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EXAMINING PROPOSALS TO LIMIT GUANTANAMO DETAINEES' ACCESS TO HABEAS CORPUS REVIEW

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MONDAY, SEPTEMBER 25, 2006

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC

The Committee met, pursuant to notice, at 10:04 a.m., in room 226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Cornyn and Leahy.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Senate Judiciary Committee will now proceed with our hearing on the issue of habeas corpus review on the pending legislation with respect to the detainees at Guantanamo.

I begin by thanking my colleagues and the staff for this unusual Monday morning hearing. The Senate customarily does not begin until afternoon, but with the pendency of legislation dealing with detainees, Senator Leahy and I thought that it was important that we move ahead to examine this issue in a hearing.

I thank Senator Leahy especially for rearranging his schedule to be here this morning, and I thank Senator Cornyn for being here, and the staff for being in session and on the job all during the weekend.

The Judiciary Committee has had a very heavy schedule with confirmations and with the Reporter's Privilege legislation, with the Eminent Domain, and with a number of other items, especially the Electronic Surveillance bill.

With the legislation now presented with the proposal to eliminate habeas corpus jurisdiction on the detainees' bill, it seemed to us especially important that we take a look at this issue.

The legislation which has been proposed by the Armed Services Committee, I think, is a considerable improvement. I think it is important to retain the principles of Geneva Common Article 3, not only to retain them, but to make sure that the world understands that we are retaining them and the appearance of retaining them.

I think it is useful to have the clarification on classified evidence which, as I understand it, will be pretty much on the line of a Confidential Information Protection Act, where the judge will review

the information and exclude material which would disclose sources, methods, or confidential information.

There is the risk that, with the exclusion of that evidence, the prosecution may not be able to proceed. But these detainees are not about to be released, even if they are on trial for war crimes. They would be detained, in any event.

The contours of the bill on those items and on the issue of coerced confessions and hearsay are not really clear, at least according to the newspaper accounts. A bill was filed on Friday, but it has been described as a placeholder, with the real text yet to be disclosed.

I think the difficulty in coming to grips with all of these issues makes it even more important that there be judicial review as to what is going on here, as to what the bill says, what it means, and how it is to be applied.

The Constitution, Article I, Section A, gives the Congress the express responsibility to deal with people captured on land or sea. Notwithstanding that, Congress has not acted, and had not acted since 9/11.

Senator Leahy introduced legislation, Senator Durbin and I introduced legislation, but it was too hot to handle and the Congress punted. It was only when the Supreme Court acted with three cases in June of 2005, and then with *Hamdan* last June, that there has been some action on the matter.

It is inexplicable to me how someone can seek to divest the Federal courts of jurisdiction on constitutional issues. It is just inexplicable to me. If the courts are not opened to decide constitutional issues, how is constitutionality going to be tested?

With habeas corpus, there is a special hurdle, a specific hurdle in the Constitution. Many do not know about it, but habeas corpus can be suspended only in time of rebellion or in time of invasion, and neither is present here.

I protested when we passed the detainee bill last year excluding habeas corpus, and we are going to try to shed some light on it so that our colleagues can make an intelligent decision when this important subject comes up.

I am going to yield back the last 4 seconds and call on my distinguished colleague, Senator Leahy.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. I will probably use it. I commend the Chairman for holding this hearing on the provisions in the proposed Military Commissions bill that would eliminate for detainees the Writ of Habeas Corpus, a cornerstone of our legal and constitutional system.

I wish we could have had the hearing at a time when more Senators could be here and there had been more time to prepare for it, because the issue carries serious consequences.

I also hope that we do not have a hearing that becomes, in Shakespeare's words, "sound and fury, signifying nothing." We had a great deal of effort on the torture legislation, and we know that once it passed the White House ignored it in a signing statement.

The same thing happened with the latest reiteration of the PATRIOT Act, after a great deal of effort made my Republicans and Democrats to work out some of the most complex parts. When the bill passed, the White House made it very clear that they were not going to follow the law anyway.

For weeks now, politicians and media have breathlessly debated the fine points and political implications of this whole compromise on proposed trial procedures for suspected terrorists—a compromise, incidentally, nobody has yet seen—and in doing so we have ignored a central, more sweeping issue.

Important as rules for military commissions are, they are only going to apply to a few cases. The administration, with this effort in the war on terror, has charged a total of 10 people in the nearly 5 years since the President declared his intention to use military commissions. He now says, with all the pressure going on, they may charge another 14.

But of course, that leaves almost 500 prisoners at Guantanamo. As Donald Rumsfeld said 3 years ago, the administration has no interest in trying them.

Today we are addressing the single most consequential provision in this much-discussed bill, a provision that can be found buried on page 81 of the proposed bill. This provision would perpetuate the indefinite detention of hundreds of individuals against whom the government has brought no charges and presented no evidence, without any recourse to justice whatsoever. This is un-American. This is un-American.

[Applause].

Chairman SPECTER. There will be no demonstrations from the people in the room. We want you to be here, we want you to listen, but that is out of order. Excuse me, Senator Leahy.

Senator LEAHY. No. I understand.

It is contrary to American interests. As many in the military said, this hurts our interests abroad.

Going forward, the bill departs even more radically from our most fundamental values. It would permit the President to detain indefinitely, even for life, any alien, whether in the United States or abroad, whether a foreign resident or lawful permanent resident, without any meaningful opportunity for the alien to challenge his detention. The administration would not even have to assert, much less prove, that the alien was an enemy combatant. It would suffice that the alien was "awaiting determination" on that issue.

In other words, the bill would tell the millions of legal immigrants living in America, participating in American families, working for American businesses and paying American taxes, that our government may at any minute pick them up, detain them indefinitely without charge and without any access to the courts, or even to military tribunals unless and until the government determines that they are not enemy combatants.

Detained indefinitely and unaccountably until proven innocent, not until proven guilty. Like the Canadian citizen Maher Arar. As the Canadian Government recently concluded, there is no evidence that Mr. Arar ever committed a crime or posed a threat to U.S. or Canadian security.

But what happened? He is a Canadian citizen. While returning home to Canada from a family vacation, he had to change planes in New York. He was detained, interrogated, and then shipped off to be tortured in a torture cell in Syria by the Bush-Cheney administration.

While the Canadian Government has now documented that the wrong thing was done to the wrong man, the Bush-Cheney administration, as usual, evaded all accountability by hiding behind the purported State Secrets Privilege.

The administration's defenders would like to believe the case is an isolated blunder, but it is not. Numerous press accounts have quoted administration officials who believe a significant percentage of those detained at Guantanamo have no connection to terrorism. They were just people picked up by mistake and then held because we never admit mistakes these days.

The most important part of habeas corpus is to correct mistakes like that. It is precisely to prevent such abuses that the Constitution prohibits the suspension of the Writ of Habeas Corpus unless, as the Chairman pointed out, in the case of rebellion or invasion, the public safety may require it.

I have no doubt this bill, which would permanently eliminate the Writ of Habeas Corpus for all aliens within and outside the United States whenever the government says they might—not that they are, but they might—be enemy combatants, violates that prohibition.

I have no doubt the Supreme Court, even with seven out of nine members Republicans, would ultimately conclude this attempt by the Bush-Cheney administration to abolish basic liberties and evade essential judicial review and accountability is unconstitutional.

It would be utterly irresponsible for Congress to neglect our oath to the Constitution and the American people and pass such unconstitutional legislation in the hope that maybe the court, once the congressional elections are over this year, would rescue us from our folly. That would just undermine the war on terror. It would not make us safer. In the long run, it would make us less safe.

We should put these military detentions on a solid legal footing and establish military tribunals. We tried to do that 4 years ago. I introduced a bill in 2002 to do that. So did Senator Specter.

But the Bush-Cheney administration, the Republican leadership ignored us, choosing instead to roll the dice and hope it could prevail on a radical go-it-alone theory of Presidential power.

They got a rude awakening this year in the *Hamdan* case. The court affirmed what we had told them all along. When the terrorists brought down the Twin Towers on 9/11, they did not bring down the rule of law on which our system of government is founded. They did not supplant our form of government with one in which an unaccountable Executive can imprison people without trial for years.

But you know what? On the way to losing that case, we wasted 4 years. We actually did more than waste 4 years. Just yesterday, the press reported what the administration has been misrepresenting to the American people.

It was apparently confirmed in the national intelligence estimate. The invasion and continuing U.S. military presence in Iraq has created a new generation of anti-American terrorists, and the threat to America has grown.

Meanwhile, having failed to try a single detainee, and having failed to secure a conviction of a single terrorist offense, the administration has demanded that we pass a bill it drafted last week before the end of this week. Ignore it for four or 5 years, then suddenly, oh, my God, you have got to get it done in a week.

Well, if the administration and the Republican leadership of the Senate believe that suspending the Writ is constitutionally justified, they should grant the joint request that Chairman Specter and I made last week for sequential referral of this bill.

Constitutional issues involving the Writ of Habeas Corpus are at the center of this committee's jurisdiction. We can, and we should, review this legislation thoroughly.

If a few habeas petitions are filed in the meantime, we are not going to lose the war on terror because of those filings. But if this Congress votes to suspend the Writ of Habeas Corpus first and ask questions later, then liberty and accountability will be the victims.

Mr. Chairman, I took longer. I appreciate the courtesy. I will put my full statement in the record.

Chairman SPECTER. Without objection, your full statement will be made a part of the record.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Senator Cornyn, would you care to make an opening statement?

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. A brief one. Thank you, Mr. Chairman.

Mr. Chairman, I think in 2005, when Congress passed the Detainee Treatment Act, we believed—at least I believed—that we had provided an alternative source of judicial review rather than the Writ of Habeas Corpus.

In addition to the CSRTs, the Combat Status Review Tribunals, that were implemented on July 30, 2004, the Administrative Review Boards that are provided on an annual basis and which were first implemented on September 15, 2004, along with the direct appeal after a trial on the merits by a military tribunal that the unlawful combatants detained at Guantanamo Bay were getting all the process that they were due.

It is important to remember, and sometimes I think some forget, these are enemies of the United States, captured on the battlefield. These are not individuals who have been arrested for committing crimes and then who are entitled to all of the process an American citizen would in an Article III court. These are enemies of the United States on the battlefield.

I would like to quote a statement by Mr. Michael Ratner, published March 21, 2005 in Mother Jones. He is with the Center for Constitutional Rights. He is involved in some of this litigation.

Mr. Ratner says about the litigation that has ensued at Guantanamo Bay, he says, "The litigation is brutal for them. It is huge.

We have over 100 lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder to do what they are doing."

No one has suggested previously, to my knowledge, that an alien enemy combatant to the United States is entitled to rights under the U.S. Constitution similar to those accorded to a defendant in a criminal lawsuit.

If in fact they are, then I would like to hear from the witnesses why it is that they would say that if they are constitutionally entitled to the Writ of Habeas Corpus, why these unlawful combatants who have killed, in many cases, our own troops or innocent civilians, are entitled to the Fifth Amendment right against self-incrimination, if they are, or if they are not, why they would make the distinction that they are entitled to the constitutional provision allowing Writ of Habeas Corpus or prohibiting the suspension, but they would not be entitled to the Fifth Amendment right against self-incrimination.

Or the Fourth Amendment right against unreasonable searches and seizures. Are we going to apply that to unlawful combatants of the United States?

Or the Eight Amendment prohibition against cruel and unusual punishment. Are we somehow now going to allow 1983 lawsuits for civil damages for deprivation of constitutional rights and give those to unlawful combatants against the United States, people who obviously have no respect for the laws of war and who target civilians in the process?

I support what we tried to do in the Detainee Treatment Act by applying the alternate remedies available to the CSRT, the Administrative Review Boards, and direct appeals following a trial on the merits.

I support those provisions and I believe they should be applied to all pending applications for Writ of Habeas Corpus. That was, I believe, Congress's intent. We were not successful in convincing the Supreme Court the first time, but it is certainly within our power and I intend to support making that provision more explicit so we avoid what Mr. Ratner has described as mass confusion, by confusing the rights of unlawful combatants with those of ordinary American citizens accused of a crime.

Thank you.

Chairman SPECTER. Thank you very much, Senator Cornyn.

Senator LEAHY. Mr. Chairman, I would also, if I might, ask that the full statement of Senator Kennedy be included in the record at an appropriate spot.

Chairman SPECTER. Without objection, it will be made a part of the record.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Senator LEAHY. And in the Washington Times today there was a column by Nat Hentoff entitled, "A Government of Law," and I would ask that that be included in the record in the appropriate spot.

Chairman SPECTER. Without objection, it will be made a part of the record.

We turn now to our first witness, Rear Admiral John Hutson, retired, U.S. Navy, attorney and former Judge Advocate General of the Navy. He is currently Dean and President of the Franklin Pierce Law Center in Concord, New Hampshire. He has a Bachelor's degree from Michigan State, a law degree from Minnesota, and a Master's in law from Georgetown.

Thank you very much for coming in on short notice, Admiral Hutson. We look forward to your testimony. I will note, there is a 5-minute customary limitation. So to the extent that you can observer it, we would appreciate it.

Admiral Hutson. I will, indeed.

STATEMENT OF REAR ADMIRAL JOHN D. HUTSON, RETIRED, PRESIDENT AND DEAN, FRANKLIN PIERCE LAW CENTER, CONCORD, NEW HAMPSHIRE

Admiral HUTSON. Thank you very much, Mr. Chairman. I have a written statement that I would request be made part of the record.

Chairman SPECTER. Without objection, it will be made a part of the record, as will all the written statements.

Admiral HUTSON. Thank you.

[The prepared statement of Admiral Hutson appears as a submission for the record.]

Admiral HUTSON. And I will endeavor not to engage in any sound or fury.

I think that the United States is at an historic crossroads right now where we can take the path of standing by our principles or take another path. Habeas corpus goes to the very heart of who we are as a Nation and to the balance of powers between the great branches of government.

It alone breathes life into all the other rights. It does not give comfort to the guilty the way the Fourth Amendment sometimes does with regard to searches, or the way the Fifth Amendment may with regard to confessions.

Habeas corpus is unique in that it only protects the innocent. If people are enemies of the United States, captured on the battlefield after having killed military personnel and civilians, they will find no comfort in habeas corpus.

I would add, perhaps parenthetically, Mr. Chairman, that this is very complicated and very important legislation, tied together with Common Article 3 and your comments with regard to military commissions.

I would urge the Senate to consider that piece of legislation independently and not wrapped together with other pieces of legislation. It needs to be considered and voted on on its own.

Although I agree completely with your assessment, Mr. Chairman, with regard to the constitutionality, for me the question goes above and beyond questions of constitutionality to questions of wisdom.

Is this wise? Is this the right thing for the United States to do? I believe that the United States is too strong, is too great a country to do this out of fear of 450 people that are detained behind barbed wire in Guantanamo.

This is not an action that we should take unless we absolutely have to take this action. We have only done it four times in our history. Since we do not have to do it, we should not do it.

I would point out to you, sir, that we had the opportunity in the wake of 9/11, in the first PATRIOT Act that was sent over by the White House in the weeks following, to suspend habeas corpus and this body declined to do that at this time. Now more than five years later is not the time to do that.

We have created a mess in Guantanamo. Suspending habeas corpus is not the way to clear up the mess or to cover it up. We debated Common Article 3 military commissions to a fare thee well, and they are important issues. They deal with how we treat detainees once we have captured them.

Habeas corpus deals with the more fundamental question of whether they should be detained at all in the first place. Recall, too, that it is our troops who are more forward deployed than all other troops in all other countries.

This is not the last war we are going to fight. It is not the next-to-last war this great country will fight. Plato said that "only the dead have seen their last war". We need to keep our powder dry. We need to set a standard that we can require demand, cajole, jawbone other countries to try to meet.

I am not so naive to believe that Al Qaeda is going to afford habeas corpus or the equivalent of habeas corpus to our troops, but that is not the test. The test cannot be "what would Al Qaeda do?" The test has to be, "what is the right thing to do?"

We are engaged in an asymmetric war right now. In an asymmetric war, the important thing to do is to try to match your strengthen against the enemy's weakness. The strength of the United States is not our military might, it is not our economy or our natural resources. The strength of the United States is who we are. It is what we stand for. It is the regard in which we are held by other countries.

The enemy's only weapon is terror. That is all they have. They know that they cannot beat us militarily. They just want to upset us, to bring us down to their level. We cannot let them do that. We have to resist that temptation at all costs, in every way. That is the crossroads that I mentioned initially.

We have an opportunity to resist that temptation, the temptation to be less than we are. I do not say this glibly or to be cute, but I believe that this body has the opportunity to achieve a military victory, to protect our troops in the future, to protect this country. Military doctrine says you have to keep the high ground. This is an opportunity for the United States to maintain the high ground.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Admiral Hutson.

Our next witness is Thomas Sullivan. He served in the Army during the Korean War in Tagdow, Korea. He is a graduate of Loyola University School of Law, and served as U.S. Attorney for the Northern District of Illinois from 1977 to 1981. He has been very heavily engaged in representation of detainees in Guantanamo.

Mr. Sullivan, with others from his law firm, came to see me last Wednesday and provided quite a volume of information, transcripts, and summaries of proceedings in Guantanamo, which dem-

onstrated that detainees were being held there for absolutely no reason.

Thank you for your public service work, Mr. Sullivan. We look forward to your testimony.

STATEMENT OF THOMAS P. SULLIVAN, PARTNER, JENNER & BLOCK, CHICAGO, ILLINOIS

Mr. SULLIVAN. Thank you very much, Senator.

My partners and I represent 10 of the Saudi Arabian prisoners at Guantanamo who have been held there from four and a half to 5 years; 3 of them have been sent back to Saudi Arabia without explanation or apology. None of them received fair hearings.

Senator Cornyn, I would like to address a few remarks you made. You said these are enemies of the United States captured on the battlefield. None of the 10 we represent were captured on the battlefield or are enemies of the United States.

You said no one suggested that the enemy combatants were entitled to habeas corpus. The Supreme Court of the United States, in the *Rasul* case 2 years ago, held specifically that they were entitled to habeas corpus to challenge the reason for their detention.

You said they have an review following a trial on the merits. None of them got a trial on the merits. You read my material that compares the rights of the CSRTs against the proposed military commissions and tell me whether that comports with your ideas as a former Justice of the Supreme Court of Texas for due process of law.

The question is whether they are enemy combatants. When they started out in these hearings, these CSRTs, they were presumed guilty. There had already been a finding they were enemy combatants. The determination had been made.

No witness or evidence was presented by the government. They would call in and they would say, all right, Mr. Cornyn, here is the charge against you. What have you got to say about it? That was it. That was all that they did.

Then they put in some classified evidence. I have been down to the secure facility. It is a joke. It is a sham. I read the classified evidence. I am not free to disclose it, but I can tell you, it is a sham.

There was no lawyer given to the defendants. They did not speak English, most of them. There were young men who had no training in law. There were no rules of evidence applicable. I put all this in my material. You can read it.

I cite the exact provisions of the statute and the CSRT rules. No cross examination was permitted or was allowed. There was not any objection to physical evidence, because there was not any produced. Now, do you call that due process, your Honor? Do you? The judges acted as the prosecutors and the judges. Classified evidence was not disclosed to them.

There could have been evidence from torture. I do not think any of the 10 we represent were tortured, but there was no prohibition against evidence obtained by torture. There was no practical ability to call witnesses or to subpoena physical evidence.

What you have referred to as a review by the Court of Appeals for the District of Columbia is so limited—I mean, you were a Su-

preme Court judge. You know what review is. It says they can review whether the CSRT determination was consistent with the standards and procedures specified by the Secretary of Defense for CSRTs. That is all.

Did they follow their own rules? Well, their own rules do not comport with our concepts of due process or, I would venture to say, with your concepts of due process.

I ask you, please, sir, if you do not do anything else, would you read the material that is on pages 3 through 7 of my submission? That is all I ask. If, at the end of reading that, you think that that comports with your notions of due process, then God bless you, go ahead and vote for this bill. But I doubt you will reach that conclusion.

On of my clients, Mr. al Siba'i, whose material I have submitted—and I have given four examples of CSRT hearings, you can read them—was a policeman in Riyad since getting out of high school.

He helped our forces when they invaded on the Kuwait invasion. He had four children at home. He did not see his daughter from the time she was one to the time she was five and a half years old. I do not know if you have daughters; I do. I think that is cruel and unusual.

He was kept in the Guantanamo Bay prison for four and one-half years for no good reason, and never had an opportunity to present his side of the case. Now, Justice Cornyn, that is not due process and that should not be approved.

This is an historic moment in our time. To suspend the Writ of Habeas Corpus without hearings, rushing it through just before elections where people are afraid to vote against this bill because somebody on the other side is going to hold up a TV commercial and criticize them for it, it is phony. I beg you to read that material and then tell me whether you think that is due process.

Thank you very much.

[Applause].

[The prepared statement of Mr. Sullivan appears as a submission for the record.]

Chairman SPECTER. The rules of the Senate do not permit demonstrations in the hearing room. We are dealing with very serious matters, very, very serious matters, and we ought to have silence and give the witnesses the opportunity to testify and the Senators an opportunity to consider what they are saying without any demonstrations from the audience.

Our next witness is Mr. Bruce Fein, partner in the consulting group of Fein & Fein. He worked for the SEC during the Reagan administration and worked directly with the Office of Legal Policy. He has a Bachelor's degree from the University of California.

STATEMENT OF BRUCE FEIN, PARTNER, FEIN & FEIN, WASHINGTON, DC

Mr. FEIN. Thank you, Mr. Chairman, Senator Leahy, and Senator Cornyn.

I oppose suspending or crippling the Writ of Habeas Corpus for alleged enemy combatants. Not a crumb of evidence has been ad-

duced suggesting that the Writ would risk freeing terrorists to return to fight against the United States.

On the other hand, volumes of evidence, including that presented by Mr. Sullivan, demonstrate a non-trivial risk that suspending the Writ risks illegal lifetime detentions.

No civilized nation has an interest in detaining any person, citizen or alien, in violation of law. If the law is deficient it should be changed, but due process should not be crucified on a cross of political expediency.

The history of liberty is the history of procedural protections. English kings were notorious for disappearing subjects into dungeons; French kings sent them to the Bastille.

The Great Writ of Habeas Corpus answered that abuse by enabling detainees to challenge the factual and legal foundations for their detentions before impartial judges.

The Writ enjoys a hallowed history. It was initially mentioned in the Magna Carta of 1215. It was enshrined in the United States's Constitution by the Founding Fathers. It is not dependent on any Act of Congress.

Now, habeas corpus is not a "get out of jail free" card. The petitioner is saddled with the burden of demonstrating a factual or legal deficiency in the Executive's justification for detention, and the burden is formidable.

State and Federal prisoners filed thousands of habeas petitions annually in Federal courts, but only a tiny percentage result in release, typically in cases of actual innocence proven by DNA testing or otherwise.

Federal judges are not dupes, nor are they guileless. They readily see through concocted tales. For example, an enemy combatant claimed that he was on the battlefield to deliver first aid, or he was a tourist guide. Judges are as much repulsed by terrorists as our legislators or executive officials.

To preserve the Great Writ for enemy combatants is not to exult form over substance. There are three good reasons why there may be errors in detaining persons as enemy combatants.

First, ethnic, tribal, political, or religious adversaries may supply the United States with false information. Further, terrorists routinely operate amidst civilian populations. That loathsome tactic creates a non-trivial risk that American soldiers, in heat of battle, may mistake an innocent civilian for an Al Qaeda member or supporter.

Finally, the Executive may exaggerate incriminating evidence and ignore the exculpatory for political effect. The greater the number of enemy combatants detained, the greater the public appearance that the fight against international terrorism is succeeding. In politics, optics is everything.

That seems to be the explanation for the misidentification of Canadian Maher Arar, as Senator Leahy mentioned, as a terrorist, his deportation by the United States to Syria, and his subsequent torture.

Jose Padilla similarly was initially detained by President Bush as an enemy combatant, but that designation has now been dropped in favor of a criminal prosecution for allegedly providing material support to a listed terrorist organization.

But if Padilla is convicted by a Federal court, habeas corpus will be available to challenge the legality of his verdict or sentence. Why should it have been different if Padilla remained identified as an illegal combatant?

President Bush and Members of Congress might contend, nevertheless, that a vote against enemy combatants by crippling habeas corpus would be popular. Few voters care about mistreatment or misapprehension of aliens who subscribe to Islam.

A corresponding sentiment carried the day when President Franklin Roosevelt and a Democratic Congress voted to intern 120,000 Japanese-Americans in World War II to appease racial bigotry.

Congress later apologized in the 1988 Civil Liberties Act and made monetary amends. Does this Congress wish to aide the French Bourbon royalty, who forgot nothing and learned nothing by cynically suspending the Great Writ for political advantage in November? The rule of law is at its zenith when it refuses to bend even for the most reviled.

I would like to address a few ending comments to Senator Cornyn. The Writ of Habeas Corpus does not establish any constitutional right to the Fifth Amendment, the Fourth Amendment, or otherwise.

It simply permits a detainee an opportunity to make arguments to be ultimately decided by an impartial judge as to whether various rights ought to be acknowledged. That is what suspending the Great Writ is about, denying that opportunity to have a fair adjudication of those claimed rights in Federal courts.

I also would suggest that, as previous commentators have indicated, this Committee and the Senate ought to take up separately bills addressing electronic surveillance, military tribunals, and the Writ of Habeas Corpus.

They all present distinct issues, and the best reflection of Congressional sentiment is when all the issues are voted on separately as opposed to requiring Senators to compromise their views on some of those questions because they support others. Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Mr Fein.

[The prepared statement of Mr. Fein appears as a submission for the record.]

Chairman SPECTER. We turn now to Lt. Commander Charles Swift, in the Navy's Judge Advocate General's Corps. He represented Salem Hamdan in the celebrated case of *Hamdan* v. *Rumsfeld*. He is a graduate of the Naval Academy and the Seattle University School of Law.

We welcome you back, Commander Swift. The floor is yours.

STATEMENT OF LIEUTENANT COMMANDER CHARLES SWIFT, U.S. NAVY, JUDGE ADVOCATE GENERAL'S CORPS, ARLINGTON, VIRGINIA

Commander SWIFT. Thank you, Mr. Chairman and members of the Judiciary Committee for inviting me to speak to you today.

My testimony is given in my capacity as Mr. Hamdan's military defense counsel, and it does not represent the opinions of either the Department of the Navy or the Department of Defense.

I want to thank the Chairman and the Committee for pausing to carefully consider the issue of denying habeas rights to an accused designated for trial by military commissions in Guantanamo Bay.

I first testified before this body on June 15, 2005. During that testimony I told this Committee that when the chief prosecutor for commissions requested assignment of counsel to Mr. Hamdan, he specified that access to Mr. Hamdan was contingent upon him negotiating a guilty plea.

I told this Committee then, and I continue to believe today, that the only way that I could have ethically represented Mr. Hamdan under those conditions was to present him with a second option, and that was to file a habeas petition if he chose not to plead guilty.

For you see, Mr. Hamdan had been placed in a judicial limbo of pre-trial isolation until he was willing to plead guilty. This literally creates someone outside the CSRTs, outside the review process, outside of everywhere, outside of the commissions, until they want to plead guilty, unless they have habeas.

During oral argument before the DC Court of Appeals, Assistant Attorney General Peter Kiesler told the court that I had "acted consistently with the highest traditions of the legal profession and my military service." I had done my duty.

Apparently Mr. Kiesler did not check with his client before making these statements because the legislation introduced by the President following the *Hamdan* decision attempts to see to it that no one else will be able to do what I did.

If successful, Section 6 of the Military Commissions Act will suspend habeas. I again believe, for reasons I have detailed in my written testimony, that any commission under the MCA is unlawful and will ultimately be struck down by the courts.

But whether I am right or not, a challenge to the legislation should happen actually immediately. Imagine if the courts had abstained in the *Hamdan* cases. The government urged that 15 or 20 detainees would have been tried, with presumably some of them convicted, before the Supreme Court ultimately declared the whole process unlawful. All the trials would be a nullity.

The families and victims of 9/11 would be forced to undergo a second round of trials to the extent that the Constitution would even sanction such double jeopardy, and justice delayed for even more years.

Now, let me dispel a few myths that have been flying around on what habeas might do. A) it will give KSM and others more rights than other detainees. What rights detainees should have, in general, is an open question; this is a new war. But what is not open, is that habeas rights have existed in conjunction with military commissions for more than 150 years. That is not open. Suspending it goes back to the dark days of Makar Adell.

Habeas will delay proceedings. Chief Prosecutor Colonel Davis stated recently that, with regards to 14 high-profile detainees, that the prosecution was actually now really starting from scratch. He said, "We have got attorneys that are looking at the cases, but obviously those are complex cases and it is early in the process. We have got a long way to go."

Well, from my experience in the *Hamdan* case, on a simple case for a low-profile detainee, a long way to go meant a year and a half. So the truth of the matter is, Khalik Shayd Mohammed is not coming to trial for years. In the meantime, if we suspend habeas we will not even know if the trial is valid, so five, 7 years from now it can get overturned.

What is the better way to do it? The better way is to submit this, like McCain-Feingold was, for immediate judicial review. Let us not get this wrong a second time. But if it is wrong, let us make corrections immediately, with no more delay, and get the trial process right.

All I have ever sought for Mr. Hamdan is a fair trial. This is not it. We are going to have to challenge it again. But sooner or later we will get it right. Let us get it right sooner. Thank you.

Chairman SPECTER. Thank you very much, Commander Swift.

[The prepared statement of Lt. Commander Swift appears as a submission for the record.]

Chairman SPECTER. Our next witness is Mr. David Rivkin, partner in the Washington law firm of Baker & Hostetler. He is an expert on constitutional law. He served in the Department of Justice and the White House in the Reagan and the first President Bush administrations. He is a graduate of Georgetown University and has a J.D. from Columbia Law School.

Thank you very much for being with us, Mr. Rivkin. The floor is yours.

STATEMENT OF DAVID RIVKIN, PARTNER, BAKER & HOSTETLER, LLP, WASHINGTON, DC

Mr. RIVKIN. Mr. Chairman, Ranking Member Leahy, Senator Cornyn, it is my pleasure to be with you and share with you, briefly, some observations about this important legislation, the Military Commissions Act of 2006.

I believe it builds upon, and works well, with the judiciary review procedures set forward in the Detainee Treatment Act, and together they provide a set of judicial review strictures that are streamlined, yet fair, and provide detainees with sufficient due process opportunities.

As such, I believe those provisions comport with our Constitution and do not amount to suspension of habeas corpus and will withstand judicial review. I would briefly remind everybody of the pre-MCA DTA-driven set of judicial review strictures.

The DTA makes the DC Circuit the exclusive venue for handling any legal challenges by the detainees in two instances. One, is the appeal as to the validity of a final decision of a Combatant Status Review Tribunal that the alien was properly classified as an enemy combatant, and review of a final decision by a military commission.

In both instances, the scope of review is precisely defined and limited to essentially two questions. CSRT and military commissions operated in a way that was consistent with the standards and procedures adopted by these bodies and limited to the extent of the Constitution and laws of the United States are applicable.

The use of such standards and procedures by CSRT or a military commission to reach its decision are consistent with the Constitution and laws of the United States.

Now, there has been some debate as to the meaning of this language, whether or not it only deals with questions of law or whether any factual issues are reachable.

In my view, there is at least a possibility that one key factual issue would be amenable to review because, under the teaching of *Ex Parte Milligan*, bringing civilians before military commissions is unconstitutional.

While Article III courts are open and functioning, an enemy civilian who has been subjected to military commission proceedings is, arguably, in a situation where the application of those procedures to him is inconsistent with the Constitution.

That, by the way, is exactly the way the court proceeded in the seminal case of *Quirin* by rejecting the petitioners' contention that they were civilians, not subject to military jurisdiction. To be sure, *Milligan* dealt with an American soil-based commission dealing with American citizens.

It is not entirely clear whether, even in the aftermath of *Rasul*, an enemy alien detained in Guantanamo or elsewhere outside the United States is deemed to have the same substantive constitutional provisions implicated by *Milligan*, as distinct from being merely eligible under Section 2241 for an access to Federal court in the context of habeas proceedings.

Now, I want to emphasize that I do not take limitations on judicial review available to detained unlawful enemy combatants lightly. Indeed, I believe that any restrictions on judicial review that entirely eliminate the access to Article III courts could implicate the Suspension Clause, and is unnecessary under present circumstances.

I feel sufficiently strongly about this matter that I spoke publicly against an earlier version of a DTA that which seemed to eliminate all judicial review opportunities.

That, of course, is not what ended up being done with the DTA and I believe the judicial review options featured in the DTA and the Military Commissions Act are fully consistent with the constitutional requirements as articulated by the Supreme Court in cases like *Milligan, Quirin, Yamashita*, and the Ninth Circuit case in *Ratrido*.

Now, the MCA, of course, also has language in Section 6, which has been mentioned a little bit earlier, that reaffirms the proposition that outside of the DTA-provided judicial review system, "[n]o court, justice or judge shall have jurisdiction to hear or consider an application for a Writ of Habeas Corpus..."

But again, given the existence of perfectly valid opportunities to have meaningful Article III review, to me, suggests that these provisions amount to a suspension, is just not tenable.

Now, a couple of observations. I think it is an understandable response to the *Hamdan* court decision that DTA jurisdiction's defining provisions were not sufficiently clear on the retroactive application. The MCA comes out with pretty tight language on retroactivity.

Again, I cannot imagine that any court would find that language to be insufficient to ensure retroactive application. I do not believe that retroactive application in this case presents any additional constitutional problems.

The MCA also, partially in response to the *Hamdan* decision and partially in response to statements by some critics, contains language that "[n]o a person may invoke the Geneva Conventions, or any protocols thereto, in any habeas" actions.

I am not greatly troubled by this language, as I believe that even given the *Hamdan* court teaching, Common Article 3 was brought only in a very narrow, limited context, namely the operations of military commissions, therefore, this language really does not change the status quo.

My bottom line view is that both the Detainee Treatment Act and the Military Commissions Act combined featured a very balanced and fair approach to judicial review, eliminating repetitive challenges, banning forum shopping, and yet they provide the necessary essentials of judicial review for unlawful enemy combatants, going both to the issue of their status and their prosecution. As such, the MCA is fully consistent with our international and legal obligations and the Constitution.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Mr. Rivkin.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Chairman SPECTER. Our final witness is Mr. Bradford Berenson, partner at Sidley Austin, Washington, DC. He served as Associate White House Counsel during the last term of President Bush. He is a graduate of Harvard Law School and Yale University.

Thank you very much for being with us today, Mr. Berenson. We look forward to your testimony.

STATEMENT OF BRADFORD BERENSON, PARTNER, SIDLEY AUSTIN, LLP, WASHINGTON, DC

Mr. BERENSON. Thank you, Mr. Chairman, Mr. Ranking Member, Senator Cornyn. I appreciate the opportunity to address you this morning.

I am actually here, notwithstanding my service in the Bush White House as an advocate of congressional power.

I have one basic submission I would like to make to the Committee this morning, and that is that in deciding what form of judicial review to extend to alien enemy combatants our military is holding abroad, the Congress is not seriously constrained in any way by the Suspension Clause.

That is to say, this is a policy choice. There are arguments that can be made on either side of it, but the constitutional issues are, in my view, a red herring. I would like to do something different than most of the previous panelists and really talk to you a bit about the law. There are three basic reasons why the Suspension Clause does not constrain the Congress in deciding what to do vis-a-vis these detainees.

The first has to do with the scope of the Writ itself. Obviously there can be no suspension if the Writ does not cover these particular detainees. There are at least two reasons for thinking that it does not.

First, the original understanding of the Suspension Clause is that it did not grant a right to habeas corpus to those in Federal

custody. It was merely a restraint on the power of the Congress to prohibit the State courts from issuing habeas writs.

A proposal was considered at the Constitutional Convention to grant a Federal right to habeas corpus and it was voted down. This was the compromise. Professor Irwin Chemerinsky, in his treatise, articulates exactly this view of the Suspension Clause.

Now, there is reason in some of the modern cases to question whether our current Supreme Court would follow that original understanding, but the issue simply has not been decided.

Even if the modern Supreme Court did not follow that view, there is a Supreme Court decision directly on point which says unequivocally that alien enemy combatants held in military custody abroad have no Constitutional right to habeas corpus. That is the decision in *Johnson* v. *Eisentrager*.

With all respect to Mr. Sullivan, who I know is working hard to represent the interests of his clients, Rasul did not cast one iota of doubt on the holding in *Eisentrager*. Rasul was strictly a statutory decision and it recognized the separate constitutional holding in *Eisentrager* and did not disturb it or question it in any fashion.

As Justice Jackson observed in *Eisentrager*, furnishing habeas corpus rights to enemy combatants, held abroad would "hamper the war effort and bring aid and comfort to the enemy. Habeas corpus proceedings would diminish the prestige of our commanders, not only with enemies, but with wavering neutrals.

It would be difficult to devise a more effective fettering of a field commander than to allow the very detainees he has ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attentions from the military offensive abroad to the legal defensive at home, nor is it unlikely that the result of such enemy litigiousness would be a conflict between the judiciary and military opinion, highly comforting to enemies of the United States." That was Justice Jackson in *Eisentrager*.

Even if the Writ actually did cover alien enemies held abroad, what the Congress has done in the Detainee Treatment Act, which would extend retroactively through the legislation currently under consideration, does not amount to a suspension of the Writ.

The Supreme Court again has clearly recognized in *Swain* v. *Presley*, "The substitution of a collateral remedy, which is neither inadequate nor ineffective, to test the legality of a person's detention does not constitute a suspension of the Writ of Habeas Corpus."

That is exactly what the Congress has done in the Detainee Treatment Act. It has provided a collateral remedy that is neither inadequate, nor ineffective.

Again, with due respect to Mr. Sullivan, he did not give you the full standard of review. The standard of review is not simply whether the CSRTs followed their own procedures; another portion of that same section of the Act clearly states that the DC Circuit, and ultimately the Supreme Court, are empowered to review whether those procedures comport with the Constitution and laws of the United States. That is exactly the office of habeas corpus.

Finally, the last reason why the Congress need not worry that what it is doing here is in derogation of its constitutional obligations is that the Suspension Clause permits the Congress to sus-

pend the Writ of Habeas Corpus in certain circumstances, "when in cases of rebellion or invasion the public safety may require it."

Even if everything else I have said were wrong, this is still a situation where the requirements of the Suspension Clause would probably be met.

There was a physical invasion of this country on 9/11. Our financial center was attacked. The nerve center of the U.S. military was attacked. That was done by alien enemy combatants on our soil. I would suggest that, if the Congress wished to exercise its powers under the Suspension Clause, it could do so here.

Thank you very much.

Chairman SPECTER. Thank you, Mr. Berenson.

[The prepared statement of Mr. Berenson appears as a submission for the record.]

Chairman SPECTER. You talk about an invasion on 9/11. Is that invasion still going on?

Mr. BERENSON. Well, Senator, not having been in the government for several years now, I cannot tell you for sure. I know that it is an important object of all of our Homeland Security efforts to try to find and disrupt any cells.

Chairman SPECTER. You do not have to be in the government. It is just a simple question: is the invasion still going on?

Mr. BERENSON. If there are Al Qaeda cells still operating in the United States and planning further attacks, then I believe it is, yes.

Chairman SPECTER. All right. Well, that is a big "if". But let us come back to this red herring. It does not look so red to me, as I read the plain language of the Constitution: "The privilege of the Writ of Habeas Corpus shall not be suspended unless, when in cases of rebellion or invasion, the public safety may require it." It looks to me, on its face, without the need for argument or discussion, that it is pretty flat.

This is a good time to introduce the letter from Ken Starr. We had asked Mr. Starr to be here today and his scheduled did not permit it. We asked him to submit a letter. We have the text of the letter, although it has not been signed. Without objection, it will be made a part of the record.

But he deals directly with *Johnson* v. *Eisentrager*, which you have cited, and notes the conflict, or as he calls it, the "apparent conflict" there. But when you cite the case, you comment about aliens held abroad.

The Supreme Court concluded in *Rasul* that the detention at Guantanamo was not abroad, but since it was under subject and control of the U.S. Government, that it was subject to habeas corpus rights, which I think are very plain under *Rasul* and under the flat language of the Constitution.

Mr. Rivkin, you have commented in your testimony that you had originally spoken out against the Detainee Treatment Act. Your Law Review article in "Commentary," "Don't Cross the Habeas Corpus Line" with Mr. Leo Casey, speaks in very emphatic terms about the importance of habeas corpus.

How can you square that with the very limited opportunities for judicial review and judicial challenge in the pending legislation?

Mr. RIVKIN. Thank you very much, Mr. Chairman. I would put things in context. This op-ed in the L.A. Times was, as I mentioned in my prepared statement, was done in response to an earlier version of DTA and it was very much in flux.

In fact, I was provided that language by one of Senator Kennedy's staffers. My reading of it was that it vitiated all judicial review. I do not necessarily depart entirely from Mr. Berenson's remarks about the different modalities and unsettled legal question as to whether it applies in these circumstances.

My feeling, however, was that it was essential both to help ensure public support for this process and endow it with greater legitimacy to ensure that detainees have some meaningful access to Article III courts.

In my opinion, respectfully, Mr. Chairman, the Detainee Treatment Act and the Military Commissions Act very much does that. The reason for it is quite simple. Habeas, at least in its core form, is not meant to be a mini retrial. It is not meant to be delving deeply into the factual issues involved in the preceding trials.

Chairman SPECTER. I am going to have to interrupt you, Mr. Rivkin, because the time is very limited, five minutes to a round. I find it hard to square that with the flat prohibition in the pending legislation to take away habeas.

Do you want to comment, Mr. Rivkin? Go ahead.

Mr. RIVKIN. If I can just make a point. This prohibition has to be looked at in the context with other provisions in the legislation that provide for meaningful opportunity for review.

With all due respect, if you look at the Supreme Court teachings in *Quirin*, the type of issues, the way the court approached the *Quirin* detainees—who, after all, were sentenced to death; this was not just an appeal from a detention—was exactly that, which is to say, were the procedures that you got in their totality appropriate? Were they given status as enemy combatants?

Chairman SPECTER. You have had your reply. You have got to leave me 10 seconds.

Mr. Sullivan, the examples you give of "no good reason" are going to be put in the record. You commented that three of the people you represented were released. It has been suggested that once Writs of Habeas Corpus are filed, petitions are filed, that then the government, for the first time, takes a look at the case.

There have been reports that detainees have been released just on the filing. Could you comment on that? And let the record show, the red light went on in the middle of my last question.

Mr. SULLIVAN. Senator, there have been a number of detainees released after what is called the Administrative Review Board reviews, which come up annually. But they are no better than the original CSRTs because the detainee still cannot bring in any evidence. He is still not presented with any evidence on the other side. It is purely in the whim of the people that are running this operation.

I would, if I may, like to pose a question to Messrs. Berenson and Rivkin. If they were brought before a tribunal in Syria, say, they were captured and they said, all right, Rivkin, all right, Berenson, what is your answer to this question? You were picked up on such and such a date, and you had connections with such and such an

organization. They say, I did not have any connection with that organization, that is not true.

Four and a half years later, they are still sitting in jail. Would they sit here today and say that was due process of law? Because that is precisely—precisely—what has happened to a majority of the 500 men that are sitting down in Guantanamo Bay.

I have been at that prison three times. It is grim. It is a concentration camp. It is not just a nice, homey prison. These people are sitting in little cells. They are cages about twice the size of this table with a toilet, a wash basin, and a place to sleep. Wire mesh on the sides that, if you keep looking at it, destroys your distance vision. No exercise. Very little communication with their families.

Berenson and Rivkin, what do you say about that, if that happened to you?

Chairman SPECTER. Well, it is unusual for one witness to propound questions to another, but Mr. Sullivan has made a point. I think, aside from his propounding the question, Mr. Rivkin and Mr. Berenson are entitled to a response, if they care to do so.

Mr. Berenson?

Mr. BERENSON. Thank you, Mr. Chairman. I will try to be brief. I think Mr. Sullivan's comments reflect total confusion between the military and the civilian criminal justice systems, and it is a confusion that pervades these debates.

If I took up arms against Syria and fought against Syria in some battlefield, and I were apprehended as part of that war and I received the procedures that our military is affording to the detainees here, I would not have a legal complaint.

I might not be happy about my situation—the situation of people captured during war is not a pretty one—but I would not have had any legal rights violated. These CSRT procedures go way beyond anything that the military ordinarily affords under Article 5 of the Geneva Conventions.

All throughout *Rasul* we were hearing from the detainees' advocates that all they wanted was an Article 5 proceeding. After *Rasul* said that there had to be a proceeding, the CSRTs gave them that and more. Now they are claiming that what they really need is essentially the process afforded to criminal suspects.

Chairman SPECTER. Mr. Rivkin?

Mr. RIVKIN. Yes. If I could just add to that. I agree with Brad. The essential thing to keep in mind, is that this is not a penal process. I understand that people are being detained, but this is a challenge to an administrative determination as to one's status.

Just to give you, very briefly, evidence as to what other countries, signatories to the Geneva Conventions, have done. Article 5, by the way, sort of basically codifies customary law. I am talking about very few countries who have done anything here, Canadians, Brits. Typically, an Article 5 proceeding is several people sitting in a tent in a desert and may not even see the detainee, just looking at the file.

By contrast, the CSRT procedures are positively fulsome. I will be the last person to claim that they rise to the level of due process you get in criminal proceedings, but they are nothing like that. It is not a penal process at all.

Chairman SPECTER. Senator Leahy? Thank you, Mr Rivkin. Thank you, Mr. Berenson. Thank you, Mr. Sullivan.

Senator LEAHY. Well, thank you, Mr. Chairman.

I think Mr. Rivkin and Mr. Berenson, with all due respect, your answers beg the question. Mr. Sullivan asked the question if they were there, not making the presupposition that they were enemy combatants, that they were just captured.

As we know, in Guantanamo there are a whole lot of people held there by mistake who are not enemy combatants. We have acknowledged this when, sometimes by accident, it is discovered. Others have been held for years and had absolutely nothing to do with the attack on the United States.

It is like the Canadian citizen arrested here in the United States and sent to Syria to be tortured, and after the torture and after he was sent back, we say, whoops, sorry about that, a little mistake there. I think that is what Mr. Sullivan was referring to, if you were caught in that situation, how might you feel?

Let me ask this question, briefly, of Mr. Fein and Mr. Sullivan. Operative word: briefly.

The proposed legislation strips courts of jurisdiction over cases that were filed years ago. Is that a problem?

Mr. FEIN. Well, there is a problem of attempting to manipulate the jurisdiction of the court to get particular results, so that if you are trying to retroactively upset a procedural protection, that is problematic.

I would especially want to underscore this, Senator, about the comments about habeas corpus if it was fully effective, there was no attempt to curtail it. Neither Mr. Rivkin nor Mr. Berenson has uttered one syllable suggesting if we had our customary habeas corpus rights, that a single terrorist would be released.

Senator LEAHY. Mr. Sullivan, is there a problem, in your view, that it would strip the courts of jurisdiction over cases that were filed years ago?

Mr. SULLIVAN. Absolutely. Absolutely. If they are going to strip, they have to put in a procedure that is roughly the same. This procedure that I have outlined here, and I have asked Senator Cornyn to look at it—and I have been practicing law for over 50 years and I have never been a Supreme Court justice, but I know due process when I see it. I know fair proceedings when I see it, and this ain't it.

Senator LEAHY. Well, let me ask this question, Mr. Fein. Proponents of this bill have argued that the Combatant Status Review Tribunals, CSRTs, are a sufficient substitute for habeas corpus to satisfy any constitutional requirement.

But the proposed legislation cuts off habeas rights even for detainees who have not had the minimal review afforded by the CSRT process. Apparently under the bill, if an alien is awaiting a determination, that is enough. Well, you have people being held indefinitely. What is the impact if you eliminate habeas?

Mr. FEIN. Well, I think the fact is that the statute would enable the executive branch to simply decline to hold CSRT proceedings. There is nothing in the bill that would require, with reasonable speed, any Combatant Status Review Tribunal proceeding to be held.

Until that happens, the statute cuts off any access to any Court of Appeals to review the legality of the detention, so it gives the executive branch, if it wishes, to hold the detainees indefinitely without any access to Federal courts.

Senator LEAHY. So if you had a President or a Secretary of Defense in the room and if they decided a detainee is an enemy combatant, that is it?

Mr. FEIN. Yes.

Senator LEAHY. Judge, jury.

Mr. FEIN. Right. They would say, we do not want to hold a Combatant Status Review Tribunal, it is so clear they are enemy combatants. If they do not hold that tribunal hearing, there is no access to Federal courts under the statute.

Senator LEAHY. Admiral Hutson, putting aside for the moment—and I cannot imagine myself saying this—the importance of habeas to fairness and justice and our fundamental values, are there advantages to our national security and our foreign policy in allowing habeas review for Guantanamo detainees?

Admiral HUTSON. Absolutely there are. As I said in my comments, that is what gives us strength. That is what makes us the United States. Without those kinds of protections, we are just another banana republic if we let these things go.

The problem, Senator, is the emperor has no clothes. We all know what we are talking about here. We are talking about 450 people that we do not know what to do with. That is what this is all about. We can pretend that it is a bunch of other things and we can cite *Milligan* and *Quirin* and *Eisentrager*. For 5 years now, lawyers have been driving this train in the wrong direction.

Senator LEAHY. But is this not a case—and Commander Swift may want to answer this, too—we have a lot of people down there that even the administration says, well, yes, we may have some that are totally innocent. They were picked up not in uniform, picked up well off the battlefield. If you do not have habeas, how are you ever going to have an innocent person get a chance to be let out?

Admiral HUTSON. That is the whole point. That is absolutely right, Senator. That is the whole point of habeas. There was a study done by Seton Hall Law School using DoD data, using DoD information that said that 5 percent of the people in Guantanamo were picked up by U.S. troops.

The others were picked up and turned over by the Northern Alliance and Pakistan. To say that these are all killers, they are the worst of the worst, they are all terrorists, is just deceiving ourselves.

More importantly, the point is, we cannot reverse engineer their guilt and create a system to ensure that result. The question is, are they terrorists? Are they killers? Are they the worst of the worst? If they are, they will be sent back to Guantanamo. If they are not, we will have done justice.

Senator LEAHY. And I would pose, also, the question to Commander Swift.

Commander SWIFT. Sir, I would like to address in this also the difficulty of equivalent review even in the commissions because it

is not. One of the first things, and it was cited by the Supreme Court, not fixed.

Two things were lacking. One, was CAFF, which this Committee tried to put back in, but we put in a specially selected court which does not meet it. Two, is that you only get an appeal into the system if you get 10 years. Get less than 10 years, you have no automatic right to appeal. You have an automatic right to habeas, but you do not have an automatic right to appeal in this system.

So, in fact it is not equivalent because Mr. Hamdan could be convicted and sentenced to 9 years, 11 months, and 355 days, with no right to appeal.

Senator LEAHY. Mr. Chairman, I was struck by the answers of everybody here, but the answer of Admiral Hutson, who talked of the people, only a few of whom were picked up on the battlefield, and a number were turned over to American troops.

Considering the areas where these people are being turned over, the tribal rivalries and the fights, boy, what an easy way to settle a score with somebody because you did not like the fact they had part of your land, or something like that. Turn them over and say, hey, I got you an enemy combatant, and they are gone forever.

Chairman SPECTER. Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

Mr. Chairman, I know you have been to Guantanamo Bay, and I have. I am sorry, I do not recall about Senator Leahy. I have also been to Auschwitz. Anyone that would compare Guantanamo Bay to Auschwitz, all I can say, has a very active fantasy life. I think it certainly bears on the credibility of the witness, anyone who would make that comparison.

Mr. Berenson, let me direct this to you because I think you were the one to point this out. When Mr. Sullivan read the scope of review of the Combatant Status Review Tribunal and the Administrative Review Board under the Detainee Treatment Act, he left out an important element to that scope of review.

Is it not true that the Detainee Treatment Act says, to the extent the Constitution and the laws of the United States are applicable, whether the use of such standards and procedures to make the determination consistent with the Constitution and laws of the United States.

In other words, would that scope of review for the Court of Appeals, under the Detainee Treatment Act, purport to address the concerns that have been expressed today about an inadequate scope of review?

Mr. BERENSON. Yes, Senator, you are exactly correct. That language appears in the pending legislation. It governs the scope of review, both of appeals from military commissions and from the determinations of the CSRTs regarding the detentions, and it precisely tracks the historic office of habeas corpus, which is to review the legality of detention, not to provide a retrial on the merits.

Indeed, that standard probably will embrace almost every claim that has already been made on behalf of the detainees, including claims about sufficiency of the evidence. Under *Jackson* v. *Virginia* in our own court system, legal review of State sentences does incorporate a minimal sufficiency of the evidence review.

This is really unprecedented access to our domestic court system for alien enemies that are being held abroad in the course of a conflict. No nation on the face of the earth in any previous conflict has given people they have captured anything like this, and none does so today.

Senator CORNYN. Mr. Berenson, you touched on this as well. If we were to afford all of the panoply of rights available to an American citizen in a criminal prosecution to these enemy combatants in a time of war, what would that do in terms of diverting the attention of our troops on the battlefield from the war effort, fighting and winning the war, to criminal investigations, subpoenaing witnesses from the battlefield to come testify at judicial hearings and the like?

Mr. BERENSON. Senator, I think both the Department of Justice and the Department of Defense would tell you that the existing litigation, which embraces hundreds of cases, has seriously impeded the operations at Guantanamo, has exhausted resources of the Department of Justice that could better be used elsewhere, and has proven to be a significant distraction, as well as providing a potent propaganda platform for our adversaries.

So, those practical concerns are quite serious and they do not even begin to exhaust the problems that would arise if we go down the road of extending constitutional protections, such as those arguably contained in the Suspension Clause, to alien enemies against whom we are fighting.

If the due process clause applies to those people, why does every victim of collateral damage in a theater of combat whose property is destroyed, who is wounded, whose life is taken, who loses a family member in error not have a constitutional claim against our government? If you really spin out the consequences, they are just too unbelievable to seriously contemplate.

Senator CORNYN. Mr. Rivkin, there has been a claim that these detainees would have no meaningful access to U.S. courts under the provisions of the Detainee Treatment Act, under the provisions of the Combatant Status Review Tribunal, the scope of review afforded in a Court of Appeals, as well as the Administrative Review Board which annually reviews the status of these detainees, and any direct appeal that would be permitted after a full trial on the merits before a military commission.

Does that indicate to you that these detainees would be provided no meaningful access to our courts?

Mr. RIVKIN. Not at all, Senator Cornyn. Let me mention, again, a couple of points here. The level of due process that these detainees are getting far exceeds the level of due process accorded to any combatants, captured combatants, lawful or unlawful, in any war in human history.

We had millions of captured enemy combatants throughout the course of American history, going back to the Civil War and World Wars I and II, and I do not remember anybody suggesting that they are entitled to a level of due process that is typically accorded to criminal defendants.

As to how much due process they would get in a judicial review, much has been made of the argument that, unlike in the military

commission context, in the CSRT the defendant may not be able to see classified evidence against him, but the DC Circuit will.

The DC Circuit will see all the evidence upon which the CSRT has reached its conclusion. Much has been made out of the fact that he would not have access to a lawyer.

That is true, but it is not meant to be a judicial process. It is meant to be user-friendly, often battlefield-based, back to my point about three officers sitting in a tent in the desert for 15 minutes.

We are provided an enormously enhanced level of due process, both within the military system and beyond. But I would submit to you, if what you really want is the same level of due process that is accorded to criminal defendants, U.S. citizens, in Article III courts, this is not, arguably, the same level.

But they are not entitled to it. We are giving them a lot more, Senator, than they are legally entitled to, under either international or the law in the U.S. Constitution.

Chairman SPECTER. Senator Cornyn, you are a little over time, but if you want to take a few extra minutes you may. I want to maintain as much balance as we can.

Senator CORNYN. I appreciate it.

Let me followup on that, Mr. Rivkin. You mentioned about our obligations under the Geneva Conventions of the laws of war. Are the Combatant Status Review Tribunals and the Administrative Review Board mechanisms not precisely what is required, and perhaps more than is required, under the Geneva Conventions and laws of war?

Mr. RIVKIN. Indeed, it is far more than is required. You do have a gateway provision in Article 5 of Geneva Convention 3 that talks about, in case of doubt. In this case, everybody gets it. It is not a question of doubt.

Second of all, the only requirement is that their status be reviewed by a competent tribunal. Again, there are very few countries that are signatories to the Geneva Conventions.

Only Canada and the U.K. have resorted to those types of procedures. Very austere, very streamlined. The detainee often is not there and there is no involvement by lawyers.

The whole system would break down, Senator, if it got turned into a mini trial. So, this is way in excess of what we are required to do under Geneva Article 5, and Article 5 really codifies customary international law here.

Senator CORNYN. Mr. Chairman, the last thing I would just add is, under the provisions of the Detainee Treatment Act which Congress passed last year under the "Judicial Review of Detention of Enemy Combatants," Section E, it says, "Except as provided in Section 1405 of the Detainee Treatment Act of 2005, no court, justice or judge shall have jurisdiction to hear or consider an application for Writ of Habeas Corpus filed on or behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba."

To me, it is abundantly clear that all Congress is going to do in this legislation, is to actually give effect to the very same provisions that we passed in the Detainee Treatment Act in late 2005, although with perhaps greater clarity so that Congress's intent may be achieved. Thank you very much.

Chairman SPECTER. Thank you, Senator Cornyn. Just a couple of very brief questions, to followup before concluding.

Admiral Hutson, our military troops, particularly in a court martial, do not have rights to habeas corpus. The issue has been raised from time to time, why should there be habeas corpus rights here where there is no such right under a military tribunal?

Admiral HUTSON. I am not sure I agree with the premise that they do not have habeas corpus rights in the first place.

Chairman SPECTER. Is habeas corpus applicable for people convicted in courts martial?

Admiral HUTSON. Yes.

Chairman SPECTER. All right. That is the answer.

Very briefly, Mr. Berenson. When you look at the opinion in *Hamdi*, "Absent suspension, the Writ of Habeas Corpus remains available to every individual detained in the United States."

The reference is made to abstention. Does that not really signify a Supreme Court ruling that the clause in the Constitution that habeas corpus cannot be suspended, except on rebellion or invasion, applicable here?

Mr. BERENSON. I think that there are sentences in *Hamdi*, in *Rasul*, and in some other decisions that appear to assume that there is a constitutional core in the Suspension Clause that Congress does not have the automatic right to eliminate. But as I say, the question has never really been adjudicated.

The larger significance of *Hamdi*, I think, is Justice O'Connor's admonition that even a U.S. citizen who is detained is only entitled to notice and a meaningful opportunity to contest the factual basis for detention before a neutral decisionmaker, and she, for the court, specifically says that "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."

Then the court specifically says that "an appropriately authorized and properly constituted military tribunal", which a CSRT certainly is, would be adequate, even in the case of a U.S. citizen, to satisfy the minimal due process rights recognized in *Hamdi*.

Chairman SPECTER. Commander Swift, it is especially offensive where you were told that the representation of Hamdan was contingent upon his being willing to plead guilty. Was anything ever done to bring to book the people who made that condition?

Commander SWIFT. To my knowledge, no, sir. The chief prosecutor, shortly thereafter, left. I do not know the specifics on why.

The reason I think that it ultimately did not play out and cause any problem, was I had habeas corpus. It was the fix, and it fixed it. I would say that the entire country should be grateful that it did. We do not have the problems and specters of illegal trials.

We won, as a country, a great deal in *Hamdan*, and the only reason we were able to win it was habeas corpus. It vindicated the United States's rule of law rather than slow or bring is down. To take it away, as was done in Makar Adell is to give up our strength, as Admiral Hutson pointed out, as a nation of laws. We cannot be beat as long as we are a nation of laws.

Chairman SPECTER. Senator Leahy, anything further?

Senator LEAHY. Just a couple of things. One, I would like to put in the record a New York Times article dated back in 2004 that cites administration officials as suggesting that many of the people held in Guantanamo may well be innocent.

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator LEAHY. And just to followup a little bit on what Commander Swift was talking about. In this hearing we are talking about habeas-stripping provisions. But suppose there was evidence obtained as a result of torture. Does this legislation guarantee that that evidence can be excluded?

Commander SWIFT. To me? No, sir, it does not. It does not guarantee it at the CSRT level and it does not guarantee it at the commission level. At the commission level, in torture—and I find torture to be a difficult word because I do not know what it means, and everybody who read the statute does not know what it means. Coercion. I know what that means. Coercion can be brought in.

By the way, the chief presiding officer down in the commissions did not know whether sticking a red-hot poker in somebody's eye would actually be torture, so I do not think I am alone in this. But it allows that evidence in by coercion.

The more scary part is, the way this has been done, both in the CSRTs and in the commissions, is how do you know? The burden is put on the accused, whether he is at the CSRT or at the commissions, to prove that the evidence was obtained by torture or by coercion.

Given that, and given the fact that the government does not have to turn anything over, here is the statement; we are not going to tell you how we got it. That possibility certainly exists.

Chairman SPECTER. Senator Cornyn, anything further?

Senator LEAHY. Just one thing if I might, Mr. Chairman.

Chairman SPECTER. Oh. Excuse me, Senator Leahy.

Senator LEAHY. Admiral Hutson, I wanted to make sure. I did not want to leave it dangling. I said, because this is not World War II where you have armies marching against each other in uniforms and it is easy to determine who the combatant is.

When so many were not captured on the battleground but were just turned over by various factions, many of whom may not have been friendly to each other, did I give an appropriate description of that, that you may well have people in there where scores are being settled, not so much that they were combatants?

Admiral HUTSON. Absolutely. The only thing that I would add, is that there was frequently a bounty of $5,000 or $25,000 associated with it, depending on whether the person was alleged to be Taliban or Al Qaeda, which is a king's ransom.

Senator LEAHY. This is in an area where the per capita income is about $100 or $200 a year?

Admiral HUTSON. Indeed, sir.

Mr. SULLIVAN. Senator Leahy, I have been down there and have met these men, several of them. When I described previously that they do not appear any more dangerous—and I have seen a lot of dangerous men. I have represented a lot of them, I have prosecuted a lot of them—than my younger grandchild, who is 12. My 14-year-old objected to that on the ground of a negative pregnant.

[Laughter.]

Senator LEAHY. I have four grandchildren. I understand, Mr. Sullivan.

Thank you, Mr. Chairman.

Chairman SPECTER. Anything further, Senator Cornyn?

Senator CORNYN. Mr. Chairman, just a few housekeeping measures.

First of all, I would like to ask to be made part of the record a Washington Post article dated October 24, 2004 entitled, "Released Detainees Rejoining the Fight."

Chairman SPECTER. Without objection, it will be made a part of the record.

Senator CORNYN. And I would also like to offer pages 12 through 14 of the U.S. February 17, 2006 supplemental brief in the Al Oudot case, which makes the following points. I will summarize.

According to the Justice Department, the detainees have urged habeas corpus to dictate conditions on Guantanamo Naval Base, ranging from the speed of Internet access afforded to their lawyers to the extent of mail delivered to the detainees. More than 200 cases have been filed on behalf of 600 purported detainees. This number exceeds the number of detainees actually held at Guantanamo, which is closer to 500.

Also, according to the Justice Department, the Department of Defense has been forced to reconfigure its operations at Guantanamo Naval Base to accommodate hundreds of visits by private habeas counsel. This habeas litigation has consumed enormous resources and disrupted the day-to-day operation of Guantanamo Naval Base.

Finally, the United States notes that this litigation has had a serious negative impact on the war against Al Qaeda, according to the United States's brief. Perhaps most disturbing, the habeas litigation has imperiled crucial military operations during a time of war.

In some instances, habeas counsel have violated protective orders and jeopardized the security of the base by giving detainees information likely to cause unrest. Moreover, habeas counsel have frustrated interrogation, critical to preventing further terrorist attacks on the United States.

[Interruption by protester].

Chairman SPECTER. Proceed, Senator Cornyn.

Senator CORNYN. Finally, I would like to offer for part of the record pages 32 through 35 of the Department of Justice brief in the Al Oudot case, which points out that the CSRT procedures used to adjudicate enemy combatant status are based on, and closely track, the procedures used to adjudicate prisoner of war status under Article 5 of the Geneva Convention and sets out the variety of rights available.

[Interruption by protester].

Senator CORNYN. I will be satisfied with the hard copy itself being made a part of the record.

Chairman SPECTER. Without objection.

Mr. Sullivan, you said something very poignant just before we started the hearing about the importance of this week, and we will conclude with your statement on that, if you care to make it.

Mr. SULLIVAN. Senators, it is my opinion as a long-time loyal American that this is a momentous moment in our history, this week, to think that the Congress, on the eve of elections without any hearings—this is the first hearing, and three people are here—and any serious consideration being given to momentous, momentous legislation, is just beyond my capacity to accept.

I believe that if this bill is passed with these habeas-stripping provisions in it, then after I am dead and the members of this Senate hearing are dead, an apology will be made, just as we did for the incarceration of the Japanese citizens in the Second World War. It is shameful and it is momentous.

I have listened to Senator Cornyn. I respect him very much. I think that there is a serious overstatement of what has occurred and what will occur at these hearings. They are in no way comporting with any kind of due process. And to talk about battlefields, these men have been kept there in cages for 5 years. There is not any emergency here.

Indeed, Senator Specter, it is our opinion that if these habeas corpus petitions were permitted to go ahead on the sole issue of the validity of detention, most of the men, the great majority, would be put on planes and sent back home, for the simple reason that there is no evidentiary basis for keeping them there.

Chairman SPECTER. Well, thank you very much, gentlemen, for coming in today. Thank you, Senator Leahy and Senator Cornyn.

We will note the presence of people in this room who have been disrespectful and rude, and have made every effort to goad the Chair into ousting them. I have restrained from doing that because it would cause more attention than simply by ignoring them. But you are rude. You are disrespectful. This hearing has been held very much to promote the interests that you are articulating.

For you to come here and to stand up, and you had your photo op, then you turned around and you had your photo op, then you turned around again and had your photo op and tried very hard to be ousted when you spoke up disrespectfully to Senator Cornyn. Do not consider that your conduct is a precedent for what we will do in these hearings. As the Chairman, I will do what I can to minimize your intrusion, and that is by ignoring you.

[Whereupon, at 11:39 a.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

BEFORE THE UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

TESTIMONY OF BRADFORD A. BERENSON

Former Associate Counsel to the President
Partner, Sidley Austin LLP

September 25, 2006

Chairman Specter, Senator Leahy, and Members of the Committee, I appreciate the opportunity to testify before you today. The question the Committee is addressing this morning is an important one: how much access to our domestic courts should suspected foreign terrorists captured on the global battlefield they have to challenge their detentions? Arriving at the right answer to this question is vital both to ensuring that the United States does not compromise its commitment to the rule of law and fair procedure and to ensuring that we can wage war effectively in order to protect our liberties and our system of laws from those who wish to destroy them.

My perspective on these issues is informed by my experience as Associate Counsel to President Bush from January, 2001 through January, 2003. As a member of the President's staff during the immediate post-9/11 period, I was one of the lawyers that initially began to grapple with this complex questions, which seemed new at the time but which we quickly discovered are in fact very old. I assisted in the legal and policy research and analysis that resulted in the President's Military Order of November 13, 2001, which authorized the Secretary of Defense to establish a system of military commissions to try suspected terrorists. It was that Order the Supreme Court found, in it surprising ruling in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), was subject to certain provisions of the Uniform Code of Military Justice and the Geneva Conventions with which it did not comply, and which has thereby touched off the latest round of legislative activity on this subject. Since leaving the White House, I have returned to my private practice in Washington, D.C., but I have continued to follow closely the developments in this area of law and to contribute in whatever way I can to the ongoing public debate.

The genesis of the problem: *Rasul v. Bush*

The issue the Committee is examining this morning arises only indirectly from the *Hamdan* decision. Its real genesis is the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), which held that suspected terrorists detained by the United States at the United States Naval Base in Guantanamo, Cuba had a statutory right to pursue habeas corpus relief in the federal courts. The Supreme Court's decision in *Rasul* was, to my knowledge, the first time in recorded history that any court of a nation at war had held that its enemies captured in battle had a right of access to its domestic courts and could sue the Commander-in-Chief to challenge their detentions. During World War II, for example, the United States had detained hundreds of thousands of German and Japanese enemy combatants. Many of those detainees were held here in the United States. Many also had plausible claims to having been captured or held in error or to having no enmity against the United States. Yet those prisoners were not outfitted with lawyers and invited to sue our commanders during the conflict. The federal courts were not swamped with requests to order the release of prisoners held in military custody while our troops were in the field. Indeed, with respect to enemy combatants held outside the United States, the Supreme Court unambiguously held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that detainees enjoyed no right of habeas corpus in U.S. courts. The Court declined "to invest these enemy aliens, resident, captured, and imprisoned abroad, with standing to demand access to our courts," reversing the court of appeals' determination to "g[i]ve our Constitution an extraterritorial application to embrace our enemies in arms." *Id.* at 777, 781. It was this decision that the Administration relied on in believing that litigation by Taliban and al Qaeda detainees held at Guantanamo would be summarily dismissed.

Rasul changed all that. It opened the floodgates – or, more accurately, it allowed the floodgates to remain open – to a massive amount of litigation in federal district court by militant Islamists held at Guantanamo against their captors. It is worth bearing in mind that virtually every single detainee at Guantanamo has now sued the President, the Secretary of Defense, and other military commanders, with the assistance of some of this country's finest lawyers, seeking to force the military to release them back into the world. Candor compels the recognition that, despite the careful screening procedures employed in the field and in Washington, there is likely to be some rate of error associated with the Guantanamo detentions. But whether that error rate is 2%, 5%, or 15%, it surely does not begin to approach 100%. The detainees may all claim to be shepherds or religious students captured by mistake or sold for bounties, but a large percentage of them are not telling the truth.

We thus found ourselves after *Rasul* with hundreds of our nation's most vicious enemies suing our military and civilian commanders in federal court seeking writs of habeas corpus. Indeed, now that Khalid Sheikh Mohammed, the al Qaeda mastermind of 9/11, has been transferred to Guantanamo, it may not be long before he, too, can continue his aggression against the United States, this time through our own court system. This widespread litigation distracted military commanders from their primary duties, caused innumerable difficulties in running the detention facility at Guantanamo, and soaked up enormous resources at the Department of Justice. It also allowed the detainees a propaganda platform in the midst of the conflict whose potency is already a matter of record.

Congress's attempted solution: The Detainee Treatment Act

Because the Supreme Court's decision in *Rasul* was based only on an interpretation of section 2241 and not the Constitution, Congress was free to address the serious

problems caused by the *Rasul* decision with a legislative solution. The Congress immediately sought to overrule the *Rasul* decision, at least partially. While unwilling to subscribe to the traditional rule articulated in *Eisentrager* that no habeas corpus review at all would be available to enemy combatants held outside our shores, the Congress sought to strike a sensible compromise and to circumscribe detainee litigation within some reasonable limits.

In the Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) ("the DTA"), the Congress established a process of formal administrative review of enemy combatant status for those detained at Guantanamo. The Combatant Status Review Tribunals (CSRTs) were charged with conducting reviews of each detainee's status and making an on-the-record determination of the basis for continued detention. Congress then provided for judicial review, akin to judicial review of administrative action, in the United States Court of Appeal for the District of Columbia Circuit. In each case, the D.C. Circuit was permitted by the Detainee Treatment Act to consider whether continued detention was consistent with the Constitution and laws of the United States. This standard was meant to permit judicial review of the lawfulness of the fact of detention but to eliminate judicial review of some of the more tenuous conditions-of-confinement type claims the detainees had begun to assert.

It is fairly clear to me that these formal procedural rights were not meant to be in addition to the existing habeas litigation but rather were intended to be a substitute for it. Indeed, a review of the congressional debate suggests that a desire to eliminate the floodtide of detainee litigation and to channel it into a more orderly and manageable process was a principal reason the DTA was passed in the wake of *Rasul*. Thus, in section 1005(h) of the DTA, the Congress enacted a provision that I believe most Members understood to mean that the new standards and procedures of the DTA would apply to all suspected terrorists in U.S. custody at Guantanamo,

present or future, and would provide the exclusive judicial remedies for those individuals, whether or not they had already brought habeas corpus proceedings in federal district court. The problem of detainee litigation was thus brought under congressional supervision and control and the interests of the detainees had been balanced, as a matter of policy, against the interests of the United States to produce a fair and moderate mechanism.

The problem returns: *Hamdan v. Rumsfeld*

Unfortunately, the Supreme Court proved resistant to the policy choice made by Congress. In *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), seizing on an arguable ambiguity in the language of section 1005 of the DTA, the Supreme Court strained to preserve its own jurisdiction to hear Hamdan's challenge to President's military commission structure by concluding that the DTA did not apply to any of the actions pending on the date of its enactment, notwithstanding the fact that those actions had provided a major impetus for its enactment. Instead, the Supreme Court held that the DTA would apply only prospectively, so that all of the existing litigation in the federal district courts could continue apace. And it has.

Once again, however, if Congress believes the Supreme Court erred in this aspect of *Hamdan*, it has the opportunity to correct that error. Because the Court's decision rests only on a construction of the DTA itself, rather than any constitutional norm, Congress can restore the system it established in the DTA simply by asserting in clearer language than it did before that the procedures provided in the DTA are exclusive and are intended to apply to all pending actions, as well as those that might be filed in the future. That is exactly what the portions of the pending bill we are discussing this morning would do.

The questions before the Congress now are thus: (1) can Congress overrule this aspect of the *Hamdan* decision without running afoul of constitutional restrictions that were not at issue in *Hamdan*, and (2) should it?

The Suspension Clause

The question whether Congress should overrule *Hamdan* and redirect all detainee habeas challenges to the D.C. Circuit is a question that Congress has answered before, and it is not apparent why Congress would arrive at any different conclusion now. If the intent of Congress in the DTA was to cover pending litigation, then there is no further policy judgment to be made; all Congress needs to do is give effect to its original judgment, which the Supreme Court misinterpreted. But even if that were not Congress's original judgment, at a minimum, Congress has decided as a prospective matter that the DTA procedures represent the correct policy judgment about how much process terrorist suspects detained at Guantanamo ought to receive. There is no obvious reason why that policy judgment would not apply equally to detainees who have already sued as to those who have not. If the DTA procedures are the correct procedures that best balance the competing interests, allowing dozens of cases to proceed on a parallel track under different procedures serves no real purpose and in fact creates very real risks of disparate treatment among similarly situated detainees. In any event, this Committee and the executive branch are in a far better position than I to discuss, weigh, and evaluate the competing policy considerations.

I will therefore devote the balance of my remarks to the principal legal issue affecting consideration of the provision in the proposed legislation that would overrule *Hamdan* and restore the DTA's procedures for judicial review of detainees' challenges to their detentions. This issue centers on the Suspension Clause of the Constitution, U.S. Const. Art. I § 9, cl. 2, and

derives from a concern that the DTA procedures might somehow infringe on constitutional habeas corpus guarantees. Because I can only analyze the law, I have long since given up trying to predict decisions of the Supreme Court in cases that attract an unusual amount of public and international attention, but based on my reading of current law, I believe the risk that the Congress would violate the Suspension Clause by requiring the suspected terrorists at Guantanamo to follow the procedures in the DTA for judicial review of their detentions is exceedingly low. Enacting the habeas corpus and judicial review provisions now contained S. 3930 would, in my judgment, be consistent with the applicable principles of law under the Suspension Clause.

There are three essential reasons why this Committee and the Senate need not fear that the current compromise legislation imperils any constitutional rights of the detainees. First, to the extent the Suspension Clause itself requires any habeas corpus remedy for those in federal custody, the scope of the writ does not cover alien enemies of the United States, captured during an armed conflict, and held abroad. Second, even if it did, the DTA's procedures are a sufficient substitute for the traditional habeas corpus remedy available to those in military custody to satisfy any constitutional requirement. They are in fact considerably more generous than anything we or any other nation in the history of the world has previously afforded to our military adversaries. Finally, even if that were not the case, there is a strong argument that Congress has the power under the Suspension Clause in current circumstances to suspend or otherwise limit the applicability of the writ to alien enemies. I will explain each of these points in turn. First, however, I will provide a brief summary of the procedural mechanisms for judicial review afforded to the Guantanamo detainees by the legislation now under consideration.

Procedures established by the new legislation

There are two provisions in S. 3930 that affect the rights to judicial review of the Guantanamo detainees.

The first is new section 950j(b), which is added to title 10, U.S. Code, as part of the new military commissions code pursuant to section 4 of the bill. This section provides that judicial review of any and all matters "relating to the prosecution, trial, or judgment of a military commission" established by the Act must occur pursuant to the procedures set forth in new Chapter 47A of title 10. That chapter, in turn, provides that, following exhaustion of all appellate remedies within the executive branch, including the Court of Military Commission Review, a detainee may take an appeal to the United States Court of Appeals for the District of Columbia Circuit. That court is empowered to determine "the final validity of any judgment of a military commission." The scope of review is controlled by section 1005(e)(3) of the DTA. That section provides that there is an appeal as of right for any detainee in a capital case or who has received a sentence of 10 years or greater; the Court of Appeals has discretionary jurisdiction over the remainder of the cases. Presumably that discretion will be guided by an assessment of how substantial the legal issues are that the detainee raises in his petition for review. When reviewing a final decision of a military commission, the D.C. Circuit is authorized to consider "whether the final decision was consistent with the standards and procedures" governing the commission trials and "whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States. This standard may well be construed to import some deferential sufficiency-of-the-evidence review, but it appears to exclude any claims based on treaty rights that have not been incorporated into U.S. law or are not mirrored in any U.S. constitutional protections that would apply to the detainees. Following

a decision by the D.C. Circuit, either on the merits or not to review a case, discretionary review by certiorari is thereafter available in the Supreme Court of the United States.

The other relevant provision works in a similar fashion for detainees who have not been charged with war crimes and tried before a military commission but who are instead merely being detained for the duration of the conflict to keep them *hors de combat*. Such detainees have rights of administrative review within the military system of the factual basis for their detention – *i.e.,* the conclusion that they are enemy combatants fighting against the United States on behalf of militant Islamist terrorist elements. These rights include review of their detentions by the Combatant Status Review Tribunals (CSRTs) and then periodic review and revisitation of the enemy combatant determination by Administrative Review Boards (ARBs). The second jurisdictional provision in the bill, which covers these individuals, is contained in section 6 and provides that section 1005(e)(2) of the DTA sets forth the exclusive means for obtaining judicial review of any claim that would challenge "any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien detained by the United States" as an enemy combatant. The provision also makes clear that its terms are to apply "without exception" to all actions of this description pending on the date of enactment. This would encompass all of the existing Guantanamo detainee litigation and would overrule the *Hamdan* decision's holding interpreting the DTA to apply only prospectively.

Section 1005(e)(2), in turn, is quite similar to section 1005(e)(3), providing that the D.C. Circuit has exclusive jurisdiction over detainee appeals from "the final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant." The scope of review embraces claims that the CSRT's status determination was inconsistent with the standards and procedures for CSRT proceedings promulgated by the Secretary of Defense or

that such standards and procedures are inconsistent with the U.S. Constitution or laws. This portion of the DTA specifically provides that the D.C. Circuit may review the sufficiency of the evidence to ensure that a preponderance of the evidence supports detention, but it, too, appears to exclude any claim based solely on treaty law. Once again, the Supreme Court would retain its ordinary certiorari jurisdiction.

In considering whether there is anything constitutionally problematic about this system, there are two critical overall questions about the Suspension Clause. First, what constitutional right, if any, does it create to habeas corpus for foreign enemies held abroad by our military and intelligence agencies during wartime? Second, assuming such rights exist, what would amount to a suspension?

Before turning to those questions, however, it is critical to recognize as Congress consider this legislation that, if there is a constitutional problem with the DTA procedures, it is already the law. Because these procedures already apply under the DTA to cases initiated after the DTA, any constitutional infirmity would already exist. Applying the existing procedures to the cases pending before the DTA would not alter the constitutional calculus in any significant way, apart from applying it to more cases. Thus, the decision whether to shrink from this system for constitutional reasons has already been made. That bridge has been crossed. Failing to apply the DTA retroactively would only serve to create a confusing and burdensome disuniformity in the access rights of the detainees. But, as I will now explain, I do not believe that the DTA procedures encroach on any core constitutional habeas corpus right arising under the Suspension Clause.

The scope of the writ

The first task in considering whether the Suspension Clause is violated by the new procedures is to understand the scope of the writ. Unless individuals in the detainees' position, *i.e.,* foreign enemy combatants held abroad in wartime, have a constitutional right to habeas corpus, then the Suspension Clause is simply not implicated, because there is nothing to suspend as to them. In fact, the best reading of current law is that enemy combatants held abroad enjoy no such constitutional habeas corpus rights, and extending habeas corpus privileges to the suspected terrorists at Guantanamo is pure policy choice for the Congress. At least that is so as to detainees whom the United States does not seek to punish through a trial. Although the question whether the Constitution requires judicial review, at least in the minimal form of a petition for a writ of habeas corpus or certiorari to the United States Supreme Court, is a closer one, nothing in the Constitution itself, including the Suspension Clause, confers rights of access to our courts for alien enemy combatants being held in the ordinary course of an armed conflict.

Indeed, there is a respectable argument, based on the original understanding of the Suspension Clause, that the Constitution itself creates no habeas corpus right at all for prisoners of any type in federal custody and that all such rights are entirely a creature of the Congress. No less a critic of the Administration than Professor Erwin Chemerinsky has explained that, "[a]lthough the Constitution prohibits Congress from suspending the writ of habeas corpus except during times of rebellion or invasion, this provision was probably meant to keep Congress from suspending the writ and preventing *state* courts from releasing individuals who were wrongfully imprisoned. The constitutional provision does not create a right to habeas corpus; rather, federal statutes [do so]." E. Chemerinsky, *Federal Jurisdiction* 679 (1989) (emphasis in original); *see also id.* at 683 ("the Constitutional Convention prevented Congress from

obstructing the state courts' ability to grant the writ, but did not try to create a federal constitutional right to habeas corpus"); W. Duker, *A Constitutional History of Habeas Corpus* 135-136 (1980). After all, if the Suspension Clause itself were an affirmative grant of procedural rights to those held in federal custody, there would have been little need for the first Congress to enact, as it did, habeas corpus protections in the Judiciary Act of 1789. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

Creation of a constitutional right to habeas corpus had been proposed at the Constitutional Convention but was rejected. The compromise proposal adopted by the Convention and ratified in the Constitution was the current Suspension Clause, which is clearly phrased as a prohibition, rather than as a grant of power or rights. The main fear animating the Framers was based upon their own experience during colonial times, in which Parliament frequently prohibited the courts of the colonies from granting the writ. They thus sought to ensure that the national government would not, without good cause, bar the courts of general jurisdiction in the several states from issuing writs of habeas corpus. But the powers of the federal courts to issue habeas writs was to be derived wholly from congressional legislation. *See Lonchar v. Thomas*, 517 U.S. 314, 323 (1996) (judgments about the proper scope of the writ are "normally for Congress to make"); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (confirming that the jurisdiction of federal court to issue writs of habeas corpus is not inherent and that "the power to award the writ by any of the Courts of the United States must be given by written law"). Recent decisions, including *Rasul* itself, sometimes appear to assume that the Constitution creates some limited right to federal habeas corpus and thus provide reason to question whether the modern Supreme Court would adhere to this originalist view of the Suspension Clause, but it is nonetheless worth noting that there is a respectable body of thought

that regards the Suspension Clause as creating no federal constitutional right to habeas corpus at all and leaving the scope of the federal habeas remedy entirely to the Congress. On this view, of course, there could be nothing wrong at all with the procedures for judicial review of foreign terrorist detentions erected in the DTA.

Even if the Suspension Clause were, however, construed to create some constitutionally-guaranteed minimum habeas right, there is every reason to believe that the core habeas remedy would not include a right of access to our courts for alien enemy combatants held abroad by our military in wartime. It is important not to confuse statutory habeas rights, which can be altered, amended, or limited by the Congress that created them, and the constitutional minimum which Congress would be prohibited from altering. *Rasul* dealt only with the former, as the decision itself makes clear. *See Rasul*, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").[1] As to the latter, there is a clear holding of the United States Supreme Court, which has never been questioned or undermined, and has indeed been repeatedly and recently reaffirmed, that aliens held in military custody outside our shores are not protected by the rights granted "we the people" under the Constitution.

In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court held that the Suspension Clause does not give aliens held abroad any constitutional right to habeas corpus relief. The same case made clear that aliens held abroad also enjoy no Fifth Amendment protections. *See id.* at 784-85 ("extraterritorial application of organic law" to aliens would be

[1] *Rasul* held only that the predicate for the statutory holding in *Eisentrager* had been overruled *sub silentio* in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973). It based its ruling on an interpretation of the term "within their respective jurisdiction" in 28 U.S.C. § 2241, and it expressly distinguished between the statutory holdings and constitutional holdings in *Eisentrager*, limiting its ruling only to the statutory holding.

inconceivable). The notion that constitutional rights do not attach to aliens outside our country was reaffirmed in recent years in cases such as *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), and *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001). Only when an alien comes within our territory or establishes some sort of meaningful connection to the United States do the protections of our constitution begin to attach. Needless to say, planning to kill our civilians in mass terror attacks generally does not qualify as a meaningful connection for constitutional purposes. As Justice Jackson noted in *Eisentrager*, "it seems not then to have been supposed that a nation's obligations to its foes could ever be put on a parity with those to its defenders." *Eisentrager*, 339 U.S. at 775.

Eisentrager's holding regarding the reach of habeas corpus rights accords with a common sense interpretation of the language of the Suspension Clause. That clause states that, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I sec. 9, cl. 2. The two instances in which suspension is permitted under the clause – rebellion and invasion – both contemplate a physical threat to public safety *inside* the United States. The focus of the clause is domestic. If the writ is to be suspended, the Framers appear to contemplate that it would be suspended as to individuals found inside the United States. The notion that the writ spans the globe does not sit comfortably with the words of the Suspension Clause itself.

Moreover, *Rasul* itself indirectly supports the notion that habeas corpus rights for alien enemy combatants held on foreign soil are not part of any constitutional habeas right. *Rasul* expressly recognized *Eisentrager*'s statutory holding that habeas corpus rights did not extend to aliens held abroad and distinguished it from *Eisentrager*'s constitutional holding. The *Rasul* majority held that *Eisentrager*'s statutory holding was fatally undermined by the claimed

overruling of *Ahrens v. Clark*, 335 U.S. 188 (1948), in 1973 in *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973), *see Rasul*, 542 U.S. 466, 476-79 (2004), and the *Rasul* dissenters (rightly in my view) held that this statutory ruling had not been overruled until the decision in *Rasul* itself. *Rasul*, 542 U.S. 466, 476-79 (2004). The Court thus did not question that those rulings were correct until recently. It also did not question *Eisentrager*'s holding that the Constitution did not afford habeas rights to enemy aliens abroad. If there were a constitutional right to habeas corpus relief for alien enemies held abroad, the implication would thus be that it sprang into existence some time after 1973, if not just two years ago in 2004, and received no mention in *Rasul*. No matter how robust a concept of the "living Constitution" one embraces, this sort of Miracle-Gro Constitution cannot fit within it.

In the specific context of alien enemy combatants, the *Eisentrager* Court explained that, if the Constitution conferred rights on foreign enemy combatants, "enemy elements . . . could require the American Judiciary to assure them freedoms of speech, press, and assembly as in the First Amendment, the right to bear arms as in the Second, security against 'unreasonable searches and seizures' as in the Fourth, as well as rights to jury trial as in the Fifth and Sixth Amendments." *Eisentrager*, 339 U.S. at 784. If the Constitution were meant to extend its protections to foreign enemies – which would have been a truly radical concept at the time of adoption when the U.S. was threatened constantly with external invasion, and national survival and providing for the common defense was a central object of government and the Constitution that created it – "it could scarcely have failed to excite contemporary comment," yet, the Court observed, "[n]ot one word can be cited," and "[n]o decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it." *Id.*

And no wonder. The Constitution was designed to restrain the power of our government as regards our own citizens or those under our country's protection. But it had the opposite purpose with respect to our nation's enemies. As to our military adversaries, the Constitution was meant to empower, not restrain, our government. With the experience of the Revolution in mind, where structural weaknesses in government had near-fatal consequences, the Framers of the Constitution sought to ensure that the new nation could effectively protect itself against external enemies and thus fulfill one of the Constitution's great purposes, stated in the preamble: "to provide for the common defence."

A constitutional requirement, deriving from the Suspension Clause, that alien enemies abroad would under all circumstances have recourse to our courts to challenge their detentions would have been entirely inconsistent with this great goal, which remains as important today as it was then. As Justice Jackson observed in *Eisentrager*, furnishing habeas corpus rights to enemy combatants abroad "would hamper the war effort and bring aid and comfort to the enemy. [Habeas corpus proceedings] would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." *Eisentrager*, 339 U.S. at 779. The wisdom of the Supreme Court's pronouncement in 1950 has been amply borne out by our experience with the Guantanamo litigation, and the old common sense and practical appreciation for the imperatives of wartime that informed it seem increasingly difficult to come by.

From a practical perspective, if the Constitution mandated habeas corpus for alien enemies held abroad, what would stop the thousands of insurgents being held in Iraq and Afghanistan from suing? And if some latent guarantee of habeas corpus lurking in the Suspension Clause could apply to alien enemies abroad, then why not other fundamental constitutional guarantees, such as Due Process? If the Due Process Clause applied to aliens in foreign countries, then why would there not be a violation of those aliens' constitutional rights every time a bomb was dropped in error? Why would not every innocent person injured, killed, or deprived of property in military operations be able to sue the United States? After all, there is no such concept as "collateral damage" when it comes to those whom our Constitution protects.

Put simply, the conduct of warfare against foreign enemies would impossible if our Constitution protected them as it does us. The values of civilization and human rights are not served by affording rights under the U.S. Constitution to our enemies; those values are served by vigorously and effectively defending our society and our liberties against those who would destroy both. As the Supreme Court recently observed, accepting the claim that aliens abroad enjoy federal constitutional protections "would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries." *Verdugo-Urquidez*, 494 U.S. at 273.

If there is a habeas corpus right at the constitutional core of the Suspension Clause, it almost certainly does not extend so far as to cover foreign fighters captured and held abroad by our military and intelligence services. Indeed, the Supreme Court has already so held. No principle of law or justice requires a contrary conclusion. Although the Congress may, in its exercise of policy judgment, and sensitive to the role that public and international perception play in the effectiveness of our war effort, elect to afford statutory judicial review rights to

enemy combatants held at Guantanamo or elsewhere, it would be a grave mistake to conclude that the Constitution compels the Congress to do so. The Constitution permits Congress to experiment in this area with the measures that best serve our policy objectives and further our national security. It does not shackle the political branches of government in meeting foreign threats by requiring rights of judicial review in wartime that not only were completely unknown at the time of the founding but remain so in most of the rest of the world even today.

Suspension of the writ?

Even if the Suspension Clause applied to foreign enemy combatants held abroad, it is highly unlikely that the procedural protections in the DTA would be held to violate that clause. Put simply, the DTA regime respects whatever constitutional habeas corpus rights a foreign fighter could be thought to have. It provides for meaningful judicial review of the legality of the Guantanamo detentions. The writ is not suspended by the DTA; if anything, it is extended.

The office of the Great Writ is to test the legality of detention through judicial review; it is not an all-purpose vehicle to redress any conceivable legal wrong. It is a flexible and supple remedy that has been repeatedly adjusted and changed through both judicial decisions and Acts of Congress. *See, e.g., Felker v. Turpin*, 518 U.S. 651, 664 (1996) (significant habeas restrictions even as to prisoners in civilian custody inside the United States do not effect an unconstitutional suspension, recognizing that "evolutionary process" of adjustments to the scope of the writ do not generally amount to suspensions). And neither remedial labels nor the precise courts exercising jurisdiction matter: as long as there is some court available to decide whether a detention comports with the Constitution and laws of the United States, the writ has been preserved, not suspended.

Thus, the Supreme Court has stated that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381 (1977). And it has specifically noted that "Congress could, without raising any constitutional questions, provide an adequate substitute through the courts of appeals." *INS v. St. Cyr*, 533 U.S. 289, 314 & n.38 (2001).

That is precisely what Congress has done in section 1005 of the DTA, which the pending bill would apply to all existing Guantanamo detainee litigation. The DTA procedures provide for a federal court of appeals to review the executive branch determinations that the suspected terrorists at Guantanamo are enemy combatants subject to detention under the laws of armed conflict. The court is specifically empowered to ensure that the applicable administrative procedures and standards for combatant status review have been followed and that those procedures and standards comport with federal constitutional and statutory norms. The court is also directed to ensure that the executive determinations are supported by a preponderance of the evidence. Although this review does not track in every particular the specific contours of the statutory habeas right, it does not need to. This is robust, meaningful review of the legality of detention, and it is difficult to see how it could be so "inadequate" or "ineffective" as to constitute a suspension of any core habeas right secured by the Constitution to our military foes.

To be sure, the DTA review in the D.C. Circuit does not entail de novo evidentiary hearings or judicial factfinding. But neither do many habeas corpus proceedings in federal district court. In the ordinary habeas context, even as applied to U.S. citizens convicted of crime in a state court, review of factual sufficiency is highly deferential. *Jackson v. Virginia*, 443 U.S. 307, 320-24 (1979). Indeed, the traditional rule on habeas corpus review of non-

criminal executive detentions was that "the courts did generally did not review the factual determinations made by the executive." *St. Cyr*, 533 U.S. at 27. Most petitions for collateral relief by federal prisoners under 28 U.S.C. § 2255 are resolved without any form of evidentiary hearing. And in the context of military detentions and trials, the established rules currently recognized by the Supreme Court are even more limited, providing for judicial review of legal issues and commission jurisdiction but no review at all of factual questions of guilt or innocence. *See, e.g., Ex parte Quirin*, 317 U.S. 1, 25 (1942); *Yamashita v. Styer*, 327 U.S. 1 (1946). The kind of quasi-administrative record review provided for by the DTA has ample precedent in contexts as diverse as habeas corpus review of selective service and immigration decisions. *See, e.g., St. Cyr*, 533 U.S. at 305-06; *Cox v. United States*, 332 U.S. 442, 448-49 (1947); *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 312 (1946). In those contexts, significant deprivations of liberty have been reviewed and upheld on habeas corpus review as long as there is some reasonable quantum of evidence to support an otherwise lawful executive decision. The Supreme Court has never implied that this form of habeas corpus review amounts to a suspension of the writ. Nor do I believe it would do so here.

The suggestion that the Constitution gives suspected foreign terrorists held at Guantanamo extensive rights to searching factual review in district court also cannot be reconciled with *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which addressed the extent of the due process to which an *American citizen* detained militarily in the current war was entitled. The Court concluded that even U.S. citizens are only entitled to notice and a meaningful opportunity to contest the factual basis for their detentions before a neutral decisionmaker. *See id.* at 533

(plurality opinion).[2] The *Hamdi* court noted that "the exigencies of the circumstances may demand that, aside from these core elements, enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." *Id.* at 533. In that regard, the Court noted that such procedural innovations as the use of hearsay or the erection of a presumption in favor of the government's evidence would not offend the Constitution. *See id.* at 533-34. Significantly, Justice O'Connor specifically noted that "an appropriately authorized and properly constituted military tribunal" might permissibly serve the adjudicative function contemplated and make enemy combatant determinations – again, even as to United States citizens who might be detained. *Id.* at 538 (plurality opinion). That is precisely what the CSRTs do, and the provision of meaningful judicial review of the CSRTs' determinations are a further guarantee of legality and regularity. In my judgment, it is unlikely that the courts would conclude the Congress is constitutionally required to provide more.

Power to suspend the writ as to alien enemy combatants following the 9/11 attacks

In any event, the debate over whether the pending bill, and the DTA standards it incorporates, would effect a suspension of the writ may be somewhat academic. That is because Congress is expressly permitted to suspend the writ in certain circumstances. Not every suspension of the writ is unlawful. On the contrary, the Suspension Clause specifically recognizes that Congress is *permitted* to suspend the writ when in cases of rebellion or invasion the public safety may require its curtailment. Even if it were the case that the Suspension Clause vests alien enemy combatants held abroad with constitutional habeas rights that would be

[2] The procedural holdings of the plurality in *Hamdi* represent the law of the land, as Justice Thomas dissented on a ground that would give the government *greater* latitude to detain enemy combatants and therefore would necessarily constitute a fifth vote for the constitutionality of the more protective procedures ordained by the plurality.

infringed by the DTA procedures, there would be a strong argument that such infringements would not exceed Congress's powers or themselves violate the Constitution.

The attacks on September 11 constituted a literal invasion of this country by a ruthless enemy. Our financial center was attacked; the headquarters of our military was attacked; and an attempt was made to attack the seat of our government. All of this was accomplished by enemy combatants who entered our territory surreptitiously and planned and executed their attacks from our soil. The horrific loss of innocent life resulting from those attacks amply demonstrates the danger to public safety presented by al Qaeda's invasion. It would seem reasonable that, at least if Congress made the necessary findings, its power under the Suspension Clause to limit application of the writ would be triggered. And the pending bill enacts such a narrowly tailored limitation of the relevant procedural rights and remedies – applying only to suspected foreign enemy combatants held outside the United States and affording even such persons a meaningful opportunity to contest their detentions – that it seems unlikely a court would conclude that Congress had exceeded or abused that power.

Moreover, it may not even be necessary to conclude that the 9/11 attacks constituted an "invasion" in order for Congress to be vested with its suspension power. Only a slightly less strict construction of the Suspension Clause, which interpreted it in a manner consistent with its evident purposes, would suggest that Congress has the power to suspend the writ when an external threat genuinely imperils public safety within the United States. Again, under this view, at least with appropriate findings and narrow tailoring of the limitations on judicial review, Congress's approach in the pending legislation should be within its power.

* * * *

All freedom-loving people cherish the Great Writ. But we debase that writ, rather than honor it, if we extend it into realms where neither history nor tradition support its use. The writ of habeas corpus is undermined, not strengthened, when it is used to afford new procedural rights to captured enemy fighters who would, if we allow them to, jettison the Magna Carta and everything that came after it in favor of the Koran. Our enemies have nothing but contempt for Anglo-American civil liberties. It is up to the Congress to decide as a matter of policy how many of those liberties we wish to extend to those enemies; the Constitution itself does not protect them, at least when they are detained abroad in the ordinary course of military operations. Certainly nothing in the Suspension Clause requires Congress to afford alien military detainees access to our domestic courts.

In closing, I wish to thank the Committee for the opportunity to address this important issue. The Committee's concern with preserving and protecting the writ of habeas corpus is laudable. I hope I have been able to clarify that the decision how to do so in this context rests with the Congress as a policy matter and is almost certainly unconstrained by the Suspension Clause. I would be glad to answer any questions the Committee may have.

DOJ BRIEF (Al Odah)

"prudent and incremental" (id.), and specifically disapproved the "quite extensive discovery" (id. at 2646) that the district court had ordered.

2. The CSRTs would easily satisfy the due process requirements that the Hamdi plurality said would be constitutionally sufficient for American citizens held in this country. They afford notice: the recorder of a tribunal "shall provide the detainee in advance of the proceedings with notice of the unclassified factual basis for the detainees' designation as an enemy combatant." JA 1188. They afford a fair opportunity to rebut the Government's case: the detainee has a "right to testify or otherwise address the Tribunal in oral or written form, and to introduce relevant documentary evidence," JA 1189; and the detainee "shall be allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," JA 1188; the detainee "shall be allowed to attend all proceedings," except as to "matters that would compromise national security if held in the presence of the detainee," ibid. Finally, they afford a neutral decisionmaker: each CSRT is composed of three military officers, "none of whom was involved in the apprehension, detention, interrogation, or previous determination of status of the detainee." JA 1187-88.

The CSRT procedures used to adjudicate enemy combatant status are based on and closely track the procedures used to adjudicate prisoner-of-war status under

Article 5 of the Geneva Convention, as set forth in Army Regulation 190-8, which was cited with approval by the plurality in Hamdi. For example, the CSRT and Army Regulation 190-8 procedures have the following features in common, among others:

- Tribunals are composed of three commissioned officers plus a non-voting officer who serves as recorder;[1]
- Tribunal members are sworn to faithfully and impartially execute their duties;[2]
- The detainee has the right to attend the open portions of the proceedings;[3]
- An interpreter is provided if necessary;[4]
- The detainee has the right to (a) call witnesses if reasonably available, (b) question witnesses called by the tribunal, and (c) testify or otherwise address the tribunal;[5]

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[1] Compare JA 1187 and JA 1194-95 with JA 1226.

[2] Compare JA 1188 and JA 1200 with JA 1226.

[3] Compare JA 1188 and JA 1197 with JA 1227.

[4] Compare JA 1188 and JA 1197 with JA 1227.

[5] Compare JA 1188-89 and JA 1197 with JA 1227.

- The detainee may not be forced to testify;[6]
- The tribunals make decisions by majority vote;[7]
- The decision is made based on a preponderance of the evidence;[8]
- The tribunals create a written report of their decision;[9] and
- The tribunal record is reviewed by the Staff Judge Advocate for legal sufficiency.[10]

In several respects, the CSRTs provide even greater procedural protections than those required by Article 5 Tribunals. For example:

- The CSRTs contain express qualifications to ensure the tribunal's independence. See JA 1187-88. There are no comparable qualifications for Article 5 Tribunals.
- The CSRTs provide the detainee a personal representative to assist him in preparing his case. See JA 1187, 1195. There is no such requirement in Article 5 Tribunals.

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[6] Compare JA 1189 and JA 1197 with JA 1227.

[7] Compare JA 1189 and JA 1200 with JA 1227.

[8] Compare JA 1189 and JA 1199 with JA 1227.

[9] Compare JA 1201 with JA 1227.

[10] Compare JA 1189 and JA 1195, 1202 with JA 1227.

- In CSRTs, the Recorder is obligated to search government files for, and provide to the Tribunal, any "evidence to suggest that the detainee should not be designated as an enemy combatant." See JA 1203. There is no such requirement in Article 5 Tribunals.
- In CSRTs, the detainee is provided with an unclassified summary of the evidence supporting his detention in advance of the hearing. See JA 1188, 1197, 1200. There is no such requirement in Article 5 Tribunals.
- CSRTs allow the detainee to introduce relevant documentary evidence. See JA 1189, 1197. Article 5 Tribunals provide no analogous guarantee.
- Every CSRT decision is automatically reviewed by a higher authority, who may return the record to the tribunal for further proceedings. See JA 1189, 1202. There is no counterpart provision for Article 5 Tribunals.

Under the standards set forth in the plurality opinion in Hamdi, these procedural protections would be more than sufficient to adjudicate even whether an American citizen in this country may be held as an enemy combatant.

STATEMENT OF BRUCE FEIN

BEFORE THE SENATE JUDICIARY COMMITTTEE

RE: HABEAS CORUPUS FOR ALLEGED ENEMY COMBATANTS

SEPTEMBER 25, 2006

Mr. Chairman and Members of the Committee:

I oppose suspending or crippling the writ of habeas corpus for alleged enemy combatants. Not a crumb of evidence has been adduced suggesting that the writ would risk freeing terrorists to return to fight against the United States. On the other hand, volumes of evidence demonstrate a non-trivial risk that suspending the writ risks illegal lifetime detentions. No civilized nation has an interest in detaining any person—citizen or alien—in violation of law. If the law is deficient, it should be changed. But due process should not be crucified on a cross of political expediency.

The history of liberty is the history of procedural protections.

English Kings were notorious for "disappearing" subjects in dungeons. The Great Writ of habeas corpus answered that abuse by enabling detainees to challenge the factual and legal foundations for their detentions before impartial judges. The Writ enjoys a hallowed history. It was initially mentioned in the Magna Charta of 1215. It was enshrined in the Constitution by the Founding Fathers. It is not dependent on any act of Congress. The Writ may be suspended only by an express act of Congress "when in cases of rebellion or invasion the public safety may require it." (It cannot be seriously maintained that Al Qaeda has "invaded" the United States or has disabled the civil courts from functioning).

Habeas corpus is not a "get out of jail" free card. The petitioner is saddled with the burden of demonstrating a factual or legal deficiency in the executive's justification for detention. The burden is formidable. State and federal prisoners file thousands of habeas petitions annually, but only a tiny percentage result in release, typically in cases of actual innocence proved by DNA testing or otherwise. Federal judges are neither dupes

nor guileless. They readily see through concocted tales, for example, an enemy combatant's claim that he was on the battlefield to deliver first aid or as a tourist guide. Judges are as much repulsed by terrorists as are legislators or executive officials.

To be sure, habeas petitions filed by alleged enemy combatants are more likely to implicate classified or top secret information than typical prisoner petitions. But federal courts for decades have successfully managed criminal and civil cases involving such sensitive information under the Classified Information Procedure Act or otherwise. The pending indictment against "Scooter" Libby is illustrative. Indeed, then Assistant Attorney General for the Criminal Division, Michael Chertoff, in testifying about President Bush's executive order creating military tribunals in the aftermath of 9/11, lavished praise on federal courts for their adeptness in presiding over terrorism cases without compromising national security.

In sum, neither experience nor intuition nor logic suggests that habeas corpus for alleged enemy combatants would endanger the public safety. Indeed, the reason for curtailing the Great Writ as elaborated by Senator Lindsey Graham is to relieve federal courts from hearing frivolous claims, not to avoid freeing enemy combatants. And even the argument about frivolity is unconvincing. Frivolous claims filed by state or federal prisoners are routinely dismissed without a hearing.

To preserve the Great Writ for enemy combatants is not to exalt form over substance. Enemy combatants may be erroneously detained for at least three reasons. Ethnic, tribal, political, or religious adversaries may have supplied the United States military with false information. Further, terrorists routinely operate amidst civilian populations. That loathsome tactic creates a non-trivial risk that American soldiers in the

heat of battle may mistake an innocent civilian for an Al Qaeda member or supporter. Finally, the executive may exaggerate incriminating evidence and ignore the exculpatory for political effect. The greater the number of enemy combatants detained, the greater the public appearance that the fight against international terrorism is succeeding. In politics, optics is everything. That seems to be the explanation for the misidentification of Canadian Maher Arar as a terrorist and his deportation by the United States to Syria, where he was tortured.

Jose Padilla similarly was initially detained by President Bush as an enemy combatant. But that designation has been dropped in favor of a criminal prosecution for allegedly providing material support to a listed terrorist organization. If Padilla is convicted, habeas corpus will be available to challenge the legality of his verdict or sentence.

The Defense Department has released scores of detainees after internal reviews discredited the belief that they were enemy combatants. Former Guantanamo commander General Jay Hood and deputy commander General Martin Lucenti have been quoted as agreeing that "a large number" of Guantanmo Bay detainees "shouldn't be there…and have no meaningful connection to al Qaeda or the Taliban."

President Bush and Members of Congress might contend, nevertheless, that a vote against enemy combatants by crippling habeas corpus would be popular. Few voters care about mistreatment or misapprehension of aliens who subscribe to Islam. A corresponding sentiment carried the day when President Franklin Roosevelt and a Democrat Congress voted to intern 120,000 Japanese Americans in World War II to

appease racial bigotry. Congress later apologized in the 1988 Civil Liberties Act and made monetary amends.

Does this Congress wish to ape the French Bourbon royalty, who forgot nothing and learned nothing, by cynically suspending the Great Writ for political advantage in November? The rule of law is at its zenith when it refuses to bend even for the most reviled.

I have attached a Commentary article I recently authored for The Washington Times that amplifies on my prepared statement. I would also urge the Committee to consider bills addressing the National Security Agency's warrantless surveillance program separate from habeas corpus because they raise distinct issues. A Senator may favor one but oppose the other, just as a Senator might support the war in Afghanistan, but voice reservations over the war in Iraq. Separate votes will best reflect the sentiments of the Senate as a whole on each discrete issue.

Cripple the Great Writ?

By Bruce Fein
September 19, 2006

Fear distorts judgment. President Bush is trying to frighten Congress into crippling the Great Writ of habeas corpus, the best shield ever invented against arbitrary executive detentions.

The president's proposed Military Commissions Act of 2006 (MCA) -- even as amended by Republican Sens. John McCain, John Warner and Lindsey Graham -- would deny the Great Writ to alleged illegal combatants detained indefinitely in U.S.-controlled facilities. Not a crumb of evidence has been adduced showing the public safety requires the measure. Congress should balk.

Habeas corpus is the legal procedure for detainees to challenge the factual and legal foundations of their detentions before an independent and impartial federal court. The Great Writ emerged not from academic theorizing but from a history of executive abuses. In England, kings were notorious for "disappearing" subjects into dungeons. Habeas corpus made an initial appearance in the Magna Carta of 1215. It was available during America's entire Colonial experience, and was enshrined in the Constitution. Article I, section 9, clause 2 declares: "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The Founding Fathers understood human nature does not change and unchecked executive power risks wrongful or oppressive detentions. Guided by those insights, Congress has suspended the writ on but four occasions, and for limited times and in places of active combat. It has kept the suspension threshold high.

President Bush's MCA, in contrast, would lacerate the Great Writ without a finding of either an international terrorist invasion or a public safety need. An alleged illegal combatant would be stripped of his customary habeas corpus right to challenge the lawfulness of his treatment, for example, torture, or his indefinite detention at Guantanamo Bay.

An illegal combatant would be loosely defined as any person affiliated with or supporting an international terrorist organization engaged in hostilities against the United States in violation of the law of war. In Hamdi v. Rumsfeld (2004), the Supreme Court held constitutional due process entitles illegal combatants to a fair opportunity to dispute their designations before an impartial tribunal. Concurrently, in Rasul v. Bush (2004), the Court sustained the right of illegal combatants at Guantanamo Bay to challenge the legality of their detentions in habeas corpus proceedings.

Clipping the Great Writ might be justified if its post-September 11 invocation was creating legal havoc or threatened release of genuine enemies to return to fight against the United States. The life of the law should be experience, not theory. But neither the president nor Congress has proffered any evidence habeas corpus would enable illegal combatants to fool federal judges into thinking they were hospital workers or lost tourists on the battlefield. Sen. Lindsey Graham, South Carolina Republican, in defending the Great Writ's curtailment, bemoaned the alleged undue burden on federal courts and the

frivolity of many legal claims, not the risk that cock-and-bull stories would be believed.

It is worth underscoring that habeas corpus is not a "get out of jail free" card, but simply an opportunity for the adjudication of legal claims by federal judges who are repulsed by terrorists every bit as much as are executive officials or legislators. Zacarias Moussaoui was tried and sentenced in a federal court without endangering the national security. There is no reason to believe the case would be different for illegal combatants challenging their detentions or treatment.

The MCA would be less troublesome if President Bush's designations of illegal combatants were infallible. Jane Mayer in the July 3 New Yorker, however, reported that in August 2002 a confidential CIA dispatch to Washington concluded most Guantanamo Bay detainees "didn't belong there."

Former Guantanamo commander Gen. Jay Hood, deputy commander Gen. Martin Lucenti and interrogators have also publicly agreed "a large number" of Guantanamo detainees "shouldn't be there ... and have no meaningful connection to al Qaeda or the Taliban." Jose Padilla was initially detained as an illegal combatant, but that designation has been dropped in favor of a criminal prosecution. The Defense Department has released scores of illegal combatants after internal reviews demonstrated the initial designations were erroneous.

Habeas corpus for illegal combatants is thus not a superfluous affirmation of indefinite detentions already known to be reliable, but a necessity to avoid wrongful deprivations of liberty. Congress should reject its proposed diminishment in the MCA. The difference between civilization and barbarism is the difference between caring that justice is done and indifference to injustice. Al Qaeda should not carry us back to the Stone Age.

Bruce Fein is a constitutional lawyer and international consultant with Bruce Fein & Associates and the Lichfield Group.

ARNOLD & PORTER LLP

September 25, 2006

To United States Senators and Members of Congress

Dear Madams/Sirs:

This letter is written in the name of the former members of the diplomatic service of the United States listed below.

We urge that the Congress, as it considers the pending detainee legislation, not eliminate the jurisdiction of the courts to entertain habeas corpus petitions filed on behalf of those detainees.

There is no more central principle of democracy than that an officer of the executive branch of government may restrain no one except at sufferance of the judiciary. The one branch is vital to insure the legitimacy of the actions of the other. Habeas corpus is the "Great Writ." It is by habeas corpus that a person – any person – can insure that the legality of his or her restraint is confirmed by a court independent of the branch responsible for the restraint. Elimination of judicial review by this route would undermine the foundations of our democratic system.

We are told that the central purpose of our engagement in that "vast external realm" today is the promotion of democracy for others. All nations, we urge, should embrace the principles and practices of freedom and governance that we have embraced. But to eliminate habeas corpus in the United States as an avenue of relief for the citizens of other countries who have fallen into our hands cannot but make a mockery of this pretension in the eyes of the rest of the world. The perception of hypocrisy on our part – a sense that we demand of others a behavioral ethic we ourselves may advocate but fail to observe – is an acid which can overwhelm our diplomacy, no matter how well intended and generous. Pretensions are one thing; behavior another, and quite the more powerful message. To proclaim democratic government to the rest of the world as the supreme form of government at the very moment we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interests in the larger world.

This is the first and primary reason for rejecting the proposal. But the second is almost as important, and that is its potential for a reciprocal effect. Pragmatic considerations, in short, are in this instance at one with considerations of principle. Judicial relief from arbitrary detention should be preserved here else our personnel serving abroad will suffer the consequences. To deny habeas corpus to our detainees can be seen as prescription for how the captured members of our own military, diplomatic and NGO personnel stationed abroad may be treated.

As former officials in the diplomatic service of our nation, this consideration weighs particularly heavily for us. The United States now has a vast army of young Foreign Service officers abroad. Many are in acute and immediate danger. Over a hundred, for example, are serving in Afghanistan. Foreign service in a high-risk post is voluntary. These officers are there willingly. The Congress has every duty to insure their protection, and to avoid anything which will be taken as justification, even by the most disturbed minds, that arbitrary arrest is the acceptable norm of the day in the relations between nations, and that judicial inquiry is an antique, trivial and dispensable luxury.

We urge that the proposal to curtail the reach of the Great Writ be rejected.

Respectfully submitted,

William D. Rogers, former Under Secretary of State

Ambassador J. Brian Atwood
Ambassador Harry Barnes
Ambassador Richard E. Benedick
Ambassador A Peter Burleigh
Ambassador Herman J. Cohen
Ambassador Edwin G. Corr
Ambassador John Gunther Dean
Ambassador Theodore L. Eliot, Jr.
Ambassador Chas W. Freeman, Jr.
Ambassador Robert S. Gelbard
Ambassador Lincoln Gordon
Ambassador William C. Harrop
Ambassador Ulric Haynes, Jr.
Ambassador Robert E. Hunter
Ambassador L. Craig Johnstone
Ambassador Robert V. Keeley
Ambassador Bruce P. Laingen
Anthony Lake, former National Security Advisor
Ambassador Princeton N. Lyman
Ambassador Donald McHenry
Ambassador George Moore
Ambassador George Moose
Ambassador Thomas M. T. Niles
Ambassador Robert Oakley
Ambassador Robert H. Pelletreau
Ambassador Pete Peterson
Ambassador Thomas R. Pickering
Ambassador Anthony Quainton
Helmut Sonnenfeldt, former Counselor of the Department of State
Ambassador Roscoe S. Suddarth
Ambassador Phillips Talbot
Ambassador William Vanden Heuvel
Ambassador Alexander F. Watson

Written Testimony of

Jonathan Hafetz

before the

U.S. Senate Committee on the Judiciary

September 25, 2006

Dear Senator Specter, Senator Leahy, and Members of the Committee:

Thank you for the opportunity to submit this statement in connection with today's hearing. ("Examining Proposals to Limit Guantánamo Detainees Access to Habeas Corpus Review."). My comments focus on the historical foundations of habeas corpus that are relevant to the Committee's consideration of the proposed legislation, S. 3930. As the United States Supreme Court has repeatedly made clear, the Constitution, at a minimum, protects the writ of habeas corpus as it existed in 1789.[1] Eliminating habeas corpus for prisoners held at Guantánamo Bay would be inconsistent with centuries of tradition and would fall below the review required by the Constitution.

I am currently Counsel at the Brennan Center for Justice at New York University School of Law. The Brennan Center is a nonpartisan institution dedicated to safeguarding access to justice and the rule of law through scholarship, public education, and legal action. One of the Brennan Center's primary goals is to ensure accountability, transparency, and checks and balances in the formulation and implementation of national security policy.

[1] *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 301 (2001).

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During the past decade, I have focused extensively on the history of habeas corpus. My scholarly articles and *amicus curiae* briefs on habeas have been cited by the Supreme Court and federal courts of appeals. I hold a J.D. from Yale Law School and a Masters Degree in History from Oxford University.

My comments are organized as follows. *First*, I describe the historical roots of habeas corpus as a check against unlawful executive detention and how those protections are guaranteed under the Constitution and laws of the United States. *Second*, I explain the writ's broad territorial scope and guarantee of a searching examination of the factual and legal basis for a prisoner's detention. *Third*, I show that habeas corpus secures another fundamental requirement of the common law and due process – the right to be free of detention based on evidence gained by torture. *Finally*, I explain why appellate review under the Detainee Treatment Act of 2005 of a Combatant Status Review Tribunal determination does not provide an adequate and effective substitute for constitutionally mandated habeas. To the contrary, such review would foreclose any meaningful inquiry into the factual and legal basis for a prisoner's detention and sanction evidence secured by torture and other coercion.

I. Habeas Corpus Provides A Check Against Unlawful Executive Detention.

For centuries, the writ of habeas corpus has provided the most fundamental safeguard against unlawful executive detention in the Anglo-American legal system. William Blackstone praised habeas as the "bulwark" of individual liberty,[2] while Alexander Hamilton called it among the "greate[st] securities to liberty and

[2] 1 William Blackstone, *Commentaries* *137.

republicanism."[3] The writ has since been described as "the most important human right in the Constitution."[4]

Today, habeas is typically used by convicted prisoners to collaterally attack their criminal sentences. At its historical core, however, the writ provides a check against executive detention without trial, and it is in this context that its protections have always been strongest.[5] Above all, habeas guarantees that no individual will be imprisoned without the most basic requirement of due process – a meaningful opportunity to demonstrate his innocence before a neutral decisonmaker.

Habeas corpus was part of colonial law from the establishment of the American colonies, and the common law writ operated in all thirteen British colonies that rebelled in 1776.[6] The Framers enshrined habeas corpus in the Suspension Clause of the Constitution, which states that Congress "shall not" suspend the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it."[7] The First Congress codified this constitutional command in the Judiciary Act of 1789,[8] making the writ available to any individual held by the United States who challenges the lawfulness of his detention. For the Framers of the Constitution, restricting Congress's power to suspend habeas corpus was never controversial: the only debate concerned what conditions, *if any*, could *ever* justify suspension of the Great Writ,[9] and the Framers

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[3] The Federalist 84, at 511 (Alexander Hamilton) (C. Rossiter ed., 1961).
[4] Zechariah Chafee, Jr., *The Most Important Right in the Constitution*, 32 B.U.L. Rev. 143, 143 (1952).
[5] *See, e.g.*, *St. Cyr*, 533 U.S. at 301; *Swain v. Pressley*, 430 U.S. 372, 385-86 (1977) (Burger, C.J., concurring); *Brown v. Allen*, 344 U.S. 443, 533 (Jackson, J., concurring in result).
[6] William F. Duker, *A Constitutional History of Habeas Corpus* 98, 115 (1980).
[7] Art. I, § 9, cl. 2.
[8] Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73 (codified at 28 U.S.C. § 2241(c)(1)).
[9] *Compare* 2 The Records of the Federal Convention of 1787, at 438 (M. Farrand ed. 1966) (no suspension except "on the most urgent occasions, and then only for a limited time not exceeding twelve months") (proposal of Charles Pinckney) (internal quotation marks omitted), *with id.* (habeas corpus "inviolable" and should never be suspended) (proposal of John Rutledge).

concluded that Congress could exercise its suspension power only under the most exceptional circumstances. The constitutional guarantee of habeas corpus stands apart and perpetually independent from the other guarantees of the Bill of Rights enacted two years later in 1791.

Under the influence, if not the command of the Suspension Clause,[10] Congress has always felt itself obligated to provide for the writ in the most ample manner. Since the Nation's founding, the writ has been suspended on only four occasions: during the middle of the Civil War in the United States; during an armed rebellion in several southern States after the Civil War; during an armed rebellion in the Philippines in the early 1900s; and in Hawaii immediately after the attack on Pearl Harbor.[11] Each suspension was not only a response to an ongoing, present emergency, but was limited in duration to the active rebellion or invasion that necessitated it.

II. Habeas Corpus Extends To Any Territory Within The Government's Exclusive Jurisdiction And Control And Guarantees A Searching Inquiry Into The Factual And Legal Basis For A Prisoner's Detention.

As the Supreme Court has recognized, the writ of habeas corpus has an "'extraordinary territorial ambit.'"[12] Habeas has always reached any territory over which the government exercised sufficient power and control to compel obedience to the writ's command.[13] As Lord Mansfield wrote in 1759, "even if a territory was 'no part of the realm [of England],' there was 'no doubt' as to the court's power to issue writs of habeas

[10] *See Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807) (Marshall, C.J.); *see also St. Cyr*, 533 U.S. at 304 n.24.
[11] Duker, *supra*, at 149, 178 n.190.
[12] *Rasul v. Bush*, 547 U.S. 466, 482 n.12 (2004) (quoting R.J. Sharpe, *Law of Habeas Corpus* 188-89 (2d ed. 1989)).
[13] *Id.* at 482 ("the reach of the [common law] writ depended not on formal notions of territorial sovereignty, but rather on the practical question of the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown").

corpus if the territory was 'under the subjection of the Crown.'"[14] At common law, therefore, habeas was available not only in territories beyond the borders of England, such as the mainland American colonies and West Indies,[15] but also in territory over which England exercised exclusive control and jurisdiction but lacked sovereignty.[16]

The right to habeas corpus has always extended to aliens as well as citizens.[17] The writ has been available in time of peace as well as in time of war.[18] Even alleged enemy aliens have had access to habeas to demonstrate their innocence,[19] including by submitting evidence to a court.[20] Indeed, in one case Chief Justice Marshall, on circuit, required an enemy alien to be produced in court and ordered his release.[21] As the Supreme Court observed in *Rasul v. Bush*,[22] detainees at Guantánamo have the right to habeas review because they are imprisoned in territory over which the United States has complete jurisdiction and control and because, unlike the World War II-era prisoners in *Johnson v. Eisentrager*,[23] they have never been convicted of any crime and maintain their innocence.[24]

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[14] *Id.* (quoting *R. v. Cowle*, 97 Eng. Rep. 587, 598-99 (K.B. 1759)).
[15] *Id.*
[16] Brief *Amici Curiae* of Legal Historians at 12-15, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343) (describing, for example, availability of habeas corpus in India, where the England exercised *de facto* but not *de jure* sovereignty).
[17] *Rasul*, 542 U.S. at 481; *Somerset's Case*, 20 Howell's St. Tr. 1, 79-82 (K.B. 1772).
[18] *See, e.g.*, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).
[19] *See, e.g.*, *Three Spanish Sailors' Case*, 96 Eng. Rep. 775 (C.P. 1779) (reviewing habeas petition of alien detained as prisoner of war; denying relief on the merits); *R. v. Schiever*, 97 Eng. Rep. 551 (K.B. 1759) (same).
[20] *Lockington's Case*, Bright (N.P.) 269, 298-99 (Pa. 1813) (Brackenridge, J.) (habeas court may consider evidence showing that prisoner "is not an alien enemy").
[21] *See* Gerald L. Neuman & Charles F. Hobson, *John Marshall and the Enemy Alien: A Case Missing from the Cannon*, 9 Green Bag 40, 41-43 (2005) (reporting decision in *United States v. Thomas Williams*, U.S. Cir. Ct. for Dist. of Va. 1813).
[22] 542 U.S. 466 (2004).
[23] 339 U.S. 763 (1950).
[24] *Rasul*, 542 U.S. at 475-76.

Common law courts did not simply accept the government's factual response to a prisoner's habeas petition; instead, they routinely probed that response and examined additional evidence submitted by both sides to ensure the factual and legal sufficiency of a person's confinement. The writ's guarantee of a searching judicial inquiry crystallized in response to the Crown's efforts to detain individuals indefinitely without due process. In 1592, English judges protested that when they ordered the release of individuals unlawfully imprisoned by the Crown, executive officials transported them to "secret [prisons]" to place them beyond judicial review.[25] As a result, the judges issued a resolution affirming their power to release prisoners if a response to the writ was not made.[26]

The Crown, nevertheless, continued to avoid a judicial examination into a prisoner's detention by providing a general response (or return) that did not specify the cause of commitment. This issue came to a head in the seminal *Darnel's Case*.[27] There, the Attorney General asserted that it was the king's prerogative to detain suspected enemies of state by his "special command," without a judicial inquiry into the factual and legal basis for their detention.[28] He emphasized the Crown's overriding interest in national security and insisted that judges defer to the king's judgment.[29]

When the court upheld the Crown by finding its response sufficient, it sparked a constitutional crisis that led to the establishment of habeas corpus as the pre-eminent safeguard of common law due process and personal liberty. This was entrenched through

[25] Duker, *supra*, at 42.
[26] *Resolution of the Judges*, 123 Eng. Rep. 482 (1592); R.J. Sharpe, *Law of Habeas Corpus* 8 (2d ed. 1989).
[27] 3 How. St. Tr. 1 (K.B. 1627).
[28] *Id.* at 37.
[29] *Id.* at 45.

the enactment of the Petition of Right of 1628,[30] the Habeas Corpus Act of 1641,[31] and the Habeas Corpus Act of 1679.[32] By the late 1600s, habeas corpus had become – and would remain – "the great and efficacious writ, in all manner of illegal confinement"[33] and the most "effective remedy for executive detention."[34]

At common law, courts consistently engaged in searching review on habeas corpus to probe the factual and legal basis for a prisoner's commitment, including by conducting hearings and taking evidence.[35] In the United States, courts have exercised the same searching review of executive detention.[36] Indeed, in one its first habeas cases, the Supreme Court affirmed the writ's historic function at common law: to determine whether there was an adequate factual and legal basis for the commitment,[37] fully examining and considering the evidence and finding it insufficient to justify the prisoners' detention on allegations of treason.[38]

Habeas also has always guaranteed review of the lawfulness of a newfangled

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[30] 3 Car. 1, c.1 (1628).
[31] 16 Car. 1, c.10 (1641).
[32] 31 Car. 2, c.2 (1679).
[33] 3 William Blackstone, *Commentaries* *131.
[34] Dallin H. Oaks, *Legal History in the High Court – Habeas Corpus*, 64 Mich. L. Rev. 451, 460 (1966).
[35] *See, e.g.*, *Goldswain's Case*, 96 Eng. Rep. 711, 712 (C.P. 1778) (judges temporarily discharge impressed sailor, refusing to "shut their eyes" to facts in petitioner's affidavits showing he was legally exempt from impressment); *R. v. Delaval*, 97 Eng. Rep. 913, 915-16 (K.B. 1763) (scrutinizing affidavits and concluding that girl had been fraudulently indentured as an apprentice and was being misused as a prostitute); *R. v. Turlington*, 97 Eng. Rep. 741, 741 (K.B. 1761) (discharging woman from "mad-house" after ordering medical inspection, reviewing doctor's affidavit, and inspecting woman who "appeared to be absolutely free from the least appearance of insanity"); *see also Bushell's Case*, 124 Eng. Rep. 1006, 1010 (C.P. 1670) (Vaughan, C.J.) (requiring that evidence supporting detention be "full and manifest").
[36] *See, e.g.*, *Ex parte D'Olivera*, 7 F. Cas. 853, 854 (Cir. Ct. D. Mass. 1813) (Story, J., on circuit) (discharging Portuguese sailors arrested as alleged deserters); *United States v. Villato*, 28 F. Cas. 377, 378-79 (Cir. Ct. D. Pa. 1797) (discharging non-citizen arrested for treason); *Matter of Peters*, M-1215 (D.W. Tenn. Dec. 31, 1827) (conducting detailed factual inquiry into petitioner's state of mind and determining petitioner "enlisted . . . when he was wholly incapable of transacting business or understanding it by reason of intoxication," thus invalidating legal basis for commitment), *cited in* Eric M. Freedman, *Habeas Corpus: Rethinking the Great Writ of Liberty* 28 & 166 n.56 (2001).
[37] *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807).
[38] *Id.* at 125-26.

tribunal established to try individuals before that trial takes place.[39] This review has been exercised in time of war and in time of peace, and over all categories of alleged offenders. To deny that review would jeopardize a longstanding protection of habeas.

By contrast, habeas review has always been more limited in post-conviction cases—which today make up the bread and butter of a federal court's habeas docket. But that is precisely because the prisoner *had already been convicted* at a trial that provided fundamental due process, including the opportunity to see the government's evidence and to confront and cross-examine its witnesses,[40] a right that Justice Scalia has said is "founded on natural justice."[41] Absent that process, a federal judge with jurisdiction over a habeas corpus petition has the power to examine the factual and legal basis for the prisoner's detention in the first instance, including the power to take evidence and conduct a hearing, where appropriate. At issue in the Guantánamo habeas cases is executive detention without any judicial process—precisely the situation that lies at the Great Writ's core and that mandates a searching examination of the government's allegations.

III. Habeas Corpus Serves As An Essential Check On The Use of Evidence Gained By Torture.

Habeas corpus also vindicates another core guarantee of the common law – the categorical prohibition on the use of evidence obtained by torture. During the sixteenth century, crown officials occasionally issued warrants authorizing the torture of

[39] *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1868); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Unlike courts-martial, the President's military commissions demonstrate the importance of pre-trial habeas review because these commissions' validity has never been upheld. *See Hamdan v. Rumsfeld*, 548 U.S. __, 126 S. Ct. 2749 (2006).
[40] *Crawford v. Washington*, 541 U.S. 36 (2004).
[41] *Id.* at 49.

prisoners.[42] Pain was inflicted by a variety of ingenious devices, including thumbscrews, pincers, and the infamous rack.[43] The use of torture declined after an investigation showed that a suspected traitor had been "tortured upon the rack" based upon false allegations.[44] Shortly thereafter, the king asked the common law judges whether another alleged traitor "might not be racked" to make him identify accomplices, and "whether there were any law against it." The judges' answer was unanimous: the prisoner could not be tortured because "no such punishment is known or allowed by our law."[45]

The Framers of the Constitution also abhorred torture, which they viewed as a mechanism of royal despotism.[46] As the Supreme Court has repeatedly held, reliance on evidence obtained by torture is forbidden not merely because it is inherently unreliable but also because such "interrogation techniques [are] offensive to a civilized system of justice."[47] Without the availability of habeas corpus to provide a searching inquiry into the basis for a prisoner's detention, and to determine whether, in fact, evidence justifying that detention has been obtained by torture or other coercive methods, this fundamental common law protection would be jeopardized.

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[42] John H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Regime* 130 (1977).
[43] David Hope, *Torture*, 53 *Int'l & Comparative Law Qtr'ly* 807, 811 (2004).
[44] Langbein, *supra*, at 130-31.
[45] *Proceedings Against John Felton*, 3 Howell's St. Tr. 367, 371 (1628). This tradition continues today. Notably, a recent unanimous decision of a specially convened panel of seven members of the House of Lords concluded that evidence obtained by the torture of witnesses by a foreign State could not be admitted even when the United Kingdom had not been complicit in the torture. *A (FC) v. Secretary of State*, [2005] UKHL 71 (appeal taken from Eng.). As the panel explained, "the common law has regarded torture and its fruits with abhorrence for over 500 years" – an abhorrence "now shared by over 140 countries which have acceded to the Torture Convention." *Id.* ¶ 51 (per Lord Bingham).
[46] *See, e.g.*, 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 447 (1836) ("What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment.") (Patrick Henry).
[47] *See, e.g.*, *Miller v. Fenton*, 474 U.S. 104, 109 (1985); *accord Brown v. Mississippi*, 297 U.S. 278, 286 (1936) (coercive interrogation techniques are "revolting to the sense of justice"); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961) (conviction following admission of involuntary confession cannot stand, regardless of confession's purported reliability); *Rochin v. California*, 342 U.S. 165, 173 (1952) (coercive techniques "offend the community's sense of fair play and decency").

IV. The Proposed Legislation Would Violate the Suspension Clause.

The proposed legislation would markedly depart from historical precedent and the Constitution's command that the writ be made available. This legislation, moreover, would sweep under the jurisdictional bar only non-citizens, raising serious questions under the Constitution's guarantee of equal protection as well.

The Committee may ask whether review by the District of Columbia Circuit established under the Detainee Treatment Act of 2005 ("DTA") obviates any problem under the Constitution. It does not. Such review falls far short of the minimum review guaranteed under the Suspension Clause because it would deny prisoners any meaningful inquiry into the factual and legal basis for their detention and would sanction the use of evidence secured by torture and other coercion. Since others have explained the flaws of this review scheme in greater detail,[48] I describe them below only briefly.

The Guantánamo detainees are all held pursuant to a finding by the Combatant Status Review Tribunal ("CSRT") that they are "enemy combatants." The CSRT was established by the President only nine days after the Supreme Court's ruling in *Rasul* that Guantánamo detainees have the right to challenge their executive detention in federal district court by habeas corpus. The order creating the CSRT pre-judged the detainees, declaring that they had already been found to be enemy combatants based on multiple levels of internal review. Rather than affording the detainees a meaningful opportunity to prove their innocence, the CSRT denied them fundamental rights, including the right to counsel; the right to see the evidence against them; and the right to a neutral decisionmaker. Moreover, as the government itself acknowledges, the CSRT permits the

[48] *See* Written Testimony of Joseph Margulies; Materials for Testimony of Thomas P. Sullivan.

use of evidence gained by torture.[49] In short, as District Judge Joyce Hens Green found, the CSRT denies the core protections of elementary due process that habeas provides: a searching factual inquiry to determine whether a prisoner's detention is unlawful, including whether it is based on evidence secured by torture.[50]

Review of CSRT determinations under the DTA would not provide detainees with any opportunity to challenge the factual and legal basis for their detention. The DTA, on its face, limits review to whether the CSRT followed its own procedures. No detainee, as the government argues, can ever present evidence to a federal court even if that evidence shows he is innocent or that he was tortured. In short, DTA review of a CSRT finding would deny prisoners precisely the meaningful factual inquiry provided by habeas corpus and secured under the Suspension Clause.[51]

V. Conclusion

Habeas corpus has aptly been described as "the water of life to revive from the death of imprisonment."[52] For centuries, the Great Writ has prevented the Executive from imprisoning individuals based upon mere suspicion and without a meaningful examination of its allegations. Habeas corpus demands that individuals have a fair opportunity to demonstrate their innocence before a neutral decisionmaker. Eliminating habeas at Guantánamo would flout this long tradition and would gut the core protections guaranteed under the Suspension Clause.

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[49] Oral Argument Transcript, Dec. 2, 2004, *Khalid v. Bush*, 04-CV-1142 (RJL) (D.D.C.); *Boumediene v. Bush*, 04-CV-1166 (RJL) (D.D.C.), at 84:7-84:22.

[50] *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468-74 (D.D.C. 2005).

[51] The Supreme Court, moreover, has held that alleged "enemy combatants" are entitled under the United States Constitution to an additional layer of procedural protection beyond common law habeas. *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (plurality op.); *id.* at 553 (Souter, J., concurring). The CSRT, *a fortiori*, fails this requirement.

[52] Rollin C. Hurd, *A Treatise on the Right of Personal Liberty and on the Writ of Habeas Corpus* 266 (2d ed. 1876).

Thank you for the opportunity to provide this statement. My colleagues and I are happy to provide the Committee with any further information.

Jonathan Hafetz
New York, New York
September 25, 2006

TESTIMONY
JOHN D. HUTSON
RADM JAGC USN (RET.)
DEAN AND PRESIDENT
FRANKLIN PIERCE LAW CENTER
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY
SEPTEMBER 25, 2006

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.
Article 1, Section 9, Clause 2
The Constitution of the United States

A persuasive argument can be made that the Writ of Habeas Corpus, the Great Writ, is the single most important bulwark in protecting our rights and freedoms. It is virtually sacrosanct, and those who have suspended it have often been treated harshly by history. That is why these hearings are so important and the action Congress is being asked to take is so momentous. This is an historic moment.

The Great Writ breathes life into all our fundamental and most cherished rights and freedoms. None of them have value if potential violations can't be tested in court. What value is Freedom of Speech if those who speak out are incarcerated and not able to have their cases heard?

As with all our rights, we must be tremendously cautious when we consider picking and choosing who may enjoy them and be protected by them.

It is too facile to say that the men detained in Guantanamo "are all terrorists," "the worst of the worst, and "all killers." Maybe they are. Maybe they aren't. The point of habeas corpus is to answer those questions. If we strip them of that right and the courts of jurisdiction to hear their cases, we will never know the answers to those very important questions.

In World War II, when thousands and thousands of German and Italian POWs were imprisoned in various camps throughout the United States, we didn't suspend habeas corpus. There is only one recorded case of a POW using habeas to test his imprisonment. He was an Italian American and his petition was denied. The prisoners knew that their detention was lawful and that habeas petitions would therefore be futile. No prisoner contested the very fact of being an enemy soldier, as many of the Guantanamo detainees do. And there were no allegations in those prison camps of abuse, coercive interrogation, sleep deprivation, and induced hypothermia.

The fact is that it is not at all obvious to many Americans and to the world community that all the detentions at Guantanamo are as clearly justified as those in World War II or in other conflicts. The existence of the right of habeas corpus will go a long way to resolving those concerns; conversely, eliminating that right will only give rise to greater concern and doubt.

There are two ways to consider the question of stripping the courts of their jurisdiction to hear habeas petitions.

One analysis is legal. Is it constitutional? The other is pragmatic. Even if it is legal, is it wise? I believe that the legislative proposal that Congress is being asked to pass is both unconstitutional and, more importantly, unwise.

The constitutional test is two pronged. One prong is whether we are in a situation of invasion or rebellion. The other is whether the public safety is jeopardized. Both have to exist in order to empower Congress to legally suspend habeas.

Rebellion clearly does not pertain. Nor have we been invaded in such a way as to justify suspension of the writ of habeas corpus. While on September 11, 2001 we were attacked in a most horrific way, the detainees presently incarcerated in Guantanamo were not picked up in the United States. They were picked up elsewhere and we brought them to Guantanamo presumably against their will. Most certainly had no direct connection to 9/11 and such a connection certainly cannot be presumed. Although others attacked us on our soil, these individuals did not invade the United States. The Constitution cannot be read to mean that if there is an invasion, habeas can be suspended over five years later for all aliens in U.S. custody. Even if they are determined unilaterally to be enemy combatants, that status does not necessarily mean they had anything to do with the attack on 9/11. The proposed legislation is without temporal, geographic or common sense limitations. This fails the "invasion" test.

Although the public safety is threatened by terrorists generally, there must be a clearer nexus between the public safety and the individuals for whom the writ is being suspended.

Even if they may have posed a danger in the past, the men detained at Guantanamo no longer present a danger to American citizens, other than perhaps their guards. They are in a very, very secure place ninety miles off our shore. If they exercise their right to test their detention and are determined to be a threat, then they will be returned. If they are not a threat, then by definition the public safety is not compromised. We cannot create the requisite danger to public safety by importing them to Guantanamo. That is not what the Framers of the Constitution envisioned.

Nor is it reasonable to argue that the public safety is jeopardized by overwhelming our court system with frivolous habeas petitions from the detainees. They are represented by respected lawyers from some of the most prestigious law firms in the

country. These lawyers are doing their work generally on a pro bono basis. They have no desire to waste their time or the courts' time on clearly bogus matters. The experience in World War II demonstrates this. Habeas provides no comfort for prisoners who are legally and properly imprisoned.

On the other hand, these lawyers are extremely dedicated and will eagerly devote their own and court time to fundamental and important questions of the basis for suspect incarceration. That's the way it should be.

This fails the public safety test.

As important as it is, in some respects the constitutional argument is subordinated to an even more profound rationale. Even if stripping the courts of their habeas jurisdiction were constitutional and therefore within the authority of Congress to do, it is simply not a wise action for Congress to take for several reasons.

Perhaps first and foremost is that if we fail to provide a reasonable judicial avenue to consider detention, other countries will feel justified in doing the same thing. While obviously we don't expect al Qaeda to provide habeas corpus rights or anything remotely equivalent to their captives, we must remember this is not the last war the United States will fight. Plato said only the dead have seen their last war. Moreover, it is U.S. troops who are forward deployed in greater numbers and on more occasions than all other nations combined. It is our troops who are in harm's way and deserve judicial protections. In future wars, we will want to ensure that our troops or those of our allies are treated in a manner similar to how we treat our enemies. We are now setting the standard for that treatment.

Moreover, it is inconsistent with our own history and tradition to take this action. If we diminish or tarnish our values, those values that the Founders fought for and memorialized in the Constitution and have been carefully preserved by the blood and honor of succeeding generations, then we will have lost a major battle in the war on terror. There has never been a time when it is more important for us to remember who we are. We owe that both to honor the memory of the men and women who gave us those rights and to the hope for our progeny for whom we must preserve and protect them. We don't want to leave them a diminished Constitution.

This is also bad policy. The Constitution sets up a carefully structured system of checks and balances between the three branches of government. We can't gainsay the fact that the balance naturally and unavoidably shifts through time and by events. But Congress must be very reluctant to affirmatively shift the balance. Balances and the laws of physics being what they are, there inevitably will be a readjustment looming in the future.

Indeed, I'm also surprised anyone is suggesting jettisoning habeas corpus because it actually provides a reasonable way for us to extricate ourselves from the Gordian knot we have tied around our hands in dealing with long term detention.

As we all know, the Global War on Terror will not end anytime soon, and we may not even recognize the end when it comes for some time. We have a problem which is that we have detained hundreds of people, the vast majority of whom will never see the inside of a military commission hearing room, and we don't know what to do with them. In Vietnam, where a large number of captives were taken into custody while dressed as civilians, we afforded them a hearing process in keeping with Article 5 of the Third Geneva Convention, the so-called "competent tribunal," to determine whether we were holding the right people on proper grounds. The military has scrupulously followed that requirement in all our recent conflicts since Vietnam. For example, in the last Gulf War, we conducted about 1200 of these hearings, and found in 75% of the cases that the detainees were innocents picked up in the fog of war. We don't have that process now. The Combatant Status Review Tribunal is neither an adequate substitute for a court hearing nor is it an adequate substitute for an Article 5 competent tribunal held in close time and geographical proximity to the capture. The question I keep hearing around the country is, "What are we going to do with all these guys." We are now talking about closing off our one escape route. Let the courts handle it.

I testified last July before the Senate Armed Services Committee on the question of military commissions. At that hearing a number of Senators and witnesses, including me, pointed out that the United States has the undeniable right to hold enemy combatants. Indeed, theoretically we could prosecute a detainee at a military commission, acquit him, and still continue to hold him. That scenario becomes significantly less palatable if there is no reasonable recourse to have their status examined.

Contrary to popular opinion, the CSRTs are not a reasonable substitute. They presume the evidence against the prisoner is accurate and that he is an enemy combatant. He must rebut those presumptions without benefit of counsel and even if the evidence against him is secret or obtained by torture or coercion. "Enemy combatant" includes unknowing or unintentional support of al Qaeda.

Finally, we all know that the vast majority of detainees will never be prosecuted in a military commission. Their fates will never be resolved by an impartial court. We will create the Kafkaesque situation wherein Saddam Hussein and Moussoui will be afforded greater rights than the least significant detainee in Guantanamo who will be held indefinitely without access to a court.

That necessarily raises the question of why strip the courts of habeas jurisdiction. One might assume that we are afraid the courts will make a mistake and release a dangerous man, viz., that we don't really trust the courts. Even if that were a legitimate concern, which I don't think it is, does that justify holding hundreds of men forever without legitimate recourse?

Another rationale may be that we don't have the evidence to support the incarcerations in the first place. Many of these men, if not most of them, were caught up in dragnets, or turned over by war lords or neighbors in exchange for lucrative bounties.

I certainly do not argue that all these men are innocent of any wrongdoing or that they should not be incarcerated. I am simply arguing that the Supreme Court has held that they have the right to have their incarceration examined by a court and we shouldn't take it away. If petitions are heard and denied and detainees are returned to Guantanamo, that's fine with me. Justice will have been done and the Constitution served.

Note well what you are considering here. The proposed legislation is clear. If we say you are an alien and we take you into custody as an enemy combatant, you have no recourse to test any of those allegations. We don't need to do this. America is too strong. Our system of justice is too sacred to tinker with in this way. At a time with the United States is threatened from without is the time we must cling most tightly to the fundamentals of our democracy and humanity.

Senator Edward M. Kennedy's Statement Regarding the Senate Judiciary Committee's Hearing on Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review

The writ of habeas corpus has stood for centuries as the principal legal check on arbitrary deprivations of liberty. The writ's roots extend back to the Magna Charta. It was considered so fundamental that the Founding Fathers enshrined it in the Constitution, which permits its suspension only in times of rebellion or invasion. The great writ should never be suspended lightly.

Yet, we are faced today with legislation that would not only cut off the habeas rights of all of the detainees at Guantanamo, but would prohibit a court from hearing a habeas petition filed by any alien in United States custody who has been or may in the future be determined to be an enemy combatant. This is a step that we must not take.

We must identify and punish terrorists. This Administration has failed miserably in that obligation. Five years after 9/11, it has yet to try successfully a single Guantanamo detainee, in large part because it pursued a go-it-alone strategy in establishing unlawful military tribunals. Finally, the Supreme Court had to tell the Administration to start over. Unfortunately, it has come forward with a proposal that will bar the access of detainees to courts and, in so doing, will spawn protracted legal challenges to the constitutionality of suspending the writ of habeas corpus. Surely, it has no basis for contending that we are in a time of rebellion or invasion.

We know that there are dangerous terrorists confined at Guantanamo. We also know from numerous sources that many of the detainees at Guantanamo simply should not be there. The CIA reported in 2002 that many of the Guantanamo detainees did not belong there and the former Commander and Deputy Commander of Guantanamo have both stated that many of those detained should not be confined at Guantanamo. Indeed, some have been released, but we must ensure that the people confined at Guantanamo truly are the worst of the worst. And that is the purpose of a habeas petition – to ensure that the government has a basis in law and in fact for imprisoning an individual. We must not shut down that process for separating terrorists from the innocent.

Some have suggested that the Combatant Status Review Tribunals provide a sufficient alternative. They are wrong. Those tribunals are internal military proceedings in which the defendant is not accorded the procedural rights that we hold fundamental to due process. The defendant is not represented by counsel, cannot see the evidence against him, lacks the ability to examine witnesses or to call witnesses of his own and the government can rely on coerced statements.

Ironically, by cutting off habeas, we will extend greater protections to known terrorists than to those who may not belong in Guantanamo. Detainees who have committed heinous acts should and will be tried before military tribunals that afford them numerous procedural protections. Those detainees against whom the government lacks sufficient evidence will never be tried, yet can be held indefinitely and will not have access to U.S. courts.

The effort to eliminate habeas jurisdiction is part of a pattern pursued by this Administration since 9/11 to avoid accountability for its conduct. It initially took detainees to Guantanamo in the belief that United States law would not apply. It then fought vigorously to deny them counsel. It then argued that detainees lacked habeas rights, but the Supreme Court rejected that argument. It then sought to eliminate those rights in the Detainee Treatment Act and urged the courts to misconstrue it to wipe out all of the habeas petitions that had already been filed. Once again the Supreme Court rejected the government's contention. Now, we are being asked once again to wipe out all of those pending cases.

Imagine how the United States would react if our citizens were captured by a foreign nation, confined in a remote location without access to a judge and told that they might spend the rest of their lives in that condition. We do serious damage to our standing in the world if we do not live up to our own great traditions of fairness and respect for liberty and due process.

Left to its own devices, the Administration would have taken prisoners to Guantanamo and asserted the right to hold them for life without anything resembling a fair process to determine guilt or innocence. Many innocent men would have suffered the consequences and we would know far less about conditions at Guantanamo. The Administration should not be permitted to escape accountability for its actions again. Access to the courts must be preserved.

Statement of Senator Patrick Leahy,
Ranking Member, Judiciary Committee
Hearing on "Examining Proposals to Limit Guantanamo Detainees' Access to Habeas Corpus Review,
September 25, 2006

I commend the Chairman for holding this hearing today on the provisions in the proposed military commissions bill that would eliminate for detainees the writ of habeas corpus, a cornerstone of our legal and constitutional system. I wish this hearing could have taken place at a time when more Senators could attend and when witnesses, Senators, and staffs could have had time to prepare. This issue carries serious consequences and deserves to be considered carefully.

For weeks now, politicians and the media have breathlessly debated the fine points and political implications of the so-called "compromise" on proposed trial procedures for suspected terrorists. In doing so, we have ignored a central and more sweeping issue. Important as the rules for military commissions are, they will apply to only a few cases. The Administration has charged a total of 10 people in the nearly five years since the President declared his intention to use military commissions, and it recently announced plans to charge 14 additional men. But for the vast majority of the almost 500 prisoners at Guantanamo, the Administration's position remains as stated by Secretary Donald Rumsfeld three years ago: It has no interest in trying them.

Today we are belatedly addressing the single most consequential provision of this much-discussed bill, a provision that can be found buried on page 81 of the proposed bill. This provision would perpetuate the indefinite detention of hundreds of individuals against whom the Government has brought no charges and presented no evidence, without any recourse to justice whatsoever. That is un-American, and it is contrary to American interests.

Going forward, the bill departs even more radically from our most fundamental values. It would permit the President to detain indefinitely – even for life – any alien, whether in the United States or abroad, whether a foreign resident or a lawful permanent resident, without any meaningful opportunity for the alien to challenge his detention. The Administration would not even need to assert, much less prove, that the alien was an enemy combatant; it would suffice that the alien was "awaiting [a] determination" on that issue. In other words, the bill would tell the millions of legal immigrants living in America, participating in American families, working for American businesses, and paying American taxes, that our Government may at any minute pick them up and detain them indefinitely without charge, and without any access to the courts or even to military tribunals, unless and until the Government determines that they are *not* enemy combatants.

Detained indefinitely, and unaccountably, until proven innocent. Like Canadian citizen Maher Arar. As the Canadian Government recently concluded in a detailed and candid report, there is no evidence that Mr. Arar ever committed a crime or posed a threat to

U.S. or Canadian security. Yet, while returning home to Canada from a family vacation, he was detained, interrogated, and then shipped off to a torture cell in Syria by the Bush-Cheney Administration While the Canadian Government has now documented that the wrong thing was done to the wrong man, the Bush-Cheney Administration has, as usual, evaded all accountability by hiding behind a purported state secrets privilege.

The Administration's defenders would like to believe that Mr. Arar's case is an isolated blunder, but it is not. Numerous press accounts have quoted Administration officials who believe that a significant percentage of those detained at Guantanamo have no connection to terrorism. In other words, we have been holding for several years, and intend to hold indefinitely without trial or any recourse to justice, a substantial number of innocent people who were picked up by mistake in the fog of war.

The most important purpose of habeas corpus is to correct errors like that. It is precisely to prevent such abuses that the Constitution prohibits the suspension of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it." I have no doubt that this bill, which would permanently eliminate the writ of habeas for all aliens within and outside the United States whenever the Government says they might be enemy combatants, violates that prohibition. And I have no doubt that the Supreme Court would ultimately conclude that this attempt by the Bush-Cheney Administration to abolish basic liberties and evade essential judicial review and accountability is unconstitutional.

It would be utterly irresponsible for Congress to neglect our oath to the Constitution and the American people and pass this unconstitutional legislation in the hope that the Court will ultimately rescue us from our folly. Doing so would only undermine the War on Terror by prolonging the legal limbo into which the Administration has dragged the entire regime of military detentions.

We should have put military detentions on a solid legal footing and established military tribunals four years ago. I introduced a bill in 2002 to authorize military commissions. So did Senator Specter. But the White House and the Republican leadership ignored us, choosing instead to roll the dice and hope that it could prevail on its radical go-it-alone theories of presidential power.

The Bush-Cheney Administration got a rude awakening earlier this year in the *Hamdan* case. The Supreme Court -- which happens to include seven Republican appointees in its nine Justices -- affirmed what we had told it all along: when the terrorists brought down the Twin Towers on 9/11, they did not bring down the rule of law on which our system of Government is founded. They did not supplant our republican form of Government with one in which an unaccountable Executive can imprison people forever without trial or judicial review.

On its way to losing that case, the Administration wasted four years. Actually, it did more than waste four years. Just yesterday the press reported what the Administration has been misrepresenting to the American people and what was apparently confirmed in a

National Intelligence Estimate: that the invasion and continuing U.S. military presence in Iraq has created a new generation of anti-American terrorists, that the terrorist threat against the U.S. has grown and, according to intelligence officials, that the Iraq war has "made the overall terrorism problem worse." Meanwhile, having failed to try a single detainee, and having failed to secure a conviction of a single terrorist offense, the Administration is demanding that we pass a bill it drafted last week before the end of this week.

The Administration's sudden and belated haste to move ahead makes no sense, other than as a matter of crass electoral politics. We are taking a first look at a bill that the Administration claims is central to the decisive ideological battle of the 21st Century, a bill that would suspend habeas corpus for the first time since the Civil War, and a bill that, if enacted, will almost certainly be used by America's enemies as a pretext for the torture and indefinite detention without judicial review of Americans abroad.

If the Administration and the Republican leadership of the Senate believe that suspending the writ is constitutional and justified, they should grant the joint request that Chairman Specter and I made last week for a sequential referral of the bill. Constitutional issues involving the writ of habeas corpus are at the center of this Committee's jurisdiction. We can and should review this legislation thoroughly, and if a few habeas petitions are filed in the meantime, we will not lose the War on Terror as a result of those filings. If this Congress votes to suspend the writ of habeas corpus first and ask questions later, liberty and accountability will be the victims.

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The Torn Fabric of the Law: An Interview With Michael Ratner
One key battle in the war on terror is being fought in courtrooms. And the administration isn't winning there, either.

Onnesha Roychoudhuri
March 21 , 2005

In the immediate aftermath of the Sept. 11 attacks, lawyers and legal advocacy groups, even those with long records as stalwart defenders of human rights, were reluctant to take on "war on terror" cases, for fear of seeming unpatriotic or worse. Not so Michael Ratner and his colleagues at the Center for Constitutional Rights. They lost no time in opposing President Bush's increasingly bold assertions of executive power, starting with the novel claim that, under the WOT rubric, the US could indefinitely detain anyone, at any time, without ever bringing charges against them. Not that Ratner's decision was free of consequences. As he writes in his book, Guantanamo: What the World Should Know, "I got the worst hate mail I have ever received. I got letter asking me why I didn't just let the Taliban come to my house and eat my children."

Since then, happily, hundreds of lawyers around the country have overcome their reluctance and joined in a broad effort to represent war-on-terror detainees, which they see as a matter of upholding basic legal principles, such as the right to due process, against an unprecedented executive assault.

It makes sense that Ratner was one of the few lawyers to take a stand early on. After all, he'd already fought -- and beaten -- the US government when, in the early 90s, it claimed broad power to detain hundreds of Haitian asylum seekers on the grounds that they (or family members) were HIV+. The detention camp in that case, it's worth remembering, was at Guantanamo.

Ratner and the CCR are litigating a broad range of cases that turn on an equally broad range of questions. Taken together, the outcomes of these cases will define the relationship of the executive branch to the law for generations to come.

Ratner recently spoke by phone with Mother Jones.

Mother Jones: How did you become involved with the torture cases?

Michael Ratner: I became involved back in November 2001. The President had just issued a military order saying he had the power to indefinitely detain any non-citizen who he believed was involved in international terrorism. The idea that you could pick up people anywhere in the world and hold them forever without a trial is outrageous. We at the Center for Constitution Rights (CCR) decided that we would represent the first people who were detained under that military order. In early January 2002, we got authority to represent David Hicks. We began looking for other lawyers to help us in these initial cases, but couldn't find many outside of the office and the death penalty lawyers who we had originally gathered around us. Nobody else, no other human rights or civil rights organization would get involved in the cases. It was only about three months after 9/11 and I think they were terrified of these cases, of the public reaction.

MJ: Were you surprised by this?

MR: That much reluctance by bread and butter civil rights organizations, and even some progressive lawyers, was surprising. If it was true what Rumsfeld said—that the people they were taking to Guantanamo had tried to kill 10,000 Americans—it would cause anyone to question representing them. But this was a case that was regarding a fundamental principle, going back to the Magna Carta in 1215, about the right to have some kind of a hearing before you get tossed in jail.

MJ: How many Guantanamo detainees are you representing?

MR: I started personally representing the ones in the Supreme Court along with Joe Margulies, Clive Stafford Smith, and a few other lawyers. Once we won in the Supreme Court case [Rasul v. Bush], we got authorizations from family members to represent about 100 detainees. What the CCR did was to get other lawyers, who are now more willing to represent these detainees, to directly represent these people.

MJ: Are you working on representing any people who were detained in Iraq or Afghanistan?

MR: Yes. We have at least two cases pending. We represent close to one hundred people who were tortured at Abu Ghraib and other prisons around Iraq. We have a lawsuit against the private interrogation companies Titan and CACI. That case is pending in Southern California. The other one is on behalf of about 17 Iraqis against Rumsfeld and 10 other high officials in a German court. We're trying to get a criminal investigation of Rumsfeld and the officials regarding torture.

MJ: What are the details of that case?

MR: We filed an affidavit in the German criminal case which basically said there was a conspiracy to commit torture and that, with Gonzales and Rumsfeld at the top, there's a conspiracy to cover up the torture. That was my case, and I went to Berlin to file it. Germany has what they call "universal jurisdiction" to prosecute war crimes wherever they occur in the world. And some of the people who allegedly committed the torture—General Sanchez, and Colonel Pappas, head of military intelligence brigade in Abu Ghraib—are actually living in Germany right now. So we went after them because they were there. We asked for a criminal investigation, but Germany dropped the case. But, I'm confident we're going to win the next round of appeals. They're going to have to think about opening a criminal investigation. It's a bit difficult because the U.S. has tried to intimidate them. Rumsfeld said that he wasn't going to go to the Munich Security Conference if the case wasn't dropped.

MJ: What are the other cases you are currently pursuing?

MR: There is a scattering of other cases. For instance, we are representing some former detainees who have been released, and we filed a damage case against Rumsfeld. We're probably going to be adding some others who have just been released as well. We've set up a Guantanamo Justice Project at the CCR that we are separately staffing and making a major part of our work with three lawyers working almost full time for the project.

MJ: Rumsfeld is looking to move about half of the Guantanamo detainees to other countries. Do you see this as a step forward or back?

MR: It's a complicated question. Obviously we want the camp closed. We want indefinite detentions and torture ended. But, they're currently building a permanent detention facility and looking to expand the number of cells. So, essentially, we're looking at a permanent U.S. facility off-shore—so we're going to have to continually press them in litigation. We're probably still going to be fighting this fight when you and I talk next year. The problems we're faced with in terms of prisoners being sent to other countries depends on the client. For example, if 100+ Saudis are sent to Saudi Arabia and put in jail, it's likely that they're going to be tortured because it is well known that this happens there -- even according to our own State Department. In those cases, we are trying to insist that the government give us notification of what countries the detainees are going to be sent so that we can get a chance to litigate the question of whether sending these people to Saudi Arabia is in compliance with the Convention Against Torture. For a lot of our clients, it could be fatal to be sent to their home countries. It is a different case for detainees who may be sent to certain countries like Kuwait. That's conceivably a positive step from Guantanamo. The Kuwaiti government is actually paying for the lawyers to litigate on the Kuwaiti prisoners' behalf. So they may have a very different attitude than the Egyptian, Saudi, or Pakistani governments.

MJ: What do you think the intent was in saying they were going to move half these prisoners out of Guantanamo?

MR: The litigation is brutal for them. It's huge. We have over one hundred lawyers now from big and small firms working to represent these detainees. Every time an attorney goes down there, it makes it that much harder to do what they're doing. You can't run an interrogation and torture camp with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there? Lawyers are down there to interview their clients, and statements that are coming out on a weekly basis referring to sexual abuse, religious abuse, the use of dogs.

What we are finding out—though I think there has been recognition of for a long time now—is that most of the people in Guantanamo have no useful information and are not dangerous. While we may not be having many victories in freeing people, we're winning heavily in the litigation.

MJ: Are you generally pleased with the court rulings thus far?

MR: The litigation has done much better that I had expected. In the beginning, I never would have expected the Supreme Court victory [Rasul v. Bush]. District Judge Joyce Hens Green's opinion afforded Constitutional rights in Guantanamo, and said it is not acceptable to use evidence from torture. She also said that the Geneva Conventions apply. These are all great rulings. What has been frustrating is that our clients have suffered tremendously during these three years and we still don't have most of them out.

MJ: The Bush administration, taking its cue from the Gonzales memo, seems to claim their justification for these extra-legal actions as the unprecedented nature of the conflict. In your opinion, is there a dearth of applicable law in investigating and prosecuting terrorist suspects?

MR: Certainly not. Colin Powell responded to Gonzales' January 2002 memo by stating that he was wrong—that we have to apply Geneva Conventions. He emphasized that we have a 100-year history of applying the Geneva Conventions and that the Geneva Convention interrogation procedures are not outmoded. What's going to happen to U.S. soldiers when they go overseas if other countries don't think they have to abide by the Geneva Conventions? We have soldiers all over the place who are very upset at the administration. What Gonzales was really saying in the memo was "Geneva Conventions don't apply because it's a war crime if there's a violation of Geneva Conventions and we don't want to be prosecuted for war crimes."

If you want to prosecute terrorists, there are plenty of criminal laws to use. You don't have to make up special new laws like military commissions or holding people indefinitely. You can use regular criminal law and prosecute them for anything in the world. Or, if you are going to prosecute them for "war crimes," you can prosecute them under court martial—in which you have a whole slew of things you don't get from military commissions—you have charges, real lawyers; coerced statements can't be used, you have appeals to civilian courts, you have a whole panoply of due process that is completely legitimate. The administration has plenty of alternatives. They have instead disregarded fundamental laws.

When we won the Supreme Court case, Rasul v. Bush, the justices cited the Magna Carta because I think they were so upset. They essentially said that since 1215 it has been illegal to have executive detentions. What this administration decided to do was get out from under a thousand years of laws, take a huge amount of power for itself, and disregard both criminal law and military law. They are simply picking and choosing which laws they want to follow.

MJ: Can you talk more about what legal justifications the administration is picking and choosing from?

MR: On the one hand the Bush administration is applying the laws of war because they like the parts of these laws that allow them to keep people to the end of war. But, of course, the laws of war were never written with the idea that you would keep people to the end of an indefinite war that would go for fifty or one hundred years. They like that principle, but they don't want to give detainees any of the rights they have under the laws of war, such as the right to a hearing if you're not a POW and the right to be treated humanely. What the U.S. is really doing is using the analogy of the laws of war and then picking the things that are most draconian out of them. They are only the swords, not the shields.

MJ: Does the administration's use of different legal justifications complicate the legal counter-battles?

MR: The question that we've come down to in litigating these cases, especially Guantanamo, is not really the question of whether military law or criminal law applies, but simply that everybody should get some kind of hearing before they can be held, without deciding necessarily what has to be proven at that hearing, or deciding which body of law applies -- military or criminal -- because the Constitution and due process should apply. The first thing we decided in arguing cases is that we have to have a right to a hearing. It may differ from case to case, but the main principle is the same. For example, if I'm representing a client from the Taliban, the laws of war are applicable. If I'm representing an alleged terrorist from the Gambia, then I would argue that you can't apply military law, that individual has to be treated as a criminal. In both cases, the courts have affirmed the fundamental premise that the courthouse door is open and detainees have the right to go in and litigate why they're being held. These first two big hurdles aren't that complex. The first is whether the courthouse is open to the detainees and the second is whether they have some rights once they're in the courthouse.

MJ: Have you made much progress in relation to these first hurdles?

MR: Absolutely. With Rasul and Hamdi, the main thing the Supreme Court said was that the court door is open for detainees to come into court and ask the government why they're being held. The problem is that the Supreme Court opened the courthouse door, but it didn't say what would happen once detainees got into the court room—what rights they might have under the Geneva Conventions or U.S. Constitution. That's what we're still litigating. The difference between Judge Richard Leon and Judge Joyce Hens Green is that Leon said that detainees can get into the courtroom, but it's essentially empty when they get in there: no Constitution, no international law or rights, no treaty rights. What Green said that in the courtroom there's a due process, Geneva Conventions and rules against torture that pertain. They're filling in the picture that the Supreme Court left open. There's a footnote in the Supreme Court opinion (footnote 15) that we think states that there are constitutional rights in Guantanamo, but this is still being debated. The other part of the picture is whether those hearings are supposed to take place in Guantanamo or in federal court. The government tried to say that it could hold all its factual hearings at these Combatant Status Review Tribunals (CSRTs) and then that ruling will go to federal court as a piece of paper that says "you're an enemy combatant and that's all you can do." We're saying that detainees have the right to a real factual hearing in federal court.

MJ: How did the president obtain the power to detain these people to begin with?

MR: He didn't do it legally. It's called the AUMF (The Authorization to Use Military Force). This authorization was passed in September 2001. It authorized the president to use force against anybody responsible for 9/11, or related to 9/11. What he did immediately after this passed is expand that definition to be anyone who he considered to be an international terrorist. The expanded definition doesn't say "international terrorist who was involved in 9/11." It's anyone he single-handedly decides is an international terrorist. And this is just a military order, never approved by Congress. He's way beyond what even the broadest view of the authorization to use military force would allow.

One of the government's patterns is that once we start winning the litigation, it comes out that the administration doesn't have enough evidence to hold people, so they release them. In Hamdi, as soon as the Supreme Court forced a hearing, they released him. Now that we're getting into federal court and requiring the government to give reasons for why they're holding people, they're going to have to come up with something. Even if they're using these CSRTs, they still have to litigate those in federal court. Once the government is forced to declare why they are holding a certain detainee, they're going to look silly. They're going to say, "We're holding you because you are an enemy combatant. You were found to be an enemy combatant by the CSRT and the evidence against you is that you have a friend from Bosnia who was a person who we believe is a terrorist." They won't even tell you the name of the friend. So, the administration's reasoning is going to be torn apart in court.

MJ: Do you think the Bush administration realizes that it's, as you say, losing the battle?

MR: I think they still are trying to figure out how they can fight off rights at Guantanamo. I think it's partly about the war on terror to them. But, I think it's really about trying to assert incredible authoritarian power over human beings that they label as bad. At times, it seems that Guantanamo is a kind of diversion from what the U.S. is doing to so-called "high-value detainees" in terms of "extraordinary rendition." That's something we've just scratched the surface of. No one has really touched the CIA in what it's doing around the world. And the fact is that a lot of the torture memos were probably written to give the CIA cover for some of the worst torture imaginable. But if you look at some of the administration's original claims, we see they're losing ground. At first they claimed that no court can hear the detainee cases. The Supreme Court overruled this. Now that they lost that, they've gone back and said, okay a court can hear the cases, but there's nothing to hear because there's no rights. I think they're fighting still for the maximum amount of power that they can still get from these decisions.

MJ: Is the U.S. judicial system facing pressures from the administration or lawyers?

MR: Yes. The administration is equating ruling in favor of basic legal rights with giving terrorists rights. The wording of the legal briefs that the administration present basically makes judges feel responsible for the release of any terrorists, and therefore, feel responsible for the next potential terrorist attack. The briefs all start off with the planes hitting the buildings and a statement to the effect that the president should have extraordinary power in this situation. They claim that federal judges should not be interfering at all with what's going on, that they shouldn't be second-guessing what they administration is doing. The legal community is considered interference.

MJ: Do you anticipate that these detainee and torture cases will be cleared up by the time the next administration comes in? Or are we dealing with repercussions well into the next administration?

MR: I think we're dealing with repercussion well into the next administration. Not for everybody, but for a lot of the people. They're building a permanent detention facility in Guantanamo with no standard of proof for the people being kept there. We've got to go to federal court and demand the evidence for these detainments. But the government is going to fight every step of the way, saying they can't reveal any evidence. We're going to be litigating these cases for a very long time. One of the reasons we've beefed up our team at the CCR was because of this. At the same time, I think that an administration that is even halfway decent will repudiate what's happened with regard to inhumane treatment and torture. And any future administration would hopefully do a serious independent investigation into the torture instead of the series of reports we've had thus far that are simply whitewashes.

MJ: Do you have any sense of how this is all going to play out, in legal terms, in the end?

MR: We've already won with, as some have said, the most significant ruling since Brown v. Board. We have the ruling that anyone held in detention by the U.S. who is a citizen or non-citizen, can go into a court whether they're in Guantanamo or held anywhere in the world. So that's a pretty big beginning. The second thing we're probably going to win is constitutional rights for people in Guantanamo. The third is real hearings. Where it's going to end is that there are going to be very few people held in these indefinite detention permanent facilities within the next couple of years, but there will still be litigation around them for years to come.

The torture stuff will end very badly for those who authorized torture. I can't say that's going to happen in three years or ten, but if you look at what's happening to Pinochet with the roundup and torture of people in "Operation Condor" 30 years later, it doesn't bode well for those involved in this. Operation Condor is the same principle as our extraordinary rendition, the same as Guantanamo. We're picking up people all over the world and torturing them, killing some of them. The U.S. is so far off of the moral compass right now of what it used to supposedly stand for in terms of prohibitions on torture, disappearances, military commissions, and indefinite detentions. I think we'll get back to where we were before eventually. But the problem is that once you've done it, it's like a torn fabric, it's never the same as having it whole—it's always patched up. It could happen again. And when other countries do it, we're going to have trouble taking a moral stand. It's damaged us for generations.

MJ: Do you think the media is adequately covering the legal issues?

MR: I think they've done a terrible job on the torture stuff. It's open and notorious that the highest government level officials authorized torture in the memos. They should be nailing these guys. You've heard Rumsfeld's name a little bit. But you rarely hear about his aides Cambone and General Boykin, who were instrumental in carrying out Rumsfeld's torture policies. The media's long non-acceptance, and much belated use of the word "torture" has also been an issue. Also, I have seen very little coverage of people who have been released from Guantanamo. Similarly, I don't understand why the media didn't cover the German case we brought. I was willing to give the Times an exclusive and they wouldn't cover it, neither would the Wall Street Journal.

MJ: Why don't you think they wanted to cover the Germany case?

MR: I think it's because we're alleging they committed war crimes and people still think war crimes is only what happened in Nazi Germany, or Rwanda. But, in fact, these high-level officials have committed war crimes. It's like the emperor has no clothes and everybody else in the world knows it, but in the U.S., our Congress refuses to look at it, and some of our press people refuse to as well. There's no doubt, if you read the law, we have committed war crimes. We're calling some of the highest-level officials in the country war criminals and people don't want to hear it, they're afraid of it. They're also afraid of it because they believe that it might hurt the U.S. But something has to be done.

The administration has taken the key architects of a whole series of illegal policies and they've elevated them. They've taken Rumsfeld and given him another 4 years, they gave Gonzales a bigger job. They may give General Ricardo Sanchez a fourth star. Look what they've done. The media is one issue. The Democrats in Congress are another. They might have voted against making Gonzales Attorney General, but they should still be screaming. The guy is the attorney general of the U.S. and he's a war criminal. It's remarkable.

MJ: If all the evidence is there, why aren't we seeing more outrage?

MR: I think people in the U.S. think these detainees are dead guilty and the heck with them if they get tortured. I think some people think this is going to make us a little safer to have people abused and kept like this. There were reporters who I used to talk to early on in the history of the Guantanamo detainee camp who told me not to worry, that they had talked with their sources and everybody said it's hunky-dory in Guantanamo. They really believed that nothing really bad was happening. There's a problem with people believing what the government says. In the first days of Guantanamo, even I thought that Rumsfeld might be telling the truth, that maybe they really were getting the people at Guantanamo who were involved in 9/11. But it's just not the case.

MJ: Do you have any suggestions for our readers who want to get involved?

MR: There's a variety of actions that we have to take. We need to contact our local representatives and insist on an independent investigation or special prosecutor to look at the widespread use of torture. People can go to local editorial boards, visit their House of Representatives, or find out who is justifying this kind of torture and demonstrate against them—for instance, people like John Yoo at Berkeley who should, by no stretch of the imagination, be teaching other people how to be lawyers. There is also currently a play being put on across the country regarding prisoners in Guantanamo <<image001.gif>> . I would encourage people to go to the play. It's called Guantanamo: Honor Bound to Defend Freedom. We are also trying to get people to schedule readings of the play in their hometowns. And there are plenty of other opportunities to get involved through our website, www.ccr-ny.org.

The New York Times

THE LAST KING OF SCOTLAND

June 21, 2004

U.S. Said to Overstate Value of Guantánamo Detainees

By TIM GOLDEN and DON VAN NATTA Jr.

GUANTÁNAMO BAY, Cuba, June 19 — For nearly two and a half years, American officials have maintained that locked within the steel-mesh cells of the military prison here are some of the world's most dangerous terrorists -- "the worst of a very bad lot," Vice President Dick Cheney has called them.

The officials say information gleaned from the detainees has exposed terrorist cells, thwarted planned attacks and revealed vital intelligence about Al Qaeda. The secrets they hold and the threats they pose justify holding them indefinitely without charge, Bush administration officials have said.

But as the Supreme Court prepares to rule on the legal status of the 595 men imprisoned here, an examination by The New York Times has found that government and military officials have repeatedly exaggerated both the danger the detainees posed and the intelligence they have provided.

In interviews, dozens of high-level military, intelligence and law-enforcement officials in the United States, Europe and the Middle East said that contrary to the repeated assertions of senior administration officials, none of the detainees at the United States Naval Base at Guantánamo Bay ranked as leaders or senior operatives of Al Qaeda. They said only a relative handful -- some put the number at about a dozen, others more than two dozen -- were sworn Qaeda members or other militants able to elucidate the organization's inner workings.

While some Guantánamo intelligence has aided terrorism investigations, none of of it has enabled intelligence or law-enforcement services to foil imminent attacks, the officials said. Compared with the higher-profile Qaeda operatives held elsewhere by the C.I.A., the Guantánamo detainees have provided only a trickle of intelligence with current value, the officials said. Because nearly all of that intelligence is classified, most of the officials would discuss it only on the condition of anonymity.

"When you have the overall mosaic of all the intelligence picked up all over the world, Guantánamo provided a very small piece of that mosaic," said a senior American official who has reviewed the intelligence in detail. "It's been helpful and valuable in certain areas. Was it the mother lode of intelligence? No."

In September 2002, eight months after the detainees began to arrive in Cuba, a top-secret study by the Central Intelligence Agency raised questions about their significance, suggesting that many of the accused terrorists appeared to be low-level recruits who went to Afghanistan to support the Taliban or even innocent men swept up in the chaos of the war, current and former officials who read the assessment said.

Nearly two years later, military officials said, the evidence against many of the detainees is still so sparse that investigators have been able to deliver cases for military prosecution against only 15 of the

suspects, 6 of whom have already been designated as eligible for trial by President Bush. Investigators are now preparing 35 to 40 other cases for the military tribunals, those officials said.

In interviews, officials at Guantánamo and in the Pentagon defended the intelligence-gathering effort and said it continued to produce useful information. "Every single day we get some piece of information that's relevant to now," said Steve Rodriguez, who oversees the interrogation teams at the base.

Officials said the intelligence had allowed them to piece together a more detailed picture of Al Qaeda before Sept. 11, 2001, including how young jihadis were recruited and screened, how the organization moved funds and how it related to other militant groups. They said some were important Qaeda operatives, including financiers, a bodyguard for Osama bin Laden and -- a recent discovery -- a militant who they say helped recruit 9/11 hijackers.

Yet even as he argued the importance of that information, the commander of the task force that runs the Guantánamo prison, Brig. Gen. Jay W. Hood, acknowledged disappointment among some senior officials in Washington.

"The expectations, I think, may have been too high at the outset," he said. "There are those who expected a flow of intelligence that would help us break the most sophisticated terror organization in a matter of months. But that hasn't happened."

In recent weeks, the Pentagon has initiated a broad study of prison operations, including an examination of the criteria used to determine which detainees are held there, officials at Guantánamo said. "Everything is on the table," said Col. Tim Lynch, the chief of staff at Guantánamo.

The Pentagon's determination to hold the detainees as "enemy combatants" -- beyond the reach of United States law and unbound by the Geneva Conventions on treatment of prisoners of war -- has also come under renewed scrutiny in the wake of the scandal over abuses at Abu Ghraib prison in Iraq. Defense Department officials have acknowledged that American jailers in Iraq, under pressure to produce better intelligence, adapted some new, more aggressive interrogation techniques that were approved by Secretary of Defense Donald H. Rumsfeld for use at Guantánamo.

While refusing to discuss specifics, Pentagon officials called the interrogation methods used at Guantánamo humane and said they had applied more severe methods only sparingly. In at least one of those cases, they said, the techniques prompted an important Qaeda member to give up vital information.

But new details of that case, which involved a 26-year-old Saudi man who apparently tried unsuccessfully to enter the United States as the 20th hijacker in the attacks of Sept. 11, 2001, call some of those assertions into question.

Several officials familiar with the case said that for months, no one at Guantánamo even knew who the detainee, Mohamed al-Kahtani, was and that he was identified only after the Federal Bureau of Investigation stepped in. The officials also said that the harsher interrogation methods used against him were largely unsuccessful, that he had little sense of other Qaeda plots, and that he had been most forthcoming under more subtle persuasion.

Even now, officials acknowledge that they have been unable to get any information from at least 60 detainees -- including in some cases their identities. Those uncertainties, the officials said, leave open

the possibility that more serious terrorists may be among Guantánamo's detainees.

"We weren't sure in the beginning what we had; we're not sure today what we have," said Gen. James T. Hill, the head of the Army's Southern Command. "There are still people who do not talk to us. We could have the keys to the kingdom and not know it."

The problems of collecting information about the detainees have also hampered their screening for possible release. As a result, some of the men are being held apparently as much for what officials do not know about them as for what they do.

Officials said they had cautiously vetted the 146 detainees who have been freed, including the 16 who had been transferred to the custody of their home governments. Even so, at least a handful of serious mistakes have already been made.

New accounts from officials in Afghanistan and the United States indicate that at least 5 of the 57 Afghan detainees released have returned to the battlefield as Taliban commanders or fighters. Some of the five have been involved in new attacks on Americans, officials in southern Afghanistan said, including a notorious Taliban commander, Mullah Shahzada, who was reportedly killed in a recent accident.

American and foreign officials have also grown increasingly concerned about the prospect that detainees who arrived at Guantánamo representing little threat to the United States may have since been radicalized by the conditions of their imprisonment and others held with them.

"Guantánamo is a huge problem for Americans," a senior Arab intelligence official familiar with its operations said. "Even those who were not hard-core extremists have now been indoctrinated by the true believers. Like any other prison, they have been taught to hate. If they let these people go, these people will make trouble."

First Wave: Initial Screenings Were Flawed

As the Taliban government crumbled, American officials braced themselves for what they expected would be waves of hardened terrorists captured in the Afghanistan war. Military officials said they had culled the most dangerous of the roughly 10,000 prisoners caught there and shipped them to Guantánamo Bay.

"These are people who would gnaw through hydraulic lines at the back of a C-17 to bring it down," Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, said as the first 20 shackled prisoners arrived in Cuba on Jan. 11, 2002.

The first makeshift prison at Guantánamo, called Camp X-Ray, was built and run accordingly. Inmates were dressed in Day-Glo orange jump suits and shackled whenever they were moved, their eyes covered by blacked-out goggles or hoods. Fearing that the terrorists among them might somehow seek revenge, officials instructed military police guards to cover their name badges and avoid any mention of their families, hometowns or outside jobs.

"We really didn't have a good feel for who we were dealing with," Gen. Rick Baccus, who took over command of the military police units two months after the camp opened, said in an interview. "We had to err on the side of security."

But almost immediately, questions began to emerge -- in Afghanistan, at Guantánamo and eventually in Washington -- about the pedigrees of some of the men and why they had been selected to go to Cuba.

At a sprawling detention camp at the airport in Kandahar, Afghanistan, military intelligence officers, F.B.I. agents and others scrambled vainly to keep up with the torrent of prisoners, officers who served there said, making it nearly impossible to weed out the most dangerous.

"It was like trying to catch guys as they ran by," a former Kandahar interrogator recalled. "Some you were going to miss."

C.I.A. operatives took their pick of prisoners turned over by commanders of the Afghan Northern Alliance. They also took custody of some military prisoners in whom they had interest, military officers said.

"Anybody who we thought was going to have significant value we had priority in debriefing," said a former senior C.I.A. official. "We focused on the individuals we got in Afghanistan and elsewhere who we thought were linchpins in the process. D.O.D. got stuck processing the rest."

Officials of the Department of Defense now acknowledge that the military's initial screening of the prisoners for possible shipment to Guantánamo was flawed. It was not until hundreds of detainees had arrived here that the classified criteria even referred directly to the threat that they might represent, military officials said.

But some clues were obvious. Some of the detainees were elderly or infirm. One of those was Faiz Muhammad, a genial old man with a long wispy beard whom interrogators nicknamed "Al Qaeda Claus." Another, who was able to make the trip only after extensive medical care from Army doctors in Afghanistan, quickly became known as "Half-Dead Bob."

"You had a group of people who didn't come with ID cards, who weren't wearing uniforms, who were of all kinds of different nationalities, gathered up off various parts of the battlefield in a very chaotic environment," General Hill, the Southern Command chief, recalled. "We were all in very uncharted waters."

A former secretary of the Army, Thomas E. White, who supervised a team of senior Pentagon officers at Guantánamo, said he was told by a senior military official at the base on an early visit that only a third to a half of the detainees appeared to be of some value and that sorting through them would be a considerable problem.

In late summer 2002, a senior C.I.A. analyst with extensive experience in the Middle East spent about a week at the prison camp observing and interviewing dozens of detainees, said officials who read his detailed memorandum.

While the survey was anecdotal, those officials said the document, which contained about 15 pages, concluded that a substantial number of the detainees appeared to be low-level militants, aspiring holy warriors who had rushed to Afghanistan to defend the Taliban, or simply innocents in the wrong place at the wrong time.

Senior military officials now readily acknowledge that many members of the intelligence team initially sent to Guantánamo were poorly prepared to sort through the captives. During the first half of 2002,

they said, almost none of the Army interrogators had any substantial background in terrorism, Al Qaeda or other relevant subjects.

One Army intelligence reservist had previously been managing a Dunkin' Donuts. Many younger Army interrogators had never questioned a real prisoner before. As in Afghanistan, interrogators at Guantánamo asked the same basic questions again and again, many former detainees recalled.

"They asked me, 'Do you know the Taliban? Do you know Mullah Muhammad Omar? Do you know bin Laden?' " said Jan Muhammad, 37, a farmer from Helmand Province who said he had been forcibly conscripted into the Taliban. "I said, 'I have never seen bin Laden; I have not even seen bin Laden's car driving past.' "

Interpreters were in such short supply that the Army turned to private contractors, most of whom knew nothing about intelligence. The Southern Command, responsible for military operations in Latin America, had no particular experience with Al Qaeda or Afghanistan, either. Nonetheless, its intelligence analysts often rewrote reports on the detainees as they saw fit, former interrogators complained.

One of the few American intelligence sectors to show any early interest in the detainees was an obscure defense intelligence unit that traced weapons around the world, one interrogator said. As a result, interrogators were required to question detainees about the serial numbers on rifles they had used and the markings on their bullets. "Of course, they had no idea," the interrogator said.

Military intelligence units at Guantánamo managed to solve some of the shortcomings, gathering available experts -- a Lebanese-born F.B.I. counterterrorism specialist and an Afghan interpreter, for example -- and having them conduct a daylong seminar on Al Qaeda, the Taliban and other relevant subjects.

But senior defense officials grew frustrated with the shortage of compelling information. "At the beginning, the process was broken everywhere," said Lt. Col. Anthony Christino III, a recently retired Army intelligence officer who specialized in counterterrorism and was familiar the Guantánamo intelligence. "The quality of the screening, the quality of the interrogations and the quality of the analysis were all very poor. Efforts were made to improve things, but after decades of neglect of human intelligence skills, it can't be fixed in a few years."

Defense officials ultimately ordered a broad review of the intelligence-gathering effort. That assessment, in September 2002, led to a series of changes including a major overhaul of intelligence databases and the addition of 30 days of basic training for interrogators and analysts at Fort Huachuca, Ariz., a course quickly nicknamed "Terrorism 101."

Around the same time, faced with continuing resistance from many detainees, some military intelligence officers urged that they be allowed to take advantage of the suspension of Geneva Conventions to try more coercive methods -- a step that led to bitter conflicts between military intelligence members and military criminal investigators assigned to prepare cases for the tribunals.

"As time went on, people wanted to do more," a senior officer who served there said. "The detainees were resistant. They knew we weren't going to torture them. So we needed to come up with a Plan B for the small group of people who wouldn't talk and who we thought did have intelligence."

The 20th Hijacker: It Took Months To Identify Kahtani

For interrogators at Guantánamo looking to score a high-profile intelligence victory, Mr. Kahtani, the Saudi who was the so-called 20th hijacker, appeared to be their man. In the end, though, his case instead came to illustrate some of the problems they faced in determining who they were holding and what they knew.

According to several officials familiar with the case, military intelligence officers had no idea who the young detainee was when he arrived in Cuba from Afghanistan, where he had been captured on the battlefield in December 2001. For some weeks, the officials said, Mr. Kahtani -- like most of the detainees -- refused to cooperate with interrogators, withholding his name and denying their suspicions that he was Saudi.

Then, in July 2002, a routine check by F.B.I. agents matched his fingerprints to a thumbprint from a man who had been turned back by an immigration official after flying into Orlando International Airport in Florida from London on Aug. 3, 2001, without a return ticket or hotel reservation.

Members of the F.B.I. unit investigating the Sept. 11 attacks were immediately intrigued, officials said. On that same day in August 2001, they noted, toll records showed calls from a pay phone at the Orlando airport to Mustafa al-Hawsawi, a Qaeda member in the United Arab Emirates who served as a logistical coordinator for the attacks, the officials said.

Checking surveillance camera recordings for that day, the agents found that a rental car used by the hijackers' leader, Mohamed Atta, entered an airport parking lot shortly before Mr. Kahtani's Virgin Atlantic flight arrived from London, officials said.

In July 2002, about a week after Mr. Kahtani's identity was discovered, military officials invited the F.B.I. to question him, officials said.

The bureau sent a longtime counterterrorism specialist who is fluent in Arabic and worked extensively on investigations of Al Qaeda. Michael Kortan, an F.B.I. spokesman, declined to comment on the Kahtani case, other than to request that the agent's identity be withheld from publication to ensure his safety.

Over a series of interrogations that extended into the fall of 2002, the agent slowly built a rapport with Mr. Kahtani, approaching him with respect and restraint, officials said. "He prays with them, he has tea with them, and it works," a senior official said, speaking generally of the agent's approach to terrorist suspects.

Mr. Kahtani began to open up, officials said. He disclosed that he attended an important Qaeda planning meeting with two of the Sept. 11 hijackers in Malaysia, in January 2000. Mr. Kahtani also said he had a relative he thought might be living near Chicago.

The relative, Ali Saleh Kahlah al-Marri, is believed by officials to have been planted in the United States as a Qaeda "sleeper" agent. He was taken into custody as a material witness shortly after arriving in the country on Sept. 10, 2001, and was later confined to a Naval brig in Charleston, S.C., with two American citizens charged as "enemy combatants," Jose Padilla and Yaser Hamdi.

One official said that Mr. Kahtani had admitted that he had intended to join the hijackers but that he had given up little or nothing about other Qaeda plans. To some F.B.I. experts, officials said, his ignorance seemed credible: he had been recruited to be what the plotters called a "muscle" hijacker,

someone to subdue passengers rather than pilot a plane. Officials said such lower-level operatives were generally only minimally informed even as to the details of attacks in which they would take part.

But military intelligence officials were skeptical, believing that new approaches to Mr. Kahtani might well reveal plans for attacks that were to follow the hijackings or that might have involved Mr. Marri. In late November 2002, Pentagon officials informed the F.B.I. that they would take over interrogations of Mr. Kahtani, an official said.

A list of 17 new interrogation techniques -- the first such addition since the Army field manual was issued in 1987 -- was approved by Mr. Rumsfeld in early December. Ten of the techniques were used on Mr. Kahtani before complaints from some military officials prompted Mr. Rumsfeld to retract his approval for the more extreme methods, military officials said.

Military officials refused to say which techniques had been used on Mr. Kahtani, but the list, contained in a memo dated Jan. 8, 2003, included hooding prisoners during questioning, placing them in "stress positions" like standing or squatting for up to four hours, aggravating phobias like fear of dogs, and "mild noninjurious physical contact," officials familiar with the memo said. Another detainee was also subjected to methods from the same list, they said.

General Hill, the Southern Command chief, said the tougher techniques used on a detainee he would not identify -- but who was identified by others as Mr. Kahtani -- "were successful." Last month, a senior Bush administration official told The Times that Mr. Kahtani had provided information to interrogators "about a planned attack and about financial networks to fund terrorist operations." But several other officials disputed that characterization, saying he had not given any new information about plots by Al Qaeda.

Carrot and Stick: Hard Treatment And Favored Treatment

As the Pentagon built a more permanent prison at Guantánamo, fashioning cell blocks from double-wide trailers, the intelligence-gathering effort changed under Maj. Gen. Geoffrey D. Miller, who took over in November 2002.

Military police and intelligence units that had often been rivalrous were fused into a single task force. Interrogators, linguists and analysts were divided into "tiger teams" to interview detainees. Guards were encouraged to observe the prisoners closely, trying to detect the leaders among them so they could be isolated or marked for interrogation. Pentagon officials say the changes produced more intelligence.

Foreign intelligence and law-enforcement agencies were brought in to interview some detainees who refused to talk to American interrogators. Since early last year, intelligence gathered at Guantánamo has been entered into a new database shared by 42 government agencies worldwide.

Questions about the treatment of prisoners linger. Several detainees who have been released said coercive interrogation methods used at Guantánamo had constituted abuse, charges American officials have denied. Among the allegations are complaints of druggings, invasive body searches, sleep deprivation and other mistreatment.

Parkhudin, a 26-year-old Afghan farmer who was held at Guantánamo from February 2003 to March 2004, said in an interview in Khost that he had been questioned for up to 20 hours at a time under uncomfortable conditions at Guantánamo. He said he had been shackled with a small chain during questioning. "They made me stand in front of an air-conditioner," he said. "The wind was very cold."

In a visit to Guantánamo this week, several military officers disputed accounts of harsh treatment and said the most useful interrogation tool was a reward system put into effect in 2003, in which more cooperative detainees were accorded privileges like more comfortable quarters or occasional ocean swims.

The most cooperative detainees are moved to "Camp 4," a medium-security facility where they are permitted to wear white uniforms, rather than the standard prison orange. In Camp 4, cells hold 10 prisoners each, and the detainees can spend up to nine hours a day outside their cells. They can also play soccer, eat meals outside and watch "family oriented" films in their native language. Last week, a half dozen Camp 4 detainees went on a field trip -- to the beach.

"We try to keep people hopeful," said Col. Nelson J. Cannon, the commander of the joint detention operation at the base. "Camp 4 is the place they aspire to get to."

In interviews, Mr. Rodriguez, the head of Guantánamo's intelligence-gathering effort, and two interrogators said valuable information continued to be produced. "We've had new openings just in recent weeks," Mr. Rodriguez said. "After two years, my team still has fresh fields to plow."

One morning last week, a reporter was allowed to observe -- but not listen to -- two interrogations at Guantánamo from behind one-way glass. In one room, an elderly detainee with a long white beard played chess with his interrogator. The chess game was a "reward" for 90 minutes of "fruitful" discussion, an interrogator said. In another room, a detainee in his late 30's wearing an orange jump suit looked despondent as his interrogator spoke calmly to him through an interpreter. In a period lasting nearly 10 minutes, the detainee appeared to say nothing.

Intelligence and law-enforcement officials outside the Defense Department generally agree that the compendium of narrow, personal accounts from detainees has deepened the intelligence sector's historical understanding of Al Qaeda's recruitment and training activities. But there are limits to the historical information.

"It's like going to a prison in upstate to find out what's happening on the streets of New York," a counterterrorism official with knowledge of Guantánamo intelligence said. "The guys in there might know some stuff. But they haven't been part of what's going on for a few years."

Other investigators describe the value of the detainees more narrowly: for hundreds of intelligence and law enforcement officers now working on terrorism, stints at the camp have offered a rare chance to study committed Islamic militants. "We haven't had this broad of access to true believers ever," a senior counterterrorism official said. "It has taught people how to go face-to-face with them. If we see can them as they see themselves, it makes us stronger."

As public criticism of Guantánamo has increased, the Pentagon has intensified its public-relations campaign on the importance of intelligence from the base. General Miller, who left Guantánamo in May to take over prison operations in Iraq, has claimed repeatedly -- although without specifics -- that the quality of the intelligence gathered from detainees had improved the longer they had been imprisoned.

Paul Butler, who was the senior Pentagon official for detainee policy until recently becoming Mr. Rumsfeld's chief of staff, was even more expansive. At a briefing on Feb. 13, Mr. Butler described the Guantánamo detainees as "very dangerous people" who included "senior Al Qaeda operatives and

leaders and Taliban leaders." In the most detailed public accounting yet of important detainees at Guantanamo, he also briefly profiled 10 unidentified Qaeda members or "affiliated" militants. But several senior officials with detailed knowledge of the Guantánamo detainees described Mr. Butler's portrait of the camp as a work of verbal embroidery, saying none of the detainees at the camp could possibly be called a leader or senior operative of Al Qaeda.

Value of Detainees: Some Challenge Claims of Success

Mr. Rumsfeld has repeatedly cited the importance of Guantánamo to the fight against terror, saying the detentions there had helped prevent attacks.

"We are keeping them off the street and out of the airlines and out of nuclear power plants and out of ports across this country and across other countries," he said in a speech in February.

In interviews with reporters, officials have repeatedly pointed to two operations against foreign militants whose success they attributed to interrogations at Guantánamo. One, they said, involved a plot in which Saudi militants in Morocco were to attack British and American ships in the Strait of Gibraltar with small, explosives-laden boats. The other involved breaking up a terrorist cell in Milan that same year.

A closer look at both, however, indicates that the role the Guantánamo information played was overstated, as was the nature of the threat the two cases posed.

According to interviews with European, North African and American officials, small teams of law-enforcement and intelligence officials from both Italy and Morocco visited Guantánamo several times in 2002 and 2003 to interview detainees from those countries.

In the Moroccan case, an important tip came from one of nine Moroccans who were initially held there. In March 2002, the detainee told a Moroccan interrogator about a Saudi man who had recruited young men in Morocco on behalf of Al Qaeda in the late 1990's. The detainee knew the man only by the name "Zuher," an Arab counterterrorism official said. He also provided the full names of the man's Moroccan wife and sister-in-law.

Moroccan investigators were able to track down the sister-in-law. She then pointed the investigators to her brother-in-law, who was living in Morocco.

The authorities quickly began surveillance of the man, whom they identified as Zuher al-Tbaiti, 35. With the help of Saudi intelligence officials, the Moroccans learned that Mr. Tbaiti had attended a Qaeda training camp in Afghanistan in the late 1990's and had been in the Tora Bora area of Afghanistan in December 2001, during the United States bombing campaign to kill Mr. bin Laden.

The Moroccan authorities arrested Mr. Tbaiti along with two Saudi associates in June 2002. A Casablanca prosecutor later disclosed that Mr. Tbaiti and his two associates had intended to load a small boat with explosives to attack an American or British warship in a plot modeled after the attack that killed 17 American sailors aboard the American destroyer Cole in October 2000.

Both American and Moroccan officials have at times suggested that the plot was thwarted in its final stages. In recent interviews, however, counterterrorism officials from both countries acknowledged that the Saudis and their Moroccan associates were in the earliest planning stages when they were arrested.

"I don't believe the attacks were anything more than an idea," a senior American official said. "They were far from pulling it off."

What Moroccan investigators did not learn from Guantánamo -- or were not particularly interested in -- is also revealing.

By the time Moroccan investigators made a second trip to Guantánamo in September 2002, the number of Moroccan prisoners had grown to 18 from 9. Nearly all of them had trained with Al Qaeda in Afghanistan, but investigators said only five had any useful information -- and that was about recruitment and links between other Moroccan extremists and Al Qaeda. One official also said a lead developed during the trip had been given to British officials, which helped bring about the arrests of several men in possession of the toxic agent ricin in a north London apartment in January 2003.

That same month, the Moroccans traveled again to Guantánamo for a new round of interrogations. This time, however, the detainees not only refused to cooperate but also began lying about their activities.

"By then they were discouraged and cynical and realized they were not getting out any time soon," an official with knowledge of the interviews said.

As with the Moroccan case, the episode in Milan involved the authorities who were already well into their investigations. American officials have pointed to it as a trophy of the intelligence effort at Guantánamo, but other senior officials say the information developed there had a limited impact on counterterrorism investigations in Italy.

Italian investigators first traveled to the camp in July 2002 to try to learn more about a militant cell in Milan. The cell's suspected leader, Yassine Chekkouri, had been under arrest in Italy for more than six months on charges of possession of explosives and chemical weapons. After they arrived in Guantánamo, the investigators discovered that Mr. Chekkouri's brothers, Redouan and Younes, were being held there. Ultimately, however, the two detainees were not helpful with the case, the officials said.

The Italian investigators did have some other useful conversations at Guantánamo, officials said, speaking to about 10 other detainees -- Tunisians, Moroccans, an Egyptian -- who had passed through Italy at various times and offered some background information about some of the dozen Islamic militants who had been arrested in the Milan investigation over the course of 2001. They also provided some information on the reputed head of Al Qaeda's operations in Italy, Essid Sami Ben Kehmais, a Tunisian convicted last year.

None of the information led to new suspects, however, or prevented any attacks, officials said.

One European official familiar said the Guantánamo interrogations "confirmed a lot of things" that had already been under investigation. But an American investigator familiar with the case was even less generous.

"It was part of the overall picture, but there was other evidence, I think, that helped," the official said. "This was also a logistical cell, not an operational cell."

Releases: Hopes for Spies Vs. Returned Foes

Government officials initially hoped to do more at Guantánamo than extract information from

detainees they had captured; they hoped they might be able to turn some of them into intelligence "assets" in their fight against terrorism.

According to several officials, the C.I.A. has carried out an active effort to recruit some of the detainees as spies for the agency, offering to help them get out of Guantánamo and resettle in their home countries in return for information about militant activities.

The success of those efforts is unknown; Bill Harlow, the C.I.A. spokesman, declined to comment on the matter. What is more certain, though, is that American officials have freed at least a handful of captives who turned out to be dangerous -- another indication of how difficult it has been for officials to get a firm assessment of just who they have imprisoned at Guantánamo.

"Let me put it this way," Mr. Rumsfeld said at a Pentagon briefing on March 9. "I've been told by senior people in this department that of the people that have been released, we know of at least one who has gone back to being a terrorist."

Pressed for details, Mr. Rumsfeld said, "I can't give you any more information because I don't -- I've forgotten."

Military and police officials in southern Afghanistan were more forthcoming.

In interviews, the officials said at least five prisoners released from Guantánamo since early 2003 had rejoined the Taliban and resumed attacks on American and Afghan government forces. Although two American officials said only one of the former detainees had turned out to be an important figure, Afghan officials said all five men were in fact commanders with close contacts to the Taliban leadership.

"They are fighting again and killing people," said Khan Muhammad, the senior military commander in southern Afghanistan.

The most notorious of the former Guántanamo detainees, Mullah Shahzada, had been a lieutenant to a senior commander when he was first captured in the war, an American military intelligence official said. After his return to Afghanistan in March 2003, he emerged as a frontline Taliban commander, Afghan officials said, leading a series of attacks in which at least 13 people were killed, including 2 aid workers.

Senior Pentagon officials refused to explain how Mr. Shahzada had talked his way out of Guantánamo. But two other military officials with knowledge of the case said he had given a false name and portrayed himself as having been captured by mistake.

"He stuck to his story and was fairly calm about the whole thing," a military intelligence official said. "He maintained over a period time that he was nothing but an innocent rug merchant who just got snatched up."

Other detainees who are known to have been released and then taken up arms are Mullah Shakur and two men known only as Sabitullah and Rahmatullah. A senior security official, Abdullah Laghmani, described all five men as commanders with close ties to the outlawed Taliban leadership.

Afghan officials blamed the United States for the return of the five men to the Taliban's ranks, saying neither American military officials nor the Kabul police, who briefly process the detainees when they

are sent home, consult them about the detainees they free.

"There are lots of people who were innocent, and they are capturing them, just on anyone's information," said Dr. Laghmani, the chief of the National Security Directorate in Kandahar. "And then they are releasing guilty people."

Tim Golden reported from New York and Washington for this article, and Don Van Natta Jr. from Guantánamo Bay. Reporting was contributed by Carlotta Gall, David Rohde, Lizette Alvarez, Clifford Krauss, Raymond Bonner and Jason Horowitz.

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--David B. Rivkin, Jr.--
Testimony
Senate Judiciary Committee

Monday, September 25, 2006

The Military Commissions Act of 2006 ("MCA") builds upon and works with the judicial review procedures set forth in the Detainee Treatment Act of 2005 ("DTA"). Together, they provide a set of judicial review procedures that are streamlined, yet fair and provide detainees with sufficient due process opportunities. As such, I believe that these provisions comport with the Constitution and will withstand judicial review.

Let me begin by briefly laying out the pre-MCA, DTA-driven judicial review system for detained unlawful enemy combatants. The DTA makes the D.C. Circuit the exclusive venue for handling any legal challenges by detainees and limits the D.C. Circuit's jurisdiction to two sets of circumstances – review of the validity of the final decision of a Combatant Status Review Tribunal ("CSRT") that an alien has been properly detained

as an enemy combatant and review of the validity of the final decision by a Military Commission.

In both instances, the scope of review is precisely defined and limited to essentially two questions – whether CSRT or the Military Commission operated in a way that was consistent with the standards and procedures adopted by these respective bodies and whether, to the extent that the Constitution and laws of the United States are applicable, the use of such standards and procedures by either the CSRT or a Military Commission "to reach the final decision is consistent with the Constitution and laws of the United States".

By the way, while there has been some debate about the meaning of this language – specifically, whether any factual issues arising out of the CSRT or Military Commissions proceedings can be reviewed by the D.C. Circuit (and, ultimately, by the Supreme Court) – in my view, there is at least a possibility that one key factual issue may be amenable to review. Because under the teaching of Ex Parte *Milligan*, it is unconstitutional to

bring civilians before Military Commissions, while the Article III courts are open and functioning, an enemy civilian who has been subjected to the Military Commissions procedures is, arguably, in a situation where the applications of such procedures to him is inconsistent with the Constitution of the United States. This, by the way, is what the Court did in Quirin by rejecting the petitioners' contention that they were civilians, not subject to military jurisdiction. To be sure, the *Milligan* case dealt with an American citizen, being tried by a military commission on American soil. It is not entirely clear whether, even in the aftermath of the *Rasul* decision, it is the case that an enemy alien, held at Guantanamo or elsewhere outside of the United States, is deemed to be subject to the substantive constitutional protections implicated by *Milligan*, as distinct from being merely eligible for an access to a federal court in the context of a habeas proceeding.

I want to emphasize that I do not take limitations on judicial review available to detained unlawful enemy combatants lightly. Indeed, I believe any restrictions on judicial review that entirely eliminate the access to

Article III courts amount to a total suspension of habeas corpus, and are unnecessary and constitutionally problematic. I feel so strongly about this matter that I spoke out publicly against an early version of the DTA, which seemed to eliminate all judicial review opportunities. This, of course, is not what ended up being done, and I believe that the judicial review options featured in the DTA are consonant with the constitutional requirements, as construed by the Supreme Court in such leading cases as Milligan, Quirin and Yamashita.

Now, moving on to the MCA, while the CSRT procedures remain unchanged, the Military Commission-related procedures are greatly refined. The MCA establishes a new body – the Court of Military Commission Review – as the final entity within the military establishment for reviewing and confirming the decisions of Military Commissions and specifies that the D.C. Circuit's jurisdiction to determine the final validity of the Military Commission's judgment does not arise until all of the intra-military system appeals have been exhausted or waived. This is quite reasonable and is

designed to enable the D.C. Circuit to step in after the military system has finished its work. It appears that the existing language would ensure that an accused, being tried by Military Commission, who decides that he wants to waive the review by the Court of Military Commission Review, would be unable then to get into the D.C. Circuit as well. I am not sure whether this is deliberate or an oversight. But assuming that this is a deliberate choice, it does not strike me as being particularly volatile of due process – the right analogy from the civilian justice system might be a defendant, who having been tried by a District Court, decides to waive an appeal to the Circuit Court and, as a result, cannot get to the Supreme Court as well.

The MCA also has language – in Section 6 – that reaffirms the proposition that, outside of the DTA-provided judicial review system, "[n]o court, justice or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States", provided that he has been determined to be an enemy combatant – presumably, through a CSRT-based process. The

bill also removes any jurisdiction to hear cases for damages or injunctive relief, arising out of any aspect of detention, transfer, trial or conditions of confinement of an enemy combatant, against the U.S. or any of its agents. This provision effectively vitiates any prospect of civil liability in this area by either the U.S. or its agents, and, when combined with the revised War Crimes Act provisions, ensures full legal immunity for CIA interrogators or anybody else involved in the interrogation process, provided they comply with these revised War Crimes Act provisions.

In an understandable response to the *Hamdan* Court's decision that the DTA jurisdiction limiting provisions were not sufficiently clear on the issue of retroactive application, the MCA comes up with a pretty air tight language – "shall apply to all cases, without exception, pending on or after the date of the enactment of this Act" – on the retroactivity issue. I cannot imagine how any U.S. court would find this language to be insufficient to ensure retroactive application.

The MCA, also partially in response to the *Hamdan* decision and partially to the way in which this decision was interpreted by the media and academe, contains pretty air tight language, indicating that "[n]o person may invoke the Geneva Conventions, or any protocols thereto, in any habeas" action brought against the U.S. or any of its agents. As intended, this language renders the Geneva Conventions judicially unenforceable. However, since, in my view, this has always been the case, and the *Hamdan* court has brought in Common Article 3 only in the very narrow and limited context – military commission proceedings – and has done so in the context of Congress' alleged legislative incorporation of that Article through the UCMJ, I am not at all troubled by the MCA's reaffirmation of this principle.

My bottom line view is that the MCA has come up with a fair and balanced approach to judicial review, eliminating repetitive challenges, banning forum shopping, and yet, preserved the necessary essentials of a judicial review for detained unlawful combatants, going both to the issue of their status and their prosecution. As such, the MCA is consonant with both the Constitution and our international law obligations.

Kenneth W. Starr
24569 Via de Casa
Malibu, CA 90263

September 24, 2006

The Honorable Arlen Specter
Chairman, Senate Committee on the Judiciary
Dirksen Senate Office Building, Room 224
Washington, D.C. 20510

Dear Chairman Specter:

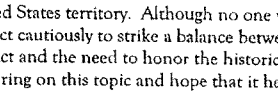
I write to express my concerns about the limitations on the writ of *habeas corpus* contained in the compromise military commissions bill, The Military Commissions Act of 2006 (S. 3930). Although S. 3930 contains many laudable improvements to military commission procedure, section 6 of the bill effectively bars detainees at the U.S. Naval Base at Guantanamo Bay, Cuba from applying for *habeas corpus* review of their executive detention. I am concerned that limitation may go too far in limiting *habeas corpus* relief, especially in light of the apparent conflict between the holdings of Rasul v. Bush, 124 S.Ct. 2684 (2004), and Johnson v. Eisentrager, 339 U.S. 763 (1950).

Although the Rasul Court limited its holding to statutory *habeas* rights, which may be limited by the Congress, the Supreme Court nevertheless viewed Guantanamo Bay, Cuba as a territory within the control and jurisdiction of the United States. Accordingly, the Eisentrager case may no longer be relied upon with confidence to rule out constitutional *habeas* protections for Guantanamo detainees. One of the Eisentrager factors that limited constitutional *habeas* rights for aliens in military custody was whether the detainee was held outside of the United States. Based on the finding of the Rasul case that Guantanamo Bay falls within U.S. territorial jurisdiction, Guantanamo detainees likely have a different constitutional status than the alien detainees in Eisentrager, who were held in Landsberg, Germany.

Article 1, section 9, clause 2 of the United States Constitution provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." The United States is neither in a state of rebellion nor invasion. Consequently, it would problematic for Congress to modify the constitutionally protected writ of *habeas corpus* under current events.

I encourage the Senate Judiciary Committee to study the constitutional implications of S. 3930 on the *habeas corpus* rights of detainees in United States territory. Although no one wants the War on Terror to be litigated in the courts, Congress should act cautiously to strike a balance between the need to detain enemy combatants during the present conflict and the need to honor the historic privilege of the writ of *habeas corpus*. I thank you for holding a hearing on this topic and hope that it helps to strike that balance.

Sincerely,



Kenneth W. Starr

STATEMENT OF THOMAS P. SULLIVAN
REGARDING THE
PROPOSED MILITARY COMMISSIONS BILL

My name is Thomas P. Sullivan, and I want to thank Chairman Specter and the members of the Committee for affording me the opportunity to address you today.

After graduating from Loyola Law School in Chicago in 1952, I served in the Army for two years, including a year in Korea. In the fall of 1954, I joined the law firm of Jenner & Block in Chicago. I've been a lawyer there since then, except for my term as United States Attorney for the Northern District of Illinois from June 1977 to April 1981. My resume is attached as Tab 1.

In my career, I have been privileged to represent some of the finest men, women and corporations in our country. Together with other attorneys at our firm, I am now privileged to represent seven Saudi Arabian men currently held in custody at Guantánamo and three Saudi men who were released in May, 2006. I have been to Guantánamo three times this year. Each of our clients has spent more than four years at Guantánamo; none has been charged before any military tribunal, and we seriously doubt – based on the nature of the evidence against them – that they ever will be charged.

Presently, only 10 of the 465 men at Guantánamo have been charged before the military tribunals. As to the other men – our clients included – who are held indefinitely at Guantánamo and won't be charged before the tribunals, habeas corpus relief presents their only meaningful legal avenue for challenging the factual and legal basis for their detention. Congress is now considering proposals – on a very rushed basis – to deprive the federal court in Washington, D.C. of jurisdiction to even hear their existing habeas corpus claims.

The provisions relating to the writ of habeas corpus should be deleted from the proposed bill relating to military commissions. At the very least, thoughtful consideration should be given before Congress enacts a law that purports to revoke the rights of the prisoners at Guantánamo Bay to pursue their pending habeas petitions.

In 2004, the United States Supreme Court ruled that the federal District Court in Washington, D.C. has jurisdiction under 28 U.S.C. § 2241 "to hear the prisoners' habeas corpus challenges to the legality of their detention at the Guantánamo Bay Naval Base." *Rasul v. Bush*, 542 U.S. 466, 484 (2004). But while many of these prisoners have been held in custody for almost five years, none has yet had a habeas hearing.

Members of the Senate and House should reflect on the effect of the bills in their present form. They strip the federal court of jurisdiction over the pending

habeas petitions and they do not substitute any alternative trial or hearing procedure, except for the relatively few prisoners who will be charged before the newly formed military commissions. As to the rest of these men – the overwhelming majority of the Guantanamo Bay prisoners – the purported legislation endorses the proceedings held in 2004 and 2005 by so-called Combatant Status Review Tribunals - CSRTs.

Here is a comparison of the procedures followed in the CSRTs and those to be followed in the military commissions, demonstrating the many ways in which the proposed bill will afford important due process protections to prisoners charged before the commissions that did not exist for prisoners who had CSRT proceedings:[1]

1. Burden of proof and presumption of innocence.

Commission: The accused is presumed innocent and cannot be convicted unless proven guilty beyond reasonable doubt. § 949l(c)(1).

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[1] References relating to the military commissions are to the Senate Bill reflecting the compromise reached between Senators Graham, McCain, and Warner and the White House on September 21, 2006. References relating to "Order" are to the memorandum sent by the Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, July 7, 2004, entitled "Order Establishing Combat Status Review Tribunal." References to "Memorandum" are to Enclosures 1 through 9 to the Memorandum of the Deputy Secretary of Defense, July 29, 2004, entitled "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants detained at Guantanamo Bay Naval Base, Cuba" (hereafter "Memorandum").

CSRT: There was no presumption of innocence. To the contrary, there was a presumption of guilt; the Order establishing the CSRTs provided, "Each detainee subject to this Order has been determined to be an enemy combatant through multiple levels of review by officers of the Department of Defense." Order, ¶ a. The Tribunal was to determine whether the preponderance of the evidence supported that determination; however, the Deputy Secretary's Order provided, "There shall be a rebuttable presumption in favor of the Government's evidence." Order, ¶ g(12). Further, if the Tribunal upheld the determination that the prisoner was an enemy combatant, there was a rebuttable presumption that the supporting evidence was genuine and accurate. Memorandum, Enclosure 1, ¶ G(11).

2. Defense lawyers.

Commission: Prisoners have a right to military lawyers, and they may also retain civilian defense counsel. §§ 948k(a)(1), 949c(b)(3).

CSRT: Prisoners were not permitted to be represented by legal counsel. Memorandum, Enclosure 1, ¶ F(5).

3. Rules of evidence.

Commission: The commissions are regularly constituted courts, and are to afford all necessary judicial guarantees recognized as indispensable by civilized people under common article 3 of the Geneva Conventions. § 948b (d). In

general, the rules of evidence applicable in trials by general courts-martial shall apply. § 949a.

CSRT: The Tribunal is not bound by the rules of evidence, and is free to consider any information it deems relevant and helpful to a resolution of the issues. Order, ¶ g(9). Memorandum, Enclosure 1, ¶ G(7).

4. Ability to confront government evidence.

Commission: The government must introduce evidence which supports the charges. The prisoner's lawyer may cross examine the government's witnesses. § 949c(b)(6).

CSRT: No evidence was presented by the government. Instead, a summary of the charges was read to the prisoner and he was asked to respond. No explanation was given as to the source of or basis for the charges. Memorandum, Enclosure 3, ¶ C(4).

5. Disclosure of classified evidence.

Commission: Classified portions of evidence may be presented to the presiding military judge outside the presence of the accused, but the defense must receive a summary of the information or relevant facts contained in the classified information. § 949d(e)(2)(A).

CSRT: Much of the critical evidence was deemed classified, and was not disclosed to the prisoner. Order, ¶ c; see also summary transcripts attached as Tabs 3, 4 and 5.

6. Admissibility of evidence obtained by torture.

Commission: Evidence obtained by torture may not be considered. § 948r(b). A statement allegedly obtained by coercion is admissible only if the military judge finds the statement is "reliable and possessing sufficient probative value," and admitting the statement would best serve the interests of justice. § 948r(c). Statements made after December 2005 are inadmissible if obtained through methods that violate the Fifth, Eighth, and Fourteenth Amendments of the Constitution. § 948r(d).

CSRT: There was no limitation on the kind of evidence which the CSRT members were permitted to consider, including evidence obtained by torture. See Memorandum, Enclosure 1, ¶ G(7).

7. Prisoners' ability to call defense witnesses and produce evidence.

Commission: These rights will be fully protected through the commission's subpoena power. § 949j(a). The government is required to disclose exculpatory evidence to the accused. § 949j(c).

CSRT: As a practical matter, prisoners had no ability to call their own witnesses, or to produce physical evidence from outside sources. See

Memorandum, Enclosure 1, ¶ F(6) and G(9), Tabs 3, 4 and 5. There was no requirement that exculpatory evidence be disclosed to the prisoner.

8. Appellate review.

Commission: The accused may appeal from the commission's ruling to the Convening Authority, to a Court of Military Commission Review, to the Court of Appeals for the District of Columbia Circuit, and to the United States Supreme Court. §§ 950b, f, g. The accused is to be represented by military appellate counsel or retained civilian counsel. § 950h.

CSRT: Rulings previously made were final and conclusive. Under the Detainee Treatment Act of 2005, (incorporated by reference into the proposed legislation), the United States Court of Appeals for the District of Columbia may review the CSRTs' determination, but was and is limited to deciding whether the CSRT followed its own procedures, and whether – if the Constitution is applicable (the government has asserted it is not) – those procedures are constitutional. § 1005(2)(C).[2]

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[2] In *In re Guantánamo Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005), the CSRT procedures described above were held to be defective for multiple reasons, including (1) extensive reliance on classified information not shown to the prisoners, (2) prohibition of defense lawyers (pp. 468-72), (3) reliance on evidence that may have been obtained through torture or coercion (pp. 472-74), and (4) the vague, overly broad meaning of "enemy combatant" (pp. 474-77).

To illustrate the total unfairness of the CSRT proceedings and findings, I attach at Tab 2 a summary of the non-classified portion of the CSRT proceeding involving one of my clients, Abdul-Hadi Al Siba'i, and the official, non-classified non-verbatim transcript of that hearing which was provided by the government. Mr. Al Siba'i was imprisoned in virtual isolation for over four years at the Guantanamo Bay prison. Also attached at Tabs 3, 4 and 5 are three other non-classified transcript summaries provided by the government which serve as further examples of the serious unfairness and lack of fundamental due process of law accorded the prisoners:

Mustafa Ait Idr (Tab 3): Mr. Idr, an Algerian who had been working in Bosnia, was initially detained by Bosnia at the request of the United States on charges that he planned to bomb the embassy in Sarajevo. After the Bosnian Supreme Court acquitted him following an intensive investigation, he was handed over to U.S. authorities and the U.S. transferred him to Guantánamo. During his CSRT hearing, Mr. Idr denied any involvement in any alleged plot, or any association with al Qaeda, and attempted to answer the Tribunal's questions as well as he could. The following exchange highlights the fundamental unfairness of CSRTs:

Tribunal Recorder: While living in Bosnia, the Detainee associated with a known al Qaida operative.

Detainee: Give me his name.

Tribunal President: I do not know.

Detainee: How can I respond to this?

Tribunal President: Did you know of anybody that was a member of al Qaida?

Detainee: No, no.

Detainee: [T]hese are accusations that I can't even answer. . . You tell me I am from al Qaida, but I am not al Qaida. I don't have any proof except to ask you to catch Bin Laden and ask him if I am part of al Qaida. . . What should be done is you should give me evidence regarding these accusations because I am not able to give you any evidence. I can just tell you no, and that is it.

* * *

The Tribunal upheld the determination that Mr. Idr was an enemy combatant and was part of al Qaida. Judge Joyce Hens Green, the federal judge appointed by the D.C. District Court to oversee the Guantánamo habeas cases following the Supreme Court's decision in *Rasul*, cited Mr. Idr's hearing as an example of the fundamental unfairness of the CSRT process. *See* 355 F. Supp. 2d 443 (D.D.C. 2005).

Murat Kurnaz (Tab 4): Mr. Kurnaz, a German resident of Turkish descent, was traveling through Pakistan with Islamic missionaries in November 2001 when he was detained by local police and eventually turned over to U.S. officials. The U.S. justified Mr. Kurnaz's detention on the basis that he was associated with a man who allegedly committed a suicide bombing in Turkey. In his CSRT hearing, Mr. Kurnaz explained how he knew the alleged suicide bomber but did not know he was a terrorist; and he believed terrorism is not the way of Islam. Based on classified evidence Mr. Kurnaz was not allowed to review or answer, the CSRT upheld the determination that Mr. Kurnaz was an enemy combatant and associated with al Qaida. However, when that information was later declassified, it contained no evidence directly linking Mr. Kurnaz to al Qaida, and showed U.S. and foreign intelligence agencies believed that Mr. Kurnaz did not have links to al Qaida. The alleged suicide bomber was found alive in Germany, and German authorities said they had no proof that he was a terrorist. After being detained for five years without charge, Mr. Kurnaz was released in August 2006. (*See* Carol D. Leonnig, Panel Ignored Evidence on Detainee: U.S. Military Intelligence, German Authorities Found No Ties to Terrorists, *The Washington Post*, March 27, 2005, p. A1.)

Abdur Rahman (Tab 5): In January 2002, Pakistani authorities came to Mr. Rahman's home searching for artifacts they said were looted. The authorities found nothing and Mr. Rahman said that he knew nothing about

> them. Mr. Rahman was detained and told he needed to pay a bribe to be released. While he was being held by Pakistani authorities, a soldier asked Mr. Rahman if there was someone else in his village by the same name; he said Mr. Rahman was arrested when Pakistani soldiers were looking for someone else. Mr. Rahman was blind-folded and taken to an airplane. The interrogators who took custody of him said he was not Abdur Rahman but was Abdur Rahman Zahid, the Deputy Foreign Minister of the Taliban. At his CSRT proceeding, Mr. Rahman testified he had been accused by interrogators of being three different people: a Taliban Deputy Foreign Minister, a Taliban security guard, and a Taliban military judge. Mr. Rahman vehemently denied these charges and insisted that he was a chicken farmer, that his detention was a case of mistaken identity, and he was being confused for another man with a similar name. Despite not showing Mr. Rahman any incriminating evidence, and despite Mr. Rahman's protests of innocence, the Tribunal upheld the determination that Mr. Rahman was an enemy combatant.

There is a shameful inconsistency involved here. It is difficult to believe the members of Congress intend to enact a law in which the few prisoners who are deemed by the government to be truly the "worst of the worst" will be charged and tried by the commissions, and accorded the full panoply of rights specified in the legislation creating the military commissions. Yet those rights have not been – *and will not be* – made available to any of the hundreds of other prisoners, including many whom we believe to have been innocent bystanders, captured and sold five years ago by the Northern Alliance to our government.[3]

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[3] Whether the CSRTs provided any semblance of a fair process is not an academic issue; mistakes were clearly made. A confidential CIA report sent to Washington in August 2002 concluded that most of the Guantánamo detainees "didn't belong there." (Jane Mayer, The New Yorker, July 3, 2006, p. 44.) More recently, the former Guantánamo Commander, General Hood, and Deputy Commander, General Lucenti, as well as numerous government interrogators, have indicated that, "a

Thus, the persons alleged to be the major culprits will be treated much better than those conceded by the government to be, at worst, lesser lights, including many we and the other lawyers for the prisoners believe to be completely innocent of any wrongdoing, but who have never had an opportunity to hear, see and confront the government's proof, or to introduce their own evidence of innocence.

Unless amended, the pending bill will retroactively ratify and approve what may fairly be described as "kangaroo court" proceedings, and purport to repeal the constitutional and statutory right to file petitions for writ of habeas corpus to all alien prisoners of the United States, past and present. The bill would remit the vast majority of Guantanamo Bay prisoners to legal limbo, without any effective way to seek fair hearings to test whether there is an evidentiary justification to extend their five years of isolated confinement.

The Great Writ has been an integral part of our system of justice since the colonists from England brought it with them as a safeguard against tyranny of the King, and it has been enshrined in our Constitution from the very beginning. If the bill is enacted in its present form, and the prisoners' right to challenge their detention through petitions for habeas corpus is revoked, years of litigation will

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large number" of the detainees "shouldn't be there. . . and have no meaningful connection to Al Qaeda or the Taliban." (Wisconsin State Journal, Aug. 16, 2004, p. 1A; Wall Street Journal, Jan. 26, 2005, p. A1.) As General Lucenti said, "Most of these guys weren't fighting. They were running." (Washington Post, Oct. 6, 2004, p. A16.)

follow as to whether the statute violates the Suspension Clause (U.S. Const. art. I, § 9, cl. 2) of the United States Constitution and other constitutional provisions and legal principles. In the meantime, the prisoners will languish in their cells on a remote tip of Cuba. Here is what a group of prestigious former federal judges had to say about this proposed legislation:

> "Eliminating habeas jurisdiction would raise serious concerns under the Suspension Clause of the Constitution. The writ has been suspended only four times in our Nation's history, and never under circumstances like the present. Congress cannot suspend the writ at will, even during wartime, but only in 'Cases of Rebellion or Invasion [when] the public Safety may require it.' U.S. Const. art. I, § 9, cl. 2. Congress would thus be skating on thin constitutional ice in depriving the federal courts of their power to hear the cases of Guantánamo detainees. At a minimum, Section 6 would guarantee that these cases would be mired in protracted litigation for years to come. If one goal of the provision is to bring these cases to a speedy conclusion, we can assure you from our considerable experience that eliminating habeas would be counterproductive."[4]

The lawyers who represent the prisoners believe that if the prisoners' habeas corpus petitions are permitted to proceed, only a few of the requested habeas hearings will occur; most of the prisoners will be returned to their homes, because the government has no evidence which justifies their continued detention. The few habeas petitions that will be contested will be disposed of after brief, summary

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[4] Undated letter to Members of Congress from former federal judges John J. Gibbons, Shirley M. Hufstedler, Nathaniel R. Jones, Timothy K. Lewis, William A. Norris, George C. Pratt, H. Lee Sarokin, William S. Sessions and Patricia M. Wald. Former federal judges Susan Getzendanner, George N. Leighton, Frank J. McGarr, and Abner J. Mikva have joined in this letter.

hearings: these petitions do not involve full trials, or juries, and are handled routinely and expeditiously by federal judges. The federal courts know full well how to address petitions like those filed by my clients.

This is momentous, far reaching legislation, which is being rushed through on the eve of elections. The habeas stripping provision is opposed by many prestigious, high-ranking military lawyers, former federal judges, the American Bar Association, the American College of Trial Lawyers, state and local bar associations, former federal prosecutors, and hundreds of experienced lawyers. These provisions also have been severely criticized in newspaper editorials around the country.

Under the doctrine of equivalence, the sauce for the gander will be our sanction of every other country to treat our citizens taken into custody in the very same way, allowing indefinite imprisonment without meaningful hearings or fair procedures.

Accordingly, I urge all members on both sides of the aisle to delete the habeas stripping provisions from this bill, take the time for rational discussions among those concerned on all sides, and then, if legislation is needed, enact legislation that is worthy of this body.

Thomas P. Sullivan

330 N. Wabash Avenue
Chicago, IL 60611

September 25, 2006

Attachments:

Tab 1 - Resume of Thomas P. Sullivan.

Tab 2 - Summary of Abdul-Hadi al Siba'i CSRT hearing, and government's non-verbatim transcript of the hearing.

Tab 3 - Government's non-verbatim transcript of Mustafa Ait Idr's CSRT hearing.

Tab 4 - Government's non-verbatim transcript of Murat Kurnaz's CSRT hearing.

Tab 5 - Government's non-verbatim transcript of Abdur Rahman's CSRT hearing.

Testimony of
Lieutenant Commander Charles D. Swift, JAGC, USN
Office of the Chief Defense Counsel, Office of Military Commissions
Senate Judiciary Committee
September 24, 2006

INTRODUCTION

Thank you, Chairman Specter and Members of the Judiciary Committee, for inviting me to speak to you today. My testimony is given in my capacity as Mr. Hamdan's military defense counsel and does not represent the opinions of either the Department of the Navy or the Department of Defense. I thank the Chairman and Committee for pausing to carefully consider the issue of denying habeas rights to an accused designated for trial by Military Commission in Guantanamo Bay.

On June 15, 2005, I first testified before this Committee regarding my decision to file a next friend habeas petition on behalf of Mr. Hamdan. I told the Committee that when the Chief Prosecutor for commissions requested assignment of counsel to Mr. Hamdan, he specified that access to Mr. Hamdan was contingent upon negotiating a guilty plea on Mr. Hamdan's behalf. I told this Committee then and I continue to believe today that the only way I could ethically represent Mr. Hamdan under those conditions was to present Hamdan with a second option of filing a habeas petition instead of pleading guilty. After the Appointing Authority refused to charge Mr. Hamdan and chose instead to keep him in the judicial limbo of "pre-trial isolation" that threatened Hamdan's sanity, I filed just such a petition.

During oral argument before the D.C. Court of Appeals, Assistant Attorney General Peter Kiesler told the Court that I "had acted consistently with the highest traditions of the legal profession and his military service. He has done his duty." Apparently Mr. Kiesler did not check with his client before making this statement because the legislation introduced by the President following the *Hamdan* decision attempts to see to it that no one else, myself included will have a similar chance to do his duty by challenging the commissions. If successful, Section 6 of the Military Commissions Act (MCA) permits the government to do exactly what I was able to prevent- coerce a guilty plea in an unlawful forum.

I again believe, for reasons I detail below that any Commissions under the MCA is unlawful and will ultimately be struck down by the courts. Whether I am right or not, a challenge to the legislation should happen immediately. Imagine if the courts had abstained in the Hamdan case as the government urged. Fifteen to twenty detainees would have been tried, with presumably some of them convicted, before the Supreme Court ultimately declared the process unlawful. All of the trials would be a nullity. The families of the victims of 9/11 would be forced to undergo a second round of trials – to the extent the Constitution would even sanction such double jeopardy. Justice delayed for years more.

Instead of permitting immediate challenge to spare the country such a fate, Section 6 of the MCA would sanction one of the most sweeping jurisdiction stripping measures in our history

and raise grave constitutional questions.[1] Rather than simplifying the procedures for judicial review of military commissions, the MCA would actually introduce several *new* complex legal issues that the Supreme Court avoided deciding in *Hamdan v. Rumsfeld*. *See* 126 S. Ct. 2749, 2764, 2769 n.15 (2006). The MCA is inconsistent with prior interpretations of the Constitution, including the Suspension Clause, the Exceptions Clause, the Equal Protection Clause, and the prohibition on Bills of Attainder. To strip jurisdiction at the same time as an entirely newfangled military commission is created is an extremely dangerous and unwise act. It is a profound and dangerous threat to both judicial independence and core rule-of-law values.

I. The MCA Does Not Constitutionally Suspend the Right To Petition For Habeas Corpus.

The MCA seeks to achieve an unconstitutional suspension of habeas corpus. "Habeas corpus is...a writ antecedent to statute,...throwing its root deep into the genius of our common law....The writ appeared in English law several centuries ago [and] became an integral part of our common-law heritage by the time the Colonies achieved independence." *Rasul v. Bush*, 542 U.S. 466, 473-74 (citations omitted). Our Founders took care to ensure that the availability of habeas was not dependent upon executive or legislative grace. *See, e.g., INS v. St. Cyr*, 533 U.S. 289, 304 n.24 (2001) (noting Suspension Clause protects against loss of right to pursue habeas claim by "either the inaction or the action of Congress"). The Constitution's right to habeas relief exists even in the absence of statutory authorization, and may be suspended only by explicit congressional action and only under limited conditions. *See Johnson v. Eisentrager*, 39 U.S. 763, 767-68 (1950) (assuming that, in the absence of statutory right of habeas, petitioners could bring claim directly under Constitution to the extent their claims fell within the scope of habeas protected by the Suspension Clause); *Rasul*, 542 U.S. at 473-78 (2004). Congress has not invoked its suspension power in the MCA, and any attempt to do so under the current circumstances would likely be invalid.

A. Congress May Suspend the Writ Only with Unmistakable Clarity and in Certain Circumstances.

If Congress intends to implement its Suspension Clause power, it must do so with unmistakable clarity. *See St. Cyr*, 533 U.S. at 298-99. Nothing here meets that requirement. Congress has only suspended the writ four times. In each of those instances, Congress invoked its Suspension power, each time using the verb "suspend."[2] Simply withdrawing a statutory

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[1] Indeed, "no case has ever countenanced an effort to strip both [the Supreme Court] and the lower federal courts of original and appellate jurisdiction to pass on the constitutionality of Executive action in derogation of personal liberty. To do so would place the very structure of the Constitution at risk by attacking an 'essential function' of the Supreme Court and the Article III judiciary. *See* Henry M. Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364-65 (1953)." Amicus Br. of Norman Dorsen *et al.*, Hamdan v. Rumsfeld, No. 05-184, at 20. This brief was signed, incidentally, by David Shapiro, a Harvard Law School professor who served as Principal Deputy Solicitor General to Ken Starr in the first Bush Administration.

[2] The four suspensions occurred (1) during the Civil War, as authorized in 1863; (2) in 1871, to confront widespread resistance to Reconstruction by armed groups such as the Klu Klux Klan; (3) in 1902, during a rebellion against United States authority in the Philippines; and (4) in December 1941, immediately following the attack on Pearl

basis for habeas is not sufficient to suspend the Great Writ. *Cf. St. Cyr*, 533 U.S. at 298-300. (I believe you told me that you were at the oral argument in *Hamdan*, if so, you heard a version of this when Justice Souter indignantly attacked the Solicitor General when he claimed inadvertent withdrawal sufficed.)

Even without using the clear terms of "suspension," the MCA should not be read as an attempted exercise of the Suspension Clause power. Congress lacks *carte blanche* power to suspend the writ at will, even in times of open war. Instead, the Constitution permits a suspension only when in "Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Nowhere in the MCA does Congress state that it is exercising its power to suspend habeas corpus. Nor does Congress make any finding that the Nation is currently undergoing a "Rebellion" or "Invasion," or that "the public Safety" was so endangered as to require suspension of the writ. *See* MCA, § 2.

B. Congressional Suspension of the Writ Must be Limited in Scope and Duration.

Even during actual "Rebellion or Invasion," congressional suspension must be limited in scope and duration in ways that the MCA is not. First, Congress must tailor its suspension geographically to jurisdictions in rebellion or facing imminent invasion. In *Ex parte Milligan*, 71 U.S. 2 (1866), the Supreme Court recognized that while some States were in rebellion when the Act of March 3d, 1863 suspending habeas was issued, since Milligan was a resident of Indiana, a State not in rebellion, he maintained his right to habeas. *Id.* at 126.[3] The MCA purports to apply to Guantanamo Bay, the primary location where aliens have been held in United States custody since September 11, 2001.[4] Yet like Indiana at the time of *Milligan*, Guantanamo Bay is "far removed from any hostilities." *Rasul*, 542 U.S. at 487 (Kennedy, J., concurring).[5] The MCA could not, even if intended to do so, constitutionally suspend the right of individuals detained at Guantanamo Bay and elsewhere to a writ of habeas corpus.

Moreover, the Supreme Court has made clear that Congress may suspend the writ only for the limited time during which the suspension can be justified constitutionally. Thus, *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946), invalidated a habeas suspension permitting a military commission "more than eight months after the Pearl Harbor attack." The "courts must be utterly incapable of trying criminals or of dispensing justice in their usual manner before the Bill of Rights may be temporarily suspended." *Id.* at 330. (Murphy, J. concurring). The MCA, however,

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Harbor (but only for Hawaii). *See* Amicus Br. of Natl. Security Ctr., Hamdan v. Rumsfeld, No. 05-184, at 26-30 (discussing four instances of suspension).

[3] The Court reached this conclusion even though Congress had authorized a broader suspension. *See* Act of Mar. 3, 1863, 12 Stat. 755 (authorizing the President to "suspend the privilege of the writ of habeas corpus in any case throughout the United States, or any part thereof").

[4] The MCA states that "the term 'United States', when used in a geographic sense, has the meaning given that term in section 1005(g) of the Detainee Treatment Act of 2005." § 6(a). That provision of the Detainee Treatment Act states that "the term 'United States', when used in a geographic sense, is as defined in section 101(a)(38) of the Immigration and Nationality Act and, in particular, does not include the United States Naval Station, Guantanamo Bay, Cuba."

[5] Nor can *all* the territory "outside the United States" be deemed in Rebellion, subject to Invasion, or a threat to public Safety.

has no terminal date and indefinitely denies access to habeas corpus.

The scope of the right protected from suspension is defined by the historic purposes and applications of the writ. *See St. Cyr*, 533 U.S. at 300-01. "Consistent with the historic purpose of the writ, [the Supreme] Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving Executive detention, in wartime as well as in times of peace," including petitions of "admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*...and its insular possessions, *In re Yamashita*." *Rasul*, 542 U.S. at 474 (citations omitted).[6]

Thus, *Yamashita* asked whether there was legal authority for the establishment of a commission and whether that petitioner fell within its jurisdiction. 327 U.S. at 9-18.[7] Although the petitioner was able to rely on the statutory provisions authorizing habeas, the Supreme Court explained that the result would have been no different had there been no statutory habeas, as Congress and the Executive "could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." *Id.* at 9. *See also Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("[N]either the [Presidential Proclamation subjecting enemy aliens to commissions] nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.").

Eisentrager does not support a different result. The *Eisentrager* petitioners were captured, held, and tried by a commission sitting in China and "who, at no relevant time and in no stage of [their] captivity, ha[ve] been within its territorial jurisdiction." *Id.* at 768. The qualification was essential, for the writ has long been extended to alleged enemy aliens held or tried within English and U.S. territory. *E.g.*, *Rasul*, 542 U.S. at 482 ("As Lord Mansfield wrote in 1759, . . . there was 'no doubt' as to the court's power to issue writs of habeas corpus if the territory was 'under the subjection of the Crown.'") (citation omitted); *id.* at 480-82 & nn.11-14 (collecting cases); 3 W. Blackstone, Commentaries on the Laws of England 131 (1766) (observing that "[t]his is a high prerogative writ, . . . running into all parts of the king's dominions . . . wherever that restraint may be inflicted.").

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[6] It makes no constitutional difference whether an individual petitioning for habeas corpus is a non-citizen accused of being an enemy of the United States. Aliens have been able to file habeas petitions to challenge detention at least since the 17th century. *See St. Cyr*, 533 U.S. at 305-06 (from founding, habeas "jurisdiction was regularly invoked on behalf of noncitizens"); *id.* at 301-02 (collecting cases). Both the Habeas Corpus Act of 1641, 16 Car. 1, and the Habeas Corpus Act of 1679, 31 Car 2, granted "any person" the right to file a petition. *See generally* Amicus Br. of Legal Historians, Rasul v. Bush, No. 03-334 (original conception of habeas permitted challenges by enemy aliens).

Moreover, the Great Writ has long been available to challenge the military's treatment of alleged enemies. *See Rasul*, 542 U.S at 474-75. For example, English courts heard habeas claims from alleged foreign enemy combatants challenging their status in the Eighteenth Century. *See, e.g.*, *Three Spanish Sailors' Case*, 96 Eng. Rep. 775, 776 (C.P. 1779) (Spanish sailors challenging detention as alleged prisoners of war); *Rex v. Schiever*, 97 Eng. Rep. 51 (K.B. 1759) (Swedish sailor captured aboard enemy ship); *Commonwealth Lawyers Br.* 6-8 & n.9 (collecting cases). Similarly, U.S. courts have heard enemy aliens' habeas petitions from the War of 1812, *Lockington* v. *Smith*, 15 F. Cas. 758 (C.C.D. Pa. 1817), through the Second World War, *Quirin* 317 U.S. at 1.

[7] The writ has traditionally been available to challenge the jurisdiction of a committing tribunal, including a military commission. *E.g.*, *Quirin*, 317 U.S. at 19; *Milligan*, 71 U.S. at 118; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 475 (1963) ("The classical function of the writ of habeas corpus was to assure the liberty of subjects against detention by the executive or the military."); *St. Cyr*, 533 U.S. at 302 n.19 ("impressment into the British Navy").

Thus, *Eisentrager* acknowledged that the judiciary retained the obligation to inquire into the "jurisdictional elements" of the detention of an enemy alien with a sufficient connection to U.S. territory. 339 U.S. at 775. In these and other habeas cases, the Court explained, "it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act," *id.* at 771, for "their presence in the country implied protection," *id.* at 777-78.[8] The Supreme Court has already concluded that individuals detained in Guantanamo Bay are within the "territorial jurisdiction" of the United States. *Rasul*, 542 U.S. at 480. *See also id.* at 487 (Kennedy, J., concurring in judgment) ("Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."). Thus, where there has been no suspension of the Great Writ, those individuals have a right to bring habeas claims directly under the Constitution. The MCA would run squarely up against this hallowed line of constitutional interpretation.

Finally, Congress has provided nothing to resemble an adequate substitute remedy for the writ to detainees. *See St. Cyr,* 533 U.S. at 305 ("[A] serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute for its exercise."). The limited judicial review in the MCA is wholly inadequate. *See In re Bonner*, 151 U.S. 242, 259 (1894) (holding that when a "prisoner is ordered to be confined in [a facility] where the law does not allow the court to send him for a single hour ...[t]o deny the writ of habeas corpus in such a case is a virtual suspension of it"). Under the MCA, an individual's entitlement to judicial review of the legality of his detention, treatment, or trial is entirely dependent on the government's decision to institute – and render a final decision in – proceedings against him. By permitting review only after a final judgment, the statute precludes entirely any claim that a prisoner is being held unlawfully without trial, a claim at the core of the right to habeas and of no small significance in light of the powers asserted by the President. *See, e.g., Rasul*, 542 U.S. at 556; *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). By the same token, the MCA provides no review for a person who is allegedly being held for trial, but never is given one.

Let me further put the habeas stripping in context. In past wars, the federal courts have always been open – before trial – to test the legality of the military commission. So in the Civil War, when McCardle was indicted in a military commission – he sought to challenge his commission before his trial began. That of course led the Congress to divest part of the jurisdiction over his challenge, but the Supreme Court made clear in its opinion that McCardle had a contemporaneously available avenue to contest the lawfulness of the tribunal. In World War II, in the midst of fighting, 8 nazi saboteurs landed on our shores. These were evil men, with plans to blow up American critical infrastructure. The United States Supreme Court heard their

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[8] The reason the *Eisentrager* petitioners lacked a constitutional right to habeas was because of the lack of any nexus with U.S. territory. Each

> (a) [was] an enemy alien; (b) [had] *never been or resided in* the United States; (c) was captured *outside* of our territory and there held in military custody...; (d) was tried and convicted by a Military Commission sitting *outside* the United States; (e) for offenses against laws of war committed *outside* the United States; (f) and [was] at all times imprisoned *outside* the United States.

Id. at 777 (emphasis added). It was based on this lack of connection to territory within U.S. control that the Court distinguished *Quirin* and *Yamashita*. *Id.* at 779-80. The Court explained that a nexus with a territory under U.S. control, like the Philippines then or Guantanamo now, was sufficient to invoke the right to habeas. *Id.* at 780.

challenge [brought by an American military officer, etc. duty honor the American way] *before* the individuals were convicted. That type of process ensures basic fairness.

For this reason, some of the individuals in the human rights community who have claimed that the proposed legislation gives "more rights" to Khalid Sheik Muhmmad are simply wrong. People who face military commissions have two barriers to their freedom – their trial before this newfangled tribunal *and* detention as an enemy combatant. As the government has said several times, even if the tribunal finds someone not guilty, or even if a tribunal's verdict is overthrown by a federal court, that individual can still be detained indefinitely as an enemy combatant. But what is on the line in military commissions goes to the heart of justice – involving the most awesome powers of the government – life imprisonment and the death penalty. In that zone, American courts have always policed the jurisdiction and lawfulness of military tribunals at the outset – to avoid the trauma to the nation that would come from convictions that would later have to be tossed out.

Therefore, the first action this body should undertake is to protect the right to challenge, via habeas corpus, the lawfulness and jurisdiction of this newfangled military commission. Doing so would be in line with American court tradition for 150 years, and will ensure that when trials begin, they are brought in tribunals that are lawful and just.

II. The MCA Violates Equal Protection Guarantees.

If the MCA precludes individuals from pursuing their pending claims for relief, it is only because that individual is an alien (rather than a citizen) in United States custody yet being detained outside the United States (rather than in a brig in Norfolk, Virginia or any other place), since September 11, 2001. Legislation that deprives individuals of access to the protections of the Great Writ based on such an arbitrary collage of distinctions—and at the exclusive discretion of the Executive—violates the Fifth Amendment.

The Fifth Amendment protects aliens within U.S. territory as well as U.S. citizens. *See, e.g., Wong Wing v. United States*, 163 U.S. 228 (1896); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (all "aliens within the *jurisdiction* of the United States" are protected) (emphasis added); *Galvan v. Press*, 347 U.S. 522, 530 (1954). As the Supreme Court noted, "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base." *Rasul*, 542 U.S. at 480. Accordingly, detainees held in U.S. custody there are protected by the Fifth Amendment.

Legislation that enacts substantial discriminatory barriers to the exercise of fundamental rights is subject to strict scrutiny. *See, e.g., Clark v. Jeter*, 486 U.S. 456, 461 (1988). Access to courts is such a fundamental right. *See Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963). The right of access to habeas is particularly fundamental, and is indeed so important to our constitutional tradition that it is singled out for constitutional protection. U.S. Const. art. I, § 9, cl. 2.[9]

[9] *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (declaring that the right to habeas corpus is "shaped to guarantee the most fundamental of all rights"); *Coolidge v. New Hampshire*, 403 U.S. 443, 454 n.4 (1971) (listing the right to the writ of habeas corpus among rights that are "to be regarded as of the very essence of constitutional liberty")

No justification for the distinctions drawn by the MCA is apparent. While alienage may be a relevant basis for determining membership in a political community,[10] or for allocating scarce entitlements,[11] it is not a permissible basis for determining access to an Article III court in an effort to protect an alien's personal liberty. *See In re Griffiths*, 413 U.S. 717 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982). Furthermore, "where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 92 (1973) (Marshall, J., dissenting). The discrimination here is surely more corrosive than, for example, conditioning access to habeas on a filing fee. *Smith v. Bennett*, 365 U.S. 708 (1961). It offends the very essence of equal justice under law. It is targeted at a population who cannot vote, and concerns not government benefits, but the touchstone issue of who can come into court to protect his liberty.

III. The MCA Violates the Exceptions Clause.

Congress' power to make "Exceptions" to the Supreme Court's appellate jurisdiction is limited. U.S. CONST., art. III, § 2, cl. 2. Indeed, every time the Supreme Court has upheld a congressional limitation under the Exceptions Clause, it has gone out of its way to confirm that an alternative avenue of *contemporaneous* appellate review was available. *See Felker v. Turpin*, 518 U.S. 651, 661-62 (1996); *id.* at 667 (Souter, J., concurring) ("[I]f it should later turn out that statutory avenues other than certiorari for reviewing [a lower court's denial of habeas] were closed, the question whether the statute exceeded Congress's Exceptions Clause power would be open"); *Ex parte Yerger*, 75 U.S. 85, 105-06 (1869); *Ex parte McCardle*, 74 U.S. 506, 515 (1869).[12] Yet in many cases, the MCA provides absolutely *no* right to judicial review, much less a right to contemporaneous appellate review in a timely and meaningful manner. *See infra* at 6-7. In addition, the MCA significantly restricts the scope of legal challenges that petitioner may ultimately bring to any final decision of a military commission or a combatant status review tribunal. *See* MCA § 6(a); Detainee Treatment Act of 2005, §1005(e)(2), (3).[13]

IV. The MCA Constitutes a Bill of Attainder.

Finally, the MCA would likely run afoul of the Bill of Attainder Clause. U.S. Const., art. I, sec. 9, cl. 9. A law is an unlawful attainder if (1) it applies to easily ascertainable members of a group, and (2) inflicts punishment. *United States v. Lovett*, 328 U.S. 303, 315 (1946). The MCA satisfies both prongs. The MCA's plain language applies only to "alien[s] detained outside the United States...since September 11, 2001." § 6(b). The MCA undoubtedly constitutes punishment. The extended detention and the denial of a right to challenge treatment or unfair

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(citation omitted).

[10] *Foley v. Connelie*, 435 U.S. 291 (1978).

[11] *Matthews v. Diaz*, 426 U.S. 67 (1976).

[12] Nor may Congress may use its power under the Exceptions Clause "to withhold appellate jurisdiction . . . as a means to an end." *United States v. Klein*, 80 U.S. 128, 145 (1872).

[13] The Supreme Court did indicate that the statutory language conferring "exclusive jurisdiction" upon the Court of Appeals for the D.C. Circuit to review CSRT and military commissions determinations would not deprive the Supreme Court of jurisdiction over an appeal of a decision under the Act.

trials, is at least as punitive as the denial of the right to engage in a particular profession. *See Ex Parte Garland*, 4 Wall. 333 (1867) (denial of right to practice law is an attainder).

In general, it will be difficult, if not impossible, to use the new MCA against Khalid Sheik Muhammad or any of the other individuals currently detained. This legislation is punitive, and ex post facto, and likely to run afoul of both of those prohibitions. KSM was a political stunt, and you all should not fall for it. Particularly since people like KSM evidently have lots of inculpatory evidence against them already.

V. Expedited Review

Instead of unconstitutionally attempting to suspend the writ Section 6 of the MCA should provide for a three-judge district court to immediately hear a challenge to this scheme via an anti-abstention provision modeled on the McCain-Feingold Campaign Finance Act. Particularly in the wake of the last section of the bill, which suggests that even its authors believe there may be constitutional flaws in the legislation, it is imperative for all concerned to know whether the system is legal before convictions are set and evidence is presented. To that end I propose that the MCA be amended as by inserting the following provision into the Act, after the severability clause:

Sec. 11. EXPEDITED REVIEW.

(a) THREE-JUDGE DISTRICT COURT HEARING.—Notwithstanding any other provision of law, any civil action challenging the legality of any provision of, or any amendment made by, this Act, shall be heard by a three-judge panel in the United States District Court for the District of Columbia convened pursuant to the provisions of section 2284 of title 28, United States Code. For purposes of the expedited review provided by this section, the exclusive venue for such an action shall be the United States District Court for the District of Columbia

(b) APPELLATE REVIEW.—Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under subsection (a) shall be reviewable as a matter of right by direct appeal to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 calendar days after such order or judgment is entered; and the jurisdictional statement shall be filed within 30 calendar days after such order or judgment is entered.

(c) EXPEDITED CONSIDERATION.—It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

CONFORMING AMENDMENTS

Section 6 of the proposed Act should be modified. This provision would remove jurisdiction from all U.S. courts to hear habeas petitions (or any other actions, except as provided by the DTA) of aliens detained outside the United States who are currently in U.S. custody or who have been properly detained as an enemy combatants. .

The following provision would also have to be modified from the proposed Chapter 47A:

§ 950i. Finality of proceedings, findings, and sentences

...

(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of this chapter, relating to the prosecution, trial, or judgment of military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

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HEADLINE: Released Detainees Rejoining The Fight

BYLINE: John Mintz, Washington Post Staff Writer

BODY:

At least 10 detainees released from the Guantanamo Bay prison after U.S. officials concluded they posed little threat have been recaptured or killed fighting U.S. or coalition forces in Pakistan and Afghanistan, according to Pentagon officials.

One of the repatriated prisoners is still at large after taking leadership of a militant faction in Pakistan and aligning himself with al Qaeda, Pakistani officials said. In telephone calls to Pakistani reporters, he has bragged that he tricked his U.S. interrogators into believing he was someone else.

Another returned captive is an Afghan teenager who had spent two years at a special compound for young detainees at the military prison in Cuba, where he learned English, played sports and watched videos, informed sources said. U.S. officials believed they had persuaded him to abandon his life with the Taliban, but recently the young man, now 18, was recaptured with other Taliban fighters near Kandahar, Afghanistan, according to the sources, who asked for anonymity because they were discussing sensitive military information.

The cases demonstrate the difficulty Washington faces in deciding when alleged al Qaeda and Taliban detainees should be freed, amid pressure from foreign governments and human rights groups that have denounced U.S. officials for detaining the Guantanamo Bay captives for years without due-process rights, military officials said.

"Reports that former detainees have rejoined al Qaeda and the Taliban are evidence that these individuals are fanatical and particularly deceptive," said a Pentagon spokesman, Navy Lt. Cmdr. Flex Plexico. "From the beginning, we have recognized that there are inherent risks in determining when an individual detainee no longer had to be held at Guantanamo Bay."

The latest case emerged two weeks ago when two Chinese engineers working on a dam project in Pakistan's lawless Waziristan region were kidnapped. The commander of a tribal militant group,

Abdullah Mehsud, 29, told reporters by satellite phone that his followers were responsible for the abductions.

Mehsud said he spent two years at Guantanamo Bay after being captured in 2002 in Afghanistan fighting alongside the Taliban. At the time he was carrying a false Afghan identity card, and while in custody he maintained the fiction that he was an innocent Afghan tribesman, he said. U.S. officials never realized he was a Pakistani with deep ties to militants in both countries, he added.

"I managed to keep my Pakistani identity hidden all these years," he told Gulf News in a recent interview. Since his return to Pakistan in March, Pakistani newspapers have written lengthy accounts of Mehsud's hair and looks, and the powerful appeal to militants of his fiery denunciations of the United States. "We would fight America and its allies," he said in one interview, "until the very end."

Last week Pakistani commandos freed one of the abducted Chinese engineers in a raid on a mud-walled compound in which five militants and the other hostage were killed.

The 10 or more returning militants are but a fraction of the 202 Guantanamo Bay detainees who have been returned to their homelands. Of that group, 146 were freed outright, and 56 were transferred to the custody of their home governments. Many of those men have since been freed.

Mark Jacobson, a former special assistant for detainee policy in the Defense Department who now teaches at Ohio State University, estimated that as many as 25 former detainees have taken up arms again. "You can't trust them when they say they're not terrorists," he said.

A U.S. defense official who helps oversee the prisoners added: "We could have said we'll accept no risks and refused to release anyone. But we've regarded that option as not humane, and not practical, and one that makes the U.S. government appear unreasonable."

Another former Guantanamo Bay prisoner was killed in southern Afghanistan last month after a shootout with Afghan forces. Maulvi Ghafar was a senior Taliban commander when he was captured in late 2001. No information has emerged about what he told interrogators in Guantanamo Bay, but in several cases U.S. officials have released detainees they knew to have served with the Taliban if they swore off violence in written agreements.

Returned to Afghanistan in February, Ghafar resumed his post as a top Taliban commander, and his forces ambushed and killed a U.N. engineer and three Afghan soldiers, Afghan officials said, according to news accounts.

A third released Taliban commander died in an ambush this summer. Mullah Shahzada, who apparently convinced U.S. officials that he had sworn off violence, rejoined the Taliban as soon as he was freed in mid-2003, sources with knowledge of his situation said.

The Afghan teenager who was recaptured recently had been kidnapped and possibly abused by

the Taliban before he was apprehended the first time in 2001. After almost three years living with other young detainees in a seaside house at Guantanamo Bay, he was returned in January of this year to his country, where he was to be monitored by Afghan officials and private contractors. But the program failed and he fell back in with the Taliban, one source said.

"Someone dropped the ball in Afghanistan," the source said.

One former detainee who has not yet been able to take up arms is Slimane Hadj Abderrahmane, a Dane who also signed a promise to renounce violence. But in recent months he has told Danish media that he considers the written oath "toilet paper," stated his plans to join the war in Chechnya and said Denmark's prime minister is a valid target for terrorists.

Human rights activists said the cases of unrepentant militants do not undercut their assertions that the United States is violating the rights of Guantanamo Bay inmates.

"This doesn't alter the injustice, or support the administration's argument that setting aside their rights is justified," said Alistair Hodgett, a spokesman for Amnesty International.

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A government of laws

Habeas corpus, war and the Bush administration

By Nat Hentoff

There was considerable applause — and much concern by the president and his supporters — when the Senate Armed Services Committee passed a bill more in line with the Geneva Conventions than the president's proposals. But Sens. John Warner, John McCain and Lindsey Graham also included prohibition of habeas corpus petitions by detainees — contrary to this June's Supreme Court decision that federal courts have the authority to hear their claims on the lawfulness of their imprisonment and, and conditions of treatment (Hamdan v. Rumsfeld).

Amid the continuing debate in the press, in Congress and around the country on the Senate committee's "Military Commissions Act of 2006," little attention is being paid to Section 6 of this Warner-McCain-Graham bill that denies the right to a habeas-corpus hearing not only to Guantanamo Bay prisoners, but to any alien detainee outside the United States designated by the president as an "enemy combatant."

Much in the Senate committee bill admirably opposes the president's legislation "clarifying" the Geneva Conventions treatment of prisoners, and his changes in the War Crimes Act that would protect the CIA. But the president has not objected to the habeas ban, and a House bill supporting his proposals also contains the suspension of habeas corpus.

SWEET LAND OF LIBERTY

In a Sept. 12 letter to Senate Armed Services Committee Chairman John Warner and its ranking member, Carl Levin, retired Navy Adjutant Gens. John Hutson and Donald Guter (both rear admirals), and retired Marine Corps Brig. Gen. David Brahms emphasized that forgotten in this removal of habeas petitions are "the vast majority of the detainees who have never been charged, and most likely never will be charged. These detainees . . . will continue to be held as 'enemy combatants.' It is critical to these detainees, who have not been charged with any crime, that Congress not strip the courts of (jurisdiction) to hear their . . . habeas cases (which) are the only avenue open for them to challenge their detention (as they face) potentially life imprisonment."

Messrs. Warner, McCain and Graham are being acclaimed by many civil libertarians for insisting in their bill on basic due-process protections for the detainees (provided by the Supreme Court in the 2004 Rasul v. Bush ruling as well as in this year's Hamdan case). But these senators allowed the suspension of habeas petitions for many detainees, including those who may be entirely innocent. And if the prohibitions on habeas rights become law — the prisoners can be held for the rest of their lives on the secret evidence and the coerced interrogations that the three senators tried to remedy in their bill.

Why do Mr. Warner and Mr. McCain remain silent on the exclusion of any chance for these prisoners to appeal the conditions of their treatment and the conduct of their trials?

And the widely respected Sen. John Warner has stated that he pressed for the bill that bears his name to assure that it will pass the scrutiny of the Supreme Court this time around. He surely must realize that lawyers for the detainees will appeal the sweeping suspension of habeas corpus to this very Hamdan v. Rumsfeld Supreme Court, which may well again overturn the law on constitutional grounds.

In the blizzard of expensive TV ads and scathing stump speeches as the midterm elections approach, I doubt if any of the candidates and their supporters will focus on, or even mention, this assault on habeas corpus. But nine retired federal judges have tried to awaken Congress to this constitutional crisis. Among them are such often-honored jurists as Shirley Hufstedler, Nathaniel Jones, Patricia Wald, H. Lee Sarokin and William Sessions (who was head of the CIA and the FBI).

They write, particularly with regard to Mr. McCain's concerns about torture, that without habeas petitions, how will the judiciary ensure that "Executive detentions are not grounded on torture"? The judges also remind Congress that the writ of habeas corpus has been suspended only four times in our history — and then, the Constitution states, only in "Cases of Rebellion or Invasion (when) the public Safety may require it.")

To be sure, Abraham Lincoln suspended habeas during the horrors of the Civil War; but in 1866, the Supreme Court declared that action unconstitutional because the civilian courts were still open during the war — as they still are right now. So, if this suspension becomes law, say these deeply concerned retired federal judges, "there will be protracted legislation for years to come" — and many detainees may never experience justice.

These judges also remind us — and Messrs. Warner, McCain and Graham (the latter has long wanted to undermine habeas) — that, as Chief Justice John Marshall declared, and warned, "ours is a government of laws, not men." Having certainly acted on principle in putting the president on the defensive, McCain and Warner should now stand up for "the 'Great Writ.' "

And Thomas Jefferson, as the Constitution was being written, objected even to the inclusion of a clause suspending habeas corpus because of the danger that suspension could be "habitual."

Nat Hentoff's column for The Washington Times appears on Mondays.