existing habeas corpus jurisdiction over petitions now pending as well as those to be filed by detainees at Guantánamo Bay. We write because we believe this course of action unwise and contrary to the most fundamental precepts of American constitutional traditions. Yet the Amendment was proposed and enacted in the course of days, without debate about its implications and without any hearings. We hope the Senate will revisit immediately this course of action.

Enactment of the Amendment in its current form does harm to the Constitution and the rule of law. Reasonable people may differ over the best way to administer the relationship between Guantánamo Bay and the federal courts. The Graham Amendment approach, however, is not appropriate for it seeks to terminate ongoing and future federal court litigation concerning the liberty and treatment of persons detained by the Executive during counter-terrorism operations.

Pursuant to the Military Order signed by President Bush on November 13, 2001, the Department of Defense has set up non-statutory military commissions and vested them with power to impose sentences on detainees of long imprisonment and even of death. Earlier this month, in *Hamdan v. Rumsfeld*, the Supreme Court agreed to review aspects of the legality of these military commissions. The Amendment apparently seeks to remove the Supreme Court's appellate jurisdiction to resolve the important legal questions raised by the *Hamdan* appeal – purporting to leave the issues within the exclusive control of the Executive.

Furthermore, the Amendment, as currently drafted, renders it impossible to implement in the federal courts the full scope of the rulings of the Supreme Court in two recent cases, *Hamdi v. Rumsfeld* and *Rasul v. Bush*. In *Hamdi v. Rumsfeld*, the Supreme Court held that the Due Process Clause applies to and provides standards to gauge the adequacy of the process by which individuals (in that case a U.S. citizen not detained at Guantánamo) are designated as “enemy combatants.” In *Rasul v. Bush*, the Supreme Court concluded that federal habeas jurisdiction included Guantánamo Bay.

The Graham Amendment is akin to, but broader than, what the Congress did in the wake of the Civil War when Congress enacted a law to terminate ongoing federal court review of substantial constitutional claims of unlawful executive detention. The issue there was the First Amendment rights of a newspaper editor protesting aspects of Reconstruction. But that 1867 law was quite unlike the Graham Amendment. The 1867 law limited only one avenue of judicial review, which ended in an appeal to the Supreme Court. The act, however, left open other means for the federal courts to adjudicate the serious constitutional claims raised during the Reconstruction period. Although the

Supreme Court upheld the March 1867 law in *Ex Parte McCardle*, shortly thereafter, the Court took up a habeas case and decided it via a different grant of jurisdiction.

In retrospect, the effort by Congress to cut off Supreme Court review has been criticized by many as a sad chapter of American constitutional history. It is no model for emulation. Moreover, the Graham Amendment would go further yet, seeking to eliminate habeas corpus review of the lawfulness of deprivations of liberty and processes by which persons stand to be convicted and punished for very serious crimes.

The Graham Amendment would dramatically erode our core constitutional commitment to separation of powers. The Amendment consigns the protection of fundamental human liberties to unilateral executive determination under which the Executive chooses the prisoners, chooses the charges, chooses the judges, chooses the punishment – and cuts off judicial review of its determinations. We should not forget the Framers’ insight, expressed so eloquently by James Madison in the 47th Federalist Paper, that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.”

The Framers’ concerns are borne out by recent events. The abuses documented at Guantánamo and the Abu Ghraib prison, and other U.S. facilities around the world, are reminders of what can happen when Madison’s advice is cast aside. Further, were the Amendment enacted, it would undermine the ability to enforce in federal court the pending McCain Amendment. That Amendment, approved by the Senate 90-9, makes it unlawful for any “individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location [to be] subject to cruel, inhuman, or degrading treatment or punishment.”

The Graham Amendment departs from our commitment to checks-and-balances. The Amendment’s passage occurred without hearings by committees such as the Senate Judiciary Committee and without time for sufficient public debate. No discussion has been had on the Amendment’s apparent effect that persons sentenced to long incarceration or to death would have no federal judicial review. The extraordinary sweep of the Graham Amendment, at a minimum, warrants the Congress’s full deliberative processes. Enactment of the Amendment as currently drafted does harm to the Constitution and to the rule of law.

We urge you to vote for an amendment of the kind described by Senator Jeff Bingaman of New Mexico on Thursday to eliminate the jurisdiction-stripping part of the Graham Amendment.

Yours,¹

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