

that fixed it, and did not provide, for the first time in the history of American history—or world history, for that matter—enemy prisoners be given the right to sue the generals who have captured them.

All right. So we did that, and we passed it. The DC Circuit Court of Appeals, in interpreting that statute, has followed it and concluded that Congress has changed the law and that the prisoners in Guantanamo are not entitled to habeas rights that we provide to every American citizen.

Now, that is the right thing. This is exactly what we should do. So I am somewhat taken aback by the suggestion of those who are promoting this amendment that somehow Congress denied the Great Writ and changed the law and they are here to restore it.

This is purely a matter of congressional policy and national policy on how we want to conduct warfare now and in the future. How are we going to do that? Are we going to do it in a way that allows those we capture to sue us? Now you can utilize those rights if we choose to try a prisoner of war and to lock them up or to execute them. You can use a lot of legal rights. A prisoner can use those rights, but not in this circumstance. This is merely to restore the historical principles of habeas that already existed. The current law does that. The new amendment would change it.

THE PRESIDING OFFICER (Mr. WHITEHOUSE). The Senator's time has expired.

The Senator from Vermont.

Mr. LEAHY. Mr. President, at the beginning of this debate, I said Congress committed a historic error when it eliminated the Great Writ of habeas corpus because it did it not just for those detained at Guantanamo Bay—that raises enough questions about our sense of history and our sense of our own basic jurisprudence in this country—but Congress also eliminated it for millions—millions—of permanent legal residents here in the United States. Some of them are professors in our finest schools, others are medical people in our hospitals, and some are actually serving in our law enforcement and in our military. Listening to the arguments these past few days of those opposed to restoring habeas rights, it becomes ever more apparent that this was a mistake the last Congress and the administration made based on fear. I cannot think of a greater mistake than one based on fear in the most powerful Nation on Earth.

Opponents make the alarmist argument that if we permit people to challenge their detention in Federal court, we will jeopardize our national security and place ourselves in greater danger. In fact, of course, the opposite is true.

We have heard these kinds of arguments before during trying and turbulent times in American history, such as when the Government shamefully interned tens of thousands of Japanese-

Americans during World War II. We should know by now that it hurts this country, and especially our men and women in uniform, when we allow public policy to be guided by fear, rather than by American values and freedoms.

The critics of habeas restoration resort to scare tactics because they know that history and the facts are against them.

The truth is that casting aside the time-honored protection of habeas corpus makes us more vulnerable as a nation because it leads us away from our core American values and calls into question our historic role as the defender of human rights around the world. It also allows our enemies to accomplish something they could never achieve on the battlefield—the whittling away of liberties that make us who we are, the liberties we fought during the Revolutionary War to preserve, the liberties we fought a civil war to preserve, the liberties we defended not only our own freedom but the freedom of much of the Western World in two world wars to preserve.

The need for the Great Writ has never been stronger than it is today. We have an administration that at every opportunity has aggressively sought unchecked executive power while working to erode or to eliminate constitutionally enshrined checks on that power by the courts and by Congress. Stripping away habeas rights which allow people to go to court to challenge detention by the executive is just the latest brazen attempt in a 6-year-long effort to consolidate power in the executive branch. You could have picked up somebody, locked them up, and all that person wants to say is: I am not the person named here. Before we did this, someone could at least get a writ of habeas corpus, go to the court, and say: I am not going to contest the case or anything else, but just the fact that you picked up the wrong person. They can't even do that now. This is America?

The writ of habeas corpus is not some special benefit to be honored only when it is convenient. As no less a conservative than Justice Antonin Scalia has written, “[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.” Habeas has served for centuries to protect individuals against unlawful exercises of state power.

Habeas corpus is the only common law writ enshrined in the Constitution. Article I, section 9 provides that the “Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or invasion the public Safety may require it.” The Judiciary Act of 1789 specifically empowered federal courts to issue writs of habeas corpus “for the purpose of an inquiry into the cause of commitment.” In more than two centuries since then, habeas has only been suspended four times, all of them at times of active rebellion or in-

vasion. Even this administration does not claim that we are at such a point now.

The Military Commissions Act of 2006 spurned centuries of tradition and empowered the executive to detain non-citizens potentially forever, with no meaningful check by another branch of Government. With this act, Congress permanently eliminated the writ of habeas corpus for any noncitizen determined to be an enemy combatant or even awaiting such determination. If the determination hasn't been made, we are going to spend a few years making up our minds whether you are an enemy combatant, but you still can't contest the fact that we have picked up the wrong person. So a mere accusation by the executive is enough to keep a person in custody indefinitely, and that detention is not subject to review. As our Founders knew well, no administration—no administration, not this one, not the next one, not the one after that—can be trusted with that kind of power.

The Specter-Leahy amendment would restore the proper balance of power between the branches of Government by reestablishing the law on habeas as it existed prior to the passage of the Detainee Treatment Act and the Military Commissions Act. It creates no new legal rights. The U.S. Supreme Court confirmed in the Rasul case that American and British courts have routinely assumed jurisdiction over habeas claims made by aliens.

British courts in the 18th century considered habeas claims of aliens held as enemy combatants, as did the U.S. Supreme Court during World War II, a war where we faced the possible destruction of democracy. These courts considered habeas claims of alien enemy combatants who had already received military trials—meaning even before their habeas claims, they had already received more process than most noncitizen detainees will ever get now. Our legendary Chief Justice, John Marshall, in one instance granted relief to an alien enemy combatant bringing a habeas claim. In most of these historical cases, though, habeas petitioners lost and were not granted any relief, and indeed most habeas petitioners have their claims dismissed with a simple, one-page ruling from a judge. This historical record is evidence that habeas can be relied upon as a necessary, but entirely reasonable, check on Executive power.

As in the past, noncitizen detainees alleged to be enemy combatants should at least have the right to go into an independent court to assert that they are being held in error—not to have a trial but at least to say: Hey, we read the warrant, this is not the person—I am not the person named; you picked up the wrong person. They can't even ask an independent court to determine that.

As in the past, a court will only grant habeas relief if the petitioner is able to, in fact, establish this effort.