



## PROTECT THE MCCAIN ANTI-TORTURE AMENDMENT.

## OPPOSE THE GRAHAM AMENDMENT THAT MAKES ANTI-TORTURE PROTECTIONS ALMOST IMPOSSIBLE TO ENFORCE.

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CAROLINE FREDRICKSON  
DIRECTOR

**RE:** Graham Court-Stripping Amendment to DOD Authorization Bill  
Would Make McCain Anti-Torture Amendment Nearly Impossible to  
Enforce and Jeopardizes the Rule of Law

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Dear Senator:

The draft revisions to the proposed Graham amendment on detainees do not remove its problems. The Graham amendment would continue to gut protections against torture and abuse at Guantanamo Bay and **make the McCain amendment nearly impossible to enforce.** The only change made in the Graham amendment since the amendment previously filed is that it allows a single court to review a status classification question that has nothing to do with any claims of torture or abuse. It will unconstitutionally remove the system of checks and balances for anyone claiming the federal government engaged in torture or abuse.

The American Civil Liberties Union strongly urges you to oppose an amendment, that could be offered today by Senator Graham, that would strip all courts--**including the United States Supreme Court--of jurisdiction to consider habeas corpus petitions or any other action challenging any aspect of the detention of foreign detainees held at Guantanamo Bay--** other than the limited question of whether a status review tribunal has followed its own rules in classifying detainees. The ACLU urges Senators to reject the Graham amendment because it would (i) eviscerate the protections of the McCain anti-torture amendment and other anti-torture laws, (ii) violate the Constitution by denying the Supreme Court and other federal courts their core function as the final authority on the constitutionality and legality of acts

of the federal government (other than for the single question of whether the government followed its own rules properly classified a detainee), and (iii) would terminate all other court litigation brought by officers in the military's Judge Advocate General Corps on behalf of detainees. We also urge you to reject any similar amendment that may be offered.

The Graham Amendment undermines the McCain anti-torture amendment, and other protections against torture, abuse, and due process violations

The Graham amendment would make the federal government's protections against torture, abuse, and denial of due process, including the protections in the McCain anti-torture amendment, almost impossible to enforce. Without access to the courts, persons detained in Guantanamo Bay will have no protection except by a military review board that is not accountable to the judicial system, and has no authority to stop torture or abuse or other violations of due process. The review board hears only questions of status and charges against detainees. The only question that a court could hear is whether the government followed its own procedures in classifying a person's combat status. As a result, the Graham amendment would achieve the Bush Administration's initial purpose of selecting Guantanamo Bay for imprisoning these foreign detainees: to put these persons in "a legal no-man's land."

The Supreme Court rejected the federal government's position that Guantanamo Bay is a legal no-man's land, outside the reach of American courts. Thus, the rule of law applies to Guantanamo Bay and the courts have the authority to review government actions to determine whether they are unconstitutional or otherwise illegal. The courts now ultimately have the authority to determine if the government is violating federal laws against torture, abuse, or denial of due process.

After the Senate's overwhelming and courageous 90-9 vote to affirm the rule of law by bolstering the prohibition against governmental torture and cruel, inhuman, and degrading treatment, which was repeated just last Friday, the Graham amendment would suspend the rule of law in Guantanamo Bay, except on one narrow question. There would be no judicial check on the government breaking the rules in Guantanamo Bay--as one of the architects of the government's torture policies reportedly said, Guantanamo will be "the legal equivalent of outer space."

Nothing is more emblematic of the rule of law than judicial review and the availability of habeas corpus in the courts--and nothing is a greater marker of the absence of the rule of law than the lack of judicial review of government action. The Graham amendment would place Guantanamo Bay outside the rule of law.

The Graham amendment deprives the U.S. Supreme Court of its core function as final authority on constitutionality and legality of government action

The Graham amendment would take the extraordinarily harmful--and likely unconstitutional--step of stripping even the U.S. Supreme Court of jurisdiction over almost all questions related to Guantanamo Bay, thereby denying the Supreme Court its historical role as the final authority on the constitutionality and legality of government actions. In fact, in response to a House debate last year on a court-stripping provision, New York University law professor Barry Friedman explained that only once in its entire history has the Congress passed legislation entirely removing Supreme Court review of federal government action. The Senate should not take this nearly unprecedented step of denying persons held in Guantanamo Bay protections mandated by the Constitution and federal law.

The courts have had few occasions to determine any permissible limits on court-stripping primarily because the Congress has historically exercised restraint in passing court-stripping legislation. Nonetheless, it is clear that no statute can deprive the Supreme Court of its essential functions. The explanation provided by James Madison in Federalist Paper No. 80 has been the guiding principle for both Congress in considering court-stripping legislation, and for the courts in considering court-stripping statutes. Federalist Paper No. 80 states that the core functions of the judiciary include ensuring the supremacy and uniformity of federal law, and that congressional action to undermine these functions would be impermissible.

The Graham amendment wholly violates the separation of powers principle explained in Federalist Paper No. 80. Under the Graham amendment, there would be no access to the federal courts for persons held at Guantanamo Bay. The amendment suspends the rule of law by removing the U.S. Supreme Court from exercising its core function as the final authority on the constitutionality and legality of nearly all federal actions at Guantanamo Bay. The Congress cannot deny the Supreme Court this core function.

The Graham amendment cuts the legs out from under Judge Advocate General Corps officers trying to restore the rule of law

The Graham amendment would terminate nearly all court litigation brought by officers in the military's Judge Advocate General Corps on behalf of detainees at Guantanamo Bay. Military officers in the Judge Advocate General Corps have been charged with the representation of detainees at Guantanamo Bay. These military attorneys are essential to restoring the rule of law to the detention system. However, the Graham amendment would cut the legs out from under the Judge Advocate General Corps by terminating nearly all litigation in federal courts brought on behalf of detainees.

Particularly in the same week that the U.S. Supreme Court decided to hear a case (brought by a detainee represented by a Judge Advocate General Corps military officer) challenging aspects of a detention, and at a time when the courts have cases in which they can reassert the rule of law at Guantanamo Bay, the Senate should not undermine the system of checks and balances. The Judge Advocate General Corps officers working to restore the rule of law should not have the courthouse doors slammed by an amendment that would give a government review board unchecked power.

The ACLU strongly urges you to reject the Graham amendment to the Defense Department authorization bill. Please do not hesitate to call us at 202-675-2308 if you have any questions.

Sincerely,



Caroline Fredrickson  
Director



Christopher E. Anders  
Legislative Counsel