

**NEW YORK  
CITY BAR**

SAMUEL W. SEYMOUR  
PRESIDENT  
Phone: (212) 382-6700  
Fax: (212) 768-8116  
sseymour@nycbar.org

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The Honorable Carl Levin  
Chairman, Armed Services Committee  
Committee  
United States Senate  
269 Russell Office Building  
Washington, DC 20510

The Honorable John McCain  
Ranking Member, Armed Services  
United States Senate  
241 Russell Office Building  
Washington, DC 20510

Re: Proposed Section 1037 of the National Defense  
Authorization Act for Fiscal Year 2011

Dear Senator Levin and Senator McCain:

On behalf of the Association of the Bar of the City of New York (the "Association"),<sup>1</sup> I write to urge that you oppose Section 1037 of the National Defense Authorization Act for Fiscal Year 2011, which is currently set forth in H.R. 5136 and to be included in an as-yet unnumbered Senate bill.

The proposed provision would require the Inspector General of the Department of Defense to investigate lawyers representing Guantanamo detainees in habeas corpus proceedings or military commissions if there is a "reasonable suspicion" that they engaged in a series of vague and ill-defined practices. The provision not only serves no useful purpose, but seriously threatens to undermine the constitutional right to assistance of counsel, lawyers' ethical obligations, the rule of law and our nation's long and proud tradition of encouraging lawyers to represent those who cannot afford representation, no matter how unpopular those persons are.

Section 1037 would require the Inspector General of the Department of Defense to investigate lawyers representing Guantanamo detainees in habeas proceedings or in military commissions if there is a "reasonable suspicion" that they "interfered with operations at Guantanamo" relating to detainees; "violated any applicable policy of the Department of Defense," "violated any law within the exclusive jurisdiction of the Inspector General," or "generated any material risk to a member of the United States Armed Forces."

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<sup>1</sup> The Association is a professional association of over 23,000 attorneys. Founded in 1870, it has long been committed to studying, addressing, and promoting the rule of law and, when appropriate, law reform. Through its many standing committees, the Association educates the Bar and public about legal issues relating to the war on terrorism, the pursuit of suspected terrorists, and the treatment of detainees.

Section 1037 is entirely unnecessary. The apparent impetus for the law is the claim that certain lawyers representing clients before the military commissions improperly disclosed the identity of government interrogators who allegedly used coercive and unlawful interrogation techniques. But the Justice Department has already appointed U.S. Attorney Patrick Fitzgerald as Special Counsel to investigate those charges and he is doing so. Moreover, the federal government already has adequate powers to investigate unlawful or improper conduct by lawyers representing Guantanamo detainees and to take appropriate action where justified by the facts. It is unclear why Congress should mandate that this power be duplicated and expanded in the Office of the Inspector General.

The law encompasses actions far broader than improper conduct. Virtually all actions by lawyers seeking to advocate effectively for detainees can be said to “interfere” with operations at Guantanamo in that they might compel the Department of Defense to take some action other than operating the facility as it chooses. In addition, lawyers cannot possibly be expected to know every Department of Defense policy that may possibly be violated, or whether they are generating a material risk to a member of the armed forces, as many of these rules are kept undisclosed. Section 1037 would quite simply interfere with a lawyer’s ability to provide the representation that is not only necessary, but contemplated by the rules of the tribunals, both the federal courts and military commissions, where these proceedings are conducted.

Whether this is its intended effect, Section 1037 is virtually certain to discourage many members of the Bar from representing detainees or from carrying out their ethical obligation to represent their detainee clients zealously within the bounds of the law, for fear that doing so will unwittingly subject them to investigation for violating one of Section 1037’s vague standards. Section 1037 would be at severe tension with a lawyer’s ethical obligations to represent clients who cannot afford representation, no matter how unpopular, and to do so zealously. The proposed provision would also undermine a detainee’s right to effective assistance of counsel, a right that is guaranteed by the Military Commissions Act,<sup>2</sup> and a right that is necessary to give effect to the Supreme Court’s decision in *Boumediene v. Bush*,<sup>3</sup> which upheld a detainee’s right to petition for a writ of habeas corpus. Finally, it would also be inconsistent with our long-standing traditions encouraging pro bono representations, even when the client is unpopular or great personal sacrifice is required. In short, Section 1037 threatens to disrupt the adversary system of justice on which our legal system is founded.

The Association therefore urges you to oppose this unnecessary and harmful provision.

Very truly yours,

A handwritten signature in black ink, appearing to read 'S. Seymour', with a long horizontal line extending to the right.

Samuel W. Seymour

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<sup>2</sup> See 10 U.S.C. § 948k (2006) and 10 U.S.C. § 949a (2006, as amended 2009).

<sup>3</sup> 553 U.S. 723 (2008).