MILITARY COMMISSIONS ACT OF 2006

The PRESIDING OFFICER. The clerk will report the bill by title.

The assistant legislative clerk read as follows:

A bill (S. 3930) to authorize trial by military commission for violations of the law of war, and for other purposes.

The amendment (No. 5085) was agreed to.

(The amendment is printed in today's RECORD under ''Text of Amendments.'')

The PRESIDING OFFICER. The majority leader is recognized.

Mr. FRIST. Mr. President, for 5 years we have been a nation at war. It is a war unlike any we have ever before fought. It is an ideological war against radicals and zealots. We are fighting a different kind of enemy—an enemy who seeks to destroy our values, to destroy our freedom, and to destroy our way of life, people who will kill and who will actually stop at nothing to bring America to its knees. It is a war against an enemy who won't back down, ever, telling interrogators: I will never forget your face. I will kill you. I will kill your brothers, your mother, your sisters. It is a war against an enemy who undertakes years of psychological training to consciously resist interrogation and to withhold information that could be critical to thwarting future threats, future attacks. But it is also a physical war. On the field of battle, it is a war that demands quick thinking and creativity. It demands tactics that entice the enemy to reveal his weaknesses.

As we learned 5 years ago, safety and security aren't static states; they are dynamic, constantly shifting, constantly moving. We consistently and repeatedly have to be able to adjust and take stock and reassess and, when necessary, implement changes in response.

In the past 5 years alone, in this body we have passed more than 70 laws and other bills related to the war on terror, but they haven't been enough. They haven't kept pace with the ever-changing field of battle. There is more we can do and, indeed, we must do. That is why over the last month we have focused the Senate agenda on security, and that is why today we address our Nation's security by debating one of the most serious and most urgent security issues currently facing the Nation: the detainment, questioning, and prosecution of enemy combatants—terrorists captured on the battlefield.

A few weeks ago, I traveled with several of my colleagues to Guantanamo Bay. That is where the mastermind of 9/11 currently resides—Khalid Shaikh Mohammed. This man, the man the 9/11 Commission calls the principal architect behind the 9/11 attacks, didn't stop with 9/11. Not 1 month after 9/11, he was busy again plotting and planning, orchestrating, scheming, and conspiring to strike us again while we were still down. His next plot targeted the tallest buildings on the west coast with hijacked planes, buildings that house businesses and organizations absolutely critical to our economic and our financial stability, including the Library Tower in Los Angeles, CA. But this time, we were ready. We thwarted that plot, and Khalid Shaikh Mohammed now resides at Guantanamo. But he wouldn't reside there and we wouldn't have stymied his evil designs at that Library Tower if not for the ability to question detainees.

Soon after 9/11, we detained an al-Qaida operative known as Abu Zubaydah. Under questioning, he yielded several operational leads. He revealed Shaikh Mohammed's role in the 9/11 attacks. Coupled with other sources, the information he gave up led to Shaikh Mohammed's capture and detainment. Khalid Shaikh Mohammed currently awaits prosecution. That prosecution cannot happen until we act. Our great Nation will know no justice—and his victims' families will know no justice—until Congress acts by passing legislation to establish these military commissions.

Before we recess this week, we will complete this bill. We could complete it possibly today but if not, in the morning. The bill itself provides a legislative framework to detain, question, and prosecute terrorists. It reflects the agreement reached last week: Republicans united around the common goal of bringing terrorists to justice. It preserves our intelligence programs—intelligence programs that have disrupted terrorist plots and saved countless American lives.

When we capture terrorists on the battlefield, we have a right to prosecute them for war crimes. This bill establishes a system that protects our national security while ensuring a full and fair trial for detainees. The bill formally establishes terrorist tribunals to prosecute terrorists engaged in hostilities against the United States for war crimes. Terrorist detainees will be tried by a 5- or 12-member military commission overseen by a military judge. They will have the right to be presumed innocent until proven guilty, the right to military and civilian counsel, the right to present exculpatory evidence, the right to exclude evidence obtained through torture, and the right to appeal.

The bill also protects classified information—our critical sources and methods—from terrorists who could exploit it to plan another terrorist attack. It provides a national security privilege that can be asserted at trial to prevent the introduction of classified evidence. But the accused can be provided a declassified summary of that evidence.

Moreover, the bill provides legal clarity for our treaty obligations under the Geneva Conventions. It establishes a specific list of crimes that are considered grave breaches of the Geneva Conventions.

Ultimately, these procedures recognize that because we are at war, we should not try terrorists in the same way as our uniformed military or common civilian criminals. We must remember that we are fighting a different kind of enemy in a different kind of war. We are fighting an enemy who seeks to destroy our values, our freedoms, and our very way of life.

To win this war, we must provide our military, intelligence, and law enforcement communities the tools they need to keep us safe. By formally establishing terrorist tribunals, the bill provides another critical tool in fighting the war on terror, and it provides a measure of justice to the victims of 9/11.

Until Congress passes this legislation, terrorists such as Khalid Shaikh Mohammed cannot be tried for war crimes, and the United States risks fighting a blind war without adequate intelligence to keep us safe. That is simply unacceptable, and that is why this bill must be passed.

I look forward over the next few hours to an open and civilized debate in the best traditions of the Senate. I urge my colleagues—Republican, Democrat, and Independent alike—to work together to pass this bill. The American people can't afford to wait. Even though we are in the midst of an election year, this issue—the safety and security of the American people—should transcend partisan politics. The time to act is now.

Mr. President, I yield the floor.

Mr. LEVIN. Mr. President, I yield myself 15 minutes off the bill itself.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, first let me begin by commending our colleagues on the Armed Services Committee, Senator WARNER, Senator MCCAIN, and Senator GRAHAM, for their effort earlier this month to produce a military commissions bill that will protect our troops, withstand judicial review, and be consistent with American values. The administration of their own party had prepared a bill that would authorize violations of our obligations under international law, permit the abusive treatment of prisoners, and allow criminal convictions based on secret evidence. The three Senators drafted a different bill, in consultation with our senior military lawyers. When the administration objected to this bill, Senator WARNER scheduled a markup in the Senate Armed Services Committee anyway, and we reported that bill out with a bipartisan vote of 15 to 9.

Unlike the administration bill, the committee bill would not have allowed convictions based on secret testimony that is never revealed to the accused. The committee bill would not have allowed testimony obtained through cruel or inhuman treatment. The committee bill would not have allowed the use of hearsay where a better source of evidence is readily available. The committee bill would not have attempted to reinterpret our obligations under international law to permit the abuse of detainees in U.S. custody.

While the committee bill was not perfect—in particular, it included a very problematic provision on the writ of habeas corpus—the military commissions it established would have met the test of the Supreme Court's decision in the Hamdan case and provided for the trial of detainees for war crimes in a manner that is consistent with American values and the American system of justice. It provided standards we would be able to live with if other countries were to apply similar standards to our troops if our troops were captured. And, of course, the committee bill provided for the interrogation, for the detention, and for criminal trials of detainees.

Unfortunately, the committee bill was not brought to the Senate. Instead, the three Republican Senators entered into negotiations with an administration that has been relentless in its determination to legitimize the abuse of detainees and to distort military commission procedures to ensure criminal convictions. The bill before us now is the product of these negotiations. I will be offering the committee-approved bill as a substitute a little later today. The bipartisan committee bill, which came from our committee just about a week ago on a vote of 15 to 9, will be offered by me as a substitute to the bill which is now before us.

The bill before us does make a few significant improvements over the administration bill. I want to begin by outlining what those improvements are.

First, while the bill before us is not as clear as the committee bill in committing us to a standard that will protect our troops by conforming to our obligations under the Geneva Conventions, it is far preferable to the administration bill in this regard. In particular, the bill before us does not reinterpret U.S. obligations for the treatment of detainees under Common Article 3 of the Geneva Conventions. It does not place a congressional stamp of approval on an executive branch reinterpretation of those obligations. All it does in this regard is to state the obvious: that the President is responsible for administering the laws and that this gives him the authority to adopt regulations interpreting the meaning and application of the Geneva Conventions in the same manner and to the same extent as he can issue such regulations interpreting other laws.

Common Article 3 of the Geneva Conventions, the Detainee Treatment Act, and the new Army Field Manual all prohibit such interrogation abuses as forcing a detainee to be naked, to perform sexual acts or pose in a sexual manner; prevent such abuses as sensory deprivation, placing hoods or sacks over the head of a detainee, applying beatings, electric shock, burns, or other forms of physical pain; waterboarding, using military working dogs, inducing hypothermia or heat injury, conducting mock executions, or depriving the detainee of necessary food, water, or medical care. Nothing in this bill would change any of the standards of the Geneva Conventions, the Detainee Treatment Act, or the Army Field Manual. Nothing in this bill would authorize the President to do so.

Second, the bill does not permit the use of secret evidence that is not revealed to the defendant. Instead, the bill clarifies that information about sources, methods, or activities by which the United States obtained evidence may be redacted before the evidence is provided to the defendant and introduced at trial. Any material redacted from the evidence provided to the defendant cannot be introduced at trial. The defendant would have the right to be present for all proceedings and to examine and respond to all evidence considered by the military commission.

This approach is consistent with the approach taken to classified information in the Manual for Courts Martial, and it ensures that a defendant could not be convicted on the basis of secret evidence, evidence that is not known to him.

Those are two positive changes from the approach which the administration has argued for and demanded, in these two cases without success.

Unfortunately, at the insistence of the administration, the bill before us contains a great many ill-advised changes from the approved bill of the Armed Services Committee. For example, on coerced testimony, the committee-approved bill prohibited the admission of statements obtained through cruel, inhuman, or degrading treatment. The bill before us prohibits the admission of statements obtained after December 30, 2005, through ''cruel, inhuman or degrading treatment,'' but, inexplicably, contains no such prohibition for statements that were obtained before September 30, 2005. As a result, military tribunals would be free to admit, for the first time in U.S. legal history, statements that were extracted through abusive practices.

On the question of hearsay, the committee bill permitted the admission of hearsay evidence not admissible at trials by court-martial, if direct evidence, which is inherently more probative, could be procured ''through reasonable efforts, taking into consideration the unique circumstances of the conduct of military and intelligence operations during hostilities.''

The bill before us makes hearsay evidence admissible unless the defendant can demonstrate that it is unreliable or lacking in probative value. Hearsay evidence is not only inherently less reliable, its use also deprives the accused of the ability to confront witnesses against him. The approach taken by this bill not only relieves the Government of any obligation to seek direct testimony from its witnesses, it also appears to shift the burden to the accused by presuming that hearsay evidence is reliable unless the accused can demonstrate otherwise.

On the question of search warrants, the committee bill, the bill which I will be offering as a substitute later on today—the committee bill provided that evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant. The bill before us deletes the limitation so that it no longer applies to evidence seized outside the United States. As a result, the bill authorizes the use of evidence that is seized inside the United States without a search warrant. This provision is not limited to evidence seized from enemy combatants; it does not even preclude the seizure of evidence without a warrant from U.S. citizens. As a result, this provision appears to authorize the use of evidence that is obtained without a warrant, in violation of the U.S. Constitution.

On the definition of unlawful combatant, the committee bill defined the term ''unlawful combatant'' in accordance with the traditional law of war. The bill before us, however, changes the definition to add a presumption that any person who is ''part of'' the ''associated forces'' of a terrorist organization is an unlawful combatant, regardless of whether that person actually meets the test of engaging in hostilities against the United States or purposefully and materially is supporting such hostilities.

The bill also adds a new provision which makes the determination of a Combatant Status Review Tribunal, or CSRT, that a person is an unlawful enemy combatant—it makes that determination dispositive for the purpose of the jurisdiction of a military commission, even though the CSRT determinations may be based on evidence that would be excluded as unreliable by a military commission.

On the issue of procedures and rules of evidence, the committee bill provided that the procedures and rules of evidence applicable in trials by general courts martial would apply in trials by military commission, subject to such exceptions as the Secretary of Defense determines to be ''required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need.'' That approach, in our committee bill, was consistent with the ruling of the Supreme Court in the Hamdan case, but built in flexibility to address unique circumstances arising out of military and intelligence operations. The bill before us reverses the presumption. Instead of starting with the rules applicable in trials by courts martial and establishing exceptions, the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it practicable to do so. As one observer has pointed out, this provision is now so vaguely worded that it could even be read to authorize the administration to abandon the presumption of

innocence in trials by military commission.

On the issue of habeas corpus, the habeas corpus provision in the committee bill stripped alien detainees of habeas corpus rights, even if they had no other legal recourse to demonstrate that they were improperly detained. It also stripped those detainees of any other recourse to the U.S. courts for legal actions regarding their detention or treatment in U.S. custody. If the committee bill had been brought to the floor, I would have joined in offering an amendment to address the obvious problems with this provision. But at least the court-stripping provision in the committee bill was limited to aliens who were detained outside of the United States. The bill before us expands that provision to eliminate habeas corpus rights and all other legal rights for aliens, including lawful permanent residents detained inside or outside the United States who have been determined by the United States to be the enemy. The only requirement is that the United States determine that the alien detainee is an enemy combatant—but the bill provides no standard for this determination and offers the detainee no ability to challenge it in those cases which I have identified.

Consequently, even aliens who have been released from U.S. custody, such as the detainee that the Canadian Government recently found was detained without any basis and was subjected to torture, would be denied any legal recourse as long as the United States continues to claim that they were properly held.

I yield myself an additional 3 minutes.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. In other words, a determination by the United States could not be contested, even if there is overwhelming evidence that the claim was incorrect.

These changes in the committee bill, a bill which was approved on a bipartisan basis in our committee, the changes that appear in the bill which is now before us, taken together, will put our own troops at risk if other countries decide to apply similar standards to our troops if they are captured and detained. These changes in the bill before us from the committee bill are likely to result in the reversal of convictions on appeal, and that means that efforts to convict these people of crimes can be readily reversed on appeal because of the changes that were made in the committee bill and the fact, which seems to me to be quite clear, that they do not comply in many instances with the requirements set forth in Hamdan, and the changes in the bill before us from the committee bill are inconsistent with American values.

I particularly again highlight the search and seizure requirements of our fourth amendment and the way that seems to be abandoned in the bill before us.

I close by applauding, again, Senators WARNER, MCCAIN, and GRAHAM for their willingness to stand up to the administration and at least at the Armed Services Committee produce a bill that we were able to approve in the Armed Services Committee on a strong bipartisan vote.

However, the administration has been even more relentless in their effort to legitimize the mistreatment of detainees and to undermine some of the cornerstone principles of our legal system. While the bill before us is a modest improvement over the language originally proposed by the administration, it has adopted far too many provisions from the administration's bill. The substitute which we will be offering later on today is the committee-approved bill. That will do a much better job, if we adopt it, of protecting our troops who might become detainees in the future and does a much better job of upholding our values as a nation.

I yield the floor.

The PRESIDING OFFICER. Who yields time? If no one yields time, time will be charged to both sides.

The Senator from Michigan.

Mr. LEVIN. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. LEVIN. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. Mr. President, I ask unanimous consent that of the time under the control of the Democratic leader, Senator REID, that 45 minutes be allocated to Senator LEAHY.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. I suggest the absence of a quorum and ask that the time be charged equally to both sides.

The PRESIDING OFFICER. Is there objection? Without objection, it is so ordered.

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WARNER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WARNER. Parliamentary inquiry: At this time the Senate is now proceeding on the Hamdi bill; is that correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. WARNER. Mr. President, I rise to speak in support of the Military Commissions Act of 2006 which would authorize military commissions for the trial of an alien enemy unlawful combatant.

I take a moment to say my colleagues and others with whom I have served in the Senate the last 28 years stand at a moment of critical importance in the history of our Nation. What we do today will impact how we conduct the war on terror for as long as it lasts. In the estimate of this humble Senator, that could be for decades. It will fundamentally impact our relationships with our allies. It will fundamentally impact the image of the United States of America in the eyes of the world. It is crucial to our ability to keep America safe. It will speak most loudly about the core values, the principles of this great Republic known as the United States of America.

From the outset, I make it clear I respect the views of all participants in this dialog, from the President and his team, to those particularly in the Congress, but elsewhere in the Congress, on both sides of the aisle. I have certain core principles I share with several of my colleagues. I have endeavored to see this particular bill reflects those principles to the best of my ability, as have they. Nevertheless, I respect the views of others who may differ.

The goal of this legislation, from my point of view, and I think it is shared by others, is first and foremost to meet the challenge for withstanding review by the Supreme Court. Out of respect for that Court, the Hamdi decision, which was quite an interesting decision in many of its findings, divided by different panels within that Court, it is quite likely in one or more instances, if this becomes law, the bill now presently before the Senate, that will likewise be taken to the Supreme Court. That is the way we do things in the United States of America.

We hope we who have labored to craft this, and the 100 Senators who will finally cast their votes, together with the other body, will give to the President a bill that will effectively enable him to do those things to keep America free, to fight the war on terrorism and, at the same time, pass the Federal court review—whether it is the district, appellate, or the Supreme Court—such as likely will take place.

In late June, the Supreme Court struck down the President's initial plan to try detainees by military commissions. In its opinion, Hamdi v. Rumsfeld, the Court held by a fractured five-Justice panel that the present system for trials by military commission violated both the Uniform Code of Military Justice and particularly Common Article 3 of the 1949 Geneva Conventions. There were some four conventions put together in 1949. In particular, the Common Article 3 was common to all four of those conventions.

That historic moment in world history was a culmination from the learning experience of what took place all across our globe during World War II in an effort to see that certain injustices, in terms of the basic core values of the free world, would never occur again.

It is my fervent hope and conviction that whatever the Congress does, the

legislation we produce must be able to withstand further security review and scrutiny of the Federal court system, particularly the Supreme Court.

From my own personal perspective, it would be a very serious blow to the credibility of the United States—and I have said this a number of times in connection with the debate—not only in the international community but also at home, if the legislation as prepared by the Congress now and enacted by the President failed to meet another series of Federal court reviews.

To meet the mandate of the Court in its decision, Hamdi v. Rumsfeld, this legislation provides for a military commission that, in the words of Common Article 3, affords ''all the judicial guarantees which are recognized as indispensable by civilized peoples.''

That is what we are striving to obtain. The Military Commissions Act of 2006 provides these essential guarantees in the following ways. The bill generally follows the current military rule on the use of classified information at trial. That has been an area of concern probably to each and every Senator but most particularly to this Senator and others who worked closely in our group. We have, to the satisfaction of all interested parties, resolved that.

That is a very fundamental thing we must maintain; that is, the ability of our continued gathering of evidence, the protection of source and methods—nevertheless, to provide, on a real-time basis intelligence for our fighting men and women and, indeed, intelligence to protect us here at home.

However, our bill goes further by creating a privilege that protects classified information at all stages of a trial and prohibits disclosure of classified information, including sensitive intelligence sources and methods, to an alleged terrorist accused.

As a fundamental matter—and one we feel is crucial for this bill to survive judicial review—the bill would not allow an accused, however, to be tried and sentenced—perhaps even being given the death penalty—on evidence that the accused has never been allowed to see. That, in my judgment, and I think in the judgment of many, would be establishing a precedent that is without foundation in American jurisprudence or, indeed, the jurisprudence of the vast majority of nations in the world.

Further, the bill would prohibit the use of evidence that was allegedly obtained through the use of torture. A statement obtained before the date of enactment of the Detainee Treatment Act of 2005—December 30, 2005—in which the degree of coercion is in dispute could be used only—and I repeat—only at trial if the military judge finds that it is reliable and tends to prove the point for which it was offered.

A statement obtained after the date of enactment of the Detainee Treatment Act of 2005, in which the degree of coercion is in dispute, may only be admitted in evidence if the military judge finds that the first two tests are met and finds that the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by the Detainee Treatment Act of 2005.

The bill would generally follow the rules of evidence that apply to courts-martial. However, the Secretary of Defense, in consultation with the Attorney General, would be authorized to make substantial exceptions due to the unique circumstances presented by the conduct of military and intelligence activities so long as those exceptions are not inconsistent with the statutory provisions provided by this new law.

Most importantly, this bill achieves the President's benchmark objective by clearly defining those grave breaches of Common Article 3 of the Geneva Conventions that would be a criminal offense under the U.S. domestic law in the War Crimes Act.

That term, ''grave breaches,'' is set forth in that Convention of 1949. And in conjunction with working on this, we extensively examined the legislative history. Doing so allows our military and intelligence interrogators to know what conduct is prohibited under U.S. law. Moreover, this bill provides that no foreign sources of law may be used to define or interpret U.S. domestic criminal law implementing Common Article 3.

This bill does not provide as a matter of law that this legislation fully satisfies Common Article 3 of the Geneva Conventions. My colleagues and I feel that to make such a statement a matter of statute would amount to a reinterpretation of our obligations under the Geneva Conventions some 57 years after the United States signed those treaties. Such an action could open the door to statutory reinterpretation by a host of other nations with less regard for human rights than the United States, and would result in possibly our U.S. troops being put at greater risk should they become captives in a future conflict.

However, in addition to clearly defining grave breaches of Common Article 3 that are war crimes under the War Crimes Act, this bill acknowledges the President's authority under the Constitution to interpret the meaning and application of the Geneva Conventions, and to promulgate administrative regulations for violations of our broader treaty obligations which are not grave breaches of the Geneva Conventions. To ensure transparency, such interpretations are required to be published in the Federal Register and are subject to congressional and judicial oversight.

We have had a robust discussion of these issues among Members and with administration officials for some several months, most particularly the last few weeks. I strongly believe this bill achieves the best balance for our country. It will allow terrorists to be brought to justice in accordance with the founding principles and values that have made our Nation the greatest democracy in the world.

This bill will also provide the clarity needed to allow our essential intelligence activities to go forward—I repeat: go forward—under the law. And this bill is consistent with the Geneva Conventions, which have helped protect our own forces in conflicts over the past 57 years.

I thank my colleagues for their support. I wish at this time to thank the many staff members who have worked on this thing tirelessly. And I might add, in my 28 years here I have never known the legislative counsel's office to literally work 24 hours around the clock. Perhaps they have, but certainly they did in this instance. I want to give a special recognition and thanks to that office for assisting the Senate in preparing this bill.

Now, Mr. President, my understanding is the Senator from Michigan may well have an amendment he would like to bring forward.

The PRESIDING OFFICER. The Senator from Michigan.

AMENDMENT NO. 5086

(Purpose: In the nature of a substitute)

Mr. LEVIN. Mr. President, I now call up amendment No. 5086, which is an amendment in the nature of a substitute.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Michigan [Mr. LEVIN] proposes an amendment numbered 5086.

Mr. LEVIN. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

(The amendment is printed in today's RECORD under ''Text of Amendments.'')

Mr. LEVIN. Mr. President, the amendment which I have just called up would substitute a bill which was adopted by the Senate Armed Services Committee on a bipartisan vote of 15 to 9 for the pending language.

Before I outline the differences between the bill which the committee adopted and the bill before us, I want to thank my good friend from Virginia for the work he and a number of other colleagues on the Republican side put into the committee bill to make it possible for that bill to be adopted.

In my earlier statement, when the Senator was not on the floor, I commended him and Senator MCCAIN and Senator GRAHAM for their effort earlier this month to produce a military commissions bill that would protect our troops in the event they were captured at some point down the road that would withstand judicial review and be consistent with our values.

They produced this bill in the committee, despite huge administration opposition. The chairman of the committee actually scheduled a markup, as I indicated in my prior statement, despite the opposition of the administration. The administration did then and

continues to want to permit the treatment of prisoners which is abusive. They did then and they still want to allow criminal convictions to be based on secret evidence.

But what the chairman and a number of other Republican Senators were able to do was to make some accomplishments in those two areas: in the area of secret evidence, and in the area, to an extent, of coercive statements, statements that were obtained by coercion, depending on when the statement was obtained. I will get into that in greater detail because there is a distinction in the bill that is on the floor now as to whether the statement was obtained before or after December 30, 2005, as to whether certain types of coercive treatment would be allowed and that statement, nonetheless, be admitted into evidence. I think that distinction between a statement obtained by coercion before or after December 30, 2005, is a distinction which is totally unsustainable. But I will get into that again in a moment.

But before I begin, because my friend, Senator GRAHAM, who is also on the floor now, and my friend from Virginia were not on the floor before—before I list a number of major differences with the pending bill that I and a number of others have with the pending bill—I want to again compliment my good friend from Virginia, Senator MCCAIN, and Senator GRAHAM because they had to withstand a huge amount of administration pressure to get the bill out of committee. It is a far better bill than the one which is now before us. That is why I am going to attempt to substitute it for the bill that is now before us. But, nonetheless, their effort has produced some significant gains over the administration language. I acknowledge that and I thank them for that effort before I proceed to offer the committee bill that is a substitute.

Mr. WARNER. Mr. President, will the Senator kindly yield for me to address his comments?

Mr. LEVIN. I am happy to.

The PRESIDING OFFICER. Without objection.

Mr. WARNER. Mr. President, the Senator has recited that our committee had a markup on a bill. That was after receiving from the administration its own bill. So in a sense, the Senate had before it two bills. Perhaps the formalities I will not go into. But the Senate had the administration's bill and the draft of the committee bill at the time we went into the markup.

The Senator referred to the administration's huge pressure, but those are matters we can go into at another time. But I want you to know the group I was working with, and other Senators, were working with the administration right up until the hours before the markup started.

As the Senator proceeds with his amendment, I am going to ask that the Senator from South Carolina, at the conclusion of your remarks on the amendment, be recognized for the purpose of giving his statement which, indeed, addresses the current bill in the context of the bill that was drafted by the committee, as I understand it from the Senator from South Carolina. And then we will proceed further with discussion on your bill.

We have 3 hours to consider matters here. But I point out, we have your substitute bill, which is basically a 60-minute proposition; the Rockefeller congressional oversight, which is 60 minutes; the Kennedy interrogation, which is 60 minutes; the Byrd sunset which is 60 minutes; and the Specter-Leahy habeas corpus—and I expect you might be a part of that habeas corpus amendment—which is 120 minutes.

Mr. LEVIN. If the Senator will yield?

Mr. WARNER. Yes.

Mr. LEVIN. Without losing his right to—

The PRESIDING OFFICER. Without objection.

Mr. LEVIN. The time limit on the substitute amendment is also 120 minutes.

The PRESIDING OFFICER. Correct.

Mr. WARNER. Yes, correct. I don't know if I stated that, but it should be here as a part of it.

Mr. LEAHY. Will the Senator yield, without losing his right to the floor?

Mr. WARNER. Yes.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. My understanding is the Senator from Vermont has an hour reserved on the bill, with up to 45 minutes of that on the Specter-Leahy habeas amendment.

Mr. WARNER. Mr. President, I would have to inquire of the Chair if the Chair has knowledge of that.

The PRESIDING OFFICER. That is not part of the agreement.

Mr. WARNER. Does the Senator from Michigan wish to address that request?

Mr. LEVIN. I know that I did ask unanimous consent to protect the Senator from Vermont for 45 minutes on the habeas amendment.

The PRESIDING OFFICER. The Senator from Michigan is correct. Under the consent agreement, 45 minutes has been reserved to the Senator from Vermont out of the leadership time.

Mr. LEVIN. That is on the bill itself. And on the habeas amendment, that would be up to you and Senator SPECTER—right?—to control.

Mr. LEAHY. No. Mr. President, I am confused by this. It was my understanding the Senator from Vermont had up to 45 minutes specifically reserved, not from anybody else's time, but from his own time, on the Specter-Leahy, et al., amendment, and a total—out of which the 45 minutes would have to come—of 1 hour on the bill. Is that incorrect?

Mr. WARNER. Mr. President, I would suggest the following to work our way through this: I call on the Chair to inform the Senate as to the time agreement which I understand has been agreed upon by our leaders.

The PRESIDING OFFICER. Under the previous order, there is to be 2 hours equally divided for the Levin amendment, 2 hours equally divided for the Specter amendment on habeas, 1 hour equally divided on the Rockefeller, Kennedy, Byrd amendments each; general debate is 3 hours equally divided, 90 minutes on each side, of which 45 minutes on the minority side had been allocated to the Senator from Vermont.

Mr. WARNER. At this time, I advise my colleagues that I would oppose any change to that unanimous consent and ask any Members who so desire to address the UC to do so to their respective leadership.

Mr. LEAHY. Will the Senator yield for a question?

Mr. WARNER. Yes.

Mr. LEAHY. The senior Senator from Virginia has an absolute right to object to anything further. This is not what I understood had been agreed to. It is the unanimous consent that the Chair has so stated. I will not seek to change it. I don't suggest that it is the fault of the Senator from Virginia. This is not what I understood the agreement to be.

I ask unanimous consent that the senior Senator from Connecticut, Mr. DODD, be added as an original cosponsor to the Specter-Leahy habeas amendment.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

The Senator from Virginia controls the floor.

Mr. WARNER. Do I see another Senator wishing to speak?

Mr. DORGAN. Mr. President, I ask unanimous consent to be added as an original cosponsor to the Specter-Leahy-Dodd amendment.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. WARNER. Mr. President, I will yield the floor, and the Senator from Michigan will regain his right to the floor.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, on September 14, the Senate Armed Services Committee favorably reported S. 3901, the Military Commissions Act of 2006, to the Senate floor with a bipartisan vote of 15 to 9. Supporters of the committee bill on both sides of the aisle emphasized that the bill met two critical tests:

First, that we would be able to live with the procedures we established if the tables are turned and our own troops were subject to similar procedures.

Second, that the bill was consistent with our American system of justice and would stand up to scrutiny on judicial review.

On the first point, the committee bill did not authorize departure from the requirements of the Geneva Conventions, did not authorize the abuse of prisoners in U.S. custody, did not authorize the use of testimony obtained

through abusive practices, because the standards for detention, interrogation, and trial in the bill were consistent with international norms. The bill contained no procedures that we could not live with if they were applied to our own troops who might be captured at some future time.

On the second point, the committee bill established legal procedures consistent with basic principles of the American system of justice, such as the right to examine and respond to all evidence presented, and the exclusion of unreliable categories of evidence, such as coerced statements. Because the bill took the approach outlined by the Supreme Court in the Hamdan case, a trial process based on rules and procedures applicable in trials by courts martial, subject to such exceptions as might be required by the unique circumstances of military and intelligence operations in an ongoing conflict, committee members could have confidence that these provisions would be upheld by the courts on appeal.

The committee bill was not brought to the Senate floor. Indeed, the majority leader reacted to the action of the Armed Services Committee by telling the press he would filibuster the bill if the Senate Armed Services Committee bill was brought to the Senate floor. Consequently, the three Republican Senators who had drafted the committee bill, Senators WARNER, MCCAIN, and GRAHAM, entered into negotiations with an administration that has been unrelenting in its determination to legitimize the abuse of detainees and to distort military commission procedures to ensure convictions.

The bill before us, which is the product of those negotiations, has been changed from the committee bill in so many ways that the bill is a very different bill from the one that was adopted by the Armed Services Committee. It is the Armed Services Committee bipartisan bill that I have now offered as a substitute to this new version that is being offered today.

Let me give you some examples of the differences between the committee-adopted bill and the bill that is before us. On coerced testimony, the committee bill prohibited the admission of statements obtained through cruel, inhuman, or degrading treatment. The bill before us prohibits the admission of statements obtained after December 30, 2005, through ''cruel, inhuman, or degrading treatment'' but inexplicably contained no such prohibition for such statements that were obtained before December 30, 2005.

As a result, military tribunals would presumably be free to admit, for the first time in U.S. legal history, statements that were extracted through cruel or inhuman practices.

By the way, on that issue, if anybody wants to read the actual difference in the way in which the December 30, 2005, date was provided in this bill as a dividing line between statements that could be admitted into evidence, although they were obtained through cruel and inhuman treatment, they can refer to sections 948(R)(c), on a statement obtained before December 30, 2005, the date of the enactment of the Detainee Treatment Act of 2005, which says:

> The degree of coercion in dispute may be admitted if the military judge finds the following: Totality of the circumstances renders the statement reliable in possessing sufficient probative value; and, 2, the interest of justice would best be served by the admission of the statement into evidence.

But subsection (d) reads:

> If the statement is obtained after December 30, 2005, the date of the enactment of the Detainee Treatment Act of 2005, the degree of coercion may be disputed and may be admitted under those same two circumstances.

It then adds a third finding that is required:

> That the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment, prohibited by section 1003.

So if the statement is obtained after December 30, 2005, then if it is obtained through cruel and inhuman treatment, it is not allowable into evidence. But because that requirement is missing relative to statements obtained prior to December 30, 2005, presumably, even though a statement is obtained through cruel and inhuman treatment, it is nonetheless admissible into evidence if it meets the other two tests provided. That is an unsustainable provision. It would be the first time in American legal history that we would, in effect, be authorizing statements that were obtained through that type of coercion—cruel treatment, inhuman treatment—to be admitted into evidence. That is something we should not accept.

On the issue of hearsay, the committee bill permitted the admission of hearsay not admissible at trials by court-martial if direct evidence, which is inherently more probative, could be procured ''through reasonable efforts,'' taking into consideration the unique circumstances of the conduct of military and intelligence operations during hostilities.

The bill before us, unlike the committee bill, makes hearsay evidence admissible, unless the defendant can demonstrate that it is unreliable or lacking in probative value. Well, hearsay evidence is not only inherently unreliable, it is used to deprive the accused of the ability to confront the witnesses against him.

The approach taken by this bill not only relieves the Government of any obligation to seek direct testimony from its witnesses, it also appears to shift the burden to the accused by presuming that hearsay evidence is reliable, unless the accused can demonstrate otherwise.

Relative to search warrants, the committee bill provided that evidence seized outside of the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant. The bill before us deletes the limitation to evidence seized outside of the United States. As a result, the bill authorizes the use of evidence that is seized inside the United States without a search warrant. I note that the chairman of the Judiciary Committee is on the floor. I particularly point out this provision to him—that because the words ''outside of the United States'' were deleted, the bill before us would allow into evidence, for the first time in history, I believe—it authorizes the use of evidence seized inside the United States without a search warrant. It is not limited to evidence seized from enemy combatants. It does not even preclude the seizure of evidence without a warrant from U.S. citizens. That is a major departure from the committee-adopted bill. It would appear to authorize the use of evidence obtained without a warrant, in violation of the United States Constitution.

The next problem I want to address is the definition of ''unlawful combatant.'' The committee bill defines the term ''unlawful combatant'' in accordance with the traditional law of war. The bill before us changes the definition to add a presumption that any person who is ''part of'' the associated forces of a terrorist organization is an unlawful combatant, regardless of whether that person actually meets the test of engaging in hostilities against the United States or purposefully and materially supporting such hostility.

In addition, the bill also adds a new provision which makes the determination of a Combatant Status Review Tribunal, CSRT, that a person is an unlawful enemy combatant, dispositive for the purpose of the jurisdiction of a military commission, even though CSRT determinations may be based on evidence that would be excluded as unreliable by a military commission.

We should not make those findings dispositive, particularly where the CSRT findings can be based on such very unreliable evidence.

Next is procedures and rules of evidence. The committee bill provided that the procedures and rules of evidence applicable in trials by general courts-martial would apply in trials by military commissions, subject to such exceptions as the Secretary of Defense determines to be ''required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need.''

So the committee bill starts with the courts-martial, the manual, and then says that the Secretary of Defense may make such exceptions as he determines are ''required by the unique circumstances of the conduct of military and intelligence operations or by practical need.''

This approach is consistent with the ruling in Hamdan. It builds in some flexibility to address unique circumstances arising out of military and

intelligence operations. The bill before us reverses the presumption, and instead of starting with the rules applicable in trials by court-martial and establishing exceptions, the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it practicable to do so. As one observer has pointed out, this provision is now so vaguely worded that it could even be read to authorize the administration to abandon the presumption of innocence in trials by military commission.

On the issue of habeas corpus, the habeas corpus provision in the committee bill stripped alien detainees of habeas corpus rights, even if they have no other legal recourse to demonstrate that they were improperly detained. It also stripped those detainees of any other recourse to U.S. courts for legal actions regarding their detention or treatment in U.S. custody.

If the substitute amendment we are offering is approved, a further amendment will be necessary to address the obvious problems with the committee habeas corpus amendment. That habeas corpus amendment is going to be offered in either event, whether or not the bill before us remains or whether or not the committee bill is substituted for it. But at least in the committee bill, the court-stripping provision was limited to aliens who were detained outside the United States. The bill before us expands that provision to eliminate habeas corpus rights and all other legal rights of redress for wrongs committed by aliens, including lawful permanent residents detained inside or outside the United States who have been determined by the United States to be enemies.

The only requirement under the bill before us is that the Government determines that the alien detainee is an enemy combatant, but the bill provides no standard for this determination and offers the detainee no ability to challenge it. Consequently, even aliens who have been released from U.S. custody, such as the detainee that the Canadian Government recently found was detained without any basis and subjected to torture, even those kinds of aliens, such as that Canadian citizen, would be denied any legal recourse as long as the United States continues to claim in a way which cannot be contested that they were properly held.

No matter how overwhelming the evidence, there is no way to contest it, and there is no legal recourse under the bill before us. That was not true of the committee bill.

The committee bill had lots of problems, in my judgment, on habeas corpus, but the bill before us, for the reasons I just outlined, goes way beyond what the committee bill provided.

As a result of these changes, the bill that is before us does not meet either of the two tests used by the majority of members at the Armed Services Committee markup. The two tests that are not met: The bill before us places our own troops at risk if others apply similar standards, and it is likely to result in convictions by military commissions that are overturned on appeal.

For example, the provision in the bill addressing coerced testimony would prohibit the use of statements that are obtained through cruel and inhuman treatment if those statements were obtained after December 30, 2005, but again, it inexplicably contains no such prohibition on statements obtained through those same methods prior to this date. This provision, in other words, expressly authorizes military commissions to consider evidence that was obtained through cruel and inhuman treatment of defendants and other witnesses.

By expressly omitting the principle that statements obtained through cruel and inhuman treatment of detainees should be precluded from evidence—even if they were obtained before December 30, 2005—this provision would set an absolutely unacceptable and frightening standard if the rest of the world adopts this same standard. This is a standard under which our own troops could be subjected to abuse and mistreatment of all kinds in order to force them to sign statements that would then be used to convict them of war crimes.

The provision also sets a standard which will be used by our terrorist enemies as evidence of U.S. hypocrisy when it comes to proclamations of human rights. Our failure to conclusively exclude statements obtained through cruel and inhuman methods are all too likely to be seen through much of the world as a confirmation of negative views of Americans and what we stand for and that have been shaped by their views of what happened at Abu Ghraib and Guantanamo.

The administration and its supporters have argued that our military judges can be counted on to exclude statements that are based on extreme forms of abuse. That may be; that may be. We have many fine military judges, and I share the hope that these judges will be willing to stand up for the humane treatment of detainees, even where Congress has failed to do so and even when the administration is unwilling to do so.

Indeed, our top military lawyers have told us that evidence obtained through coercive techniques is inherently unreliable. The Army Deputy Chief of Staff for Intelligence, LTG John Kimmons, said the same thing when he released the new Army Field Manual on interrogation procedures. He stated:

> No good intelligence is going to come from abusive practice. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that. And moreover, any piece of intelligence which is obtained under duress . . . through the use of abusive techniques would be of questionable credibility.

I am hopeful that our military judges will likewise reject testimony that is obtained through abusive techniques as inherently unreliable and of questionable credibility.

However, our military judges cannot protect our troops in future conflicts. If an American soldier, sailor, airman, or marine is put on trial by a hostile power, he or she will not have an American military judge to stand up for his or her rights. Our troops will face foreign judges, and if the standard applied by those judges is similar to the one proposed in this bill for statements obtained prior to December 30, 2005, they are a lot less likely to get either fair treatment or fair trials.

If statements obtained through cruel and inhuman treatment of detainees are allowed into evidence, as this provision provides, any resulting convictions are unlikely to withstand scrutiny on judicial review in our own courts.

The Supreme Court specifically addressed this issue in the Hamdan case earlier this year. In that case, the Court pointed out that Common Article 3 of the Geneva Conventions prohibits the passing of sentences ''without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.''

The Supreme Court concluded that ''[t]he regular military courts in our system are the courts-martial established by congressional statutes'' and ''can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice''; and the language requiring ''judicial guarantees which are recognized as indispensable by civilized peoples'' must require, at a minimum, that any deviation from procedures governing courts-martial be justified by ''evident practical need.''

The rules of evidence reviewed by the Supreme Court in the Hamdan case, such as the rules we are considering today, would have permitted the admission of statements obtained through coercion—other than torture—into evidence if a military commission determines the statements to be probative and reliable. The plurality opinion of the Court notes that under these procedures, ''evidence obtained through coercion [is] fully admissible.'' Similarly, Justice Kennedy's concurring opinion observes that the procedures in place ''make no provision for exclusion of coerced declarations save those 'established to have been made as a result of torture.' ''

The Supreme Court expressly rejected those procedures. The procedures established by the President, according to the Supreme Court, ''deviate from those governing courts-martial in ways not justified by any 'evident practical need,' and for that reason, at least, fail to afford the requisite guarantees'' that are recognized as indispensable by civilized peoples.

Like the procedures previously rejected by the Supreme Court, this bill

would make evidence obtained through coercion, other than torture, admissible, at least in the case of evidence obtained prior to December 30, 2005. Given that the Supreme Court has already struck down procedures that similarly failed to preclude coerced testimony once, it is surely likely that the Court will strike them down again. Whatever minimal due process may be required in the case of an alien enemy combatant, it certainly cannot be met by procedures that, as a majority of the Supreme Court has already determined, fail to provide the ''judicial guarantees which are recognized as indispensable by civilized people.''

We should also reject this provision because it is inconsistent with American values and what we stand for as a nation. During the Revolutionary War, the British mistreated many American prisoners. But as described by David Hackett Fischer in his book ''Washington's Crossing,'' General Washington ''ordered that . . . the captives would be treated as human beings with the same rights of humanity for which Americans were striving,'' and those ''moral choices in the War of Independence enlarged the meaning of the American Revolution.''

We have always believed that we hold ourselves to a higher standard than many other nations. Others may abuse prisoners; we do not. Others may engage in cruel and inhuman practices; we do not. Others may believe that the ends justify the means; we do not. It is contrary to what we stand for as a nation.

Former Navy general counsel Alberto Mora bravely fought against efforts by others in this administration to approve cruel and inhuman interrogation techniques. Mr. Mora explained his stand when he was awarded the 2006 John F. Kennedy Profile in Courage Award on May 22. He said:

> We need to be clear. Cruelty disfigures our national character. It is incompatible with our constitutional order, with our laws, and with our most prized values. Cruelty can be as effective as torture in destroying human dignity, and there is no moral distinction between one and the other. To adopt and apply a policy of cruelty anywhere within this world is to say that our forefathers were wrong about their belief in the rights of man because there is no more fundamental right than to be safe from cruel and inhuman treatment. Where cruelty exists, law does not.

If we enact this provision into law, giving a congressional stamp of approval to the use of cruel and inhuman methods to extract testimony from detainees, we will diminish ourselves as a people and, as Colin Powell stated in a recent letter to Senator MCCAIN, add to the world's doubts about the moral basis of our fight against terrorism.

The bill, as reported by the Armed Services Committee, will protect our troops, will be more likely to result in convictions that are upheld on appeal, and will be more in keeping with our values as a nation. That bill allows for interrogation, it allows for detention, it allows for prosecution, and it allows for conviction.

The issue isn't whether we interrogate or detain people. We are going to do it. We need to do it. The question is whether we do it in a way which is in keeping with our values, which is in keeping with rules we have established in the Army manual, for instance, for the treatment of people who are captured by our Army. It is whether we do it in a way that is in keeping with what we would insist others follow if they capture our people, what we insist upon in the committee substitute—that committee bill which we adopted on a bipartisan basis—our standards and rules for which we will argue if our people are captured or detained by others.

We cannot make the distinction this bill before us makes—that cruel and inhuman treatment which leads to a statement or confession is not going to be the basis for excluding a statement if that statement is made before December 30, 2005. Only after December 30, 2005, are statements excluded where they are the product of cruel and inhuman treatment. But before December 30, 2005, according to the bill in front of us now, those statements are not excluded unless they meet two other tests. We have to be very clear on this issue. After December 30, 2005, any of three tests, if met, will result in the exclusion of those statements but not before December 30, 2005, when we know as a fact that so much of the abuse took place.

So I urge our colleagues to support the substitute amendment. Again, I wish to make clear that this substitute amendment is the Senate Armed Services Committee bill which the chairman and others labored so hard to produce. It is a bill which avoids many of the pitfalls of the bill that is before us. I hope our colleagues will vote to substitute that bill for the pending language.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER (Mr. MARTINEZ). Twenty-four minutes 10 seconds.

Mr. LEVIN. I thank the Chair, and I yield the floor.

Mr. WARNER. Mr. President, I was particularly taken by Senator LEVIN's reference to General Washington and what General Washington said with regard to prisoners. But we must be mindful that General Washington was facing the King's Army. Those were uniformed individuals. Those were individuals acting on behalf of the Crown. That is totally different—totally different—from what we as a nation and many other nations today are facing with these terrorists.

Consequently, as a part of the evolution of this extraordinary proliferation of terrorism across the world has come the definitions and terms relating to the unlawful enemy combatant—I repeat, unlawful—because those individuals are not wearing uniforms, they are not following any code of laws or conduct that has overseen much of warfare in the history of the world. They are not affiliated with any state. They are driven, in my judgment, by convictions, much of it religious convictions which are totally antithetical to their own religion, and willing to sacrifice their own lives to foster their ambitions and goals.

We expanded this definition of ''unlawful enemy combatant'' when we went from the committee bill to a bill that was worked on by, again, Senator MCCAIN, Senator GRAHAM, and myself, and in conjunction with the White House and our leadership and other colleagues.

It was pointed out to us that perhaps our bill is drawn so narrowly that we would not be able to get evidence and support convictions from those who are involved in hiding in the safe houses, wherever they are in the world, including here in the United States.

It is wrong to say that this provision captures any U.S. citizens. It does not. It is only directed at aliens—aliens, not U.S. citizens—bomb-makers, wherever they are in the world; those who provide the money to carry out the terrorism, wherever they are—again, only aliens and those who are preparing and using so many false documents.

There were a lot of categories which we, with the best of intentions, perhaps did not fully comprehend when we were working through that markup session. So at this time, I yield the floor because I see my distinguished colleague from South Carolina. I thank the Senator. He is recognized for his knowledge as an officer in the U.S. Air Force, a colonel who has practiced and studied military law for many years, and we are fortunate to have had his services and continue to have them in addressing this legislation.

I would also point out to my colleagues that Senator MCCAIN, who worked with us throughout this process, is away attending a funeral of a very dear and valued colleague, and he will be returning later this afternoon and will be fully engaged from that point on.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, I yield such time as he may consume to the Senator from South Carolina.

Mr. GRAHAM. Mr. President, I would like to return the compliment that Senator LEVIN gave to myself, Senator MCCAIN, and Senator WARNER. I have found Senator LEVIN and his staff to be very good to work with. Sometimes we reach agreement and sometimes we don't, but all the time we try. As to my staff, I appreciate the tons of time they have spent trying to give us the best product we can get in the legislative process that will adhere to our values and allow the war effort to move forward in an effective way.

As to the difference between the committee bill, which we wrote and supported, and the compromise we reached

with the White House, which we wrote and support, there are some differences. I think some of them we have addressed with Senator LEVIN's staff. They were very helpful. He found some language which was dropped inadvertently which made the bill stronger.

I would just like to suggest that whatever military experience I have had pales in comparison to the men and women who are in charge of today's military legal system. I am a reservist. I come in and out of military law. I spent 6½ years on active duty, and I really enjoyed my time. I dealt a lot in the court-martial process as a prosecutor and a defense attorney. But as a reservist and Guard member, it has been a part-time job. But those who do this full time supported the administration's proposal when it came to the admission of evidence by the military judge. I will, at an appropriate time, introduce that into the RECORD.

I believe the JAGs are a good source of advice. That doesn't mean they are the only source of advice. That doesn't mean that because the Judge Advocate Generals of all four branches say so, we need to do what they say. It would be wise to just listen, and I have tried to listen. Sometimes I agree; sometimes I don't. But they have said unanimously, it is my understanding, that the evidentiary standards in terms of admission of evidence, where the judge will determine whether the evidence is reliable and probative using the totality of circumstances to create justice, was a sufficient legal standard, and they were supportive of that standard. So this idea that we are going to allow coerced evidence into a trial purposely, that we made a conscious decision from the committee bill to the compromise to change course and take everything we had said before and just throw it over in a ditch, quite honestly, makes no sense.

Whatever motives you would like to attribute to the effort here, I can assure my colleagues I want to create a process that would be acceptable if our troops found themselves subject to it. And every military Judge Advocate, every admiral, and every general, believes the evidentiary standard in this committee bill is legally acceptable and appropriate.

Why the difference between December 30, 2005, and before? The reason we have a two-tiered system is because in 2005, due to the hard work of Senator MCCAIN and Senator LEVIN—who was a champion in trying to bring this about on the Democratic side—we were able to make a policy statement of the United States that says: Cruel and inhumane and degrading treatment as a policy will be forbidden. And we referenced the 5th, 8th, and 14th amendments standard called ''shock the conscience'' that existed in the convention on torture. All bills have excluded evidence that violates the torture statute. It is a per se exclusion. If the military judge, in their discretion, believes that the conduct in front of the court amounts to torture, in violation of the torture statute, it does not come into evidence.

The committee bill had a per se exclusion for a violation of the Detainee Treatment Act, and it has been changed, and here is why: The Detainee Treatment Act is a policy statement, not an evidentiary standard. The Detainee Treatment Act says that the Government and its agents and agencies will not engage in cruel, inhumane, and degrading treatment. I would argue that to exclude evidence in a military commission that may run afoul of degrading treatment would create a higher standard for a terrorist than our own military members have in their own courts-martial. So I think the policy statement ''cruel and inhumane and degrading'' should not be an evidentiary standard, and it is not.

But what we did do to bolster that policy statement is we took the 5th, 8th, and 14th amendment ''shock the conscience test'' and said: From the date of the Detainee Treatment Act forward, that will be an area that the judge has to make an inquiry into regarding the admission of evidence. The reason we didn't want to go backward is because before the Detainee Treatment Act passed in 2005, no one had recognized the 5th, 8th, and 14th amendment concepts applying to enemy combatants. So what we are trying to do is start over after Hamdan and incorporate into the military commission model as many protections as we can that also protect America. So going forward, from the Detainee Treatment Act forward, any evidence gathered after the Detainee Treatment Act will have to comply with the 5th, 8th, and 14th amendments requirements that make up the heart and soul of the Detainee Treatment Act. To make it retroactive and exclude statements where that concept was not known, was not part of our legal system regarding enemy combatants, in my opinion, was unwise.

So we are going forward, reinforcing the Detainee Treatment Act, and the standard of admission of evidence of reliable and probative meets the standards of justice and totality of the circumstances test, stays in place, covers all statements before and after. Our Judge Advocate Generals, to a person, have said that if you take the Detainee Treatment Act out of the equation, what is left still is acceptable. And the courts will make that decision.

I am confident that the standard that we had, the administration had when it came to the admission of evidence, was acceptable, and the judge advocates who have objected to many things did not object to that.

So the idea that we made a conscious decision to allow cruel and inhumane treatment to become a player defies what we did in totality.

The title 18, War Crimes Act, was rewritten. One of the crimes that we put in title 18 that would constitute a grave breach of the Geneva Conventions, a felony under our own law, is cruel or inhumane treatment: The act of a person who commits or conspires or attempts to commit an act intended to inflict severe or serious physical or mental pain or suffering, other than pain or suffering incidental to lawful sanctions, including serious physical abuse upon another within his custody or control. And we defined those terms. It is a felony in U.S. law to engage in cruel or inhumane treatment, not just torture. It is a felony in U.S. law to mutilate or maim.

What we did—intentionally causing serious bodily harm, rape, sexual assault or abuse, taking hostages—what we did is we took what the Geneva Conventions have defined as being a grave breach of the conventions, we put it in title 18 of the War Crimes Act, and made it a felony. So if you are a military member or CIA agent and you run afoul of the title 18 War Crimes Act, you can be prosecuted. When it comes time for the military judge to rule upon the admissibility of evidence in a military commission, the standard that we will be using has been blessed by every Judge Advocate General that we have, those in charge of our military legal system.

So I think it is a good standard. I think the fact that we put the DTA 5th, 8th and 14th amendment standard into the statute in a perfective way enhances and emboldens what we are trying to do with the DTA and will make us a better nation.

The other areas of concerns: enemy combatant definition. The enemy combatant definition that is changed from the compromise and committee bill allows us to, subject to military commission, try those people who intentionally and knowingly aid terrorism; materially support terrorism. To me, that makes sense. I want to prosecute the person who sells the guns to al-Qaida as much as the people who use the weapons. I want to go after the support network that supports terrorism. To me, that makes perfect sense. I am glad we expanded the definition because those who are assisting terrorists in a knowingly purposeful way should be held accountable for their actions.

Under no circumstance can an American citizen be tried in a military commission. The jurisdiction of military commissions does not allow for the trial of American citizens or lawful combatants, and those who say otherwise, quite frankly, have not read the legislation because there is a prohibition to that happening.

The hearsay rules that are in the compromise very much mirror the committee bill, but that we are allowing a burden shift, to me, makes sense given the global nature of the war. I can spend a lot of time explaining the differences between the two bills, but I will basically summarize by saying that the purpose of the committee bill has been met by the compromise. If it were not so, I would not vote for it. We are not allowing into evidence coerced

statements unless the judge makes the decision they are reliable, probative, and in the totality of circumstances they meet the ends of justice.

At the end of the day you are going to have a judge applying a legal standard to a request to admit evidence. The administration, in my opinion, in their first product, was trying to legislate a conviction. In many ways they were trying to set up the rules when it came to the military commission format that would allow evidence to go to the jury never seen by the accused. That would make it very hard to defend yourself.

We have changed that. Anything the jury gets to convict, the accused can examine and rebut. To me, that was a huge accomplishment that put the trials back on sound footing within our value system, and legally I think they will pass muster now.

So at the end of the day, in my opinion we do not need to try to legislate how the judge should rule. Everybody has their pet peeve about where the administration has failed or succeeded, about how the CIA has conducted its business. I have found an effort to tie the judges' hands to the point that we have no flexibility when it comes to admitting evidence. The judge is in the best place—better than anybody here—to make a decision as to what should come into that trial. What are we asking the judges to do? To use their experience, their knowledge of the law, their sense of right or wrong to determine: Is that statement reliable? Is it probative? Given everything around it, would the interests of justice be met if it came into the trial?

That is an acceptable legal standard, not only to every Judge Advocate General who serves today in our military, it should be a standard that every American is proud of because I am proud of it.

I bet you dollars to doughnuts when the Supreme Court gets hold of our work product they are going to approve it.

Finally, Hamdan is about applying the Geneva Conventions to the war on terror. Everybody I know of in the administration believed that the Geneva Conventions did not apply to these unlawful enemy combatants. I shared that belief. We were wrong. The Supreme Court—whether I agree or not—ruled. After their ruling, we had two things that we had to accomplish to get this country back on track within the rule of law. We had a challenge: to take the CIA interrogation program that existed and will exist and make sure that it was Geneva Conventions compliant.

What do the Geneva Conventions require of every country that signs the document? It requires that, domestically, that country will outlaw, within its own domestic law, grave breaches of the treaty. Every country has an affirmative duty to set out within their laws and prosecute their own people for grave breaches of the Geneva Conventions.

Title 18 is the War Crimes Act. Under title 18 we have listed nine crimes that would be considered grave breaches of the Geneva Conventions. To the CIA: Your program, whatever it may be in classified form, must comply with the War Crimes Act. And the War Crimes Act runs the gamut from torture to cruel, inhumane treatment, intentional infliction of serious bodily injury, or mental pain.

We have taken nine well-defined felonies and told the CIA and every other agency in the country: Whatever you do, if you violate these statutes you will be subject to being prosecuted.

I want a CIA program to be classified when it comes to interrogating high-value terrorist targets. I think it would be foolhardy to tell the terrorist community everything that comes your way when you join al-Qaida or some other terrorist organization. But it is important to tell every American, every CIA agent, their family, and the international community what we do will not only be within the Geneva Conventions, it is going to be beyond what the Conventions require, and I think we have accomplished that.

There are six specified events in article 129 and article 130 of the Geneva Conventions that constitute grave breaches. We have adopted all six, and we have added to that list. Whatever the CIA is doing and wherever they do it, whatever the Department of Defense is doing and wherever they do it, they now have the notice and the clarity that they did not have before to do their job within the law.

This idea that we have rewritten the statute and given immunity to people who have violated the statute is absurd. There is nothing in the compromise or the committee bill that would give immunity or amnesty to someone who violated the felony provisions. But what we did do, that I am proud of, is that we took a 1997 War Crimes Act that was so ill-defined that no one understood it and gave clarity and purpose to it so those whom we are asking to defend us from the most vicious people in the world will have a chance to know the law.

Abu Ghraib was about policies that cut legal corners, that migrated from one side of the Government to the other, that got everybody involved confused as to what you could and could not do. It was a mixture of individual deviance and bad policy, poorly trained people, not enough folks to do the job, and not trained well enough to understand what the job was. It was a mess. For 2 years we have been trying—and I have been as helpful as I know how to be—to create some sense of balance to bring order out of chaos, and we are on the verge of doing it.

This is a product, not only that I support, that I had but one that I am proud of. Every military lawyer who sits on the top of our military legal system has had input on every issue. They have had the guts to go to the House and Senate and say some things about the President's proposal are flat wrong. That took a lot of guts, and I am here to tell you the final product took their input and what their concerns were and has been changed.

But if you want a CIA program that is not classified, you lost. I want the program to be classified. But I want it to run within the obligations of the Geneva Conventions, and we have accomplished that.

Finally, what did we do in the compromise that we didn't do in the committee bill? We said that every obligation under the Geneva Conventions that our country has, outside of the War Crimes Act, will be fulfilled by our President. Under our constitutional democracy, it is the obligation of the executive branch to implement and interpret treaties. This whole debate, what I have been working on for 2 weeks and getting beat up on in every talk radio show in the country, was about how can you comply with the Geneva Conventions in a way that will be seen by the world as not getting out of the Conventions.

The proposal for the Congress to redefine the treaty terms, in my opinion, would have created a precedent for every other country, in a war that they are in the middle of, to change the treaty in the middle of a war. The conventions have been closed for years. It would have been wrong, ill-advised for the Congress to sit down with the President and rewrite the treaty obligations for domestic purposes because clearly then we would have been changing the treaty terms without notifying the other parties.

What we did to avoid that is we, Congress, defined nine crimes that would constitute grave breaches, honoring our commitment under the Geneva Conventions, to outlaw grave breaches, felonies. We have done our job, and we turned to the Executive and said in this legislation: It is your job, Mr. President, consistent with our constitutional democracy, to implement and fulfill the obligations of the treaty outside of title 18. And when you make a decision, publish what you have decided. And any decision you make cannot take power away from the courts or the Congress that we have in the same arena.

Those people who want to overturn the election, who do not like President Bush, are upset that we recognized he has a role to play. Let me tell you, he does have a role to play. Any President has the same role that we are going to give President Bush—to implement a treaty, not change a treaty.

So I think we have done a very good job of putting into law our obligations under the Geneva Conventions defining, constitutionally, who has what responsibility so that no reasonable person could say the United States has abandoned its longstanding obligations to the Geneva Conventions because we have not. And that is what we have

been sweating over for weeks. No reasonable person can say that this compromise condones torture, cruel, or inhumane treatment because we make it a felony. What we have done is given the military judge the tools he or she will need to render justice. And I have tried to embolden and strengthen the Detainee Treatment Act in a way that I think makes sense.

The military court-martial system will be the model. The military commission will deviate. And the authority given to the Secretary is the same authority given to the President: to make differences between the district courts and the military justice system as a whole. It is compliant with article 36 of the Uniform Code of Military Justice. This compromise is compliant with Hamdan. It is compliant with the values we are fighting for. And it has the flexibility we need to fight an enemy that knows no bounds.

The work product is the result of give and take, is the result of being more than one branch of Government, is the result of having to deal with a court decision that was new and novel. I can say from my point of view that not only will I vote for the compromise, I am very proud of it.

I yield the floor.

Mr. WARNER. Mr. President, my distinguished colleague from South Carolina will be placing in today's RECORD the correspondence from the judge advocate generals. I think that is very important. I think for those following this debate, it would be of great interest to give an example of how in response to the letter sent by the distinguished Senator from Michigan to a judge advocate they respond. I ask unanimous consent to have printed in the RECORD first at this juncture a letter from Senator LEVIN to Bruce MacDonald, Judge Advocate General of the Navy, on this point of what we call the two categories of evidence.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. SENATE,
COMMITTEE ON ARMED SERVICES,
Washington, DC, September 25, 2006.

Rear Admiral BRUCE MACDONALD,
The Judge Advocate General, Department of the Navy, Washington, DC.

DEAR ADMIRAL MACDONALD: The Senate will soon begin consideration of a bill entitled the Military Commissions Act of 2006, which would add a new Chapter 47A to title 10, United States Code, addressing trials by military commission. Section 948r of the proposed new chapter would address the issue of compulsory self-incrimination and statements obtained by torture or other methods of coercion.

Under this provision, a copy of which is attached, a statement obtained on or after December 30, 2005 through coercion that is less than torture would be admissible if the military judge finds that: (1) the totality of the circumstances renders it reliable and possessing sufficient probative value; (2) the interests of justice would best be served by admission of the statement into evidence; and (3) the interrogation methods used do not violate the cruel, unusual, or inhumane treatment of punishment prohibited by the 5th, 8th, and 14th Amendments to the United States Constitution.

Under the same provision, a statement obtained before December 30, 2005 would be subject to the first two requirements, but not the third. Consequently, a statement obtained before December 30, 2005 through cruel, unusual or inhumane treatment prohibited by the U.S. Constitution would be admissible into evidence, as long as the other conditions in the provision are met.

I would appreciate if you would provide your personal views and advice as a military officer on the merits of this provision and the impact that it would have on our own troops, should they be captured by hostile forces in the future. Because this issue will be debated on the Senate floor this week, I request that you provide your views by no later than the close of business on Tuesday, September 26, 2006.

Thank you for your assistance in this matter.

Sincerely,

CARL LEVIN,
Ranking Member.

DEPARTMENT OF THE NAVY, OFFICE OF THE JUDGE ADVOCATE GENERAL
Washington, DC, September 26, 2006.

Hon. CARL LEVIN,
U.S. Senate, Russell Senate Office Building, Washington, DC.

DEAR SENATOR LEVIN: Thank you for your letter of September 25, 2006, requesting my personal views on the admissibility of coerced statements at military commissions.

My consistent position before the Congress is and has been that the presiding military judge should have the discretion and authority to inquire into the underlying factual circumstances and exclude any statement derived from unlawful coercion, in order to protect the integrity of the proceeding.

This approach is consistent with the practice of international war crimes tribunals sanctioned by the United States and United Nations and addresses the concern regarding reciprocal treatment of U.S. armed forces personnel in present or future conflicts.

Sincerely,

BRUCE MACDONALD,
Rear Admiral, JAGC, U.S. Navy.

Mr. WARNER. Mr. President, it is a clear indication by those who are currently given the responsibility of defending the men and women of the United States military how this provision in the bill now before the Senate is consistent with their understanding of international and domestic law.

I yield the floor.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. WARNER. Mr. President, I inquire of our distinguished colleague, is he now drawing time on the Levin amendment?

The PRESIDING OFFICER. The Senator's time is from the Democratic leader's time on the measure itself.

Mr. LEAHY. Mr. President, how much time is there to the Democratic leader on this?

The PRESIDING OFFICER. The Senator from Vermont has 47 minutes; 45 minutes of the 57 minutes remaining to the Democratic leader.

Mr. LEAHY. Mr. President, as I said earlier, I understood that the consent agreement was to give me 45 minutes on the Specter-Leahy-Dodd amendment and 15 minutes on the bill. That seems to not have been the agreement entered into by leadership. I ask that I take 10 minutes from the Democratic leader's time and the remaining time from my own 45 minutes of time.

I see the concern by the Senator from Michigan. I will take it from my 45 minutes. I also note that I will not consent to any other time agreements on this bill insofar as the time agreement I understood I had was not entered into. I will take the 45 minutes.

Mr. President, this administration has yet to come clean to the Congress or the American people in connection with the secret legal justifications it has generated and secret practices it has employed in detaining and interrogating hundreds if not thousands of people in the war on terror. Even they cannot dismiss the practices at Guantanamo as the actions of a few ''bad apples.'' With Senate adoption of the anti-torture amendment last year and the recent adoption of the Army Field Manual, I had hoped that 5 years of administration resistance to the rule of law and to the U.S. military abiding by its Geneva obligations might be drawing to a close. Despite the resistance of the Vice President and the administration, the new Army Field Manual appears to outlaw several of what the administration euphemistically calls ''aggressive'' tactics and that much of the world regards as torture and cruel and degrading treatment. Of course, the President in his signing statement undermined enactment of the anti-torture law, and now the administration is seeking still greater license to engage in harsh techniques in connection with the military tribunal legislation before us now.

What is being lost in this debate is any notion of accountability. Where are the facts of what has been done in the name of the United States? Where are the legal justifications and technicalities the administration's lawyers have been seeking to exploit? Senator LEVIN's amendment, which restores the bipartisan legislation passed by the Senate Armed Services Committee, would maintain some accountability for this administration's actions and some standards of justice and decency. The Republican leadership's legislation which is before us now strips away all accountability and erodes our most basic national values.

If the administration had answered me when I asked over and over about the Convention Against Torture and about rendition, we could have come to grips with those matters before they degenerated, as they have, into international embarrassment for the United States. As Secretary Colin Powell wrote recently, ''The world is beginning to doubt the moral basis of our fight against terrorism.'' It did not need to come to that.

If FBI Director Mueller had been more forthcoming with me at or after the May 2004 hearing in which I asked him about what the FBI had observed at Guantanamo, we could have gotten to a detention and interrogation policy

befitting the U.S. years sooner than we have.

If the administration would have responded to my many inquiries over the years regarding the rendition of Maher Arar, I would not have had to send yet another demand for information to the Attorney General this week, and we would not have been embarrassed by the Canadian commission report about his being sent by U.S. authorities to Syria where he was tortured. Mr. Arar is the Canadian citizen who was returning to Canada through New York when he was arrested by American authorities at JFK airport and held for 12 days without access to a Canadian consular official or lawyer. He was then rendered, not to Canada, but to Syria, without the knowledge or approval of Canadian officials, where he was tortured. Last week, a Canadian commission inquiry determined that Mr. Arar had no ties to terrorists, he was arrested on bad intelligence, and his forced confessions in Syria reflected torture, not the truth. Sadly, the administration is still seeking to avoid accountability by hiding behind legal doctrines. The administration continues to thwart every effort to get to the facts, to get to the truth and to be accountable. I am worried that the legislation before us is one more example of that trend.

Unfortunately, Senator LEVIN's amendment, like the Armed Services Committee's bill, retains the extremely troubling habeas provision. I will be submitting an amendment to strip that provision.

We are rushing through legislation that would have a devastating effect on our security and on our values, and we need to step back and think about what we are doing. The President recently said that ''time is of the essence'' to pass legislation authorizing military commissions. Time was of the essence when this administration took control and did not act on the dire warnings of terrorist action. Time was of the essence in August and early September 2001 when the 9/11 attacks could still have been prevented. This administration ignored warnings of a coming attack and even proposed cutting the anti-terror budget. It focused on Star Wars, not terrorism. Time was of the essence when Osama bin Laden was trapped in Tora Bora.

After 5 years of unilateral actions by this administration that have left us less safe, time is now of the essence to take real steps to keep us safe from terrorism like those in the Real Security Act, S. 3875. Instead, the President and the Republican Senate leadership call for rubberstamping more flawed White House proposals in the run up to another election. I hope that this time the U.S. Senate will act as an independent branch of the government and finally serve as a check on this administration.

We need to pursue the war on terror with strength and intelligence, but also to do so consistent with American values. The President says he wants clarity as to the meaning of the Geneva Conventions and the War Crimes Act. Of course, he did not want clarity when his administration was using its twisted interpretation of the law to authorize torture, cruel and inhumane treatment of detainees and spying on Americans without warrants and keeping those rationales and programs secret from Congress. The administration does not seem to want clarity when it refuses even to tell Congress what its understanding of the law is following the withdrawal of a memo that said the President could authorize and immunize torture. That memo was withdrawn because it could not stand up in the light of day.

It seems that the only clarity this administration wants is a clear green light from Congress to do whatever it wants. That is not clarity; it is immunity. That is what the current legislation would give to the President on interrogation techniques and on military commissions. Justice O'Connor reminded the nation before her retirement that even war is not a ''blank check'' when it comes to the rights of Americans. The Senate should not be a rubberstamp for policies that undercut American values and make Americans around the world less safe.

In reality, we already have clarity. Senior military officers tell us they know what the Geneva Conventions require, and the military trains its personnel according to these standards. We have never had trouble urging other countries around the world to accept and enforce the provisions of the Geneva Conventions. There was enough clarity for that. What the administration appears to want, instead, is to use new legislative language to create loopholes and to narrow our obligations not to engage in cruel, degrading, and inhuman treatment.

In fact, the new legislation muddies the waters. It saddles the War Crimes Act with a definition of cruel or inhuman treatment so oblique that it appears to permit all manner of cruel and extreme interrogation techniques. Senator MCCAIN said this weekend that some techniques like waterboarding and induced hypothermia would be banned by the proposed law. But Senator FRIST and the White House disavowed his statements, saying that they preferred not to say what techniques would or would not be allowed. That is hardly clarity; it is deliberate confusion.

Into that breach, this legislation throws the administration's solution to all problems: more Presidential power. It allows the administration to promulgate regulations about what conduct would and would not comport with the Geneva Conventions, though it does not require the President to specify which particular techniques can and cannot be used. This is a formula for still fewer checks and balances and for more abuse, secrecy, and power-grabbing. It is a formula for immunity for past and future abuses by the Executive.

I worked hard, along with many others of both parties, to pass the current version of the War Crimes Act. I think the current law is a good law, and the concerns that have been raised about it could best be addressed with minor adjustments, rather than with sweeping changes.

In 1996, working with the Department of Defense, Congress passed the War Crimes Act to provide criminal penalties for certain war crimes committed by and against Americans. The next year, again with the Pentagon's support, Congress extended the War Crimes Act to violations of the baseline humanitarian protections afforded by Common Article 3 of the Geneva Conventions. Both measures were supported by a broad bipartisan consensus, and I was proud to sponsor the 1997 amendments.

The legislation was uncontroversial for a good reason. As I explained at the time, the purpose and effect of the War Crimes Act as amended was to provide for the implementation of America's commitment to the basic international standards we subscribed to when we ratified the Geneva Conventions in 1955. Those standards are truly universal: They condemn war criminals whoever and wherever they are.

That is a critically important aspect of the Geneva Conventions and our own War Crimes Act. When we are dealing with fundamental norms that define the commitments of the civilized world, we cannot have one rule for us and one for them, however we define ''us'' and ''them.'' As Justice Jackson said at the Nuremberg tribunals, ''We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.''

In that regard, I am disturbed that the legislation before us narrows the scope of the War Crimes Act to exclude certain violations of the Geneva Conventions and, perhaps more disturbingly, to retroactively immunize past violations. Neither the Congress nor the Department of Defense had any problem with the War Crimes Act as it now stands when we were focused on using it to prosecute foreign perpetrators of war crimes. I am concerned that this is yet another example of this administration overreaching, disregarding the law and our international obligations, and seeking to immunize others to break the law. It also could well prevent us from prosecuting rogues who we all agree were out of line, like the soldiers who mistreated prisoners at Abu Ghraib.

The President said on May 5, 2004 about prisoner mistreatment at Abu Ghraib: ''I view those practices as abhorrent.'' He continued: ''But in a democracy, as well, those mistakes will be investigated, and people will be brought to justice.'' The Republican leader of the Senate said on the same day: ''I rise to express my shock and

condemnation of these despicable acts. The persons who carried them must face justice.''

Many of the despicable tactics used in Abu Ghraib the use of dogs, forced nudity, humiliation of various kinds do not appear to be covered by the narrow definitions this legislation would graft into the War Crimes Act; of course, despite the President's calls for clarity, the new provisions are so purposefully ambiguous that we cannot know for sure. If the Abu Ghraib abuses had come to light after the perpetrators left the military, they might not have been able to be brought to justice under the administration's formulation.

The President and the Congress should not be in the business of immunizing people who have broken the law, making us less safe, turning world opinion against us, and undercutting our treaty obligations in ways that encourage others to ignore the protections those treaties provide to Americans. We should be very careful about any changes we make.

If we lower our standards of domestic law to allow outrageous conduct, we can do nothing to stop other countries from doing the same. This change in our law does not prevent other countries from prosecuting our troops and personnel for violations of the Geneva Convention if they choose; it only changes our domestic law. But it could give other countries a green light to change their own law to allow them to treat our personnel in cruel and inhuman ways.

Let me be clear. There is no problem facing us about overzealous use of the War Crimes Act by prosecutors. In fact, as far as I can tell, the Ashcroft Justice Department and the Gonzales Justice Department have yet to file a single charge against anyone for violation of the War Crimes Act. Not only have they never charged American personnel under the act, they have never used it to charge terrorists either.

We can address any concerns about the War Crimes Act with reasonable amendments, as the Warner-Levin bill did, without gutting the Act in a way that undermines our moral authority and makes us less safe. Senator LEVIN's amendment goes back to the Warner-Levin bill's formulation, and I urge Senators of both parties to support it.

The proposed legislation would also allow the admission into military commission proceedings of evidence obtained through cruel and inhuman treatment. This provision would once again allow this administration to avoid all accountability for its misguided policies which have contributed to the rise of a new generation of terrorists who threaten us. Not only would the military commission legislation before us immunize those who violated international law and stomped on basic American values, but it would allow them then to use the evidence gotten in violation of basic principles of fairness and justice.

Allowing in this evidence would violate our basic standards of fairness without increasing our security. Maher Arar, the Canadian citizen sent by our government to Syria to be tortured, confessed to attending terrorist training camps. A Canadian commission investigating the case found that his confessions had no basis in fact. They merely reflected that he was being tortured, and he told his torturers what they wanted to hear. It is only one of many such documented cases of bad information resulting from torture. We gain nothing from allowing such information. The Armed Services Committee bill, which the Levin amendment restores, would not allow the use of this tainted evidence.

The military commissions legislation departs in other unfortunate ways from the Warner-Levin bill. Early this week, apparently at the White House's request, Republican drafters added a breathtakingly broad definition of ''unlawful enemy combatant'' which includes people—citizens and non-citizens—alike—who have ''purposefully and materially supported hostilities'' against the United States or its allies. It also includes people determined to be ''unlawful enemy combatant'' by any ''competent tribunal'' established by the President or the Secretary of Defense. So the government can select any person, including a U.S. citizen, whom it suspects of supporting hostilities—whatever that means—and begin denying that person the rights and processes guaranteed in our country. The implications are chilling. We should go back to the reasonable definition the Senate Armed Services Committee came up with. That is what the Levin amendment does.

I hope that we will take the opportunity before us to consider and pass bipartisan legislation that will make us safer and help our fight on terrorism, both by giving us the tools we need and by showing the world the values we cherish and defend, the same values that make us a target. We should amend the legislation before us to keep the War Crimes Act strong and to require some accountability from the administration. The Levin amendment does just that, and I urge all senators to vote for it. Let us join together on behalf of real security for Americans.

Mr. President, before we stand here congratulating ourselves too much about all the wonderful things we did in these closed-door meetings and these back-room meetings and the Bush-Cheney statements about what we are allowed to do or not allowed to do in what has become an increasingly rubberstamp Congress—the most rubberstamp Congress I have ever seen in 32 years here—I want to talk about the habeas stripping provisions, what I call un-American provisions, which are regrettably in the bill before us and unfortunately contained in the committee bill, and even included in the amendment before us now. The Specter-Leahy-Dodd amendment will eliminate those provisions from the bill pending before the Senate.

It will be interesting to see whether the Bush-Cheney administration will allow Republican Senators to vote for it. Lord knows there have not been many votes made here that have been by independent Senators.

As currently drafted, section 7 of the military commissions bill would wrongfully, and in my view, unconstitutionally eliminate the writ of habeas corpus for anyone detained by this administration on suspicion of being what they call an ''enemy combatant,'' which is a dangerous concept that is being expanded by a vague and ever-expanding definition.

The President could basically say I think you are an enemy combatant, and lock you up, and you can't even contest it.

I think of the hundreds of pages of statements made by Senators on both sides of the aisle when other countries have done something this arbitrary, or this vague, and locked up people inside their borders, and we said how un-American it is. If we pass this, we can no longer call it un-American. We can call it codified American law.

Important as the rules for military commissions are, they will apply to only a few cases. In this war on terror, you may wonder how many people have been brought to justice. We are holding about 500 people in Guantanamo. We are so committed to this war that we have charged a total of 10 people in the nearly 5 years that the President declared his intention to use military commissions. That is two a year. They just announced plans to charge an additional 14 men. At this rate, I will be about 382 years old when they get around to charging all the people they are detaining. But for the vast majority of the almost 500 prisoners at Guantanamo, and the thousands it has detained over the last 5 years, the administration's position remains as stated by Secretary of Defense Donald Rumsfeld 3 years ago: There is no interest in trying them.

It is not just a question of we have no interest in trying those we have determined to be enemy combatants. If we have dozens and dozens or even hundreds of people who are picked up by mistake or turned over by bounty hunters to get the bounty and not because they might have done something, we are not going to try them either. Sorry, we are just going to lock them up.

Perhaps the single most consequential provision of the so-called military commissions bill can now be found buried nearly 100 pages in to curtail judicial review and any meaningful accountability. 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. Maybe some of them are guilty.

If they are, try them. But we have to understand that there may be people in there who have no reason to be there and there are no charges and no evidence. This is un-American, it is unconstitutional, and it is contrary to American interests. This is not what a great and wonderful nation should be doing.

Going forward, the bill departs even more radically from our most fundamental values. I am proud to be an American, and I am proud to be a Senator. But mostly I am proud of what has been in the past our American values. Provisions that were profoundly troubling a week ago when the Armed Services Committee marked up the bill have gotten much worse in the course of the closed-door revisions over the past 5 days, including the last round of revisions, which were put in behind closed doors and sent around late yesterday, and that the majority now demands we pass immediately. Five years they sit, doing nothing, and then all of sudden, whoops, the polls look bad this fall for the election: Quick, pass anything, no matter how unconstitutional it might be.

For example, the bill has been amended to eliminate habeas corpus review even for people inside the United States, and even for people who have not been determined to be enemy combatants. Quick, pass it; quick, do it now; quick, pass it out of here so we can rubberstamp it in a signing ceremony before anybody reads the fine print.

We have done this in the past. As a witness said before our committee this week, we did this in the past. We did it with the Tonkin Gulf Resolution. We did it with the internment of Japanese Americans. Now we are about to do it again.

As the bill now stands, 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 that person 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 to say that the alien was awaiting a determination on that issue, even though they may wait 20, 30, 40 years and wait until the grave gives them their escape.

In other words, the bill would send a message to the millions of legal immigrants living in America, participating in American families, working for American businesses, and paying American taxes. Its message would be 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—even though they have no ability to help in that determination themselves. In turn, the bill now defines the term enemy combatants in a tortured and unprecedented broad manner.

Detained indefinitely, and unaccountably, until they are proven innocent; even though they have no right to stand up and offer proof. It is like the Canadian citizen Maher Arar, shipped off to a torture cell in Syria by the Bush-Cheney administration, despite what the Canadian Government recently concluded, that there is no evidence that he ever committed a crime or posed a threat to either the United States or Canadian security. Pick him up. He looks bad. Ship him to Syria. Torture him. Maybe he will confess to something and prove we were right.

Now it has been documented the Bush-Cheney administration did the wrong thing to the wrong man. When asked about it, what do they do? As usual, they evade all accountability. This is an administration that makes no mistakes. A rubberstamp Congress will never ask them what they did, they make no mistakes, and they hide behind a purported State secrets privilege.

The administration's defenders would like to believe Mr. Arar's case is an isolated blunder, but it is not. We have numerous press accounts that have quoted administration officials themselves who believe a significant percentage of those detained at Guantanamo Bay have no connection to terrorism. They have been held by the Bush-Cheney administration for several years and the administration intends to hold them indefinitely without trial or any recourse to justice, even though a substantial number of them are innocent people who were turned in by anonymous bounty hunters or picked up by mistake in the fog of war.

The most important purpose of habeas corpus is not to give people extra rights. No one is asking to give people special rights. Habeas corpus does not do that. Habeas corpus is intended to correct errors such as this to protect the innocent. 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 public safety may require it.''

I would assume the Bush-Cheney administration is not saying we are handling this question of terrorists so poorly that we are under invasion now. And I have no doubt this bill, which will permanently eliminate the writ of habeas corpus for all aliens within and outside the United States whenever the Government says they might be enemy combatants, violates that prohibition. I believe even the present Supreme Court, seven of the nine members now Republican, would hold it unconstitutional.

When former Secretary of State Colin Powell wrote of his concerns with the administration's bill, he wrote: ''The world is beginning to doubt the moral basis of our fight against terrorism.''

Talk to anyone who travels around the world anywhere, even among some of our closest allies, our best friends. We are asked, What are you doing? Have you lost your moral compass? And these are countries that faced terrorist attacks long before we did.

General Powell, former head of the Joint Chiefs of Staff, was right.

We have heard from current and former diplomats, military lawyers, Federal judges, law professors, law school deans, and even a former Solicitor General under the first President Bush, Kenneth Starr, that they have grave concerns with the habeas corpus stripping provisions of this bill. I have letters that come from across the political and legal spectrum saying this is wrong.

I ask unanimous consent that some of these letters be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

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.

Weare 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.

TO MEMBERS OF CONGRESS: The undersigned retired federal judges write to express our deep concern about the lawfulness of Section 6 of the proposed Military Commissions Act of 2006 (''MCA''). The MCA threatens to strip the federal courts of jurisdiction to test the lawfulness of Executive detention at the Guantanamo Bay Naval Station and elsewhere outside the United States. Section 6 applies ''to all cases, without exception, pending on or after the date of the enactment of [the MCA] which relate to any aspect of the detention, treatment, or trial of an alien detained outside of the United States . . . since September 11, 2001.''

We applaud Congress for taking action establishing procedures to try individuals for war crimes and, in particular, Senator Warner, Senator Graham, and others for ensuring that those procedures prohibit the use of secret evidence and evidence gained by coercion. Revoking habeas corpus, however, creates the perverse incentive of allowing individuals to be detained indefinitely on that very basis by stripping the federal courts of their historic inquiry into the lawfulness of a prisoner's confinement.

More than two years ago, the United States Supreme Court ruled in Rasul v. Bush, 542 U.S. 466 (2004), that detainees at Guantanamo have the right to challenge their detention in federal court by habeas corpus. Last December, Congress passed the Detainee Treatment Act, eliminating jurisdiction over future habeas petitions filed by prisoners at Guantanamo, but expressly preserving existing jurisdiction over pending cases. In June, the Supreme Court affirmed in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), that the federal courts have the power to hear those pending cases. These cases should be heard by the federal courts for the reasons that follow.

The habeas petitions ask whether there is a sufficient factual and legal basis for a prisoner's detention. This inquiry is at once simple and momentous. Simple because it is an easy matter for judges to make this determination—federal judges have been doing this every day, in every courtroom in the country, since this Nation's founding. Momentous because it safeguards the most hallowed judicial role in our constitutional democracy—ensuring that no man is imprisoned unlawfully. Without habeas, federal courts will lose the power to conduct this inquiry.

We are told this legislation is important to the ineffable demands of national security, and that permitting the courts to play their traditional role will somehow undermine the military's effort in fighting terrorism. But this concern is simply misplaced. For decades, federal courts have successfully managed both civil and criminal cases involving classified and top secret information. Invariably, those cases were resolved fairly and expeditiously, without compromising the interests of this country. The habeas statute and rules provide federal judges ample tools for controlling and safeguarding the flow of information in court, and we are confident that Guantanamo detainee cases can be handled under existing procedures.

Furthermore, depriving the courts of habeas jurisdiction will jeopardize the Judiciary's ability to ensure that Executive detentions are not grounded on torture or other abuse. Senator John McCain and others have rightly insisted that the proposed military commissions established to try terror suspects of war crimes must not be permitted to rely on evidence secured by unlawful coercion. But stripping district courts of habeas jurisdiction would undermine this goal by permitting the Executive to detain without trial based on the same coerced evidence.

Finally, 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 Guantanamo 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.

For two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not of men. The proposed legislation imperils this proud history by abandoning the Great Writ to the siren call of military necessity. We urge you to remove the provision stripping habeas jurisdiction from the proposed Military Commissions Act of 2006 and to reject any legislation that deprives the federal courts of habeas jurisdiction over pending Guantanamo detainee cases.

Respectfully,

Judge John J. Gibbons, U.S. Court of Appeals for the Third Circuit (1969–1987), Chief Judge of the U.S. Court of Appeals for the Third Circuit (1987–1990).

Judge Shirley M. Hufstedler, U.S. Court of Appeals for the Ninth Circuit (1968–1979).

Judge Nathaniel R. Jones, U.S. Court of Appeals for the Sixth Circuit (1979–2002).

Judge Timothy K. Lewis, U.S. District Court, Western District of Pennsylvania (1991–1992), U.S. Court of Appeals for the Third Circuit (1992–1999).

Judge William A. Norris, U.S. Court of Appeals for the Ninth Circuit (1980–1997).

Judge George C. Pratt, U.S. District Court, Eastern District of New York (1976–1982), U.S. Court of Appeals for the Second Circuit (1982–1995).

Judge H. Lee Sarokin, U.S. District Court for the District of New Jersey (1979–1994), U.S. Court of Appeals for the Third Circuit (1994–1996).

William S. Sessions, U.S. District Court, Western District of Texas (1974– 1980), Chief Judge of the U.S. District Court, Western District of Texas (1980–1987).

Judge Patricia M. Wald, U.S. Court of Appeals for District of Columbia Circuit (1979–1999), Chief Judge of the U.S. Court of Appeals for District of Columbia Circuit (1986–1991).

MALIBU, CA,
September 24, 2006.

Hon. ARLEN SPECTER,
Chairman, Senate Committee on the Judiciary, Washington, DC.

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.

Mr. LEAHY. Monday we rushed to hold a hearing before the Judiciary committee on this important issue, and what happens? The surrogate for the administration, former White House associate counsel Brad Berenson, who testified before us, defends the habeas corpus stripping provisions of this bill by arguing that the United States has been and still is suffering from an invasion that requires the suspension of habeas corpus.

What are we doing? What is going on? That is outrageous. That is running scared. That is so wrong. Is he saying that for 5 years this administration has been allowing an ongoing invasion in the United States and we are not aware of it? Are we going to suspend the great writ on this basis?

To quote Kenneth Starr:

The United States is neither in a state of rebellion nor invasion. Consequently, it would [be] problematic for Congress to modify the constitutionally protected writ of habeas corpus under current events.

I suppose the administration would say we are not modifying it. Heck, no, we are eliminating it. We are not modifying the writ of habeas corpus, we are knocking it out for all aliens.

I agree with those from the right to the left, we should not modify, and we certainly should not eliminate, the great writ of habeas corpus. I agree with hundreds of law professors who described an earlier, less extreme version of the habeas provisions of this bill as ''unwise and contrary to the most fundamental precepts of American constitutional tradition.'' And I agree with the former ambassadors and other senior diplomats who wrote to us saying that eliminating habeas corpus for aliens does not help America, it does not make America safer, but rather it harms our interests abroad and makes us less safe.

Maybe some of those who want to pretend how powerful they have been in military matters ought to talk to those who have been in the military and actually understand a time when we are reaping the mistakes of our folly in Iraq. Let us not expand it further. The United States, especially since World War II and the Marshall Plan, has been a beacon of hope and freedom for the world. How do we spread a message of freedom abroad if our message to those who come to America is that they may be detained indefinitely without any recourse to justice?

In the wake of the attack of September 11, and in the fact of the continuing terrorist threat, now is not the time for the United States to abandon its principles. Admiral Hutson was right to point out that when we do, there would be little to distinguish America from a banana republic or the repressive regimes against which we are trying to rally the world and the human spirit.

Now is not the time to abandon American values and to shiver and quake as though we are a weak country and we have to rely on secrecy and torture. We are too great a nation for that. Those are the ways of weakness. Those are the ways of repression and oppression. Those are not the ways of America. Those are not the ways of this Nation I love.

The habeas provisions of this bill are wrongheaded. They are flagrantly unconstitutional. Tinkering with them would not make them less wrongheaded but might make them less flagrantly unconstitutional. I see no reason to save the administration from itself and from the inevitable defeat when the Supreme Court strikes them down.

Why should those who take our oath to uphold the Constitution seriously, who understand the fundamental importance of habeas to freedom, find ourselves compromising with such an irresponsible provision?

That is why at the appropriate point the chairman of the Senate Judiciary Committee and I will offer just one amendment, to remove the habeas provisions from the bill in their entirety. That is the right thing to do. I should also add, that is the American thing to do. We would still be left with the disgraceful but less extreme habeas stripping provisions that we enacted earlier this year in the Detainee Treatment Act. But we would at least not make one bad mistake even worse. By not totally eliminating habeas for all aliens, we can reduce the damage to America's credibility as a champion of freedom and show the American people and the courts that Congress is not entirely cavalier when it comes to its constitutional obligations. We can show the world that this great Nation is not so frightened and so shaky and so quaky that we are going to have to give up the principles that made us a great nation.

Our amendment would reduce the grave harm that will be done if the bill before the Senate passes. It was not too late last night for the Republicans to make yet more revisions to this unconstitutional bill. It is not too late today for the Senate to make the bill a little less bad, a little less offensive to the values and freedom for which America stands.

This is one American who is not going to run and hide. This is one American who is not willing to cut down the laws of our Nation. This is one American who thinks these laws and our protections have made us great not only here but abroad. This is one American who thinks that our freedoms, our laws, our protections, are what attracted people from other countries, people from other countries who have fled oppression in their own country and fled a lack of rule of law in their own country, to come to America, where we have a rule of law.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, we are anxious to go on with the matters before the Senate this afternoon in connection with this pending bill.

As I understand it, the amount of time remaining on the Levin substitute amendment is how much?

The PRESIDING OFFICER. The Senator from Michigan has 24 minutes 10 seconds; the Senator from Virginia has 24 minutes.

Mr. WARNER. It had been my hope we could set this amendment aside pending instructions from the leadership as to a time of vote and proceed to another amendment.

At this point in time, I see another colleague who is seeking recognition.

I yield the floor.

Mr. REED. Mr. President, I ask for 12 minutes from the time.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REED. Mr. President, we are engaged in a very important debate about the way we will bring to justice very heinous individuals who committed terrorism. I will put in context first what I think the situation is.

First, our most essential mission in the war on terror is to find these individuals, to attempt to capture them, and if they have refused to be captured, to take extreme measures to eliminate them as terrorist threats to the United States.

If they are in our hands as detainees or in any capacity, we have an obligation to interrogate them and we have to be consistent with international norms while also recognizing that as we treat people in our custody we can expect if our military personnel fall in the hands of a military power, they will be similarly treated. We must be very conscious of this.

But an important point that is often overlooked in the entire debate, all of the individuals we are talking about today—the 14 detainees at Guantanamo Bay and others—are enemy combatants. Under international law, they can be held indefinitely. There is a big difference between an individual who is an enemy combatant and someone who is in a criminal justice situation someplace else. Even if these individuals are acquitted of their crimes, they are still in the custody of the United States and still will remain in the custody of the United States.

So as we debate this issue of military tribunals, we have to recognize what we are talking about is not allowing people to walk out the door because our procedures are inadequate, because some clever attorney can take advantage of the rules of evidence. They will

never walk out the door. What we are talking about is whether we will have legitimacy to impose the most difficult sanction on an individual, the most severe sanction. To be consistent with our value as a nation, I believe we have to have procedures that are procedurally legitimate, that are fair and are perceived that way.

There is another issue here, not just in terms of our moral standing. It is a very practical one. I have suggested it before. How we treat these people will be the standard with which our military personnel will be treated overseas. We will surrender the right to condemn those people who may in the future hold our soldiers if they choose to use procedural gimmicks, if they want to stage show trials rather than real trials, if they want to punish an American fighting man or woman without any regard for the principles and practices of international law. That is, I think, the issue before us today.

The substitute Senator LEVIN has offered today is one we supported on a bipartisan basis in the committee. It was a strong, good bill. It represented not only our best principles, but it recognized that these principles could also and would also be applied in the future—we hope not—but certainly we have to recognize the possibility that American military personnel will be in the hands of hostile forces in the future.

The bill we had in the Armed Services Committee did things this legislation before us undoes. For example, the committee bill prohibited the admission of statements obtained through cruel, inhuman, or degrading treatment. The bill before us prohibits the admission of statements obtained after December 30, 2005, through ''cruel, inhuman or degrading treatment,'' but it contains no prohibition against using statements so obtained prior to December 30, 2005.

I do not think the Geneva Conventions were in abeyance up until December 30, 2005. I do not think the standards we should insist upon did not exist there. And very practically speaking, ask yourself, would we accept the response from a foreign power who said: Oh, of course, we are going to follow the Geneva Conventions. Of course we are not going to use abusive treatment to obtain a confession, prior to December 30, 2020 or 2015? I think this seriously weakens not only the legitimacy of this approach but also our ability to argue with compelling legal and moral force in the future that other nations have to play by the rules.

There are other provisions here in this bill, and there are many of them that I think alter dramatically what we accomplished on a bipartisan basis, what was applauded by General Powell and General Vessey and others.

For example, the committee bill provided that evidence seized outside of the United States shall not be excluded from trial by military commissions on the grounds the evidence was not seized pursuant to a search warrant. That was a very practical provision. We are not going to require a soldier, a special forces operator who is running through the woods of some foreign land, to produce a search warrant when he picks up valuable intelligence material.

But the bill before us deletes the limitation to evidence seized outside the United States. As a result, the bill authorizes the use of evidence that is seized inside the United States without a search warrant. This provision is not limited to evidence seized from enemy combatants. It does not even preclude the seizure of evidence without a warrant when that evidence is seized from United States citizens.

If you want an invitation to irresponsible conduct within the United States, disregarding our principles of justice and the Constitution of the United States, it might be found here because, frankly, we have the obligation to establish rules we can live with. No one is arguing with trying to create some type of situation in which a soldier has to pull out his Black's Law Dictionary and have his warrant and do all these things, but it is quite a bit different from police authorities here in the United States.

Additional problems with this bill: The committee bill, the one we supported in the Armed Services Committee, provided that the procedures and rules of evidence applicable in trials by general courts martial would apply in trials by military commissions, subject to such exceptions as the Secretary of Defense determines to be ''required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need.'' Establish a rule saying: Listen, we are going to use the procedures for courts martial except if the Secretary says there is some expedient circumstance. Because of hostilities, we have to make changes. This approach is consistent with Hamdan and the Supreme Court.

The bill before us reverses the presumption. Instead of starting with the rules applicable in trials by courts martial as the governing provision, and then establishing exceptions, the Secretary of Defense is required to make trials by commission consistent with those rules only when he considers it is practical. The exception has swallowed up the rule.

As one observer has pointed out, this provision is now so vaguely worded that it could even be read to authorize the administration to abandon the presumption of innocence in trials by military commissions, with the claim that military expedience requires a determination that the individual is guilty, and then he or she may prove their innocence. That, I think, is a significant retreat from the standards we established.

There is another major issue here that is so important, and it is often confused; and that is with respect to Common Article 3. In Hamdan, the Supreme Court held that Common Article 3 applies to all members of al-Qaida, terrorists, anyone who comes into our control, not only in the areas of fair trials, but also in the areas of treatment.

But I want to clarify this because this is often, I think, distorted and perhaps deliberately so. Many opponents of this legislation have stated that ''terrorists should not be given the same rights as our military personnel.'' What they are, I think, imprecisely but deliberately, perhaps, suggesting is that we are attempting to treat these individual terrorists as prisoners of war. And that is not the case. There are four Geneva Conventions. The first two protect sick and injured soldiers. The fourth protects civilians in areas of hostilities.

The third convention—not the third Common Article—the third Geneva Convention deals with prisoners of war, our soldiers who fall into the hands of hostile forces. These provisions are very clear about how POWs must be treated. You only have to give your name, rank, and serial number. That is it. Beyond that, there is no question. You cannot have any mental or physical coercion. ''[P]risoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.''

That is the way soldiers should be treated—all of our soldiers. But the Supreme Court never said that is the way we have to treat these terrorists. What they said is Common Article 3, which is in every Convention. It establishes a general baseline of the treatment of individuals. POWs are treated at a much higher status because of their uniformed participation in armed conflict, because of their discipline, because of the fact that we expect them to follow rules, too. But people who fall into our hands who are enemy combatants do not deserve that treatment. They are not going to get it here. But they have to be afforded Common Article 3 protection. It has been described as ''a convention within a convention.''

Common Article 3 of the Geneva Conventions mandates that all persons taking no active part in hostilities, including those who have laid down their arms or been incapacitated by capture or injury, are to be treated humanely and protected from ''violence to life and person,'' and any ''outrages upon personal dignity, in particular, humiliating and degrading treatment.'' Anyone in our custody has to be afforded the protections of Common Article 3.

The PRESIDING OFFICER. The Senator has used 12 minutes.

Mr. REED. Mr. President, I know there are others who wish to speak. I ask unanimous consent for 2 additional minutes to simply summarize.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REED. We have to follow Common Article 3. However, the bill we are

considering today authorizes the President to interpret the Geneva Conventions and provides that such interpretations ''shall be authoritative . . . as a matter of U.S. law, in the same manner as other administrative regulations.'' I think we are verging on a situation where the President, by definition, by clarification, and by regulation, could eviscerate these Common Article 3 protections.

As I mentioned before, Secretary Powell and others have stated this is the core ideal, principle, we have to use in dealing with all of these individuals.

Let me simply conclude, there is, I think, the presumption here that if we do not establish procedures that basically make it a slam dunk case, that we somehow are going to see these terrorists walk away, snub their noses at us, and start actively conspiring against us again.

They will never see the light of day. No President will release these individuals. And no President will be forced under any international law to do so. But we will be judged whether, when we impose punishment—not detention, punishment—on these individuals, we have done it according to our principles that we can argue before the world and the American people represent our values; and we can insist that other nations that may hold our forces or civilians abide by the same principles. That is the issue here today. That is why I support Senator LEVIN's substitute amendment.

I yield the floor.

The PRESIDING OFFICER (Mr. COBURN). Who yields time?

Mr. LEVIN. Mr. President, how much time do I have?

The PRESIDING OFFICER. Ten minutes 16 seconds.

Mr. LEVIN. Mr. President, I yield 9 minutes to the Senator from New Mexico.

The PRESIDING OFFICER. The Senator from New Mexico is recognized for 9 minutes.

Mr. BINGAMAN. Mr. President, I thank my colleague from Michigan for yielding me time and I also thank him for bringing forth this amendment.

I strongly support his proposal, essentially, to take the legislation, the agreement that was worked out in the Armed Services Committee by our colleagues, and to substitute that for what is now before us.

This overall military commissions bill has three general areas of focus: first, the rules pertaining to the interrogation of prisoners; second, the procedures we should have in place for the trial of individuals who are brought before military commissions; and, third, the rights of those prisoners who under this bill will continue to be held without being charged at Guantanamo or elsewhere in the world, or even in this country.

Let me take a moment to briefly comment on these first two issues before I discuss the third issue, which I believe has not received the attention that it deserves.

With regard to interrogation techniques, I have been deeply troubled by the administration's insistence on weakening the prohibition on the use of torture and cruel and inhumane treatment. I strongly believe that we can give our military and intelligence officers the tools they need to protect the American public without abandoning our basic decency. The use of torture and other abusive techniques are not only morally repugnant, but they are ineffective and do great damage to our Nation's credibility with respect to our commitment to human rights. They also put our soldiers at risk of being subjected to similar treatment.

Rather than redefining the Geneva Conventions to permit harsh interrogation techniques by the CIA, as the administration had proposed, the Republican compromise legislation retroactively revises the War Crimes Act so that criminal liability does not result from techniques that the United States may have employed, such as simulated drowning, exposure to hypothermia, and prolonged sleep deprivation.

Under the Detainee Treatment Act, which we passed last year to reaffirm the prohibition on torture, the military is clearly prohibited from engaging in torture or cruel, degrading or inhumane treatment, as specified in the recently issued Army Field Manual. However, under the bill we are debating today, the CIA would be allowed to continue to subject detainees to harsh interrogation techniques without fear of criminal liability. As the President has stated, the ''program'' can continue.

In essence, the legislation defines prisoner abuse and criminal liability in such a way that the administration is able to argue that it is complying with international and domestic legal restraints while at the same time continue to use techniques that amount to abuse under international treaty obligations.

There is also a fundamental lack of clarity with respect to what conduct this legislation forbids. For example, when asked if water-boarding is permitted under this bill, Senator MCCAIN has said that it would not be allowed. But if one asks the administration, it will only say CIA interrogation techniques are classified and that the bill allows the CIA to continue to use so-called alternative interrogation techniques—techniques which our military is prohibited from employing.

I think there is little doubt that these disturbing practices continue. This type of legal ambiguity has not served us well with respect to the treatment of detainees, and we should be taking this opportunity to provide greater legal clarity, not further muddying the water.

I am also concerned about the rules and procedures of the newly constituted military commissions. The bill permits statements allegedly derived through coercive means to be used if the statements are probative and were obtained prior to December 2005, which coincides with the enactment of the Detainee Treatment Act. Statements obtained after the enactment of the Detainee Treatment Act cannot be admitted as evidence if they have been derived through interrogation techniques that amount to cruel, unusual, or inhumane treatment as prohibited by the fifth, eighth, and fourteenth amendments to the U.S. Constitution. Essentially we are saying that you can't admit statements derived from coercive methods except for those statements derived when we were using coercive methods. Having these two different standards may be beneficial from the prosecution's perspective in terms of increasing the likelihood that statements will be found admissible, but it is not exactly the clarity we should have with regard to standards of justice.

There are also a variety of problems regarding the rules on hearsay, the appeals process, the definition and retroactive application of crimes, and the admission of secret evidence, among others. Overall, the rules and procedures contained in the proposed legislation fall short of the basic fairness required in any criminal trial.

I wish to talk about the provisions that relate to habeas corpus. One of the most disturbing provisions in the underlying legislation pertains to the disposition of those prisoners who will never be charged before a military commission or any court but who, instead, will be held indefinitely—or at least that option exists for our executive and our military to hold those individuals indefinitely in confinement.

The current bill endorses the administration's practice of designating people, including U.S. citizens, I would point out, as ''enemy combatants.'' It eliminates the ability of aliens—non-U.S. citizens—to bring habeas claims or other claims related to their detention or their treatment or their conditions of confinement.

Whereas the previous attempt to strip the Federal courts of jurisdiction over these individuals under the Detainee Treatment Act applied only to individuals held by the Department of Defense at Guantanamo, this current legislation applies to any alien who is detained by the United States anywhere in the world, including those who are held within the United States. The current language also makes it clear that the elimination of judicial review is retroactive. It applies to all cases involving the detention of individuals since September 11, 2001.

Various of my colleagues have already talked about the right of habeas corpus and its importance in our system of justice. Simply stated, the ability to file a writ of habeas corpus is the right of a person to challenge the legal basis for their detention.

Habeas, which is also known as the Great Writ, is one of the most fundamental protections against arbitrary

governmental power. This right dates back to the Magna Carta of 1215, and is enshrined in Article I, section 9, clause 2 of the U.S. Constitution. Filing a habeas petition doesn't entitle a person to a full-blown trial, but it does provide a means to ask whether the person's confinement is in compliance with the law. It doesn't confer any additional constitutional rights; it simply allows a person to ask whether their depravition of liberty is consistent with the Constitution.

One of the principal arguments proponents for removing this protection have put forward in the past was that maintaining habeas rights leads to unnecessary and frivolous litigation. The fact is that these arguments misconstrue the nature of habeas petitions. The reality is, in my view, that court-stripping provisions will not, in fact, lead to less litigation. For example, if this measure is passed, the courts will be forced to consider whether this provision amounts to a suspension of the writ of habeas corpus. If it is determined that it does suspend the writ of habeas corpus, the courts will determine whether the suspension clause of the Constitution has been satisfied. Our Constitution is very clear. It says Congress is afforded the authority to suspend habeas in cases of rebellion and invasion. At a time when our courts are open and functioning, I think a person would be hard-pressed to argue that public safety requires removing judicial review. One would be hard-pressed to argue that we are in a period of rebellion, or that we have suffered an invasion, as that phrase was intended by our Founding Fathers.

The one other issue, of course, that I think is important is that the Constitution gives Congress the power to suspend the writ. Here we are not just suspending the writ; this proposal is to abolish the writ, to permanently eliminate this right, this protection for this group of individuals. In my view, it makes more sense to simply allow the courts to hear the cases that are pending in the courts and determine the legality of the detention that is occurring. It makes more sense to do that than it does to litigate over whether those individuals who are incarcerated, in fact, have a right to have their cases heard.

If what the administration says is true and the indefinite imprisonment of individuals at Guantanamo or elsewhere is legal, then why does the administration continue to fight so hard to eliminate the ability of the courts to hear those cases? If these individuals are in fact ''the worst of the worst,'' which we have been assured, then why is it so difficult to provide some factual basis for continuing to detain them?

The likelihood is that some, and maybe many, of these prisoners have very little to do with terrorism. According to a 2002 CIA report, most of the Guantanamo prisoners ''did not belong there.'' According to a Wall Street Journal article earlier this year, an estimated 70 percent of the individuals held at Guantanamo were wrongfully imprisoned. BG Jay Hood, the former commander at Guantanamo, was quoted as saying, ''Sometimes, we just didn't get the right folks.''

I don't believe that all of those being held at Guantanamo are innocent. Clearly, they are not. Those who are a threat need to be held accountable for their actions, need to be tried before properly constituted military commissions or criminal courts. Those who are not a threat need to be released and returned to their country of origin. The point is that judicial review allows us to sort the good from the bad and focus our efforts on those who in fact do pose a threat to our country.

It is during times like these that our Founding Fathers envisioned habeas corpus rights needed to be preserved. If judicial review is not required as a matter of law, it makes sense from a policy standpoint to preserve these essential rights in the law. Having a court determine whether a person's detention by the executive branch is consistent with our Constitution and laws does not inhibit this Nation's ability to fight terrorism. To the contrary, ensuring that we are holding the right people not only allows us to focus on those who truly pose a threat, it also will help to reduce criticism in the world community that the United States is not complying with its own laws and Constitution.

In a letter I received from over 30 former diplomats, they stated:

> To proclaim democratic government to the rest of the world as the supreme form of government at the very time that we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interest in the larger world.

I agree with that statement.

It is also important to note that should the current habeas language be removed from the bill, Guantanamo prisoners would still be prohibited from bringing habeas claims in the future under current law. In the Rasul decision, the Supreme Court held that U.S. courts have jurisdiction to hear habeas claims of Guantanamo prisoners. Congress subsequently passed the Detainee Treatment Act, which contained the Graham-Levin compromise language regarding the elimination of habeas. Graham argued that the language was retroactive and barred all pending cases, and Levin argued that the language only eliminated cases initiated after the enactment of the act.

In assessing whether the Supreme Court had jurisdiction to hear the Hamdan case, the Court found that because congressional intent was unclear it would be inappropriate to view the statute as retroactive. As such, if the status quo is maintained, we would still have language on the books that prohibits any future habeas claims from being filed on behalf of Guantanamo prisoners. Although I disagree with the law as it currently stands, Senators should know that if the language in the existing bill is removed, this Congress has already drastically limited judicial review.

It is important to look at the big picture. As general matter, this bill puts in place procedures to try suspected terrorist by military commissions whereby the only ones who will have an opportunity to prove their innocence will be the high-level prisoners. The suspected low-level prisoners will continue to linger in indefinite imprisonment without charges. Before the previous military commissions were found unconstitutional, the administration charged approximately 10 detainees with crimes. None were ever tried. The President has indicated that he now intends to charge the 14 CIA prisoners, or at least some of them, under the newly constituted military commissions.

Therefore, the reality is that of the approximately 450 prisoners now at Guantanamo only about 25 will likely receive trials. Under the compromise legislation, the remaining prisoners, many of whom have been imprisoned for more than 4 years, will not be held accountable nor will they be able to prove their innocence—instead, they will be denied the right to challenge the legality of their continued confinement.

As Rear Admiral John Hutson, Rear Admiral Guter, and Brigadier General Brahms, pointed out in a letter to the Senate Armed Services Committee, the effect of this legislation would be to give greater protections to the likes of Khalid Sheikh Mohammed than to the vast majority of the Guantanamo detainees, who claim that they have nothing to do with al-Qaida or the Taliban.

Mr. President I ask unanimous consent that this letter be printed in the RECORD following my remarks.

The PRESIDING OFFICER. Without objection, it is so ordered. (See exhibit 1.)

Mr. BINGAMAN. Most troubling of all, with this legislation Congress is giving its consent to the executive branch to continue to unilaterally designate individuals as enemy combatants and imprison them indefinitely. We are saying that the President can pick up whoever he wants, designate them an enemy combatant and hold them without substantive judicial review.

I know that many of my colleagues have worked to ensure that the military commission procedures comply with our international legal obligations under the Geneva Conventions and that our Nation's soldiers are not put at risk by diminished standards. I support these efforts, and believe that the trial of these suspected terrorists is long overdue. However, passing this flawed bill is not the solution.

Mr. President, this debate is about who we are as a people and whether we are going to continue to adhere to the rule of law and basic human rights. It

is about our fundamental values as a people. The U.S. Constitution was crafted by men who were keenly aware of the potential abuse that could result from providing the executive branch with unrestrained powers with respect to individuals' liberties. The Constitution was crafted to be relevant in the good times, as well as in the times when our Nation faces domestic or foreign threats.

It deeply concerns me that with this bill we are sanctioning the indefinite imprisonment of people without charges. This is wrong. Should this legislation pass as currently drafted, history will not look kindly on this mistaken endeavor.

Frankly, the notion that Congress is willing to provide the President with the authority to indefinitely imprison people without ever having to charge them is quite astonishing. What is more amazing is that the Senate appears prepared to do so after one brief hearing in the Senate Judiciary Committee on the issue and with little substantive debate on the Senate floor.

We must also remember that in establishing these military commissions we are not solving the Guantanamo problem. This legislation will result in a flurry of legal challenges. The administration's handling of detainee issues has brought us Guantanamo, Abu Griab, and a series of Supreme Court decisions rejecting the administration's legal positions. Let us not complicate the problem by enacting the provisions.

Mr. President, I yield the floor.

EXHIBIT 1

SEPTEMBER 12, 2006.

Senator JOHN WARNER,
Chairman, U.S. Senate Committee on Armed Services, U.S. Senate, Washington, DC.
Senator CARL LEVIN,
Ranking Member, U.S. Senate Committee on Armed Services, U.S. Senate, Washington, DC.

We find it necessary yet again to communicate with you about issues arising out of our policies concerning detainees held at Guantanamo Bay. It would appear that each time the U.S. Supreme Court speaks, efforts are taken to reverse by legislation the decision of the Court. We refer, of course, to the Supreme Court's *Rasul* and *Hamdan* decisions and to the provision in the Administration's proposed Military Commissions Act of 2006 that would strip the federal courts of jurisdiction over even the pending habeas cases that have been brought by the detainees at Guantanamo to challenge the basis for their detention. We urge you to reject any such habeas-stripping provision.

As we have argued and agreed since 9/11, it is necessary for Congress to enact legislation to create military commissions that recognize both the basic notions of due process and the need for specialized rules and procedures to deal with the new paradigm we call the war on terror. This effort must cover those already charged with violating the laws of war and those newly transferred to Guantanamo Bay.

But the military commissions we are now fashioning will have no application to the vast majority of the detainees who have never been charged, and most likely never will be charged. These detainees will not go before any commissions, but 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 pending habeas cases. The habeas cases are the only avenue open for them to challenge the bases for their detention—potentially life imprisonment—as ''enemy combatants.''

We strongly agree with those who have argued that we must arrive at a position worthy of American values, i.e., that we will not allow military commissions to rely on secret evidence, hearsay, and evidence obtained by torture. But it would be utterly inconsistent, and unworthy of American values, to include language in the draft bill that would, at the same time, strip the courts of habeas jurisdiction and allow detainees to be held, potentially for life, based on CSRT determinations that relied on just such evidence. The effect would be to give greater protections to the likes of Khalid Sheikh Mohammed than to the vast majority of the Guantanamo detainees, who claim that they had nothing to do with al Qaeda or the Taliban.

We are on a course that should have been plotted and navigated years ago, and we might be close to consensus. We ask that, in the closing moments of your consideration of this vital bill, you restore the faith of those who long have been a voice for simple commitment to our longstanding basic principles, to our integrity as a nation, and to the rule of law. We urge you to oppose any further erosion of the proper authority of our courts and to reject any provision that would strip the courts of habeas jurisdiction.

As Alexander Hamilton and James Madison emphasized in the Federalist Papers, the writ of habeas corpus embodies principles fundamental to our nation. It is the essence of the rule of law, ensuring that neither king nor executive may deprive a person of liberty without some independent review to ensure that the detention has a reasonable basis in law and fact. That right must be preserved. Fair hearings do not jeopardize our security. They are what our country stands for.

Sincerely,

JOHN D. HUTSON,
Rear Admiral, JAGC, USN (Ret.).
DONALD J. GUTER,
Rear Admiral, JAGC, USN (Ret.).
DAVID M. BRAHMS,
Brigadier General, USMC (Ret.).

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, we are prepared to yield back the time on this side. First, I simply say to my colleagues that this has been a good debate. But I assure colleagues that the bill now before them has been very carefully reviewed by the Department of Justice, and I have even reached out to scholars—lawyers who I know have a considerable depth of knowledge about international matters as well as our own fabric of law as it relates to criminal prosecution. I myself served as assistant U.S. attorney for close to 5 years.

We bring before this Chamber a work product which we believe is consistent with international as well as domestic law. It strikes a balance. We have no intention to try to accord aliens engaged as unlawful combatants with all the rights and privileges of American citizens, but we recognize that they are human beings, and this country has standards that respect life and human beings. But at the same time, we are engaged in a war on terror. Let there be no mistake about that.

One of the challenges in this war on terror is with these individuals who are willing to act as human bombs. It doesn't have a lot of precedent. We have been very careful to try to strike a balance between the standards and principles that guide this Nation, at the same time recognizing that we need the tools to fight this war on terror—fighting it in a way that not only enables our men and women in the Armed Forces in forward deployments to carry out their missions but to preserve and protect us here at home from tragic incidents like we experienced on 9/11.

As I have worked through each of these provisions and consulted with my colleagues, I always bring up the images of 9/11. I think our President has done his best to try to prepare this Nation, in many ways, to protect ourselves from the repetition of that or any incident like it—a lesser incident or a greater incident. It is a constant challenge.

But the bill before this body represents our best product that we could achieve, working together and in consultation with a wide range of individuals who have an expertise in these complicated legal matters and can provide to us their own corroboration of our judgments as to how best to structure this legal document and strike the balance that we must between our standards of law and our recognition of international law. I think that is the hallmark of what Senators MCCAIN, GRAHAM, and myself set out to do—to make sure this Nation cannot be perceived as trying to rewrite in any way Common Article 3, which is the law of our land, I remind citizens who are following this debate. It is the international treaties to which we, with the advice and consent of the Senate and that of the President, acceded and signed, and it has become part of the law of the land. I am proud of the work we have done, certainly, in that complicated area, as well as others.

Mr. President, at this time, I am prepared to yield back all the time on this side and ask for the yeas and nays.

The PRESIDING OFFICER. Is there a sufficient second? There is a sufficient second.

The yeas and nays were ordered.

Mr. LEVIN. Mr. President, there is no question that we have to fight the war on terrorism, and we can win that war, but we can do so without compromising the very principles that govern this Nation and have given us strength and attract us to so many other nations. Those principles are compromised in the bill before us. They were not compromised in the committee bill that passed on a bipartisan vote.

Here are two quick examples of how our basic principles are compromised

in this bill: Evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant. In other words, in the United States of America, evidence can be seized from an American citizen, not an enemy combatant—it can be seized from any one of us without a search warrant and used in one of these trials. This language in the bill which is before us would authorize the use of that evidence so seized. That is a fundamental compromise with the principles that have governed this Nation. We have never allowed testimony and statements that have been obtained through cruel and inhuman treatment to be introduced into evidence. Yet that is the way the bill is written.

The PRESIDING OFFICER. The Senator's time has expired.

Mr. LEVIN. Mr. President, I ask unanimous consent for 30 additional seconds to finish that statement.

Mr. WARNER. I have no objection.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEVIN. I thank the Chair.

A second example of how a fundamental principle is compromised in the bill before us is, if a statement is obtained through cruel and inhuman treatment of somebody, for the first time in American jurisprudence, this bill would apparently say that statement is allowable in evidence if it was acquired before December 30, 2005. That is unlike statements that are acquired after December 30, 2005, where there are no ifs, ands, or buts, there are no other tests that need to be applied—if it was obtained through cruel and inhuman treatment, it is not admissible into evidence. That is a fundamental principle which is not followed for statements obtained before December 30, 2005, in the bill before us. That is another example of why the substitute, I hope, will be adopted, which is the committee bill—a bipartisan bill—that is now before us.

Mr. WARNER. Mr. President, I ask to reclaim about 6 minutes of my time so that I can engage my colleague in a colloquy.

The PRESIDING OFFICER. The Senator has that right and may reclaim his time.

Mr. WARNER. Mr. President, I wish to make clear that category of evidence cannot reach those established standards of torture. No evidence that was gained by means that are tantamount to the torture can be admitted.

Mr. President, I ask my colleague, am I not correct in that statement?

Mr. LEVIN. That is correct. That is not in dispute.

Mr. WARNER. Does the Senator concur in that statement?

Mr. LEVIN. I surely do. We are talking here about cruel and inhuman treatment.

Mr. WARNER. Correct, but the judge of the court is going to look at that evidence. We have set forth certain standards that have to be met, but one standard that judge cannot violate is the standard of torture. If that case can be made, then that judge has no ability to admit any evidence which is tantamount to torture. I ask my colleague, is that not correct?

Mr. LEVIN. The statement is correct. The issue, of course, which we are debating is why, relative to statements obtained prior to December 30, 2005, is another test omitted, which is present for statements obtained after December 30, 2005, which are statements that are obtained through cruel and inhuman treatment. That is the issue which I raised.

Mr. WARNER. Lastly, Mr. President, I ask my colleague, he makes reference to the illegal searches and seizures, which is the fourth amendment to the U.S. Constitution. That Constitution does not give protection to aliens who are the subject of these trials; am I not correct in that?

Mr. LEVIN. I think that is true. It may or may not protect aliens, but it does protect American citizens. And the language on page 21 does not protect American citizens from seizures that are illegal. It says:

> Anything which is seized without a search warrant is allowable into these trials.

It is not limited to material that is seized from aliens or material which is seized from enemy combatants. It says illegally obtained material can be admitted into this trial, period.

We had such a restriction in the bill which came out of committee so that it was limited to evidence which was seized abroad, for instance. That would be fine because they may not have the fourth amendment that we do. But in the bill which is now before us, there is no such limitation.

I will read the one sentence:

> Evidence shall not be excluded—

> Shall not be excluded—

from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.

In the substitute bill, that allowance of illegally seized evidence is limited to evidence which is not seized from American citizens here. So that distinction has been obliterated in the bill which is before us.

Mr. WARNER. Mr. President, we have clearly debated it, but I want to make, in conclusion, the observation that no evidence which is the consequence of torture can be admitted. The aliens are not entitled to the constitutional provisions of the fourth amendment and, therefore, I urge our colleagues to think carefully through those arguments which we believe we have fully answered and carefully written this bill to be in conformity with our Constitution.

Mr. President, I yield back the remainder of my time.

The PRESIDING OFFICER. The question is on agreeing to amendment No. 5086. The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. The following Senators were necessarily absent: the Senator from Arizona (Mr. MCCAIN) and the Senator from Maine (Ms. SNOWE).

Mr. DURBIN. I announce that the Senator from Hawaii (Mr. INOUYE) is necessarily absent.

The PRESIDING OFFICER. Are there any other Senators in the Chamber desiring to vote?

The result was announced—yeas 43, nays 54, as follows:

[Rollcall Vote No. 254 Leg.]

YEAS—43

Akaka	Durbin	Mikulski
Baucus	Feingold	Murray
Bayh	Feinstein	Nelson (FL)
Biden	Harkin	Obama
Bingaman	Jeffords	Pryor
Boxer	Johnson	Reed
Byrd	Kennedy	Reid
Cantwell	Kerry	Rockefeller
Carper	Kohl	Salazar
Chafee	Lautenberg	Sarbanes
Clinton	Leahy	Schumer
Conrad	Levin	Stabenow
Dayton	Lieberman	Wyden
Dodd	Lincoln	
Dorgan	Menendez	

NAYS—54

Alexander	DeWine	Martinez
Allard	Dole	McConnell
Allen	Domenici	Murkowski
Bennett	Ensign	Nelson (NE)
Bond	Enzi	Roberts
Brownback	Frist	Santorum
Bunning	Graham	Sessions
Burns	Grassley	Shelby
Burr	Gregg	Smith
Chambliss	Hagel	Specter
Coburn	Hatch	Stevens
Cochran	Hutchison	Sununu
Coleman	Inhofe	Talent
Collins	Isakson	Thomas
Cornyn	Kyl	Thune
Craig	Landrieu	Vitter
Crapo	Lott	Voinovich
DeMint	Lugar	Warner

NOT VOTING—3

Inouye	McCain	Snowe

The amendment (No. 5086) was rejected.

Mr. WARNER. Mr. President, I move to reconsider the vote, and I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WARNER. Mr. President, the managers, working with our leadership, of course, have a designated number of amendments. My understanding at this time is that the Senator from Pennsylvania will be recognized for the purpose of proposing an amendment.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

AMENDMENT NO. 5087

(Purpose: To strike the provision regarding habeas review)

Mr. SPECTER. Mr. President, I call up amendment No. 5064.

The PRESIDING OFFICER. The Senator is advised we have No. 5087 at the desk?

Mr. SPECTER. The amendment which I seek to call up, Mr. President, is one which proposes to strike section 7 of the Military Commission Act entirely.

Mr. WARNER. Mr. President, if the Senator will yield for a moment, I ask

the Chair to recite the unanimous consent agreement with regard to the amendment of Senator SPECTER, the time limitation being?

The PRESIDING OFFICER. The amendment has 2 hours equally divided on it.

The clerk will report.

The assistant legislative clerk read as follows:

The Senator from Pennsylvania [Mr. SPECTER], for himself and Mr. LEAHY, Mr. DODD, and Mr. FEINGOLD, proposes an amendment numbered 5087:

On page 93 strike line 9 and all that follows through page 94, line 13.

Mr. LEAHY. Mr. President, will the Senator yield for a couple of clarifications?

Mr. SPECTER. I do yield.

Mr. LEAHY. Mr. President, in stating the time, isn't there also the remainder of the time? I did not use my full 45 minutes this afternoon. Doesn't the Senator from Vermont have some remaining time on this amendment?

The PRESIDING OFFICER. The Senator from Vermont has remaining time on the bill.

Mr. LEAHY. How much time is that?

The PRESIDING OFFICER. The Senator from Vermont has 23 minutes on the bill.

Mr. LEAHY. Mr. President, am I correct that the amendment is offered on behalf of the distinguished senior Senator from Pennsylvania and myself, the distinguished senior Senator from Connecticut, and the distinguished Senator from Wisconsin, Mr. FEINGOLD?

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. LEAHY. I ask and also the distinguished Senator from North Dakota, Mr. DORGAN.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. REID. If the Senator from Pennsylvania will yield just for a question?

Mr. SPECTER. I do.

Mr. REID. I have had conversations—I have not spoken with the Senator from Pennsylvania, but I have spoken with his staff on a number of occasions. I had the understanding that the Senator would be able to give Senator LEAHY a few minutes off of his time to speak on this amendment?

Mr. SPECTER. I will consider that, depending on how the argument goes. I appreciate very much the contribution of the distinguished ranking member. I do not know how many people on this side are going to seek time, but I do believe we can accommodate the request of Senator LEAHY. But I want to see how the argument goes before making a commitment.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Mr. President, substantively, my amendment would retain the constitutional right of habeas corpus for people detained at Guantanamo. The bill before the Senate strips the Federal district court of jurisdiction to hear these cases. The right of habeas corpus was established in the Magna Carta in 1215 when, in England, there was action taken against King John to establish a procedure to prevent illegal detention.

What the bill seeks to do is to set back basic rights by some 900 years. This amendment would strike that provision and make certain that the constitutional right and the statutory right—but fundamentally the constitutional right of habeas corpus—is maintained. The core provision is contained in article I, section 9, clause 2 of the U.S. Constitution, which states:

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.

We do not have either rebellion or invasion, so it is a little hard for me to see, as a basic principle of constitutional law, how the Congress can suspend the writ of habeas corpus in the face of that flat language. When you have an issue of constitutionality, how can constitutionality be determined and interpreted except in the Court?

We had a very extended discussion of this in the confirmation of Chief Justice Rehnquist, and the Chief Justice said that the Congress of the United States lacked the authority to remove the jurisdiction of the Federal courts on issues involving the first amendment.

The same thing would apply generally. It is a constitutional question. But here you have it buttressed in addition by an express provision by the Framers, focusing on the writ of habeas corpus in and of itself, and saying you can't suspend it, so that anyone who can make an argument about stripping jurisdiction—I don't think it lies on a constitutional issue generally because if it does, who is going to interpret the Constitution if the Court does not have jurisdiction? But the writ of habeas corpus is so important and so fundamental and so deeply ingrained in our tradition, going back to 1215 against King John, that the Framers made it expressed and explicit.

It appears to me that this is really dispositive and you don't really need several hours to develop it. But I shall proceed on the matter as to how we got where we are and what the Supreme Court has had to say in four major cases in the course of the last 18 months.

The Congress of the United States has the express responsibility under article I, section 8 of the U.S. Constitution to establish rules governing people captured on land and sea. But the Congress of the United States did not act after 9/11, and we had people detained at Guantanamo. Legislation was introduced by many Senators. Senator DURBIN and I introduced a bill. Senator LEAHY introduced a bill. Many Senators introduced legislation, but the Congress did not act on it. Congress did not act on it because it was too hot to handle. What resulted is what results many times—Congress punted. It didn't act, left it to the Supreme Court of the United States. That took a long time, to have these cases come through the judicial process.

Finally, in June of 2005 the Supreme Court ruled in three major cases: Hamdi v. Rumsfeld, Rasul v. Bush, and Rumsfeld v. Padilla. The Supreme Court of the United States rejected the argument of the Government that the President had inherent power under article 2 and could act on that constitutional authority, and the Supreme Court said that habeas corpus was effective.

In Rasul v. Bush, the Supreme Court said that it applied even to aliens. It didn't have to be a citizen; that the Constitution draws no distinction between Americans and aliens held in custody and said the writ of habeas corpus applied.

In the case of Hamdi v. Rumsfeld, Justice O'Connor had this to say: All agree that absent suspension, the writ of habeas corpus remains available to every individual detained within the United States.

That was held to apply to Guantanamo, since the United States controlled Guantanamo.

Justice O'Connor went on to say that under the U.S. Constitution, article I, section 9, clause 2:

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.

Justice O'Connor then goes on to delineate statute 2241, which sets the outline of the procedures, and then says habeas petitioners would have the same opportunity to present and rebut facts that court cases like this retain some ability to vary the ways in which they do so as mandated by due process.

What has happened in Guantanamo with respect to the proceedings under the Combat Status Review Tribunal, referred to as CSRT, demonstrates the importance of having some impartial judicial review to find what, in fact, has happened. These tribunals operate with very little information. Somebody is picked up on the battlefield. There is no record preserved as to what that individual did. If there was a weapon involved, it has been placed with many other weapons, and it can't be identified. The proceedings simply do not comport with basic fairness because the individuals do not have the right to know what evidence there is against them.

Repeatedly, the Combat Status Review Tribunal said the information is classified and the individual can't have it.

There was specific reference to the proceedings in the CSRT in the case action en re: Guantanamo Detainee Cases, 355 Fed. Sup. Section 443, 2005. The U.S. District Court for the District of Columbia criticized the way CSRTs required detainees to answer allegations based on information that cannot be disclosed to the detainees. The Court described what might be referred

to as a comical scene, where the detainee said he couldn't answer the allegations whether the detainee associated with a known al-Qaida operative because the tribunal could not provide the alleged operative's name.

The detainee said: Give me his name.

The tribunal said: I do not know.

The detainee said: How can I answer this?

The detainee's frustration reportedly led to laughter among all of the tribunal's participants. And the District Court then said:

> The laughter reflected in the transcript is understandable, and this exchange might have been humorous had the consequences of the detainee's enemy combatant status not been so terribly serious and had the detainee's criticism of the process not been so piercingly accurate.

How can you sanction that kind of a proceeding? If it is not a sham, it certainly is insufficient. As I reflect on it, it is more than insufficient. It is, in fact, a sham.

When it was apparent that both the committee bill and the administration's position was going to strike habeas corpus, the Judiciary Committee held on short notice a hearing on Monday. We had a distinguished array of witnesses appear. LCDR Charles Swift was present. The attorney who represented Hamdan before the Supreme Court gave very compelling evidence as to why habeas corpus was indispensable in order to have basic justice. Bruce Fein, ranking member of the Reagan administration in the Justice Department, was emphatic on his conclusion about the need to retain habeas corpus. The very distinguished retired U.S. Navy rear admiral, John Hutson, who is now the dean of the Franklin Pierce Law Center, testified about his experience and the importance of retaining habeas corpus. We called, as a matter of balance, other witnesses: David Rivkin and Bradford A. Berenson.

I commend to my colleagues the testimony of Thomas B. Sullivan, LCDR Charles D. Swift, Bruce Fein, David B. Rivkin, Jr., Bradford A. Berenson, and John D. Hutson.

Mr. President, the testimony that was given by Thomas B. Sullivan was especially poignant. Mr. Sullivan is a man in his late seventies. He was U.S. Attorney for 4 years in the late 1970s. He has a distinguished law practice with Jenner & Block. He has been to Guantanamo on many occasions and has represented many people who are detained in Guantanamo.

His testimony was, as I say, especially poignant when he said that long after all of those in the hearing room are dead, there would be an apology made if habeas corpus is denied, just as the apology was made after the detention of the Japanese in World War II being a denial of basic and fundamental fairness, where we in the United States pride ourselves on the rule of law.

He made reference to a number of individual cases where the proceedings before the Combat Status Review Tribunal were just totally insufficient, reflecting hearings where individuals were called in, they did not speak the language, they did not have an attorney, they did not have access to the information which was presented against them, and they were detained.

Mr. President, documentation presented to the committee speaks eloquently and emphatically about the procedures which lack the most fundamental of due process. These individuals did not know what their charges were; they were so vague and illusory, just like the detainee who was alleged to have an al-Qaida associate. They wouldn't even produce the man's name. How do you know what the charge is? Then they don't have attorneys. Then they don't know what the evidence is. It is classified, and they are not told what the evidence is.

This goes back, again, to Justice O'Connor's opinion where she says:

> Habeas petitioners would have some opportunity to present and rebut facts.

Well, how can you rebut facts when you do not know what the facts are? How can you rebut facts when the material is classified and you are not told what the alleged facts are? That is why it is so important that the courts be open.

I have had considerable experience with habeas corpus when I was a prosecuting attorney. When a habeas corpus petition is presented, it requires the government—the Commonwealth of Pennsylvania when I was DA—to take a close look at the case and to focus on it.

One of the matters that was inserted into the RECORD from Mr. Sullivan, after he filed the petition for a writ of habeas corpus and was proceeding to gather evidence to present it, he says:

> Several months ago without notice to me and without explanation, compensation, or apology, the United States Government returned Mr. Abdul-Hadi al Siba to Saudi Arabia.

So when the Government had to defend, apparently they found out what the case was about. When they had to find out what the case was about, they sent the detainee back to Saudi Arabia.

But here we have a very explicit statement by Justice O'Connor about the right to rebut the facts. It simply is not present in the proceedings which happened before the Combat Status Review Tribunal.

Kenneth Starr, formerly Solicitor General, formerly judge on the Court of Appeals for the District of Columbia, could not be present at our hearing on Monday but submitted this letter dated September 24. I will not read it in its entirety but only the first sentence where he says:

> I write to express my concerns about the limitation on writ of habeas corpus contained in the comprehensive military commissions bill.

Then, in the third paragraph, he cites article I, section 9, clause 2, which I have referred to, about the privilege being suspended only in the case of invasion or rebellion, and again notes the obvious—that we do not face either an invasion or rebellion.

Mr. President, how much time of my hour remains?

The PRESIDING OFFICER. The Senator has consumed 21 minutes.

Mr. SPECTER. Mr. President, that states the essence of the proposition.

I reserve the remainder of my time and yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, if I could just use such time as I want, I will not take much because I am anxious for my colleagues to address this issue.

The distinguished Senator from Pennsylvania made the statement that they have constitutional rights. I wish to respectfully sort of differ with the Senator. The Supreme Court, in the Rasul case, ruled that rights of aliens held at Guantanamo Bay, Cuba, 28 U.S.C, 2241—the Court did not reach the question of the constitutional right of habeas corpus that applies to a U.S. citizen; of course, they being aliens. In the Rasul case, the Court interpreted the habeas corpus statute, section 2241, to apply to an alien held at Guantanamo Bay. That holding is based in large part due to the unique long-term lease that the Court took judicial notice of and other evidence brought before the Court, the long-term lease tantamount to U.S. territory.

For more than 50 years, the Court held that aliens in military detention outside the United States had no right to petition the Federal courts for review of their military detention. So I question whether you can elevate that to a constitutional status.

Mr. SPECTER. If I may respond, Mr. President, I didn't cite Rasul v. Bush for a constitutional proposition. I cited Hamdi v. Rumsfeld, and I cited the opinion of Justice O'Connor. But let me repeat it because it is the core consideration. She said:

> All agree that absent suspicion the writ of habeas corpus remains available to every individual detained within the United States. Of course, that does include Guantanamo.

Then Justice O'Connor goes on to say:

> United States Constitution, article I, section 9, clause 2, privilege of writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety requires it.

Then she says that all agree that suspension of the writ has not occurred here. Then she deals with the statute, 2241, and makes the comment that it sets the procedures, but Justice O'Connor puts detention in the Hamdi case squarely on constitutional grounds.

Mr. WARNER. There are a variety of divided opinions on that point.

At this time, I will regain the floor and discuss this issue. I am anxious to hear from my two colleagues, one from South Carolina and one from Texas, who seek recognition.

Mr. SPECTER. If I might be recognized.

Mr. WARNER. I yield the floor on my time.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, what the distinguished chairman says is accurate about Rasul, but you have Hamdi, which puts it on constitutional grounds. It is that simple.

I yield the floor.

Mr. WARNER. I yield such time as the distinguished Senator from South Carolina desires.

Mr. GRAHAM. Mr. President, this debate is a strength, not a weakness, in our country.

In my opinion, the fundamental question for the Senate to answer when it comes to determining enemy combatant status is, Who should make that determination? Should that be a military decision or should it be a judicial decision?

I am firmly in the camp that when it comes to determining who an enemy of the United States is, one who has taken up arms and who presents a threat to our Nation, that is not something judges are trained to do, nor should they be doing. That is something our military should do.

For as long as I have been a military lawyer, Geneva Conventions article 4, where it talks about a competent tribunal to decide whether a person is a civilian—lawful, unlawful, combatant—that competent tribunal has been seen in terms of military people making those decisions.

I have a tremendous respect for our courts. We will follow whatever they tell Congress to do because we are a rule-of-law nation, but this Congress has a role to play.

Unlike my chairman, Senator SPECTER, I believe the question before the Congress is not whether an enemy combatant noncitizen alien has a constitutional right to habeas corpus because I don't believe that is what the court has said. The issue for the Congress is whether habeas corpus rights should be given to an enemy combatant noncitizen under section 2241 and whether the military should make the determination of who an enemy combatant is versus judiciary.

What happens now is that when someone is brought to Guantanamo Bay, very shortly after they arrive, the military will create a combat status review tribunal that is supposed to be compliant with article 4 of the Geneva Conventions, a competent tribunal.

When we look at the history of competent tribunals, normally they are one person. We will have three people. Of the three people will be a military intelligence officer—and it could be other officers within our military who have expertise in determining what the battlefield situation is and who is involved with the enemy forces and who is not. That tribunal has an evidentiary standard to meet. The tribunal must make a finding by a preponderance of the evidence that the person before them indeed fits within the definition ''enemy combatant.'' There is a rebuttal of presumption in favor of the Government's evidence.

Our Federal courts will have the opportunity shortly to determine whether the combat status review tribunal is constitutional due process. The reason I say that is because under the Detainee Treatment Act we passed last year, every detainee at Guantanamo Bay will have their day in Federal court.

After the military renders their decision that they are an enemy combatant, as a matter of right each person can go to the DC Circuit Court of Appeals, and the Federal DC Circuit Court of Appeals will look at that case with two issues before them: Does this CSRT process, the annual review board, does it constitutionally pass muster as being adequate due process not only under the Geneva Conventions but under our Constitution to the extent it applies? Second, was the decision rendered by that board finding the person enemy combatant by the preponderance of the evidence—the standards and procedures involved, do they pass muster? And in the individual case, did they get it right? That is the structure for them to decide the issue set up in a constitutionally sound manner.

The reason I oppose my chairman, for whom I have great respect, is because the habeas process is a doctrine that is normally associated with criminal law, and we are in a war. The Japanese and German prisoners we interred in World War II never had access to our Federal courts to bring lawsuits against the people who confined them—our own troops—for a reason: it was a right not given in international law to an enemy prisoner, and it was not a right we gave to any prisoner we have held in the history of our country consciously as Congress.

The problem in this case is the Government argued that Guantanamo Bay was outside the jurisdiction of the United States. Why is it important? It is clear that our habeas statutes do not apply overseas. The Government lost that argument. Chairman SPECTER is absolutely right. The court said that for legal purposes, Guantanamo Bay falls within the confines of the United States. Section 2241, the habeas statute, unless Congress says otherwise, will apply to this environment.

Now it is time for Congress to decide, in its wisdom, whether the Federal courts should be determining who an enemy combatant is through a habeas action. Do we want that to reside in the military, where it has been for our whole history, and allow Federal courts to review the military decision, not substitute their judgment for the military?

It is not about who loves America and who is un-American. Mr. Sullivan came to my office yesterday. He is a lawyer representing detainees at Guantanamo Bay. He is a great American. He gave me four or five stories about how his client appeared before the Combat Status Review Tribunal, and he had nothing but bad things to say about the way his client was treated and the procedures in place.

Once a week, I get a call from somebody from South Carolina who says their family member was screwed in court. And then what I try to do is to make sure we listen to them respectfully but understand that there are a lot of complaints about any system.

Mr. Sullivan's complaints got me thinking, and I think there is a way to provide some remedies that do not exist now without substituting judges for military officers when it comes to wartime decisions. I will privately talk to him about that.

I urge this Senate to think in broad terms. Do we really want to allow the Federal judiciary to have trials over every decision about who an enemy combatant is or is not, taking that away from the military? Do we really want the people who have been housed by our military to bring every known lawsuit to man against the people fighting the war and protecting us?

I compliment Senator SPECTER because in this new version they take the conditions of confinement lawsuits off the table. There are 400-something cases that have been filed arising from Guantanamo Bay detention. There is a $300 million lawsuit against Secretary Rumsfeld. There are allegations that people do not get enough exercise. It goes on and on and on. Never in the history of warfare has the host country allowed an enemy prisoner to bring a court case against those people who are fighting the enemy on behalf of the host country. That needs to stop.

I am urging this Senate to dismiss under 2241 the right of habeas actions by enemy prisoners so that judges will not take the role of the military. Adopt anew what we did last year, allowing the military to use a process that I believe is Geneva Conventions compliant, and then some, and have as a backstop judicial review, where the DC Circuit Court of Appeals can review the military's decision. That way, we will have due process unknown to any other war. That will keep the roles of the responsible parties intact. The role of the military in a time of war, I earnestly believe, is to control the battlefield and to designate who is in bounds and out of bounds when it comes to the battlefield. The role of the courts in a time of war is to pass muster and judgment over the processes we create—not substituting their judgment for the military but passing judgment over the infrastructure the military uses to make these decisions.

The problem with this war—there is no capital to conquer, no navy to sink, no army to defeat. The people we are fighting owe an allegiance to an idea, not to a piece of property. They have no home to defend. They have an idea they would like to sell, and they are

selling that idea, whether you want to buy it or not. They are selling it in a very brutal way. They are trying to get good and decent people accepting their view of the world because they are terrified of the way the enemy behaves. This is a war unlike other wars in this regard. People do not wear uniforms, but the ideas the terrorists represent are not unknown to mankind. Hitler wore a uniform. He had the same view of mankind as these people do: there are some people not worth living because they are different.

We have to adjust, but we do not need to change who we are. I am not asking this Senate to change who America is because we are fighting barbarians. Quite honestly, we will never win this war if we move in their direction. Our goal is to get the world to move in our direction by practicing what we preach.

I believe the way to balance the interests of our need to protect ourselves and to adhere to the rule of law is to apply the law of armed conflict, not criminal law.

The act of 9/11, in my opinion, was an act of war, not a crime. And the problem with this country is the people we are fighting were at war with us a long time before we knew we were at war with them. Now we are at war.

This administration, on occasion, in my opinion, has tried to cut the corners of the law of armed conflict. I embrace the law of conflict. I want to fully apply the actions of the United States. I embrace the Geneva Conventions. I want to apply it fully to the war we are fighting even though our enemy will not. But I am insistent, with my vote and with my time in this Senate, that we fight the war and not criminalize the war.

No enemy prisoner should have access to Federal courts—a noncitizen, enemy combatant terrorist—to bring a lawsuit against those fighting on our behalf. No judge should have the ability to make a decision that has been historically reserved to the military. That does not make us safer.

There is due process in place for the enemy combatants at Guantanamo Bay, Afghanistan, and Iraq that I believe is Geneva Conventions compliant. There is judicial review consistent with the military being the lead agency. I urge this Senate to adopt that and to reject this amendment.

I yield the floor.

Mr. SPECTER. Will the Senator from South Carolina respond to a question?

Mr. GRAHAM. I will try.

Mr. SPECTER. I direct an inquiry to my colleague from South Carolina. Would the Senator respond to the question?

Mr. GRAHAM. Yes. I will try my best.

Mr. SPECTER. I didn't want you to yield for a question because I didn't want to interrupt your presentation.

I begin by complimenting the Senator from South Carolina for his excellent work. He and Senator WARNER and Senator MCCAIN have done exemplary work in maintaining the Geneva Conventions and appropriate rules and to classify evidence.

When you talk about constitutional issues and you talk about section 2241, I agree with the Senator, but how do you deal with the flat terms of the Constitution, ''the privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion public safety may require it''? How do you deal with that if you do not have rebellion?

Mr. GRAHAM. Mr. Chairman, I guess one could make that argument. I have been assuming something from the beginning—that the Court's decision in Rasul and Hamdi is a statement by the Court that because Guantanamo Bay falls within the jurisdiction of the United States, it is section 2241 that we are dealing with. It is a statutory right of habeas that has been granted to enemy combatants. And if there is a constitutional right of habeas corpus given to enemy combatants, that is a totally different endeavor, and it would change in many ways what I have said.

I do not know what the Court will decide, but if the Court does say in the next round of legal appeals there is a constitutional right to habeas corpus by those detained at Guantanamo Bay, then the Senator is absolutely right. We would have to make a different legal determination. We would have to make a different legal analysis. And if the Court does that, I will sit down with the Senator and we will figure out how to work through that.

I am just being as honest with the Senator as I know how to be. I think this is a statutory problem, not a constitutional problem.

Mr. SPECTER. Well, Mr. President, the distinguished chairman of the Armed Services Committee says he does not want to come back and legislate again. If this bill is passed, we will be right back here at a later date.

When the Senator from South Carolina says it is not on constitutional grounds, the plain English of the decision says it is. But let me ask the Senator one further question; that is, you fought hard to have classified evidence available in the trials, albeit a war crimes trial. And you have Justice O'Connor saying they have to have the opportunity to rebut facts. When these proceedings are handled so much on classified information the detainees cannot see, would it not be consistent with your approach on classified information generally to at least have them know something about the charge so they can rebut the facts?

Mr. GRAHAM. If I may, I would invite the chairman—I cannot remember what paragraph the language is in, but Justice O'Connor gave some guidance to the military—I think it is Army Regulation 190-dash-something—that she indicated would be a proper mechanism or at least a guide of how to set up due process rights for this administrative determination. So after that decision, I know the military looked at the Army regulation that she cited and built the CSRT process off that concept. I am of the opinion that the Combat Status Review Tribunal does afford the rights Justice O'Connor indicated and is more than the Army regulation would allow that she cited, and it is fully compliant with article 5 of the Geneva Conventions—competent tribunal—but if you look in that decision, she mentions an Army regulation as a guide as to how to do this. I think the military, the Department of Defense, has gone beyond that.

Mr. SPECTER. Well, Mr. President, there is flexibility, I agree, but the determination as to whether that flexibility is adequate is up to the Court. That is what the Supreme Court has said.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. I thank the Chair.

I would say to my colleague, there is an interesting thing we best watch here as we are trying to determine the rights of these people because it seems to me if there is such a fundamental right of constitutionality attached to this thing, then someone might argue: Well, if it is actionable in Guantanamo—this lease thing is to me a fairly weak basis on which to do it—what about 18,000 in our custody in Iraq now? So we just better exercise a little caution as we begin to use that because if we begin to extend habeas corpus to 18,000 in Iraq, we have a problem.

Mr. President, I yield the floor.

Mr. SPECTER. Mr. President, I stipulate that Senator WARNER is right about Iraq on this point.

The PRESIDING OFFICER. The Senator from Arizona.

Mr. KYL. Mr. President, I have a longer presentation, but what I would like to do is respond specifically to the argument Senator SPECTER is now making, and then Senator CORNYN has longer remarks to make.

Let me begin by saying that I have the utmost respect for the chairman of the committee, my friend, the Senator from Pennsylvania. And he is entitled to be wrong once in a while. In this matter, he is wrong. It was testimony before the committee on Monday that verifies that this is not a constitutional issue with respect to aliens. It is only a constitutional issue with respect to citizens.

This legislation has nothing to do with citizens. The decision cited by the Senator from Pennsylvania is the Hamdi decision, which dealt with a U.S. citizen. And, of course, the writ of habeas corpus applies to U.S. citizens. Our legislation does not.

Here is what David Rivkin, a partner at Baker & Hostetler law firm, testified to on Monday. He said in this legislation:

> We are giving [alien enemy combatants] a lot more . . . than they are legally entitled to under either international [law] or the law in the U.S. constitution.

Now, let me just proceed from that. Our Supreme Court has held that U.S. constitutional protections do not apply to aliens held outside of our borders. The Johnson v. Eisentrager case, for example, rejected the view that the U.S. Constitution applies to enemy war prisoners held abroad, saying:

No 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.

In 1990, the Supreme Court reaffirmed this view in the Verdugo case, saying:

[W]e have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.

That case also makes it clear that constitutional protections do not extend to aliens detained in this country who have no substantial connection to this country. The Supreme Court there said that aliens ''receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.''

The Verdugo Court further clarified that ''lawful but involuntary'' presence in the United States ''is not of the sort to indicate any substantial connection with our country.''

Now, the Rasul case took great pains to emphasize that its extension of habeas to Guantanamo Bay was only statutory. Some Justices may have wanted to make Rasul a constitutional holding, but there was no majority for such a ruling.

So both Eisentrager and Verdugo are still the governing law in this area. These precedents hold that aliens who are either held abroad or held here but have no other substantial connection to this country are not entitled to invoke the U.S. Constitution.

As committee witness Brad Berenson noted at Monday's hearing:

[N]othing in the Constitution, including the Suspension Clause, confers rights of access to our courts for alien enemy combatants being held in the ordinary course of armed conflict.

He also refuted the argument that constitutional rights of habeas for enemy combatants is embedded in the Rasul decision. As he explained before, going through the logic of that opinion and its dependence on the 1973 Braden case, and I am quoting:

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.

He was trying to be clever there to point out the fact that never has the Court come close to holding that for alien enemy combatants there is a constitutional right of habeas. And no decision of the Supreme Court has ever grounded its decision on the Constitution—only the case with respect to U.S. citizens.

So I do not fear the Supreme Court overturning what we are trying to do here. One never knows what the Court might do. And Senator SPECTER certainly is correct that if it did, we would have to revisit this issue. I am totally confident, however, that this legislation would be upheld and certainly not be declared unconstitutional based upon a view that the habeas provisions apply to alien enemy combatants.

Mr. President, the Specter amendment strikes at the heart of the litigation reforms in this bill—it undercuts the entire bill. The amendment would undercut and override the carefully calibrated accountability and supervision mechanisms negotiated by the Armed Services committee. And it would give enemy soldiers challenging their detention unprecedented access to our courts. It should be strongly opposed.

Under the MCA, detainees already receive extremely generous process without habeas corpus lawsuits.

Every detainee held at Guantanamo currently receives a Combatant Status Review Tribunal (CSRT) review of his detention. The CSRT process is modeled on and closely tracks the Article 5 hearings conducted under the Geneva Conventions. In the 2004 Hamdi decision, the Supreme Court cited Article 5 hearings as an example of the type of hearing that would be adequate to justify detention of even an American citizen who has engaged in war against the United States. Moreover, under the Geneva Conventions, Article 5 hearings are given to detainees only when there is substantial doubt as to their status. In all American wars, only a small percentage of detainees have ever been given Article 5 hearings. Yet at Guantanamo, we have given a CSRT hearing to every detainee who has been brought there. And finally, it bears emphasis that the CSRT gives unlawful enemy combatants even more procedural protections than the Geneva Conventions' Article 5 hearing give to lawful enemy combatants. For example:

A CSRT provides a detainee with a personal representative to help him prepare his case. An Article 5 tribunal does not.

Under the CSRT procedure, the hearing officer is required to search government files for ''evidence to suggest that the detainee should not be designated as an enemy combatant.'' An Article 5 tribunal provides no such right.

CSRTs give the detainee a summary of the evidence supporting his detention in advance of the hearing. Article 5 tribunals do not.

CSRTs are subject to review by supervising authorities and may be remanded for further review. Article 5 provides no such rights.

Finally, after a CSRT is completed, the Detainee Treatment Act, DTA, and the Military Commissions Act, MCA, give an al-Qaida detainee the right to appeal the result to the DC Circuit. That circuit—staffed by some of the best judges in this country—is then authorized to make sure that all proper procedures were followed in the CSRT hearing, and to judge whether the CSRT process is consistent with the Constitution and with federal statutes—though no treaty lawsuits are authorized, pursuant to long-standing precedent.

Now I would grant, the DTA does not allow re-examination of the facts underlying a prisoner's detention, and it limits the review to the administrative record. I commented on these provisions more extensively in remarks submitted for the RECORD on December 21. But as committee witness Brad Berenson noted at Monday's Judiciary Committee hearing, quoting the Supreme Court's 2001 decision in St. Cyr, ''the traditional rule on habeas corpus review of non-criminal executive detentions was that 'the courts generally did not review the factual determinations made by the executive.''' And under the original common-law writ of habeas corpus, the facts in the custodian's return could not be contested. Thus, although the DTA does not allow sufficiency-of-the-evidence challenges, neither did the common law writ of habeas corpus—especially for noncriminal executive detentions. DTA review is limited—it has to be, or we would face the same litigation burdens as under the Rasul-inspired litigation. But common-law habeas itself is a limited remedy. Under the DTA, prisoners are not denied anything that they would have been entitled to under the original common-law writ of habeas corpus.

Moreover, the fact that we are letting detainees go to court to challenge their conviction is totally unprecedented. At a hearing held on Monday before the Judiciary Committee, one of the witnesses who opposes the MCA, Rear Admiral John Hutson, nevertheless conceded in his testimony that ''[i]n World War II, when thousands and thousands of German and Italian POWs were imprisoned in various camps throughout the United States . . . 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.''

Just to be clear: there were 425,000 enemy combatants held in the United States during World War II. Yet according to Senator SPECTER's own witness at his Judiciary Committee hearing, only one habeas petition challenging detention was filed—and that was filed by an American citizen. The MCA only applies to aliens—not American citizens, so even that case would not have been affected by this bill.

World War II did see several petitions challenging military trials, but the MCA and the DTA also allow judicial review of military commissions.

At Senator SPECTER's September 25, 2006, hearing on the MCA before the Judiciary Committee, committee witness Brad Berenson, a partner at the Sidley & Austin law firm, testified that ''[n]o nation on the face of the earth in any previous conflict has given people they

have captured anything like [the procedures provided by CSRTs and the DTA], and none does so today.'' Mr. Berenson reiterated: The MCA's procedures ''are in fact more generous than anything we or any other nation in the history of the world has previously afforded to our military adversaries.''

At the same hearing—Senator SPECTER's hearing on the MCA on Monday—we also heard from David Rivkin, a partner at the Baker & Hostetler law firm. This is what he had to say: ''[t]he level of due process that these detainees are getting [under CSRTs and the DTA] far exceeds the level of due process accorded to any combatants, captured combatants, lawful or unlawful, in any war in human history.'' Mr. Rivkin added: ''We are giving [alien enemy combatants] a lot more . . . than they are legally entitled to under either international [law] or the law in the U.S. Constitution.''

The Supreme Court has held that U.S. constitutional protections do not apply to aliens held outside of our borders. For example, in Johnson v. Eisentrager (1950), the Supreme Court rejected the view that the U.S. Constitution applies to enemy war prisoners held abroad, noting that ''[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.'' In 1990, the Supreme Court reaffirmed this view in the Verdugo case, holding that ''we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States.''

The Verdugo case also makes clear that constitutional protections do not extend to aliens detained in this country who have no substantial connection to this country. The Supreme Court noted that aliens ''receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.'' The Verdugo Court further clarified that ''lawful but involuntary'' presence in the United States ''is not of the sort to indicate any substantial connection with our country.'' That is *United States* v. *Verdugo-Urquidez*, 494 U.S. 259 (1990).

Rasul v. Bush took great pains to emphasize that its extension of habeas to Guantanamo Bay was only statutory. Some Justices may have wanted to make Rasul a constitutional holding, but there clearly was no majority for such a ruling.

Eisentrager and Verdugo are still the governing law in this area. These precedents hold that aliens who are either held abroad, or held here but have no other substantial connection to this country, are not entitled to invoke the U.S. Constitution. As committee witness Brad Berenson noted at Monday's hearing, ''nothing in the Constitution, 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.'' Berenson also refuted the argument that a constitutional right of habeas for enemy combatants is embedded in the Rasul decision. As he explained, going through the logic of that opinion and its dependence on the 1973 Braden case:

> 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.

The Specter amendment would have led to a nightmare of litigation in other wars.

During World War II, the United States held millions of axis enemy combatants. During some periods, enemy war prisoners were shipped into this country at the rate of 60,000 a month. By the end of the war, over 425,000 enemy war prisoners were detained in prison camps inside the United States. Overall, the United States detained over two million enemy combatants during World War II. Prisoner camps for these combatants existed in all but three of the then-48 states.

If the Specter amendment had been law during World War II, all of these 2 million enemy combatants would have been allowed to file habeas corpus lawsuits in Federal district court against our Armed Forces. Just try to imagine what that would have meant. The vast majority of these 2 million enemy prisoners were not familiar with the American legal system and did not speak English. If they had habeas corpus rights, they surely would have had to be provided with a lawyer in order to effectuate those rights. Also, should each of these 2 million prisoners also have been given access to the classified evidence that might be used against them to justify their detention? Should all 2 million of these prisoners have been entitled to call witnesses on their behalf? Should they have been allowed to recall the U.S. soldiers at the front who captured them, and to cross examine them?

The consequences of the Specter amendment are unimaginable. We cannot allow enemy war prisoners to sue us in our own courts. Such a system would make it simply impossible for the United States to fight a war. But don't take my word for it. The United States Supreme Court came to the same conclusion in its landmark decision in Johnson v. Eisentrager. The Supreme Court in that case clearly and eloquently explained why we cannot allow alien enemy combatants to sue our military in our courts:

> A basic consideration in habeas corpus practice is that the prisoner will be produced before the court. This is the crux of the statutory scheme established by the Congress; indeed, it is inherent in the very term ''habeas corpus.'' And though production of the prisoner may be dispensed with where it appears on the face of the application that no cause for granting the writ exists, Walker v. Johnston, we have consistently adhered to and recognized the general rule. Ahrens v. Clark. To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation of shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise 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.

The Specter Amendment would disrupt the operation of Guantanamo and undermine the war on terror. We already know that habeas litigation at Guantanamo has consumed enormous resources and disrupted day-to-day operation of the base. The United States February 17, 2006 Supplemental Brief in the Al Odah case in the DC circuit describes the burdens imposed on the military by the Guantanamo litigation and the frivolous nature of some of the claims being pursued. At pages 12–14, the brief describes the following:

According to the Justice Department: ''The detainees have urged habeas courts to dictate conditions on [Guantanamo Naval] Base ranging from the speed of Internet access afforded 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 near 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;'' The United States also notes that this litigation has had a serious negative impact on the war with Al Qaeda. According to the U.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. One of the coordinating counsel for the detainees boasted about this in public:

The litigation is brutal for [the United States.] It's huge. We have over one hundred lawyers now from big and small firms working to represent the detainees. Every time an attorney goes down there, it makes it that much harder [for the U.S. military] to do what they're doing. You can't run an interrogation . . . with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?

Brad Berenson, who testified at the September 25 Judiciary Committee hearing on this bill, offers what I think is a fitting comment on the habeas corpus litigation at Guantanamo Bay thus far. He concluded his testimony by noting, ''All freedom-loving people cherish the Great Writ. But we debase the writ, rather than honor it, if we extend it into realms where neither history nor tradition support its use.''

At Monday's Judiciary Committee hearing, some witness suggested that the bulk of the detainees held at Guantanamo are innocent. One witness at Monday's Judiciary Committee hearing, a lawyer who represents 10 Saudis held at Guantanamo, went so far as to assert that ''none of the ten . . . are enemies of the United States.'' This lawyer even told us that the men at Guantanamo ''do not appear any more dangerous . . . than my younger grandchild, who is 12.'' Another witness at the Judiciary Committee's September 25 hearing asserted that ''[n]ot a crumb of evidence has been adduced suggesting that the writ would risk freeing terrorists to return to fight against the United States.''

This characterization, and similar assertions that the bulk of the detainees at Guantanamo are innocent, simply do not comport with reality. The United States has already released a number of detainees. These are detainees who our own Armed Forces decided were not enemy combatants or were no longer dangerous. Our Armed Forces are obviously very cautious about whom they release—they have great reason to be cautious, since they bear the consequences of releasing anyone who is a threat. Yet we already know that even among those detainees whom our Armed Forces thought were not dangerous, a significant number instead turned out to remain committed to war against the United States and its allies. According to a October 22, 2004 story in the Washington Post, at least 10 detainees released from Guantanamo have been recaptured or killed fighting U.S. or coalition forces in Afghanistan or Pakistan. This is what the Washington Post described:

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 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.

* * * * *

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.

I urge that anyone consider these facts before contending that the bulk of the detainees at Guantanamo are ''innocent.''

I would also like to respond to some of the attacks that have been made on the underlying DTA. One of the complaints made is that there is no mandate in the DTA, or in the MCA, that the military conduct CSRTs for enemy combatants that it captures. In a September 25 letter to Senators, for example, the ACLU urges opposition to the MCA on the ground, among other things, that ''[w]hile the bill does allow limited appeals for those who do go before a military commission or a Combatant Status Review Tribunal, CSRT, there is no guarantee that any person detained by our government be provided with either a trial or a CSRT.'' Similarly, at the September 25 hearing before the Judiciary Committee, committee witness Bruce Fein argued against the MCA on the ground ''the fact is that the statute would enable the executive branch to simply decline to hold CSRT proceedings . . . [I]t gives the executive branch, if it wishes, [the right] to hold detainees indefinitely without any access to the Federal courts. [Military commanders could] say, we do not want to hold a Combatant Status Review Tribunal, it is so clear that they [the detainees] are enemy combatants. If they do not hold the tribunal hearing, there is no access to Federal courts under the statute.''

My response to these critics is that what they have described does accurately describes the DTA and MCA—and also the Geneva Conventions. As I noted earlier, the Geneva Conventions require an Article 5 hearing on the status of a detainee, but only if there is doubt as to his status. Under the Geneva Conventions, I would submit, there is no need for any Article 5 hearing for any of the al-Qaida and Taliban detainees, because there is simply no question that these detainees are not entitled to privileged status under the Geneva Conventions. The Conventions allow the military to make blanket determinations, and our nation would certainly be within its rights to do so here. What the military currently is doing for Guantanamo detainees goes well beyond the process to which they are entitled. What these critics want Congress to apply to our Armed Forces is a rule of no good deed goes unpunished. Because the military, in response to criticism of Guantanamo, started giving everyone at Guantanamo a CSRT hearing, these critics contend, it should be compelled to do so for all future detainees, and for all future wars. What is now given as a matter of executive grace, they contend, should be transformed into a legislative mandate.

This the Armed Services committees and this congress declined to do. Aside from the fact that these detainees, aliens all, are not entitled to CSRTs or any Article 5 type hearing under the Geneva Conventions, it would be absurdly impractical to require the military to provide such hearings in all future conflicts. Consider, for example, the case of World War II. As I mentioned earlier, the United States detained over 2,000,000 enemy combatants during that conflict. How on earth could we possibly expect the military to conduct CSRTs for 2 million people?

And how could the DC Circuit be expected to handle 2 million appeals from CSRTs, even under the de minimis facial challenge authorized by the DTA? It is simply inconceivable.

The CSRTs and DTA review, I concede, would be insufficient to justify detention of a United States citizen accused of a crime. This is not civilian criminal justice due process. But these detainees are not entitled to civilian criminal justice due process. Nor are they entitled to such hearings under the Geneva Conventions.

What the DTA review standards do offer is judicial review that is consistent with military needs and with the executive branch's primacy among the branches of government in the conduct of war. It is judicial review in keeping with the traditional limited role of the courts in reviewing the conduct of war. As others have noted, DTA judicial review is limited to two narrow inquiries: did the CSRTs and commissions use the standards and procedures identified by the Secretary of Defense, and is the use of these systems to either continue the detention of enemy combatants or try them for war crimes consistent with the Constitution and federal statutes? The first inquiry I think is straightforward: did the military follow its own rules? This inquiry does not ask whether the military reached the correct result by applying its rules or whether a judge agrees that the evidence meets some particular standard of evidence. The inquiry is simply whether the correct rule was employed.

Former United States Attorney General Bill Barr, in his testimony before the Senate Judiciary Committee on June 15 of last year, described the understanding of judicial review of military decisions that the DTA's review standards are designed to reflect:

It seems to me that the kinds of military decisions at issue here—namely, what and who poses a threat to our military operations—are quintessentially Executive in nature. They are not amenable to the type of process we employ in the domestic law enforcement arena. They cannot be reduced to neat legal formulas, purely objective tests and evidentiary standards. They necessarily require the exercise of prudential judgment and the weighing of risks. This is one of the reasons why the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. If the concept of Commander-in-Chief means anything, it must mean that the office holds the final authority to direct how, and against whom, military power is to be applied to achieve the military and political objectives of the campaign.

I am not speaking here of ''deference'' to Presidential decisions. In some contexts, courts are fond of saying that they ''owe deference'' to some Executive decisions. But this suggests that the court has the ultimate decision-making authority and is only giving weight to the judgment of the Executive. This is not a question of deference—the point here is that the ultimate substantive decision rests with the President and that courts have no authority to substitute their judgments for that of the President.

I think that last point is worth emphasizing. The DTA is not an invitation for the courts to substitute their judgment for that of the military. It is not for the courts to decide if someone is an enemy combatant, regardless of the standard of review. It is simply not the role of the courts to make that decision. It is not the courts, after all, who bear the burden of capturing an enemy combatant again if he is released and rejoins the battle. The only thing the DTA asks the courts to do is check that the record of the CSRT hearings reflect that the military has used its own rules. It is up to the military to decide what the result should be under those rules, or even how those rules should be modified in the future.

I would also reiterate a few words about the legality review that the DTA provides. This provision authorizes, in effect, a facial challenge to the CSRTs. I anticipate that once the District of Columbia circuit decides these questions with regard to a particular set of CSRT procedures in use, that decision will operate as circuit precedent unless and until the CSRT procedures are changed. Based on the long body of Supreme Court precedent governing judicial review of military affairs, I do not anticipate that any type of hearing is required by the Constitution or by Federal statute in order for the military to be allowed to detain alien enemy combatants. The Geneva Conventions do require hearings when there is doubt as to a detainee's privileged status, but those Conventions are not enforced through the courts, and the DTA does not disturb that limit on judicial enforceability. Allow me to quote the previous understanding of the scope of judicial review of military-commission trials that the DTA is designed to embody, as expressed in the Supreme Court's landmark decision in Johnson v. Eisentrager:

It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission. The petition shows that these prisoners were formally accused of violating the laws of war and fully informed of particulars of these charges. As we observed in the Yamashita case, ''If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions. We consider here only the lawful power of the commission to try the petitioner for the offense charged.''

Finally, I would like to reiterate the most important reason why I believe that Congress needs to bring an end to the habeas litigation involving war-on-terror detainees. Keeping captured terrorists out of the court system is a prerequisite for conducting effective and productive interrogation. And it is interrogation of terrorist detainees that has proved to be an important source of critical intelligence that has saved American lives.

Giving detainees access to federal judicial proceedings threatens to seriously undermine vital U.S. intelligence-gathering activities. Under the new Rasul-imposed system, shortly after al-Qaida and Taliban detainees arrive at Guantanamo Bay, they are informed that they have the right to challenge their detention in Federal court and the right to see a lawyer. Detainees overwhelmingly have exercised both rights. The lawyers inevitably tell detainees not to talk to interrogators. Also, mere notice of the availability of these proceedings gives detainees hope that they can win release through adversary litigation, rather than by cooperating with their captors.

Navy Vice-Admiral Lowell Jacoby addressed this matter in a declaration attached to the United States's brief in the Padilla litigation in the Southern District of New York. Vice-Admiral Jacoby at the time was the Director of the Defense Intelligence Agency. He noted in the Declaration that:

DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.

Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.

Specifically with regard to Jose Padilla, Vice Admiral Jacoby also noted in his Declaration that:

Providing [Padilla] access to counsel now would create expectations by Padilla that his ultimate release may be obtained through an adversarial civil litigation process. This would break—probably irreparably—the sense of dependency and trust that the interrogators are attempting to create.

In remarks that I submitted for the RECORD when the original DTA was enacted, I described some of the valuable intelligence that the United States has gained as a result of the interrogation of al-Qaida detainees. The President made a similar case in a speech that he delivered on September 6, but much better than I had done. I would like to simply quote at length, so that it is available in the RECORD, what the President described—why it is important that our intelligence agents be able to conduct effective interrogations of al-Qaida members. On the sixth of this month, the President stated:

Within months of September the 11th, 2001, we captured a man known as Abu Zubaydah. We believe that Zubaydah was a senior terrorist leader and a trusted associate of

Osama bin Laden. Our intelligence community believes he had run a terrorist camp in Afghanistan where some of the 9/11 hijackers trained, and that he helped smuggle al Qaeda leaders out of Afghanistan after coalition forces arrived to liberate that country. Zubaydah was severely wounded during the firefight that brought him into custody—and he survived only because of the medical care arranged by the CIA.

After he recovered, Zubaydah was defiant and evasive. He declared his hatred of America. During questioning, he at first disclosed what he thought was nominal information—and then stopped all cooperation. Well, in fact, the ''nominal'' information he gave us turned out to be quite important. For example, Zubaydah disclosed Khalid Sheikh Mohammed—or KSM—was the mastermind behind the 9/11 attacks, and used the alias ''Muktar.'' This was a vital piece of the puzzle that helped our intelligence community pursue KSM. Abu Zubaydah also provided information that helped stop a terrorist attack being planned for inside the United States—an attack about which we had no previous information. Zubaydah told us that al Qaeda operatives were planning to launch an attack in the U.S., and provided physical descriptions of the operatives and information on their general location. Based on the information he provided, the operatives were detained—one while traveling to the United States.

We knew that Zubaydah had more information that could save innocent lives, but he stopped talking. As his questioning proceeded, it became clear that he had received training on how to resist interrogation. And so the CIA used an alternative set of procedures. These procedures were designed to be safe, to comply with our laws, our Constitution, and our treaty obligations. The Department of Justice reviewed the authorized methods extensively and determined them to be lawful. I cannot describe the specific methods used—I think you understand why—if I did, it would help the terrorists learn how to resist questioning, and to keep information from us that we need to prevent new attacks on our country. But I can say the procedures were tough, and they were safe, and lawful, and necessary.

Zubaydah was questioned using these procedures, and soon he began to provide information on key al Qaeda operatives, including information that helped us find and capture more of those responsible for the attacks on September the 11th. For example, Zubaydah identified one of KSM's accomplices in the 9/11 attacks—a terrorist named Ramzi bin al Shibh. The information Zubaydah provided helped lead to the capture of bin al Shibh. And together these two terrorists provided information that helped in the planning and execution of the operation that captured Khalid Sheikh Mohammed.

Once in our custody, KSM was questioned by the CIA using these procedures, and he soon provided information that helped us stop another planned attack on the United States. During questioning, KSM told us about another al Qaeda operative he knew was in CIA custody—a terrorist named Majid Khan. KSM revealed that Khan had been told to deliver $50,000 to individuals working for a suspected terrorist leader named Hambali, the leader of al Qaeda's Southeast Asian affiliate known as ''J-I''. CIA officers confronted Khan with this information. Khan confirmed that the money had been delivered to an operative named Zubair, and provided both a physical description and contact number for this operative.

Based on that information, Zubair was captured in June of 2003, and he soon provided information that helped lead to the capture of Hambali. After Hambali's arrest, KSM was questioned again. He identified Hambali's brother as the leader of a ''J-I'' cell, and Hambali's conduit for communications with al Qaeda. Hambali's brother was soon captured in Pakistan, and, in turn, led us to a cell of 17 Southeast Asian ''J-I'' operatives. When confronted with the news that his terror cell had been broken up, Hambali admitted that the operatives were being groomed at KSM's request for attacks inside the United States—probably [sic] using airplanes.

During questioning, KSM also provided many details of other plots to kill innocent Americans. For example, he described the design of planned attacks on buildings inside the United States, and how operatives were directed to carry them out. He told us the operatives had been instructed to ensure that the explosives went off at a point that was high enough to prevent the people trapped above from escaping out the windows.

KSM also provided vital information on al Qaeda's efforts to obtain biological weapons. During questioning, KSM admitted that he had met three individuals involved in al Qaeda's efforts to produce anthrax, a deadly biological agent—and he identified one of the individuals as a terrorist named Yazid. KSM apparently believed we already had this information, because Yazid had been captured and taken into foreign custody before KSM's arrest. In fact, we did not know about Yazid's role in al Qaeda's anthrax program. Information from Yazid then helped lead to the capture of his two principal assistants in the anthrax program. Without the information provided by KSM and Yazid, we might not have uncovered this al Qaeda biological weapons program, or stopped this al Qaeda cell from developing anthrax for attacks against the United States.

These are some of the plots that have been stopped because of the information of this vital program. Terrorists held in CIA custody have also provided information that helped stop a planned strike on U.S. Marines at Camp Lemonier in Djibouti—they were going to use an explosive laden water tanker. They helped stop a planned attack on the U.S. consulate in Karachi using car bombs and motorcycle bombs, and they helped stop a plot to hijack passenger planes and fly them into Heathrow or the Canary Wharf in London.

We're getting vital information necessary to do our jobs, and that's to protect the American people and our allies.

Information from the terrorists in this program has helped us to identify individuals that al Qaeda deemed suitable for Western operations, many of whom we had never heard about before. They include terrorists who were set to case targets inside the United States, including financial buildings in major cities on the East Coast. Information from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaeda member or associate detained by the U.S. and its allies since this program began. By providing everything from initial leads to photo identifications, to precise locations of where terrorists were hiding, this program has helped us to take potential mass murderers off the streets before they were able to kill.

This program has also played a critical role in helping us understand the enemy we face in this war. Terrorists in this program have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that allows us—that has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.

The information we get from these detainees is corroborated by intelligence, and we've received—that we've received from other sources—and together this intelligence has helped us connect the dots and stop attacks before they occur. Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and in other places. It's helped our allies protect their people from deadly enemies. This program has been, and remains, one of the most vital tools in our war against the terrorists. It is invaluable to America and to our allies. Were it not for this program, our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this program has saved innocent lives.

I don't think that it can be seriously doubted that this intelligence would not have been obtained if these men—Khalid Shaisk Muhammed and Abu Zubaydah—had been given the right to file a habeas petition and access to a lawyer immediately after they were captured. And had we not obtained this information, lives of Americans and other innocent people would have been lost.

The DTA and the MCA create a balanced and appropriate mechanism for managing the detention of alien enemy combatants. They are consistent with military tradition and our Nation's security needs. The Specter amendment would upend that system. I urge the Specter amendment's defeat.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I only need one sentence to refute the arguments of the Senator from Arizona, and it comes back to Justice O'Connor's opinion again. She says:

All agree that, absent suspension, the writ of habeas corpus remains available to every individual—

Every individual—

detained within the United States.

Guantanamo is held to be within that concept. But she talks about ''every individual.'' That includes citizens and noncitizens.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I congratulate the distinguished chairman of the Senate Judiciary Committee and my other colleagues who serve on the Judiciary Committee—Senator GRAHAM and Senator KYL—for the quality of the discussion and debate. This is the kind of debate I came to the Senate and hoped to participate in.

I want to try to address the concerns raised by the distinguished chairman of the Judiciary Committee about this constitutional issue. I happen to agree with what the Senator from Arizona said about the way the U.S. Supreme Court has interpreted the rights of an

alien with regard to their constitutional rights.

The difference is, the Hamdi case the chairman was citing really had to do with whether Guantanamo Bay—leased property in Cuba—was within the jurisdiction of the Court. It held because it was under a lease and under the control of the United States that it was subject to the laws pertaining to habeas corpus. But the way I read the case—and I believe this is correct and consistent with the way the Senator from Arizona interpreted it—it does not apply, they did not hold that it applied to an alien. But I want to say, even if he is right—and I disagree that he is—that aliens, particularly unlawful combatants captured on the battlefield, have all the rights an American citizen does under the Constitution, I believe his concerns are answered by the Swain case, decided by the U.S. Supreme Court, which held that if, in fact, there is an adequate substitute remedy, that in fact that satisfies any constitutional concerns with regard to the writ of habeas corpus.

I believe the Detainee Treatment Act, which we passed just last year, provides an adequate substitute remedy sufficient to meet Supreme Court scrutiny. Even if the Supreme Court woke up and decided that all of a sudden it would overrule all of its old cases and hold that an unlawful combatant, an alien—not a citizen of this country—was somehow entitled to the whole panoply of constitutional rights, that would satisfy the Supreme Court's concerns about the process to which that alien was due.

But I also want to question sort of the logic of applying the Constitution to unlawful combatants captured on the battlefield. Are we saying they are entitled to a fourth amendment right against unreasonable searches and seizures? Are we saying they have a fifth amendment right not to incriminate themselves? Well, surely not. We have all acknowledged the importance of being able to capture actionable intelligence through the interrogation process. And much of the debate we have been having in these last few weeks has been: How do we preserve this important intelligence-gathering tool which has allowed us to detect and disrupt terrorist attacks? How do we preserve that and at the same time meet our other legal obligations, constitutional and statutory?

I believe the Senator from South Carolina had a question. I would be happy to yield to him for a question.

Mr. GRAHAM. Mr. President, I appreciate that, and I am sorry to interrupt. But I went back to the Hamdi decision that referenced the exchange we had with the chairman in reference to the point the Senator just made.

Justice O'Connor said:

> Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker.

When you turn to the next page, she says:

> There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.

She is referring to Army regulation 190–8. And my question to Senator CORNYN is, do you agree that Justice O'Connor was telling the Department of Defense that if you will model a tribunal on Army regulation 190–8, you will have met your obligation to have a competent tribunal under the Geneva Conventions to make an enemy combatant status determination?

Mr. CORNYN. Mr. President, I say to the Senator from South Carolina, I think that is certainly a reasonable construction of what the opinion says.

Let me describe for our colleagues the kind of petitions for writ of habeas corpus we are talking about that are being filed at Guantanamo Bay.

A Canadian detainee who threw a grenade that killed an Army medic in a firefight and who comes from a family with longstanding al-Qaida ties moved for a preliminary injunction forbidding interrogation of him. That is one example.

Another one is a Kuwaiti detainee who seeks a court order that they must be provided dictionaries in contravention of the force protection policy at Guantanamo Bay, and that their lawyer be given high-speed Internet access at their lodging on the base and be allowed to use classified Department of Defense telecommunications facilities, all under the theory that otherwise their ''right to counsel'' is unduly burdened.

Then there is the motion by a high-level al-Qaida detainee complaining about base security procedures, speed of mail delivery, and medical treatment—even though they have abundant medical treatment and medical facilities at Guantanamo Bay. They further seek an order that he be transferred to the ''least onerous conditions'' at Guantanamo Bay and is asking the court to order that Guantanamo Bay authorities allow him to keep any books and reading materials sent to him and to ''report to the court'' on his opportunities for exercise, communication, recreation, and worship, among other things.

Then there is the ''emergency'' motion seeking a court order requiring the authorities at Guantanamo Bay to set aside its normal security practices and show detainees DVDs that are purported to be family videos.

Finally, I will mention, by way of absurd examples, the motion by Kuwaiti detainees who are unsatisfied with the Koran they are provided as standard issue by the Guantanamo authorities, and they seek a court order that they be able to keep various other supplemental religious material, such as a ''tafsir,'' or 4-volume Koran with commentary, in their cells.

To say there is ''no meaningful judicial review'' or adequate substitute remedy afforded unlawful combatants flies in the face of the facts.

The Senator from South Carolina described the fact that these detainees are, under current law, entitled to a combat status review tribunal, whose decision could then be appealed to the DC Circuit Court of Appeals to make sure the officials have actually provided the process to which these detainees are due, to make sure they have not been swept up in the fog of war and were innocent bystanders. This provides a fair process for them and adequate judicial review.

We also have an annual administrative review board that determines, on an annual basis, whether this remains a necessity to keep these individuals in detention. I will point out that sometimes we are too lenient in terms of who we let go. I will cite to you a story of October 22, 2004, in the Washington Post, entitled ''Released Detainees Rejoining the Fight.'' There are at least 10 detainees who were released from Guantanamo Bay that have been recaptured or killed while fighting U.S. or coalition forces after they were released.

The Supreme Court of the United States has talked about the impracticality of providing enemy combatants of the U.S. the full privilege of litigation. The Eisentrager court explained clearly and eloquently why we don't let enemy combatants sue the U.S. military and our soldiers in our own Federal courts. This is what the court said:

> Such trials would hamper the war effort and bring aid and comfort to the enemy. . . . 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 into 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.

Those burdens placed on our military by enemy combatant litigation against our military effort persist today, and we have it within our power to eliminate that burden, to allow our men and women in uniform to fight the fight they volunteered to do on our behalf, to keep us safe and, at the same time, provide an adequate substitute remedy through the Detainee Treatment Act, as I have described a moment ago.

More than 200 cases have been filed on behalf of a purported 600 detainees. Strangely, that exceeds the number of detainees who are actually at Guantanamo Bay. So we have lawsuits for people who don't even exist, apparently.

According to the Department of Justice:

> This habeas litigation has consumed enormous resources and disrupted the day-to-day operation at Guantanamo Naval Base.

The United States of America, in a brief filed in the Al Odah case, said:

Perhaps most disturbing, the habeas litigation has imperiled crucial military operations during a time of war. In some cases, 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.

This seems to have been validated—these criticisms—by the U.S. in briefs filed in Federal court by a lawyer who has filed those lawsuits on behalf of enemy combatants held at Guantanamo Bay. He boasted about disrupting U.S. war efforts in a magazine, where he said:

The litigation is brutal for [the United States.] It's huge. We have over 100 lawyers now from big and small firms working to represent detainees. Every time an attorney goes down there, it makes it that much harder [for the United States military] to do what they're doing. You can't run an interrogation . . . with attorneys. What are they going to do now that we're getting court orders to get more lawyers down there?

I know time is precious and I want to yield back to the chairman of the Armed Services Committee, but I believe those who argue for an extension of full habeas corpus rights, such as would be provided to an American citizen in civilian courts, are making a fundamental mistake by confusing two different realms of constitutional law. One would apply to an American citizen accused of a crime, where certainly the desire and the order of business is to protect that individual against unjust charges, and to make sure that the full panoply of the Bill of Rights applies to that individual. Different considerations apply when you are talking about a declared enemy of the U.S., and particularly an unlawful combatant, someone who doesn't wear the uniform, someone who doesn't respect the law of wars, and who targets innocent civilians in the pursuit of their ideology.

I don't think we should make that mistake. So I reluctantly oppose the amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, I address the Senate on this issue and pose a question to my distinguished colleague, the senior Senator from Pennsylvania. I will put into the RECORD, following the conclusion of my remarks and my colloquy with the Senator from Pennsylvania, additional material.

Before I yield the floor, it is my desire to conclude the time on our side with the Senator from Missouri, and then reserve the remainder of my time for tomorrow. It would be my hope that the Senator from Pennsylvania, likewise, would save such remarks he may wish to make for tomorrow. As he knows, there is a function going on now, which I think most of us are trying to attend.

With that, I yield the floor.

Mr. SPECTER. Mr. President, that is satisfactory to me. How much time do I have remaining?

The PRESIDING OFFICER. The Senator has 33 minutes remaining.

Mr. SPECTER. I thank the Chair.

The PRESIDING OFFICER. The Senator from Missouri is recognized.

Mr. BOND. Mr. President, the amendment to give unlawful combatant habeas corpus rights to mirror U.S. domestic procedures is unnecessary and inappropriate.

The amendment is unnecessary because the U.S. is already giving enemy unlawful combatants more rights to question their continued incarceration than they are entitled to under international law.

Under Geneva Conventions Article 5, combatants captured during wartime are due a hearing to determine their lawful status only if such status is in doubt.

The United States goes beyond this requirement to give every combatant a status hearing, even when there is no doubt as to their status.

The U.S. gives combatants Combat Status Review Tribunal hearings, known as CSRTs, to determine their status and review the need for their continued incarceration.

If this were not enough, there is a review process under the Detainee Treatment Act, passed last year, to which detainees are also subjected.

There is no need for further review processes for these enemy combatant detainees. An enemy combatant detainee sounds a little sterile, but take a look at the name that is often referred to dealing with this. The Supreme Court case which brought about the need for this legislation deals with Hamdan. Let's be clear, Hamdan was Osama bin Laden's body guard and driver. This is the kind of person about whom we are talking. Giving unlawful enemy combatants such as these U.S. domestic habeas rights is inappropriate. These people are not U.S. citizens, arrested in the U.S. on some civil offense; they are, by definition, aliens engaged in or supporting terrorist hostilities against the U.S., and doing so in violation of the laws of the war.

Some may not have been around long enough to remember that the U.S. detained hundreds of thousands of German and Japanese soldiers, captured on World War II battlefields. We didn't give these enemy combatants access to U.S. domestic courts or habeas corpus rights. Not only would that have been absurd, it would have totally bogged down the legal system.

There has never been a legal question over the appropriateness of a separate military process for enemy combatants. We should not now start admitting them to the U.S. domestic legal process.

Current military review processes are more than adequate. Indeed, they exceed international standards. Granting enemy combatants additional U.S. domestic habeas corpus rights is unnecessary and inappropriate.

I urge my colleagues to oppose this amendment.

I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, at this time, I observe no other Senators desiring to address the subject with regard to the pending bill. Having said that, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. WARNER. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

The PRESIDING OFFICER (Mr. VITTER). Without objection, it is so ordered.

VOTE EXPLANATION

Mr. MCCAIN. Mr. President, due to the passing of a close friend, I was not present for the vote on amendment No. 5086, offered by Mr. LEVIN. With whis statement, I would like to inform the Senate that, had I been present, I would have voted against this amendment, which sought to strike the pending legislation on military commissions and insert the text of the bill reported out of the Armed Services Committee.

Senators WARNER, GRAHAM and I wrote and supported the bill that was reported out of the Senate Armed Services Committee. Over the past 2 weeks, however, we have been involved in negotiations with the White House and the House of Representatives and reached a compromise.

The compromise legislation, which I support, does not redefine the Geneva Conventions in any way. It amends the War Crimes Act—which currently says only that a violation of Common Article 3 is a war crime—by enumerating nine categories of offenses that constitute ''grave breaches of Common Article 3'' and thus are war crimes, punishable by imprisonment or death.

The bill authorizes the President to interpret the Geneva Conventions—a power he has already under the Constitution—as to what constitute nongrave breaches. These interpretations must be published in the Federal Register, and they will have same force as other administrative regulations, and thus may be trumped by law passed by Congress.

I am pleased with the agreement that we have reached with the administration and I support this legislation in the form pending on the floor. For this reason, if I had been present, I would have cast my vote against amendment No. 5086.

Mr. ROBERTS. Mr. President, I rise today in support of the timely passage of this legislation. In my view it is essential to the successful prosecution of our war against the terrorists.