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November 14, 2005

Honorable Arlen Specter
United States Senate
711 Hart Senate Office Building
Washington, DC 20510

Honorable John Warner
United States Senate
225 Russell Senate Office Building
Washington, DC 20510

Dear Senators Specter and Warner:

I am writing in my capacity as President of the National Institute of Military Justice (NIMJ).

On a matter as important and complex as that addressed in Senator Graham's amendment to the Defense Authorization Bill, there should be hearings. When hearings are conducted, Senators may wish to consider the following:

1. There should be review in the United States District Court for the District of Columbia for decisions of the Combatant Status Review Tribunals (CSRTs) and Administrative Review Board (ARB)—

a. under the usual administrative law standards for judicial review of agency action: arbitrary or capricious, abuse of discretion, unsupported by substantial evidence on the whole record, or not otherwise in accordance with law;

b. forbidding the use of evidence obtained in violation of the Convention Against Torture; and

c. permitting actions to compel CSRTs and ARBs that are unreasonably delayed

2. Habeas corpus should be left intact so that detainees may litigate—

a. military commission matters;

b. conditions of detention/confinement; and

c. detention itself if they are not afforded a CSRT or ARB within prescribed time limits

3. There should be review by the United States Court of Appeals for the Armed Force (CAAF) for military commission cases, including government interlocutory appeals.

Explanatory Notes:

Point 1: Review of CSRTs and the ARB should lie in a trial court, both so as not to disturb the normal judicial review architecture (very few agencies are subject to direct review in the courts of appeals) but also to preserve some possibility for supplementation of the agency record, as is sometimes necessary for meaningful judicial review of agency action. There would then be no need either for recourse to CAAF or for direct review in the United States Court of Appeals for the District of Columbia Circuit. There is nothing to fear from district court review; it is already highly deferential.

Point 2: **The McCain Amendment is unenforceable without habeas**. As President Reagan observed in another context, "Trust, but verify." Habeas in military commission cases is in accordance with Attorney General (as he now is) Gonzales's 2001 op-ed in *The New York Times*. District judges can already dispose of

frivolous conditions-of-confinement claims summarily in *in forma pauperis* cases—and do so all the time. Points 1c and 2c are related. Permitting both kinds of actions will help avoid detainees falling into a "black hole."

Point 3: It makes little sense to address collateral review of military commissions (Point 2a) without doing something about direct appellate review. No provision for Art. 66, UCMJ, review by a service Court of Criminal Appeals (CCA) is included because (a) the military commission process is "purple" (multi-service), and (b) the Review Panel functions, in effect, as a CCA.

NIMJ hopes these suggestions are helpful to you as the Senate continues its consideration of this very important matter. I would be happy to meet with you or members of your staffs to discuss these ideas. Please feel free to share this letter with your colleagues.

Very respectfully,

Eugene R. Fidell

Eugene R. Fidell

cc: Honorable Lindsey Graham
Honorable John McCain
Honorable Chuck Hagel
Honorable Joseph I. Lieberman
Honorable Mary L. Landrieu
Honorable Jeff Bingaman
Honorable Carl Levin