

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK
CITY BAR

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November 17, 2005

Hon. Bill Frist
Majority Leader
509 Hart Senate Office Building
Washington, DC 20510

Dear Senator Frist:

We recognize and appreciate the effort being made by the Senate to establish Congress' role regarding the Administration's policy toward the Guantanamo detainees. We applaud the McCain amendment; however, we continue to have serious concerns regarding the Graham Amendment, notwithstanding the significant improvements made Tuesday, which provide for limited procedural challenges to Combat Status Review Panel and Military Commission decisions, and permit pending challenges to the Military Commissions to proceed.

In particular, the Amendment leaves a gaping hole precisely where the Administration's policies are most troublesome, and where the world is most carefully watching – the indefinite detention of persons whose status as an enemy combatant has not been adequately examined, and the treatment of those detainees.

Proponents of the Amendment argue that the United States has not given prisoners in prior conflicts access to the United States courts. This statement is not fully accurate, but even assuming its accuracy, there are good reasons why this conflict is different, and why the role of the courts is crucial.

1. The "war on terror", unlike other U.S. wars, has no conceivable end point. Terrorism has been with us throughout recorded history, and there is no reason to believe it will disappear in the foreseeable future. What is different is the intensity and visibility of the terrorists' efforts, and the potential weapons at their disposal, which has greatly heightened our fears. Therefore, there is every reason to believe that the detainees being held at Guantanamo could spend the rest of their lives as prisoners.
2. In other U.S. wars, there was a degree of certainty as to whom the enemy was, and we therefore had a reasonable degree of confidence that those captured on the

“battlefield” were indeed engaged in fighting us. In the “war on terror”, however, the President has found the “battlefield” to be without limit, and it is much harder to discern who is the enemy. Guantanamo detainees include persons captured in several countries in which U.S. troops are not engaged. Some detainees were delivered by groups whose motivations we cannot necessarily trust. Nevertheless, the Administration issued a blanket statement that all the detainees are enemy combatants, and the Combatant Status Review Panel procedures do not provide comfort that individualized determinations are being made. Indeed, serious doubt has been raised by military officers whether many of the detainees are indeed the enemy.

3. For the first time in U.S. history, our dedication to the humane treatment of war prisoners – which has been embedded in our law and custom – has been called into serious question. Supported by dubious legal reasoning, the Administration’s policies and procedures have led to many documented instances of torture and cruel, inhuman and degrading treatment of detainees. The Senate, by passing the McCain Amendment, has made a strong statement that these practices must end. However, that Amendment has no provision for its enforcement.

4. The Administration has declared that all Guantanamo detainees have no protection under the Geneva Conventions, and has argued that in any event the Conventions are not enforceable by individuals. Even the basic requirements of Common Article 3, universally understood to set the minimum standard for treatment of all persons captured in an armed conflict, are denied by the Administration.

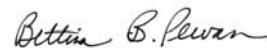
5. The Combatant Status Review Panels do not seek to meet the minimal requirements of the Conventions’ status determination proceedings. They proceed on the basis that neither Taliban nor Al Qaeda combatants can be prisoners of war. The panels can therefore determine only whether a detainee is an unlawful combatant or non-combatant and do not address whether a detainee is a prisoner of war under the Third Geneva Convention. However, even if the panels met the Conventions’ requirements, they would provide insufficient due process in the current situation, where detainees face indefinite and possibly lifetime detention far from any field of battle in circumstances where affording judicial habeas review is operationally feasible.

Without treaty protection or a guarantee of a hearing with adequate due process, and without any way of protesting instances of illegal treatment, Guantanamo detainees would be consigned, under the Graham Amendment, to a legal void of indefinite duration. Detainees who are actually charged with crimes and subject to the Military Commission process would be enmeshed in a system whose legality, constitutionality and wisdom are in serious doubt. Under the Amendment, those responsible for the detention and treatment of detainees could evade legal responsibility for mistreatment. The courts would lose their crucial role of reviewing the actions of their co-equal branches of government and holding accountable those who violate our laws and regulations.

We recognize that the Amendment calls for Congressional oversight, but that oversight cannot replace a court's ability to examine a particular claim or set of claims and to meet out justice in individual cases. Our courts have exercised this power with great care, and they have not been overburdened by the habeas caseload. Given the unique nature of the Guantanamo facility and the departures from 200 years of policy and practice, there is enormous value in maintaining the courts' role. We must do so not only to provide a check on the actions of government authorities, but also to show other nations that we live up to our international humanitarian obligations and to the high standards we ourselves set for our nation and its leaders.

Just yesterday, we learned that our government expressed outrage over the torture of prisoners by Iraqi captors in an Iraqi ministry building. To have moral force, our expressions of outrage must be buttressed at home by protections that only the writ of habeas corpus can provide.

Very truly yours,

A handwritten signature in cursive script that reads "Bettina B. Plevan".

Bettina B. Plevan