

our commanders are charged with reducing to submission have a right to sue us.

The Court further held—this is in 1950—that the fifth amendment is inapplicable to aliens abroad and, in reasoning fully applicable to the suspension clause, explained “extraterritorial application of organic law” to aliens would be inconceivable.

Writing for the majority, Justice Jackson, who was referred to by Senator DODD and Senator KYL—a great Justice on the Court—stated:

The Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.

That is pretty plain language, wouldn't you say? I think that is the plain language of the Constitution. It does not give them immunity from military trial.

Even if, as opponents mistakenly argue, this amendment restores a statutory right to habeas, the Supreme Court has also held that Congress may freely repeal habeas jurisdiction if it affords an adequate and effective substitute or remedy. Essentially, if legislation strips habeas, according to the Supreme Court, the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention, does not constitute a suspension of the right of habeas corpus. In other words, if they provide some fair procedure for even prisoners of war that we decide is consistent with our military efforts and consistent with our sense of fairness, that does not confer and give a guaranteed right to a habeas corpus review.

The Military Commission Act of 2006 was drafted with these important Supreme Court precedents in mind. After careful negotiation among our Members and careful analysis of the Supreme Court's decision in *Hamdan v. Rumsfeld*, Congress went above and beyond what was required by the Constitution and the Geneva Conventions to ensure detainees, even terrorists, at Guantanamo Bay, had an adequate and effective substitute method to test the legality of their detention.

So we did that. We did not fail to respond. We did that. The MCA provides alien enemy combatants far more legal process than has ever been afforded by any country in the history of armed conflict.

I am not aware of a single country in the history of armed conflict that has provided more rights than our procedures that we have established under the Military Act that we passed and the President signed into law last October.

The Combatant Status Review Tribunal for detainees is more robust than those to which lawful combatants, honorable soldiers in organized militaries of a foreign nation, are entitled to under the Geneva Conventions.

Let me repeat that and drive home the importance of that concept. The

Geneva Conventions were decided upon by a group of nations that came together and thought that during the course of military conflicts, too many things happened that are not justified and are not necessary and are damaging to people in ways that could not be justified. We wrote the conventions, the nations did, to try to ameliorate some of the problems in warfare. We said that if you have a lawful combatant, as part of the Geneva Conventions, a person who has signed up for his or her country, fighting for the country, who wears a uniform, who carries his weapons openly and does not act in a surreptitious manner, does not act in a terroristic manner but fight battles according to the laws of war—if captured, must be treated and afforded the protections of the Geneva Conventions.

That is a good standard of review and protection. Congress passed a law to provide for the people at Guantanamo, who are not lawful combatants but are unlawful enemy combatants and who have not historically been considered to have been covered by the Geneva Convention. We afforded them privileges that are not required even under the Geneva Conventions on how you handle detainees.

Let's talk about our present conflict, the war on terrorism. Former Attorney General John Ashcroft has made this point. If you think about it, it is worthy of our consideration. John Ashcroft is a great believer in American liberty, the rights of liberty, a key characteristic of the American people. But he points out we ought not to think about restraints that occur as some sort of a balancing test between liberty and control and domination. He says, when you engage in an action that is designed to protect us, the test should be not a balancing test, but the test should be: Does it improve liberty? In other words, if you go to the airport and have to go through one of those checking stations as I did today, the question is: Do you feel more free to fly, having had that inspection occur? Is your liberty to travel, is your liberty to fly safely and securely in an aircraft in America, enhanced because you take a couple of minutes to go through that line? Or not?

If it is, then that is a protection of liberty. We are indeed in a different world than we used to be, when threats fundamentally came from foreign nations. Now, even a few people with dedicated, malicious intent, with modern weapons of mass destruction and death can have tremendous impact on us. So what we are trying to do is execute lawful actions that improve our liberty, not deny liberty but to enhance liberty for all peace-loving and law-abiding American citizens.

I want to talk about *Hamdi v. Rumsfeld*. As part of the Judiciary Act of 1789, Congress conferred on the Federal courts jurisdiction to hear petitions for habeas corpus. Though the language has gone through minor changes since 1789, current law, now codified at 28

U.S.C. section 2241, is essentially the same grant of habeas corpus as originally enacted. The statutory language has never referred specifically to enemy combatants because such a grant was understood not to apply to those individuals detained during a time of war. Congress understood that detention of enemy combatants during time of war is strictly a military decision, since we do not allow enemy combatants to continue their war against us through the judiciary, through litigation.

Though the Supreme Court has repeatedly held that habeas corpus does not extend to alien enemy combatants detained outside the United States, some argue that Justice O'Connor's plurality decision in *Hamdi v. Rumsfeld* changed this precedent. In that decision, Justice O'Connor said:

All agree that, absent suspension, habeas corpus remains available to every individual within the United States.

Proponents of this amendment that we are debating cite this statement by Justice O'Connor as proof that habeas relief is available to all those detained within the United States, regardless of whether they are an alien enemy combatant. Let me note that during World War II, there were 425,000 enemy combatants held within the United States, none of who were allowed relief through habeas petitions. Furthermore, reliance on that statement by Justice O'Connor is wrong, since the question in *Hamdi* was whether the executive had the authority to detain a U.S. citizen as an enemy combatant and whether that citizen detainee had habeas rights. Focusing on that narrow issue, the plurality referred specifically to the rights, in their opinion, the plurality opinion, of citizens, eight times in the opinion; and in the holding of the case—and the holding of the case is limited to the circumstances of the cases itself—*Hamdi* was, after all, a U.S. citizen.

Regardless, some advocates maintain that Justice O'Connor's otherwise inconsequential statement, too tenuous to constitute dicta, reversed years of settled precedent and for the first time granted habeas rights to illegal enemy combatants detained overseas. That proposition flies in the face of the commonsense interpretive rule that one does not hide elephants in mouseholes. Had the *Hamdi* Court intended to extend habeas rights to all individuals in the United States, not just citizens, including suspected foreign terrorists detained outside U.S. territory, it most assuredly would have articulated such a consequential ruling with more clarity. But *Hamdi* did not present that question and the Court did not resolve it. Moreover, as the Court aptly noted, quoting *Eisenstrager*:

Such extraterritorial application of organic law would have been so significant an innovation in the practice of government that, if intended or apprehended, it could scarcely have failed to excite contemporary comment.