

a moment, against public opinion, to set the gold standard and set us apart.

We have been known as the nation of Nuremberg. My fear is now we will be known as the nation of Guantanamo, and I worry about that.

Mr. WARNER. We have our differences, if I may say, but that was a war of state-sponsored nations and aggressions, men wearing uniforms, men acting at the direction of recognized governments. Today's war is a disparate bunch of terrorists, coming overnight, no uniforms, no principles, guided by nothing. We are doing the best we can as a nation, under the direction of our President, to defend ourselves.

Mr. DODD. If our colleague would yield, I do not disagree, but I don't think there is a choice between upholding the principles of America and fighting terrorism. Every generation of Americans will face their own threats. This is ours. Every previous generation faced serious threats, and they did not abandon the principles upon which this country is founded. I am fearful we are going to do that today.

Mr. WARNER. I disagree with my friend, and I yield the floor.

The PRESIDING OFFICER. The Democratic leader.

Mr. REID. For this little conclusion, I will use leader time.

I ask unanimous consent that 5 minutes from Senator ROCKEFELLER and Senator KENNEDY—they both have a half hour on their respective amendments—be transferred to Senators CLINTON and JOHN KERRY. They will each have 5 minutes to speak. And that I have 12 minutes under my control remaining on the bill and that time be equally divided between Senators FEINSTEIN and FEINGOLD. They will each have 6 minutes to speak on the bill.

Mr. WARNER. Madam President, reserving the right to object, and I will not object, but I listened carefully. You courteously advised me that this request works within the confines of the standing unanimous consent, is my understanding, in terms of the allocation of time.

Mr. REID. This adds no time to the bill.

Mr. WARNER. That is correct. I wanted to make that clear to my colleagues.

Mr. LEAHY. Reserving the right to object. I shall not, of course. As a matter of clarification, there is still some specific time reserved to the Senator from Vermont; is that correct?

The PRESIDING OFFICER. There remains 23 minutes on the bill.

Mr. REID. That is 23 minutes, plus the good offices of Senator SPECTER may give the Senator additional time.

Mr. LEAHY. Thank you.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is now closed.

MILITARY COMMISSIONS ACT OF 2006

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of S. 3930, which the clerk will report.

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.

Pending:

Specter amendment No. 5087, to strike the provision regarding habeas review.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Madam President, just for purposes of advising colleagues, there remains on the Specter amendment 16 minutes under the control of the Senator from Virginia. I desire to allocate about 4 minutes to Senator KYL, 2 to 3 minutes to Senator SESSIONS, and to wrap it up, 2 to 3 minutes to Senator GRAHAM. But we will alternate or do as the Senator from Michigan—you have 33 minutes, I believe, under the control of Senator SPECTER and those in support of his amendment.

Mr. LEVIN. Madam President, parliamentary inquiry: How much time is remaining to Members on this side, including on the bill?

The PRESIDING OFFICER. Senator SPECTER's side controls 33 minutes.

Mr. LEVIN. On the Democratic side?

The PRESIDING OFFICER. Senator WARNER controls 16 minutes, and the proponent of the amendment controls 33.

Mr. LEVIN. And on the bill itself, is there time left?

The PRESIDING OFFICER. Senator REID has allocated the remainder of the debate time on the bill itself.

Mr. LEVIN. All time is allocated?

The PRESIDING OFFICER. Correct.

Mr. LEVIN. Madam President, I ask unanimous consent that I be allowed to proceed for 30 seconds.

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

Mr. LEVIN. Madam President, I wish to thank the Senator from Connecticut for one of the most passionate statements I have ever heard on this floor—heartfelt, right on target. The distinctions made in this bill which will allow statements to be admitted into evidence that were produced by cruel treatment is unconscionable. It is said that, well, statements made after December 30 of 2005 won't be allowed, but those that are produced by cruel and inhuman treatment prior to December 30 of 2005 are OK. It is unconscionable. It is unheard of. It is untenable, and the Senator from Connecticut has pointed it out very accurately, brilliantly. I thank him for his statement.

Mr. WARNER. Madam President, we will proceed on Specter's amendment. In due course, I will find the time to comment on my colleague's 30 seconds. I want to keep this thing in an orderly progression. I would like to add the

Senator from Texas, Mr. CORNYN, in the unanimous consent agreement to be recognized as one of the wrap-up speakers on those in opposition to the amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Madam President, yesterday Senator SPECTER argued that one sentence in the Hamdi opinion that refers to habeas corpus rights as applying to all "individuals" inside the United States indicates that alien enemy combatants have constitutional habeas rights when they are held inside this country. I believe that Senator SPECTER is incorrect, for the following reasons: (1) The Hamdi plurality repeatedly makes clear that "the threshold question before us is whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" The plurality expressly frames the issue before it in terms of the rights of citizens no fewer than eight times. It is clear that it is only the rights of citizens that the Hamdi plurality studied and ruled on. (2) Elsewhere the Hamdi plurality criticized a rule that would make the government's right to hold someone as an enemy combatant turn on whether they are held inside or outside of the United States. The plurality characterized such a rule as creating "perverse incentives," noted that it would simply encourage the military to hold detainees abroad, and concluded that it should not create a "determinative constitutional difference." The same effect would, of course, be felt if enemy soldiers' habeas rights were made turn on whether they were held inside or outside of the United States. The fact that the Hamdi plurality rejected this type of geographical gamesmanship in one context casts doubt on the theory that it endorsed it in a closely related context. (3) Had Hamdi extended habeas rights to alien enemy combatants held inside the United States, that would have been a major ruling of tremendous consequence. Because courts typically do not hide elephants in mouseholes, cf. *Whitman v. ATA*, it is fair to conclude that no such groundbreaking ruling is squirreled away in one ambiguous sentence in the Hamdi plurality opinion on the floor Wednesday evening, I presented the argument that the constitutional writ of habeas corpus does not extend to alien enemy soldiers held during wartime. Senator SPECTER responded by quoting from a passage in Justice O'Connor's plurality opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that he believes establishes that alien combatants are entitled to habeas rights if they are held within the United States. That statement, towards the beginning of section III.A of the court's opinion, is a part of a statement of general principles noting that "[a]ll agree" that, absent suspension, habeas corpus remains available to every "individual" within the United States. Senator

SPECTER reads this statement, unadorned by any qualification as to whether the individual in question is a U.S. citizen, an illegal immigrant, or an alien enemy combatant, to stand for the proposition that even the latter has a constitutional right to habeas corpus when held within the United States.

I would suggest that this single, ambiguous statement cannot be construed to bear that much weight, for three reasons.

Elsewhere in its opinion, the Hamdi plurality repeatedly makes clear that the only issue it is actually considering is whether a U.S. citizen has habeas and due process rights as an enemy combatant. The plurality's emphasis on citizenship is repeatedly made clear throughout Justice O'Connor's opinion. For example, on page 509, in its first sentence, the plurality opinion says: "we are called upon to consider the legality of the detention of a United States citizen on United States soil as an 'enemy combatant' and to address the process that is constitutionally owed to one who seeks to challenge his detention as such." On page 516, the plurality again notes: "The threshold question before us is whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'" On page 524, the plurality once again emphasizes: "there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status." On page 531: "We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." On page 532: "neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant." On page 533: "We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertion before a neutral decisionmaker." On page 535: military needs "are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." And on page 536-37: "it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his government."

Whatever loose language may have been used in the plurality's statement of general principles at the outset of its analysis, it is apparent that the only issue that the plurality actually studied and intended to address is the constitutional rights of the U.S. citizen.

Another thing that augurs against interpreting the Hamdi plurality opin-

ion to extend constitutional habeas rights to alien enemy combatants whenever they are held inside the United States is that, elsewhere in its opinion, the plurality is quite critical of a geographically-based approach to enemy combatant's rights. At page 524, the plurality responds to a passage in Justice Scalia's dissent that it reads as arguing that the government's ability to hold someone as an enemy combatant turns on whether they are held inside or outside of the United States. The plurality opinion states that making the ability to hold someone as an enemy combatant turn on whether they are held in or out of the United States:

creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

It is doubtful that this same plurality—one that sees "perverse" effects in rules that would encourage the government to hold enemy combatants outside of the United States in order to avoid burdensome litigation—also intended to rule that full constitutional habeas rights attach to alien enemy combatants as soon as they enter U.S. airspace.

Finally, Senator SPECTER's argument that the ambiguous reference to "individuals" on page 525 of Hamdi extends habeas rights to foreign enemy combatants held inside U.S. territory is inconsistent with the common sense interpretive rule that one does not "hide elephants in mouseholes." *Whitman v. American Trucking Association*, 531 U.S. 457, 468 (2001). Although this rule of construction typically is applied by the court to our enactments, I see no reason why its logic would not operate when applied in reverse, by members of this body to the court's opinions.

For the Hamdi court to have extended constitutional habeas rights to alien enemy soldiers held inside the United States would have been a major decision of enormous consequence to our nation's warmaking ability. As the Hamdi plurality itself noted, "detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war." As I noted yesterday, during World War II the United States detained over 425,000 enemy war prisoners inside the United States. Yet as Rear Admiral Hutson—no supporter of section 7 of the MCA—noted in his testimony at Monday's Judiciary Committee hearing, aside from one petition filed by an American of Italian descent, no habeas petitions challenging detention were filed by any of these World War II enemy combatants. It is simply inconceivable that all of the 425,000 enemy combatants held inside the United States during this period could

have been allowed to sue our government in our courts to challenge their detention. And were their right to do so made to turn on whether they were held inside or outside of the United States, our Armed Forces inevitably would have been forced to find some accommodations for them in foreign territory. And since holding enemy combatants near the war zone is neither practical nor safe, our nation's whole ability to fight a war would be made to turn on whether we could find some third country where we could hold enemy war prisoners. I would submit that this elephant of a result simply will not fit in the small space for it created by the one ambiguous passage in the Hamdi plurality opinion.

For these three reasons, I believe that Senator SPECTER is incorrect to interpret the Hamdi plurality opinion to extend constitutional habeas corpus rights to alien enemy combatants held inside the United States.

Just to conclude by summarizing the point as follows: On eight separate times, the plurality opinion in Hamdi refers to the rights of citizens. That is the question before the court. This is what it rules on. This is our holding. At no point does it extend it to citizens. There is one sentence rather loosely framed that refers to individuals. Had the courts in that decision intended to apply the habeas right to all individuals in the United States rather than citizens, it would most assuredly have said so.

I don't think, with all due respect to my great friend, the chairman of the committee, that relying on that one loose word in one sentence of the opinion overrides all of the other reasoning, all of the other clear statements, and the obvious intent of the opinion to relate it to citizens only. With all due respect, I disagree with the reading of the case and conclude that there is nothing wrong with this legislation before us limiting the rights of habeas to those who are citizens and not extending it to alien enemy combatants.

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

Mr. SPECTER. Madam President, by way of brief reply to the comments of the Senator from Arizona, he argues that the Hamdi decision does not apply to aliens but only to citizens, trying to draw some inferences. But that does not stand up in the face of explicit language by Justice O'Connor to this effect:

All agree that absent suspension the writ of habeas corpus remains available to every individual detained in the United States.

The Senator from Arizona can argue all he wants about inferences, but that hardly stands up to an explicit statement on individuals. And Justice O'Connor knows the difference between referring to an individual or referring to a citizen or referring to an alien. And "individuals" covers both citizens and aliens.

Following the reference to individuals is the citation of the constitutional provision that you can't suspend

habeas corpus except in time of rebellion or invasion.

Buttressing my argument is the *Rasul v. Bush* case where it applied specifically to aliens; and it is true that the consideration was under the statute section 2241. There the Court says that section 2241 “draws no distinction between Americans and aliens held in Federal custody.”

That again buttresses the argument I have made in two respects. First, *Rasul* specifically grants habeas corpus, albeit statutory, to aliens and says there is no distinction. So on the face of the explicit language of the Supreme Court of the United States there is a constitutional requirement, and it is fundamental that Congress cannot legislate in contradiction to a constitutional interpretation of the Supreme Court. That requires a constitutional amendment—not legislation.

I yield the floor.

The PRESIDING OFFICER. Who yields time? The Senator from Vermont.

Mr. LEAHY. Madam President, will the Senator from Pennsylvania yield?

Mr. SPECTER. Madam President, how much time remains under my control?

The PRESIDING OFFICER. Thirty minutes.

Mr. SPECTER. Madam President, I yield 10 minutes to the distinguished Senator from Vermont.

The PRESIDING OFFICER. The Senator from Vermont.

Mr. LEAHY. Thank you, Madam President. If I require further time beyond 10 minutes I will take time from that reserved to the Senator from Vermont.

Let's understand exactly what we are talking about here. There are approximately 12 million lawful permanent residents in the United States today. Some came here initially the way my grandparents did or my wife's parents did. These are people who work for American firms, they raise American kids, they pay American taxes.

Section 7 of the bill before us represents a choice about how to treat them. This bill could have been restricted to traditional notions of enemy combatants—foreign fighters captured on the battlefield—but the drafters of this bill chose not to do so.

Let's be very clear. Once we get past all of the sloganeering, all the fundraising letters, all the sound bites, all the short headlines in the paper, let's be clear about the choice the bill makes. Let's be absolutely clear about what it says to lawful permanent residents of the United States. Then let's decide if it is the right message to send them and if it is really the face of America that we want to show.

Take an example. Imagine you are a law-abiding, lawful, permanent resident, and in your spare time you do charitable fundraising for international relief agencies to lend a helping hand in disasters. You send money abroad to those in need. You are selec-

tive in the charities you support, but you do not discriminate on the grounds of religion. Then one day there is a knock on your door. The Government thinks that the Muslim charity you sent money to may be funneling money to terrorists and thinks you may be involved. And perhaps an overzealous neighbor who saw a group of Muslims come to your House has reported “suspicious behavior.” You are brought in for questioning.

Initially, you are not very worried. After all, this is America. You are innocent, and you have faith in American justice. You know your rights, and you say: I would like to talk to a lawyer. But no lawyer comes. Once again, since you know your rights, you refuse to answer any further questions. Then the interrogators get angry. Then comes solitary confinement, then fierce dogs, then freezing cold that induces hypothermia, then waterboarding, then threats of being sent to a country where you know you will be tortured, then Guantanamo. And then nothing, for years, for decades, for the rest of your life.

That may sound like an experience from some oppressive and authoritarian regime, something that may have happened under the Taliban, something that Saddam Hussein might have ordered or something out of Kafka. There is a reason why that does not and cannot happen in America. It is because we have a protection called habeas corpus, or if you do not like the Latin phrase by which it has been known throughout our history, call it access to the independent Federal courts to review the authority and the legality by which the Government has taken and is holding someone in custody. It is a fundamental protection. It is woven into the fabric of our Nation.

Habeas corpus provides a remedy against arbitrary detentions and constitutional violations. It guarantees an opportunity to go to court, with the aid of a lawyer, to prove that, yes, you are innocent.

As Justice Scalia stated in the *Hamdi* case:

The very core of liberty secured by the Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.

Of course, the remedy that secures that most basic freedom is habeas corpus.

Habeas corpus does not give you any new rights, it just guarantees you have a chance to ask for your basic freedom.

If we pass this bill today, that will be gone for the 12 million lawful, permanent residents who live and work among us, to say nothing of the millions of other legal immigrants and visitors who we welcome to our shores each year. That will be gone for another estimated 11 million immigrants the Senate has been working to bring out of the shadows with comprehensive immigration reform.

The bill before the Senate would not merely suspend the great writ, the

great writ of habeas corpus, it would eliminate it permanently. We do not have to worry about nuances, such as how long it will be suspended. It is gone. Gone.

Over 200 years of jurisprudence in this country, and following an hour of debate, we get rid of it. My God, have any Members of this Senate gone back and read their oath of office upholding the Constitution? This cuts off all habeas petitions, not just those founded on relatively technical claims but those founded on claims of complete innocence.

We hundred Members in the Senate, we privileged men and women, are supposed to be the conscience of the Nation. We are about to put the darkest blot possible on this Nation's conscience. It would not be limited to enemy combatants in the traditional sense of foreign fighters captured in the battlefield, but it would apply to any alien picked up anywhere in the world and suspected of possibly supporting enemies of the United States.

We do not need this bill for those truly captured on the battlefield who have taken up arms against the United States. That is why the definition of enemy combatant has been so expansively redefined behind closed doors in the dark of night.

This bill is designed instead to sweep others into the net. It would not even require an administrative determination that the Government's suspicions have a reasonable basis in fact. By its plain language, it would deny all access to the courts to any alien awaiting—what a bureaucratic term, to determine your basic human rights, “any alien awaiting”—a Government determination as to whether the alien is an enemy combatant. The Government would be free to delay as long as it liked—for years, for decades, for the length of the conflict which is so undefined and may last for generations.

One need only look at Guantanamo. Even our own Government says a number of people are in there by mistake, but we will not get around to making that determination. Maybe in 5 years, maybe 10, maybe 20, maybe 30. And we wonder why some of our closest allies ask us, what in heaven's name has happened to the conscience and moral compass of this great Nation? Are we so terrified of some terrorists around this country that we will run scared and hide? Is that what we will do, tear down all the structures of liberty in this country because we are so frightened?

It brings to mind that famous passage in “A Man for All Seasons.” Thomas More is talking to his protege, William Roper, and says something to the effect that England is planted thick like a forest with laws. He said, Would you cut down those laws to get after the devil? And Roper said, of course I would cut down all the laws in England to get the devil. And then More said, Oh, and when the last law was down and the devil turned on you, what will protect you?

This legislation is cutting down laws that protect all 100 of us, and now almost 300 million Americans. It is amazing the Senate would be talking about doing something such as this, especially after the example of Guantanamo. We can pick up people intentionally or by mistake and hold them forever.

How many speeches have I heard in my 32 years in the Senate during the cold war and after, criticizing totalitarian governments that do things such as that? And we can stand here proudly and say it would never happen in America; this would never happen in America because we have rights, we have habeas corpus, and people are protected.

I am not here speculating about what the bill says. This is not a critic's characterization of the bill. It is what the bill plainly says, on its face. It is what the Bush-Cheney administration is demanding. It is what any Member who votes against the Specter-Leahy amendment and for the bill today is going to be endorsing.

The habeas stripping provisions in the bill go far beyond what Congress did in the Detainee Treatment Act in three respects. First, as the Supreme Court pointed out in *Hamdan*, the DTA removed habeas jurisdiction only prospectively, for future cases. This new bill strips habeas jurisdiction retroactively, even for pending cases. This is an extraordinary action that runs counter to long-held U.S. policies disfavoring retroactive legislation.

Second, the DTA applied only to detainees at Guantanamo. This new legislation goes far beyond Guantanamo and strips the right to habeas of any alien living in the United States if the alien has been determined an enemy combatant, or even if he is awaiting a determination—and that wait can take years and years and years. Then, 20 years later, you can say: We made a mistake. Tough. It allows holding an alien, any alien, forever, without the right of habeas corpus, while the Government makes up its mind as to whether he is an enemy combatant.

And third, the impact of those provisions is extended by the new definition of enemy combatant proposed in the current bill. The bill extends the definition to include persons who supported hostilities against the United States, even if they did not engage in armed conflict against the United States or its allies. That, again, is an extraordinary extension of existing laws.

If we vote today to abolish rights of access to the justice system to any alien detainee who is suspected—not determined, not even charged; these people are not even charged, just suspected—of assisting terrorists, that will do by the back door what cannot be done up front. That will remove the checks in our legal system that provide against arbitrarily detaining people for life without charge. It will remove the mechanism the Constitution provides

to stop the Government from overreaching and lawlessness.

This is so wrong. It grieves me, after three decades in this Senate, to stand here knowing we are thinking of doing this. It is so wrong. It is unconstitutional. It is un-American. It is designed to ensure the Bush-Cheney administration will never again be embarrassed by a U.S. Supreme Court decision reviewing its unlawful abuses of power. The Supreme Court said, you abused your power. And they said, we will fix that. We have a rubberstamp Congress that will set that aside and give us power that nobody—no king or anyone else setting foot in this land—had ever thought of having.

In fact, the irony is this conservative Supreme Court—seven out of nine members are Republicans—has been the only check on the Bush-Cheney administration because Congress has not had the courage to do that. Congress has not had the courage to uphold its own oath of office.

With this bill, the Congress will have completed the job of eviscerating its role as a check and balance on the administration. The Senate has turned its back on the Warner-Levin bill, a bipartisan bill reported by the Committee on Armed Services, so it can jam through the Bush-Cheney bill. This bill gives up the ghost. It is not a check on the administration but a voucher for future wrongdoing.

Abolishing habeas corpus for anyone the Government thinks might have assisted enemies of the United States is unnecessary and morally wrong, a betrayal of the most basic values of freedom for which America stands. It makes a mockery of the Bush-Cheney administration's lofty rhetoric about exporting freedom across the globe. We can export freedom across the globe, but we will cut it out in our own country. What hypocrisy.

I read yesterday from former Secretary of State Colin Powell's letter in which he voiced concern about our moral authority in the war against terrorism. The general and former head of the Joint Chiefs of Staff and former Secretary of State was right.

Admiral John Hutson testified before the Judiciary Committee that stripping the courts of habeas corpus jurisdiction was inconsistent with our history and our tradition. The admiral concluded:

We don't need to do this. America is too strong.

When we do this, America will not be a stronger nation. America will be a weaker nation. We will be weaker because we turned our back on our Constitution. We turned our back on our rights. We turned our back on our history.

I ask unanimous consent to have printed in the RECORD a letter from more than 60 law school deans and professors who state that the Congress would gravely deserve our global reprobation by doing this.

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

SEPTEMBER 27, 2006.

To United States Senators and Members of Congress.

DEAR SENATORS AND REPRESENTATIVES: We, the undersigned law deans and professors, write in our individual capacity to express our deep concern about two bills that are rapidly moving through Congress. These bills, the Military Commissions Act and the National Security Surveillance Act, would make the indefinite detention of those labeled enemy combatants and the executive's program of domestic surveillance effectively unreviewable by any independent judge sitting in public session. While different in character, both bills unwisely contract the jurisdiction of courts and deprive them of the ability to decide critical issues that must be subject to judicial review in any free and democratic society.

Although the Military Commissions Act of 2006 (S. 3929/S. 3930) was drafted to improve and codify military commission procedures following the Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*, it summarily eliminates the right of habeas corpus for those detained by the U.S. government who have been or may be deemed to be enemy combatants: Detainees will have no ability to challenge the conditions of their detention in court unless and until the administration decides to try them before a military commission. Those who are not tried will have no recourse to any independent court at any time. Enacting this provision into law would be a grievous error. As several witnesses testified before the Senate Judiciary Committee on Monday, Article I, Section 9 of the Constitution specifies 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," conditions that are plainly not satisfied here.

Similarly, the National Security Surveillance Act of 2006 (S. 3876) would strip courts of jurisdiction over pending cases challenging the legality of the administration's domestic spying program and would transfer these cases to the court established by the Foreign Intelligence Surveillance Act of 1978 (FISA). The transfer of these cases to a secret court that issues secret decisions would shield the administration's electronic surveillance program from effective and transparent judicial scrutiny.

These bills exhibit a profound and unwarranted distrust of the judiciary. The historic role of the courts is to ensure that the legislature promulgates and the executive faithfully executes the law of the land with due respect for the rights of even the most despised. Any protections embodied in these bills would be rendered worthless unless the courts can hold the executive accountable to enacted law. Moreover, the bills ignore a central teaching of the Supreme Court's decision in *Hamdan v. Rumsfeld*: the importance of shared institutional powers and checks and balances in crafting lawful and sustainable responses to the war on terror. Absent effective judicial review, there will be no way to enforce any of the limitations in either bill that Congress is currently seeking to place upon the executive's claimed power.

We recognize the need to prevent and punish crimes of terrorism and to investigate and prosecute such crimes. But depriving our courts of jurisdiction to determine whether the executive has acted properly when it detains individuals in this effort would endanger the rights of our own soldiers and nationals abroad, by limiting our ability to demand

that they be provided the protections that we deny to others. Eliminating effective judicial review of executive acts as significant as detention and domestic surveillance cannot be squared with the principles of transparency and rule of law on which our constitutional democracy rests.

The Congress would gravely deserve our global reputation as a law-abiding country by enacting bills that seek to combat terrorism by stripping judicial review. We respectfully urge you to amend the judicial review provisions of the Military Commissions Act and the National Security Surveillance Act to ensure that the rights granted by those bills will be enforceable and reviewable in a court of law.

Sincerely,

James J. Alfani, President and Dean, South Texas College of Law.

Michelle J. Anderson, Dean, CUNY School of Law.

Katharine T. Bartlett, Dean and A. Kenneth Pye Professor of Law, Duke Law School.

Molly K. Beutz, Yale Law School.

Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School.

Harold J. Krent, Dean & Professor, Chicago-Kent College of Law.

Lydia Pallas Loren, Interim Dean and Professor of Law, Lewis & Clark Law School.

Dennis Lynch, Dean, University of Miami School of Law.

John Charles Boger, Dean, School of Law, University of North Carolina at Chapel Hill.

Jeffrey S. Brand, Dean, Professor and Chairman, Center for Law & Global Justice, University of San Francisco Law School.

Katherine S. Broderick, Dean and Professor, University of the District of Columbia, David A. Clarke School of Law.

Brian Bromberger, Dean and Professor, Loyola Law School.

Robert Butkin, Dean and Professor of Law, University of Tulsa College of Law.

Evan Caminker, Dean and Professor of Law, University of Michigan Law School.

Judge John L. Carroll, Dean and Ethel P. Malugen Professor of Law, Cumberland School of Law, Samford University.

Neil H. Cogan, Vice President and Dean, Whittier Law School.

Mary Crossley, Dean and Professor of Law, University of Pittsburgh School of Law.

Mary C. Daly, Dean & John V. Brennan Professor Law and Ethics, St. John's University School of Law.

Richard A. Matasar, President and Dean, New York Law School.

Phillip J. McConaughay, Dean and Donald J. Farage Professor of Law, The Pennsylvania State University, Dickinson School of Law.

Richard J. Morgan, Dean William S. Boyd School of Law, University of Nevada, Las Vegas.

Fred L. Morrison, Popham Haik Schnobrich/Lindquist & Vennum Professor of Law and Interim Co-Dean, University of Minnesota Law School.

Kenneth M. Murchison, James E. & Betty M. Phillips Professor of Law, Louisiana State University, Paul M. Hebert Law Center.

Cynthia Nance, Dean and Professor, University of Arkansas, School of Law.

Nell Jessup Newton, William B. Lockhart Professor of Law, Chancellor and Dean, University of California at Hastings College of Law.

Maureen A. O'Rourke, Dean and Professor of Law, Michaels Faculty Research Scholar, Boston University School of Law.

Margaret L. Paris, Dean, Elmer Sahlstrom Senior Fellow, University of Oregon School of Law.

Stuart L. Deutsch, Dean and Professor of Law, Rutgers School of Law-Newark.

Stephen Dycus, Professor, Vermont Law School.

Allen K. Easley, President and Dean, William Mitchell College of Law.

Christopher Edley, Jr., Dean and Professor, Boalt Hall School of Law, UC Berkeley.

Cynthia L. Fountaine, Interim Dean and Professor of Law, Texas Wesleyan University School of Law.

Stephen J. Friedman, Dean, Pace University School of Law.

Dean Bryant G. Garth, Southwestern Law School, Los Angeles, California.

Charles W. Goldner, Jr., Dean and Professor of Law, William H. Bowen School of Law, University of Arkansas at Little Rock.

Mark C. Gordon, Dean and Professor of Law, University of Detroit Mercy School of Law.

Thomas F. Guernsey, President and Dean, Albany Law School.

Don Guter, Dean, Duquesne University School of Law.

Jack A. Guttenberg Dean and Professor of Law.

LeRoy Pernel, Dean and Professor, Northern Illinois University College of Law.

Rex R. Perschbacher, Dean and Professor of Law, University of California at Davis School of Law.

Raymond C. Pierce, Dean and Professor of Law, North Carolina Central University School of Law.

Peter Pitegoff Dean and Professor of Law, University of Maine School of Law.

Efrén Rivera Ramos, Dean, School of Law, University of Puerto Rico.

William J. Rich, Interim Dean and Professor of Law, Washburn University School of Law.

James V. Rowan, Associate Dean, Northeastern University School of Law, Boston, Massachusetts.

Edward Rubin, Dean and John Wade-Kent Syverud Professor of Law, Vanderbilt University.

David Rudenstine, Dean, Cardozo School of Law.

Lawrence G. Sager, Dean, University of Texas School of Law, Alice Jane Drysdale Sheffield Regents Chair in Law, Capital University Law School.

Joseph D. Harbaugh, Dean and Professor, Shepard Broad Law Center, Nova Southeastern University.

Lawrence K. Hellman, Dean and Professor of Law, Oklahoma City University School of Law.

Patrick E. Hobbs, Dean and Professor of Law, Seton Hall University School of Law.

José Roberto Juárez, Jr., Dean and Professor of Law, University of Denver Sturm College of Law.

W. H. Knight, Jr., Dean and Professor, University of Washington School of Law, Seattle, Washington.

Brad Saxton, Dean & Professor of Law, Quinnipiac University School of Law.

Stewart J. Schwab, the Allan R. Tessler Dean & Professor of Law, Cornell Law School.

Geoffrey B. Shields, President and Dean and Professor of Law, Vermont Law School.

Aviam Soifer, Dean and Professor, William S. Richardson School of Law, University of Hawai'i.

Emily A. Spieler, Dean, Edwin Hadley Professor of Law, Northeastern University School of Law.

Kurt A. Strasser, Interim Dean and Phillip I. Blumberg Professor, University of Connecticut Law School.

Leonard P. Strickman, Dean, Florida International University, College of Law.

Steven L. Willborn, Dean & Schmoker Professor of Law, University of Nebraska College of Law.

Frank H. Wu, Dean, Wayne State University Law School.

David Yellen, Dean and Professor, Loyola University Chicago School of Law.

Mr. LEAHY. Kenneth Starr, the former independent counsel and Solicitor General for the first President Bush, wrote that the Constitution's conditions for suspending habeas corpus have not been met and that doing it would be problematic.

The post-9/11 world requires us to make adjustments. In the original PATRIOT Act five years ago, we made adjustments to accommodate the needs of the Executive, and more recently, we sought to fine-tune those adjustments. I think some of those adjustments sacrificed civil liberties unnecessarily, but I also believe that many provisions in the PATRIOT Act were appropriate. I wrote many of the provisions of the PATRIOT Act, and I voted for it.

This bill is of an entirely different nature. The PATRIOT Act took a cautious approach to civil liberties and while it may have gone too far in some areas, this bill goes so much further than that. It takes an entirely dismissive and cavalier approach to basic human rights and to our Constitution.

In the aftermath of 9/11, Congress provided in section 412 of the PATRIOT Act that an alien may be held without charge if, and only if, the Attorney General certifies that he is a terrorist or that he is engaged in activity that endangers the national security. He may be held for seven days, after which he must be placed in removal proceedings, charged with a crime, or released. There is judicial review through habeas corpus proceedings, with appeal to the D.C. Circuit.

Compare that to section 7 of the current bill. The current bill does not provide for judicial review. It would preclude it. It does not require a certification by the Attorney General that the alien is a terrorist. It would apply if the alien was "awaiting" a Government determination whether the alien is an "enemy combatant." And it is not limited to seven days. It would enable the Government to detain an alien for life without any recourse whatsoever to justice.

What has changed in the past 5 years that justifies not merely suspending but abolishing the writ of habeas corpus for a broad category of people who have not been found guilty, who have not even been charged with any crime? What has turned us? What has made us so frightened as a nation that now the United States will say, we can pick up somebody on suspicion, hold them forever, they have no right to even ask why they are being held, and besides that, we will not even charge them with anything, we will just hold them? What has changed in the last 5 years?

Is our Government is so weak or so inept and our people so terrified that we have to do what no bomb or attack could ever do, and that is take away

the very freedoms that define America? We fought two world wars, we fought a civil war, we fought a revolutionary war, all these wars to protect those rights.

And now, think of those people who have given their lives, who fought so hard to protect those rights. What do we do? We sit here, privileged people of the Senate, and we turn our backs on that. We throw away those rights.

Why would we allow the terrorists to win by doing to ourselves what they could never do and abandoning the principles for which so many Americans today and throughout our history have fought and sacrificed? What has happened that the Senate is willing to turn America from a bastion of freedom into a cauldron of suspicion, ruled by a government of unchecked power?

Under the Constitution, a suspension of the writ may only be justified during an invasion or a rebellion, when the public safety demands it. Six weeks after the deadliest attack on American soil in our history, the Congress that passed the PATRIOT Act rightly concluded that a suspension of the writ would not be justified.

But now, 6 weeks before a midterm election, as the fundraising letters are running around, the Bush-Cheney administration and its supplicants in Congress deem a complete abolition of the writ the highest priority, a priority so urgent that we are allowed no time to properly review, debate, and amend a bill we first saw in its current bill less than 72 hours ago. There must be a lot of fundraising letters going out.

Notwithstanding the harm the administration has done to national security—first by missing their chance to stop September 11 and then with their mismanaged misadventures in Iraq—there is no new national security crisis. Apparently, there is only a Republican political crisis. And that, as we know, is why this un-American, unconstitutional legislation is before us today.

We have a profoundly important and dangerous choice to make today. The danger is not that we adopt a pre-9/11 mentality. We adopted a post-9/11 mentality in the PATRIOT Act when we declined to suspend the writ, and we can do so again today.

The danger, as Senator FEINGOLD has stated in a different context, is that we adopt a pre-1776 mentality, one that dismisses the Constitution on which our American freedoms are founded.

Actually, it is worse than that. Habeas corpus was the most basic protection of freedom that Englishmen secured from their King in the Magna Carta. The mentality adopted by this bill, in abolishing habeas corpus for a broad swath of people, is not a pre-9/11 mentality, it is a pre-1215—that is the year, 1215—mentality, a mentality we did away with in the Magna Carta and our own Constitution.

Every one of us has sworn an oath to uphold the Constitution. In order to uphold that oath, I believe we have a

duty to vote for this amendment—the Specter-Leahy amendment—and against this irresponsible and flagrantly unconstitutional bill. That is what I will do.

The Senator from Vermont answers to the Constitution and to his conscience. I do not answer to political pressure.

Madam President, I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

The Senator from Virginia.

Mr. WARNER. Madam President, we have colleagues on this side who are ready to proceed. Now, there is a great deal of time left on the other side, but in order of preference, I say to Senator SESSIONS, if you are ready to proceed.

Mr. SESSIONS. Madam President, I will be pleased to do so.

Mr. WARNER. Madam President, might I inquire of the amount of time under my control for those in opposition to the amendment?

The PRESIDING OFFICER. Senator WARNER controls 11 minutes.

Mr. WARNER. Eleven minutes.

The PRESIDING OFFICER. Senator SPECTER controls 20 minutes.

Mr. SESSIONS. Madam President, if the chairman would approve, I would ask for 3 minutes.

Mr. WARNER. Yes. And following that, Senator CORNYN for such time as he may need.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. Madam President, habeas corpus—the right to have your complaints heard while in custody—is a part of our Constitution. But we have to remember habeas corpus did not mean everything in the whole world when it was adopted. So what did “habeas” mean? What does it mean today and at the time it was adopted? It was never, ever, ever, ever intended or imagined that during the War of 1812, if British soldiers were captured burning the Capitol of the United States—as they did—that they would have been given habeas corpus rights. It was never thought to be. Habeas corpus was applied to citizens, really, at that time. I believe that is so plain as to be without dispute.

So to say: Habeas corpus, what does it mean? What did those words mean when the people ratified it? They did not intend to provide it to those who were attacking the United States of America. We provide special protections for prisoners of war who lawfully conduct a war that might be against the United States. We give them great protections. But unlawful combatants, the kind we are dealing with today, have never been given the full protections of the Geneva Conventions.

Second, my time is limited, and I have been so impressed with the debate that has gone on with Senators KYL and CORNYN and GRAHAM, and I associate myself generally with those remarks, but I want to recall that in a spate of an effort to appease critics and

those who had “vague concerns,” not too many years ago, this Congress passed legislation that said that CIA-gathered information could not be shared with the FBI. We passed a law in this Congress to appease the left in America, the critics of our efforts against communism, primarily. And we have put a wall between the CIA and FBI.

So that was politically good. Everybody must have been happy about that. I was not in the Senate then. Then they complained that the CIA was out talking with people who had criminal records who may have been involved in violence, and this was somehow making our CIA complicitous in dealing with dangerous people, and we banned that. We passed a statute that eliminated that. And everybody felt real good that we had done something special.

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

Mr. SESSIONS. Madam President, I ask unanimous consent for an additional minute.

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

Mr. SESSIONS. After 9/11, we realized both of those were errors of the heart perhaps, but of the brain. And so what happened? We reversed both of them. We reversed them both. And we need to be sure that the legislation we are dealing with today does not create a long-term battle with the courts over everybody who is being detained. That is a function of the military and the executive branch to conduct a war.

Madam President, I yield the floor.

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

Mr. FEINGOLD. Madam President, I understand I have 6 minutes on the bill in general.

The PRESIDING OFFICER. The Senator is correct.

Mr. FEINGOLD. Madam President, I oppose the Military Commissions Act.

Let me be clear: I welcomed efforts to bring terrorists to justice. Actually, it is about time. This administration has too long been distracted by the war in Iraq from the fight against al-Qaida. We need a renewed focus on the terrorist networks that present the greatest threat to this country.

We would not be where we are today, 5 years after September 11, with not a single Guantanamo Bay detainee having been brought to trial, if the President had come to Congress in the first place, rather than unilaterally creating military commissions that did not comply with the law. The Hamdan decision was a historic rebuke to an administration that has acted for years as if it is above the law.

I have hoped that we would take this opportunity to pass legislation that allows us to proceed in accordance with our laws and our values. That is what separates America from our enemies. These trials, conducted appropriately, have the potential to demonstrate to

the world that our democratic constitutional system of government is our greatest strength in fighting those who attack us.

That is why I am saddened I must oppose this legislation because the trials conducted under this legislation may send a very different signal to the world, one that I fear will put our troops and personnel in jeopardy both now and in future conflicts. To take just a few examples, this legislation would permit an individual to be convicted on the basis of coerced testimony and hearsay, would not allow full judicial review of the conviction, and yet would allow someone convicted under these rules to be put to death. That is just simply unacceptable.

Not only that, this legislation would deny detainees at Guantanamo Bay and elsewhere—people who have been held for years but have not been tried or even charged with any crime—the ability to challenge their detention in court. The legislation before us is better than that originally proposed by the President, which would have largely codified the procedures the Supreme Court has already rejected. And that is thanks to the efforts of some of my Republican colleagues, for whom I have great respect and admiration. But this bill remains deeply flawed, and I cannot support it.

One of the most disturbing provisions of this bill eliminates the right of habeas corpus for those detained as enemy combatants. I support an amendment by Senator SPECTER to strike that provision from the bill.

Habeas corpus is a fundamental recognition that in America the Government does not have the power to detain people indefinitely and arbitrarily. And in America, the courts must have the power to review the legality of executive detention decisions.

This bill would fundamentally alter that historical equation. Faced with an executive branch that has detained hundreds of people without trial for years now, it would eliminate the right of habeas corpus.

Under this legislation, some individuals, at the designation of the executive branch alone, could be picked up, even in the United States, and held indefinitely without trial and without any access whatsoever to the courts. They would not be able to call upon the laws of our great Nation to challenge their detention because they would have been put outside the reach of the law.

Some have suggested that terrorists who take up arms against this country should not be allowed to challenge their detention in court. But that argument is circular. The writ of habeas allows those who might be mistakenly detained to challenge their detention in court before a neutral decision-maker. The alternative is to allow people to be detained indefinitely with no ability to argue that they are not, in fact—that they are not, in fact—enemy combatants.

There is another reason we must not deprive detainees of habeas corpus, and that is the fact that the American system of government is supposed to set an example for the world as a beacon of democracy.

A group of retired diplomats sent a very moving letter to explain their concerns about this habeas-stripping provision. Here is what they said:

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.

Many dedicated patriotic Americans share these grave reservations about this particular provision of this bill. Unfortunately, the suspension of the Great Writ is not the only problem with this legislation. Unfortunately, I do not have time to discuss them all.

But the bill also appears to permit individuals to be convicted, and even sentenced to death, on the basis of coerced testimony. According to the legislation, statements obtained through cruel, inhuman, or degrading treatment, as long as it was obtained prior to December 2005, when the McCain amendment became law, would apparently be admissible in many instances in these military commissions.

Now, it is true that the bill would require the commission to find these statements have sufficient and probative value. But why would we go down this road of trying to convict people based on statements obtained through cruel, inhuman, or degrading interrogation techniques? Either we are a nation that stands against this type of cruelty and for the rule of law or we are not. We cannot have it both ways.

In closing, let me do something I do not do very often, and that is quote my former colleague, John Ashcroft. According to the New York Times, in a private meeting of high-level officials in 2003 about the military commission structure, then-Attorney General Ashcroft reportedly said:

Timothy McVeigh was one of the worst killers in U.S. history. But at least we had fair procedures for him.

How sad that this Congress would seek to pass legislation about which the same cannot be said.

Mr. President, I strongly support Senator SPECTER's amendment to strike the habeas provision from this bill.

At its most fundamental, the writ of habeas corpus protects against abuse of government power. It ensures that individuals detained by the government without trial have a method to challenge their detention. Habeas corpus is a fundamental recognition that in America, the government does not have the power to detain people indefinitely and arbitrarily. And that in America, the courts must have the power to review the legality of executive detention decisions.

It goes without saying that this is not a new concept. Habeas corpus is a

longstanding vital part of our American tradition, and is enshrined in the U.S. Constitution, article 1, section 9, where it 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.

The Founders recognized the importance of this right. Alexander Hamilton in *Federalist Paper No. 84* explained the importance of habeas corpus, and its centrality to the American system of government and the concept of personal liberty. He quoted William Blackstone, who warned against the “dangerous engine of arbitrary government” that could result from unchallengeable confinement, and the “bulwark” of habeas corpus against this abuse of government power.

As a group of retired judges wrote to Congress, habeas corpus “safeguards the most hallowed judicial role in our constitutional democracy—ensuring that no man is imprisoned unlawfully.”

This bill would fundamentally alter that historical equation. Faced with an administration that has detained hundreds of people without trial for years now, it would eliminate the right of habeas corpus for anyone the executive branch labels an alien “enemy combatant.”

That's right. It would eliminate the right of habeas corpus for any alien detained by the United States, anywhere in the world, and designated by the government as an enemy combatant. And it would do so in the face of years of abuses of power that—thus far—have been reined in primarily through habeas corpus challenges in our Federal courts.

Let me be clear about what it does. Under this legislation, some individuals, at the designation of the executive branch alone, could be picked up, even in the United States, and held indefinitely without trial and without any access whatsoever to the courts. They would not be able to call upon the laws of our great Nation to challenge their detention because they would have been put outside the reach of the law.

That is unacceptable, and it almost surely violates our Constitution. The rule of law is something deeper and more profound than the collection of laws that we have on paper. It is a principle that undergirds our entire society, and that has been central to our nation since its very founding. As Thomas Paine explained at the time of our country's birth in 1776, the rule of law is that principle, that paramount commitment, “that in America, the law is king. . . . and there ought to be no other.” The rule of law tells us that no man is above the law—and as an extension of that principle—that no executive will be able to act unchecked by our legal system.

Yet by stripping the habeas corpus rights of any individual who the executive branch decides to designate as an enemy combatant, that is precisely

where we end up—with an executive branch subject to no external check whatsoever. With an executive branch that is king.

Now, it may well be that this provision will be found unconstitutional as an illegal suspension of the writ of habeas corpus. But that determination will take years of protracted litigation. And for what? The President has been urging Congress to pass legislation so that Khalid Sheikh Mohammed, the alleged mastermind of 9-11, and other “high value” al-Qaida detainees can be tried. This bill is supposed to create a framework for prosecuting unlawful enemy combatants for war crimes that the Supreme Court can accept following the decision this summer in the Hamdan case. There is absolutely no reason why we need to restrict judicial review of the detention of individuals who have not been charged with any crime.

That raises another point. People who are actually subject to trial by military commission will at least be able to argue their innocence before some tribunal, even if I have grave concerns about how those military commissions would proceed under this legislation. But people who have not been charged with any crime will have no guaranteed venue in which to proclaim and prove their innocence. As three retired generals and admirals explained in a letter to Congress:

The effect would be to give greater protections to the likes of Khalid Sheikh Mohammed than to the vast majority of the Guantanamo detainees.

How does this make any sense? Why would we turn our back on hundreds of years of history and our Nation’s commitment to liberty?

We have already, in the Detainee Treatment Act, said that no new habeas challenges can be brought by detainees at Guantanamo Bay. The Supreme Court found in *Hamdan v. Rumsfeld* that the Detainee Treatment Act did not apply to Hamdan’s pending habeas petition, and went forward with considering his argument that the President’s military commission structure was illegal. And I would think that we should all be pleased that it did so, because otherwise we would have had to wait for several more years for Hamdan’s trial to be completed before he would have had any chance to challenge the President’s military commission system in court. The Supreme Court’s decision striking down those commissions would have occurred several years later. And we would be right back where we are now, but with several more years of delay.

There is another reason why we must not deprive detainees of habeas corpus, and that is the fact that the American system of government is supposed to set an example for the world, as a beacon of democracy. And this provision will only serve to harm others’ perception of our system of government.

A group of retired diplomats sent a very moving letter explaining their

concerns about this habeas-stripping provision. Here is what they said:

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.

They went on to explain further:

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.

That is a direct quote.

Let’s not go down this road. Let’s remove this provision from the bill.

As is already clear, I’m not the only one who has serious concerns about this provision. There is bipartisan support for this amendment. And Congress has received numerous letters objecting to the habeas provision, including from Kenneth Starr; a group of former diplomats; two different groups of law professors; a group of retired judges; and a group of retired generals. Many, many dedicated patriotic Americans have grave reservations about this particular provision of the bill.

They have reservations not because they sympathize with suspected terrorists. Not because they are soft on national security. Not because they don’t understand the threat we face. No. They, and we in the Senate who support this amendment, are concerned about this provision because we care about the Constitution, because we care about the image that America presents to the world as we fight the terrorists. Because we know that the writ of habeas corpus provides one of the most significant protections of human freedom against arbitrary government action ever created. If we sacrifice it here, we will head down a road that history will judge harshly and our descendants will regret.

Let me close with something that this group of retired judges said.

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. . . .

Mr. President, we must not imperil our proud history. We must not abandon the Great Writ. We must not jeopardize our Nation’s proud traditions and principles by suspending the writ of habeas corpus, and permitting our government to pick people up off the street, even in U.S. cities, and detain them indefinitely without court review. That is not what America is about.

Madam President, I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Madam President, I ask unanimous consent for 3 minutes from our time.

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

Mr. CORNYN. First of all, Madam President, I would like to point out

there are many myths about this legislation. We need to get to the facts and get to the truth so people can understand what the choices are.

Our distinguished colleague from Wisconsin, in my view, also perpetrated another myth by saying this war is all about Iraq, when, in fact, the new leader of al-Qaida in Iraq, succeeding al-Zarqawi, just reported in an Associated Press story that 4,000 al-Qaida foreign fighters have been killed in Iraq due to the war effort there. But this is a global war, and it requires a uniformed treatment of the terrorists in a way that reflects our values but also the fact that we are at war.

I think our colleagues need to be reminded of legislation which we passed in December of 2005, known as the Detainee Treatment Act. When people come here and suggest that we are stripping all legal rights from terrorists who are detained at Guantanamo Bay, they are simply flying in the face of the Detainee Treatment Act that we passed in December 2005, which provides not only a review through a combatant status review tribunal, with elaborate procedures to make sure there is a fair hearing, but then a right to appeal to the District of Columbia Circuit Court of Appeals, not only to make sure that the right standards were applied—that is, whether the military applied the right rules to the facts—but also to attack the constitutionality of the system should they choose to do so. So those who claim we are simply stripping habeas corpus rights are simply flying in the face of the facts as laid out in the Detainee Treatment Act.

Now, the question may be: Are we going to provide what the law requires? Are we going to provide additional rights and privileges that some would like to confer upon these high-value detainees located at Guantanamo Bay? But the fact is, to do what the proponents of this amendment propose would be to divert our soldiers from the battlefield and to tie their hands in ways with frivolous litigation and appeals. And the last thing that I would think any of us would want to do would be to provide an easy means for terrorists to sue U.S. troops in U.S. courts, particularly when it is not required by the Constitution, laws of the United States, not mandated by the Supreme Court, and we have provided an adequate substitute remedy, which I believe is entirely consistent with the U.S. Supreme Court’s decisions in this area.

We have provided an avenue or a process by which these detainees can have their rights protected, such rights as they have being unlawful combatants attacking innocent civilians. America is conferring rights upon them that we do not have to confer, but we are conferring them because we believe there ought to be a fair process and we ought to be consistent with our Constitution and with the decisions of the U.S. Supreme Court.

The last thing I would think any of us would want to do would be to tie the hands of our soldiers to permit terrorists to sue U.S. troops in Federal court at will.

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

The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I ask unanimous consent for 10 minutes from Senator WARNER's side on the bill.

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

Mr. BOND. Mr. President, I appreciate the opportunity to talk generally about the bill. I have already spoken about the importance of not affording habeas corpus to the unlawful combatants when they have more protections than international law requires, or than any other country provides.

Speaking on the bill, for the last 5 years, our most important job has been to protect our families from another terrorist attack.

Our children, our mothers, fathers, grandparents, and grandchildren—none of them deserved to die in the 9/11 attacks; none deserve to die in another terrorist attack. That is why we are doing everything we can to protect our families by stopping terrorists, capturing them, learning their secrets, foiling their plots, and bringing the terrorists to justice.

Through our hard work, there has not been another direct attack on U.S. soil since 9/11. We have worked hard to prevent and stop attacks in the last 5 years and must continue to prevent future attacks. We dramatically boosted airport and airline security. We hired new airport screeners, implemented new checks, and even put armed agents on flights where necessary.

We added thousands of new FBI agents, thousands of new intelligence officers, and increased their budgets by billions to provide new armies against terrorism.

We passed the PATRIOT Act to provide the tools needed to discover terrorist plots and stop them. We reorganized our intelligence agencies to bring a single focus and purpose against terrorism.

We tore down the walls between law enforcement and intelligence to get terror planning and plot information to authorities as quick as possible.

All of this is going on as I speak, as we sleep at night, as our children go to school, we are fighting the war on terrorism.

The President recently highlighted some of the successes we have had because of our terror fighting tools and efforts. He recounted how we have captured terrorists, used new tools to learn their secrets, captured additional terrorists, connected the dots of their conspiracies, and foiled their terror attack plans.

But now some want to tie the hands of our terror fighters, they want to take away the tools we use to fight terror—handcuff us, hamper us—in our fight to protect our families.

It's not new, really. Partisans have slowed our efforts to fight terror every step of the way.

Many on the other side voted against the PATRIOT Act.

Many blocked reauthorization of the PATRIOT Act for months. The Democrat Leader actually boasted, "We killed the PATRIOT Act."

Thank Heavens that wasn't true. Now, I know that they all love our country. They are not unpatriotic. They just don't understand the terrorist enemies we face.

These critics are not willing to do what is necessary to protect fully our families from terrorists.

You don't have to take my word for it, just look at their record over the last 5 years. Whether or not you would say terror war critics have a weak record on terror, they have certainly tried to block, slow down, and take away our terror fighting tools.

Some congressional Democrats voted to cut and run from Iraq. Nothing would embolden terrorists more than to see the U.S. turn tail and run home.

Osama bin Laden cited America quitting Somalia, and failing to respond to the U.S.S. *Cole* bombing, as signs of U.S. weakness and vulnerability. We all know what happened later.

Democrats in the Senate have blocked the appointment of senior anti-terror officials. The 9/11 commission report recommended better coordination between law enforcement and intelligence officials. Only last week did Democrats stop blocking the appointment of the senior Justice Department official for National Security.

Partisans readily spread classified information leaked to the public or the media. They call news conferences to highlight cherry-picked intelligence information, or quote newspaper articles betraying our Nation's secret terror fighting programs. Don't they think this encourages the enemy or demoralizes our troops or allies?

Some propose to handcuff our ability to discover terrorist plots. They propose to make it hard to listen in on a potential terrorist calling from a foreign country, or to a foreign country to discuss terror plans.

If al-Qaida calls in, we ought to be listening. That is authorized under the Constitution. The Constitution clearly gives the President the power to intercept phone calls under the foreign intelligence exception in the amendment.

In my meetings with intelligence officials both abroad and here at home I have heard repeatedly how the disclosure, not only of classified information, but also of our interrogation techniques, are extremely damaging.

Our personnel have encountered enemy combatants trained to resist disclosed interrogation techniques thanks to leakers in our media.

If we lay out precisely the techniques that will be used and we print them in the Federal Register, they will be in an al-Qaida training manual within 48 hours.

I'm pleased that with the current Military Commissions legislation moving forward, we have clarified our strict adherence to standards that forbid torture in any way, shape or form and we are allowing our CIA to move forward with a humane interrogation program whose techniques will not be published in the Federal Register, or even worse, in another newspaper disclosure.

Critics support trial procedures that would give terrorists secret intelligence information.

Why on Earth would we hand over classified evidence and information to terrorists so that information could be used against us in the future?

Remember the 1993 World Trade Center bombing? The prosecution of terror suspects there involved giving over 200 names of terror suspects to the attorneys representing the terrorists. They gave them that in a trial, and some months later, after an investigation of the bombings in Africa, we captured the al-Qaida documents which had all of that information that had been given to the attorneys. So once you give it to a detainee or the detainee's attorney, you can count on it getting out.

One other thing is important. Some would propose exposing our terror fighters to legal liability. They oppose giving our terror fighters certainty and clarity in how to go about their jobs. They leave them vulnerable to prosecution and handcuff their efforts and leave the rest of us vulnerable to terror plots that went undiscovered.

Right now, these people are worried and they are buying insurance. People who are trying to carry out the very important intelligence missions of the United States, if they ask any questions, or if they don't give them four square meals a day and keep them in a comfortable motel, they are afraid they are going to get sued. We need to give protection to the people who are operating within the law as we are laying it out to make sure they don't cross over the line.

The problem we have is that if the critics take away the valuable tools we have in breaking apart terror plots, we are going to be significantly less safe. As the President said, the CIA interrogation program has already succeeded in breaking apart terror conspiracies and preventing several terror attacks. Critics within the program are preventing us from punishing terrorists and gaining valuable information that could prevent future attacks.

One thing I, along with the President and my Republican colleagues, share with the war critics is a strong opposition to torture. It is abhorrent, evil, and has no place in the world. What I oppose is how terror war critics would go soft on terror suspects, allowing them comforts they surely don't deserve.

Critics are being tough on targets. Terrorists argue that we should treat them like prisoners of war under the

Geneva Conventions. Article 72 of the Geneva Conventions on treatment of prisoners of war says POWs shall be allowed to receive parcels containing foodstuffs. Is that what critics think the 9/11 Commission conspirators deserve? Cookie care packages?

Article 71 says POWs shall be allowed to send and receive letters and cards. Is that what opponents of the bill believe people who conspire to cut off our heads deserve—letters from home? “Mail call Ramzi bin al-Shibh.”

Article 60 requires us to grant all POWs monthly advances of pay. It even says how much: below sergeant, 8 Swiss francs; officers, 50 Swiss francs; generals, 75 Swiss francs.

Do the critics think Khalid Sheikh Mohammed deserves 50 Swiss francs or 75?

Critics of being tough on terrorists say that we should adhere to international standards of decency. Where was the decency when international troops withdrew without a fight from Srebrenica, Bosnia allowing the genocide of its men and boys?

Where was the decency when the U.N. allowed Sudan, guilty of genocide in Darfur, to serve on the Human Rights Commission, and allowed Cuba to help monitor international human rights? This was neither moral nor decent.

Some say that the tough treatment we are debating will lead to bad treatment of America's soldiers in the future. That is a close cousin to the argument that if we leave the terrorists alone they will stop attacking us, or that America made them do it.

Do we need a reminder of how badly they are already treating us? The Wall Street Journal reporter kidnapped by terrorists, Daniel Pearl, had his head cut off long before the criminal acts of Abu Grahیب or news of the CIA prisons.

The charred bodies of our Special Forces dragged through the streets of Mogadishu tell us what the vague standards of the Geneva Convention got us.

As I said before, I support a torture ban. I also support provisions that clearly ban cruel, inhuman treatment or intentionally causing great suffering or serious injury. These are serious felonies, as they should be. But what we cannot do is give up tough treatment short of this that protects our families from attack.

What do critics think would happen if we went soft on terrorists? Would they be satisfied with only name, rank and serial number? Would they have us say to our terror suspects, “Oh gosh darn, I was so hoping you would willingly tell us your terror plots. Oh well, here's your 50 Swiss franc advance pay, don't eat too much from your cookie care package, we've scheduled a dentist appointment for you for Tuesday.”

Of course not, that would be absurd to think that terrorists will willingly tell us their plots. Terror war critics have been watching too many Law and Order TV shows if they think some hokey good cop—bad cop law enforcement approach will work on al-Qaida.

These people flew airplanes into buildings for heaven's sake, or should I say for hell's sake.

America must fight with honor. We must fight from the moral high ground.

But do not tell me we lack a moral basis for our fight against terror. Show me someone who doubts America's moral basis in this fight against terror and I will show you someone who has lost their own moral compass.

The compass of America's future points to this bill. We live in an age where we must fight terror. To win, we must fight tough in that fight against terror. We must give our terror fighters the tools they need and the protections they require to protect our families from terror.

We cannot fall into the traps our terror war critics suggest: handcuffing our law enforcement and intelligence agents, blocking our terror fighting leadership, releasing and spreading our terror war secrets, giving terror suspects our terror fighting methods and techniques, granting terrorists overly-comfortable protections, going soft on terrorists who hold the secrets of their plots, their attacks.

Our agents deserve better, our soldiers deserve better, our families deserve better.

To start where I began, this is what all our efforts are about. Protecting our vulnerable families. Protecting our children, protecting our mothers and fathers, protecting grandparents and grandchildren. None of the vulnerable it protects deserved to die in the 9/11 attacks, and none deserve to die again in another terrorist attack.

I urge my colleagues to support this legislation.

Mr. WARNER. Mr. President, we are anxious to move to a vote on the Specter amendment to accommodate a number of colleagues. Therefore, I urge that the remaining time on the Specter amendment under the control of Senator SPECTER, and the time in opposition under my control, be now utilized by colleagues, such that we can move to that vote.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. That is not a unanimous consent request, is it?

Mr. WARNER. No.

Mr. LEVIN. We have three Senators who have been allocated time specifically, and that time may be used relative to the amendment or in general debate on the bill. I will not agree to any restriction on the use of time that the Senator has been allocated.

Mr. WARNER. I recognize that. It is in our mutual interests to the move ahead on the bill. There will be time after the vote for Senators to speak. You have 18 minutes on the bill. I have 47 under my control on general debate.

The PRESIDING OFFICER. The Senator from California is recognized.

Mr. WARNER. Mr. President, the time for the Senator from California is under which category?

The PRESIDING OFFICER. General debate time.

Mrs. FEINSTEIN. Mr. President, I strongly believe the true test of a nation comes when we face hard decisions and hard times. It is really not the easy decisions that test our character and our commitment to fundamental principles and values. It is when the easy answer is not the right answer, but is politically expedient.

We face one of those times right now. The war against terror has challenged our country to fight a nontraditional enemy—one that is not part of any State or military. The enemy does not wear a uniform, it has no code of ethics, and it relishes in the killing of innocents. It strikes in cowardly ways. They have also challenged us as to whether we can continue during this period in fighting this enemy to abide by the bedrock of our justice system, the Constitution.

Before us on the floor of the Senate is a bill to address how our country will interpret the Geneva Conventions, and how we will treat those we apprehend and detain in this nontraditional, asymmetric war.

I truly believe that how we answer these challenges will not only test our commitment to our Constitution, but it will also test our very foundation of justice. It sends a message, also, to other countries—a message that will ultimately dictate how our soldiers and personnel are treated should they be captured by others.

Earlier this month, a bipartisan group of Senators worked together to develop a solution to these complex issues, and the Armed Services Committee reported a compromise military commissions bill to the Senate by a vote of 15 to 9.

Unfortunately, that is not the bill that is before this body today. Instead, House and Senate Republicans met with the White House and made changes that significantly altered the impact of this legislation and changed the bill in such a manner that I cannot at present support its passage without substantial amendment.

I do not believe the bill before us is constitutional. It is being rushed through a month before a major election in which the leadership of this very body is challenged.

The first of my concerns is the issue of habeas corpus. I very much support the amendment offered by the chairman of the Judiciary Committee. The bill before us eliminates a basic right of the American justice system, and that is the right of habeas corpus review. It is constitutionally provided to ensure that innocent people are not held captive or held indefinitely.

Habeas corpus has been a cornerstone of our legal system. It goes back, as it has been said, to the days of the Magna Carta. Our Founding Fathers enshrined this right in the Constitution because they understood mistakes happen and there is need for someone to appeal a mistake or a wrong conviction.

Just a few weeks ago, a man named Abu Bakker-Qassim, who was held at

Guantanamo, described how he was held for years, even though he had never been a terrorist or a soldier. He was never even on a battlefield. He had been sold by Pakistani bounty hunters to the United States military for \$5,000. Qassim said it was only because of the availability of habeas corpus that this mistake was able to be corrected. That is why Senator SPECTER's amendment is right.

If innocent people are at Guantanamo—and they presumably are and have been—or if abuses are taking place—and its likely some have—there must be an avenue to address these problems. Eliminating habeas corpus rights is a serious mistake and it will open the door to other efforts to remove habeas corpus.

Next, I am very concerned about the ability to use coerced testimony. This will be the first time in modern history that United States military tribunals will be free to admit evidence that was obtained through abusive tactics so long as the judge determines it is reliable and relevant or so long as it was obtained before December 30, 2005.

We have heard from countless witnesses that coerced testimony is inherently unreliable. We don't want to send the message that coercion is an acceptable tactic to use on Americans as well.

The fact is we had testimony in the Judiciary Committee from the head of all of the Judge Advocate Corps who said they did not believe torture worked.

I am very concerned about the definition of torture and the lack of clarity on cruel and inhumane treatment—especially combined with giving the President discretion to decide what he believes interrogation methods are permissible.

We have already seen through press reports that this administration pushes the boundaries on allowable interrogation techniques and these abuses cannot continue.

Finally, I am concerned about the rules for what evidence may be used to convict someone and then their limited ability to have a court review their case.

If one is not allowed to know what the basis of conviction was and then is only given limited judicial review of their conviction, how can we be confident that we are not holding innocent people who were caught in the wrong place at the wrong time—such an outcome severely harms our standing in the global community.

I believe these issues are too important for us to rush through a bill of this magnitude.

These are difficult times and difficult issues. However, I do not believe the expediency of the moment or the political winds of an impending election should lead us to abandon our core values as a Nation.

The Founding Fathers created specific constitutional limitations. And since that time the United States has

been at the forefront of demanding humane treatment of all people. We must not turn our back on these fundamental principles.

I am disappointed to be voting against this bill. I had hoped a real bipartisan compromise could be reached.

The PRESIDING OFFICER. The Senator's time has expired. Who yields time?

Mr. SPECTER. Mr. President, I yield 10 minutes to the distinguished Senator from Oregon.

The PRESIDING OFFICER. The distinguished Senator is recognized for 10 minutes.

Mr. SMITH. Mr. President, this is a most difficult issue we are engaged in. We are arguing about what I believe is a cornerstone principle of the rule of law, and that is the issue of habeas corpus.

I know this is an unusual war, and I don't know its duration. No one fully does. But I do know if we are going to be true to our Constitution and to the rule of law, we have to be true to that law.

I have traveled as a Senator all over this globe and have spoken with great pride about our rule of law and the superiority of democracy to other means of government. While I support this bill in providing due process for these detainees, I rise because I am concerned about the provisions relating to habeas corpus.

I am reminded of the words of Thomas Jefferson who once said:

The habeas corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume.

On another occasion he said:

I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it.

What we are talking about is section 7 of this bill, which will further strip the Federal courts of jurisdiction to hear pending Gitmo cases as it applies to all pending and future cases. Had this proposal been law earlier this year, the Supreme Court may not have had jurisdiction to hear the Hamdan case, which is what brings us here today.

At the heart of the habeas issue is whether the President should have the sole authority to indefinitely detain unlawful enemy combatants without any judicial restraints. Congress will provide the President with this unilateral authority by enacting legal restrictions aimed at stripping courts of jurisdiction to hear habeas claims. In doing so, the President does not have to show any cause for detaining an individual labeled an "unlawful enemy combatant."

Stripped of jurisdiction by recent legislation, U.S. courts will not have the ability to hear an individual's request to learn why he is even being detained. Providing detainees with the right to ask a court to evaluate the legality of their detention I believe would not cost U.S. lives. However, it will test American laws.

Claims have been made that providing detainees the right to hear why they are being detained necessitates providing them with classified information. I do not believe this to be true. Similar to the military commission legislation, it would only allow a judge or an attorney with security clearance to see the evidence against the defendant to evaluate its reliability and probative value.

Permanent detention of foreigners without reason damages our moral integrity regarding international rule of law issues. To quote: "History shows that in the wrong hands, the power to jail people without showing cause is a tool of despotism." A responsibility this Nation has always assumed is to ensure that no one is held prisoner unjustly.

Stripping courts of their authority to hear habeas claims is a frontal attack on our judiciary and its institutions, as well as our civil rights laws. Habeas corpus is a cornerstone of our constitutional order, and a suspension of that right, whether for U.S. citizens or foreigners under U.S. control, ought to trouble us all. It certainly gives me pause.

The right to judicial appeal is enshrined in our Constitution. It is part and parcel of the rule of law. The Supreme Court has described the writ of habeas corpus as "the fundamental instrument for safeguarding individual freedom against arbitrary and lawless State action."

Some of the darkest hours in our Nation's history have resulted from the suspension of habeas corpus, notably the internment of Japanese Americans during World War II.

Obviously, I am not here to question the wisdom of Abraham Lincoln. We have had no wiser President. But one of the most controversial decisions of his administration was the suspension of habeas corpus for all military-related cases, ignoring the ruling of a U.S. circuit court against this order. He, in fact, I believe, if my memory of history serves me, imprisoned the entire Maryland Legislature because of their attempts to secede from the Union. He did it. It happened. It is not necessarily the proudest moment of his administration. But it is something that has been raging with controversy ever since.

Habeas petitions are not clogging the courts and are not frivolous. The administration claims that the approximately 200 pending habeas claims are clogging our courts and are for the most part frivolous. These petitions are not an undue administrative burden. Judges always have the discretion to dismiss frivolous claims, and indefinite detention of a foreigner without showing cause, Mr. President, is not frivolous.

I suppose what brings me to the floor today is my memory of my study of the law. While I was in law school, I was particularly taken with the study of the Nuremberg trials. The words of

Justice Robert H. Jackson inspired me then and inspire me still. He was our chief counsel for the allied powers. What he said on that occasion in his closing address to the international military tribunal is an inspiration. Said he:

That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.

On the fairness of the Nuremberg proceedings, he said in his closing statement:

Of one thing we may be sure. The future will never have to ask with misgiving, what could the Nazis have said in their favor. History will know that whatever could be said, they were allowed to say. They have been given the kind of a Trial which they, in the days of their pomp and power, never gave to any man. But fairness is not weakness. The extraordinary fairness of these hearings is an attribute to our strength.

I simply feel this particular provision in this bill ought to be taken out. We ought not to suspend the writ of habeas corpus. We should go the extra mile, not as a sign of weakness, but as evidence of our strength.

I intend to vote for the underlying bill and ultimately will leave the judgment of its constitutionality without habeas to the judgment of the judiciary, but I believe we are called upon to go the extra mile to show our strength and not our weakness, and ultimately our Nation will be stronger if we stand by the rule of law.

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, I thank the distinguished Senator from Oregon for those very cogent remarks, especially in the context of additional Republican support, stated bluntly, and in light of more moderate Republican support.

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

Mr. LEVIN. Mr. President, the Democratic leader has yielded 2 minutes of his leadership time to me. I ask unanimous consent that I be allowed to proceed on that basis.

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

Mr. LEVIN. Mr. President, I support the Specter-Leahy amendment on the writ of habeas corpus. The habeas corpus language in this bill is as legally abusive of the rights guaranteed in the U.S. Constitution as the actions at Abu Ghraib, Guantanamo, and the CIA's secret prisons were physically abusive of the detainees themselves.

The Supreme Court has long held that all persons inside the United States, including lawful permanent residents and other aliens, have a constitutional right to the writ of habeas corpus. Yet, this provision purports to apply even to aliens who are detained inside the United States, including lawful permanent residents.

Unlike the provision that was included in the Detainee Treatment Act last year, this court-stripping provision would apply on a world-wide basis, not just at Guantanamo. It would apply to detainees of all Federal agencies, not just the Department of Defense. It would attempt to expressly strip the courts of jurisdiction over all pending cases.

This provision goes beyond stripping the courts of habeas corpus jurisdiction. It also prohibits the U.S. courts from hearing or considering "any other action against the United States or its agents relating to any aspect of the detention, treatment, or trial" of an alien detainee. As a result, this provision would leave many detainees without any alternative legal remedy at all, even after released, even if there is every reason to believe that the detention was in error, and even if the detainee was tortured or abused while in U.S. custody.

For example, the Canadian Government recently concluded, after a comprehensive review, that one of its citizens had been handed over by U.S. authorities to a foreign country which subjected him to torture and cruel and inhuman treatment, without any evidence that he was an enemy combatant or that he supported any terrorist group. Under this habeas corpus court-stripping provision, this individual would have no legal remedy in the U.S. courts even after he was finally released from illegal detention, unless the United States acknowledges that it made a mistake when it determined that he was an enemy combatant.

The fundamental premise of last year's Detainee Treatment Act, DTA, was that we could restrict future habeas corpus suits, because we were providing an alternative course of access to the courts.

The language in the bill before us would deprive many detainees of the right to file a writ of habeas corpus without providing any alternative form of relief. For example: The provision applies on a worldwide basis, not just at Guantanamo. DOD detainees outside Guantanamo do not have access to Combatant Status Review Tribunals—CSRTs—so they can't get to court to review CSRTs. Because this bill would deprive them of the writ of habeas corpus or any other legal remedy, they would have no access to the courts at all.

The provision applies to detainees of all Federal agencies, not just DOD. Detainees of other Federal agencies do not get CSRTs, so they can't get to court to review CSRTs. Because this bill would deprive them of the writ of habeas corpus or any other legal remedy, they would have no access to the courts at all.

The provision even applies to lawful resident aliens who are detained and held inside the United States. Because this bill would deprive them of the writ of habeas corpus or any other legal remedy, they would have no access to the courts at all.

Even in cases where DOD regulations provide detainees a right to Combatant Status Review Tribunals—CSRTs—such tribunals may not be an adequate substitute for judicial review under a writ of habeas corpus. CSRTs are permitted to use coerced testimony, hearsay evidence, and evidence that is never disclosed to the accused. Detainees before those status review tribunals are denied access to witnesses and documents needed to rebut allegations made by the government. Courts reviewing CSRT determinations are not authorized to make an independent determination whether there is a lawful basis for the detention.

The court stripping provision in the bill does more than just eliminate habeas corpus rights for detainees. It also prohibits the U.S. courts from hearing or considering "any other action against the United States or its agents relating to any aspect of the detention, treatment, or trial" of an alien detainee.

A separate provision in the bill adds that no person—whether properly held as an alien detainee or not—may invoke the Geneva Conventions as a source of rights in any court of the United States. Other provisions establish new defenses for individuals who may be accused of violating standards for the treatment of detainees under U.S. and international law.

Taken together, these provisions do not just deprive detainees of the ability to challenge the basis on which they have been detained—they are an effort to insulate the United States from any judicial review of our treatment detainees, an effort to ensure that there will be no accountability for actions that violate the laws and the standards of the United States.

Last year, this Congress took an important stand for the rule of law by enacting the Detainee Treatment Act, which prohibits the cruel, inhuman or degrading treatment of detainees in the custody of any U.S. agency anywhere in the world. That landmark provision is at risk of being rendered meaningless, if we establish rules ensuring that it can never be enforced.

Earlier this month, we received a letter from three retired Judge Advocates General, who urged us not to strip the courts of habeas corpus jurisdiction. That letter, signed by Admiral Hutson, Admiral Guter, and General Brahms, stated:

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.

We have received similar letters from nine distinguished retired Federal

judges, from hundreds of law professors from around the United States, and from many others.

If we don't strike this court-stripping language in the bill before us, if instead of Congress being a check on excessive executive power, Congress attempts to write a blank check to the executive branch, our expectation is that the courts will find this provision to be a legislative excess and strike it down as unconstitutional. We have a chance to do the right thing and not just to rely on the courts. This body is the body of last resort legislatively when it comes to protecting that great writ of habeas corpus which is in the Constitution. I hope we live up to that responsibility today.

Mr. BYRD. Mr. President, the military commissions bill before us would strip from the U.S. Constitution of one of its most precious protections: the writ of habeas corpus. The Great Writ. The bill would deny those who are detained indefinitely—even those who may be innocent—the opportunity to challenge their detention in court.

Habeas corpus is a procedure whereby a Federal court may review whether an individual is being improperly detained. The concept of habeas corpus is deeply rooted in the English common law and was specifically referenced in the Magna Carta of 1215, which stated:

No Freeman shall be taken, or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.

The legal procedure for issuing writs of habeas corpus was codified by the English Parliament in response to concerns by the British people that no monarch should be permitted to hold innocent people against their will without due process of law.

It is precisely because the Founders of the United States feared elimination of the writ that, when they enumerated the powers of the Congress in the very first article of the U.S. Constitution, they included specific reference to the writ of habeas corpus and sought to protect it. The language they included in article I, section 9, clause 2 of the Constitution, also known as the "Suspension Clause," reads as follows. It 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.

I wonder whether those who drafted the provision in this bill to eliminate habeas corpus have read this clause of the Constitution. Inconceivably, the U.S. Senate is being asked to abolish a fundamental right that has been central to democratic societies, including our own, for centuries. The outrageous provision we debate today could imprison indefinitely, without access to the courts, not just suspects picked up overseas but even those taken into custody on U.S. soil.

Some persons detained at Guantanamo may be terrorists guilty of plotting against the people and the Government of these United States. Of course terrorists must be properly detained and prosecuted for their evil deeds. But some detainees may be innocent. Some may be persons simply swept up because they were in the wrong place at the wrong time. How can we know which truly deserve to be held and tried as enemy combatants if we abolish the legal right of the incarcerated to fairly challenge their detention in court?

The provision in the bill before us deprives Federal courts of jurisdiction over matters of law that are clearly entrusted to them by the Constitution of the United States. The Constitution is clear on this point: The only two instances in which habeas corpus may be suspended are in the case of a rebellion or an invasion. We are not in the midst of a rebellion, and there is no invasion. It is notable that those who drafted the Constitution deliberately used the word "suspended." They did not say that habeas corpus could be forever denied, abolished, revoked, or eliminated. They said that, in only two instances, it could be "suspended," meaning temporarily. Not forever. Not like in this bill.

How can we, the U.S. Senate, in this bill abolish habeas corpus by approving a provision that so clearly contravenes the text of the Constitution? Where is our respect for the checks and balances that were built into our system by the Framers? They included an explicit prohibition against blanket suspension of the writ of habeas corpus precisely to protect innocent persons from being subject to arbitrary and unfair action by the state.

This flagrant attempt to deny a fundamental right protected by the Constitution reveals how White House and Pentagon advisers continue to chip away at the separation of powers. They relentlessly pursue their dangerous goal of consolidating power in the hands of the Executive at the expense of the Congress, the judiciary, and, sadly, the People. How can we even contemplate such an irresponsible and dangerous course as this de facto canceling of the writ of habeas corpus.

The Constitution of the United States is a time-tested contract between our people and their Government, for which thousands of American military men and women have died. Why would we seek to violate its terms? Aren't we fighting the terrorists precisely to preserve individual liberties and the rule of law? If we as a people jettison the very democratic ideals that have made our Nation great and we become, instead, exactly like those whom we seek to imprison—standing for nothing and capable of anything—then what are we fighting for? And if we indefinitely and illegally detain innocent parties of other nations, with what credibility can we request that they release our own?

Mr. President, I ask my colleagues to join me in support of the amendment that has been offered to preserve the writ of habeas corpus.

Mr. REID. Mr. President, I have received a letter from over 100 law professors and other distinguished citizens expressing their opposition to the habeas corpus provisions in the military tribunal bill. They urge support for the Specter-Leahy amendment to remedy that flaw. I ask unanimous consent that the letter be printed in the RECORD.

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

Hon. BILL FRIST,
Majority Leader, U.S. Senate, Washington, DC.
Hon. DENNIS HASTERT,
Speaker, House of Representatives, Washington, DC.

Hon. HARRY REID,
Democratic Leader, U.S. Senate, Washington, DC.

Hon. NANCY PELOSI,
Democratic Leader, House of Representatives, Washington, DC.

DEAR SENATOR FRIST, SENATOR REID, SPEAKER HASTERT AND REP. PELOSI: We agree with the views set forth in the undated letter sent this month to Members of Congress from Judge John J. Gibbons, Judge Shirley M. Hufstедler, Judge Nathaniel R. Jones, Judge Timothy K. Lewis, Judge William A. Norris, Judge George C. Pratt, Judge H. Lee Sarokin, Judge William S. Sessions, and Judge Patricia M. Wald.

These nine distinguished, retired federal judges expressed deep concern about the lawfulness of a provision in the Military Commissions Act of 2006 stripping the courts of jurisdiction to test the lawfulness of Executive detention outside the United States.

This matter is even more urgent now. The provision would eliminate habeas for all alleged alien enemy combatants, whether lawful or unlawful, even if they are detained in the United States.

We concur with the request made by the judges that Congress remove the provision stripping habeas jurisdiction from the proposed Military Commissions Act.

Respectfully, (100 Signatures)

The PRESIDING OFFICER. Who yields time?

Mr. GRAHAM. Mr. President, how much time is remaining?

The PRESIDING OFFICER. On which side?

Mr. GRAHAM. On the Warner side.

The PRESIDING OFFICER. Senator WARNER has 4 minutes in opposition to the Specter amendment.

Mr. WARNER. Mr. President, I yield that to the Senator from South Carolina.

The PRESIDING OFFICER. The Senator is recognized for 4 minutes.

Mr. GRAHAM. Mr. President, this has been a very spirited debate and I am going to give you a spirited answer to what I am proposing with my vote. No. 1, my moral compass is very much intact, and when people mention moral compasses and the conscience of the Senate, I am going to sleep very good casting my vote. I think I have a decent moral compass about what we should be doing to people: What is humane, what is not; what is right, what is wrong. I have tried to balance the interests of our troops and the interests

of our country when it comes to dealing with people who find themselves in our capture.

Why not habeas for noncitizen, enemy combatant terrorists housed at Gitmo? No. 1, the whole Congress has agreed prospectively habeas is not available; the Detainee Treatment Act will be available. The only reason we are here is because of the Hamdan decision. The Hamdan decision did not apply to the Detainee Treatment Act retroactively, so we have about 200 and some habeas cases left unattended and we are going to attend to them now.

Why do we—I and others—want to take habeas off the table and replace it with something else? I don't believe judges should be making military decisions in a time of war. There is a reason the Germans and the Japanese and every other prisoner held by America have never gone to Federal court and asked the judge to determine their status. That is not a role the judiciary should be playing. They are not trained to make those decisions.

Under the Geneva Conventions article 5, the combatant tribunal requirement is a military decision. So I believe very vehemently that the military of our country is better qualified to determine who an enemy combatant is over a Federal judge. That is the way it has been, that is the way it should be and, with my vote, that is the way it is going to be.

What is the problem? Why am I worried about having Federal judges turning every enemy combatant decision into a trial? In 1950 the Supreme Court, denying habeas rights to German and Japanese prisoners, said:

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

I agree with that.

They would diminish the prestige of our commanders not only with enemies, but wavering neutrals.

I agree with that.

It would be difficult to devise a more effective fettering of a field commander than to allow the very enemies he has 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.

I agree with that. That is why we shouldn't be doing habeas cases in a time of war. Nor is it unlikely that the result of such enemy litigiousness would be conflict between judicial and military opinion—highly comforting to the enemies of the United States.

These trials impede the war effort. It allows a judge to take what has historically been a military function.

What I am proposing for this body and our country is to allow the military to do what they are best at doing: controlling the battlefield. Let them define who an enemy combatant is under the Geneva Conventions requirements, under the Combatant Status Review Tribunal system, which is Geneva Conventions compliant, in my opinion, and let the Federal courts come in after they made their decision

to see if the military applied the correct law, the procedures were followed, and the evidence justifies the decision of the military.

To substitute a judge for the military in a time of war to determine something as basic as who our enemy is is not only not necessary under our Constitution, it impedes the war effort, it is irresponsible, it needs to stop, and it should never have happened. I am confident Congress has the ability, if we choose to redefine the rights of an enemy combatant, noncitizen—what rights they have in a time of war and what has happened.

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

Mr. GRAHAM. Mr. President, I will ask unanimous consent to have printed in the RECORD, if I may, examples of the habeas petitions filed on behalf of detainees against our troops.

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

EXAMPLES OF HABEAS PETITIONS FILED OF BEHALF OF DETAINEES

1. Canadian detainee who threw a grenade that killed an Army medic in firefight and who comes from family with longstanding al Qaeda ties moves for preliminary injunction forbidding interrogation of him or engaging in "cruel, inhuman, or degrading" treatment of him (n.b. this motion was denied by Judge Bates).

2. "Al Odah motion for dictionary internet security forms"—Kuwaiti detainees seek court orders that they be provided dictionaries in contravention of GTMO's force protection policy and that their counsel be given high-speed internet access at their lodging on the base and be allowed to use classified DoD telecommunications facilities, all on the theory that otherwise their "right to counsel" is unduly burdened.

3. "Alladeen—Motion for TRO re transfer"—Egyptian detainee who Combatant Status Review Tribunal adjudicated as no longer an enemy combatant, and who was therefore due to be released by the United States, files motion to block his repatriation to Egypt.

4. "Paracha—Motion for PI re Conditions"—Motion by high level al Qaeda detainee complaining about base security procedures, speed of mail delivery, and medical treatment; seeking an order that he be transferred to the "least onerous conditions" at GTMO and asking the court to order that GTMO 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, worship, etc."

5. "Motion for PI re Medical Records"—Motion by detainee accusing military's health professionals of "gross and intentional medical malpractice" in alleged violation of the 4th, 5th, 8th, and 14th Amendments, 42 USC 1981, and unspecified international agreements.

6. "Abdah—Emergency Motion re DVDs"—"emergency" motion seeking court order requiring GTMO to set aside its normal security policies and show detainees DVDs that are purported to be family videos.

7. "Petitioners' Supp. Opposition"—Filing by detainee requesting that, as a condition of a stay of litigation pending related appeals, the Court involve itself in his medical situation and set the stage for them to second-guess the provision of medical care and other conditions of confinement.

8. "Al Odah Supplement to PI Motion"—Motion by Kuwaiti detainees unsatisfied

with the Koran they are provided as standard issue by GTMO, seeking court order that they be allowed to keep various other supplementary religious materials, such as a "tafsir" or 4-volume Koran with commentary, in their cells.

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

The PRESIDING OFFICER. There is 12 minutes remaining.

Mr. SPECTER. Mr. President, I think it would be appropriate, if I may have Senator WARNER's concurrence, to tell our colleagues that this will be the end of the time allocated for this amendment and we could expect to vote at about 11:45 or 11:50?

Mr. WARNER. Mr. President, very definitely. As soon as all time on this amendment is allocated or yielded back, my intention is to move to a vote.

Mr. SPECTER. I thank my distinguished colleague.

Mr. President, I fully realize it is unpopular to speak for aliens, unpopular to speak on what might be interpreted to be in favor of enemy combatants, but that is not what this Senator is doing. What I am trying to establish is a course of judicial procedure to determine whether they are enemy combatants.

I submit that the materials produced on this floor and in the hearings of the Judiciary Committee show conclusively that the Combatant Status Review Tribunals do not have an adequate way of determining whether these individuals are enemy combatants. What we are doing is defending the jurisdiction of the Federal courts to maintain the rule of law. If the Federal courts are not open, if the Federal courts do not have jurisdiction to determine constitutionality, then how are we to determine what is constitutional?

My own background is one of a reverence for the law, a reverence for the independence of the judiciary, and a reverence for the rule of law as interpreted by our Constitution. If it hadn't been for the Federal courts, the Supreme Court of the United States, we would not have seen the decision in *Brown v. Board of Education* in 1954. The legislative branches were too mired in politics, the executive was too mired in politics, and it was only the Supreme Court which could recognize the injustice of segregation and it led to that decision.

Similarly, it was the Federal courts which changed the criminal procedure in this country as a matter of basic fairness. Prior to the decision of the case of *Brown v. Mississippi* in 1936, the Federal courts did not establish standards for State criminal courts. It was determined as a matter of States rights that States could establish their own determinations. But in that case, the evidence was overwhelming about a brutal, coerced confession and, for the first time, the Supreme Court of the United States stepped in and said: States may not take an individual,

take him across State lines, have a feigned hanging, extract a confession, and use that to convict him. That was done by the Federal courts.

I had the occasion when I was in the Philadelphia district attorney's office to witness firsthand on a daily basis a revolution in constitutional criminal procedure. I was litigating the issues in the criminal courts when *Mapp v. Ohio* came down, imposing the rule of exclusion of evidence in State courts if obtained in violation of the fourth amendment and, when Escobedo came down, limiting admissions and confessions if not in conformity with rules. Then *Miranda v. Ohio* came down. I found those decisions as a prosecutor very limiting and impeding. But the course of time has demonstrated that those decisions have improved the quality of justice in America. Chief Justice Rehnquist, a recognized conservative, sought to eliminate or limit *Miranda* when he came to the Supreme Court of the United States. Later in his career, he said in *Miranda* that the protections of those warnings were appropriate and were helpful in our society.

There are four fundamental, undeniable principles and facts involved in the issue we are debating today. The first undeniable principle is that a statute cannot overrule a Supreme Court decision on constitutional grounds, and a statute cannot contradict an explicit constitutional provision. That is point No. 1.

Point No. 2, the Constitution is explicit in the statement that habeas corpus may be suspended only with rebellion or invasion.

Fact No. 3, uncontested. We do not have a rebellion or an invasion.

Fact and principle No. 4, the Supreme Court says that aliens are covered by habeas corpus.

We have already had considerable exposition of the opinion by Justice O'Connor that the constitutional right of habeas corpus applies to individuals, which means citizens and aliens. The case of *Rasul v. Bush*, which explicitly involved an alien, says this in the opinion of Justice Stevens speaking for the Court:

Habeas corpus received explicit recognition in the Constitution, which forbids the suspension of—

Then Justice Stevens cites the constitutional provision.

The privilege of the writ of habeas corpus cannot be suspended unless in the cases of rebellion or invasion, and neither is present here. So you have the express holding of the Supreme Court in *Rasul v. Bush* that habeas corpus applies to aliens.

Justice Stevens went on to say that:

Executive imprisonment has been considered oppressive and lawless since John, at Runnymede.

What this bill would do in striking habeas corpus would take our civilized society back some 900 years to King John at Runnymede which led to the adoption of the Magna Charta in 1215, which is the antecedent for habeas cor-

pus and was the basis for including in the Constitution of the United States the principle that habeas corpus may not be suspended.

I believe it is unthinkable, out of the question, to enact Federal legislation today which denies the habeas corpus right which would take us back some 900 years and deny the fundamental principle of the Magna Charta imposed on King John at Runnymede.

Mr. President, how much time do I have?

The PRESIDING OFFICER. There is 3½ minutes remaining.

Mr. SPECTER. Mr. President, the argument has been made that there is an alternative procedure which passes constitutional muster. But the provisions of the statute which set up the Combatant Status Review Tribunal are conclusively insufficient on their face. The statute provides that the Combatant Status Review Tribunal may be reviewed by the Court of Appeals for the District of Columbia only to the extent that the ruling was consistent with the standards and procedures specified by the Secretary of Defense.

Now, to comply with the standards of procedures determined by the Secretary of Defense does not mean exclude on its face a factual determination as to what happens to the detainees.

When the Senator from South Carolina argues that judges should not make military decisions, I agree with him totally. But the converse of that is that judges should make judicial decisions, to decide whether due process is decided. The converse, that judges should not make military decisions, is the principle that the Secretary of Defense ought not to decide what the constitutional standards are. The Secretary of Defense should not decide what the constitutional standards are. That is up to the Supreme Court of the United States, and the Supreme Court of the United States has decided that aliens are entitled to the explicit constitutional protection of habeas corpus.

The argument is made that the Swain case allows for alternative procedures. The Swain case involved a District of Columbia habeas corpus proceeding which was virtually identical with habeas corpus provided under Federal statute 2241, so of course it was satisfactory.

A number of straw men have been set up: One, that we could not apply these principles to the 18,000 detainees in Iraq—nobody seeks to do that; the straw man that we should not give search and seizure protections of the fourth amendment—no one seeks to do that; or the fifth amendment protection against the privilege of self-incrimination.

In essence and in conclusion, what this entire controversy boils down to is whether Congress is going to legislate to deny a constitutional right which is explicit in the document of the Constitution itself and which has been applied to aliens by the Supreme Court of the United States.

The distinguished chairman of the Armed Services Committee has said that he does not want to have this matter come back to Congress. But surely as we are standing here, if this bill is passed and habeas corpus is stricken, we will be on this floor again rewriting the law.

The PRESIDING OFFICER. The time of the Senator has expired. All time has expired.

Is there further debate on the amendment?

Mr. WARNER. Mr. President, may I inquire, the distinguished Senator from Michigan seeks a little additional time on leader time, is that correct?

Mr. LEVIN. I have already accomplished that. I thank my friend.

Mr. WARNER. At this time I would like to yield to the Senator from South Carolina 3 minutes off of the time under my control on the bill.

The PRESIDING OFFICER. The Senator is recognized for 3 minutes.

Mr. GRAHAM. What I am trying to stress to the body is that this is a war we are fighting, not crime, and habeas corpus rights have not been given to any other prisoners under U.S. control in the past, for very good reason. It impedes the war effort.

Let me give you a flavor of what is coming out of Guantanamo Bay. This is what is happening to the troops defending America by the people who are incarcerated, determined by our military to be an enemy combatant. A Canadian detainee, who threw a grenade that killed an Army medic in a fire-fight and who comes from a family with longstanding al-Qaida ties, moved for a preliminary injunction forbidding interrogation of him or engaging in cruel, inhuman or degrading treatment. In other words, he was going to ask the judge to take over running the jail and his interrogation.

A Kuwaiti detainee sought a court order that would provide dictionaries in contravention of Gitmo force protection policy and that their counsel have high-speed Internet access.

Another one applied for a motion that would allow them to change the base security procedures to allow speedy mail delivery medical treatment. He sought an order transferring him to the least onerous condition at Gitmo. He asked the court to allow him to keep any books and reading materials sent to him and report to the court over his opportunities for exercise, communication, recreation and worship.

We are not going to turn this war over to a series of court cases, where our troops are having to account for a bunch of junk by people trying to kill Americans. They will have their day in court, but they are not going to turn this whole war into a mockery with my vote.

I yield back.

Mr. WARNER. Mr. President, I believe there is no time remaining?

The PRESIDING OFFICER. There is no time remaining.

Mr. WARNER. I ask for the yeas and nays.

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

The question is on agreeing to the amendment. The clerk will call the roll.

The legislative clerk called the roll.

Mr. McCONNELL. The following Senator was necessarily absent: the Senator from Maine (Ms. SNOWE).

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

The result was announced—yeas 48, nays 51, as follows:

[Rollcall Vote No. 255 Leg.]

YEAS—48

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

NAYS—51

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

NOT VOTING—1

Snowe

The amendment (No. 5087) was rejected.

Mr. WARNER. I move to reconsider the vote.

Mr. BOND. 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 of the bill have been notified there are still three amendments remaining, one by Senator ROCKEFELLER, one by Senator KENNEDY, one from Senator BYRD. If I understand from my distinguished ranking member, we will proceed to the amendment of Senator ROCKEFELLER.

Mr. ROCKEFELLER. I have yielded 5 minutes to the Senator from Massachusetts, if that is okay, on a separate matter.

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

Mr. WARNER. Mr. President, the ranking member is about to advise the Senator with regard to which amendment might be forthcoming.

Mr. LEVIN. If Senator ROCKEFELLER is ready, I understand there is a time agreement of 1 hour equally divided.

The PRESIDING OFFICER. That is correct.

Five minutes of the time of the Senator from West Virginia has been previously allocated to the Senator from Massachusetts, Mr. KERRY.

Mr. KERRY. If I could correct that, my time is not supposed to come from the Senator from West Virginia. I believe I have time already allocated, so it would be separate.

Mr. ROCKEFELLER. If the situation is it is deducted from this Senator's time, I would object.

The PRESIDING OFFICER. It is the understanding of the Chair that the Senator from Massachusetts, the unanimous consent was obtained at 10 o'clock with 5 minutes coming from the time of the Senator from West Virginia.

Mr. LEVIN. Mr. President, that unanimous consent request was apparently agreed to and is in place right now?

The PRESIDING OFFICER. That is correct.

The Senator from West Virginia.

AMENDMENT NO. 5095

Mr. ROCKEFELLER. Mr. President, I send an amendment to the desk on behalf of myself, and Senators CLINTON, WYDEN, MIKULSKI and FEINGOLD.

The PRESIDING OFFICER. The clerk will report.

The Senator from West Virginia, [Mr. ROCKEFELLER], for himself, Mrs. CLINTON, Mr. WYDEN, Ms. MIKULSKI, and Mr. FEINGOLD, proposes an amendment numbered 5095.

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

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

The amendment is as follows:

(Purpose: To provide for congressional oversight of certain Central Intelligence Agency programs)

At the end, add the following:

SEC. 11. OVERSIGHT OF CENTRAL INTELLIGENCE AGENCY PROGRAMS.

(a) DIRECTOR OF CENTRAL INTELLIGENCE AGENCY REPORTS ON DETENTION AND INTERROGATION PROGRAM.—

(1) QUARTERLY REPORTS REQUIRED.—Not later than three months after the date of the enactment of this Act, and every three months thereafter, the Director of the Central Intelligence Agency shall submit to the congressional intelligence committees a report on the detention and interrogation program of the Central Intelligence Agency during the preceding three months.

(2) ELEMENTS.—In addition to any other matter necessary to keep the congressional intelligence committees fully and currently informed about the detention and interrogation program of the Central Intelligence Agency, each report under paragraph (1) shall include (but not be limited to), for the period covered by such report, the following:

(A) A description of any detention facility operated or used by the Central Intelligence Agency.

(B) A description of the detainee population, including—

- (i) the name of each detainee;
- (ii) where each detainee was apprehended;
- (iii) the suspected activities on the basis of which each detainee is being held; and
- (iv) where each detainee is being held.

(C) A description of each interrogation technique authorized for use and guidelines on the use of each such technique.

(D) A description of each legal opinion of the Department of Justice and the General Counsel of the Central Intelligence Agency that is applicable to the detention and interrogation program.

(E) The actual use of interrogation techniques.

(F) A description of the intelligence obtained as a result of the interrogation techniques utilized.

(G) Any violation of law or abuse under the detention and interrogation program by Central Intelligence Agency personnel, other United States Government personnel or contractors, or anyone else associated with the program.

(H) An assessment of the effectiveness of the detention and interrogation program.

(I) An appendix containing all guidelines and legal opinions applicable to the detention and interrogation program, if not included in a previous report under this subsection.

(b) DIRECTOR OF CENTRAL INTELLIGENCE AGENCY REPORTS ON DISPOSITION OF DETAINEES.—

(1) QUARTERLY REPORTS REQUIRED.—Not later than three months after the date of the enactment of this Act, and every three months thereafter, the Director of the Central Intelligence Agency shall submit to the congressional intelligence committees a report on the detainees who, during the preceding three months, were transferred out of the detention program of the Central Intelligence Agency.

(2) ELEMENTS.—In addition to any other matter necessary to keep the congressional intelligence committees fully and currently informed about transfers out of the detention program of the Central Intelligence Agency, each report under paragraph (1) shall include (but not be limited to), for the period covered by such report, the following:

(A) For each detainee who was transferred to the custody of the Department of Defense for prosecution before a military commission, the name of the detainee and a description of the activities that may be the subject of the prosecution.

(B) For each detainee who was transferred to the custody of the Department of Defense for any other purpose, the name of the detainee and the purpose of the transfer.

(C) For each detainee who was transferred to the custody of the Attorney General for prosecution in a United States district court, the name of the detainee and a description of the activities that may be the subject of the prosecution.

(D) For each detainee who was rendered or otherwise transferred to the custody of another nation—

(i) the name of the detainee and a description of the suspected terrorist activities of the detainee;

(ii) the rendition process, including the locations and custody from, through, and to which the detainee was rendered; and

(iii) the knowledge, participation, and approval of foreign governments in the rendition process.

(E) For each detainee who was rendered or otherwise transferred to the custody of another nation during or before the preceding three months—

(i) the knowledge of the United States Government, if any, concerning the subsequent treatment of the detainee and the efforts made by the United States Government to obtain that information;

(ii) the requests made by United States intelligence agencies to foreign governments for information to be obtained from the detainee;

(iii) the information provided to United States intelligence agencies by foreign governments relating to the interrogation of the detainee;

(iv) the current status of the detainee;

(v) the status of any parliamentary, judicial, or other investigation about the rendition or other transfer; and

(vi) any other information about potential risks to United States interests resulting from the rendition or other transfer.

(C) CIA INSPECTOR GENERAL AND GENERAL COUNSEL REPORTS.—

(1) ANNUAL REPORTS REQUIRED.—Not later than one year after the date of the enactment of this Act, and annually thereafter, the Inspector General of the Central Intelligence Agency and the General Counsel of the Central Intelligence Agency shall each submit to the congressional intelligence committees a report on the detention, interrogation and rendition programs of the Central Intelligence Agency during the preceding year.

(2) ELEMENTS.—Each report under paragraph (1) shall include, for the period covered by such report, the following:

(A) An assessment of the adherence of the Central Intelligence Agency to any applicable law in the conduct of the detention, interrogation, and rendition programs of the Central Intelligence Agency.

(B) Any violations of law or other abuse on the part of personnel of the Central Intelligence Agency, other United States Government personnel or contractors, or anyone else associated with the detention, interrogation, and rendition programs of the Central Intelligence Agency in the conduct of such programs.

(C) An assessment of the effectiveness of the detention, interrogation, and rendition programs of the Central Intelligence Agency.

(D) Any recommendations to ensure that the detention, interrogation, and rendition programs of the Central Intelligence Agency are conducted in a lawful and effective manner.

(3) CONSTRUCTION OF REPORTING REQUIREMENT.—Nothing in this subsection shall be construed to modify the authority and reporting obligations of the Inspector General of the Central Intelligence Agency under section 17 of the Central Intelligence Agency Act of 1949 (50 U.S.C. 403q) or any other law.

(d) CERTIFICATION OF COMPLIANCE.—Not later than three months after the date of the enactment of this Act, and promptly upon any subsequent approval of interrogation techniques for use by the Central Intelligence Agency, the Attorney General shall submit to the congressional intelligence committees—

(1) an unclassified certification whether or not each approved interrogation technique complies with the Constitution of the United States and all applicable treaties, statutes, Executive orders, and regulations; and

(2) an explanation of why each approved technique complies with the Constitution of the United States and all applicable treaties, statutes, Executive orders, and regulations.

(e) FORM OF REPORTS.—Except as provided in subsection (d)(1), each report under this section shall be submitted in classified form.

(f) AVAILABILITY OF REPORTS.—Each report under this section shall be fully accessible by each member of the congressional intelligence committees.

(g) DEFINITIONS.—In this section:

(1) CONGRESSIONAL INTELLIGENCE COMMITTEES.—The term “congressional intelligence committees” means—

(A) the Select Committee on Intelligence of the Senate; and

(B) the Permanent Select Committee on Intelligence of the House of Representatives.

(2) LAW.—The term “law” includes the Constitution of the United States and any applicable treaty, statute, Executive order, or regulation.

Mr. ROCKEFELLER. Mr. President, for 4 years the Central Intelligence Agency's program was kept from the full membership of the Senate and House Intelligence Committees.

For 4 years the CIA imprisoned and interrogated suspected terrorists at secret black sites under a policy that prevented Congress from not only knowing about the program but from acting on it and regulating it.

For 4 years, the White House refused to brief Intelligence Committee members about the program's legal business and operations, as is required by law.

For 4 years, the members of the Senate and the House Intelligence Committees, whose duty it is to authorize the funding of every CIA program, were kept in the dark by an administration which ignored the legal requirement to keep the Congress fully and currently informed on all intelligence activities.

The amendment I have offered reverses the executive branch's 4-year policy of indifference toward Congress.

My amendment corrects a serious omission in the pending bill: the need for Congress to reassert its fundamental right to understand the intelligence activities it authorizes and funds.

My amendment would subject the CIA's detention and interrogation to meaningful congressional oversight for the first time in 4 years by requiring a series of reviews and reports that will enable the Congress to evaluate the program's scope and legality, as well as its effectiveness.

The amendment establishes this absent congressional oversight in four ways. First, my amendment requires the Director of the CIA to provide a quarterly report to all members of the Intelligence Committees in both the House and the Senate detailing the detention facilities, how they are operated, and how they are used by the CIA.

It requires that the detainees held at these facilities be listed by name as well as the basis for their detention and the description of interrogation techniques used on them and the accompanying legal rationale.

This quarterly report also requires the recording of any violation or abuse under the CIA program as well as an assessment of the effectiveness of the detention and interrogation program.

This issue of the effectiveness of interrogation techniques is incredibly important and often overlooked as an aspect of the debate over the CIA program. Interrogations that coerce information can produce bad intelligence—not necessarily, but they can produce misleading intelligence—fabricated intelligence to get out of the treatment, information that can harm, not help, our efforts to locate and capture terrorists.

Second, my amendment would require the Director of the CIA to pro-

vide a quarterly report to all members of the Intelligence Committees on the disposition of each detainee transferred out of the CIA prisons, whether the detainee was transferred to the Department of Defense for prosecution before a military commissioner for further detention, whether the detainee was transferred to the custody of the Attorney General to stand trial in civilian court, or whether the detainee was rendered or otherwise transferred to the custody of another nation.

There needs to be a comprehensive and accurate accounting of detainees held by the CIA. Congress has a responsibility to know who is held by the CIA, why they are held and for how long they are held.

The CIA detention and interrogation program cannot function as a black hole into which people disappear for years on end.

We have been told by CIA leaders that the agency does not want to be—they say this constantly to us—they do not want to be the prison warden for the United States Government. The goal of the CIA program should be to obtain, through lawful means, intelligence information that can identify other terror suspects to prevent further terrorist attacks and then to bring to justice those who we believe to be criminals. This is the so-called endgame that everyone talks about.

If the CIA detention program is allowed to function as some sort of prisoner purgatory, we have then failed.

Also of concern to me is the lack of existing oversight in how the United States transports or renders detainees to other countries for imprisonment and interrogation.

The limited information the administration has shared with the Senate Intelligence Committee on the CIA's rendition program does not by any means assure, at least this Senator, that the intelligence community has a program in place, so to speak, to assert what happens to these individuals when they are transferred to foreign custody, such as how they are treated, how they are interrogated, whether they divulge intelligence information of value, and whether this information is then provided to the CIA.

The CIA's rendition program deserves far greater scrutiny and congressional oversight than it has been given to date.

The third way in which this amendment establishes a meaningful oversight of the CIA detention and interrogation program is to require the CIA Inspector General and the CIA general counsel each separately review the program on an annual basis to report their findings to the Intelligence Committees. These independent Agency reviews would assess the CIA's compliance with any applicable law or regulation and the conduct of detention, interrogation and rendition activities as well as to report to Congress any violations of law or other abuse on the part of personnel involved in the program.

The annual reviews of the Inspector General and the general counsel also would evaluate the effectiveness of the detention and interrogation program; effectiveness at obtaining valuable and reliable intelligence.

Finally, my amendment requires the Attorney General to submit to Congress an unclassified certification whether or not each interrogation technique approved for use by the CIA complies with the United States Constitution and all applicable treaties, statutes and regulations. I believe this is a very important certification.

All Americans, not just the Congress, need an ironclad assurance from our Nation's top enforcement officer that the CIA program and the interrogation techniques it employs are lawful in all respects. The CIA officers in the field, I might say, above all, need this assurance.

I do not believe there is anything particularly controversial about this amendment, and I hope that Democrats and Republicans alike can embrace the need for restoring respect for the oversight role of the Intelligence Committees of the Congress over intelligence.

Only through reports that will be provided under this amendment will the Congress have the information it lawfully deserves to understand the CIA's detention and interrogation program and determine whether the program is producing the unique intelligence mission that justifies its continued operation.

Only when the President works with the Congress are we able to craft intelligence programs that are legally sound and operationally effective. Only when the President works with the Congress can America stand strong in its fight against terrorism.

Intelligence gathering through interrogation is one of the most important tools we have in the war on terrorism. My amendment would provide the congressional oversight necessary to assure that our intelligence officers in the field have clear guidelines for effective and legal interrogation.

Before yielding the floor, I will address two other matters very briefly.

Those who have taken the time to read through the bill we are debating will find the word "coercion" repeatedly in the text of the legislation. Coercion is a fitting word when considering how the Senate finds itself rushed into voting on a bill with far-reaching legal and national security implications.

The final text of the underlying bill was negotiated by a handful of Republican Senators, many of whom I respect, and the White House. Democrats were not consulted. I was not consulted. This Senator was not consulted. Senator LEVIN was not consulted. We were kept out of these closed-door sessions.

I say that because the Senate Intelligence Committee is the only Senate committee responsible for authorizing CIA activities and the only committee

briefed on classified details of the CIA's detention and interrogation program. We were denied an opportunity to consider this bill, in fact, on sequential referral, which is our due.

In the mad dash to pass this bill before the Senate recesses, Senators are being given only five opportunities, I believe, to amend the bill, effectively preventing the Senate from trying to produce the best bill possible on the most important subject possible with respect to the gathering of intelligence. It does not have to be this way.

Finally, I am troubled by what I view as misleading statements about the current state of the CIA detention and interrogation program made by President Bush and senior administration officials. I say this for the record, and strongly.

The President and others have stated in recent weeks that the CIA program was halted as a result of the Supreme Court's Hamdan decision on June 29, 2006. This assertion is false.

Significant aspects of this program were halted following the passage of the Detainee Treatment Act in 2005, prohibiting cruel, inhuman, or degrading treatment of detainees, well before the Supreme Court decision.

The President has also been very forceful in his public statements asserting that the post-Hamdan application of Geneva Conventions Common Article 3 has created legal uncertainties about the CIA interrogation procedures that the Congress must resolve through legislation—only us—in order for the CIA program to continue. This assertion is misleading, and it is false as well.

Concerns over the legal exposure of CIA officers have existed since the program's inception and did not begin with the Supreme Court's Hamdan decision. These mischaracterizations illustrate to me why it is important for Congress to understand all facts about the CIA program.

Congress cannot and should not sit on the sidelines blithely ignorant about the details of a critical intelligence program that has been operating without meaningful congressional scrutiny for years.

I thank the Presiding Officer and yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. LEVIN. Mr. President, will the Senator from Massachusetts yield for a unanimous consent request?

Mr. KERRY. Yes.

Mr. LEVIN. Mr. President, I ask unanimous consent that I be added as a cosponsor to the Rockefeller amendment.

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

The Senator from Massachusetts is recognized.

Mr. KERRY. Mr. President, the last week before we leave for a long recess has always been extraordinarily busy—particularly when an election is only 42

days away. But, sadly, this has become too much the way the Senate does business and often its most important business.

Today, the leadership of the Senate has decided that legislation that will directly impact America's moral authority in the world merits only a few hours of debate. What is at stake is the authority that is essential to winning and to waging a legitimate and effective war on terror, and also one that is critical to the safety of American troops who may be captured.

If, in a few hours, we squander that moral authority, blur lines that for decades have been absolute, then no speech, no rhetoric, and no promise can restore it.

Four years ago, we were in a similar situation. An Iraq war resolution was rushed through the Senate because of election-year politics—a political calendar, not a statesman's calendar. And 4 years later, the price we are paying is clear for saying to a President and an administration that we would trust them.

Today, we face a different choice—to prevent an irreversible mistake, not to correct one. It is to stand and be counted so that election-year politics do not further compromise our moral authority and the safety of our troops.

Every Senator must ask him or herself: Does the bill before us treat America's authority as a precious national asset that does not limit our power but magnifies our influence in the world? Does it make clear that the U.S. Government recognizes beyond any doubt that the protections of the Geneva Conventions have to be applied to prisoners in order to comply with the law, restore our moral authority, and best protect American troops? Does it make clear that the United States of America does not engage in torture, period?

Despite protests to the contrary, I believe the answer is clearly no. I wish it were not so. I wish this compromise actually protected the integrity and letter and spirit of the Geneva Conventions. But it does not. In fact, I regret to say, despite the words and the protests to the contrary, this bill permits torture. This bill gives the President the discretion to interpret the meaning and application of the Geneva Conventions. It gives confusing definitions of "torture" and "cruel and inhuman treatment" that are inconsistent with the Detainee Treatment Act, which we passed 1 year ago, and inconsistent with the Army Field Manual. It provides exceptions for pain and suffering "incidental to lawful sanctions," but it does not tell us what the lawful sanctions are.

So what are we voting for with this bill? We are voting to give the President the power to interpret the Geneva Conventions. We are voting to allow pain and suffering incident to some undefined lawful sanctions.

This bill gives an administration that lobbied for torture exactly what it wanted. And the administration has

been telling people it gives them what they wanted. The only guarantee we have that these provisions will prohibit torture is the word of the President. Well, I wish I could say the word of the President were enough on an issue as fundamental as torture. But we have been down this road.

The administration said there were weapons of mass destruction in Iraq, that Saddam Hussein had ties to al-Qaida, that they would exhaust diplomacy before they went to war, that the insurgency was in its last throes. None of these statements were true.

The President said he agreed with Senator MCCAIN's antitorture provisions in the Detainee Treatment Act. Yet he issued a signing statement reserving the right to ignore them. Are we supposed to trust that word?

He says flatly that "The United States does not torture," but then he tries to push the Congress into allowing him to do exactly that. And even here he has promised to submit his interpretations of the Geneva Conventions to the Federal Register. Yet his Press Secretary announced that the administration may not need to comply with that requirement. And we are supposed to trust that?

Obviously, another significant problem with this bill is the unconstitutional limitation of the writ of habeas corpus. It is extraordinary to me that in 2 hours, and a few minutes of a vote, the Senate has done away with something as specific as habeas corpus, of which the Constitution says: "[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."

Well, we are not in a rebellion, nor are we being invaded. Thus, we do not have the constitutional power to suspend the writ. And I believe the Court will ultimately find it unconstitutional.

The United States needs to retain its moral authority to win the war on terror. We all want to win it. We all want to stop terrorist attacks. But we need to do it keeping faith with our values and the Constitution of the United States.

Mr. President, a veteran of the Iraq War whom I know, Paul Rieckhoff, wrote something the other day that every Senator ought to think about as they wrestle with this bill. He wrote that he was taught at Fort Benning, GA, about the importance of the Geneva Conventions. He didn't know what it meant until he arrived in Baghdad. Paul wrote:

America's moral integrity was the single most important weapon my platoon had on the streets of Iraq. It saved innumerable lives, encouraged cooperation with our allies and deterred Iraqis from joining the growing insurgency. But those days are over. America's moral standing has eroded, thanks to its flawed rationale for war and scandals like Abu Ghraib, Guantánamo and Haditha. The last thing we can afford now is to leave Article 3 of the Geneva Conventions open to reinterpretation, as President Bush proposed to

do and can still do under the compromise bill that emerged last week.

We each need to ask ourselves, in the rush to find a "compromise" we can all embrace, are we strengthening America's moral authority or eroding it? Are we on the sides of the thousands of Paul Rieckhoffs in uniform today, or are we making their mission harder and even worse, putting them in greater danger if they are captured?

Paul writes eloquently:

If America continues to erode the meaning of the Geneva Conventions, we will cede the ground upon which to prosecute dictators and warlords. We will also become unable to protect our troops if they are perceived as being no more bound by the rule of law than dictators and warlords themselves. The question facing America is not whether to continue fighting our enemies in Iraq and beyond but how to do it best. My soldiers and I learned the hard way that policy at the point of a gun cannot, by itself, create democracy. The success of America's fight against terrorism depends more on the strength of its moral integrity than on troop numbers in Iraq or the flexibility of interrogation options.

I wish I could say this compromise serves America's moral mission and protects our troops, but it doesn't. No eloquence we can bring to this debate can change what this bill fails to do.

We have been told in press reports that it is a great compromise between the White House and my good friends, Senator MCCAIN, Senator WARNER, and Senator GRAHAM. We have been told that it protects the "integrity and letter and spirit of the Geneva Conventions."

I wish that what we are being told is true. It is not. Nothing in the language of the bill supports these claims. Let me be clear about something—something that it seems few people are willing to say. This bill permits torture. This bill gives the President the discretion to interpret the meaning and application of the Geneva Conventions. This bill gives an administration that lobbied for torture exactly what it wanted.

We are supposed to believe that there is an effective check on this expanse of Presidential power with the requirement that the President's interpretations be published in the Federal Register.

We shouldn't kid ourselves. Let's assume the President publishes his interpretation of permissible acts under the Geneva Convention. The interpretation, like the language in this bill, is vague and inconclusive. A concerned Senator or Congresswoman calls for oversight. Unless he or she is in the majority at the time, there won't be a hearing. Let's assume they are in the majority and get a hearing. Do we really think a bill will get through both houses of Congress? A bill that directly contradicts a Presidential interpretation of a matter of national security? My guess is that it won't happen, but maybe it will. Assume it does. The bill has no effect until the President actually signs it. So, unless the President

chooses to reverse himself, all the power remains in the President's hands. And all the while, America's moral authority is in tatters, American troops are in greater jeopardy, and the war on terror is set back.

Could the President's power grab be controlled by the courts? After all, it was the Supreme Court's decision in Hamdan that invalidated the President's last attempt to consolidate power and establish his own military tribunal system. The problem now is that the bill strips the courts the power to hear such a case when it says "no person may invoke the Geneva Conventions . . . in any habeas or civil action."

What are we left with? Unfettered Presidential power to interpret what—other than the statutorily proscribed "grave violations"—violates the Geneva Conventions. No wonder the President was so confident that his CIA program could continue as is. He gets to keep setting the rules—rules his administration have spent years now trying to blur.

Presidential discretion is not the only problem. The definitions of what constitute "grave breaches" of Article 3 are murky. Even worse, they are not consistent with either the Detainee Treatment Act or the recently revised Army Field Manual. These documents prohibit "cruel, inhumane, or degrading treatment" defined as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments." The definition is supported by an extensive body of case law evaluating what treatment is required by our constitutional standards of "dignity, civilization, humanity, decency, and fundamental fairness." And, I think quite tellingly, it is substantially similar to the definition that my good friend, Senator MCCAIN, chose to include in his bill. And there is simply no reason why the standard adopted by the Army Field Manual and the Detainee Treatment Act, which this Congress has already approved, should not apply for all interrogations in all circumstances.

In the bill before us, however, there is no reference to any constitutional standards. The prohibition of degrading conduct has been dropped. And, there are caveats allowing pain and suffering "incidental to lawful sanctions." Nowhere does it tell us what "lawful sanctions" are.

So, what are we voting for with this bill? We are voting to give the President the power to interpret the Geneva Conventions. We are voting to allow pain and suffering incident to some undefined lawful sanctions. The only guarantee we have that these provisions really will prohibit torture is the word of the President.

The word of the President. I wish I could say the words of the President were enough on an issue as fundamental as torture. Fifty years ago, President Kennedy sent his Secretary of State abroad on a crisis mission—to

prove to our allies that Soviet missiles were being held in Cuba. The Secretary of State brought photos of the missiles. As he prepared to take them from his briefcase, our ally, a foreign head of state said, simply, "put them away. The word of the President of the United States is good enough for me."

We each wish we lived in times like those—perilous times, but times when America's moral authority, our credibility, were unquestioned, unchallenged.

But the word of the President today is questioned. This administration said there were weapons of mass destruction in Iraq, that Saddam Hussein had ties to Al Qaeda, that they would exhaust diplomacy before we went to war, that the insurgency was in its last throes. None of these statements were true, and now we find our troops in the crossfire of civil war in Iraq with no end in sight. They keep saying the war in Iraq is making us safer, but our own intelligence agencies say it is actually fanning the flames of jihad, creating a whole new generation of terrorists and putting our country at greater risk of terrorist attack. It is no wonder then that we are hesitant to blindly accept the word of the President on this question today.

The President said he agreed with Senator McCAIN's antitorture provisions in the Detainee Treatment Act. Yet, he issued a signing statement reserving the right to ignore them. He says flatly that "The United States does not torture"—and then tries to bully Congress into allowing him to do exactly that. And even here, he has promised to submit his interpretations of the Geneva Convention to the Federal Register—yet his Press Secretary announced that the administration may not need to comply with that requirement.

We have seen the consequences of simply accepting the word of this administration. No, the Senate cannot just accept the word of this administration that they will not engage in torture given the way in which everything they have already done and said on this most basic question has already put our troops at greater risk and undermined the very moral authority needed to win the war on terror. When the President says the United States doesn't torture, there has to be no doubt about it. And when his words are unclear, Congress must step in to hold him accountable.

The administration will use fear to try and bludgeon anyone who disagrees with them.

Just as they pretended Iraq is the central front in the war on terror even as their intelligence agencies told them their policy made terrorism worse, they will pretend America needs to squander its moral authority to win the war on terror.

They are wrong, profoundly wrong. The President's experts have told him that not only does torture put our troops at risk and undermine our

moral authority, but torture does not work. As LTG John Kimmons, the Army's deputy chief of staff for intelligence, put it:

No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that. Any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of questionable credibility. And additionally, it would do more harm than good when it inevitably became known that abusive practices were used. We can't afford to go there.

Neither justice nor good intelligence comes at the hands of torture. In fact, both depend on the rule of law. It would be wrong—tragically wrong—to authorize the President to require our sons and daughters to use torture for something that won't even work.

Another significant problem with this bill is the unconstitutional elimination of the writ of habeas corpus. No less a conservative than Ken Starr got it right:

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.

Ken Starr says, "Congress should act cautiously." How cautiously are we acting when we eliminate any right to challenge an enemy combatant's indefinite detention? When we eliminate habeas corpus rights for aliens detained inside or outside the United States so long as the Government believes they are enemy combatants? When we not only do this for future cases but apply it to hundreds of cases currently making their way through our court system?

The Constitution is very specific when it comes to habeas corpus. It says, "[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." We are not in a case of rebellion, nor are we being invaded. Thus, we really don't have the constitutional power to suspend the Great Writ. And, even if we did, the Constitution allows only for the writ to be suspended. It does not allow the writ to be permanently taken away. Yet, this is exactly what the bill does. It takes the writ away—forever—from anyone the administration determines is an "enemy combatant," even if they are lawfully on U.S. soil and otherwise entitled to full constitutional protections, and even if they have absolutely no other recourse.

Think of what this means. This bill is giving the administration the power to pick up any non-U.S. citizen inside or outside of the United States, determine in their sole and unreviewable discretion that he is an unlawful combatant, and hold him in jail—be it Guantanamo Bay or a secret CIA prison—indefinitely. Once the Combatant Status Review Tribunal determines that person is an enemy combatant, that is the end of the story—even if the determination is based on evidence that even a mili-

tary commission would not be allowed to consider because it is so unreliable. That person would never get the chance to challenge his detention; to prove that he is not, in fact, an enemy combatant.

We are not talking about whether detainees can file a habeas suit because they don't have access to the Internet or cable television. We are talking about something much more fundamental: whether people can be locked up forever without even getting the chance to prove that the Government was wrong in detaining them. Allow this to become the policy of the United States and just imagine the difficulty our law enforcement and our Government will have arranging the release of an American citizen the next time our citizens are detained in other countries.

Mr. President, we all want to stop terrorist attacks. We all want to effectively gather as much intelligence as humanly possible. We all want to bring those who do attack us to justice. But, we weaken—not strengthen—our ability to do that when we undermine our own Constitution; when we throw away our system of checks and balances; when we hold detainees indefinitely without trial by destroying the writ of habeas corpus; and when we permit torture. We endanger our moral authority at our great peril. I oppose this legislation because it will make us less safe and less secure. I urge my colleagues to do the same.

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

Mr. WARNER. Mr. President, I yield 5 minutes to our colleague from Missouri.

THE PRESIDING OFFICER. The Senator from Missouri is recognized for 5 minutes.

Mr. BOND. Mr. President, I thank the manager of the bill for yielding me 5 minutes.

There is no question that this bill, this military commissions bill, is absolutely essential if we are going to continue to have good intelligence and move forward with the program of interrogating and containing detainees in an appropriate manner that will maintain our standing, our honor, and puts tighter control on the United States than other countries do on their unlawful combatants.

I respectfully suggest that the Rockefeller amendment is not only unnecessary, but the simple fact is, the unintended effect is it would complicate the passage of this important military commissions bill. It would either delay or perhaps even derail this bill, which is absolutely essential if we are to get our CIA agents back in the field doing appropriately limited interrogation techniques to find out what attacks are planned against the United States.

The President has pointed out, the interrogation is the thing that has uncovered plots that could have been very serious. We need to have our CIA professionals under carefully controlled

circumstances doing the interrogation that gets the information.

As to the question about whether this is about oversight, well, our committee should be all about oversight. We need to be looking at these things. We need to be looking every day at what the agencies are doing, what the intelligence community is doing. But as I have said here on the floor before, unfortunately, for the last 4 years, we have been looking in the rearview mirror. It has been our fault, not the fault of the agencies, that we have not done enough oversight because when we spent 2 years in the Phase I investigation, we found out the intelligence was flawed, the intelligence was inadequate because our intelligence assets were cut 20 percent in the 1990s. We had no human intel on the ground.

But, most of all, there was no pressure, no coercion by administration officials of the intelligence agencies, and there was no misrepresentation of the findings of the intelligence community—same intelligence that we in the Congress relied upon in supporting the decision to go to war against the hotbed of terrorism, Iraq.

Now, I do not take issue with that first phase. But Phase II has cost us another 2 years, and we have not learned anything more than we learned in the first phase and with the WMD and the 9/11 Commission.

If we would get back to looking out the front windshield, instead of looking in the rearview mirror, we should be doing precisely this kind of interrogation in the oversight committee. And I take no issue with many of the questions the Senator from West Virginia raises. As a matter of fact, I probably would have some of my own. But I do question the need for a very lengthy, detailed report every 3 months. If you read all of the requirements, this is a paperwork nightmare. They are going to have to comply and tell us how they are going to comply, and we are going to oversee them.

I believe putting out this lengthy report gets us nowhere. Frankly, if our past experience is any guide, we will probably see those reports leaked to the press because reports have a way, regrettably, of being leaked and being disclosed.

I think there is one big problem with the Rockefeller amendment. In the amendment, he requires every 3 months the Attorney General—any time there are any new interrogation techniques, the Attorney General shall submit an unclassified certification whether or not each approved interrogation technique complies with the Constitution of the United States, applicable treaty statutes, Executive orders, relations, and an explanation of why it complies.

Mr. President, what we would just order in this amendment is to spread out for the world—and especially for al-Qaida and its related organizations—precisely what interrogation techniques are going to be used. Let me tell

you something. I visited with intelligence agents around the world, some of whom have been in on the most sensitive interrogations we have had. I have asked them about that, and they have explained to me how they interrogate people. These interrogations I have learned about comply—even though they were before the passage of this law—with the detainee treatment law. They do comply, and I think they are appropriate. The important thing, they say, is that what the terrorists don't know is most important. They don't know how they are going to be questioned or what is going to happen to them. The uncertainty is the thing that gets them to talk. If we lay out, in an unclassified version, a description of the techniques by the Attorney General, that description will be in al-Qaida and Hezbollah and all of the other terrorist organizations' playbook. They will train their assets that: This is what you must be expected to do, and Allah wants you to resist these techniques.

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

Mr. BOND. Yes, I am happy to.

Mr. ROCKEFELLER. Is the Senator aware, when he talks about delaying implementation of this program, that there are no CIA detainees? What are we holding up?

Mr. BOND. Mr. President, we are passing this bill so that we can detain people. If we catch someone like Khalid Shaikh Mohammed, we have no way to hold him, no way to ask him the questions and get the information we need, because the uncertainty has brought the program to a close. It is vitally important to our security, and unfortunately the Rockefeller amendment would imperil it.

General Hayden promised to come before the committee, and I look forward, in our oversight responsibilities, to hearing how they are implementing this act.

I thank the Chair.

Mr. ROCKEFELLER. That is simply not true.

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, at this juncture, I ask unanimous consent that we step off of this amendment and allow the distinguished Senator from New Mexico to speak for up to 10 minutes regarding the bill.

The PRESIDING OFFICER. The Senator from New Mexico is recognized for 10 minutes.

Mr. DOMENICI. Mr. President, I will speak on this vital subject. I rise to speak in support of the Military Commission Act of 2006.

First off, we must all ask ourselves a very simple question: Do we believe the United States must have a terrorist attack prevention program?

I submit that the answer is a clear and resounding yes. I believe the American people expect us to have a strong terrorist attack prevention program and that they believe if we don't, we

are derelict in our duty. They know that we are at risk, that this is a war, and that there are many people out there who are waiting to do damage and harm to our people. To have anything less than a terrorist prevention program, which is the best we can put together, is shameful. I cannot support any legislation that would prevent the CIA from protecting America and its citizens.

The legislation before us allows the Federal Government to continue using one of the most valuable tools we have in our war on terror—the CIA terrorist interrogation program.

The global war on terror is a new type of war against a new type of enemy, and we must use every tool at our disposal to fight that war—not just some tools, but all of them. These tools include interrogation programs that help us prevent new terrorist attacks.

The CIA interrogation program is such a program. It is helping us deny terrorists the opportunity to attack America. It has allowed us to foil at least eight terrorist plots, including plans to attack west coast targets with airplanes, blow up tall buildings across our Nation, use commercial airliners to attack Heathrow Airport and bomb our U.S. Marine base in Africa.

Mr. President, clearly, this program is valuable. Clearly, this program is necessary in the global war on terror. We must take legislative action that will allow the program to continue. The CIA must be allowed to continue going after those who have information about planned terrorist attacks against our Nation and our friends. The CIA must be allowed to go after those who are in combat with us.

I applaud the White House, the Senate leadership, and the Armed Services Committee for working together to craft a bill that, No. 1, authorizes military tribunals and establishes the trial and evidentiary rules for such tribunals; and No. 2, clarifies the standards the CIA must comply with in conducting terrorist interrogations. We must keep the bill in its current form, fending off amendments that would put the CIA's program in jeopardy.

Regarding the Byrd sunset amendment, we don't know when the global war on terror will end, so we cannot arbitrarily tie one hand behind the CIA's back by suddenly terminating the interrogation program with a sunset provision.

We have already voted on the habeas corpus amendment, and I am glad we did not add habeas provisions to this bill. We cannot give terrorists the right to bring a habeas corpus petition that seeks release from prison on the grounds of unlawful imprisonment, as the Specter amendment would. Such legislation will clog our already overburdened courts.

Additionally, such petitions are often frivolous and disrupt operations at Guantanamo Bay. Examples of the frivolous petitions that have been filed include an al-Qaida terrorist complaining

about base security procedures, speed of mail delivery, and medical treatment; as well as a detainee asking that normal security policies be set aside so that he could be shown DVDs that are alleged to be family videos. Such petitions are not necessary.

The underlying bill allows appeals of judgments rendered by military commissions to the District of Columbia Circuit Court of Appeals—a very significant court. These are appeals of judgments rendered by the military commissions. That is a totally appropriate way to do it. When I finally understood that, I could not believe that some would come to the floor and argue as they did. My colleagues have said we are abandoning habeas corpus; we have never done anything like this before. They act as if we have decided to be totally unjust and unfair when, as a matter of fact, this is about as fair a treatment as you could give terrorist suspects and still have an orderly process. I think we have done the right thing. Giving terrorist suspects access to the court known as the second highest court in America provides an adequate opportunity for review of detainees' cases.

I laud the occupant of the chair for explaining this matter early on to many of us who did not understand the issue, and it has become clear to many of us that we have done the right thing in terms of the habeas corpus rule that we have adopted. It will be upheld, in my opinion, after I have read some other cases, by the courts.

Mr. President, my primary standard in determining whether to support this legislation is whether the legislation will allow the CIA interrogation program to continue. The answer to that question must be yes. If the answer to that question is no, then we are foolhardy, at a minimum, and totally stupid at a maximum, if we decide that the kinds of enemies we have will not be subject to the CIA terrorist interrogation program we have now. The program must continue.

The administration has informed me that this bill, in its current form, will allow the CIA terrorist interrogation program to continue. I sought that information as a critical piece of information before I started looking at all of the amendments to see where we were. Therefore, this bill must pass, and it must pass in its current form.

We must remember that we are dealing with terrorists, not white-collar criminals. We are not even dealing with the types of prisoners of war there were in the Second World War, some of whom, from the German area, might have been severely abusing the rights of prisoners-of-war. But we still did not in any way have the situation we have now with reference to prisoners of war in the Second World War.

We must remember that we are dealing with terrorists who know no limits, follow no rules, have no orderliness about them. They are just going to do what we let them do. We must give our

best—the CIA—the tools they need to do their job to fight this war on terror against these terrorists.

It is my privilege to be on the side of this bill. I believe the American people will be on the side of this bill. Some thought early that it was the wrong thing to do. Just as it happens with many bills, we got off on the wrong foot. But we are back straight, with both feet on the right path, and we must pass the bill as is.

I wonder if those who want to destroy this bill or make it ineffective would really ask the American people in honesty and sincerity, do they want the CIA program to continue or are they really trying to say we should not allow the program? If my colleagues are on the side of the latter, they ought to tell us and tell the American people. Then we would understand whom they are for and there would be no question in the American people's minds.

I yield the floor.

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, I yield to the chairman of the Intelligence Committee, the Senator from Kansas, such time as he needs.

The PRESIDING OFFICER. The Senator from Kansas is recognized.

Mr. ROBERTS. Mr. President, I thank the chairman of the Armed Services Committee, who is an ex officio member of the Intelligence Committee and does extremely valuable work as we try to work in a commensurate fashion on national security.

I rise in opposition to the amendment being offered by my good friend from West Virginia, Senator ROCKEFELLER, who is vice chairman of our committee. The amendment calls for yet another unnecessary and repetitious requirement of reporting.

Now, I do not take issue with some of the numerous questions the Senator from West Virginia seeks. Some of these questions should be answered in the context of our regular committee oversight.

The issue is not if reasonable questions are answered, but how and how often. I really question the need for a formal quarterly report—four times a year—unreasonable in scope and length that will be a very unnecessary burden on the hard-working men and women at the CIA.

The simple fact is that the vice chairman and other members of the committee have been fully briefed in the past, present, and prospective future about CIA's detention and interrogation operations and will continue to be briefed. The vice chairman and other members of the Intelligence Committee can get answers to their questions and more through the course of the committee's normal oversight activities. They only need to ask.

I just mentioned the prospective future of the CIA's interrogation program. That is because without this legislation, there will be no CIA program.

Let's be clear. If we adopt what I believe is an unnecessary amendment, contrary with the House, this bill will end up in conference with the House. If that happens, I fear the bill will languish throughout the fall while Members are out campaigning. Meanwhile, the CIA will be unable to interrogate captured unlawful alien combatants.

Forgive me, Mr. President, but I think the American people deserve better than to have this Nation's efforts against al-Qaida bog down because some in this body—and I don't question their intent—are insisting on an unnecessary symbolic and redundant series of reporting requirements that could and will be answered through the regular committee oversight. All we have to do is ask and then to listen and then to respond. Where are our priorities? Where should they be?

As I have listened to the debate on this bill in the relative safety and comfort of Capitol Hill, I cannot help but wonder whether some of us have lost our perspective. While we must do our duty as elected officials—and we will do that—we cannot forget that we are a nation at war. Consequently, our first and foremost duty should be to support our troops and intelligence officers at home and abroad, not to mandate four times a year reporting requirements that are unprecedented in scope and detail. The CIA will not be detecting and interdicting unlawful alien combatants; it will be writing one report after another.

I am on the side of our hard-working intelligence officers and against the terrorists. I think that is an obvious choice. I think most Members would think they would be in that position. But I do not believe in making their job more difficult by legislating additional reporting requirements which are needless and burdensome and which will likely delay enactment of this vital national security legislation.

If this were to pass, we can be reasonably certain that it will have a chilling effect on interrogation operations. We are sending a signal to our intelligence officers to be risk averse, the very thing we don't want to do. In fact, the very implication of this amendment is they are unable to carry out their duties with honor and respect for the law, and that, my colleagues, is just not true.

So let us do our duty, as we should, and get this bill done and to the President.

Mr. President, I oppose the amendment and I urge my colleagues to do the same.

I yield the floor.

The PRESIDING OFFICER (Mr. VITTER). The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, I wonder if I may engage my distinguished chairman in a colloquy. I am privileged to serve on his committee. Some years ago I served on the committee and at one time was vice chairman of the committee. So I draw on, if I may say

with some modesty, a long experience of working with the Intelligence Committee, and, as the chairman knows, the chairman and ranking member of the Armed Services Committee have always had a role of participation in his committee. I guess if I can add up all the years as chairman and ranking, it is about 12 or 15, I think, of my 28 years on the Armed Services Committee. I have watched this committee and have been a participant for many years.

As I read through the amendment offered by our distinguished colleague from West Virginia—he has the title of vice chairman. That came about because the chairman and the vice chairman traditionally on this committee work to achieve the highest degree—I guess the word is the committee working together as an entity.

I say to the chairman, it is my judgment that this amendment is really in the nature of a substitute for the oversight responsibilities of the committee.

As we both know, the world environment changes overnight. This business of trying to operate on the basis of reports is simply, in my judgment, not an effective way for the committee to function. The Senator from Kansas, as chairman, in consultation with the vice chairman, has to call hearings and meetings and briefings in a matter of hours in order to keep the committee currently informed about world situations.

I say with all due respect to my colleagues here and to our vice chairman of the Intelligence Committee, this amendment is a substitute for the committee's responsibilities, the basic responsibilities to be performed by this committee. It is for that reason I oppose the amendment. But I would like to have the chairman's views.

Mr. ROBERTS. Mr. President, if the chairman will yield.

Mr. WARNER. Yes.

Mr. ROBERTS. Let me repeat what I said in my statement—and I share the distinguished Senator's views, more especially from his experience on both committees, the Intelligence Committee and the Armed Services Committee. We both face the same kind of responsibilities, our oversight responsibilities. We take them very seriously. We may have differences of opinion on the Intelligence Committee or on the Armed Services Committee, but we do our oversight.

The simple fact is that the vice chairman, myself, and other members of the committee—and let me stress now full membership of the committee; we worked very hard to get that access—have been fully briefed in the past and the present and also prospectively of the CIA's detention and interrogation operations.

The vice chairman and other members of the Intelligence Committee, if people have problems, if people have questions, if people need to get more briefs, if people want to basically get into some—I say "some" because I

think some of the questions are not reasonable—say they have questions about this, all they have to do is ask. I can guarantee as chairman that those in charge of this particular program at the CIA will be there and have been there.

The inspector general of the CIA has briefed the committee—I am not going to get into the details of that briefing—both the vice chair and myself in regards to any question on what has happened, with what has gone wrong allegedly or otherwise with the interrogation and detention program, and we get an update as to where are those cases. If there was egregious behavior, what is happening to those people? Are they being prosecuted? And the answer to that is yes.

All we have to do is ask. As I look at this, I must say in scope, it is unprecedented. They ask questions that I think, quite frankly, if I were an interrogator working within the confines of the Central Intelligence Agency, would have a very chilling effect on me to know that four times a year I would be held responsible for all of these questions which I think those in charge at the Agency can certainly respond to any committee request in terms of a briefing. I would be a little nervous.

And that is not the case because, as I said in my remarks, the CIA will not be detecting and interdicting unlawful alien combatants; it will be writing one report after another, four times a year. If we look at the length, breadth, and depth, it is not whether we get this information, it is how we get the information. All we have to do is ask.

This is a tremendous burden. I must tell my colleagues that I don't know where we are going to get enough staff on the committee to respond to these four mandated reports. It is going to be a rather unique situation when we have a lot of work to do. We have briefings, as the Senator from Virginia indicated, every week. We have one this afternoon—it is terribly important—requested by members. Yet I think we are going to have to hire more people to do this if, in fact, we do this, and I think the CIA will as well.

I am not too sure, again, if I were an individual interrogator that I would want to stay in the business.

Mr. WARNER. Mr. President, I thank my colleague. Another observation of all of us who have had the responsibility of being a chairman and ranking member of committees, I know it is sometimes difficult to get witnesses to appear, but I found thus far, certainly with General Hayden—and I have known him for a number of years—I have a high degree of confidence in his ability to administer this Agency, the CIA. It is of great importance to this Senator because it is in Virginia, if I may say. I view the agency and each and every one of its employees as someone for whom I have an obligation to speak on their behalf when necessary.

I find that General Hayden is very forthcoming, very responsive. When

the Chair and ranking member desire to see him, my understanding is he makes himself available. It is not as if we have to wait until a report comes, read it, and then decide to bring him down. The Chair, in consultation with the ranking member—he and his team are quite responsive; am I not correct in that?

Mr. ROBERTS. I am happy to respond to the distinguished chairman. What he has described is accurate. It may be the situation with General Hayden, the Inspector General, or anybody else we request to appear before the committee that they may be in a situation where there would be sensitive intelligence information that at that particular time would not be provided, but there certainly would be the promise that it will be provided if at all possible.

So I am not saying that it is a *carte blanche* kind of situation. That is to be expected. But the great preponderance of requests we make of the General and of the Inspector General have been very prompt and very full, and, again, all we have to do is ask.

It is just that—I don't want to call it a book report, but that is about where we are. It is on some very important matters. I know members of the committee feel very strongly about this. I can't recall a time when members on the committee have asked me for help to get information from the executive or from the CIA or from any of our intelligence agencies where I haven't worked overtime to get that job done.

I thank the chairman for his question.

Mr. WARNER. Mr. President, I thank my distinguished colleague. I think we have framed for the full Senate the parameters of what I regard are the points to be considered at such time we vote on this amendment.

On that matter, I see the distinguished vice chairman and my colleague. How much time remains under the control of the Senator from Virginia?

The PRESIDING OFFICER. There is 8½ minutes remaining under the control of the Senator from Virginia.

Mr. WARNER. I thank the Chair.

I yield the floor.

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Mr. President, if I might speak for 2 or 3 minutes.

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

Mr. ROCKEFELLER. Mr. President I have a one-page summary. Some of the arguments I have heard are absolutely incredible. The fact of the matter is there isn't any reporting done. For 4 years this has gone on. People say: Just call them in; call in the head of the CIA, whoever it is, before the committee. That doesn't yield information. We have so many requests for information from the CIA that have not been responded to. They are not responsive to the committee because they don't want to be responsive to the committee, because they are directed not

to be responsive to the committee, I am assuming, by the Director of the National Intelligence Office.

We don't have oversight on these programs we are talking about. Anybody who suggests otherwise is wrong. I heard the opposition to the amendment say it is going to slow down the passage of the bill. Now, that is brilliant. We could have started this in a timely fashion, and all the House has to do is accept the Senate amendment, if one were to pass. In a heartbeat, it is done. So what is in that argument?

The Senator from Missouri has stated—and this is very important for my colleagues to hear—that the amendment would require public disclosure of the CIA's interrogation techniques. That is categorically false—wrong. It is a dangerous thing to say. It is an irresponsible thing to say on the floor of the Senate. The reports on the CIA program would be classified and they would be sent to the congressional Intelligence Committees and them alone. So we need to get that straight right now.

The information that is provided in the reports is made to sound like we are rewriting the Constitution 17 times in a hot summer's several months. This is information which has not been provided to us for 4 years, what these reports would be asked to do, and then they could taper off if we found a responsive intelligence community. But we have not been provided these in 4 years. Am I meant to be worried about that? Is it the job of the Senate Intelligence Committee and the House to do oversight? Yes, it is, and we can't because they won't give us the information. The chairman can say that he and I are briefed, but that is seldom and on very discrete matters that don't cover this bill.

So the Senator from Virginia, whom I obviously greatly respect, suggests this amendment is a substitute for oversight. This amendment, to the contrary, is going to allow us to do oversight, and that is my point. It is our responsibility under the law to do it. We cannot do it. We are not allowed to do it. We are systematically prevented from getting information from the people who are required by law to give it to us. That is called not being transparent, and that is called us not knowing what is going on and thus not being able to help with the war on terror.

I thank the Chair.

The PRESIDING OFFICER. Who yields time?

Mr. ROCKEFELLER. Mr. President, I yield 4 minutes to the Senator from Michigan.

The PRESIDING OFFICER. The Senator from Michigan is recognized for 4 minutes.

Mr. LEVIN. I thank the Chair, and I thank my friend from West Virginia.

Mr. President, this amendment just simply requires regular reports on detention and interrogation programs. It will give us access to legal opinions. It is essential that this amendment be adopted.

I just want to ask my good friend from West Virginia if he heard the chairman of the Intelligence Committee say that all we have to do is ask for reports and we will get them. Did I hear that right?

Mr. ROCKEFELLER. The Senator from Michigan heard that correctly.

Mr. LEVIN. Well, Mr. President, just one example here. I have been trying to get a memo called the second Bybee memo now for 2½ years. I haven't asked once, I haven't asked twice, I have probably asked a dozen times for the Bybee memo, and my good friend, the chairman of the Armed Services Committee, has asked for the Bybee memo, without any luck. So the idea that all we have to do is ask is just simply wrong.

Chairman WARNER asked on May 13, 2004—2004—that all legal reviews and related documentation concerning approval of interrogation techniques be provided to the committee. It has never been provided.

On April 12, 2005, I submitted questions to John Negroponte, who was the nominee for the Director of National Intelligence, requesting to see if the intelligence community has copies of the so-called Bybee memo.

In April of 2005, I asked General Hayden, on his nomination to be Deputy National Intelligence Director, to see if he could determine if the intelligence community has a copy of the second Bybee memo and to provide it to the committee.

Then on the intelligence budget hearing, April 28, 2005, I asked Secretary Cambone: Can you get us a copy of the second Bybee memo? This has to do with what interrogation techniques are legal. This is written by the Office of Legal Counsel, this memo. He says he will get a reply to me. That was April 2005.

In May of 2005, I wrote the Director of Central Intelligence, Porter Goss, requesting the second Bybee memo. Then I get a letter from the Director of Congressional Affairs, Joe Whipple, saying the memorandum can only be released by the Department of Justice. So in July, I write the Department of Justice, the Attorney General: Can we get a copy of the second Bybee memo? Letter after letter after letter.

Then there is a hearing by the Senate Intelligence Committee, July 2005. This is a hearing on Benjamin Powell's nomination to be general counsel in the Office of the Director of National Intelligence. I asked Mr. Powell: Can you provide us for the record a copy of that second Bybee memo? That decision, we are told a week later, is not a decision he can make; that is within the Department of Justice's purview, and on it goes.

Another year of stonewalling, of denial, of coverup by the Department of Justice of a memo which is so critically important, according to press reports and according now also to the acknowledgment by the Department of Justice. It sets a legal framework for

the interrogation of detainees, and the Senate can't get a copy.

Apparently, two Members of the Senate, the chairman and vice chairman of the Intelligence Committee, have seen this memo. That is it. Members of the Intelligence Committee can't get it. Members of the Armed Services Committee can't get it. All we have to do is ask? How many times do we have to ask before we get documents?

There are 70 documents we still can't get from the Department of Defense relative to the operation of the Feith shop. All we have to do is ask? There are documents we have asked of the Intelligence Committee for years beyond the Bybee amendment without any response.

The PRESIDING OFFICER. The Senator has used 4 minutes.

Mr. LEVIN. I thank the Chair, and I thank my good friend from West Virginia for trying to get some institutional support behind these requests that are made by Senators and committees frequently for documents.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, in consultation with my distinguished ranking member, I would like to inquire if there is further debate desired on this amendment. If not, my understanding is the leadership will select a time—joint leadership—for votes on this amendment and others at some point this afternoon and with the full expectation that this matter will be voted on final passage.

So at this time, could I inquire as to the time for the Senator from Virginia and the Senator from Michigan?

The PRESIDING OFFICER. The time is 18 minutes for the Senator from Virginia and 5 minutes 10 seconds for the Senator from West Virginia.

Mr. LEVIN. Mr. President, may I inquire of the Senator from West Virginia as to whether, if he has completed debate on this amendment, he would be willing to yield the balance of his time to the Senator from Michigan for use on the bill?

Mr. ROCKEFELLER. I would, with the exception of 1 minute to summarize just before we vote on it, so you can have the balance of the time.

Mr. LEVIN. Mr. President, I ask unanimous consent that the balance of the time of the Senator from West Virginia minus that 1 minute be assigned to the Senator from Michigan for use or allocation on the bill itself.

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

Mr. WARNER. Mr. President, I would make a similar request that the balance of my time be allocated to me for use on the bill.

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

Mr. WARNER. Therefore, I believe all time has been yielded back on both sides, and we can prepare the floor now for the receiving of an amendment

from the distinguished Senator from Massachusetts.

I yield the floor.

THE PRESIDING OFFICER. The Senator from Massachusetts is recognized.

AMENDMENT NO. 5088

Mr. KENNEDY. Mr. President, I believe my amendment No. 5088 is at the desk, and I ask for its immediate consideration.

THE PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

The Senator from Massachusetts [Mr. KENNEDY] proposes an amendment numbered 5088.

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

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

The amendment is as follows:

AMENDMENT NO. 5088

(Purpose: To provide for the protection of United States persons in the implementation of treaty obligations)

On page 83, between lines 8 and 9, insert the following:

(2) PROTECTION OF UNITED STATES PERSONS.—The Secretary of State shall notify other parties to the Geneva Conventions that—

(A) the United States has historically interpreted the law of war and the Geneva Conventions, including in particular common Article 3, to prohibit a wide variety of cruel, inhuman, and degrading treatment of members of the United States Armed Forces and United States citizens;

(B) during and following previous armed conflicts, the United States Government has prosecuted persons for engaging in cruel, inhuman, and degrading treatment, including the use of waterboarding techniques, stress positions, including prolonged standing, the use of extreme temperatures, beatings, sleep deprivation, and other similar acts;

(C) this Act and the amendments made by this Act preserve the capacity of the United States to prosecute nationals of enemy powers for engaging in acts against members of the United States Armed Forces and United States citizens that have been prosecuted by the United States as war crimes in the past; and

(D) should any United States person to whom the Geneva Conventions apply be subjected to any of the following acts, the United States would consider such act to constitute a punishable offense under common Article 3 and would act accordingly. Such acts, each of which is prohibited by the Army Field Manual include forcing the person to be naked, perform sexual acts, or pose in a sexual manner; applying beatings, electric shocks, burns, or other forms of physical pain to the person; waterboarding the person; using dogs on the person; inducing hypothermia or heat injury in the person; conducting a mock execution of the person; and depriving the person of necessary food, water, or medical care.

Mr. KENNEDY. Mr. President, I understand we have an hour evenly divided on the amendment.

THE PRESIDING OFFICER. Under the agreement, the Senator has 25 minutes under his control.

Mr. KENNEDY. Mr. President, I yield myself 10 minutes on the amendment.

THE PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I have here before me the Department of Army regulations and rules for interrogating prisoners. In the document I have here, which is the official military document to define permissible interrogation techniques, it outlines certain interrogations which are prohibited and it lists these: forcing the person to be naked, perform sexual acts, or pose in a sexual manner; applying beatings, electric shock, burns, or other forms of physical pain; waterboarding; using dogs; inducing hypothermia or heat injury; conducting mock executions; depriving the person of necessary food, water, and medical care.

Those techniques are prohibited by the Department of Defense. Those techniques are prohibited from being used against adversaries in any kind of a conflict, blatant violations the requirement for humane treatment, and what I would consider to be torture. Certainly the Army and Department of Defense have effectively found that out that these techniques do not work. They have banned them and there has not been any objection to it.

What does our amendment say? Well, it says we in the United States are not going to tolerate those techniques if any of our military personnel are captured. But not all of the people who are representing the United States in the war on terror are wearing a uniform. For example, we have SEALs, we have some special operations, special forces, we have CIA agents. We have contractors and aid workers. We have more people around the world looking out after our security interests than any other country in the world.

What does this amendment say? Well, if our military personnel are not going to do this those we capture, we are saying to countries around the world: You cannot do this against any American personnel you are going to capture in this war on terror, or in any other conflict. This amendment is about protecting American personnel who are involved in the war on terror. It is saying to foreign countries: If you use any of these techniques, the United States will say this is a war crime and you will be held accountable. How can anybody be against that? This administration has sown confusion about our commitments to the Geneva Conventions, so that protection does not exist now. That protection does not exist now. Restoring that protection is basically what this amendment is all about.

I am not going to take much time, but I just want to remind our colleagues about how we viewed some of these techniques in our conflicts in previous wars.

On the issue of waterboarding, the United States charged Yukio Asano, a Japanese officer on May 1 to 28, 1947, with war crimes. The offenses were recounted by John Henry Burton, a civilian victim:

After taking me down into the hallway they laid me out on a stretcher and strapped

me on. The stretcher was then stood on end with my head almost touching the floor and my feet in the air. They then began pouring water over my face and at times it was impossible for me to breathe without sucking in water. The torture continued and continued. Yukio Asano was sentenced to fifteen years of hard labor. We punished people with fifteen years of hard labor when waterboarding was used against Americans in World War II.

What about the case of Matsukichi Muta, another Japanese officer, tried on April 15 to 25, 1947, for, among other charges, causing a prisoner to receive shocks of electricity and beating prisoners. Shocks of electricity. He was sentenced to death by hanging. Death by hanging. We could go on.

In another case prosecuted from March 3 to April 30, 1948—the Japanese officer was sentenced for exposing prisoners to extreme cold temperatures, forcing them to spend long periods of time in the nude, making the prisoner stand in the cold for long periods of time, hour after hour, throwing water on him and inducing hypothermia. This officer received 15 years of hard labor. Fifteen years.

We didn't tolerate those abuses, and we should not tolerate those abuses inflicted on any Americans who are going to be taken in the war on terror. That is what this amendment is all about. It will tell the Secretary of State to notify every signatory from 194 nations, that if any of their governments are going to use any of these techniques on any Americans that are taken in this war on terror, that we will consider this a violation of the Geneva Conventions and that they will be accountable.

This is to protect our servicemen and servicewomen, those who are in the intelligence agencies, those performing dangerous duties, those who are not wearing the uniform in their battle against terror. We are putting everyone on notice.

We did not make up this list. All these techniques are taken right out of the Defense Department's code of conduct for interrogations.

I would take more time and review for my colleagues, where we tried individuals in World War II and sentenced individuals who performed these kinds of abuses on Americans to long periods of incarceration and even to death.

I reserve the remainder of my time.

THE PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, at this moment I suggest the absence of a quorum, with the time not chargeable to either side.

Mr. KENNEDY addressed the Chair.

Mr. WARNER. I beg your pardon. I thought my colleague yielded the floor.

Mr. KENNEDY. I did. If you want to yield your time, I wouldn't object to it, but I object if you are calling for equal time.

Mr. WARNER. No, I said charged to neither side.

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

The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. KENNEDY. Mr. President, do I have additional time? How much time have I used?

The PRESIDING OFFICER. There are 18 minutes 20 seconds remaining on the time of the Senator.

Mr. KENNEDY. I would like to yield myself 5 more minutes.

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

Mr. KENNEDY. Mr. President, it will be quite surprising to me if the Senate is not prepared to accept this amendment. I look back at the time that we actually passed the War Crimes Act of 1996. At that time it was offered by Walter B. Jones, a Republican Congressman. It was offered in response to our Vietnam experience, where American servicemen—including one of our own colleagues and dear friends, Senator MCCAIN—had been subject to torture during that period of time.

When this matter came up, both in the House of Representatives and the Senate of the United States, it passed in the Senate of the United States without a single objection. It passed the House by voice vote. This is what it says, under War Crimes, chapter 118:

Whoever, whether inside or outside the United States, commits a war crime . . .

And it talks about the circumstances—

. . . as a member of the armed forces of the United States or a national United States. It is in Title 18 so those out of uniform are subject to the code.

So that is the CIA. Those are the SEALS. Those are the people involved now in our war on terror. Then it continues along to define a war crime as a violation of Common Article 3 of the Geneva Conventions. That provision protects against cruel treatment and torture. It prevents the taking of hostages. It prohibits outrages upon personal dignity. Those are effectively the kinds of protections that act affords.

We heard a great deal from the administration, from the President, that he wanted specificity in the War Crimes Act and the Geneva Conventions in terms of what is permitted and what is not permitted. He felt those terms are too vague. Well, on that he is right. There is confusion in the world. There is confusion in the world about our commitment to the Geneva Conventions and what we think it means. There is a good deal of confusion in the world in the wake of what happened at Abu Ghraib. There we found out that these harsh interrogation techniques had been used. Sure, we have had 10 different reviews of what happened over there. What we always find out is it is the lower lights, the corporals and the sergeants who are the ones being tried

and convicted. Those in the higher ranks are not. No one has stood up and said clearly, those are violations of the Geneva Conventions. So we have Abu Ghraib, which all of us remember. And it has caused confusion.

We have the circumstances in Guantanamo—the conduct of General Miller, who brought these harsh interrogation techniques to Guantanamo at Secretary Rumsfeld's direction. When the Armed Services Committee questioned his whole standard of conduct, he moved toward early retirement to avoid coming up and facing the music. This caused confusion about our commitments to the Geneva Conventions.

Then you had the Bybee memorandum, which was effectively the rule of law for some 2 years, which permitted torture, any kind of torture, and it said that any individual who is going to be involved in torturing would be absolved from any kind of criminality if the purpose of their abusing any individual was to get information and there was no specific intent to have bodily harm for that individual. This caused confusion about our commitments to the Geneva Conventions.

That was the Bybee amendment. Finally, Attorney General Gonzales had to repudiate that or he never would have been approved as the Attorney General of the United States. That is the record in the Judiciary Committee. I sat through those hearings. I heard the Attorney General say they were repudiating the Bybee memorandum on that.

This is against a considerable background of where we have seen some extraordinary abuses.

Then we have tried to clarify our commitment. We have the action in the Senate of the United States, by a vote of 90 to 9, accepting Senator MCCAIN's Amendment to prohibit cruel, inhumane, and degrading treatment; to make the Army Field Manual the law of the land; to say we are not interested in torture. Senator MCCAIN understands. He believes that waterboarding is torture. He believes using dogs is torture. This is not complicated. We don't have to cause confusion. We have it written down on this list of prohibited techniques. It is not my list of prohibited techniques, but it is written down by the Department of Defense. This amendment says if a foreign country is going to practice these kinds of behavior against an American national who is out there in the war on terror and is being picked up, we are going to consider this to be a war crime. This is about protecting Americans.

I don't understand the hesitancy on the other side, not being willing to accept this amendment. Let's go on the record about what we say is absolutely prohibited and what we know has been favored techniques that have been used by our adversaries at other times. Let's go on the record for clarity.

Looking back in history, at the end of World War II and otherwise, we are

all familiar with the different examples where these techniques—frighteningly familiar to the series of techniques used in Iraq and Guantanamo—and are often frequently used against Americans.

I am reminded—I gave illustrations: electric shocks, waterboarding, hypothermia, heat injury. We all remember the 52 American hostages who were held in the U.S. Embassy in Iran. They were subjected to the mock executions.

The PRESIDING OFFICER. The Senator has used 5 minutes.

Mr. KENNEDY. Mr. President, I hope we could accept this amendment. I yield myself 1 more minute.

It basically incorporates what the Senate did several years ago with war crimes. It is trying to respond to what the President says. He wants specificity about what is going to be prohibited and what will not be.

The Department of Defense has found these areas to be off limits for the military. All we are saying is if other countries are going to do that to Americans, they are going to be held accountable.

This is about protecting Americans. That is the least we ought to be able to do for those who are risking their lives in very difficult circumstances.

I yield the floor.

Mr. LEVIN. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time not be charged to either side.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mrs. CLINTON. Mr. President, the Senate is currently debating a bill on how we treat detainees in our custody, and, more broadly, on how we treat the principles on which our Nation was founded.

The implications are far reaching for our national security interests abroad; the rights of Americans at home, our reputation in the world; and the safety of our troops.

The threat posed by the evil and nihilistic movement that has spawned terrorist networks is real and gravely serious. We must do all we can to defeat the enemy with all the tools in our arsenal and every resource at our disposal. All of us are dedicated to defeating this enemy.

The challenge before us on this bill, in the final days of session before the November election, is to rise above partisanship and find a solution that serves our national security interests. I fear that there are those who place a strategy for winning elections ahead of a smart strategy for winning the war on terrorism.

Democrats and Republicans alike believe that terrorists must be caught,

captured, and sentenced. I believe that there can be no mercy for those who perpetrated 9/11 and other crimes against humanity. But in the process of accomplishing that I believe we must hold on to our values and set an example we can point to with pride, not shame. Those captured are going nowhere—they are in jail now—so we should follow the duty given us by the Supreme Court and carefully craft the right piece of legislation to try them. The President acted without authority and it is our duty now to be careful in handing this President just the right amount of authority to get the job done and no more.

During the Revolutionary War, between the signing of the Declaration of Independence, which set our founding ideals to paper, and the writing of our Constitution, which fortified those ideals under the rule of law, our values—our beliefs as Americans—were already being tested.

We were at war and victory was hardly assured, in fact the situation was closer to the opposite. New York City and Long Island had been captured. General George Washington and the Continental Army retreated across New Jersey to Pennsylvania, suffering tremendous casualties and a body blow to the cause of American independence.

It was at this time, among these soldiers at this moment of defeat and despair, that Thomas Paine would write, “These are the times that try men’s souls.” Soon afterward, Washington lead his soldiers across the Delaware River and onto victory in the Battle of Trenton. There he captured nearly 1,000 foreign mercenaries and he faced a crucial choice.

How would General Washington treat these men? The British had already committed atrocities against Americans, including torture. As David Hackett Fischer describes in his Pulitzer Prize winning book, “Washington’s Crossing,” thousands of American prisoners of war were “treated with extreme cruelty by British captors.” There are accounts of injured soldiers who surrendered being murdered instead of quartered, countless Americans dying in prison hulks in New York harbor, starvation and other acts of inhumanity perpetrated against Americans confined to churches in New York City.

Can you imagine.

The light of our ideals shone dimly in those early dark days, years from an end to the conflict, years before our improbable triumph and the birth of our democracy.

General Washington wasn’t that far from where the Continental Congress had met and signed the Declaration of Independence. But it is easy to imagine how far that must have seemed. General Washington announced a decision unique in human history, sending the following order for handling prisoners: “Treat them with humanity, and let them have no reason to complain of our Copying the brutal example of the

British Army in their treatment of our unfortunate brethren.”

Therefore, George Washington, our commander-in-chief before he was our President, laid down the indelible marker of our Nation’s values even as we were struggling as a Nation—and his courageous act reminds us that America was born out of faith in certain basic principles. In fact, it is these principles that made and still make our country exceptional and allow us to serve as an example. We are not bound together as a nation by bloodlines. We are not bound by ancient history; our Nation is a new nation. Above all, we are bound by our values.

George Washington understood that how you treat enemy combatants can reverberate around the world. We must convict and punish the guilty in a way that reinforces their guilt before the world and does not undermine our constitutional values.

There is another element to this. I can’t go back in history and read General Washington’s mind, of course, but one purpose of the rule of law is to organize a society’s response to violence. Allowing coercion, coercive treatment, and torturous actions toward prisoners not only violates the fundamental rule of law and the institutionalization of justice, but it helps to radicalize those who are tortured.

Zawahiri, bin Laden’s second in command, the architect of many of the attacks on our country, throughout Europe and the world, has said repeatedly that it is his experience that torture of innocents is central to radicalization. Zawahiri has said over and over again that being tortured is at the root of jihad; the experience of being tortured has a long history of serving radicalized populations; abusing prisoners is a prime cause of radicalization.

For the safety of our soldiers and the reputation of our Nation, it is far more important to take the time to do this job right than to do it quickly and badly. There is no reason we need to rush to judgment. This broken process and the blatant politics behind it will cost our Nation dearly. I fear also that it will cost our men and women in uniform. The Supreme Court laid out what it expected from us.

I ask unanimous consent to have printed in the RECORD letters and statements from former military leaders, from 9/11 families, from the religious community, retired judges, legal scholars, and law professors. All of them have registered their concerns with this bill and the possible impact on our effort to win the war against terrorism.

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

SEPTEMBER 12, 2006.

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

DEAR CHAIRMAN WARNER AND SENATOR LEVIN: As retired military leaders of the U.S.

Armed Forces and former officials of the Department of Defense, we write to express our profound concern about a key provision of S. 3861, the Military Commissions Act of 2006, introduced last week at the behest of the President. We believe that the language that would redefine Common Article 3 of the Geneva Conventions as equivalent to the standards contained in the Detainee Treatment Act violates the core principles of the Geneva Conventions and poses a grave threat to American service-members, now and in future wars.

We supported your efforts last year to clarify that all detainees in U.S. custody must be treated humanely. That was particularly important, because the Administration determined that it was not bound by the basic humane treatment standards contained in Geneva Common Article 3. Now that the Supreme Court has made clear that treatment of al Qaeda prisoners is governed by the Geneva Convention standards, the Administration is seeking to redefine Common Article 3, so as to downgrade those standards. We urge you to reject this effort.

Common Article 3 of the Geneva Conventions provides the minimum standards for humane treatment and fair justice that apply to anyone captured in armed conflict. These standards were specifically designed to ensure that those who fall outside the other, more extensive, protections of the Conventions are treated in accordance with the values of civilized nations. The framers of the Conventions, including the American representatives, in particular wanted to ensure that Common Article 3 would apply in situations where a state party to the treaty, like the United States, fights an adversary that is not a party, including irregular forces like al Qaeda. The United States military has abided by the basic requirements of Common Article 3 in every conflict since the Conventions were adopted. In each case, we applied the Geneva Conventions—including, at a minimum, Common Article 3—even to enemies that systematically violated the Conventions themselves.

We have abided by this standard in our own conduct for a simple reason: the same standard serves to protect American servicemen and women when they engage in conflicts covered by Common Article 3. Preserving the integrity of this standard has become increasingly important in recent years when our adversaries often are not nation-states. Congress acted in 1997 to further this goal by criminalizing violations of Common Article 3 in the War Crimes Act, enabling us to hold accountable those who abuse our captured personnel, no matter the nature of the armed conflict.

If any agency of the U.S. government is excused from compliance with these standards, or if we seek to redefine what Common Article 3 requires, we should not imagine that our enemies will take notice of the technical distinctions when they hold U.S. prisoners captive. If degradation, humiliation, physical and mental brutalization of prisoners is decriminalized or considered permissible under a restrictive interpretation of Common Article 3, we will forfeit all credible objections should such barbaric practices be inflicted upon American prisoners.

This is not just a theoretical concern. We have people deployed right now in theaters where Common Article 3 is the only source of legal protection should they be captured. If we allow that standard to be eroded, we put their safety at greater risk.

Last week, the Department of Defense issued a Directive reaffirming that the military will uphold the requirements of Common Article 3 with respect to all prisoners in its custody. We welcome this new policy. Our servicemen and women have operated for too

long with unclear and unlawful guidance on detainee treatment, and some have been left to take the blame when things went wrong. The guidance is now clear.

But that clarity will be short-lived if the approach taken by Administration's bill prevails. In contrast to the Pentagon's new rules on detainee treatment, the bill would limit our definition of Common Article 3's terms by introducing a flexible, sliding scale that might allow certain coercive interrogation techniques under some circumstances, while forbidding them under others. This would replace an absolute standard—Common Article 3—with a relative one. To do so will only create further confusion.

Moreover, were we to take this step, we would be viewed by the rest of the world as having formally renounced the clear strictures of the Geneva Conventions. Our enemies would be encouraged to interpret the Conventions in their own way as well, placing our troops in jeopardy in future conflicts. And American moral authority in the war would be further damaged.

All of this is unnecessary. As the senior serving Judge Advocates General recently testified, our armed forces have trained to Common Article 3 and can live within its requirements while waging the war on terror effectively.

As the United States has greater exposure militarily than any other nation, we have long emphasized the reciprocal nature of the Geneva Conventions. That is why we believe—and the United States has always asserted—that a broad interpretation of Common Article 3 is vital to the safety of U.S. personnel. But the Administration's bill would put us on the opposite side of that argument. We urge you to consider the impact that redefining Common Article 3 would have on Americans who put their lives at risk in defense of our Nation. We believe their interests, and their safety and protection should they become prisoners, should be your highest priority as you address this issue.

With respect,

General John Shalikhvili, USA (Ret.); General Joseph Hoar, USMC (Ret.); Admiral Gregory G. Johnson, USN (Ret.); Admiral Jay L. Johnson, USN (Ret.); General Paul J. Kern, USA (Ret.); General Merrill A. McPeak, USAF (Ret.); Admiral Stansfield Turner, USN (Ret.); General William G.T. Tuttle, Jr., USA (Ret.); Lieutenant General Daniel W. Christman, USA (Ret.); Lieutenant General Paul E. Funk, USA (Ret.); Lieutenant General Robert G. Gard Jr., USA (Ret.); Lieutenant General Jay M. Garner, USA (Ret.); Vice Admiral Lee F. Gunn, USN (Ret.); Lieutenant General Arlen D. Jameson, USAF (Ret.); Lieutenant General Claudia J. Kennedy, USA (Ret.).

Lieutenant General Donald L. Kerrick, USA (Ret.); Vice Admiral Albert H. Konetzni Jr., USN (Ret.); Lieutenant General Charles Osttost, USA (Ret.); Vice Admiral Jack Shanahan, USN (Ret.); Lieutenant General Harry E. Soyster, USA (Ret.); Lieutenant General Paul K. Van Riper, USMC (Ret.); Major General John Batiste, USA (Ret.); Major General Eugene Fox, USA (Ret.); Major General John L. Fugh, USA (Ret.); Rear Admiral Don Guter, USN (Ret.); Major General Fred E. Haynes, USMC (Ret.); Rear Admiral John D. Hutson, USN (Ret.); Major General Melvyn Montano, ANG (Ret.); Major General Gerald T. Sajer, USA (Ret.); Major General Michael J. Scotti, Jr., USA (Ret.).

Brigadier General David M. Brahms, USMC (Ret.); Brigadier General James

P. Cullen, USA (Ret.); Brigadier General Evelyn P. Foote, USA (Ret.); Brigadier General David R. Irvine, USA (Ret.); Brigadier General John H. Johns, USA (Ret.); Brigadier General Richard O'Meara, USA (Ret.); Brigadier General Murray G. Sagsveen, USA (Ret.); Brigadier General John K. Schmitt, USA (Ret.); Brigadier General Anthony Verrengia, USAF (Ret.); Brigadier General Stephen N. Xenakis, USA (Ret.); Ambassador Pete Peterson, USAF (Ret.); Colonel Lawrence B. Wilkerson, USA (Ret.); Honorable Richard Danzig; Honorable William H. Taft IV; Frank Kendall III, Esq.

THE AMERICAN JEWISH COMMITTEE,

New York, NY, September 27, 2006.

DEAR SENATOR: We write on behalf of the American Jewish Committee, a national human relations organization with over 150,000 members and supporters represented by 32 regional chapters, to urge you to oppose the compromise Military Commissions Act of 2006, S. 3930, and to vote against attaching the bill to H.R. 6061, absent correcting amendments.

To be sure, the compromise that produced the current bill resulted in the welcome addition of provisions making clear that the humane treatment standards of Common Article 3 of the Geneva Conventions provide a floor for the treatment of detainees as well as specifying that serious violations are war crimes. Nevertheless, S. 3930 is unacceptable in its present form for the following reasons:

The bill arguably opens the door to the use of interrogation techniques prohibited by the Geneva Conventions.

It opens the door to the admission of evidence in military commissions obtained by coercive techniques in contravention of constitutional standards and international treaty.

It permits the prosecution to introduce evidence that has not been provided to a defendant in a form sufficient to allow him or her to participate in the preparation of his or her defense.

It unduly restricts defendants' access to exculpatory evidence available to the government.

It unduly restricts access to the courts by habeas corpus and appeal.

It interprets the definition of Common Article 3 violations to exclude sexual assaults such as those that occurred at Abu Ghraib.

There is no doubt that the authorities entrusted with our defense must be afforded the resources and tools necessary to protect us from the serious threat that terrorists continue to pose to all Americans, and, indeed, the civilized world. But the homeland can be secured in a fashion consistent with the values of due process and fair treatment for which Americans have fought and for which they continue to fight. We urge you to revisit and revise this legislation so that it accords with our highest principles.

Respectfully,

E. ROBERT GOODKIND,
President.

RICHARD T. POLTIN,
Legislative Director
and Counsel.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,
New York, NY, September 27, 2006.
Re Military Commission Act of 2006.

Hon. BILL FRIST,
U.S. Senate Majority Leader,
Washington, DC.

DEAR MAJORITY LEADER FRIST: I am writing on behalf of the New York City Bar Association to urge you to oppose the Adminis-

tration's proposed Military Commissions Act of 2006 (the "Act"). The Association is an independent non-governmental organization of more than 22,000 lawyers, judges, law professors and government officials. Founded in 1870, the Association has a long history of dedication to human rights and the rule of law, and a particularly deep historical engagement with the law of armed conflict and military justice.

The Association has now reviewed the amended version of this legislation introduced on September 22, 2006, following the compromise agreement between Senators WARNER, MCCAIN and GRAHAM, on one side, and the Administration on the other. The compromise addresses two distinct aspects of the Administration's proposal: first, the operation of the military commissions which have been envisioned, and second, aspects of United States enforcement of its treaty obligations under the Geneva Conventions. We will address our concerns in this order, keeping in mind particularly the position of our members who may be called upon to serve as defense counsel, prosecutors and judges in the commissions process, and the interests of our members who presently or may in the future serve their nation in the uniformed services or in the intelligence services.

The compromise clarifies many of the most important failings of the prior draft by bringing the military commissions process far closer to the standards established by the Uniform Code of Military Justice and the Manual on Courts-Martial. The Association shares the view presented by the service judge advocates general that the existing court-martial system, which in many respects is exemplary, provides an appropriate process for trial of traditional battlefield detainees as well as the command and control structures of terrorist organizations engaged in combat with the United States, and that the commissions should closely follow that model. The changes produced here in that regard are therefore welcome.

However, the bill gives the military judge discretion to admit coerced testimony if, as will presumably be the case, the coercion occurred before the enactment of the Detainee Treatment Act on December 31, 2005. Hearsay can also be admitted into evidence unless the accused carries a burden (traditionally accorded to the party offering the evidence, i.e., the prosecution) to show that the hearsay is not probative or reliable. This shift of burden is inconsistent with historical practice and would probably taint the proceedings themselves, particularly if the accused is not given access to the facts underlying the evidence. Admission of evidence in this circumstance would discredit the proceedings, undermine the appearance of fairness, and might, if it was critical to a conviction, constitute a grave breach of Common Article 3. These provisions do not serve the interests of the United States in demonstrating the heinous nature of terrorist acts, if such can be established in the military commissions.

The enforcement provisions raise far more troubling issues. In particular, we are concerned by the definition of "cruel treatment" which does not correspond to the existing law interpreting and enforcing Common Article 3's notion of "cruel treatment." The definition incorporates a category of "serious physical pain or suffering," but defines that category in a way that does not encompass many types of serious physical suffering that can be and are commonly the result of "cruel treatment" prohibited by Common Article 3. The Common Article 3 offense of "cruel treatment" will remain prohibited, even if not specifically criminalized by this provision. There is really no basis to doubt that Common Article 3 prohibits techniques such as waterboarding, long-time

standing, and hypothermia or cold cell if indeed they are not precluded as outright torture. However, the language of the current draft would create a crime defined in terms different from the accepted Geneva meanings, thereby introducing ambiguity where none previously existed.

This ambiguity produces risks for United States personnel since it suggests that those who employ techniques such as waterboarding, long-time standing and hypothermia on Americans cannot be charged for war crimes. Moreover, Common Article 3 contains important protections for United States personnel who do not qualify for prisoner of war treatment under the Third Geneva Convention. This may include reconnaissance personnel, special forces operatives, private military contractors and intelligence service paramilitary professionals. Erosion of Common Article 3 standards thus directly imperils the safety of United States personnel in future conflicts. We strongly share the perspective of five former chairs of the Joint Chiefs of Staff in their appeal to Congress to avoid any erosion of these protections.

The draft also seeks to strike the ability of hundreds of detainees held as "enemy combatants" to seek review of their cases through petitions of habeas corpus. The Great Writ has long been viewed as one of the most fundamental rights under our legal system. It is an essential guarantor of justice in difficult cases, particularly in a conflict which the Administration suggests is of indefinite duration, possibly for generations. Holding individuals without according them any right to seek review of their status or conditions of detention raises fundamental questions of justice. This concern is compounded by the draft's provision that the Geneva Convention is unenforceable, thus leaving detainees with no recourse should they receive cruel and inhuman treatment.

On July 19, 2006, Michael Mernin, the chair of our Committee on Military Affairs and Justice, testified before the Senate Armed Services Committee concerning this legislative initiative. He appealed at that time for caution and proper deliberation in the legislative process and urged that a commission of military law experts be convened to advise Congress on the weighty issues presented. The current legislative project continues to show severe flaws which are likely to prove embarrassing to the United States if it is enacted. We therefore strongly urge that the matter receive further careful consideration before it is acted upon and that the advice of prominent military justice and international humanitarian law experts be secured and followed in the bill's finalization.

Very truly yours,

BARRY KAMINS,
President.

SEPTEMBER 14, 2006.

DEAR SENATOR: As members of families who lost loved ones in the 9/11 attacks, we are writing to express our deep concern over the provisions of the Administration's proposed Military Commissions Act of 2006.

There are those who would like to portray the legislation as a choice between supporting the rights of terrorists and keeping the United States safe. We reject this argument. We believe that adopting policies against terrorism which honor our values and our international commitments makes us safer and is the smarter strategy.

We do not believe that the United States should decriminalize cruel and inhuman interrogations. The Geneva Convention rules against brutal interrogations have long had the strong support of the U.S. because they protect our citizens. We should not be sending a message to the world that we now be-

lieve that torture and cruel treatment is sometimes acceptable. Moreover, the Administration's own representatives at the Pentagon have strongly affirmed in just the last few days that torture and abuse do not produce reliable information. No legislation should have your support if it is at all ambiguous on this issue.

Nor do we believe that it is in the interest of the United States to create a system of military courts that violate basic notions of due process and lack truly independent judicial oversight. Not only does this violate our most cherished values and send the wrong message to the world, it also runs the risk that the system will again be struck down resulting in even more delay.

We believe that we must have policies that reflect what is best in the United States rather than compromising our values out of fear. As John McCain has said, "This is not about who the terrorists are, this is about who we are." We urge you to reject the Administration's ill-conceived proposals which will make us both less safe and less proud as a nation.

Sincerely,

Marilynn Rosenthal, Nicholas H. Ruth, Adele Welty, Nissa Youngren, Terry Greene, John LeBlanc, Andrea LeBlanc, Ryan Amundson, Barry Amundson, Colleen Kelly, Terry Kay Rockefeller, John William Harris.

David Potorti, Donna Marsh O'Connor, Kjell Youngren, Blake Allison, Tia Kminek, Jennifer Glick, Lorie Van Auken, Mindy Kleinberg, Anthony Aversano, Paula Shapiro, Valerie Lucznikowska, Lloyd Glick.

James and Patricia Perry, Anne M. Mulderry, Marion Kminek, Alissa Rosenberg-Torres, Kelly Campbell, Bruce Wallace, John M. Leinung, Kristen Breitweiser, Patricia Casazza, Michael A. Casazza, Loretta J. Filipov, Joan Glick.

SEPTEMBER 20, 2006.

Re Evangelical religious leaders speak out on cruel, inhuman, degrading treatment.

DEAR MEMBERS OF CONGRESS: The Congress faces a defining question of morality in the coming hours: whether it is ever right for Americans to inflict cruel and degrading treatment on suspected terrorist detainees. We are writing to express our strong support for the approach taken on this issue by Senators McCain, Warner and Graham and a strong, bipartisan majority of the Senate Armed Services Committee.

We read credible reports—some from FBI agents—that prisoners have been stripped naked, sexually humiliated, chained to the floor, and left to defecate on themselves. These and other practices like "waterboarding" (in which a detainee is made to feel as if he is being drowned) may or may not meet the technical definition of torture, but no one denies that these practices are cruel, inhuman, and degrading.

Today, the question before the Congress is whether it will support Sen. McCain's efforts to make it clear to the world that the U.S. has outlawed such abuse or support an Administration proposal which creates grave ambiguity about whether prisoners can legally be abused in secret prisons without Red Cross access.

Evangelicals have often supported the Administration on public policy questions because they believe that no practical expediency, however compelling, should determine fundamental moral issues of marriage, abortion, or bioethics. Instead, these questions should be resolved with principles of revealed moral absolutes, granted by a righteous and loving Creator.

As applied to issues of cruel, inhuman and degrading treatment, the practical application of this moral outlook is clear: even if it is expedient to inflict cruelty and degradation on a prisoner during interrogation (and experts seem very much divided on this question), the moral teachings of Christ, the Torah and the Prophets do not permit it for those who bear the *Imago Dei*.

It will not do to say that the President's policy on the treatment of detainees already rules out torture because serious ambiguities still remain—ambiguities that carry heavy moral implications and that are intended to preserve options that some would rather not publicly defend.

The terrorist attacks of September 11 were one of the most heinous acts ever visited upon this nation. The Commander in Chief must provide U.S. authorities with the practical tools and policies to fight a committed, well-resourced, and immoral terrorist threat. At the same time, the President must also defend the deepest and best values of our moral tradition.

As Christians from the evangelical tradition, we support Senator McCain and his colleagues in their effort to defend the perennial moral values of this nation which are embodied in international law and our domestic statutes. The United States Congress must send an unequivocal message that cruel, inhuman and degrading treatment has no place in our society and violates our most cherished moral convictions.

Sincerely,

Rev. Dr. David Gushee, Union University, Jackson, TN.

Gary Haugen, president, International Justice Mission.

Rev. Dr. Roberta Hestenes, teaching pastor, Community Presbyterian Church, Danville, CA.

Frederica Mathewes-Green, author and commentator.

Dr. Brian D. McLaren, founder, Cedar Ridge Community Church, Spencerville, MD.

Rev. Dr. Richard Mouw, president, Fuller Theological Seminary.

Dr. Glen Stassen, professor of Christian Ethics, Fuller Theological Seminary.

Dr. Nicholas Wolterstorff, professor of Philosophical Theology, Yale University.

Mrs. CLINTON. Now these values—George Washington's values, the values of our founding—are at stake. We are debating far-reaching legislation that would fundamentally alter our Nation's conduct in the world and the rights of Americans here at home. And we are debating it too hastily in a debate too steeped in electoral politics.

The Senate, under the authority of the Republican majority and with the blessing and encouragement of the Bush-Cheney administration, is doing a great disservice to our history, our principles, our citizens, and our soldiers.

The deliberative process is being broken under the pressure of partisanship and the policy that results is a travesty.

Fellow Senators, the process for drafting this legislation to correct the administration's missteps has not benefited the "world's greatest deliberative body." Legitimate, serious concerns raised by our senior military and intelligence community have been marginalized, difficult issues glossed over, and debates we should have had have been shut off in order to pass a misconceived bill before Senators return home to campaign for reelection.

For the safety of our soldiers and the reputation of our Nation, it is far more important to take the time to do the job right than to do it quickly and badly. There is no reason other than partisanship for not continuing deliberation to find a solution that works to achieve a true consensus based on American values.

In the last several days, the bill has undergone countless changes—all for the worse—and differs significantly from the compromise brokered between the Bush administration and a few Senate Republicans last week.

We cannot have a serious debate over a bill that has been hastily written with little opportunity for serious review. To vote on a proposal that evolved by the hour, on an issue that is so important, is an insult to the American people, to the Senate, to our troops, and to our Nation.

Fellow Senators, we all know we are holding this hugely important debate in the backdrop of November's elections. There are some in this body more focused on holding on to their jobs than doing their jobs right. Some in this chamber plan to use our honest and serious concerns for protecting our country and our troops as a political wedge issue to divide us for electoral gain.

How can we in the Senate find a proper answer and reach a consensus when any matter that does not serve the majority's partisan advantage is mocked as weakness, and any true concern for our troops and values dismissed demagogically as coddling the enemy?

This broken process and its blatant politics will cost our Nation dearly. It allows a discredited policy ruled by the Supreme Court to be unconstitutional to largely continue and to be made worse. This spectacle ill-serves our national security interests.

The rule of law cannot be compromised. We must stand for the rule of law before the world, especially when we are under stress and under threat. We must show that we uphold our most profound values.

We need a set of rules that will stand up to judicial scrutiny. We in this Chamber know that a hastily written bill driven by partisanship will not withstand the scrutiny of judicial oversight.

We need a set of rules that will protect our values, protect our security, and protect our troops. We need a set of rules that recognizes how serious and dangerous the threat is, and enhances, not undermines, our chances to deter and defeat our enemies.

Our Supreme Court in its *Hamdan v. Rumsfeld* decision ruled that the Bush administration's previous military commission system had failed to follow the Constitution and the law in its treatment of detainees.

As the Supreme Court noted, the Bush administration has been operating under a system that undermines our Nation's commitment to the rule of law.

The question before us is whether this Congress will follow the decision of the Supreme Court and create a better system that withstands judicial examination—or attempt to confound that decision, a strategy destined to fail again.

The bill before us allows the admission into evidence of statements derived through cruel, inhuman and degrading interrogation. That sets a dangerous precedent that will endanger our own men and women in uniform overseas. Will our enemies be less likely to surrender? Will informants be less likely to come forward? Will our soldiers be more likely to face torture if captured? Will the information we obtain be less reliable? These are the questions we should be asking. And based on what we know about warfare from listening to those who have fought for our country, the answers do not support this bill. As Lieutenant John F. Kimmons, the Army's Deputy Chief of Staff for Intelligence said, "No good intelligence is going to come from abusive interrogation practices."

The bill also makes significant changes to the War Crimes Act. As it is now written, the War Crimes Act makes it a federal crime for any soldier or national of the U.S. to violate, among other things, Common Article 3 of the Geneva Conventions in an armed conflict not of an international character. The administration has voiced concern that Common Article—which prohibits "cruel treatment or torture," "outrages against human dignity," and "humiliating and degrading treatment"—sets out an intolerably vague standard on which to base criminal liability, and may expose CIA agents to jail sentences for rough interrogation tactics used in questioning detainees.

But the current bill's changes to the War Crimes Act haven't done much to clarify the rules for our interrogators. What we are doing with this bill is passing on an opportunity to clearly state what it is we stand for and what we will not permit.

This bill undermines the Geneva Conventions by allowing the President to issue Executive orders to redefine what permissible interrogation techniques happen to be. Have we fallen so low as to debate how much torture we are willing to stomach? By allowing this administration to further stretch the definition of what is and is not torture, we lower our moral standards to those whom we despise, undermine the values of our flag wherever it flies, put our troops in danger, and jeopardize our moral strength in a conflict that cannot be won simply with military might.

Once again, there are those who are willing to stay a course that is not working, giving the Bush-Cheney administration a blank check—a blank check to torture, to create secret courts using secret evidence, to detain people, including Americans, to be free of judicial oversight and accountability, to put our troops in greater danger.

The bill has several other flaws as well.

This bill would not only deny detainees habeas corpus rights—a process that would allow them to challenge the very validity of their confinement—it would also deny these rights to lawful immigrants living in the United States. If enacted, this law would give license to this Administration to pick people up off the streets of the United States and hold them indefinitely without charges and without legal recourse.

Americans believe strongly that defendants, no matter who they are, should be able to hear the evidence against them. The bill we are considering does away with this right, instead providing the accused with only the right to respond to the evidence admitted against him. How can someone respond to evidence they have not seen?

At the very least, this is worth a debate on the merits, not on the politics. This is worth putting aside our differences—it is too important.

Our values are central. Our national security interests in the world are vital. And nothing should be of greater concern to those of us in this chamber than the young men and women who are, right now, wearing our Nation's uniform, serving in dangerous territory.

After all, our standing, our morality, our beliefs are tested in this Chamber and their impact and their consequences are tested under fire, they are tested when American lives are on the line, they are tested when our strength and ideals are questioned by our friends and by our enemies.

When our soldiers face an enemy, when our soldiers are in danger, that is when our decisions in this Chamber will be felt. Will that enemy surrender? Or will he continue to fight, with fear for how he might be treated and with hate directed not at us, but at the patriot wearing our uniform whose life is on the line?

When our Nation seeks to lead the world in service to our interests and our values, will we still be able to lead by example?

Our values, our history, our interests, and our military and intelligence experts all point to one answer. Vladimir Bukovsky, who spent nearly 12 years in Soviet prisons, labor camps, and psychiatric hospitals for non-violent human rights activities had this to say. "If Vice President Cheney is right, that some 'cruel, inhumane, or degrading' treatment of captives is a necessary tool for winning the war on terrorism, then the war is lost already."

Let's pass a bill that's been honestly and openly debated, not hastily cobbled together.

Let's pass a bill that unites us, not divides us.

Let's pass a bill that strengthens our moral standing in the world, that declares clearly that we will not retreat from our values before the terrorists.

We will not give up who we are. We will not be shaken by fear and intimidation. We will not give one inch to the evil and nihilistic extremists who have set their sights on our way of life.

I say with confidence and without fear that we are the United States of America, and that we stand now and forever for our enduring values to people around the world, to our friends, to our enemies, to anyone and everyone.

Before George Washington crossed the Delaware, before he could achieve that long-needed victory, before the tide would turn, before he ordered that prisoners be treated humanely, he ordered that his soldiers read Thomas Paine's writing. He ordered that they read about the ideals for which they would fight, the principles at stake, the importance of this American project.

Now we find ourselves at a moment when we feel threatened, when the world seems to have grown more dangerous, when our Nation needs to ready itself for a long and difficult struggle against a new and dangerous enemy that means us great harm.

Just as Washington faced a hard choice, so do we. It's up to us to decide how we wage this struggle and not up to the fear fostered by terrorists. We decide.

This is a moment where we need to remind ourselves of the confidence, fearlessness, and bravery of George Washington—then we will know that we cannot, we must not, subvert our ideals—we can and must use them to win.

Finally, we have a choice before us. I hope we make the right choice. I fear that we will not; that we will be once again back in the Supreme Court, and we will be once again held up to the world as failing our own high standards.

When our soldiers face an enemy, when our soldiers are in danger, will that enemy surrender if he thinks he will be tortured? Will he continue to fight? How will our men and women be treated?

I hope we both pass the right kind of legislation and understand that it may very well determine whether we win this war against terror and protect our troops who are valiantly fighting for us.

Thank you, Mr. President.

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, I suggest the absence of a quorum, and I ask unanimous consent that it not be charged to either side.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

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

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

Mr. LEVIN. Mr. President, the Kennedy amendment would require the

Secretary of State to notify other countries around the world that seven specific categories of actions, each of which is specifically prohibited by the Army Field Manual, are punishable offenses under common Article 3 of the Geneva Conventions that would be prosecuted as war crimes if applied to any United States person. Those seven categories of actions are: (1) Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; (2) applying beatings, electric shock, burns, or other forms of physical pain; (3) "waterboarding"; (4) using military working dogs; (5) inducing hypothermia or heat injury; (6) conducting mock executions; and (7) depriving the detainee of necessary food, water, or medical care.

I listened very carefully to what my colleague from Virginia, the Chairman of the Armed Services Committee, had to say about this amendment. He stated:

Now Senator Kennedy's amendment, depending on how the votes come, and I'm of the opinion that this chamber will reject it, I don't want that rejection to be misconstrued by the world in any way as asserting that the techniques mentioned in the amendment are consistent with the Geneva Convention or that they could legitimately be employed against our troops or anyone else. . . . We must not leave that impression as a consequence of the decisions soon to be made by way of vote on the Kennedy amendment. The types of conduct described in this amendment, in my opinion, are in the category of grave breaches of Common Article Three of the Geneva Convention. These are clearly prohibited by the bill.

I am in complete agreement with Senator WARNER that each of these practices is a grave breach of Common Article 3. I agree that these practices are unlawful today and that they will continue to be unlawful if this bill is enacted into law.

However, I am concerned that the administration may have muddied the record on these issues through its unwillingness to clearly state what practices are permitted, and what practices are prohibited, under Common Article 3. While I reach the same conclusion as Senator WARNER as to the lawfulness of the practices listed in the Kennedy amendment, I am afraid that others around the world may not.

We agree that these practices are prohibited by Common Article 3. We need to send a clear message to the world that this is the case, so that the rest of the world will abide by the same standard. That is why I strongly support the Kennedy amendment.

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

The PRESIDING OFFICER. Ten minutes remain under the Senator's control.

Mr. KENNEDY. Mr. President, I yield myself 4 minutes.

Mr. President, I want to point out why this is so necessary and so essential.

In reviewing the underlying legislation, if you look under the provisions

dealing with definitions on page 70 and 71, and then read on, you will find that it is difficult to read that without having a sense of the kind of vagueness which I think surrounds prohibited interrogation techniques. It talks about substantial risks and extreme physical pain. But the statute does not have specifics to define the areas which are prohibited. The techniques in my amendment are the same ones the Department of the Army and, to my best knowledge, our colleague and friend from Arizona has identified. Voting for my amendment would provide those specifics.

The President has asked for specificity, but he has refused to say whether Common Article 3 would prohibit these kinds of acts. That has left the world doubting our commitment to Common Article 3 and has endangered our people around the globe—those who are working for the United States in the war on terror. The administration's obfuscation comes at a great risk.

This amendment provides the clarity and sends a message to the world that these techniques are prohibited. They are prohibited from our military bringing them to bear on any combatants. We interpret the legislation so that any country in the world that has signed on to the Geneva Conventions, any of those countries that are going to practice activities prohibited by the field manual, that I consider to be torture, are going to be held by the United States interrogation committing a war crime. This is important. It is essential. It is necessary.

The general concept was improved without objection a number of years ago in the wake of the Vietnam situation, regarding the definition of war crimes. We ought to restate and recommit ourselves to protecting Americans involved in the war on terror and ensure they will not be subject to these activities.

At the present time, without this amendment, it will be left open. If we accept this amendment, it would make it clear it is prohibited. That is what we should do.

I withhold the remainder of my time. The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Virginia.

Mr. WARNER. I suggest the absence of a quorum and that it not be chargeable to either side.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. 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. BYRD. Mr. President, I ask unanimous consent the pending amendment be laid aside so that I may offer an amendment.

Mr. WARNER. Mr. President, reserving the right to object, and I will not object, I would simply like to make it clear in laying aside the amendment

the times remaining under the control of the Senator from Virginia and the Senator from Michigan remain in place. We will now, to accommodate our distinguished senior colleague, go off of the Kennedy amendment and proceed to address his amendment.

The PRESIDING OFFICER. That would be the case.

Without objection, it is so ordered.

The Senator from West Virginia is recognized.

AMENDMENT NO. 5104

(Purpose: To prohibit the establishment of new military commissions after December 31, 2011)

Mr. BYRD. Mr. President, I thank the Chair, and I also thank my very able and distinguished friend from Virginia.

Mr. President, I shall offer an amendment today that provides a 5-year sunset to any Presidential authorization of any military commission enacted under the legislation currently being debated. This amendment which I shall offer is essential to the ability of the Congress to retain its power of oversight and as an important check on future executive actions.

As I stand here now, Members are readying themselves to beat a path home to their States—I understand that—so they may get in their final politicking. Unfortunately, though, in the feverish climate of a looming election, the most important business of the Senate may suffer. I have seen that happen over the years. This is no surprise. We have seen before the fever of politics can undermine the serious business of the Congress once November and the winds of November draw nigh. We have seen the mistakes that can come when Congress rushes to legislate without the benefit of thorough vetting by committees, without adequate debate, without the opportunity to offer amendments.

Likewise, when legislation is pushed as a means of political showboating—we all know what that is—instead of by a diligent commitment to our constitutional duties, the results can be disastrous.

In fact, there have been various proposals to bring congressional oversight to the military tribunals which were first authorized in November, 2001. Senators SPECTER, LEAHY, and DURBIN were instrumental in attempting to push back against unilateral actions by the President to establish these commissions. These attempts were to reassert the power of the Congress—yes, the constitutional duty embodied in Article I of this Constitution that is vested in the Congress and in the Congress alone, to make our country's laws and specifically to make rules concerning captures on land and water.

Let me say that again. I will repeat the verbiage of the Constitution: to make our country's laws and specifically to "make rules concerning captures on land and water."

Nothing came of these proposals. Since then, the Congress has ignored

its responsibilities and this most important issue has been shoved aside.

What is this new impetus spurring congressional action and a renewed interest in the issue? Did Congress find its way back to embracing its Article I duties? No. Did the executive branch wake up to realize it is not within its purview to dictate the laws of the land? No. It was the Supreme Court's decision in the Hamdan case.

While the President grabbed the wheel and the Congress dozed, the Court stepped in to remind us of the separation of powers and the constitutional role of each branch, thank God. Yes, thank God for the separation of powers envisioned by our forefathers. Thank God for the Supreme Court. Yes, I said this before; I say it again: Thank God for the Supreme Court.

It is no coincidence that the traditional pathways of legislation through the committee and amendment process and ample opportunity for debate are the best recourse against the enactment of bad, bills.

This is the way the Senate was designed to operate and this is how it separates in the best interests of the people.

Unfortunately, because of the timing of the Supreme Court's decision and the charged atmosphere of the midterm elections, we are again confronted with slap-happy legislation that is changing by the minute.

The bill reported by the Senate Committee on Armed Services, which I supported, was the product of a thorough process, a deliberative process. Unfortunately, this bill's progress was halted by the administration's objections, and the product suffered mightily. Then, in closed-door negotiations with the White House, many of the successes announced less than a week ago in the previous version were trashed.

When the administration met stiff opposition to its views by former JAG—judge advocate general—officers and previous members of its own Cabinet, it realized it must come back to the table. Last Friday's version of the bill was superseded by Monday's version, and changes are still forthcoming. In such a frenzied, frenetic, and uncertain state, who really knows the nature of the beast? This bill could very well be the most important piece of legislation—certainly one of the most important pieces of legislation—this Congress enacts, and the adoption of my amendment, which I shall offer, ensures—ensures—a reasonable review of the law authorizing military tribunals.

There is nothing more important to scrutinize than the process of bringing suspected terrorists to justice for their crimes in a fair proceeding, without the taint—without the taint—of a kangaroo court. Those are the values of our country. We dare not handle the matter sloppily. The Supreme Court has once struck down the President's approach to military commissions, has it not? Do we want the product of this

debate subjected to the same fate? Do we want it stricken also?

The original authorization of the PATRIOT Act is a case study of the risks we run in legislating from the hip—too much haste—and how, in our haste, we can place in jeopardy those things we hold most dear. Apparently, the Senate has not recognized the error of its ways. This legislation is complex. This legislation defines the processes and the procedures for bringing enemy combatants to trial for offenses against our country, and it involves our obligations under the Geneva Conventions. This bill defines rules of evidence, it determines defendants' access to secret evidence, and it seeks to clarify what constitutes torture. We cannot afford to get this wrong.

As with the PATRIOT Act, my amendment offers us an opportunity to provide a remedy for the unanticipated consequences that may arise as a result of hasty congressional action. Along with the sweeping changes made by the PATRIOT Act, the great hope included in it was the review that was required by the sunset provision. Everyone knows the saying that hindsight is 20-20, but the use of this type of congressional review gives us the opportunity both to strengthen the parts of the law that may be found to be weak, and to right the wrongs of past transgressions.

So if we will not today legislate in a climate of steady deliberation, then let us at least prescribe for ourselves an antidote for any self-inflicted wounds. Let us prescribe for ourselves the remedy of reason—the remedy of reason. Let this be the age of reason once more. Sunset provisions have historically been used to repair the unforeseen consequences of acting in haste. You have heard that haste makes waste. If ever there were a piece of legislation that cries out to be reviewed with the benefit of hindsight, it is the current bill.

My amendment, which I hold in my hand, provides that opportunity through a 5-year sunset provision. Now, what is wrong with that? There is nothing wrong with that—a 5-year sunset provision. And I thank Senator OBAMA and I thank Senator CLINTON for their cosponsorship of my amendment. I urge my colleagues to support it.

Mr. President, I send my amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from West Virginia [Mr. BYRD], for himself and Mr. OBAMA, and Mrs. CLINTON, proposes an amendment numbered 5104:

On page 5, line 19, add at the end the following: "The authority of the President to establish new military commissions under this section shall expire on December 31, 2011. However, the expiration of that authority shall not be construed to prohibit the conduct to finality of any proceedings of a military commission established under this section before that date."

The PRESIDING OFFICER. Who yields time?

The Senator from Virginia.

Mr. WARNER. Mr. President, we are about to receive a copy of the amendment. But I listened very carefully to my distinguished colleague's remarks. As he well knows, in my relatively short 28 years in the Senate, I have listened to him and I have the highest respect for his judgment, and particularly as it relates to how the legislative body should discharge its constitutional responsibilities and how, also, it should not try to discharge its constitutional responsibilities. And I guess my opposition falls, most respectfully, in the latter category because I find this Congress has a very high degree of vigilance in overseeing the exercise of the executive powers as it relates to the war against those whom I view as jihadists, those who have no respect for, indeed, the religion which they have ostensibly committed their lives to, and those who have no respect for human life, including their human life.

It is a most unusual period in the history of our great Republic. The good Senator, having been a part of this Chamber for nearly a half century, has seen a lot of that history unfold. The Senator and I have often discussed the World War II period. That is when my grasp of history began to come into focus. And, indeed, the Senator himself was engaged in his activities in the war effort, as we all were in this Nation.

The ensuing conflicts, while they have been not exactly like World War II, have been basically engaging those individuals acting in what we refer to as their adhering to a state, an existing government that has promulgated rules and regulations, such as they may be, for the orders issued to their troops, most of whom wore uniforms, certainly to a large degree in the war that followed right after World War II, the Korean war. Most of those individuals in that conflict had some vestige of a uniform, conducting their warfare under state-sponsored regulations. I had a minor part in that conflict and remember it quite well.

Vietnam came along, and there we saw the beginning of the blurring of state sponsored. Nevertheless, it was present. The uniforms certainly lacked the clarity that had been in previous conflicts. And on the history goes.

But this one is so different, I say to my good friend, the Senator from West Virginia. And I think our President, given his duty as Commander in Chief under the Constitution, has to be given the maximum flexibility as to how he deals with these situations. We see that in a variety of issues around here. But, nevertheless, it is the exercise of executive authority, and that exercise of executive authority must also be subject to the oversight of the Congress of the United States.

But I feel that in the broad powers conferred on the executive branch to carry out its duty to defend the Nation in the ongoing threat against what we

generally refer to as terrorism—but more specifically the militant jihadists—we have to fight with every single tool we have at our disposal, consistent with the law of this Nation and international law. And, therefore, we are here in this particular time addressing a bill which provides for meting out justice, a measure of justice, to certain individuals who have been apprehended in the course of the war against this militant jihadist terrorist group.

I find it remarkable, as I have worked it through with my other colleagues, that they are alien, they are unlawful by all international standards in the manner they conduct the war. Yet this great Nation, from the passage of this bill, is going to mete out a measure of justice as we understand it.

Now, the Senator's concern is—and it always should be; it goes back to the time of George Washington and the Congress at that time—the fear of the overexercise of the authorities within the executive branch. But I think to put a clause and restriction, such as the Senator recommends in his amendment, into this bill would, in a sense, inhibit the ability of the President to rapidly exercise all the tools at his disposal.

I say to the Senator, your bill says:

The authority of the President to establish new military commissions under this section shall expire. . . . However, the expiration of that authority shall not be construed to prohibit the conduct to finality of any proceedings of a military commission established under this section before that date.

That could be misconstrued. This war we are engaged in, most notably on the fronts of Afghanistan and Iraq today, we see where it could spread across our globe and has—not to the degree of the significance of Iraq or Afghanistan, but it has spread. Other nations have become the victims, subject to the threats, subject to the overt actions such as took place in Spain and other places of the world. We should not have overhanging this important bill any such restriction as you wish to impose by virtue of what we commonly call a sunset. I think that would not be correct. It could send the wrong message. We have to rely upon the integrity of the two branches of the Congress to be ever watchful in their oversight, ever unrestrained in the authority they have under the Constitution. As we commonly say around here, what the Congress does one day, it can undo the next day.

If, in the course of exercising our authority under the doctrine of the separation of powers—how many times have I heard the distinguished Senator from West Virginia discuss the doctrine of the separation of powers? So often. I remember when we were vigilantly trying to protect those powers reserved unto the Congress from an encroachment by the executive branch.

So for that reason I most respectfully say that I do not and I urge other colleagues not to support this amendment

but to continue in their trust in this institution, in the Senate and in the House, to exercise their constitutional responsibilities in such a way that we will not let the executive branch at any time transcend what we believe are certain parameters that we have set forth in this bill regarding the trials and the conduct of interrogations.

I think an extraordinary legislation that I was privileged to be involved in, which garnered 90-some votes, was the Detainee Act, sponsored by our distinguished colleague, Mr. McCAIN. That was landmark legislation. From that legislation has come now what we call the Army Field Manual, in which we published to the world what America will do in connection with those persons—the unlawful aliens who come into our custody by virtue of our military operations, and how they will be dealt with in the course of interrogation. That was an extraordinary assertion by the Congress, within the parameters of its powers, as to what they should do, the executive branch.

But a sunset date for the authority to hold military commissions, in my judgment, is not in the best interests, at this time in this war, of our country.

I know there are other speakers. How much time do I have remaining?

The PRESIDING OFFICER. Nineteen minutes 20 seconds.

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

The PRESIDING OFFICER. The Senator from West Virginia is recognized.

Mr. BYRD. Mr. President, the Senator knows my great respect for him. It is an abiding respect. When I look at him, I see a man—a Member of this Senate—who has had vast experience and worn many coats of honor. I see a man who stands by his word, who keeps his word, and is always very meticulous in criticizing another Senator or criticizing legislation. He is most circumspect, most respectful to his colleagues, and most respectful to the Constitution. But I am abhorrent—I cannot write very well anymore. I would like to be able to write down words that other Senators say in a debate. But I cannot write. So I may have misinterpreted, or I may misstate the words. But I cannot understand why this legislation would not be in the best interests of my country.

I believe the Senator said—he certainly implied strongly—that this legislation would not be in the best interests of our country. If I am wrong, I know the Senator will correct me. Let me read, though, the amendment:

On page 5, line 19, add at the end the following: "the authority of the President to establish new military commissions under this section shall expire on December 31, 2011. However, the expiration of that authority shall not be construed to prohibit the conduct to finality of any proceedings of a military commission established under this section before that date."

Mr. President, what is wrong with that language? How would that language not be in the interest of our country? I think we are all subject to

error. Adam and Eve were driven from the Garden of Eden because of error. So from the very beginning of history, the very history of mankind, this race of human beings, there has been evidence of errors, mistakes. People did not foresee the future, and this language is a protection against that.

What is wrong with providing an expiration date for the authority given to the President in this bill, after a period of 5 years? Can we not be mistaken? Might we not see the day when we wish that we had an automatic opportunity to review this? Five years is a long time. Five years is ample time.

So I must say that I am somewhat surprised that my friend, the great Senator from Virginia, would seek to oppose this amendment. Let me read it once again. This is nothing new, having sunset provisions in bills. I think they are good. We can always review them, and if mistakes have not been made, we can renew them. There is that opportunity. But it does guarantee that there will come a time when this legislation will be reviewed. Only the word of Almighty God is so perfect that there is no sunset provision in the Holy Writ. No. But the sunset provision there is with us, and the time will come when all of us will take a voyage into the sunset.

Mr. WARNER. May I reply at the appropriate time?

Mr. BYRD. Absolutely. I will yield right now.

Mr. WARNER. Many times, the two of us have stood right here and had our debates together. It is one of those rich moments in the history of this institution when two colleagues, without all of the prepared text and so forth, can draw upon their experience and knowledge and their own love for the Constitution of the United States and engage.

I say to my good friend, 3 weeks ago, there were headlines that three Senators were in rebellion against their President, three Senators were dissidents, and on and on it went. Well, the fact is, the three of us—and there were others who shared our views, but somehow the three of us were singled out—believed as a matter of conscience we were concerned about an issue.

The concern was that the bill proposed by the administration, in our judgment, could be construed as in some way—maybe we were wrong—indicating that America was not going to follow the treaties of 1949—most particularly, Common Article 3. Common Article 3 means that article in each of these three treaties. As my good friend knows—and we draw on our own individual recollections about the horrors of World War II. I was involved in the foreign battlefield. We certainly knew about it back here at home and studied it. I was a youngster, a skinny youngster in my last year in the Navy. So much for that. But we were very conscious of what was going on, and the frightful treatment of human beings as a consequence of that war.

The world then came together—and I say the world—after that and enacted these three treaties. The United States was in the lead of putting those treaties in. Those treaties were for the purpose of ensuring that future mankind, generations, hopefully, would not experience what literally millions of people experienced by death and maiming—not only soldiers but civilians.

Mr. President, we believed that the administration's approach to this could be interpreted by the world as somehow we were not behind those treaties. If we were to put a sunset in here after all of the deliberation and all of the work on the current bill that is before this body, it could once again raise the specter that, well, if in fact the United States was trying to not live up to the treaties that brought on this debate in the Senate, then at the end of 5 years we go back to where we were. That could happen. We do not want to send that message. We want to send a message that this Nation has reconciled, hopefully, this body, as we vote this afternoon, and will send a strong bipartisan message that we are reconciled behind this legislation to ensure that in the eyes of the world we are going to live fully within the confines of the treaties of 1949.

Mr. BYRD. We are not dealing with the treaties of 1949.

Mr. WARNER. I respectfully say that our bill does, in my judgment. Clearly, it constitutes an affirmation of the treaties. I would not want to send a message at this time that there could come a point, namely, December 31, 2011, that such assurances as we have given about those treaties might expire. That is what concerns me.

Mr. BYRD. Mr. President, I am almost speechless. I listened to the words that have just been uttered by my friend. My amendment does not affect, in any way, the portions of this bill that relate to the Geneva Conventions.

It sunsets only the authority of the President to convene military commissions and, of course, the Senate can renew that authority. That is done in many instances here. I think it is insurance for our country and the welfare of our country and the welfare of the people who serve in the military.

We say 5 years. Do we want to make that 6 years? Do we want to make it 7 years? Fine. It will expire at that time. It simply means that the Senate and the House take a look at it again and renew it. What is wrong with that?

Mr. WARNER. I say to my friend, Mr. President, from a technical standpoint, he is correct. He is going in there and incising out regarding commissions. But the whole debate has been focused around how those commissions will conduct themselves in accordance with the common understanding of Article 3, particularly.

So while the Senator, in his very fine and precise way of dealing with the legislation, takes out just that, it might not be fully understood beyond our shores. The headline could go out that there is going to be an expiration.

I say to my good friend, it is just not wise to go in and try and put any imprint on this that expiration could occur. It could raise, again, the debate, and I do not think that is in the interest of the country. I think this debate, this legislation has been settled, and I don't think it was ever the President's intention in the course of the preparation of his legislation, but some fear it could.

Mr. BYRD. Mr. President, it could be a Democratic President, as far as I am concerned. I think this is wise on the part of the Senate in conducting its constitutional oversight, to say that we will do it this far and then we will take another look at it in the light of the new day, in the light of the new times, the new circumstances; we will take another look at it. We are not passing any judgment on that legislation 5 years out.

I am flabbergasted—flabbergasted—that my friend would take umbrage at this legislation.

I only have a few minutes left.

Mr. LEVIN. Will the Senator from West Virginia yield for 3 minutes?

Mr. BYRD. Yes, I yield 3 minutes.

Mr. LEVIN. Mr. President, I think the Senator from West Virginia is, more than any other person in the history of this body, the custodian in his person of the Constitution of the United States. The bill that is before us obviously raises a number of very significant issues involving our Constitution.

What the amendment of Senator BYRD does very wisely is say that after 5 years, let us double back and doublecheck—double back and doublecheck—so that we can be confident that what we have done comports with the Constitution of the United States. This amendment does it very carefully. It does not disturb any pending proceeding under the commission. The Senator has written this amendment so carefully that he says even though it will sunset, forcing us to go back and doublecheck, to look at our work, that it will not in any way disturb any existing or pending proceeding.

I believe this is such an important statement of our determination that we act in a way that is constitutional, not in the heat of a moment which is obviously critical to us, but that we comport in every way with this Constitution. We ought to heed the words of Senator BYRD, who understands the importance of this Constitution and that this body be the guardian of the Constitution. We are the body that must protect this Constitution.

Mr. BYRD. Yes.

Mr. LEVIN. And this, as he puts it, is an insurance policy that we will do just that.

Mr. BYRD. Yes.

Mr. LEVIN. I ask unanimous consent that I be added as a cosponsor to the Byrd amendment.

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

Mr. BYRD. Mr. President, I have 4 minutes remaining; do I?

The PRESIDING OFFICER. The Senator has 5 minutes 14 seconds remaining.

Mr. BYRD. I yield 5 minutes to my friend, the distinguished Senator from Illinois, Mr. OBAMA.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. OBAMA. Mr. President, I thank my dear friend and colleague from West Virginia.

I am proud to be sponsoring this amendment with the senior Senator from West Virginia. He is absolutely right that Congress has abrogated its oversight responsibilities, and one way to reverse that troubling trend is to adopt a sunset provision in this bill. We did it in the PATRIOT Act, and that allowed us to make important revisions to the bill that reflected our experience about what worked and what didn't work during the previous 5 years. We should do that again with this important piece of legislation.

It is important to note that this is not a conventional war we are fighting, as has been noted oftentimes by our President and on the other side of the aisle. We don't know when this war against terrorism might end. There is no emperor to sign a surrender document. As a consequence, unless we build into our own processes some mechanism to oversee what we are doing, then we are going to have an open-ended situation, not just for this particular President but for every President for the foreseeable future. And we will not have any formal mechanism to require us to take a look and to make sure it is being done right.

This amendment would make a significant improvement to the existing legislation, and it is one of those amendments that would, in normal circumstances, I believe, garner strong bipartisan support. Unfortunately, we are not in normal circumstances.

Let me take a few minutes to speak more broadly about the bill before us.

I may have only been in this body for a short while, but I am not naive to the political considerations that go along with many of the decisions we make here. I realize that soon—perhaps today, perhaps tomorrow—we will adjourn for the fall. The campaigning will begin in earnest. There are going to be 30-second attack ads and negative mail pieces criticizing people who don't vote for this legislation as caring more about the rights of terrorists than the protection of Americans. And I know that this vote was specifically designed and timed to add more fuel to the fire.

Yet, while I know all of this, I am still disappointed because what we are doing here today, a debate over the fundamental human rights of the accused, should be bigger than politics. This is serious and this is somber, as the President noted today.

I have the utmost respect for my colleague from Virginia. It saddens me to stand and not be foursquare with him.

I don't know a more patriotic individual or anybody I admire more. When the Armed Services bill that was originally conceived came out, I thought to myself: This is a proud moment in the Senate. I thought: Here is a bipartisan piece of work that has been structured and well thought through that we can all join together and support to make sure we are taking care of business.

The fact is, although the debate we have been having on this floor has obviously shown we have some ideological differences, the truth is we could have settled most of these issues on habeas corpus, on this sunset provision, on a whole host of issues. The Armed Services Committee showed us how to do it.

All of us, Democrats and Republicans, want to do whatever it takes to track down terrorists and bring them to justice as swiftly as possible. All of us want to give our President every tool necessary to do this, and all of us were willing to do that in this bill. Anyone who says otherwise is lying to the American people.

In the 5 years the President's system of military tribunals has existed, the fact is not one terrorist has been tried, not one has been convicted, and in the end, the Supreme Court of the United States found the whole thing unconstitutional because we were rushing through a process and not overseeing it with sufficient care. Which is why we are here today.

We could have fixed all this several years ago in a way that allows us to detain and interrogate and try suspected terrorists while still protecting the accidentally accused from spending their lives locked away in Guantanamo Bay. Easily. This was not an either-or question. We could do that still.

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

Mr. OBAMA. Mr. President, I ask unanimous consent for 2 more minutes.

The PRESIDING OFFICER. Is there objection?

Mr. WARNER. Mr. President, charged against the allocation under the proponent of the amendment.

The PRESIDING OFFICER. The proponent has no time remaining.

Mr. WARNER. We are under fairly rigid time control, but I will give the Senator from Illinois a minute.

Mr. OBAMA. I will conclude, then. I appreciate the Senator from Virginia.

Instead of allowing this President—or any President—to decide what does and does not constitute torture, we could have left the definition up to our own laws and to the Geneva Conventions, as we would have if we passed the bill that the Armed Services committee originally offered.

Instead of detainees arriving at Guantanamo and facing a Combatant Status Review Tribunal that allows them no real chance to prove their innocence with evidence or a lawyer, we could have developed a real military system of justice that would sort out the suspected terrorists from the accidentally accused.

And instead of not just suspending, but eliminating, the right of habeas corpus—the seven century-old right of individuals to challenge the terms of their own detention, we could have given the accused one chance—one single chance—to ask the Government why they are being held and what they are being charged with.

But politics won today. Politics won. The administration got its vote, and now it will have its victory lap, and now they will be able to go out on the campaign trail and tell the American people that they were the ones who were tough on the terrorists.

And yet, we have a bill that gives the terrorist mastermind of 9/11 his day in court, but not the innocent people we may have accidentally rounded up and mistaken for terrorists—people who may stay in prison for the rest of their lives.

And yet, we have a report authored by sixteen of our own Government's intelligence agencies, a previous draft of which described, and I quote, “. . . actions by the United States government that were determined to have stoked the jihad movement, like the indefinite detention of prisoners at Guantanamo Bay . . .”

And yet, we have al-Qaida and the Taliban regrouping in Afghanistan while we look the other way. We have a war in Iraq that our own Government's intelligence says is serving as al-Qaida's best recruitment tool. And we have recommendations from the bipartisan 9/11 commission that we still refuse to implement 5 years after the fact.

The problem with this bill is not that it is too tough on terrorists. The problem with this bill is that it is sloppy. And the reason it is sloppy is because we rushed it to serve political purposes instead of taking the time to do the job right.

I have heard, for example, the argument that it should be military courts, and not Federal judges, who should make decisions on these detainees. I actually agree with that.

The problem is that the structure of the military proceedings has been poorly thought through. Indeed, the regulations that are supposed to be governing administrative hearings for these detainees, which should have been issued months ago, still haven't been issued. Instead, we have rushed through a bill that stands a good chance of being challenged once again in the Supreme Court.

This is not how a serious administration would approach the problem of terrorism. I know the President came here today and was insisting that this is supposed to be our primary concern. He is absolutely right it should be our primary concern—which is why we should be approaching this with a somberness and seriousness that this administration has not displayed with this legislation.

Now let me make clear—for those who plot terror against the United

State, I hope God has mercy on their soul, because I certainly do not.

For those who our Government suspects of terror, I support whatever tools are necessary to try them and uncover their plot.

We also know that some have been detained who have no connection to terror whatsoever. We have already had reports from the CIA and various generals over the last few years saying that many of the detainees at Guantanamo shouldn't have been there—as one U.S. commander of Guantanamo told the Wall Street Journal, “Sometimes, we just didn't get the right folks.” And we all know about the recent case of the Canadian man who was suspected of terrorist connections, detained in New York, sent to Syria, and tortured, only to find out later that it was all a case of mistaken identity and poor information. In the future, people like this may never have a chance to prove their innocence. They may remain locked away forever.

The sad part about all of this is that this betrayal of American values is unnecessary.

We could have drafted a bipartisan, well-structured bill that provided adequate due process through the military courts, had an effective review process that would've prevented frivolous lawsuits being filed and kept lawyers from clogging our courts, but upheld the basic ideals that have made this country great.

Instead, what we have is a flawed document that in fact betrays the best instincts of some of my colleagues on both sides of the aisle—those who worked in a bipartisan fashion in the Armed Services Committee to craft a bill that we could have been proud of. And they essentially got steamrolled by this administration and by the imperatives of November 7.

That is not how we should be doing business in the U.S. Senate, and that is not how we should be prosecuting this war on terrorism. When we are sloppy and cut corners, we are undermining those very virtues of America that will lead us to success in winning this war. At bare minimum, I hope we can at least pass this provision so that cooler heads can prevail after the silly season of politics is over.

I conclude by saying this: Senator BYRD has spent more time in this Chamber than many of us combined. He has seen the ebb and flow of politics in this Nation. He understands that sometimes we get caught up in the heat of the moment. The design of the Senate has been to cool those passions and to step back and take a somber look and a careful look at what we are doing.

Passions never flare up more than during times where we feel threatened. I strongly urge, despite my great admiration for one of the sponsors of the underlying bill, that we accept this extraordinarily modest amendment that would allow us to go back in 5 years' time and make sure what we are doing

serves American ideals, American values, and ultimately will make us more successful in prosecuting the war on terror about which all of us are concerned.

Thank you, Mr. President.

Mr. BYRD. Mr. President, I ask the distinguished Senator from Virginia, may I have 10 seconds?

Mr. WARNER. I am going to give the Senator more than 10 seconds. I have to do a unanimous consent request on behalf of the leadership.

ORDER VITIATED—S. 295

I ask unanimous consent that the order with respect to S. 295 be vitiated.

The PRESIDING OFFICER. Is there objection?

Mr. LEVIN. Reserving the right to object.

No objection.

Mr. WARNER. I understand there is no objection. Will the Chair kindly rule?

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

The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, I yield such time as Mr. BYRD wishes to take.

The PRESIDING OFFICER. The Senator from West Virginia.

Mr. BYRD. Mr. President, I thank my friend from Virginia. I merely wanted to thank the distinguished Senator from Illinois, Mr. OBAMA, for his statement. I think it was well said, I think it was wise, and I thank him for his strong support of this amendment.

I also close by asking that the clerk once again read this amendment. I will then yield the floor. I thank the Senator from Virginia.

Mr. WARNER. Mr. President, I say to my good friend, I fully understand what you endeavor to do here, and I respectfully strongly disagree with it. I think many of us share this. This is going to be a very long war against those people whom we generically call terrorists. In the course of that war, this President and his successor must have the authority to continue to conduct these courts-martial—these trials under these commissions—and not send out a signal to terrorists: If you get under the time limit and you don't get caught, this thing may end.

Mr. WARNER. If you are not caught within this period of time, when this went into effect, then you are no longer going to be held accountable. I, and I think every Member of this body, regret that this Nation or other nations or a consortium of nations have not captured Osama bin Laden. There is a debate going on about that, and I am not going to get into that debate, but the fact is he is still at large. There could be other Osama bin Ladens, and it may take years to apprehend them, no matter how diligently we pursue them. We cannot send out a signal that at this definitive time, it is the responsibility of the President, of the executive branch, to hold those accountable for crimes against humanity. They would not be held accountable if this provision went into power.

Need I remind this institution of the most elementary fact that every Senator understands, that what we do one day can be changed the next. If there comes a time when we feel this President or a subsequent President does not exercise authority consistent with this act, Congress can step in, and with a more powerful action than a sunset, a very definitive action.

Mr. President, it is my understanding I have a few minutes left under this amendment.

The PRESIDING OFFICER (Mr. COLEMAN). The time of the Senator from Virginia is 9½ minutes.

Mr. WARNER. I would like to have that time transferred under my time on the bill as a whole. I hope Senator CORNYN, who has expressed an interest in this, gets the opportunity to use that time to address this amendment.

Now, Mr. President, as I look at the number of Senators who are desiring to speak on my side—and I think perhaps it would be helpful if you could, I say to my colleague, the ranking member, check on the other side—we still have some debate, and we are prepared to get into debate on the Kennedy amendment now. Therefore, I will undertake to do that just as soon as I finish.

But then we are in that time period where all time has expired or utilized or otherwise allocated on the several amendments. We will soon receive an indication from the leadership as to the time to vote on the stacked votes. But under the time reserved for the bill, I have, of course, the distinguished Senator from Arizona, Mr. MCCAIN, and Senator GRAHAM are going to be given by me such time as they desire, and then subject to the time utilized by those two Senators, I would hope to have time for Senator HUTCHISON, Senator CHAMBLISS, and again Senator CORNYN, Senator GRASSLEY, and Senator MCCONNELL, the distinguished majority whip.

So I am going to manage that as fairly and as equitably as I can. That is what we propose to do. I will go into the subject of the Kennedy amendment right now.

The PRESIDING OFFICER. The Senator from Michigan is recognized.

Mr. LEVIN. Mr. President, I am afraid that the way this now is set up, the Senator from Virginia has about six speakers who will have time, and we have on this side, because of the interest in the amendment process, used up our time and had to use time on the bill, so that on our side we only have—how much time left on the bill, if I could inquire of the Chair?

The PRESIDING OFFICER. The Senator from Michigan has 4 minutes remaining on the bill. The Senator from Vermont has 12 minutes remaining on the bill.

Mr. LEVIN. And the Senator from Massachusetts has how many minutes on his amendment?

The PRESIDING OFFICER. The Senator from Massachusetts has 7 minutes 20 seconds.

Mr. LEVIN. How much time all together on the majority side?

The PRESIDING OFFICER. On the bill, 50 minutes; on the Kennedy amendment, 30 minutes.

Mr. LEVIN. I think everybody ought to recognize the situation we are in. I hope we will withhold our comments until those on the other side who have been indicated as having time allocated to them speak so that we will have some time to respond to them.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

AMENDMENT NO. 5088

Mr. WARNER. Mr. President, I would now like to address the amendment offered by the senior Senator from Massachusetts.

I have read this very carefully and I have studied it, I say to my good friend. There are certain aspects of this amendment that are well-intentioned. But I strongly oppose it, and I do encourage colleagues to oppose it, because the question of the separation of powers is involved here, and that is the subject on which this Chamber has resonated many times. But here I find the amendment invades the authority of the executive branch in the area of the conduct of its foreign affairs by requiring the Secretary of State to notify other state parties to the Geneva Conventions of certain U.S. interpretations of the Geneva Conventions, in particular Common Article 3 and the law of war.

It is up to the executive branch in its discretion to take such actions in terms of its relations with other several states in this world—not the Congress directing that they must do so—such communications with foreign governments. But in the balance of powers, it is beyond the purview of the Congress to say to the Secretary of State: You shall do thus and so.

This bill speaks for itself by defining grave breaches of Common Article 3 that amount to war crimes under U.S. law. Any congressional listing of specific techniques should be avoided simply because Congress cannot foresee all of the techniques considered to maybe fall within the category of cruel and inhuman conduct, and therefore, they would become violations of Article 3. We can't foresee all of those situations. Again, it is the responsibility of this body to administer, to see that this bill becomes law in a manner of oversight.

Senator KENNEDY's amendment, depending on how the vote comes—and I am of the opinion that this Chamber will reject it—I don't want that rejection to be misconstrued by the world in any way as asserting that the techniques mentioned in the amendment are consistent with the Geneva Conventions or that they could legitimately be employed against our troops or anyone else. We must not leave that impression as a consequence of the decision soon to be made by way of a vote on the Kennedy amendment.

The types of conduct described in this amendment, in my opinion, are in

the category of grave breaches of Common Article 3 of the Geneva Conventions. These are clearly prohibited by our bill. Rather than listing specific techniques, Congress has exercised its proper constitutional role by defining such conduct in broad terms as a crime under the War Crimes Act. The techniques in Senator KENNEDY's amendment are not consistent with the Common Article 3 and would strongly protest their use against our troops or any others.

So I say with respect to my good friend, this is not an amendment that I would in any way want to be a part of this bill.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I would like to inquire of the Senator from Virginia, and I yield myself 3 minutes. As I understand, one of the reasons this amendment is being rejected is because of the burden that it is going to place on our State Department to notify the 194 countries that we expect, if these techniques are used against Americans, they would be considered a war crime. That is a possible difficulty for us? That is a burden for our State Department? Or, rather is he objecting because, we can't foresee all of the different kinds of techniques that might be used against individuals and therefore we shouldn't list these. We list them in the Army Field Manual specifically. They are not pulled out of the air; they are listed specifically in the Army Field Manual. That is where they come from. And a number of the Members on the other side of the aisle have said that those techniques are prohibited. So we have taken the Department of Defense list and incorporated it.

Then the last argument is that: Well, if it is rejected, we don't want this to be interpreted as a green light for these techniques. There must be stronger arguments. Maybe I am missing something around here. With all respect, I have difficulty in understanding why the Senator from Virginia, the chairman of the Armed Services Committee, does not address the fundamental issue which is included in this amendment, and that is this amendment protects Americans who are out on the front lines of the war on terror, the SEALS, the CIA, others who are fighting, and it gives warning to any country: You go ahead with any of these techniques and you are committing a war crime and will be held accountable.

Now, if I could get a good answer to that, I would welcome it, but I haven't heard it yet. With all respect, I just haven't heard why the Senator is refusing and effectively denying—opposition to this amendment is denying that kind of protection. I read, and it was when the Senator was here, when we found out that similar kinds of techniques were used against Americans in World War II, and we sentenced offenders to 10, 15 years and even executed some. Now we are saying: Oh, no, we

can't list those because it is going to be a bother to our State Department, notifying these countries. My, goodness.

There has to be a better reason that we are not going to protect our service men and women from these kinds of techniques. We are saying to those countries: If you use these techniques, you are a war criminal. What are those techniques? They are in the Department of Defense listing. That is what they are. How often are they used? I gave the illustrations of how they were used repeatedly, whether it has been by Iran or whether it has been by Japan, or any of our adversaries in any other war.

The PRESIDING OFFICER. The Senator has consumed 3 minutes.

Mr. KENNEDY. I yield myself 1 minute. I want to put in the RECORD the excellent letter from Jack Vessey, who is a distinguished former Joint Chief of Staff:

I continue to read and hear that we are facing a different enemy in the war on terror. No matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the armed forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950 to 1953, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II. Through those years, we held to our own values. We should continue to do so.

The Kennedy amendment does it. That is what this amendment is about. I reserve the remainder of my time.

I ask unanimous consent the letter be printed in the RECORD.

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

SEPTEMBER 12, 2006.

Hon. JOHN MCCAIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCAIN: Sometimes, the news is a little garbled by the time it reaches the forests of North-central Minnesota, but I call your attention to recent reports that the Congress is considering legislation which might relax the United States support for adherence to Common Article 3 of the Geneva Convention. If that is true, it would seem to weaken the effect of the McCain Amendment on torture of last year. If such legislation is being considered, I fear that it may weaken America in two respects. First, it would undermine the moral basis which has generally guided our conduct in war throughout our history. Second, it could give opponents a legal argument for the mistreatment of Americans being held prisoner in time of war.

In 1950, 3 years after the creation of the Department of Defense, the then Secretary of Defense, General George C. Marshall, issued a small book, titled *The Armed Forces Officer*. The book summarized the laws and traditions that governed our Armed Forces through the years. As the Senate deals with the issue it might consider a short quote from the last chapter of that book which General Marshall sent to every American Officer. The last chapter is titled "Americans in Combat" and it lists 29 general propositions which govern the conduct of Americans in war. Number XXV, which I long ago underlined in my copy, reads as follows:

"The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not terrorize helpless non-combatants, if it is within our power to avoid so doing. Wanton killing, torture, cruelty or the working of unusual hardship on enemy prisoners or populations is not justified in any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes. . . ."

For the long term interest of the United States as a nation and for the safety of our own forces in battle, we should continue to maintain those principles. I continue to read and hear that we are facing a "different enemy" in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950-53, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II. Through those years, we held to our own values. We should continue to do so.

Thank you for your own personal courage in maintaining those values, both in war and on the floor of the Senate. I hope that my information about weakening American support for Common Article 3 of the Geneva Convention is in error, and if not that the Senate will reject any such proposal.

Very respectfully,

GENERAL JOHN W. VESSEY, USA (Ret.).

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, my distinguished colleague used two phrases just now. He said: Burden. He used the word burden. He then said the word bother. Senator, you walk straight into the constitutional separation of powers in your language and you say: The Secretary of State shall—that is a direct order—notify other parties to the Geneva Conventions. You are putting a direct order to the executive branch. I say that is a transgression of the long constitutional history of this country and the doctrine of separation of powers.

Mr. KENNEDY. Would the Senator support it if we changed it to "shall," that you, the chairman of our committee, will make that request and the President will go ahead and notify and follow those instructions?

Mr. WARNER. Senator, I am not in the business of trying to amend your amendment.

Mr. KENNEDY. I am just trying to accommodate you. You are saying that this is a constitutional issue. I just offered to try to accommodate the Chairman so we can ensure we are protecting American servicemen from torture—from torture. And the response is: Well, it is going to violate the Constitution. I am interested in getting results.

But I hear the Senator say that it is unconstitutional that my amendment says Department of State shall notify other countries that if they are going to torture, they are going to be held accountable, and we are being defeated

on the floor of the U.S. Senate because the opponents are saying that is unconstitutional and we cannot find a way to do it. I find this unwillingness to compromise is outrageous.

Mr. President, I am prepared to call the roll on this one.

Mr. WARNER. Mr. President, at this point I wish to have such time as remains under the control of the Senator from Virginia accorded to me under the control of the time on the bill.

The PRESIDING OFFICER. The time will be so allocated.

Mr. WARNER. Mr. President, I wish to inform the Chamber that we are at that juncture where we will consider the statements of others, very important statements to be made. I listed them in a recitation of those who have indicated their desire to speak. But I also bring to the attention of the body that I have just been told by the leadership they are anxious to proceed to the votes.

At this time I would ask—if I can get my colleague's attention—that there be yeas and nays on all of the pending amendments remaining.

The PRESIDING OFFICER. Without objection, the yeas and nays may be requested on all pending amendments.

Mr. LEVIN. Will the Senator withhold that request for 2 minutes? Will the Senator withhold?

Mr. WARNER. Surely.

Mr. President, we will now put in a quorum call to accommodate the ranking member, such that the time is not charged to either side.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. WARNER. Mr. President, the managers, together with the guidance from their respective leaders, are endeavoring to do the following. There are three amendments to be voted on and then final passage. We hope to have as much time used on the bill as we can, to be consumed prior to the initiation of the votes. But then subsequent to the three votes, there will be a block of time. A Senator on this side has reserved 12 minutes. I intend to reserve, on my side, time to Senator MCCAIN. I am trying to work in that category of time following the votes. But until we are able to reconcile this, I ask that we now proceed.

Let me allow the Senator from Georgia to proceed. He has indicated a desire to speak for 5 or so minutes at this time. But I hope Senators are following what the two managers are saying. Those desiring to speak on the bill, with the exception of Senator MCCAIN, would they kindly come down and utilize this time before the amendments start?

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I rise today in support of the Military Commissions Act of 2006. This historic legislation is the result of much work, thought, and debate.

I commend the administration, I commend Senator WARNER, Senator MCCAIN, Senator GRAHAM, and all those who were involved in the ultimate compromise we have come to on this very sensitive and very complex issue. I am pleased we were able to find common ground on this critical issue and ensure that the President can authorize the appropriate agencies to move forward with an appropriate interrogation program.

There is no question that this program provides essential intelligence that is vital to America's success in the war on terrorism. At the same time, it honors our agreement under the Geneva Conventions and underscores to other nations that America is a nation of laws. This has been a difficult issue and I am pleased that both sides worked so diligently to achieve this result. In this new era of threats, where the stark and sober reality is that America must confront international terrorists committed to the destruction of our way of life, this bill is absolutely necessary. Our prior concept of war has been completely altered, as we learned so tragically on September 11, 2001. We must address threats in a different way. If we are going to get at the root of terrorist activity, we need to be able to get critical information to do so.

There has been much discussion during the course of the drafting of this bill about the rule of law, and the rule of law relative to detainees is, indeed, reflected in this bill. It provides for tribunals, for judges, for counsel, for discovery, and for rules of evidence.

Most importantly, however, in my view, is that while this bill provides important rule of law procedures for illegal enemy combatants, it does not give them the same protections which we afford lawful enemy combatants or our own military personnel, and that is a critical distinction. And that is how it ought to be. We have made that distinction for no other reason than to provide incentive for every nation across the world to observe international agreements for the proper treatment of captives. It bears repeating—this bill applies to the trial of illegal enemy combatants—those who make no pretense whatsoever of conformity with even minimal standards or international norms of civilized behavior when it comes to the treatment of those they capture.

We hear repeatedly that we should be concerned about what we do, for fear that we encourage others to treat our captured service men and women in a similar manner. But let's be very clear here and state what every American knows to be true. The al-Qaida terrorists treat our captured service men and women by beheading them and by dragging their bodies through the streets.

They need no encouragement or excuse for their actions by reference to our treatment of their captives.

As a result of the Supreme Court's ruling, we are creating military commissions that provide rule of law protections which are embodied in this bill—courts, judges, legal counsel, and rules of evidence. So this bill appropriately meets our international obligations and America's sense of what is right and it is in keeping with our highest values.

However, this bill will allow the President to move forward with a terrorist interrogation program that will ensure that we continue to get critical information about those who are plotting to carry out hateful acts against America and against Americans.

I commend the President for his determination to respond to the new reality confronting us. I commend Chairman WARNER and my colleagues on the Armed Services Committee who worked in good faith to craft a bill which is the right bill to respond to the challenges we face. And again, I am pleased we were able to find common ground on this critical issue and ensure that the President can move forward with an appropriate interrogation program.

I think it is important that we send a bill to the White House, to the desk of the President that is exactly the same as the bill that has already been passed by the House so we can put this program in place immediately. The way we do that is to continue to defeat all the amendments that have been put forward, and that we send the President the same bill that has already been passed by the House so that this program can be reinitiated immediately.

I yield the floor.

Mr. WARNER. Mr. President, I thank our distinguished colleague from Georgia, a very valued member of the Armed Services Committee who has from time to time participated in the extensive deliberations and consultations with regard to how the original bill which we worked on should be shaped and finally amended. I thank him.

Again, I call to the attention of colleagues that I shall put in a quorum for the purpose of trying to accommodate Members on my side who desire to speak.

I now see the distinguished Senator from South Carolina. We are prepared to allocate to him such time as he may desire. How much time does he need?

Mr. GRAHAM. Would 15 minutes be OK?

Mr. WARNER. Yes.

Mr. GRAHAM. I thank the chairman. The PRESIDING OFFICER. The Senator from South Carolina.

Mr. GRAHAM. Mr. President, in 15 minutes I will try to explain the processes as I know it to be in terms of how we arrived at this moment.

No. 1, I am glad we are here. I think the country is better off having the bill voted on in the current fashion.

I have gotten to know Senator WARNER very well over the last 30 days. I had a high opinion of the Senator before this process started, but I, quite frankly, am in awe of his ability to stand up for the institution as a U.S. Senator, who was a former Secretary of the Navy, who tried to have a balanced approach about what we are trying to do.

It is no secret that Senator MCCAIN is one of my closest friends in this body, and I respect him in so many ways. But unlike myself and most of us, Senator MCCAIN paid a heavy price while serving this country. He and his colleagues in Vietnam were treated very poorly as prisoners of war. When he speaks about the Geneva Conventions, he does so as someone who has been in an environment where the Conventions would not apply. But Senator MCCAIN believes very strongly in the Geneva Conventions. When it comes to the Vietnam war, he has told me more than once that if it were not for the insistence of the United States and the international community that constantly pushed back against the North Vietnamese, he thought the torture would have continued and all of them would eventually be killed. But the North Vietnamese became concerned about international criticism after a point in time.

While the Geneva Conventions were not applied evenly by any means, it did have an effect on the North Vietnamese.

I have been a military lawyer for over 20 years. I have had the honor of wearing the Air Force uniform while serving my country and being around great men and women in uniform. It has been one of the highlights of my life. I have never been shot at. The only people who wanted to kill me were probably some of my clients. But I do appreciate why the Geneva Conventions exist and the fact that the law of armed conflict is a body of law unique to itself and has a rich tradition in our country and throughout the world and it will work to make us safe and live within our values if we properly apply it.

The reason we are here is because the Supreme Court ruled in the Hamdan case that the military commissions authorized by the President were in violation of Common Article 3 of the Geneva Conventions. They were not regularly constituted courts.

It surprised me greatly that the Supreme Court would find that the Geneva Conventions applied to the war on terror. It was President Bush's assumption and mine, quite frankly, that humane treatment would be the standard. But this enemy doesn't wear a uniform; it operates outside the Conventions, doesn't represent a nation, and, therefore, would not be covered. But the Supreme Court came to a different conclusion. Thus, we are here.

I say to my fellow Americans, it is not a weakness, it is strength that we have three branches of government. It

is not healthy for one branch of government to dominate the other two at a time of stress.

I have pushed back against the administration when I believed they were pushing the executive power of the inherent authority of the President too far. Even though we are in a time of war, there is plenty of room for the Congress and the courts.

What I tried to do in helping draft this bill, working with the President and working with our friends on the other side, is come up with a product that would create a balance that I think would serve us well.

My basic proposition that I have applied to the problem is we are at war, that 9/11 was an act of war, and since that moment in time our Nation has been at war with enemy combatants who do not wear a uniform, who do not represent a nation but are warriors for their cause, just as dedicated as Hitler was to his cause, and they are just as vicious and barbaric as any enemy we have ever fought.

But we don't need to be like them to win. As a matter of fact, we need to show the world that we are different than them.

When the Geneva Conventions were applied to the war on terror, we had a problem. We had to renew the Military Commission Tribunal in line with Common Article 3. Common Article 3 is a mini-human-rights tree that is common to all four Convention articles. You have one about lawful combatants and unlawful combatants, civilians and wounded people. Common Article 3 is throughout all of the treaties regarding the Geneva Conventions. It says you would have to have a regularly constituted court to pass judgment or render sentences against those who are in your charge during time of war; that is, unlawful combatants.

The problem with the military commission order authorized by the President was that it deviated from the formal Code of Military Justice, the court-martial model, without showing a practical reason. Within our Uniform Code of Military Justice, it says military commissions are authorized, but they need to be like the court-martial system to the extent practicable.

What I am proud of is we have created a new military commission based on the UCMJ and deviations are there because of the practical need. A court martial is not the right forum to try enemy combatants—non-citizen terrorists—the military commission is the right forum, but we are basing what we are doing on UCMJ, and the practical differences, I think, will be sustained by the Court.

The confrontation rights that were originally posed by the administration gave me great concern. I do not believe that to win this war we need to create a trial procedure where the jury can receive evidence classified in nature, convict the accused, and the accused never knows what the jury had to render a

verdict upon, could not answer that accusation, rebut or examine the evidence.

That was the proposal which I thought went too far and that would come back to haunt us. As a result of this compromise, it has been taken out.

We have a national security privilege available to the Government to protect that prosecutor's file from being given over to the defense or to the accused so our secrets can be protected. But we will now allow the prosecutor to give that to the jury and let them bring it out on the side of the accused and the accused never knowing what he was convicted upon. That could come back to haunt us if one of our soldiers falls into enemy hands.

We would not want a future conviction based on evidence that our soldiers and CIA operative never saw. I think we have a military commission model that affords due process under the law of war that our Nation can be proud of, that will work in a way to render justice, and if a condition is abstained, it will be something we can be proud of as a nation. I am hopeful that the world would see the condition based on evidence, not vengeance.

My goal is to render justice to the terrorists, even though they will not render justice to us. That is a big distinction.

People ask me, Why do you care about the Geneva Conventions? These people will cut our heads off and they will kill us all. You are absolutely right. Why do I care?

Because I am an American. And we have led the way for over 50-something years when it comes to the Geneva Conventions applications.

I am also a military lawyer, and I can tell every Member of this body—some of them have served in combat unlike myself; some know better than I. But we have had downed pilots in Somalia. A helicopter pilot was captured by militia in Somalia. We dropped leaflets all over the city of Mogadishu. We told the militia leaders, "If you harm a helicopter pilot, you will be a war criminal." We blared that throughout town on loudspeakers with helicopters. After a period of time, they got the message, and he was released.

We had two pilots shot down over Libya when Reagan bombed Qadhafi. I was on active duty in the Air Force. We told Qadhafi directly and indirectly, if they harm these two pilots, they will be in violation of the Geneva Conventions, and we will hunt you down to the ends of the Earth.

I want to be able to say in future wars that there is no reason to abandon our Geneva Conventions obligations to render justice to these terrorists.

So not only do we have a military commission model that is Geneva Conventions compliant; we have a model that I think we should be proud of as a nation.

The idea that the changes between the committee bill and the compromise

represents some grave departure, quite frankly, I vehemently disagree with. I didn't get into this discussion and political fight to take all the heat that we have taken to turn around and do something that undercuts the purpose of being involved in it to begin with. The evidentiary standard that will be used in a military commission trial of an enemy combatant was adopted from the International Criminal Court.

I will place into the RECORD statements from every Judge Advocate General in all four branches of the services that have certified from their point of view that the evidentiary standard that the judge will apply to any statements coming into evidence against an enemy combatant are legally sufficient, will not harm our standing in the world, and, in fact, are the model of the International Criminal Court which try the war criminals on a routine basis.

The provision I added, along with Senator McCain, dealing with the provisions of the Detainee Treatment Act, 5th, 8th, and 14th amendment concepts within the Detainee Treatment Act, will also be a standard in the future designed to reinforce the relevance of the Detainee Treatment Act in our national policy, in our legal system, not to undermine anything but to enforce the concept the Detainee Treatment Act and the judicial standard that our military judges will apply to terrorists accused is the same that is applied in International Criminal Court.

I have been a member of the JAG court for over 20 years. I have had the honor of serving with many men and women who will be in that court-martial scene. The chief prosecutor, Moe Davis, I met as a captain. There is no finer officer in the military than Colonel Davis. He is committed to render justice. I am very proud of the fact that the men and women who will be doing these military commissions believe in America just as much as anybody I have ever met, and they want to render justice.

What else do we try to accomplish?

We reauthorize the military commissions in a way to be Geneva Conventions-compliant to afford the defendants accused due process in the way that will not come back to haunt us.

What else did we have to deal with? A CIA program that is classified in nature that needs to continue. There is a debate in this country: Should we have a CIA interrogation program classified in nature that would allow techniques not in the Army Field Manual to get good intelligence from high value targets? The answer, from my point of view, is yes, we should, but not because we want to torture anybody, because we want to be inhumane as a nation. The reason we need a CIA program classified in nature to get good information is because in this war information saves lives.

Mutual assured destruction was the concept of the Cold War, where if the Soviet Union attacked us, they knew

with certainty they would be wiped out. That concept doesn't work when your enemy doesn't mind killing themselves when they kill you. The only way we will protect ourselves effectively is to know what they are up to before they act. The way you find that out is to have good intelligence. But you have to do it with your value system.

Abu Ghraib was an aberration, but it has hurt this country. Anytime the world believes America has adopted techniques and tactics that are not of who we are, we lose our standing. So what we did regarding the CIA, we redefined the War Crimes Act to meet our Geneva Conventions obligations. The test for the Congress was, how can you have a clandestine CIA program and then not run afoul of the Geneva Conventions? What are the Geneva Conventions requirements of every country that signs the treaty to outlaw domestically gray areas of the treaty?

In Article 129 and 130 of the Geneva Conventions, it puts the burden on each country to do it internally, to create laws to discipline their own personnel who may violate the treaty in a grave way. It lists six offenses that would be considered grave breaches of the treaty under the conventions. Those six offenses were taken out of the treaty and put in our domestic law, title 18, the War Crimes Act, and anybody in our Government who violates that War Crimes Act is subject to being punished as a felon.

We added three other crimes we came up with ourselves.

Torture has always been a crime, so anyone who comes to the Senate and says the United States engages in torture, condones torture, that this agreement somehow legitimizes torture, you don't know what you are talking about. Torture is a crime in America. If someone is engaged in it, they are subject to being a felon, subject to the penalty of death. Not only is torture a war crime, serious physical injury, cruel and inhumane treatment mentally and physically of a detainee is a crime under title 18 of the war crimes statute.

Every CIA agent, every military member now has the guidance they need to understand the law. Before we got involved, our title 18 War Crimes Act was hopelessly confusing. I couldn't understand it. We brought clarity. We have reined in the program. We have created boundaries around what we can do. We can aggressively interrogate, but we will not run afoul of the Geneva Conventions. We are not going to let our people commit felonies in the name of getting good information, but now they know what they can and cannot do.

Who complies with that treaty? Who is it within our Government who would implement our obligations under the treaty? The Congress has decided what a war crime would be to prohibit grave breaches of the treaty. The President, this President, like every other President, implements treaties. So what we

said in this legislation, when it comes to nongrave breaches, all the other obligations of the Geneva Conventions, the President will have the responsibility constitutionally to comply with those obligations, not to rewrite title 18, not to sanction torture, not to violate the Detainee Treatment Act, but to fulfill the treaty the way every other President has in our constitutional history. That is all we have done. To say otherwise is just political rhetoric. Not only have we allowed the CIA program to go forward in a way not to violate the Geneva Conventions, we have delegated to the President what was already our constitutional responsibility to enforce the treaty—not to rewrite it but to enforce it and fulfill it.

My concern was that in the process of complying with Hamdan, we would be seen by the world as redefining the treaty for our own purposes. We have not redefined the Geneva Conventions. We have, for the first time in our domestic law, clearly defined what a crime would be against the Geneva Conventions, and we have told the President, as a Congress: It is your job to fulfill the other obligations outside of criminal law. That is the way it should be, and it is something of which I am extremely proud.

We have been at war for over 5 years. Here we are 5 years later trying to figure out the basic legal infrastructure. It has been confusing. It has been contentious. We have had two Supreme Court cases where the Government's work product was struck down.

My hope is that our homework will be graded by the Supreme Court, that this bill eventually will go to our Federal courts, as it should, and the courts will say the following: the military commissions are Geneva Conventions compliant and meet constitutional standards set out by our country when it comes to trying people.

I am confident the court will rule that way. I am confident the Supreme Court will understand that the power we gave the President to fulfill the treaty is consistent with his role as President and the war crimes we have written to protect the treaty from a grave breach from our own people is written in a way to sustain legal scrutiny.

I am also confident that Congress has finally cleared up what has been a huge problem. What role should a judge have in a time of war? Who should make the decision regarding enemy combatant status?

In every war we have been in up until now, the military has decided the battlefield issues. Under the Geneva Conventions, it is a military decision to consider who an enemy combatant is. The habeas cases that have existed in our courts from the last 3 or 4 years have led to tremendous chaos at Guantanamo Bay. Our own troops are being sued by the people we are fighting. They are bringing every kind of action you can think of into Federal courts.

Over 200 cases have been filed. It is impeding the war effort.

A judge should not make a military decision during a time of war. The military is far more capable of determining who an enemy combatant is than a Federal judge. They are not trained to do that.

We have replaced a system where the judges of this country can take over military decisions and allow judges to review military decisions, once made, for legal sufficiency. That is the way every other country in the world does it. Habeas has no place in this war for enemy prisoners. The Germans and the Japanese—no prisoner in the history of the United States has ever been able to go to a Federal court and sue the people they are fighting who are protecting us against the enemy.

We are allowing the Federal courts to review every military decision made about an enemy combatant as to whether they made the right decision based on competent evidence and whether the procedures they used are constitutional. We have rejected the idea as a Congress of allowing the courts to run the war when it comes to defining who an enemy combatant is. That was a decision which needed to be made. It is not destroying the writ of habeas corpus. It is having a rational, balanced approach to where the judges can play a meaningful role in time of war and not play a role they are not equipped to play. This will mean nothing if it does not withstand court scrutiny.

I hope soon we will have an overwhelming vote for the final product after the amendments are disposed of. My goal for 2 years has been to try to find national unity, to have the Congress, the executive branch, and eventually the courts on the same sheet of music where we can tell the world at large that we have detention policies, interrogation policies, and confinement policies that not only are humane and just but will allow us to protect ourselves from a vicious enemy and live up to our obligations as a nation. We are very close to that day coming.

I thank every Member of this Senate who has worked to make this product better. When you cast a vote, please remember, we are at war, we are not fighting crime.

The PRESIDING OFFICER. The Senator from Virginia.

Mr. WARNER. Mr. President, we now have an additional speaker, the Senator from Texas.

As the Senator from South Carolina has just completed his remarks, I have to say it has been an unusual experience for all of us these past weeks. Working together with Senator MCCAIN and the Senator from South Carolina has enabled this Senate to proceed in a way that is consistent with Senate practices: namely, have a committee go through a bill, have a markup, and then proceed to work on a product. It brought together the consensus.

I say to my friend from South Carolina, although I have had some modest experience as Secretary of the Navy dealing with court-martials, and, indeed, when I was a young officer in the Marines, I was involved in court-martials, the Senator brought together in this bill, in this deliberation, a very special expertise of the years he has had.

Now he is a full colonel in the U.S. Air Force and a Judge Advocate General recognition. I thank the Senator for his invaluable contribution to putting the series of bills we have had—putting into those bills matters which he believed were in the best interests of the men and women of the Armed Forces and, indeed, his consultation throughout this process with the Judge Advocate Generals and other past and present Judge Advocates and some of the younger officers who will be future Judge Advocate Generals. I thank the Senator from South Carolina for his strong contribution to this deliberative process in the Senate.

Now I yield the floor to our last speaker before we proceed to the votes. As I understand, we will be voting at the conclusion of this statement?

Mr. LEVIN. I don't know if the unanimous consent agreement has been finished yet. That is our hope.

Mr. WARNER. We are finishing a unanimous consent request, but I alert the Senate that it is my strong hope and prediction we will soon be voting in sequence on three amendments.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I first compliment the distinguished chairman of the Senate Committee on Armed Services, the Senator from Virginia, for being the calm and steady hand on the rudder during the course of the discussions and debates involving this important piece of legislation. His work and demeanor have always been constructive and civil, and any disagreements we have had are befitting of the great traditions of this institution. I thank him for that.

Mr. WARNER. If I may, I thank the Senator from Texas. Several times we came to the Senator's office in the course of the deliberations on this bill because the Senator, too, brings to the debate a vast experience, having risen through the ranks of the legal profession to become a judge in his State. The Senator is very well equipped and did provide a very valuable input into this debate.

Mr. CORNYN. My thanks to the Senator from Virginia.

Mr. President, not everyone who has been engaging in this debate has been as constructive. We have heard some outlandish statements that bear correction, some suggesting this bill would actually permit the use of torture. Nothing—nothing—could be further from the truth. In fact, what this bill does is make sure that the provisions of the Detainee Treatment Act,

which were passed in December of 2005 in this same Senate, that ban torture, cruel, inhuman, and degrading treatment of detainees, that we comply with those laws which reflect upon our international treaty obligations as well as our domestic laws and which reflect our American values.

We are a nation at war. But there is no equivalency with the way this war is fought and prosecuted by the United States and our allies, no equivalency with the manner in which the war is prosecuted by our enemies. We have learned that our enemies have been at war against us for much longer than just September 11, 2001, and date back many years before we even realized America was under attack.

We know that this enemy, represented by Islamic extremism, justifies the use of murder against innocent civilians in order to accomplish its goals.

America complies with all of its international treaty obligations and domestic laws. What this bill is about is to try to provide our intelligence authorities the clear direction they need so they know how to comply with those laws and, at the same time, preserve an absolutely critical means of collecting intelligence through the interrogation of high-value detainees at Guantanamo Bay.

But no civilian employee of the U.S. Government working at the CIA or elsewhere is going to risk their career, their reputation, and their assets using some sort of cloudy law or gray law that does not make clear what is permitted and what is not permitted. This bill we are prepared to pass in a few minutes provides that kind of clear direction. What it says is that we in the U.S. Congress are stepping up to take the responsibility ourselves to provide that kind of clarity that will allow our intelligence authorities to gain this important intelligence while at the same time be secure in the knowledge that what they are doing fully complies with our law, including our international treaty obligations.

We know the aggressive interrogation techniques that are legal under the provisions of the McCain amendment in the Detainee Treatment Act have provided much valuable intelligence that has saved American lives. We know the CIA's high-value terrorist detainee program works. For example, detainees have provided the names of approximately 86 individuals whom al-Qaida deemed suitable for Western operations. Half of these individuals have now been removed from the battlefield and are no longer a threat to the United States of America or our allies.

This program is effective and has saved American lives and must be preserved. Yet there are people who would go so far as to intimate that we are torturing people. But we are not torturing people. But we are using legal, aggressive interrogations consistent with the U.S. Constitution, U.S. laws, and our treaty obligations. In doing so,

we are keeping faith with the American people that the Federal Government will use every legal means available to us to keep the American people safe.

Now, we may disagree—and we do disagree on the Senate floor—with the level of rights that an accused terrorist should have. I happen to believe these individuals, who are high-value detainees at Guantanamo Bay, do not deserve the same panoply of rights preserved for American citizens in our legal system. But I would hope that we would all agree that the CIA interrogation program must continue. We must not allow the brave patriots who conduct these interrogations to be at risk unnecessarily by providing a gray zone as opposed to absolute clarity insofar as it is within our power to give it so that we may interrogate these captured terrorists to the fullest extent of the law.

To suggest that we are somehow torturing individuals or violating our own laws that we passed just last year in the Detainee Treatment Act under the McCain amendment banning torture, cruel and inhuman treatment, is absolutely untrue and irresponsible. The American people have a right to believe we will use every legal tool available to us to help keep them safe against this new and different type of enemy.

Let me just say a word about who that enemy is. We have heard we are engaged in a global war on terror, and that is absolutely true. But it does not necessarily tell us who that enemy is. Unfortunately, it is an enemy that has hijacked one of the world's great religions, Islam, in pursuit of their extremist goals that justifies the murder of innocent civilians in order to accomplish those goals.

Some on the Senate floor have said this debate is all about Iraq. It is not just about Iraq. If it were just about Iraq, how would those critics explain the attempted terrorist plot that was broken up at Heathrow Airport just a few short weeks ago, or the attacks in Madrid or Beslan in Russia or Bali or elsewhere or, for that matter, New York and Washington, DC?

The fact is, we have prevented another terrorist attack on our own soil by using this interrogation program to allow us to detect and deter and disrupt terrorist activity, and the fact we have also taken the fight on the offensive where the terrorists plot, plan, train, and try to export their terrorist attacks to the United States and elsewhere.

If we would do what some would apparently want us to do and simply pull the covers over our head and wish the bad people would go away, America would be less safe and we would not be able to stand here and say that due to the vigilance of the American people, due to the vigilance of the U.S. Congress and the executive branch of Government, we have been successful, thank goodness, in preventing another terrorist attack on our own soil, after 5 years from September 11, 2001.

So, Mr. President, I hope our colleagues will vote against these ill-advised amendments to this bill and will send a clean bill to be reconciled with the House version and sent to the President right away so that before too long we can see that some of the war criminals who sit detained at Guantanamo Bay may be brought to justice, people like Khalid Shaikh Mohammed, who was the mastermind of the 9/11 plot that killed nearly 3,000 Americans.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. CHAFEE). The Senator from Virginia.

Mr. WARNER. Mr. President, I thank my distinguished colleague from Texas. He has been a valuable addition to those who are trying to structure this piece of legislation.

Momentarily, I will seek a unanimous consent request ordering the votes and the allocation of such time as remains between Senators.

So at this point in time, I will suggest the absence of a quorum, unless the Senator from Massachusetts would like to take the additional 3 minutes that he has at this time on his amendment.

Mr. KENNEDY. Yes.

The PRESIDING OFFICER. The Senator from Massachusetts.

Mr. KENNEDY. Mr. President, just quickly, the proceedings we are going to have—if I can inquire—I use the 3 minutes, and then we are moving toward a series of votes; is that right?

Mr. WARNER. That is correct, I say to the Senator.

Mr. KENNEDY. Then, I would ask when I have 30 seconds left—Mr. President, I have 3½ minutes; am I correct?

The PRESIDING OFFICER. Three minutes.

Mr. KENNEDY. Three minutes.

Mr. WARNER. Mr. President, I may have misunderstood my colleague. That is the 3 minutes remaining on your amendment held in abeyance.

Mr. KENNEDY. That is correct.

Mr. President, I yield myself the 3 minutes.

AMENDMENT NO. 5088

Mr. President, just for the benefit of the membership, in my hand is the Army manual. In the Army manual are the prohibitions for instructions to all the interrogators of the United States, that they cannot use these kinds of harsh tactics which have been recognized by Members as torture.

This amendment says if any country is going to use those similar tactics against those who would be representing the United States in the war on terror—for example, the Central Intelligence Agency; for example, the SEALs; for example, contractors working for the intelligence agency—then they will have committed a war crime.

I reviewed earlier in the debate where we have prosecuted Japanese and other war crimes, giving them 10 or 15 years, and even execution when they went ahead with this. That is why this is so important.

Now, my good friend, the chairman of the committee, says we cannot do it

because it violates the Constitution because it is instructing—instructing—the President of the United States through the State Department to notify the 194 countries.

Well, we thought it was not unconstitutional on the Port Security Act, when we said:

When the Secretary . . . , after conducting an assessment . . . , decides that an airport does not maintain and carry out effective security measures, the Secretary . . . shall notify the appropriate authorities of the government of the foreign country. . . .

Here is port security.

Here is on the pollution issues:

The Secretary of State shall notify without delay foreign states concerned. . . .

That is the second one.

And I have the third illustration in terms of foreign carriers.

In 15 minutes we got these cases. And here we are going to say we are going to refuse to protect Americans who are on the cutting edge of the war on terror because we will not let our State Department go on an e-mail and notify the 192 countries because that is unconstitutional? If the chairman of the Armed Services Committee feels that way, we could strike that provision and just say it is the policy of the United States. Then we would not be instructing anyone. Either way, this is about protecting Americans. It is about protecting Americans.

I believe those Americans who are out there in the hills and in the mountains of Afghanistan today and tonight, those people who are in the hills and mountains and deserts of Iraq, those people who are out in Southeast Asia or all over the world in order to try to deal with the problems of terrorism ought to know, if they are in danger of getting captured, if any of their host countries are going to perform this kind of procedure and torture on them, they will be war criminals.

That is what this amendment is about. I hope it will be accepted. It should be.

Mr. President, I yield what time I have to my ranking member.

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

Mr. WARNER. Mr. President, at this time we are waiting for clearance by the leadership of the UC. But I will ask at this time we get the yeas and nays on all the votes, the amendments and final passage.

Mr. ROCKEFELLER. Mr. President, without objecting, does any unanimous consent request allow me to close on my amendment for 2 minutes?

Mr. WARNER. Mr. President, the UC, as presently drafted, gives 2 minutes to each side for the purpose of addressing amendments.

Mr. ROCKEFELLER. I thank the Senator.

Mr. WARNER. Mr. President, I once again restate the request for the yeas and nays on the amendments and final passage. I ask unanimous consent that it be in order to ask for the yeas and nays on the amendments and final passage.

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

Mr. WARNER. Mr. President, I ask for the yeas and nays on the amendments and final passage.

The PRESIDING OFFICER. Is there a sufficient second?

There appears to be a sufficient second.

The yeas and nays were ordered.

Mr. WARNER. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant 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. Mr. President, I ask unanimous consent that any remaining time be yielded back, other than as noted below, and that the Senate proceed to votes in relation to the amendments in the following order:

The Rockefeller amendment No. 5095, the Byrd amendment No. 5104, and the Kennedy amendment No. 5088.

I further ask unanimous consent that there be 4 minutes for debate, equally divided, prior to each of the above votes.

I further ask unanimous consent that prior to passage of the bill, Senator LEAHY be recognized for his remaining 12 minutes and, as set forth in the initial unanimous consent request, which was provided for under the original consent order, Senator LEVIN be in control of 4 minutes, Senator WARNER in control of 16 minutes, to be followed by closing remarks by the two leaders and, following that time, the Senate proceed to passage of the bill; further, that there then be 5 minutes equally divided prior to the vote on invoking cloture on the border fence legislation; provided further that with respect to the border fence bill, it be in order to file second degrees at the desk no later than 5 p.m. today under the provisions of rule XXII.

The PRESIDING OFFICER. Is there objection?

Mr. LEAHY. Mr. President, reserving the right to object, I did not understand the part about the fence.

Mr. WARNER. Can the Senator repeat that?

Mr. LEAHY. I did not understand the part about the timing of the fence bill.

Mr. WARNER. I will repeat it.

Mr. LEAHY. Just that part.

Mr. WARNER. It reads as follows: Following that time, the Senate proceed to passage of the bill; further, there then be 5 minutes equally divided prior to the vote on invoking cloture on the border fence legislation; provided further that with respect to the border fence bill, it be in order to file second degrees at the desk no later than 5 p.m. today under the provisions of rule XXII.

Mr. LEAHY. Mr. President, even though I believe we have made a ter-

rible and tragic mistake in the Senate, including major changes in our constitutional rights willy-nilly to get out to campaign, I realize they have locked this in and there is not much one can do about it. I think it is a farce in the Senate.

Mr. WARNER. Mr. President, I renew the unanimous consent request.

The PRESIDING OFFICER. Is there objection?

Without objection, it is so ordered.

AMENDMENT NO. 5095

There will now be 4 minutes of debate, equally divided, on the Rockefeller amendment.

The Senator from West Virginia is recognized.

Mr. ROCKEFELLER. Mr. President, my amendment would require, as I explained this morning, the CIA to provide the Congressional Intelligence Committees, which are required by law to be informed of what is going on in the intelligence world, fully the most basic and fundamental information it needs to oversee the CIA detention and interrogation program.

Frankly, for the past 4 years we have not had that information. The administration has withheld this information from us. I am not saying that in partisan fashion. It is a fact.

It has been very frustrating as a member of the Intelligence Committee, much less as a Member of the Senate. We have made repeated requests and the Intelligence Committee has been prevented from carefully reviewing the program. The program has operated, as a result, without any meaningful congressional oversight whatsoever, and that is our responsibility under the law.

All of my colleagues should be troubled by this fact. We cannot assure ourselves, we cannot assure the American people, and we cannot assure our agents overseas that the CIA program is both legally sound and effective, without the basic information required under my amendment.

My amendment is simply about oversight and accountability, nothing more, nothing less. Nothing in the amendment would require the public disclosure of any classified document or aspect of the CIA program.

Mr. President, I ask unanimous consent that Senator FEINSTEIN be added as a cosponsor of my amendment.

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

The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, I spoke in strong opposition to this amendment. Again, I think it tries to displace the oversight that is performed by the Intelligence Committee. I would like to add the following bit of information.

On September 28 of this year, GEN Michael V. Hayden, who is the current Director of the CIA, wrote a letter to Chairman PAT ROBERTS of the Intelligence Committee in the Senate. In it he said:

On September 6, 2006, I briefed the full SSCI membership on key aspects of the detainee program, providing a level of detail

previously not made available to SSCI members. I made clear to the committee that upon passage of the new detainee legislation, I would brief the SSCI on how CIA would execute the future program, and I agreed to promptly notify the committee when any modifications to the program were proposed, or when the status of any individual detainee changed.

I think that is dispositive of a very clear indication by the executive branch to allow the Senate to perform its oversight through the properly designated committee, the Senate Committee on Intelligence.

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

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

Mr. WARNER. Mr. President, I ask unanimous consent that this letter be printed in the RECORD.

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

CENTRAL INTELLIGENCE AGENCY,
Washington, DC, September 28, 2006.

Hon. PAT ROBERTS,
Chairman, Select Committee on Intelligence,
United States Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write today regarding the Rockefeller amendment to the military commissions legislation now pending on the Senate floor. The CIA strongly opposes adoption of the Rockefeller amendment.

Since the inception of its detention program, the CIA has a strong and consistent record of keeping its oversight committees fully and currently informed of critical aspects of the program. Further, the bipartisan leadership of Congress has been briefed regularly by the CIA on this program since its inception, and I personally briefed the Majority and Minority Leaders of the Senate only weeks ago. The CIA remains committed to a frank and open dialogue with the Congress on detailed aspects of the detainee program, while ensuring the secrecy of this particularly sensitive activity. Senate adoption of the Rockefeller amendment would go far beyond traditional CIA reports to Congress by mandating detailed information about assets, methods, locations and individuals involved in sensitive operations. In addition, detailing in public law the amount of sensitive information that CIA must provide to Congress will chill some of our counterterrorism partners whose cooperation is fully conditioned on the absolute secrecy of their support.

Since becoming Director of the CIA, I have made every effort to keep your committee apprised of the status of the detainee program. In July, I updated you and SSCI Vice Chairman Rockefeller on the program, sharing sensitive aspects, including information about specific detainees, examples of actionable intelligence gained from the program and about ways in which the program could continue to be successful in the future. Following this briefing and despite its highly sensitive nature, at your request—and that of Sen. Rockefeller—I fully supported briefing the entire SSCI membership.

On September 6, 2006, I briefed the full SSCI membership on key aspects of the detainee program, providing a level of detail previously not made available to SSCI members. I made clear to the committee that upon passage of new detainee legislation, I would brief the SSCI on how CIA would execute the future program and I agreed to promptly notify the committee when any modifications to the program were proposed or when the status of any individual detainee changed.

Upon Senate passage of the military commissions legislation, I stand ready to again brief your committee and the bipartisan Senate leadership on the future of the detainee program.

Sincerely,

MICHAEL V. HAYDEN,
General, USAF Director.

Mr. WARNER. Mr. President, are we prepared to move to a vote?

The PRESIDING OFFICER. Yes. The question is on agreeing to the amendment of the Senator from West Virginia.

The yeas and nays have been ordered. The clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. The following Senator was necessarily absent: the Senator from Maine (Ms. SNOWE).

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

The result was announced—yeas 46, nays 53, as follows:

[Rollcall Vote No. 256 Leg.]

YEAS—46

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

NAYS—53

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

NOT VOTING—1

Snowe

The amendment (No. 5095) was rejected.

Mr. MCCONNELL. 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.

AMENDMENT NO. 5104

The PRESIDING OFFICER. There will now be 4 minutes equally divided on the Byrd amendment.

Who yields time?

The Senator from West Virginia is recognized.

Mr. BYRD. Friends, Senators, lend me your ears. Friends, Senators, lend me your ears. I voted to report a fair and balanced bill from the Armed Services Committee, but the legislation be-

fore the Senate today bears little resemblance to that legislation. It has been changed so many times, we don't know the real implications of this ever-changing bill. The Byrd-Obama-Clinton-Levin amendment sunsets the authority of the President to convene new military commissions after 5 years. There is nothing wrong with that.

This amendment ensures that Congress will not simply stand aside and ignore its oversight responsibilities after this bill is enacted. This amendment will not stop any trials of suspected terrorists that commence before the sunset date. It simply forces Congress to revisit—revisit—the weighty constitutional implications of this bill in 5 years' time and then be in a position, on the basis of new knowledge and experience, to make a decision again.

It is a very reasonable amendment. I urge my colleagues to support it.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, I say to our most distinguished senior colleague that this amendment was well debated on the floor, but I would bring to the attention of all Senators that we do not have any estimates of how long the war on terrorism against the jihadists is going to take place. We may be having those who commit crimes today not apprehended until after this sunset provision. Then they go free. They are not subject, unless the Senate at that time somehow restores the importance of the next President to continue—to continue, Mr. President—bringing to justice and trial under our rules these individuals who are committing war crimes. So I urge all Senators to oppose this amendment.

Mr. BYRD. Mr. President, do I have any time remaining?

The PRESIDING OFFICER. The Senator has 36 seconds.

Mr. BYRD. This amendment will not set any terrorists free. Let Senators who are here 5 years from now take a new look on the basis of experience and make a decision in the light of the then circumstances. That is all I am asking. This is nothing new.

The PRESIDING OFFICER. Is there further debate on the amendment? If not, the question is on agreeing to the Byrd amendment No. 5104.

The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. The following Senator was necessarily absent: the Senator from Maine (Ms. SNOWE).

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

The result was announced—yeas 47, nays 52, as follows:

[Rollcall Vote No. 257 Leg.]

YEAS—47

Akaka	Bayh	Bingaman
Baucus	Biden	Boxer

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

NAYS—52

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

NOT VOTING—1

Snowe

The amendment (No. 5104) was rejected.

Mr. WARNER. Mr. President, I move to reconsider the vote.

Mr. MCCONNELL. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 5088

The PRESIDING OFFICER. There are 4 minutes equally divided on the Kennedy amendment.

Mr. KENNEDY. Mr. President, here is the Army Manual of 2006 printed after the Senate of the United States went on record in accepting the McCain amendment prohibiting torture. In the printed Army Manual is a list of the prohibited activities where any person who is a member of the Defense Department is prohibited to engage in these kinds of activities because they have made a finding that they are basically and effectively torture.

Today we have thousands of Americans in the Central Intelligence Agency, Special Forces, the SEALs, and American contractors working for the CIA around the world fighting terrorism. All this amendment does is give notice to each and every country that any country that is going to practice these kinds of techniques on any American will be guilty effectively of a war crime.

That is effectively what we have done with the Army Manual, and we ought to protect our intelligence agency personnel, our SEALs, and all of those who are all over the world protecting the United States.

Arguments against? It is a violation of the Constitution because it is an instruction to a member of the Cabinet about what they ought to do.

Here it is for airports. The Secretary of Transportation shall conduct an assessment with foreign countries.

Here it is on voting rights. The Attorney General is authorized and directed to institute suits that are going to be involved in poll taxes.

The Secretary of State shall notify without delay foreign states that are involved in pollution. The list goes on. If we can do it for pollution, we can do it for violation of basic and fundamental rights of Americans overseas.

This is effectively about what we adopted when we adopted the War Crimes Act, which was virtually unanimous, with not a single vote in opposition.

This is basically a restatement. I hope it will be accepted overwhelmingly.

Mr. WARNER. Mr. President, this is an amendment that requires close attention by all colleagues.

In the preparation of this bill, we defined in broad terms the conduct that is regarded as a grave breach of Common Article 3. These are war crimes. We the Congress should not try to provide a specific list of techniques. We don't know what the future holds. That is not the responsibility of the Congress. We are not going to direct. We try to make a list of techniques, that the United States describe every technique that violates Common Article 3. We cannot foresee into the future every technique that might violate Common Article 3. We should not step on that situation. It is not ours to do.

Under the separation of powers, it is reserved to the executive branch to work this out. But if at any time it is the judgment of any Member of this body, or collectively, that we are not abiding by this law, I am confident that this institution's oversight will correct and quickly remedy the situation.

I yield the floor.

The PRESIDING OFFICER. The question is on agreeing to the amendment. The yeas and nays have been ordered the clerk will call the roll.

The assistant legislative clerk called the roll.

Mr. MCCONNELL. The following Senator was necessarily absent: the Senator from Maine (Ms. SNOWE).

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

The result was announced—yeas 46, nays 53, as follows:

[Rollcall Vote No. 258 Leg.]

YEAS—46

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

NAYS—53

Alexander	DeWine	McCain
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	Stevens
Coburn	Hatch	Sununu
Cochran	Hutchison	Talent
Coleman	Inhofe	Thomas
Collins	Isakson	Thune
Cornyn	Kyl	Vitter
Craig	Lott	Voinovich
Crapo	Lugar	Warner
DeMint	Martinez	

NOT VOTING—1

Snowe

The amendment (No. 5088) was rejected.

Mr. WARNER. I move to reconsider the vote.

Mr. LEVIN. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WARNER. I ask the Presiding Officer to read the unanimous consent that is in place so all Members understand what is to take place.

The PRESIDING OFFICER. Senator LEAHY will be recognized for his remaining 12 minutes. Senator LEVIN is under the control of 4 minutes, Senator WARNER is under the control of 16 minutes, to be followed by closing remarks by the two leaders. Following that time, the Senate will proceed to passage of the bill. Further, that there then be 5 minutes equally divided prior to the vote on the motion to invoke cloture on border fence legislation.

Mr. WARNER. The Chair will now recognize Senator LEAHY?

Mr. LEVIN. Mr. President, my understanding is that was the allocation of time, not necessarily the order of speaking.

The PRESIDING OFFICER. The agreement does not appear to be in any particular order.

Mr. WARNER. Mr. President, at the appropriate time, I will allocate 14 minutes to the distinguished Senator from Arizona, Mr. MCCAIN.

At this point in time, I recognize the extraordinary contributions of the staff persons who worked on this bill, and I shall include the entire list.

We worked under the direction of Charlie Abell, Scott Stucky, David Morriss, Rick DeBobs, Peter Levine, Chris Paul, Pablo Chavez, Richard Fontaine, Jen Olson, Adam Brake, James Galyean, and legislative counsel Charlie Armstrong.

I assure Members it was a challenge from beginning to end. I cannot recall seeing a more professional group of staffers serving their Members in the Senate.

Mr. LEVIN. I suggest the absence of a quorum, and I ask unanimous consent that the time not be charged to either side or to any party.

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

The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. INHOFE. I ask unanimous consent that the order for the quorum call be rescinded.

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

UNANIMOUS CONSENT REQUEST—S. 2781

Mr. INHOFE. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar 625, S. 2781, and I ask unanimous consent that the committee-reported amendment be, for the third time, passed and the motion to reconsider be laid upon the table.

Mr. JEFFORDS. I object. I agree that wastewater security is an important issue. In fact, it is made even more important because the Homeland Security appropriations conferees have exempted these facilities from security requirements—a decision that I understand was due in large part to the Senator's opposition to including these facilities within the protections of that bill.

Although I would like to have seen stronger chemical security provisions than those I understand are forthcoming from the Homeland Security appropriations conference, I anticipate supporting that measure. I would support including wastewater facilities in that measure. But I will not support a bill like S. 2781 that provides weaker protections.

By contrast, I long ago introduced S. 1995, The Wastewater Treatment Works Security Act of 2005. I feel certain that if I asked unanimous consent to pass this bill, the Senator would object to my request. I prefer a more constructive pathway to providing essential protection to our communities.

We should fill this gap in our Nation's security, and in order to do so, we need full and fair opportunity to offer amendments to cure the serious deficiencies in this bill.

Mr. President, I ask unanimous consent to insert a statement in the RECORD concerning my objection to consideration of the Wastewater Security bill.

The PRESIDING OFFICER. The objection is heard.

Mr. INHOFE. Mr. President, I wanted to call the Senate's attention to the fact we do have wastewater legislation that has passed both the House and the Senate, in the House by a vote of 413 to 2. It is something which is desperately needed. We need to attend to that as soon as possible.

I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant 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.

COMMON ARTICLE 3 AND WAR CRIMES PROVISIONS OF THE MILITARY COMMISSIONS ACT

Mr. LEVIN. Senators WARNER and MCCAIN, over the last year, you have

played an instrumental role in bringing needed clarity to the rules for the treatment of detainees in U.S. custody. I understand that you also played a key role in negotiating the provisions of the military commissions bill regarding the War Crimes Act and Common Article 3 of the Geneva Conventions. As you said last year when the Detainee Treatment Act was adopted, this is not an area in which ambiguity is helpful. For this reason, I hope that you will help me in providing a clear record of our intent on these issues.

In particular, section 8(a)(3) of the bill provides that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions", that these interpretations shall be issued by Executive order, and that such an Executive order "shall be authoritative (as to non-grave breach provisions of Common Article 3) as a matter of United States law, in the same manner as other administrative regulations."

Would you agree that nothing in this provision gives the President or could give the President the authority to modify the Geneva Conventions or U.S. obligations under those treaties?

Mr. MCCAIN. First, I say to my good friend from Michigan that this legislation clearly defines grave breaches of Common Article 3, which are criminalized and ultimately punishable by death. It is critical for the American public to understand that we are criminalizing breaches of Common Article 3 that rise to the level of a felony. Such acts—including cruel or inhuman treatment, torture, rape, and murder, among others—will clearly be considered war crimes.

Where the President may exercise his authority to interpret treaty obligations is in the area of "nongrave" breaches of the Geneva Conventions—those breaches that do not rise to the level of a war crime. In interpreting the conventions in this manner, the President is bounded by the conventions themselves. Nothing in this bill gives the President the authority to modify the conventions or our obligations under those treaties. That understanding is at the core of this legislation.

Mr. WARNER. I concur with the Senator from Arizona.

Mr. LEVIN. Would you agree that nothing in this provision gives the President, or could give the President, the authority to modify the requirements of the Detainee Treatment Act?

Mr. WARNER. The purpose of this legislation is to strengthen, not to weaken or modify, the Detainee Treatment Act. For the first time, this legislation is required to "take action to ensure compliance" with the DTA's prohibition on cruel, inhuman, or degrading treatment, as defined in the U.S. reservation to the Convention Against Torture. He is directed to do so through, among other actions, the establishment of administrative rules and procedures. Nothing in this legisla-

tion authorizes the President to modify the requirements of the DTA, which were enshrined in a law passed last December. I would point out as well to the distinguished ranking member that the President himself never proposed to weaken the DTA. Rather, he proposed to make compliance with the DTA tantamount to compliance with Common Article 3 of the Geneva Conventions. That proposal is not included in this legislation.

Mr. MCCAIN. I agree entirely with Senator WARNER's comments.

Mr. LEVIN. Would you agree that any interpretation issued by the President under this section would only be valid if it is consistent with U.S. obligations under the Geneva Conventions and the Detainee Treatment Act?

Mr. MCCAIN. That is correct.

Mr. WARNER. I agree.

Mr. LEVIN. Section 8(b) of the bill would amend the War Crimes Act to provide that only "grave breaches" of Common Article 3 of the Geneva Conventions constitute war crimes under U.S. law. The provision goes on to define those grave breaches to include, among other things, torture, and "cruel or inhuman treatment". The term "cruel or inhuman treatment" is defined to include acts "intended to inflict severe or serious physical or mental pain or suffering."

Would you agree that the changes to the War Crimes Act in section 8(b) do not in any way alter U.S. obligations under the Geneva Conventions or under the Detainee Treatment Act?

Mr. MCCAIN. The changes to the War Crimes Act are actually a responsible modification in order to better comply with America's obligations under the Geneva Conventions to provide effective penal sanction for grave breaches of Common Article 3. It is important to note, as has the Senator from Michigan, that in this section "cruel or inhuman treatment" is defined for purposes of the War Crimes Act only. It does not infringe, supplant, or in any way alter the definition of cruel, inhuman, or degrading treatment or punishment prohibited in the DTA and defined therein with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Nor do the changes to the War Crimes Act alter U.S. obligations under the Geneva Conventions.

Mr. WARNER. I would associate myself with the comments from the Senator from Arizona.

Mr. LEVIN. Would you agree that nothing in this section or in this bill requires or should be interpreted to authorize any modification to the new Army Field Manual on interrogation techniques, which was issued last month and provides important guidance to our soldiers on the field as to what is and is not permitted to the interrogation of detainees?

Mr. WARNER. The executive branch has the authority to modify the Army Field Manual on Intelligence Interrogation at any time. I welcomed the new version of the field manual issued last

month and agree that it provides critical guidance to our soldiers in the field. That said, the content of the field manual is an issue separate from those at issue in this bill, and it was not my intent to effect any change in the field manual through this legislation.

Mr. MCCAIN. I concur wholeheartedly with the Senator from Virginia. As the Senator from Virginia is aware, there is a provision in the bill before the Senate that defines "cruel and inhuman treatment" under the War Crimes Act. I would note first that this definition is limited to criminal offenses under the War Crimes Act and is distinct from the broader prohibition contained in the Detainee Treatment Act. That act defined the term "cruel, inhuman and degrading treatment" with reference to the reservation the United States took to the Convention Against Torture.

In the war crimes section of this bill, cruel and inhuman treatment is defined as an act intended to inflict severe or serious physical or mental pain or suffering. It further makes clear that such mental suffering need not be prolonged to be prohibited. The mental suffering need only be more than transitory. It is important to note that the "nontransitory" requirement applies to the harm, not to the act producing the harm. Thus if a U.S. soldier is, for example, subjected to some terrible technique that lasts for a brief time but that causes serious and nontransitory mental harm, a criminal act has occurred.

Mr. WARNER. That is my understanding and intent as well, and I agree with the Senator's other clarifying remarks.

In the same section, the term "serious physical pain or suffering" is defined as a bodily injury that involves one of four characteristics: "a substantial risk of death," "extreme physical pain," "a burn or physical disfigurement or a serious nature," or "significant loss or impairment of the function of a bodily member, organ or mental faculty." I do not believe that the term "bodily injury" adds a separate requirement which must be met for an act to constitute serious physical pain or suffering.

Mr. MCCAIN. I am of the same view.

Mr. LEVIN. And would the Senator from Arizona agree with my view that section 8(a)(3) does not make lawful or give the President the authority to make lawful any technique that is not permitted by Common Article 3 or the Detainee Treatment Act?

Mr. MCCAIN. I do agree.

Mr. WARNER. I agree with both of my colleagues.

Mr. KENNEDY. Mr. President, in times of war, our obligation is to protect our Nation and to protect those men and women who risk their lives to defend us. This bill fails that duty. By failing to renounce torture, it inflames an already dangerous world and makes new enemies for America in our war against terror. This puts cause or peo-

ple and our troops at greater risk. That is why so many respected military leaders oppose this bill.

Throughout our history, America has led the world in promoting human rights and decency. We have fought wars against tyranny and oppression. Our enemies have employed tactics that were rightly and roundly condemned by the civilized world. We maintained American strength and honor by refusing to stoop to the level of our enemies. And we should not stoop to the level of the terrorists in the war on terror.

I rise to express my profound opposition to this bill both in terms of its substance and the procedure by which it reached the floor. The Armed Services Committee reported out a bill that I supported. That bill was not perfect, but it preserved our commitment to the Geneva Conventions, limited the possibility that detainees would be treated abusively and set up procedures for military tribunals that generally respected the fundamental requirements of fairness.

Republican members of the Armed Services Committee then began a process of secret negotiation with the White House that produced a bill that is far worse than the committee bill. Indeed, we have continued to see changes in that bill as it has been moved toward the floor in a rush to achieve passage before the Senate recesses for the election. This rush to passage to serve a political agenda is no way to produce careful and thoughtful legislation on profound issues of national security and civil liberties. At this point, most Members of this body hardly know what they are being asked to approve.

The bill as it now appears on the floor works profound and disastrous changes in our law.

This legislation sets out an overly broad definition of unlawful enemy combatant. This definition would allow the President to pick up anyone citizen and legal residents included anywhere around the world, and throw them into prison in Guantanamo without even charging or trying them. These people would never get a day in court to prove their innocence. There is no check whatsoever on the President's ability to detain people in an arbitrary manner.

We already know that our military has made mistakes in detaining people. We are currently holding dozens of people at Guantanamo who we know based on the military's own records are not guilty of anything. Yet they have not been let go.

This legislation also makes a distinction between citizens and lawful permanent residents. Citizens cannot be subject to military commissions and their flawed procedures. Yet lawful permanent residents, those green card holders who are on the path to citizenship, could be sent to military commissions. Green Card holders must obey our laws, pay taxes, and register for

the draft. They are serving our country in Iraq. They have an obligation to protect our laws, and they deserve the protection of those same laws.

The Geneva Conventions were adopted in the wake of the horrific atrocities during World War II. These conventions reflect the international consensus on how individuals should be treated in times of war. They set a minimum floor of humane treatment for all prisoners, military and civilian alike. This floor is known as Common Article 3 because it is common to all of the conventions. Yet this bill also gives the President authority to decide what conduct violates Common Article 3 of the Geneva Conventions. Again, the President's authority to define the meaning of Common Article 3 is virtually unreviewable. He is required to publish his interpretation in the Federal Register, but the administration has already made clear that it will not make public which interrogation tactics are being used. Moreover, the bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights. The President's interpretation may well likely escape judicial review, as well.

As the final method of concealing its activities, the administration has stripped the courts of their ability to review the confinement or treatment of detainees. The administration won a provision that eliminates the ability of any detainee anywhere in the world to file a habeas corpus petition challenging the justification for or conditions of his or her confinement. The provision applies to all existing petitions and would require their dismissal, including the Hamdan case itself. There is no justification for stripping courts of jurisdiction to issue the great writ of habeas corpus, which has been a foundation of our legal system with roots in the Magna Carta. The availability of the Great Writ is assured in the Constitution itself, which permits its suspension only in times of invasion or rebellion. This provision of the bill is most likely unconstitutional.

The administration has pursued a strategy to defeat accountability since it first began to take detainees into custody. It chose Guantanamo and secret prisons abroad because it thought U.S. law would not apply. It fought hard to prevent detainees from obtaining counsel and then argued that U.S. Courts lacked jurisdiction to hear detainees' complaints. It sought the prohibition on habeas corpus petitions adopted in the Detainee Treatment Act and then urged courts to misconstrue it to wipe out all pending habeas cases. This new effort to prohibit habeas petitions is a continuation of this effort to escape judicial scrutiny.

The bill also for the first time in our history would authorize the introduction of evidence obtained by torture in a judicial proceeding. Our courts have always rejected this type of evidence

because it is inconsistent with fundamental notions of justice, and also because it is unreliable. We know that detainees were subjected to harsh interrogation techniques, and made statements as a result. Under this legislation, if those statements were made before the passage of the McCain Amendment last winter, then they are admissible. The Congress is saying for the first time in our nation's history that statements obtained by torture are admissible. This fact, alone, is a stunning statement about how far we have strayed from our bedrock values.

It defines conduct that can be prosecuted as a war crime in a very narrow way that appears designed to exclude many of the abusive interrogation practices that this administration has employed. While some have argued that cruel and inhumane practices such as waterboarding, induced hypothermia and sleep deprivation would surely be covered, the White House and the Republican leadership have refused to commit to this basic interpretation of the bill.

We tried to improve this bill. A number of amendments were offered and should have been adopted. I offered an amendment that responds to the lack of clarity about which practices are prohibited by the bill. Because the administration has refused to commit itself to stop using specific abusive interrogation procedures, our commitment to the standards of Common Article 3 of the Geneva Conventions is in doubt. That puts our own people at risk. As military leaders have repeatedly stated, our adherence to the Geneva Conventions is essential to protect our own people around the world. America has thousands of people across the globe who do not wear uniforms, but put their lives on the line to protect this country every day. CIA agents, Special Forces members, contractors, journalists and others will all be less safe if we turn our backs on the standards of Common Article 3.

The bill as it has reached the floor would diminish the security and safety of Americans everywhere and further erode our civil liberties. I strongly oppose this bill.

Mr. GRASSLEY. Mr. President, we hear on a daily basis about the war we are currently engaged in, the war on terror, but I don't think most of us stop to think about what that actually means.

As citizens of the greatest country in the world, we have become so accustomed to all the rights afforded us by our Constitution that we now take them for granted. We are incredibly fortunate to live in a nation where our freedom and safety is our Government's first priority.

We aren't living in the world I grew up in. Our Nation was rocked to its core 5 years ago when we were attacked on our own soil. Thousands of innocent Americans were murdered simply because they lived in the one country that, above all others, em-

bodies freedom and democracy. The mastermind behind those attacks was Khalid Shaikh Mohammed, who is now in custody and soon will be brought to justice.

In the aftermath of these attacks, Congress authorized our President to "use all necessary force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." President Bush used this authorization, combined with his constitutional powers to make these sorts of judgments during times of war, to try enemy combatants in military commissions.

Earlier this month, we observed the 5-year anniversary of the horrific attacks on America. I cannot imagine the reaction that would have come if, 5 years ago, Members of Congress had stood on this floor and suggested that we wouldn't do all we could to prevent another attack on our country. Five years ago, with the images of the collapsing Twin Towers and the burning Pentagon and the smoldering Pennsylvania field seared into our memories, we stood united in the proposition that we intended to protect Americans first.

In *Hamdan v. Rumsfeld*, which the Supreme Court decided earlier this year, the Court ruled that the administration's use of military commissions to try unlawful enemy combatants violated international law. This decision forced our interrogators, key in defending America from terrorist attack, to curtail their investigations. Without a clarification of the vague requirements, these interrogators might be subject to prosecution for war crimes. It also brought to an end the prosecution of unlawful enemy combatants through the military commissions.

It is key to point out that military commissions have been used throughout American history to bring enemy combatants to justice since before the United States was even officially formed. George Washington used them during the American Revolution, and since our Constitution was ratified, Presidents have used military commissions to try those who seek to harm Americans during every major conflict. Some of our most popular Presidents from history have taken this route, including Abraham Lincoln and Franklin Roosevelt. Whenever the leaders of this great Nation have seen threats posed by those who refuse to abide by the rules of war, they have taken the necessary steps to protect us.

Our President has come to us and asked for help in trying these terrorists whose sole goal is to kill those who love freedom. He has asked for our help in ensuring that those investigating potential terrorist plots against our Nation and our citizens are secure from arbitrary prosecution for undefined war crimes. These people are part of our first line of defense in securing the safety of our country—we owe it to

them to protect them. Because of the Supreme Court's decision in *Hamdan*, the only way these terrorists will be brought to justice and our interrogators will be protected for doing their jobs is for Congress to write a new law codifying procedures for military commissions and clarifying our obligations under the Geneva Conventions.

I firmly believe that enemy combatants in our custody enjoyed ample due process in the military commissions established by the administration, which were brought to a halt by the Supreme Court. The compromise that we are considering here today gives more rights to terrorists who were caught trying to harm America and our allies than our own servicemembers would receive elsewhere, more than is required by the Geneva Conventions—yet some are still demanding more.

Mr. President, it is essential that we protect human dignity at every opportunity, but we have gone well beyond that with this legislation. The legislation before us responds to the Supreme Court's decision in *Hamdan* and seeks to protect national security while ensuring that the terrorists who seek to destroy America are properly dealt with. This bill affords these unlawful enemy combatants rights that they themselves would never consider granting American soldiers. It is beyond reasonable, beyond fair, and beyond time for Congress to act. We must pass this bill and reinstate the programs that, I believe, have been a crucial part of our Nation's security over the last 5 years.

Mr. WARNER. Mr. President, I ask unanimous consent to have printed in the RECORD a joint statement regarding alleged violations of the Geneva Conventions.

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

JOINT STATEMENT OF SENATORS MCCAIN, WARNER, AND GRAHAM ON INDIVIDUAL RIGHTS UNDER THE GENEVA CONVENTIONS, SEPTEMBER 28, 2006

Mr. President, we are submitting this statement into the record because it has been suggested by some that this legislation would prohibit litigants from raising alleged violations of the Geneva Conventions. This suggestion is misleading on three counts.

First, it presumes that individuals currently have a private right of action under Geneva. Secondly, it implies that the Congress is restricting individuals from raising claims that the Geneva Conventions have been violated as a collateral matter once they have an independent cause of action. Finally, this legislation would not stop in any way a court from exercising any power it has to consider the United States' obligations under the Geneva Conventions, regardless of what litigants say or do not say in the documents that they file with the court.

The Supreme Court's decision in *Hamdan* left untouched the widely-held view that the Geneva Conventions provide no private rights of action to individuals. And, in fact, the majority in *Hamdan* suggested that the Geneva Conventions do not afford individuals private rights of action, although it did not need to reach that question in its decision. This view has been underscored by judicial precedent—and even Salim Hamdan

himself did not claim in his court filings that he had a private right of action under Geneva.

Still, this legislation would not bar individuals from raising to our Federal courts in their pleadings any allegation that a provision of the Geneva Conventions—or, for that matter, any other treaty obligation that has the force of law—has been violated. It is not the intent of Congress to dictate what can or cannot be said by litigants in any case.

By the same token, this legislation explicitly reserves untouched the constitutional functions and responsibilities of the judicial branch of the United States. Accordingly, when Congress says that the President can interpret the meaning of Geneva, it is merely reasserting a longstanding constitutional principle. Congress does not intend with this legislation to prohibit the Federal courts from considering whether the obligations of the United States under any treaty have been met. To paraphrase an opinion written by Chief Justice Roberts recently, if treaties are to be given effect as Federal law under our legal system, determining their meaning as a matter of Federal law is the province and duty of the judiciary headed by the Supreme Court. So, though the President certainly has the constitutional authority to interpret our Nation's treaty obligations, such interpretation is subject to judicial review. It is not the intent of Congress to infringe on any constitutional power of the Federal bench, a co-equal branch of government.

Most importantly, the lack of judicial enforceability through a private right of action has absolutely no bearing on whether Geneva is binding on the executive branch. Even if the Geneva Conventions are not enforceable by individuals in our Nation's courts, the President and his subordinates are bound to comply with Geneva, a set of treaty obligations that forms part of our American jurisprudence. That is clear to us and to all who have negotiated this legislation in good faith.

Mrs. BOXER. Mr. President, I view this bill as a weak plan that will lead to delay after delay in convicting terrorists, endanger our troops on the field, and surrender one of the bedrock constitutional principles of our justice system—habeas corpus.

We had a chance to improve this bill with amendments, but this rubber stamp Senate defeated them one after another, leaving us with a flawed plan that will face a serious court challenge, and that makes us less safe.

The Republicans even voted against a bipartisan bill that came out of the Senate Armed Services Committee.

Mr. MCCONNELL. Mr. President, I rise today in support of the Military Commissions Act of 2006. I support this legislation, first and foremost, because this bill recognizes that we are a Nation at war. We are a Nation at war, and we are at war with Islamic extremists. We are not conducting a law enforcement operation against a check-writing scam or trying to foil a bank heist. We are at war against extremists who want to kill our citizens, cripple our economy, and discredit the principles we hold dear—freedom and democracy.

Once you accept the premise that we are at war, the most important consideration should be, Does this bill protect the American people? I submit

that this bill does just that. It does so by permitting the President's CIA interrogation program to continue. This is of profound importance.

If the attacks of September 11, 2001, taught us anything, it is that self-imposed limitations on our intelligence-gathering efforts can have devastating consequences. For instance, the wall of separation between the intelligence community and the law enforcement community that existed prior to 2001 proved to be an imposing hurdle to foiling the September 11 attacks. According to the report of the 9/11 Commission, in late summer 2001, the U.S. Government, in effect, conducted its search for 9/11 hijacker Khalid Mihdhar with one hand tied behind its back. As we all know, that search was unsuccessful. Comparable pre-9/11 efforts with respect to Zacarias Moussaoui were similarly frustrated in large part due to this wall.

Thankfully, with the PATRIOT Act, we removed this wall of separation, and now the intelligence and law enforcement arms of our Government can share information and more effectively protect us here at home.

Another lesson of September 11 was the premium that should be placed on human intelligence. Prior to September 11, we were woefully deficient in our human intelligence regarding al-Qaida. Al-Qaida is an extremely difficult organization to infiltrate. You can't just pay dues and become a member. But interrogation offers a rare and valuable opportunity to gather vital intelligence about al-Qaida's capabilities and plans before they attack us.

The CIA interrogation program provided crucial human intelligence that has saved American lives by helping to prevent new attacks. As the President has explained, 9/11 mastermind Khalid Shaikh Mohammed told the CIA about planned attacks on U.S. buildings in which al-Qaida members were under orders to set off explosives high enough in the building so the victims could not escape through the windows.

As the President also noted, the program has also yielded human intelligence regarding al-Qaida's efforts to obtain biological weapons such as anthrax. And it has helped lead to the capture of key al-Qaida figures, such as KSM and his accomplice, Ramzi bin al Shibh.

Another means of evaluating the importance of this program is by considering a grim hypothetical. What if al-Qaida or other terrorists organizations were able to get their hands on nuclear, chemical, or biological weapons and were trying to attack a major U.S. city? Thousands or even millions of lives could be at stake. Under such a chilling scenario, wouldn't we want our intelligence community to have all possible tools at its disposal? Would we want our intelligence community to respond with one hand tied behind its back as it did before September 11?

Unfortunately, that threat is all too real. The potential for al-Qaida to at-

tack a U.S. city with a device that could kill millions of people reflects how vital it is to permit the intelligence community to make full use of the tools it needs to continue protecting American lives. The compromise preserves this crucial intelligence-gathering tool and allows the CIA and others on the front lines to continue protecting America.

In addition, this bill protects classified information from being released to al-Qaida terrorists. This also is a serious concern. The identities of U.S. intelligence officials and informants—men and women who put their lives at risk to defend this Nation—must be protected at all costs.

If we needed any reminding why terrorists should not be given sensitive information, we should just look at the prosecution of the 1993 World Trade Center bombers. According to the man who prosecuted these Islamic extremists, intelligence from U.S. Government files was supplied to the defendants through the discovery process.

This information was later delivered directly to Osama bin Laden while he was living in Sudan. Let me repeat that. Information given to the jihadist defendants, individuals who tried to destroy the World Trade Center in 1993, was later given directly to bin Laden himself.

Since we are at war, we should not be revealing classified information to the enemy. That is just common sense. This bill protects classified information.

Finally, while this bill preserves our ability to continue to protect America, it also provides detainees with fair procedural rights.

In fact, this legislation provides broader protections for defendants than did Nuremberg. Liberal law professor Cass Sunstein has written that the military commissions authorized by the President in 2001 "provide far greater procedural safeguards than any previous military commission, including Nuremberg." Let me say that again: liberal law professor Cass Sunstein noted that the President's 2001 military order provided far greater procedural safeguards than any previous military commission, including Nuremberg. And in this legislation, we provide defendants with even broader procedural safeguards than the President's 2001 military order.

This system is exceedingly fair since al-Qaida in no way follows the Geneva Conventions or any other international norm. Al-Qaida respects no law, no authority, no legitimacy but that of its own twisted strain of radical Islam.

Al-Qaida grants no procedural rights to Americans they capture. Look at journalist Daniel Pearl, who was beheaded by al-Qaida in Pakistan in 2002. Al-Qaida simply executes those they capture, even civilians like Pearl. Not only do they unapologetically kill innocent civilians, they broadcast these brutal executions on the Internet for all to see.

Mr. President, I would just conclude by stating that this legislation is vitally important. It is vitally important because it is wartime legislation. It is vitally important because this bill protects our national security, it protects classified information, and it protects the rights of defendants. Most important, it protects America. For these reasons, I urge its passage.

Mr. CORNYN. Mr. President, once the Military Commissions Act, MCA, is signed into law and section 7 is effective, Congress will finally accomplish what it sought to do through the Detainee Treatment Act—DTA—last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by *Rasul v. Bush* with a narrow DC Circuit-only review of the Combatant Status Review Tribunal—CSRT—hearings.

Perhaps even more important than the narrow standards of review created by the DTA is the fact that that review is exclusive to the court of appeals. This is by design. Courts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record. The DC Circuit will operate no differently under the CSRT review provisions of the DTA. The circuit court will review the administrative record of the CSRTs to make sure that the right standards were applied, the standards that the military itself set for CSRTs. And it will determine whether the CSRT system as a whole is consistent with the Constitution and with Federal statutes.

There is no invitation in the DTA or MCA to reconsider the sufficiency of the evidence. Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence—the knowledge of the battlefield and the nature of our foreign enemies—to judge whether particular facts show that someone is an enemy combatant. By making review exclusive to the DC Circuit, the DTA helps to ensure that the narrow review standards it sets do not somehow grow into something akin to Federal courts' habeas corpus review of State criminal convictions. The court's role under the DTA is to simply ensure that the military applied the right rules to the facts. It is not the court's role to interpret those facts and decide what they mean.

Because review under the DTA and MCA will be limited to the administrative record, there is no need for any lawyer to ever again go to Guantanamo to represent an enemy combatant challenging his detention. The military, I am certain, will make the paper record available inside the United States. This is one of the major benefits of enacting the MCA. As I and others have noted previously, the hundreds of lawyer visits to Guantanamo sparked by *Rasul* have seriously disrupted the operation of the Naval facility there. They have forced reconfiguration of the facility

and consumed enormous resources, and have led to leaks of information that have made it harder for our troops there to do their job, to keep order at Guantanamo. Some of these detainee lawyers have even bragged about what a burden their activities have been on the military, and how they have disrupted interrogations at Guantanamo. Putting an end to that was the major purpose of the DTA. Today, with the MCA, we see to it that this goal is effectuated.

Another major improvement that the MCA makes to the DTA is that it tightens the bar on nonhabeas lawsuits contained in 28 U.S.C. §2241(e)(2). That paragraph, as enacted by the DTA, barred postrelease conditions-of-confinement lawsuits, but only if the detainee had been found to be properly detained as an enemy combatant by the U.S. Court of Appeals on review of a CSRT hearing. Although nothing in the DTA or MCA directly requires the military to conduct CSRTs, this limitation on the bar to non-habeas actions effectively did compel the military to hold CSRTs—and to somehow get the detainee to appeal to the DC Circuit. The alternative would have been to allow the detainee to sue U.S. troops at Guantanamo after his release.

The MCA revises section 2241(e)(2) by, among other things, adopting a much narrower exception to the bar on post-release lawsuits. Under the MCA, 2242(e)(2) will bar nonhabeas lawsuits so long as the detainee "has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination." This new language does several things. First, it eliminates the requirement that the DC Circuit review a CSRT, or that a CSRT even be held, before nonhabeas actions are barred. This is important because many detainees were released before CSRTs were even instituted. We do not want those who were properly detained as enemy combatants to be able to sue the U.S. military. And we do not want to force the military to hold CSRT hearings forever, or in all future wars. Instead, under the new language, the determination that is the precondition to the litigation bar is purely an executive determination. It is only what the United States has decided that will matter.

In addition, the language of (e)(2) focuses on the propriety of the initial detention. There inevitably will be detainees who are captured by U.S. troops, or who are handed over to us by third parties, who initially appear to be enemy combatants but who, upon further inquiry, are found to be unconnected to the armed conflict. The U.S. military should not be punished with litigation for the fact that they initially detained such a person. As long as the individual was at least initially properly detained as an enemy combatant, the nonhabeas litigation is now barred, even if the U.S. later decides that the person was not an enemy

combatant or no longer poses any threat. The inquiry created here is not unlike that for reviewing, in the civilian criminal justice context, the propriety of an arrest. An arrest might be entirely legal, might be based on sufficient probable cause, even if the arrestee is later conclusively found to be innocent of committing any crime. The arresting officer cannot be sued and held liable for making that initial arrest, so long as the arrest itself was supported by probable cause, simply because the suspect was not later convicted of a crime. Similarly, under 2241(e)(2), detainees will not be able to sue their captors and custodians if the United States determines that it was the right decision to take the individual into custody.

Mr. SESSIONS. Mr. President, I would like to make a few comments about section 7 of the bill that is before us today. This section makes a number of improvements to the Detainee Treatment Act, which was passed by the Congress and signed into law on December 30 of last year. First, section 7 will fulfill one of the original objectives of the DTA: to get the lawyers out of Guantanamo Bay. As my colleague Senator GRAHAM has noted, these lawyers have even bragged about the fact that their presence and activities at Guantanamo have made it harder for the military to do its job. Mr. Michael Ratner, the director of the Center for Constitutional Rights, which coordinated much of the detainee habeas litigation, had this to say about his activities to a magazine:

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?

This is what Congress thought that it was putting an end to when it enacted the DTA in 2005. That act provided that "no court, justice, or judge shall have jurisdiction to hear or consider" claims filed by Guantanamo detainees, except under the review standards created by that Act. The DTA was made effective immediately upon the date of its enactment. And as Justice Scalia noted in his *Hamdan v. Rumsfeld* dissenting opinion, the DTA's jurisdictional removal made no exception for lawsuits that were pending when the statute was enacted. Justice Scalia also pointed out that "[a]n ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date." He also noted that up until the *Hamdan* decision, "one cannot cite a single case in the history of Anglo-American law . . . in which a jurisdiction-stripping provision was denied immediate effect in pending cases, absent an explicit statutory reservation."

The *Hamdan* majority, on the other hand, found that the Supreme Court's

precedents governing jurisdictional statutes were trumped in that case by a legislative intent to preserve the pending lawsuits. This congressional intent, the majority concluded, was manifested in minor changes that had been made to the language of the bill and, most expressly, in statements made by Senators regarding the intended effect of the bill. As Senator GRAHAM has explained in detail in remarks in the CONGRESSIONAL RECORD on August 3, at 152 Cong. Rec. S8779, it appears that the Supreme Court was misled about the legislative history of the DTA by the lawyers for Hamdan. Those lawyers misrepresented the nature of the statements made in the Senate and caused the court to believe that Congress had an intent other than that reflected in the text of the statute. It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the provisions of that act.

Section 7 of the Military Commissions Act fixes this feature of the DTA and ensures that there is no possibility of confusion in the future. Subsection (b) provides that the bill's revised litigation bar "shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001." I don't see how there could be any confusion as to the effect of this act on the pending Guantanamo litigation. The MCA's jurisdictional bar applies to that litigation "without exception."

The new bill also bars all litigation by anyone found to have been properly detained as an enemy combatant, regardless of whether the detainee has been through the DC Circuit under the DTA or has been through a Combatant Status Review Tribunal hearing. The previous version of this bar, in the DTA, allowed detainees to bring conditions-of-confinement lawsuits after their release if their detention was not reviewed by the DC Circuit. Obviously, the Government could not force the detainee to appeal, and there are some who were released before CSRT hearings were instituted. The new bill states that as long as the military decides that it was appropriate to take the individual into custody as an enemy combatant, as a security risk in relation to a war, that person cannot turn around and sue our military after he is released. It should not be held against our soldiers that they take someone into custody, believing in good faith that he appears to be connected to hostilities against the United States, and then determine that the individual is not an enemy combatant and release the person. The fact of release should not be an invitation to litigation, so long as the military finds that it was appropriate to take the individual into custody in the first place.

The biggest change that the MCA makes to section 2241(e) is that the new law applies globally, rather than just to Guantanamo detainees. We are legislating through this law for future generations, creating a system that will operate not only throughout this war, but for future wars in which our Nation fights. In the future, we may again find ourselves involved in an armed conflict in which we capture large numbers of enemy soldiers. It is not unlikely that the safest and most secure place to hold those soldiers will be inside the United States. The fact that we hold those enemy soldiers in this country should not be an invitation for each of them to sue our Government. We held very large numbers of enemy soldiers in this country during World War II. They did not sue our Government seeking release. The Rasul decision would seem to have required that enemy combatants held in this country during wartime can sue. If that court allowed enemy combatants held in Cuba to sue, it is inevitable that those held inside this country would have been allowed to sue as well. That is simply not acceptable. It would make it very difficult to fight a major war in the future if every enemy war prisoner detained inside this country could sue our military. Through section 7 of the MCA, we not only solve our current problems with Guantanamo, but we plan for future conflicts as well. We ensure that, if need be, we can again hold enemy soldiers in prison camps inside our country if we need to, without becoming embroiled in a tempest of litigation.

I imagine that, now that Congress has clearly shut off access to habeas lawsuits, the lawyers suing on behalf of the detainees will shift their efforts toward arguing for an expansive interpretation of the judicial review allowed under the DTA. Paragraphs 2 and 3 of section 1005(e) of the DTA allow the DC Circuit to review a CSRT enemy combatant determination. The Government has provided a CSRT hearing to every detainee held at Guantanamo, with the likely exception of those transferred there this month, so all of those detainees will now be allowed to seek DTA review in the DC Circuit. Paragraphs 2 and 3 allow the DC Circuit to ask whether the military applied its own standards and procedures for CSRTs to the detainee, and they allow the court to ask whether those standards are constitutional and are consistent with nontreaty Federal law. I think that those standards speak for themselves, that they clearly allow only a very limited review. In particular, they do not allow the courts to second-guess the military's evidentiary findings. The courts simply are not in a position, they do not have the expertise, to judge whether particular evidence suggests that an individual is an enemy combatant.

I would like to note here that this is the consensus view of the DTA at this time, at least for now. I have no doubt

that in the future, lawyers will argue that these standards invite the court to reweigh the evidence, to take in evidence outside of the CSRT record, and to decide if the military was right about its factual judgment. At this time, however, both proponents and opponents of section 7 of the MCA seem to agree on what kind of review it will allow. Earlier today, for example, I heard Senator SPECTER, who opposes section 7, criticize the paragraph 2 and 3 review standards on the Senate floor. He said, "the statute provides that the Combatant Status Review Tribunal may be reviewed by the Court of Appeals for the District of Columbia only to the extent that it was—the ruling was consistent with the standards and procedures specified by the Secretary of Defense. Now, to comply with the standards and procedures determined by the Secretary of Defense does not mean—excludes on its face—a factual determination as to what happens to the detainees."

I have also come into possession of a so-called fact sheet on the DTA review standards that is being distributed on Capitol Hill by Human Rights First, a group that is lobbying Senators to oppose the MCA and to support the Specter amendment that was defeated earlier today. This fact sheet is titled, "The Limited Review Allowed Under the DTA is No Substitute for Habeas." Here is what the Human Rights First fact sheet says:

The DTA restricts the court to determining whether the prior CSRTs followed their own procedures.

* * * * *

It has been suggested that the court of appeals, in reviewing the CSRT decisions, can fix the problem simply by choosing to review the evidence itself. But that is simply not the way the statute reads. The government has taken the firm position in Bismullah that no review even of "significant exculpatory evidence" is permitted under the DTA. If Congress believes that the courts should be allowed to review the evidence—and they clearly should be—then it should change the statute to say so. It is no solution to hope that the courts will ignore the actual statutory language and rewrite the statute to correct the deficiency.

There you have it. Senators have been told in floor debate by the chairman of the Judiciary Committee that the DTA "excludes on its face" any factual determination with regard to the Guantanamo detainees. The groups lobbying Senators with regard to the MCA have pointed out that having courts make their own factual determinations, to judge the sufficiency of the evidence behind the military's findings, "is simply not the way the statute reads." We are informed that the Justice Department has taken the "firm position" that no evidentiary review is permitted under the DTA. And we are told that if we disagree with this system, if we think that "the courts should be allowed to review the evidence," then we "should change the statute to say so." The Senate is clearly on notice as to how the DTA review

will work, what the statute says on its face, how the Justice Department has construed that statute. By rejecting the Specter amendment earlier today, and by passing the MCA later today, the Senate makes clear that it does not disagree with the Justice Department and does not want to change this system.

I will close my remarks by quoting at length from the testimony of U.S. Attorney General William Barr, who spoke on the matters addressed by this legislation before the Judiciary Committee on June 15, 2005. Mr. Barr's testimony informs our understanding of the history, law, and practical reality underlying the DTA and the MCA. I would commend his statement to anyone seeking to understand these statutes and the complex relationship between the President's war-making power and the judiciary. This relationship is superficially similar to, but is fundamentally different from, the judiciary's oversight of the civilian criminal justice system. I particularly found to be true Mr. Barr's emphasis that the proper role of the courts in this area is not accurately described as "deference" to military decisions because deference implies that the ultimate decisions still lie with the courts. As Mr. Barr notes, "the point here is that the ultimate substantive decision rests with the President and that the courts have no authority to substitute their judgments for that of the President."

Here is an extended excerpt from Attorney General Barr's testimony regarding the detention of alien enemy combatants:

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant. Nevertheless, in the case of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals ("CSRTs") to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants, World War II provides a dramatic example. During that war, we held hundreds of thousands of German and Italian prisoners in detention camps within the United States. These foreign prisoners were not charged with anything; they were not entitled to lawyers; they were not given access to U.S. courts; and the American military was not required to engage in evidentiary proceedings to establish that each was a combatant. They were held until victory was achieved, at which time they were repatriated. The detainees at Guantanamo are being held under the same principles, except, unlike the Germans and Italians, they are actually being afforded an opportunity to contest their designation as enemy combatants.

Second, once hostile forces are captured, the subsidiary question arises whether they belonged to an armed force covered by the

protections of the Geneva Convention and hence entitled to POW status? If the answer is yes, then the captives are held as prisoners of war entitled to be treated in accord with the various requirements of the Convention. If the answer is no, then the captives are held under humane conditions according to the common law of war, though not covered by the various requirements of the Convention. The threshold determination in deciding whether the Convention applies is a "group" decision, not an individualized decision. The question is whether the military formation to which the detainee belonged was covered by the Convention. This requires that the military force be that of a signatory power and that it also comply with the basic requirements of Article 4 of the Treaty, e.g., the militia must wear distinguishing uniforms, retain a military command structure, and so forth. Here, the President determined that neither al-Qaeda nor Taliban forces qualified under the Treaty.

The third kind of action we are taking goes beyond simply holding an individual as an enemy combatant. It applies so far only to a subset of the detainees and is punitive in nature. In some cases, we are taking the further step of charging an individual with violations of the laws of war. This involves individualized findings of guilt. Throughout our history we have used military tribunals to try enemy forces accused of engaging in war crimes. Shortly after the attacks of 9/11, the President established military commissions to address war crimes committed by members of al-Qaeda and their Taliban supporters.

Again, our experience in World War II provides a useful analog. While the vast majority of Axis prisoners were simply held as enemy combatants, military commissions were convened at various times during the war, and in its immediate aftermath, to try particular Axis prisoners for war crimes. One notorious example was the massacre of American troops at Malmedy during the Battle of the Bulge. The German troops responsible for these violations were tried before military commissions.

Let me turn to address some of the challenges being made to the way we are proceeding with these al-Qaeda and Taliban detainees.

I. THE DETERMINATION THAT FOREIGN PERSONS ARE ENEMY COMBATANTS

The Guantanamo detainees' status as enemy combatants has been reviewed and re-reviewed within the Executive Branch and the military command structure. Nevertheless, the argument is being advanced that foreign persons captured by American forces on the battlefield have a Due Process right under the Fifth Amendment to an evidentiary hearing to fully litigate whether they are, in fact, enemy combatants. In over 225 years of American military history, there is simply no precedent for this claim.

The easy and short answer to this claim is that it has been, as a practical matter, mooted by the military's voluntary use of the CSRT process, which gives each detainee the opportunity to contest his status as an enemy combatant. As discussed below, those procedures are clearly not required by the Constitution. Rather they were adopted by the military as a prudential matter.

Nonetheless, those procedures would plainly satisfy any conceivable due process standard that could be found to apply. In its recent Hamdi decision, the Supreme Court set forth the due process standards that would apply to the detention of an American citizen as an enemy combatant. The CSRT process was modeled after the Hamdi provisions and thus provides at least the same level of protection to foreign detainees as

the Supreme Court said would be sufficient to detain an American citizen as an enemy combatant. Obviously, if these procedures are sufficient for American citizens, they are more than enough for foreign detainees who have no colorable claim to due process rights.

Moreover, most of the guarantees embodied in the CSRT parallel and even surpass the rights guaranteed to American citizens who wish to challenge their classification as enemy combatants. The Supreme Court has indicated that hearings conducted to determine a detainee's prisoner-of-war status, pursuant to the Geneva Convention, could satisfy the core procedural guarantees owed to an American citizen. In certain respects, the protocols established in the CSRTs closely resemble a status hearing, as both allow all detainees to attend open proceedings, to use an interpreter, to call and question witnesses, and to testify or not testify before the panel. Furthermore, the United States has voluntarily given all detainees rights that are not found in any prisoner-of-war status hearing, including procedures to ensure the independence of panel members and the right to a personal representative to help the detainee prepare his case. Nevertheless, there appear to be courts and critics who continue to claim that the Due Process Clause applies and that the CSRT process does not go far enough. I believe these assertions are frivolous.

I am aware of no legal precedent that supports the proposition that foreign persons confronted by U.S. troops in the zone of battle have Fifth Amendment rights that they can assert against the American troops. On the contrary, there are at least three reasons why the Fifth Amendment has no applicability to such a situation. First, as the Supreme Court has consistently held, the Fifth Amendment does not have extra-territorial application to foreign persons outside the United States. As Justice Kennedy has observed, "[T]he Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of non-citizens who are beyond our territory." Moreover, as far as I am aware, prior to their capture, none of the detainees had taken any voluntary act to place themselves under the protection of our laws; their only connection with the United States is that they confronted U.S. troops on the battlefield. And finally, the nature of the power being used against these individuals is not the domestic law enforcement power—we are not seeking to subject these individuals to the obligations and sanctions of our domestic laws—rather, we are waging war against them as foreign enemies, a context in which the concept of Due Process is inapposite.

In society today, we see a tendency to impose the judicial model on virtually every field of decision-making. The notion is that the propriety of any decision can be judged by determining whether it satisfies some objective standard of proof and that such a judgment must be made by a "neutral" arbiter based on an adversarial evidentiary hearing. What we are seeing today is an extreme manifestation of this—an effort to take the judicial rules and standard applicable in the domestic law enforcement context and extend them to the fighting of wars. In my view, nothing could be more farcical, or more dangerous.

These efforts flow from a fundamental error—confusion between two very distinct constitutional realms. In the domestic realm of law enforcement, the government's role is disciplinary—sanctioning an errant member of society for transgressing the internal

rules of the body politic. The Framers recognized that in the name of maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of "the people."

Thus our Constitution makes the fundamental decision to sacrifice efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. Both the original Constitution and the Bill of Rights contain a number of specific constraints on the Executive's law enforcement powers, many of which expressly provide for a judicial role as a neutral arbiter or "check" on executive power. In this realm, the Executive's subjective judgments are irrelevant; it must gather and present objective evidence of guilt satisfying specific constitutional standards at each stage of a criminal proceeding. The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of life or liberty. The situation is entirely different in armed conflict where the entire nation faces an external threat. In armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its national defense powers to neutralize the external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government's efficiency to achieve victory—even at the cost of "collateral damage" that would be unacceptable in the domestic realm.

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.

The Constitution's grant of "Commander-in-Chief" power must, at its core, mean the plenary authority to direct military force against persons the Commander judges as a threat to the safety of our forces, the safety of our homeland, or the ultimate military and political objectives of the conflict. At the heart of these kinds of military decisions is the judgment of what constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to tidy evidentiary standards, some predicate threshold, that must be satisfied as a condition of the President ordering the use

of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond a reasonable doubt? Does anyone really believe that the Constitution prohibits the President from using coercive military force against a foreign person—detaining him—unless he can satisfy a particular objective standard of evidentiary proof?

Let me posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building from which the troops believe they had received sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the Constitution vests these men with due process rights as against the American soldiers? When do these rights arise? If the troops shoot and kill them—i.e., deprive them of life—could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens' Constitutional tort actions for violation of due process? Alternatively, suppose the fleeing men are captured and held as enemy combatants. Does the due process clause really mean that they have to be released unless the military can prove they were enemy combatants? Does the Due Process Clause mean that the American military must divert its energies and resources from fighting the war and dedicate them to investigating the claims of innocence of these two men?

This illustrates why military decisions are not susceptible to judicial administration and supervision. There are simply no judicially-manageable standards to either govern or evaluate military operational judgments. Such decisions inevitably involve the weighing of risks. One can easily imagine situations in which there is an appreciable risk that someone is an enemy combatant, but significant uncertainty and not a preponderance of evidence. Nevertheless, the circumstances may be such that the President makes a judgment that prudence dictates treating such a person as hostile in order to avoid an unacceptable risk to our military operations. By their nature, these military judgments must rest upon a broad range of information, opinion, prediction, and even surmise. The President's assessment may include reports from his military and diplomatic advisors, field commanders, intelligence sources, or sometimes just the opinion of frontline troops. He must decide what weight to give each of these sources. He must evaluate risks in light of the present state of the conflict and the overall military and political objectives of the campaign.

Furthermore, extension of due process concepts from the domestic prosecutive arena as a basis for judicial supervision of our military operations in time of war would not only be wholly unprecedented, but it would be fundamentally incompatible with the power to wage war itself, so altering and degrading that capacity as to negate the Constitution's grant of that power to the President.

First, the imposition of such procedures would fundamentally alter the character and mission of our combat troops. To the extent that the decisions to detain persons as enemy combatants are based in part on the circumstances of the initial encounter on the battlefield, our frontline troops will have to concern themselves with developing and preserving evidence as to each individual they capture, at the same time as they confront enemy forces in the field. They would be diverted from their primary mission—the rapid destruction of the enemy by all means at their disposal—to taking notes on the con-

duct of particular individuals in the field of battle. Like policeman, they would also face the prospect of removal from the battlefield to give evidence at post-hoc proceedings.

Nor would the harm stop there. Under this due process theory, the military would have to take on the further burden of detailed investigation of detainees' factual claims once they are taken to the rear. Again, this would radically change the nature of the military enterprise. To establish the capacity to conduct individualized investigations and adversarial hearings as to every detained combatant would make the conduct of war—especially irregular warfare—vastly more cumbersome and expensive. For every platoon of combat troops, the United States would have to field three platoons of lawyers, investigators, and paralegals. Such a result would inject legal uncertainty into our military operations, divert resources from winning the war into demonstrating the individual "fault" of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-à-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unitary chain of command and undermine the confidence of frontline troops in their superior officers. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free prisoners of war whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is impossible to predict.

The Supreme Court's decision in *Rasul v. Bush* does not undercut these long-standing principles. In *Rasul*, the Supreme Court addressed a far narrower question—whether the habeas statute applies extraterritorially—and expressly refrained from addressing these settled constitutional questions. The Court, in concluding that the habeas statute reached aliens held at Guantanamo Bay, relied on the peculiar language of the statute and the "extraordinary territorial ambit" of the writ at common law." Of course, the idiosyncrasies of the habeas statute do not have any impact on judicial interpretation of the reach of the Fifth Amendment or other substantive constitutional provisions. Moreover, the Court's recognition in *Rasul* that the United States exercises control, but "not ultimate sovereignty" over the leased Guantanamo Bay territory confirms the inapplicability of the Fifth Amendment to aliens held there.

Nevertheless, even if Guantanamo Bay is somehow deemed sovereign United States territory, the Fifth Amendment is still inapplicable. The Supreme Court, in addition to the requisite detention on sovereign United States territory, demands that the aliens only "receive constitutional protections" when they have also "developed substantial connections with this country." Thus, under the Court's formulation, "lawful but involuntary" presence in the United States "is not of the sort to indicate any substantial connection with our country" sufficient to trigger constitutional protections. The "voluntary connection" necessary to trigger the Fifth Amendment's due process guarantee is sorely lacking with respect to enemy combatants.

Whatever else may be said, there can be no dispute that these individuals did not arrive at Guantanamo Bay by free choice. Captured enemy combatants that have been transported to Guantanamo Bay for detention thus are not entitled to Fifth Amendment due process rights. It should also be noted that the Supreme Court's decision in *Rasul* was a statutory ruling, not a constitutional

one. In other words, the Court concluded only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay. The Court nowhere suggested that the Constitution grants such aliens a right of access to American courts.

An important consequence follows: Congress remains free to restrict or even to eliminate entirely the ability of enemy aliens at Guantanamo Bay to file habeas petitions. Congress could consider enacting legislation that does so—either by creating special procedural rules for enemy alien detainees, by requiring any such habeas petitions to be filed in a particular court, or by prohibiting enemy aliens from hiring military officials into court altogether.”

Mr. President, with the Military Commissions Act, the Senate today enacts Mr. Barr’s third suggestion. We create a system that is consistent with our treaty obligations but that also is consistent with military tradition and the needs of our fighting forces in a time of war. It is a system that will serve this Nation well. I look forward to the act’s passage and enactment.

Mr. HARKIN. Mr. President, since my years as a pilot with the U.S. Navy, nothing has been more important to me than protecting the American people and ensuring the security of our country.

Today, we are at war with extremists who want to do grievous harm to America. We all want to fight these extremists and defeat them. We all want to ensure that those who committed or supported acts of terror are brought to justice. The only disagreement is about how best to do that. What is the smartest, most effective way to fight and defeat our enemies?

Unfortunately, as the newly declassified National Intelligence Estimate testifies very clearly, our current course is, in many ways, playing into the hands of the terrorists. It is stirring up virulent anti-Americanism around the world, it is drawing new recruits to the jihadists’ cause, and it is making America less safe.

We have to do a better job, and we can do a better job. It is not good enough to be strong and wrong. We need to be strong and smart. This is especially true when it comes to our policies on interrogating and trying suspected terrorists. Again, we all want to extract information from these suspects. We all want to try them and, if guilty, punish them. The only disagreement is about how best to do that. What is the smartest, most effective way to interrogate and to try these suspected terrorists?

There is plenty of evidence that our current course, which clearly includes torturing suspects and imprisoning them without trial, is not working. To take just one case in point, consider the Canadian citizen, whom we now know to be completely innocent, who was arrested by the CIA—I use the word “arrested” loosely. He was picked up by the CIA, bound, gagged, blindfolded, and sent to Syria for interrogation under torture. Not surprisingly, he told his torturers exactly what they

wanted to hear—that he had received terrorist training in Afghanistan. The truth, of course, is that he was never in Afghanistan, had no terrorist ties, and is completely innocent.

The cost to the United States for this miscarriage of justice, in terms of our forfeited reputation and moral standing, has been disastrous—just as the revelations of torture and abuse at Abu Ghraib. What is more, it has endangered our troops in the field—now and in the future—should they fall into the hands of captors who say they have the right to subject American prisoners to the same torture and abuse.

Again, it is not enough to be strong and wrong. We need to be strong and smart. We need to be true to 230 years of American jurisprudence, our Constitution, and the humane values that define us as Americans.

Back during the dark days of McCarthyism in the 1950s, former Senator Joseph McCarthy went on a rampage. What he was basically saying to the American people is that we have to become like the Communists in order to defeat them. Cooler heads prevailed but not until Senator McCarthy had done a lot of damage in this country, not until a lot of innocent people were blacklisted, denied employment, many of whom committed suicide because they had no place to turn. The dark days of Joseph McCarthy come back to us in the guise of this military tribunal bill.

We do not have to become like the jihadists. We don’t have to become like the terrorists in order to defeat them. The best way to defeat them is the same way we defeated Joseph McCarthy and the Communists. We stayed true to our American ideals, our American jurisprudence, and the humane values we cherish as a free society. Regrettably, the bill before us fails this test. I cannot, in good conscience, support it.

The bill includes no barrier on the President’s reinterpreting our obligations under the Geneva Conventions as he pleases, allowing practices such as simulated drowning, induced hypothermia, and extreme sleep deprivation. The President can allow all of those to continue, in contravention of the Geneva Conventions.

The bill before us rewrites the War Crimes Act in a way that fails to give clarity as to interrogation techniques that are allowed or forbidden, effectively allowing the administration—any administration—to continue the abusive techniques I just mentioned.

The bill creates a very bizarre double standard, immunizing, on the one hand, policymakers and the CIA and its contractors for committing acts of torture—immunizing them—while leaving our military troops subject to prosecution under the Uniform Code of Military Justice for the exact same practices. Let me repeat that. The bill creates this double standard: it immunizes the CIA, for example, and any contractors with the CIA, for committing acts

of torture, while at the same time those same acts, if committed by a military person, would subject that military person to prosecution under the Uniform Code of Military Justice.

What kind of a signal does this send? What kind of signal is this? The bill completely eliminates the ability of noncitizens to bring a habeas corpus petition, effectively removing the only remaining check on the administration’s decision regarding torture and other abuses.

Indeed, the habeas provisions in this bill would permit—get this—the bill would permit a legal permanent resident of the United States—a legal permanent resident of the United States—to be snatched off the street in the dark of night, bound, blindfolded, subject to indefinite detention, even torture, with absolutely no way for that person to challenge it in court.

Is that what we want to become as a nation? A legal permanent resident in the United States, of which there are millions in this country, taken out of his or her home at night, and we don’t know what happens to them? They go into the dark dungeons of who knows where. Maybe Guantanamo Bay.

Habeas corpus is the only independent remedy available to people being held in indefinite detention who, in fact, have no connection to terrorism.

I heard one of my colleagues on the other side of the aisle going on yesterday about this habeas provision. He went on about how habeas corpus is to protect U.S. citizens. It is in no way, he went on, aimed at protecting enemy combatants who are picked up.

Therein lies the problem. How do we know they are enemy combatants? Is it because the CIA says they are an enemy combatant? Who says they are an enemy combatant? This is not World War II, folks, where the Germans are on one side and they have uniforms, and the Japanese are on the other side and they have uniforms. This is an amorphous terrorist war where the terrorists don’t wear uniforms. They can be dressed like you or me. They can look just like you or me. So we don’t know.

We have instances where people have been thrown into Guantanamo, for example, and they were fingered by a neighbor who didn’t like them and wanted their property or house or didn’t like them because of something they had done to them in the past. They fingered them and said: Guess what. They are big terrorists. People were picked up and thrown in jail.

Habeas is the one provision that allows someone snatched off the streets here or anywhere else suspected of being a terrorist to at least come forward and say: What are the charges against me?

We have seen this happen in Guantanamo, people kept for months, for years, without ever having a charge filed against them, and many of them we found out were totally innocent.

What does this say to the rest of the world?

Senator OBAMA from Illinois told the story the other day about when he was in Chad in August and heard about an American citizen who was picked up in Sudan and held by the Sudanese. He made some calls to try to get this person released. It was an American journalist. After a while, he was released.

The American journalist came back and said: I was picked up by the Sudanese officials. I asked for permission to contact the U.S. Embassy with a phone call so I could talk to our Embassy.

The Sudanese captor said: Why should we let you do that? You don't let the people in Guantanamo Bay do that.

The use of habeas is not just to protect the people who are suspected so that we know whether they really are an enemy combatant. It is also as a protection for our troops, our soldiers, our civilians, our business people traveling around the world, people traveling on vacation, journalists, just like this one, who may be snatched, picked up by a foreign government. We want to be able to say to that government: Produce the person. What are the charges? If we don't allow it, we are giving the green light to every other would-be dictator anywhere in the world to do the same thing—any government anywhere.

If the moral argument against torture does not hold any weight with this administration, they should just examine the abundant evidence that torture simply doesn't work. This is not just my opinion, this is what the experts are saying.

Let me quote from a letter signed by 20 former U.S. Army interrogators and interrogation technicians:

Prisoner/detainee abuse and torture are to be avoided at all costs, in part because they can degrade the intelligence collection effort by interfering with a skilled interrogator's efforts to establish rapport with the subject.

Simply put, torture does not help gather useful, reliable, actionable intelligence. In fact, it inhibits the collection of such intelligence.

Earlier this month, the U.S. Army released its new field manual 22-3: "Human Intelligence Collector Operations," which covers interrogations by the U.S. military in detail. This manual replaces the previous manual and is to be used by our military personnel around the world in performing interrogations.

The Army Field Manual explicitly bans, among other things, beating prisoners, sexually humiliating them, threatening them with dogs, depriving them of food and water, performing mock executions, shocking them with electricity, burning them, causing other pain, or subjecting them to the technique called waterboarding, which simulates drowning.

So if these techniques are explicitly banned in the Army Field Manual, why shouldn't they be explicitly banned for CIA personnel or CIA contract per-

sonnel? Why do we have a high standard for our military and effectively no standard for the CIA and its contractors?

For me, this debate about illegal imprisonment and officially sanctioned torture is not an abstraction. It strikes very close to home for me.

Thirty-six years ago this summer at the height of the Vietnam war, I brought back photographs of the so-called tiger cages at Con Son Island where the Vietcong and North Vietnamese prisoners, as well as civilians who had committed no crime whatsoever, were being tortured and killed with the full knowledge and sanction of the U.S. Government. That was July of 1970 when I was a staff person in the House of Representatives working with a congressional delegation on a fact-finding trip to Vietnam.

We had all heard reports about the possible existence of these so-called tiger cages in which people were brutally tortured and killed. Our State Department and our military officials denied their existence. They said it was only Communist propaganda.

Through various sources, I thought that the reports about the tiger cages were at least credible and should be investigated further.

Thanks to the courage of Congressman William Anderson of Tennessee and Congressman Augustus Hawkins of California and to Don Luce, an American working for a nongovernmental organization, and because of the bravery of a young Vietnamese man who gave us the maps on how to find the prison, we were able to expose the tiger cages on Con Son Island.

This young Vietnamese man about whom I speak was let out of the tiger cages, but they kept his brother, and they said: If you breathe one word about this, we are going to kill your brother.

Why did they let him out of the tiger cages? Because he was president of the student body at Saigon University. What had been his crime? He had demonstrated against the war. So they picked up he and his brother and threw them in the tiger cages and tortured them.

The students refused to go back to class—this was a big deal—until they returned this young man to his university, which they did, but they kept his brother and said: If you breathe a word of this, we will kill him.

This young man decided he needed to take a chance, and he took a chance on me. He drew the maps and gave us the story on how to find these tiger cages which were well hidden, and without the maps we never would have found them. Fortunately, I had a camera and a hidden tape recorder which proved useful when I returned to the United States.

Supporters of the war claim that the tiger cages were not all that bad. But then Life magazine published my pictures, and the world saw the horrific conditions where, in clear violation of

the Geneva code, North Vietnamese, Vietcong, as well as civilian opponents of the war—just civilians—who committed no crimes whatsoever—were all crowded together in these cages, as I said, in clear violation of the Geneva Conventions and the most fundamental principles of human rights.

At the same time, the U.S. Government had been insisting that the North Vietnamese abided by the Geneva Conventions in their treatment of prisoners in North Vietnam. Yet here we were condoning and even supervising the torture of civilian Vietnamese, along with Vietnamese soldiers and others in clear violation of the Geneva Conventions.

We may not have known about it—our public did not know about that—but the Vietnamese sure knew about it.

I thought we had learned our lesson from that, and then I saw Abu Ghraib and thought: Wait a minute. Haven't we learned our lesson? And, Mr. President, just as 37 years ago when the tiger cages were first talked about, they were denied—and they thought they could deny them because it was hard to get to the island. You couldn't really get out there. As far as they knew, no one had ever taken pictures of it and no one had really ever escaped from there, like a Devil's Island kind of place. So the military denied it. Our Government denied it year after year until I was able to take the pictures and bring back the evidence.

Mr. President, I submit to you and everyone here and the American people that had not that courageous soldier taken the pictures of Abu Ghraib and kept those pictures, they would have denied that ever happened. They would have denied to high Heaven that such things took place at Abu Ghraib. Thankfully, one courageous young soldier decided this was wrong, it was inhumane, it was not upholding the highest human standards of America, and it was in violation of the Geneva Conventions. Had he not taken those pictures, it would be denied forever that ever happened at Abu Ghraib.

So now, as if we learned nothing from that previous tragedy of the tiger cages 36 years ago or Abu Ghraib just a couple of years ago, here we go again denying obvious instances of torture and abuse, effectively giving the green light to torture by U.S. Government agents and contractors and watering down the War Crimes Act.

This is a betrayal of our laws. It is a betrayal of our values. It is a betrayal of everything that makes us unique and proud to be Americans.

The administration apparently thinks that we will just go along with this betrayal because there is an election in 6 weeks. Apparently they think we are afraid of being branded weak on terrorism. Indeed, some are no doubt hoping that we will vote against this bill so they can use it as a bludgeon against us in the election. All I can say is: Shame on them. What is more, it is not going to work. Because opposing

this bill, which would give the green light to torture, is far, far bigger than the outcome of the November election.

This is about preserving our core values as Americans. It is about standing up for our troops and ensuring that they do not become subject to the same acts of torture and retaliation. It is about standing up for American citizens, civilians, and others who may be caught up in some foreign land with false charges filed against them, and yet not even being able to contact our embassy. It is about protecting Americans. And it is about changing course and beginning to wage an effective war against the terrorists who attacked us on September 11, 2001.

It is time to quit being strong and wrong, and it is time to start being strong and smart. Being strong and wrong has been a disaster. It has bogged us down in a civil war in Iraq. It has turbocharged the terrorists. It has made America less safe. So it is time to be strong and smart. It is time to be true to who we are as Americans. It is time to say no to indefinite—indefinite—incarceration. It is time to say no to taking away the right of someone put away to at least have the charges pressed against them. It is time to say no to torture in all its forms now and at any time in the future.

Mr. President, I yield the floor.

Mr. BIDEN. Mr. President, I want to start by complimenting Senators WARNER, MCCAIN and GRAHAM and the work that they did to improve this bill, particularly in two areas.

First, our colleagues did the right thing by rejecting the attempt by the administration to reinterpret, by statute, Common Article III of the Geneva Conventions. That would have been an enormous mistake—and an invitation for other countries to define for themselves what the Geneva Conventions require.

Second, our colleagues were right to reject the use of secret evidence in military commissions. Such a proposal is not consistent with American jurisprudence, and would not have satisfied the requirements of the Supreme Court decision in Hamdan.

Overall, the bill provides a much better framework for trying unlawful enemy combatants than under the flawed order issued by the President. All this is positive, and our three colleagues deserve credit for their good work.

But the bill contains a significant flaw. It limits the right of habeas corpus in a manner that is probably unconstitutional. Don't take my word for it. Listen to the words of a conservative Republican, Kenneth Starr, who used to sit on this nation's second highest court, and is now one of the country's leading appellate advocates, in a letter written to Senator SPECTER earlier this week:

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 be problematic for Congress to modify the constitutionally protected writ of habeas corpus under current events.

Accordingly, I believe this bill is likely unconstitutional. I hope that I am wrong. But I fear that I am right, and that we will be back here in a few years debating this issue again.

We had one chance to get this right—to ensure that we don't end up back here again after a new round of litigation. There was no reason to rush. No one challenges our right to detain the high-value prisoners the President just transferred to Guantanamo. We are not about to release them—nor should we.

But rush we did. In the last week, there have been two different versions of the legislation that emerged from closed-door negotiations with the administration. My colleagues may be willing to trust the legal judgment and competence of this administration. But I am not.

Since 9/11, several major cases have gone to the Supreme Court that relate to the laws governing the war on al-Qaida and the President's powers. And the administration has been wrong too many times—wrong about whether habeas corpus rights applied to detainees in Guantanamo Bay, wrong about whether U.S. citizens detained as enemy combatants had a right to meaningful due process, and wrong about whether the military commissions the President established by order were legal. Simply put, I am not willing to trust the administration's legal judgment again. And it is clear that the administration has put its imprint on this legislation in several troubling respects, including in the stripping of habeas rights.

In the struggle in which we are engaged against radical fundamentalists, we must be both tough and smart. This bill is not smart because it risks continued litigation about how we detain and try unlawful enemy combatants.

It is also not smart because it risks continued harm to the image of the United States. The 9/11 Commission concluded that "[a]llegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need." The recently released National Intelligence Estimate made plain that there are several factors fueling the spread of the jihadist movement, including "entrenched grievances, such as corruption, injustice, and fear of Western domination, leading to anger, humiliation, and a sense of powerlessness." The mistreatment of detainees at Abu Ghraib, and concerns about our policies governing detainees at Guantanamo Bay, undoubtedly fuel these grievances and anger against the United States. Our detainee policies have also made it harder for our allies to support our anti-terrorism policies. We have to get this right.

Therefore, even though our colleagues achieved significant improvements, I cannot support this legislation.

Mr. WARNER. Mr. President, at this point in time I yield to the distinguished Senator from Arizona 14 minutes.

I would say that I have been privileged to be a Member of this institution for now 28 years, and I first met JOHN MCCAIN through his father when I was Secretary of the Navy. So that goes back 28 plus another 5 years that I have known of JOHN MCCAIN.

This Chamber, and indeed all of America, knows full well about the extraordinary record that this man has in the service of his Nation, showing unselfishness, showing courage, showing foresight.

I am proud to have worked with him as a partner in these past weeks, indeed, months now, on this piece of legislation.

I just want to express my gratitude, and I think the gratitude of many people across this country, for the service he is rendering the Senate and hopefully will continue to render the Senate in the coming years.

When I step down under the caucus, it is my hope that JOHN MCCAIN is elected to succeed me as chairman of the Senate Armed Services Committee.

But at this point in time, I am proud to yield, as manager, my time to the Senator from Arizona.

Mr. LEVIN. Mr. President, will the Senator from Arizona yield?

Mr. MCCAIN. I would be glad to.

Mr. LEVIN. Mr. President, I heartily join my good friend from Virginia in his assessment of Senator MCCAIN. I know there has been some disagreement as to who would go first, but that should not in any way, I hope, cloud the real affection which I think everybody in this body holds for Senator MCCAIN and the effort he has made for so long to try to bring some kind of decency to the approaches we use to people whom we detain.

I thank the Senator.

The PRESIDING OFFICER. The Senator from Arizona is recognized for 14 minutes.

Mr. MCCAIN. Mr. President, I thank both my friends of many years, Senator LEVIN and Senator WARNER, for the collegiality, the bipartisanship, and the effort that we all make under their leadership on the Armed Services Committee for the betterment of the men and women who serve our country and our Nation's defense. I am honored to serve under both.

For the record, I believe I just calculated, I say to my dear friend from Virginia, it has been 33 years since I came home from Vietnam and found that our distinguished Secretary of the Navy was very concerned about the welfare of those who had the lack of talent that we were able to get shot down. So I thank my friend from Virginia especially, and I thank my friend from Michigan. I believe our committee conducts itself in a fashion

which has been handed down to us from other great Members of the Senate, such as Richard Russell and others.

Mr. President, before I move on to other issues, I have heard some criticism on the Senate floor today about the way in which the bill treats admissibility of coerced testimony.

A New York Times editorial today said that in this legislation “coercion is defined in a way that exempts anything done before the passage of the 2005 Detainee Treatment Act, and anything else Mr. Bush chooses” in their own inimitable style.

This is thoroughly incorrect, and I would like to correct not only the impression but the facts.

This bill excludes any evidence obtained through illegal interrogation techniques, including those prohibited by the 2005 Detainee Treatment Act. The goal is to bolster the Detainee Treatment Act by ensuring that the fruits of any illegal treatment will be per se inadmissible in the military commissions.

For evidence obtained before passage of the Detainee Treatment Act, we adopted the approach recommended by the military JAGs. In order to admit such evidence, the judge—we leave it to the judge—must find that: it passes the legal reliability test—and, as applied in practice, the greater the degree of coercion, the more likely the statement will not be admitted; the evidence possesses sufficient probative value; and that the interests of justice would best be served by admission of the statement into evidence.

Mr. President, I ask unanimous consent that three different letters from three different JAGs—Air Force, Navy, and Marine Corps—be printed in the RECORD.

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

DEPARTMENT OF THE AIR FORCE,
HEADQUARTER U.S. AIR FORCE,
Washington DC, August 28, 2006.

Hon. JOHN MCCAIN,
Russell Senate Office Building,
Washington DC.

DEAR SENATOR MCCAIN: Thank you for your letter of 23 August 2006, in which you requested my written recommendations on the military commissions legislation Congress is expected to consider next month. You specifically ask for my personal views on the most pressing issues involving the legislation.

As of the date of this letter, several bills have been introduced and I believe the administration is also considering legislation for congressional consideration. I appreciate the opportunity to provide my personal perspective and comments on the general nature of the potential legislation.

I begin with the premise that legislation is appropriate. As the Supreme Court noted again in *Hamdan v. Rumsfeld*, 548 U.S. 126 S.Ct. 2749 (2006), the President's powers in wartime are at their greatest when specifically authorized by Congress. While different approaches are feasible, I believe the Nation will be best served by a fresh start to the military commission process. Existing criminal justice systems, including the process established by Military Commission Order 1,

should be reviewed to develop a system that will best serve the interests of justice and the United States. The Uniform Code of Military Justice (10 U.S.C. §801 et. seq.) (UCMJ) and the Manual for Courts-Martial (MCM) provide superb starting points. The processes and procedures in the UCMJ and MCM have served us well and can be readily adapted to meet the needs of military commissions.

As I have testified, Congress could enact a UCMJ Article 135a to establish the basic substantive requirements for military commissions, and an executive order could provide detailed guidance, just as the MCM provides detailed guidance for the trial of courts-martial. Alternatively, Congress could create a separate Code of Military Commissions as a new chapter in Title 10, modeled to an appropriate degree after the UCMJ, and similarly leave the details to an executive order. Either approach must address the requirements of the Geneva Conventions and the concerns articulated in *Hamdan*.

There will necessarily be differences between current court-martial procedures and the rules and procedures for military commissions. However, the processes and procedures in the UCMJ and MCM can be readily adapted to meet the needs of military commissions and still meet the requirements of criminal justice systems established by common Article 3 of the Geneva Conventions.

The legislation must appropriately address access to evidence and the accused's presence during the trial. Specifically, it is my strongly held view that all evidence admitted against an accused and provided to members of a military commission must also be provided to the accused and accused's counsel. Any statute that allows evidence to be admitted outside the presence of the accused would mean the military commission could convict (and possibly impose a sentence of death) without the accused ever fully knowing the evidence considered against him: Such a procedure is extremely problematic, both constitutionally and from a Common Article 3 perspective.

The accused's presence is a critical facet of this legislation. The United States is more than a nation of laws; it is a country founded upon strong moral principles of fairness to all. Moreover, our country—to the delight of our adversaries—has been heavily criticized because of the perception that the pre-*Hamdan* military commission process was unfair and did not afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”

Now is the time to correct that perception and clearly establish procedures and rules that meet that standard. These procedures and rules will do more than merely correct legal deficiencies; they will help reestablish the United States as the leading advocate of the rule of law. I firmly believe doing so is an important facet of winning the global war on terrorism.

Inextricably tied to that concept is an awareness of reciprocity. We cannot hold out as acceptable a military commission process that we would consider to be unfair and illegal if used by a foreign authority to try captured United States servicemen and women for alleged offenses.

Additionally, concerns have been raised about other evidentiary and procedural issues, including the ability of the accused to represent himself, and the admissibility of hearsay, classified evidence, and an accused's own statements.

The right of an accused to represent himself pro se is well recognized in our jurisprudence. In the context of military commissions, it presents difficult issues. Current procedures allow an accused to expressly waive the right to be represented and conduct his defense personally. That option

should be available if the accused competently demonstrates to the military judge he understands the potential disadvantages and consequences of self-representation and he voluntarily and knowingly waives the right to representation. The military judge should have the authority to require that a defense counsel remain present even if the waiver is granted and to revoke the waiver if the accused is disruptive or fails to follow basic rules of decorum and procedure. This right is obviously contingent on the accused's presence throughout the proceeding as well as access to the evidence.

Again, I recommend that Congress detail the basic evidentiary requirements in the legislation and then permit an executive order to flesh out the details, just as the MCM provides evidentiary details for the UCMJ. Evidence should be admissible if, in the judgment of an experienced military judge, there are guarantees of its trustworthiness, the evidence has probative value, and the interests of justice are best served by its admission.

There has been some comment that the admission of hearsay is improper. In my view, such criticisms reflect a misunderstanding of the rules of evidence used in Federal, military and state trials today. Under the Military Rules of Evidence (MRE), hearsay is not admissible except as provided in the MREs or by statute. The MREs further define statements that are not hearsay and provide for exceptions conditioned on the availability of the declarant. Additionally, there is a residual hearsay rule that permits the introduction of other statements, having equivalent circumstantial guarantees of trustworthiness, if the court determines that the statement is material evidence; has more probative value than other available evidence; and serves the interests of justice. The Supreme Court recently narrowed the application of residual hearsay as it applies to out-of-court statements that are testimonial in nature. Such statements are now barred unless there is a showing that the witness is unavailable and the accused had a prior opportunity to cross-examine the witness. The overall application of the residual hearsay rule is functionally very much like that used in international tribunals and requires a military judge to find the evidence is probative and reliable. These existing procedures provide a meaningful starting point for addressing the hearsay issues arising in military commissions.

As to the use of classified evidence, I believe the procedures of MRE 505 adequately protect national security. MRE 505 is based on the Classified Information Procedures Act (CIP A) (Title 18, U.S.C. App III). CIP A is designed to prevent unnecessary or inadvertent disclosures of classified information and advise the government of the national security implications of going forward with certain evidence. MRE 505 achieves a reasonable accommodation of the United States' interest in protecting information and the accused's need to be able to mount a defense. The rule permits in camera, ex parte consideration of the Government's concerns by a judge, the substitution of unclassified summaries or other alternative forms of evidence, and ensures fairness to the accused. Under MRE 505, both the prosecution and the accused rely on and know about the evidence going to the court. The accused knows all that is to be considered by the trier-of-fact, has an opportunity to respond, and is able to assist the defense counsel to respond appropriately.

Concerns about the admissibility of statements made by an accused primarily involve the current requirement to provide Miranda warnings (codified more broadly in the UCMJ at Article 31) and whether the statement is the product of torture or coercion.

The military commission process must recognize the battlefield is not an orderly place. The requirement to warn an individual before questioning is one area where deviation from the established UCMJ framework may well be warranted.

Generally, if a military judge concludes the confession or admission of an accused is involuntary, the statement is not admissible in a court-martial over the accused's objection. Commonly, a statement is involuntary if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the Constitution of the United States; Article 31; or through the use of coercion, unlawful influence, or unlawful inducement. Each situation is obviously fact determinative and the military judge decides whether the statement is voluntary considering the totality of the circumstances. I trust the judgment of experienced military judges. Military commissions should not be permitted to consider evidence that is found to be unlawfully coerced and thus involuntary.

Finally, appellate jurisdiction over military commission decisions should be clearly established. That jurisdiction would be most appropriately vested in the United States Court of Appeals for the District of Columbia Circuit (consistent with the Detainee Treatment Act of 2005).

I hope this information is helpful. Please let me know if additional information or comments from me on this matter are desired.

Sincerely,

JACK L. RIVES,
Major General, USAF,
The Judge Advocate General.

DEPARTMENT OF THE NAVY,
OFFICE OF THE JUDGE ADVOCATE
GENERAL, WASHINGTON NAVY YARD,
Washington, DC, Aug. 31, 2006.

Hon. JOHN MCCAIN,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR MCCAIN. Thank you for your letter of August 23, 2006 requesting my personal views on military commission legislation.

Before proceeding with discussion of specific issues, I would like to note that I have had the opportunity to provide comment to the DoD General Counsel and the Department of Justice regarding draft commission legislation. As of this writing, I have not seen the final version of the Administration's draft.

Although existing courts-martial rules are not practical for the prosecution of unlawful enemy combatants, they provide a good starting point for the drafting of Commission legislation. I recommend that legislation establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe all substantive offenses. It also should authorize the President to promulgate supplemental rules of practice. In this regard, I believe we should follow the military justice model, whereby Congress establishes the legal framework (the Uniform Code of Military Justice, or in this case a Code for Military Commissions) and the President promulgates supplemental rules of practice (a Manual for Courts-Martial, or in this case a Manual for Military Commissions).

Within that context, I recommend that the jurisdiction of military commissions be expanded to permit prosecution of all unlawful enemy combatants who engage in or attempt to engage in hostilities against the United States. In particular, we need the ability to prosecute before military commissions irregular belligerents who violate the laws of war

while acting on behalf of foreign governments as well as terrorists not associated with al Qaida and/or the Taliban.

With regard to baseline standards of structure, procedure, and evidence, it is critically important that independent military judges preside at military commissions and have authority to make final rulings on all matters of law. Similarly, defense counsel must have an independent reporting chain of command, free from both actual and perceived influence of prosecution and convening authorities.

The introduction of evidence outside the presence of an accused is, in my view, inconsistent with U.S. law and the law of war. The Supreme Court held in *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006), that absent a sufficient practical need to deviate from existing U.S. laws and criminal trial procedures, an accused must be present at trial and have access to all evidence presented against him. A four-justice plurality also opined that Common Article 3 of the 1949 Geneva Conventions requires, at a minimum, that an accused be present at trial and have access to the evidence presented against him. Justice Kennedy, who was not part of the plurality, further signaled in a separate concurring opinion that introduction of evidence outside the presence of the accused would be "troubling" and, if done to the prejudice of the accused would be grounds for reversal. Furthermore, as a matter of policy, adopting such practice for military commissions may encourage others to reciprocate in kind against U.S. service members held in captivity.

I recommend that the legislation adopt Military Rule of Evidence 505 (M.R.E. 505), which is partly based on the Classified Information Procedures Act (CIPA). M.R.E. 505 permits a military judge to conduct an in camera, ex parte review of the Government's interest in protecting classified information and encourages the substitution of unclassified summaries or alternative forms of evidence in lieu of the classified information. This type of procedure ensures that classified information is not disclosed under circumstances that could injure national security.

While it is true that application of a M.R.E. 55-style process might conceivably result in the Government being unable to introduce evidence against an accused under certain circumstances, it is my view that we are better served by fully honoring the law of war, which requires that we afford even terrorists the judicial guarantees which are recognized as indispensable amongst civilized peoples when we choose to prosecute. For it is that very same law that allows us to hold terrorists for the duration of hostilities, however long those hostilities might last.

With regard to hearsay evidence, I have no objection to the introduction of hearsay evidence so long as the evidentiary standard is clarified to exclude information that is unreliable, not probative, unfairly prejudicial, confusing, or misleading, or when such exclusion is necessary to protect the integrity of the proceedings. Such an approach would be consistent with the practice of international war crimes tribunals supported by the United States in Rwanda and the former Yugoslavia. Those tribunals satisfy the requirements of the law of war including Common Article 3 of the Geneva Conventions of 1949.

With regard to statements alleged to have been derived from coercion, the presiding military judge should have the discretion and authority to inquire into the underlying factual circumstances and exclude any statement derived from coercion, in order to protect the integrity of the proceeding.

As I noted earlier, the legislation should enumerate all offenses triable by military

commission. Conspiracy should be included, but only conspiracies to commit one of the substantive offenses specifically enumerated and there must be a requirement to prove the defendant committed an overt act in furtherance of the conspiracy. This would mean, for example, that conspiracy to commit murder in violation of the laws of war would be a cognizable offense, but affiliation with a terrorist organization, standing alone, would not be cognizable.

I would also like to address Common Article 3 of the Geneva Conventions. Common Article 3 is a baseline standard that U.S. Armed Forces have trained to for decades. Its application to the War on Terror imposes no new requirements on us. However, if Congress desires to clarify the Common Article 3 phrase "outrages upon personal dignity, in particular humiliating and degrading treatment," this would be beneficial. The legislation might consider requiring an objective standard be used in interpreting this phrase, and define the language to encompass willful acts of violence, brutality, or physical injury, and so severely humiliating or degrading as to constitute an attack on human dignity. Examples of such conduct include forcing detainees to perform sexual acts, threatening a detainee with sexual mutilation, systematically beating detainees, and forcing them into slavery: Such an approach would accurately reflect established war crimes jurisprudence and adoption would prevent the perception that we are attempting to abrogate our obligations under the 1949 Geneva Conventions.

Thank you again for this opportunity to provide personal comment on military commission legislation. I hope that this information is helpful.

Sincerely,

BRUCE MACDONALD,
Rear Admiral, JAGC, U.S. Navy,
Judge Advocate General.

DEPARTMENT OF THE NAVY,
HEADQUARTERS U.S. MARINE CORPS,
Washington, DC, Aug. 31, 2006.

Hon. JOHN MCCAIN,
Russell Senate Office Building,
Washington, DC.

DEAR SENATOR MCCAIN. Thank you for your letter of 23 August 2006, in which you requested written recommendations from the service Judge Advocates General on the military commissions legislation Congress is expected to consider in September. You specifically asked for our personal views on the most pressing issues involving the legislation. I appreciate the opportunity to provide my personal perspective and comments.

Although I assumed the position of Staff Judge Advocate to the Commandant of the Marine Corps on 25 August, I am certainly familiar with the process to date, including the previous testimony of my predecessor, Brigadier General Kevin M. Sandkuhler, and the Judge Advocates General. Like them, I believe that military commissions, in some form, are both appropriate and necessary in prosecuting alleged terrorists while continuing to wage the Global War on Terror. I also believe that there is middle ground to be found between the Uniform Code of Military Justice (UCMJ) and the original military commissions process, which would comport with the requirements of Common Article 3 of the Geneva Conventions.

Any legislation must be approached with an eye toward both precedent and reciprocity. We must account for the values for which our nation has always stood, and also be cognizant of the fact that the solution we create may influence how our service members are judged internationally in the future.

I share in the strong position previously expressed by the Judge Advocates General

regarding the fundamental importance of an accused's access to evidence and presence at trial. Simply put, an accused (and his counsel) must be provided the evidence admitted against him. This may require the government to balance the need for prosecution on particular charges against the need to protect certain classified information. This balancing concept is not new. Domestically, the government must often weigh the sanctity of sensitive information against having to disclose it for use in a successful prosecution believe that the indispensable "judicial guarantees" referenced in Common Article 3 require the same sort of deliberative decision-making in the context of these commissions. Where the government intends to prosecute an accused using classified information, Military Rule of Evidence (MRE) 505 should serve as the evidentiary benchmark.

The commissions should be presided over by a certified and qualified (pursuant to Article 26 of the UCMJ) military judge, who is trained to make measured evidentiary rulings. While I recommend that Congress allow for an executive order to promulgate specific applicable evidentiary rules (same as with the Manual for Courts-Martial, or MCM), I do offer comment here on what I believe are two more notable evidentiary issues: hearsay and statements by an accused.

Regarding hearsay evidence, the residual hearsay exception found in the Military Rules of Evidence (MRE) provides a solid foundation upon which to build for the commissions. This exception requires that a military judge find the evidence to be probative and reliable—a standard with international acceptance. In practice, this standard could allow for alternatives to live testimony, such as by video teleconference, which take into account the global nature of the conflict.

I share previously expressed concerns about the admissibility of statements made by an accused as a product of torture or coercion. Without exception, statements obtained by torture, as defined in Title 18 of the U.S. Code, must be inadmissible. Coercion is a more nebulous concept. As a result, military judges should retain discretion to determine whether statements so alleged are admissible. After an examination of all the facts and circumstances surrounding the statement, the military judge could determine if it is inadmissible because it is either unreliable or lacking in probative value.

In closing, I submit that the jurisdiction of the military commissions should be broad enough to facilitate the prosecution of all unlawful enemy combatants, and not merely members of al Qaida, the Taliban, and associated organizations. Jurisdiction must extend to other terrorist groups, regardless of their level of organization, and the individual "freelancers" so common on the current battlefield.

Thank you again for the opportunity to provide comment. I look forward to continuing to work toward resolution of this matter.

Very respectfully,

JAMES C. WALKER,

Brigadier General, USMC,

Staff Judge Advocate to the Commandant.

Mr. MCCAIN. Mr. President, the JAG of the Air Force says:

... through the use of coercion, unlawful influence, or unlawful inducement. Each situation is obviously fact determinative and the military judge decides whether the statement is voluntary considering the totality of the circumstances. I trust the judgment of experienced military judges. Military commissions should not be permitted to consider evidence that is found to be unlawfully coerced and thus involuntary.

And the other two Judge Advocate Generals say the same thing, that the provisions of this bill are exactly in line with their opinions. Frankly, that had a great deal of weight in our adopting them.

Almost exactly 3 months ago, the Supreme Court decided the groundbreaking case of *Hamdan v. Rumsfeld*. In that case, a majority of the Court ruled that the military procedures used to try detainees held at Guantanamo Bay fell short of the standards of the Uniform Code of Military Justice and the Geneva Conventions.

The Court also determined that Common Article 3 of the Geneva Conventions applies to al-Qaida because our conflict with that terrorist organization is "not of an international character." Some of my colleagues may disagree with the Court's decision, but once issued it became the law of the land.

Unfortunately, the *Hamdan* decision left in its wake a void and uncertainty that Congress needed to address—and address quickly—in order to continue fighting the war on terrorism. I believe this act allows us to do that in a way that protects our soldiers and other personnel fighting on the front lines and respects core American principles of justice. I would like to thank Senators GRAHAM and WARNER and many others for their unceasing work on this bill.

I would like to take a few moments to describe some of the key elements of the legislation.

As is by now well known, Senators WARNER, GRAHAM, and I, and others, have resisted any redefinition or modification of our Nation's obligations under Common Article 3 of the Geneva Conventions. We did so because we care deeply about legal protections for American fighting men and women and about America's moral standing in the world. More than 50 retired military generals and flag officers expressed grave concern about redefining our Geneva obligations, including five former Chairmen of the Joint Chiefs of Staff.

Mr. President, I ask unanimous consent to have printed in the RECORD letters from GEN Colin Powell, GEN Jack Vessey, and GEN Hugh Shelton, and a letter from the former Commandant of the Marine Corps, General Krulak.

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

SEPTEMBER 13, 2006.

DEAR SENATOR MCCAIN: I just returned to town and learned about the debate taking place in Congress to redefine Common Article 3 of the Geneva Convention. I do not support such a step and believe it would be inconsistent with the McCain amendment on torture which I supported last year.

I have read the powerful and eloquent letter sent to you by one of my distinguished predecessors as Chairman of the Joint Chiefs of Staff, General Jack Vessey. I fully endorse in tone and tint his powerful argument. The world is beginning to doubt the moral basis of our fight against terrorism. To redefine

Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.

I am as familiar with The Armed Forces Officer as is Jack Vessey. It was written after all the horrors of World War II and General George C. Marshall, then Secretary of Defense, used it to tell the world and to remind our soldiers of our moral obligations with respect to those in our custody.

Sincerely,

GENERAL COLIN L. POWELL, USA (RET.).

SEPTEMBER 12, 2006.

Hon. JOHN MCCAIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCAIN: Sometimes, the news is a little garbled by the time it reaches the forests of North-central Minnesota, but I call your attention to recent reports that the Congress is considering legislation which might relax the United States' support for adherence to Common Article 3 of the Geneva Convention. If that is true, it would seem to weaken the effect of the McCain Amendment on torture of last year. If such legislation is being considered, I fear that it may weaken America in two respects. First, it would undermine the moral basis which has generally guided our conduct in war throughout our history. Second, it could give opponents a legal argument for the mistreatment of Americans being held prisoner in time of war.

In 1950, 3 years after the creation of the Department of Defense, the then Secretary of Defense, General George C. Marshall, issued a small book, titled *The Armed Forces Officer*. The book summarized the laws and traditions that governed our Armed Forces through the years. As the Senate deals with the issue, it might consider a short quote from the last chapter of that book which General Marshall sent to every American Officer. The last chapter is titled "Americans in Combat" and it lists 29 general propositions which govern the conduct of Americans in war. Number XXV, which I long ago underlined in my copy, reads as follows:

"The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not terrorize helpless non-combatants, if it is within our power to avoid so doing. Wanton killing, torture, cruelty or the working of unusual hardship on enemy prisoners or populations is not justified in any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes. . . ."

For the long term interest of the United States as a nation and for the safety of our own forces in battle, we should continue to maintain those principles. I continue to read and hear that we are facing a "different enemy" in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950-53, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II. Through those years, we held to our own values. We should continue to do so.

Thank you for your own personal courage in maintaining those values, both in war and on the floor of the Senate. I hope that my information about weakening American support for Common Article 3 of the Geneva

Convention is in error, and if not that the Senate will reject any such proposal.

Very respectfully,
GENERAL JOHN. W. VESSEY, USA (Ret.).

SEPTEMBER 20, 2006.

Hon. JOHN MCCAIN,
U.S. Senate,
Washington, DC.

DEAR SENATOR MCCAIN: I have followed with great interest the debate over whether to redefine in law Common Article 3 of the Geneva Conventions. I join my distinguished predecessors as Chairman of the Joint Chiefs of Staff, Generals Vessey and Powell, in expressing concern regarding the contemplated change. Such a move would, I believe, hinder our efforts to win America's wars and protect American soldiers.

Common Article 3 and associated Geneva provisions have offered legal protections to our troops since 1949. American soldiers are trained to Geneva standards and, in some cases, these standards constitute the only protections remaining after capture. Given our military's extraordinary presence around the world, Geneva protections are critical.

Should the Congress redefine Common Article 3 in domestic statute, the United States would be inviting similar reciprocal action by other parties to the treaty. Such an action would send a terrible signal to other nations that the United States is attempting to water down its obligations under Geneva. At a time when we are deeply engaged in a war of ideas, as well as a war on the battlefield, this would be an egregious mistake. I firmly believe that not only is such a move unnecessary, it potentially subjects our men and women in uniform to unnecessary danger.

The legislation sponsored by Senator Warner, which would enumerate war crime offenses while remaining silent on America's obligations under Common Article 3, is a better course of action. By doing so, our men and women in field will have the clarity they require, we can still interrogate terrorists, and our service personnel will have the undiluted protections offered by the Geneva Convention.

Respectfully,

GENERAL H. HUGH SHELTON.

SENATOR MCCAIN: This is the first time I have publically spoken about the administration policy regarding the war against terror but my professionalism and my conscience leads me to comment on the proposed "interpretation/change" to the Geneva Convention.

My concerns are as follows:

1. A redefinition or reinterpretation of the Geneva Convention, a document that has been taught to every recruit and officer candidate since its inception, would immediately attack the moral dimension with which every Soldier, Sailor, Marine and Airman is inculcated during their time as a member of the US Armed Forces. By weakening the moral link that these young men and women depend on . . . by allowing a redefinition of a lawful Convention . . . we run the risk of undermining the foundation upon which they willingly fight and die for our Country.

2. The mothers and fathers who give their sons and daughters to our care brought their children up to do "right" . . . to obey the law . . . to take the moral high ground. We do these parents a grave disservice by "legalizing" a different standard for their children.

3. This issue is NOT about what our enemy does to our servicemen and women when captured! This issue is all about how we, as Americans, act. Do we walk our talk. Do we change the rules of the game because our enemy acts in a horrific manner. Do we give up our honor because our enemy is without

honor? If we do, we begin to mimic the very behavior we abhor.

4. Many countries already look at the United States as arrogant. This redefinition/ reinterpretation would only serve to strengthen that conviction. The idea that the United States would "pick and choose" what portion of the Geneva Convention to follow . . . and what portion to "redefine/reinterpret" . . . goes against who we are as a people and as a Nation. The unintended consequence of this type of action is that it opens the door for other nations to make interpretations of their own . . . across a gamut of issues. The world is a dangerous place and our actions might well serve as precedents during the first battle of the NEXT war.

5. Finally, Duty-Honor-Country and Semper Fidelis are NOT just "bumper stickers". These words, and others like them, form the ethos of our Armed Forces. When you start to tamper with the laws governing warfare . . . laws recognized by countries around the world . . . you run the risk of bringing into question the very ethos that these men and women hold dear.

Semper Fidelis,

C.C. KRULAK,
General, USMC (Ret),
31st Commandant of the Marine Corps.

Mr. MCCAIN. These men express one common view: that modifying the Geneva Conventions would be a terrible mistake and would put our personnel at greater risk in this war and the next. If America is seen to be doing anything other than upholding the letter and spirit of the conventions, it will be harder, not easier, to defeat our enemies. I am pleased that this legislation before the Senate does not amend, redefine, or modify the Geneva Conventions in any way. The conventions are preserved intact.

The bill does provide needed clarity for our personnel about what activities constitute war crimes. For the first time, there will be a list of nine specific activities that constitute criminal violations of Common Article 3, punishable by imprisonment or even death. There has been much public discussion about specific interrogation methods that may be prohibited. But it is unreasonable to suggest that any legislation could provide an explicit and all-inclusive list of what specific activities are illegal and which are permitted. Still, I am confident that the categories included in this section will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering that need not be prolonged—I emphasize "that need not be prolonged."

Some critics of this legislation have asserted that it gives amnesty to U.S. personnel who may have committed war crimes since the enactment of the War Crimes Act. Nothing—nothing—could be further from the truth. As currently written, the War Crimes Act makes criminal any and all behavior that constitutes a violation of Common Article 3—specifically, any act that constitutes an "outrage upon personal dignity." Observers have commented that, though such outrages are difficult to define precisely, we all know them

when we see them. However, neither I nor any other responsible Member of this body should want to prosecute and potentially sentence to death any individual for violating such a vague standard.

The specificity that the bill provides to the War Crimes Act—and its retroactive effect—will actually make prosecuting war criminals a realistic goal. None of my colleagues should object to that goal.

It is also important to note that the acts that we propose to enumerate in the War Crimes Act are not the only activities prohibited under this legislation. The categories enumerated in the War Crimes Act list only those violations of Common Article 3 that are so grave as to constitute felonies potentially punishable by death. The legislation states explicitly that there are other, nongrave breaches of Common Article 3.

This legislation also requires the President to publish his interpretations of the Geneva Conventions, including what violations constitute nongrave breaches, in the Federal Register—in the Federal Register—for every American to see. These interpretations will have the same force as any other administrative regulation promulgated by the executive branch and, thus, may be trumped—may be trumped—by law passed by Congress.

Simply put, this legislation ensures that we respect our obligations under Geneva, recognizes the President's constitutional authority to interpret treaties, and brings accountability and transparency to the process of interpretation by ensuring that the Executive's interpretation is made public—the Executive's interpretation is made public. The legislation would also guarantee that Congress and the judicial branch will retain their traditional roles of oversight and review with respect to the President's interpretation of nongrave breaches of Common Article 3.

In short, whereas last year only one law—the torture statute—was deemed to apply to the treatment of all enemy detainees, now there is a set of overlapping and comprehensive legal standards that are in force: the Detainee Treatment Act, with its prohibition on cruel, inhuman, and degrading treatment as defined by the fifth, eighth, and fourteenth amendments to the Constitution, Common Article 3 of the Geneva Conventions, and the War Crimes Act. This legislation will allow—my colleagues, have no doubt—this legislation will allow the CIA to continue interrogating prisoners within the boundaries established in the bill.

Let me state this flatly: It was never our purpose to prevent the CIA from detaining and interrogating terrorists. On the contrary, it is important to the war on terror that the CIA have the ability to do so. At the same time, the CIA's interrogation program has to abide by the rules, including the standards of the Detainee Treatment Act.

I, like many of my colleagues, find troubling the reports that our intelligence personnel feel compelled to purchase liability insurance because of the lack of legal clarity that exists in the wake of the Hamdan decision. This legislation provides an affirmative defense for any Government personnel prosecuted under the War Crimes Act for actions they reasonably believed to be legal at the time. That is a long-standing precedent. In addition, it would eliminate any private right of action against our personnel based on a violation of the Geneva Conventions. The intent of this provision is to protect officers, employees, members of the Armed Forces, and other agents of the United States from suits for money damages or any other lawsuits that could harm the financial well-being of our personnel who were engaged in lawful—I emphasize “lawful”—activities.

It is important to note, however, that the fact that the Geneva Conventions lack a private right of action—and the fact that this legislation does not create such a right—has absolutely no bearing on whether the Conventions are binding on the executive branch. Even if the Geneva Conventions do not enable detainees to sue our personnel for money damages, the President and his subordinates are nevertheless bound to comply with Geneva. That is clear to me and to all who have negotiated this legislation in good faith.

This point is critical, because our personnel deserve not only the legal protections written into this legislation, but also the undiluted protections offered since 1949 by the Geneva Conventions. Should the United States be seen as amending, modifying, or redefining the Geneva Conventions, it would open the door for our adversaries to do the same, now and in the future. The United States should champion the Geneva Conventions, not look for ways to get around them, lest we invite others to do the same. America has more personnel deployed, in more places, than any other country in the world, and this unparalleled exposure only serves to further demonstrate the critical importance of our fulfilling the letter and the spirit of our international obligations. To do any differently would put our fighting men and women directly at risk. We owe it to our fighting men and women to uphold the Geneva Conventions, just as we have done for 57 years.

For these reasons, this bill makes clear that the United States will fulfill all of its obligations under those Conventions. We expect the CIA to conduct interrogations in a manner that is fully consistent not only with the Detainee Treatment Act and the War Crimes Act, but with all of our obligations under Common Article 3 of the Geneva Conventions.

Finally, I note that there has been opposition to this legislation from some quarters, including the New York Times editorial page. Without getting into a point-by-point rebuttal here on

the floor, I simply say that I have been reading the CONGRESSIONAL RECORD trying to find the bill that page so vociferously denounced. The hyperbolic attack is aimed not at any bill this body is today debating, nor even at the administration’s original position. I can only presume that some would prefer that Congress simply ignore the Hamdan decision and pass no legislation at all. That, I suggest to my colleagues, would be a travesty.

This is a very long, difficult task. This is critical for the future security of this Nation, and we have done the very best we can. I believe we have come up with a good product. I believe good-faith negotiations have taken place. I hope we will pass this legislation very soon. I think you will find that people will be brought to justice and we can move forward with trials with treating people under the Geneva Conventions and restoring America’s prestige in the world.

I thank my colleagues.

Mr. WARNER. Mr. President, I wish to commend our distinguished colleague on an excellent summary of the bill and his heartfelt expressions and interpretations of this bill, which I share.

The PRESIDING OFFICER. The Senator from Vermont is recognized.

Mr. LEAHY. Mr. President, it is from strength that America should defend our values and our Constitution. It takes a commitment to those values to demand accountability from the Government. In standing up for American values and security, I will vote against this bill.

I can give you many reasons, but let me take one. We will turn back the protections of the Great Writ of habeas corpus. Since 13th century Anglo jurisprudence, we have had the Great Writ. We have had habeas corpus since the birth of our Nation. We fought a revolution to make sure we could retain it. We fought a civil war, and we fought through two world wars. Now, in a matter of hours, in a debate that has so often skirted the issues, we are ready to strip back habeas corpus. I cannot vote for that.

Senator SMITH spoke stirringly earlier today of the dangers of the bill’s habeas provision, which would eliminate the independent judicial check on Government overreaching and lawlessness. He quoted from great defenders of liberty. It was Justice Robert H. Jackson who said in his role as Chief Counsel for the Allied Powers responsible for trying German war criminals after World War II: “That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason.” He closed the Nuremberg trials about which Senator DODD spoke earlier by saying: “Of one thing we may be sure. The future will never have to ask, with misgiving, ‘What could the Nazis have

said in their favor?’ History will know that whatever could be said, they were allowed to say. They have been given the kind of a trial which they, in the days of their pomp and power, never gave to any man. But fairness is not weakness. The extraordinary fairness of these hearings is an attribute of our strength.”

He was right and his wisdom was echoed this week at our Judiciary Committee hearing when Admiral Hutson and Lieutenant Commander Swift testified that fairness and lawfulness are our greatest strengths. This legislation doesn’t live up to that ideal. It strips away fairness.

The actions by the U.S. Government, this administration, for all its talk of strength, have made us less safe, and its current proposal is one that smacks of weakness and shivering fear. Its legislative demands reflect a cowering country that is succumbing to the threat of terrorism. I believe we Americans are better than that. I believe we are stronger than that. I believe we are fairer than that. And I believe America should be a leader in the fight for human rights and the rule of law, and that will strengthen us in our fight against terrorists.

We have taken our eye off the ball in this fight against terrorists. That is essentially what all of our intelligence agencies concluded in the National Intelligence Estimate that the administration had for six months while this was rolling along, but that they only shared a part of this past weekend. Our retooled and reorganized intelligence agencies, with leadership handpicked by the administration, have concluded, contrary to the campaign rhetoric of the President and Vice President, that the Iraq war has become a “cause celebre” that has inspired a new generation of terrorists. It hasn’t stopped terrorists, it has inspired new terrorists. Surely, the shameful mistreatment of detainees at Guantanamo, at Abu Ghraib, at secret CIA prisons, and that by torturers in other countries to whom we have turned over people, have become other “causes celebre” and recruiting tools for our enemies.

Surely, the continued occupation of Iraq, when close to three-quarters of Iraqis want U.S. forces to depart their country, is another circumstance being exploited by enemies to demonize our great country.

Passing laws that remove the remaining checks against mistreatment of prisoners will not help us win the battle for the hearts and minds of the generation of young people around the world being recruited by Osama bin Laden and al-Qaida. Authorizing indefinite detention of anybody the Government designates, without any proceeding or without any recourse, putting them into the secret prisons we condemned during the Cold War, is what our worse critics claim the United States would do. That is not what American values, our traditions, and our rule of law would have us do.

This is not just a bad bill, this is truly a dangerous bill.

I have been asking Secretary Rumsfeld's question for the last several weeks: whether our actions are eliminating more of our enemies than are being created. But now we understand that we are creating more enemies than we are eliminating. Our intelligence agencies agree that the global jihadist movement is spreading and adapting; it is "increasing in both number and geographic dispersion." We are putting ourselves more at risk.

"If this trend continues," our intelligence agencies say, that is, if we do not wise up and change course and adopt a winning new strategy, "threats to U.S. interests at home and abroad will become more diverse, leading to increasing attacks worldwide." Attacks have been increasing worldwide over the last 5 years of these failing policies and are, according to the judgment of our own, newly reconstituted intelligence agencies, likely to increase further in the days and months and years ahead. The intelligence agencies go on to note ominously that "new jihadist networks and cells, with anti-American agendas, are increasingly likely to emerge" and further that the "operational threat will grow," particularly abroad "but also in the homeland."

This is truly chilling. The Bush-Cheney administration not only failed to stop 9/11 from happening, but for 5 years they have failed to bring Osama bin Laden to justice, even though they had him cornered at Tora Bora. They yanked the special forces out of there to send them into Iraq. We have witnessed the growth of additional enemies.

And what do our intelligence agencies suggest is the way out of this dangerous quagmire? The National Intelligence Estimate suggests we have to "go well beyond operations to capture or kill terrorist leaders," and we must foster democratic reforms. When America can be seen abandoning its basic American democratic values, its checks and balances, its great and wonderful legal traditions, and can be seen as becoming more autocratic and less accountable, how will that foster democratic reforms elsewhere? "Do as I say and not as I do" is a model that has never successfully inspired peoples around the world, and it doesn't inspire me.

The 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. Even they cannot dismiss the practices at Guantanamo as the actions of a few "bad apples."

With Senate adoption of the antitorture 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. In rejecting the Kennedy amendment today, the Senate has turned away from the wise counsel and judgment of military professionals. Of course, the President in his signing statement already undermined enactment of the antitorture law.

The administration is now obtaining license—before, they just did it quietly and against the law and on their own say-so, but now they are obtaining license—to engage in additional harsh techniques that the rest of the world will see as abusive, as cruel, as degrading, and even as torture. Fortunately, a growing number of our own people see it that way, too.

What is being lost in this debate is any notion of accountability and the guiding principles of American values and law. 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 for 5 years? The Republican leadership's legislation strips away all accountability and erodes our most basic national values without so much as an accounting of these facts and legal arguments. Senator ROCKEFELLER's amendment to incorporate some accountability in the process through oversight of the CIA interrogation program was unfortunately rejected by the Republican leadership in the Senate.

Secrecy for all time is to be the Republican rule of the day. Congressional oversight is no more. Checks and balances are no more. The fundamental check that was last provided by the Supreme Court is now to be taken away. This is wrong. This should be unconstitutional. It is certainly unconscionable. This is certainly not the action of any Senate in which I have served. It is not worthy of the United States of America. What we are saying is one person will make all of the rules; there will be no checks and balances. There will be no dissent, and there will be nobody else's view, and we will remove, piece by piece, every single law that might have allowed checks and balances.

We are rushing through legislation that would have a devastating effect on our security and our values. I implore Senators to step back from the brink 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 in January 2001 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 antiterror budget on September 10, the day before the worst foreign terrorist attack on U.S. soil in our history. This administration was focused on Star Wars, not terrorism. Time was of the essence when Osama bin Laden was trapped in Tora Bora. But this administration was more interested in going after Sadaam Hussein, who the President recently admitted had "nothing" to do with 9/11.

After 5 years of this administration's unilateral actions that have left us less safe, time is now of the essence to take real steps to keep us safe from terrorism. Real steps like those included in the Real Security Act, S. 3875. We should be focusing on getting the terrorists and securing the nuclear material that this administration has allowed for the last 5 years to be unaccounted for around the world. We should be doing the things Senator KERRY and others are talking about, such as strengthening our special forces and winning the peace in Afghanistan, where the Taliban has regrouped and is growing in strength.

Instead, the President and the Republican Senate leadership call for rubberstamping more flawed White House proposals just in time for the runup to another election and for the fundraising appeals to go out.

I had hoped that this time, for the first time, even though the Senate is controlled by the President's party, we could act as an independent branch of the Government and serve as a check on this administration. After this debate and the rejection of all amendments intended to improve this measure, I see that day has long passed. I will continue to speak out. That is my privilege as a Senator. But I weep for our country and for the American values, the principles on which I was raised and which I took a solemn oath to uphold. I applaud those Senators who stood up several times on the floor today and voted to uphold the best of American values.

Going forward, the bill departs even more radically from our most fundamental values. And 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 closed-door revisions over the past week. For example, the bill has been amended to eliminate habeas corpus review even for persons inside the United States, and even for persons who have not been determined to be enemy combatants. It has moved from detention of those who are captured having taken up arms against the United States on a battlefield to millions of law-abiding Americans that the Government might suspect of sympathies for Muslim causes and who knows what else—without any avenue for effective review.

Remember, we are giving a blank check to a Government whose incompetence was demonstrated in historic dimensions by the lack of preparation in response to Hurricane Katrina. This is the same Government which, in its fight against terrorism, has had Senator KENNEDY and Congressman LEWIS on terrorist watch lists, and could not get them off. This is a Government which repeatedly releases confidential family information about our Armed Forces and veterans. It is a Government which just refuses to admit any mistakes or to make any corrections but regards all of its representatives, from Donald Rumsfeld to Michael Brown, as doing a "heckuva job."

The proponents of this bill talk about sending messages. What message does it send to the millions of legal immigrants living in America, participating in American families, working for American businesses, and paying American taxes? Its message is 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—a term that the bill now defines in a tortured and unprecedentedly broad manner. And that power and any errors cannot be reviewed or corrected by a court. What message does that send about abuse of power? What message does that send to the world about America's freedoms?

Numerous press accounts have quoted administration officials who believe that a significant percentage of those detained at Guantanamo have no connection to terrorism. In other words, the Bush-Cheney administration has been holding for several years, and intends to hold indefinitely without trial or any recourse to justice, a substantial number of innocent people who were turned in by anonymous bounty hunters or picked up by mistake in the fog of war or as a result of a tribal or personal vendetta. The most important purpose of habeas corpus is to correct errors like that—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 the public Safety may require it." But court review has now embarrassed the Bush administration, as the U.S. Supreme Court has three times rejected its lawyers' schemes. And, so how does the administration respond? It insists that there be no more judicial check on its actions and errors.

When the Senate accedes to that demand, it abandons American principles and all checks on an imperial Presidency. The Senator from Vermont will not be a party to retreat from America's constitutional values. Vermonters don't retreat.

Senator SMITH, speaking this morning about the habeas provisions of this bill, quoted Thomas Jefferson, who said:

The habeas corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume.

Jefferson said on another occasion:

I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it.

With this bill, the Senate reverses that profound judgment of history, chooses against liberty, and succumbs to fear.

When former Secretary of State Colin Powell wrote last week of his concerns with the administration's bill, he wrote about doubts concerning our "moral authority in the war against terrorism." This General, former head of the Joint Chiefs of Staff and former Secretary of State, was right. Now we have heard from a number of current and former diplomats, military lawyers, Federal judges, law professors and law school deans, the American Bar Association, and even the first President Bush's Solicitor General, Kenneth Starr, that they have grave concerns with the habeas corpus stripping provisions of this bill.

I agree with Mr. Starr that we should not suspend—and we should certainly not eliminate—the Great Writ. I also agree with more than 300 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 traditions." And I agree with more than 30 former U.S. Ambassadors and other senior diplomats, who say that eliminating habeas corpus for aliens detained by the United States will harm our interests abroad, and put our own military, diplomatic, and other personnel stationed abroad at risk. We cannot 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 9/11 attacks, and in the face 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, to shiver and quake, to rely on secrecy and torture. Those are ways of repression and oppression, not the American way.

We need to pursue the war on terror with strength and intelligence, but we need to uphold American ideals. 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 and cruel and inhumane treatment of detainees. He did not want clarity when spying on Americans without warrants. And he certainly did not want clarity while keep-

ing 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 withstand the light of day.

It seems the only clarity this administration wants is a clear green light from Congress to do whatever it wants. That is not clarity. That is immunity from crime. I cannot vote for that. 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 America's values.

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 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. Despite the President's calls for clarity, the new provisions are so purposefully ambiguous that we cannot know for sure whether they are covered. 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 and made us less safe. 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 the green light to change their laws 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 a 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.

This bill does not clarify the War Crimes Act. It authorizes and immunizes abhorrent conduct that violates our basic ideals. Perhaps that is why more than 40 religious organizations and human rights groups wrote to urge the Senate to take more time to consider the effects of this legislation on our safety, security, and commitment to the rule of law, and to vote against it if the serious problems in the bill are not corrected.

The proposed legislation would also allow the admission of evidence obtained through cruel and inhuman treatment into military commission proceedings. 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 commissions 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 obtained 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 arrested by our government on bad intelligence and sent 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 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 noncitizens alike—who have "purposefully and materially supported hostilities" against the United States or its allies. It also includes people determined to be unlawful enemy combatants by any "competent tribunal" established by the President or the Secretary of Defense. So the Government can select any person, including a United States 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.

I am sorry the Republican leadership passed up the chance to consider and pass bipartisan legislation that would have made 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. I will not participate in a legislative retreat out of weakness that undercuts everything this Nation stands for and that makes us more vulnerable and less secure.

The Senator from Vermont, consistent with my oath of office and my conscience and my commitment to the people of Vermont and the Nation, cannot—I will not—support this bill.

The PRESIDING OFFICER (Mr. CHAFEE). Who yields time? The Senator from Michigan.

Mr. LEVIN. Mr. President, I believe I have 4 minutes allocated.

The PRESIDING OFFICER. There is 3½ minutes remaining.

Mr. LEVIN. Mr. President, less than 2 weeks ago, the Armed Services Committee voted on a military commissions bill. The committee endorsed that bill on a bipartisan basis with a 15-to-9 vote. Yesterday, 43 of us voted for the same bill on the Senate floor.

The bill would have provided the administration with the tools that it needed to detain enemy combatants, conduct interrogations, and prosecute detainees for any war crimes they may have committed.

Unfortunately, that bill went off the tracks after it was approved by the Armed Services Committee. Instead of bringing to the Senate floor the bill that had been adopted by the Armed Services Committee on a bipartisan basis, we are voting now on a dramatically different bill based on changes made at the insistence of an administration that has been relentless in its determination to legitimize the abuse of detainees, to protect those who authorize the abuses, and to distort military commission procedures in order to ensure criminal convictions.

For example, the bill before us inexplicably fails to prohibit the use of statements or testimony obtained through cruel and inhuman treatment as long as those statements or testimony was obtained before December 30, 2005.

The argument has been made that the bill before us prohibits the use of statements that are obtained through torture. That was never in contention. The problem is that it permits the use of statements obtained through cruel and inhuman treatment that doesn't meet the strict definition of torture as long as those statements were obtained before December 30, 2005.

This is a compromise on the issue of cruelty—an issue on which there should be no compromise by our Nation or by the Senate. If we compromise on that, we compromise at our peril. The men and women who represent us in uniform will be in much greater danger if we compromise on the issue of statements obtained through cruelty and inhuman treatment.

A compromise on this issue endangers our troops because if other nations apply the same standard and allow statements or confessions obtained through cruelty to be used at so-called trials of our citizens, we will have little ground to stand on in our objecting to them.

This bill also does many other things which are dramatic changes from the bill that came out of the Armed Services Committee. For instance, the bill would authorize the use of evidence seized without a search warrant or other authorization, even if that evidence was seized from U.S. citizens inside the United States in clear violation of the U.S. Constitution.

Both the committee bill and the bill before us provide the executive branch with the tools it needs to hold enemy combatants accountable for any war crimes they may have committed. On this issue we are in agreement. We all agree that people who are responsible for the terrible events of September 11 and other terrorist attacks around the world should be brought to justice.

However, the bill before us differs dramatically from the Senate Armed Services Committee bipartisan-approved bill, particularly when it comes to the accountability of the administration for policies and actions leading to the abuses of detainees.

The bill before us contains provision after provision designed to ensure that the administration will not be held accountable for the abuse of prisoners in U.S. custody, for violations of U.S. law, or for the use of such tactics that have turned much of the world against us.

Over the last 2 days, we have debated the habeas corpus provision in the bill. Most of that debate has focused on the writ of habeas corpus as an individual right to challenge the lawfulness of detention. The writ of habeas corpus does serve that purpose.

But the writ of habeas corpus has always served a second purpose as well:

for its 900-year history, the writ of habeas corpus has always served as a means of making the sovereign account for its actions. By depriving detainees of the opportunity to demonstrate that they were detained in error, this bill not only deprives individuals of a critical right deeply embedded in American law, it also helps ensure that the administration will not be held to account for the illegal or abusive treatment of detainees.

Indeed, the court-stripping provision in the bill does far more than just eliminate habeas corpus rights for detainees. It also prohibits the U.S. courts from hearing or considering “any other action against the United States or its agents relating to any aspect of the detention, treatment, or trial” of an alien detainee. By depriving detainees of access to our courts, even if they have been subject to torture or to cruel and inhuman treatment, this provision seeks to ensure that the details of administration policies that appear to have violated our obligations under U.S. and international law will never be aired in court.

A number of other provisions in the bill before us appear to be directed at the same objective. For example, section 5 of the bill provides that no person—whether that person is an enemy combatant or anybody else—may invoke the Geneva Conventions as a source of rights in a habeas corpus or other proceeding in any court of the United States. Section 948b(g) of the military commissions part of the bill would similarly provide that no person subject to trial by military commission may invoke the Geneva Conventions as a source of rights. These provisions, like the habeas corpus provision, appear to be designed to ensure that administration policies that may have violated our obligations under U.S. and international law will never be aired in court.

Other provisions in the bill narrow the range of abuses that are covered by the War Crimes Act. As a result of these amendments, some actions that were war crimes at the time they took place will not be prosecutable. Indeed, because of a complex definition in the bill, some actions that violated the War Crimes Act at the time they took place and will violate that act if they take place in the future will not be prosecutable. In other words, this bill carves out a window to immunize actions of this administration from prosecution under the War Crimes Act.

The administration and its allies have argued that these provisions are necessary to protect CIA interrogators from prosecution for actions that they believed to be lawful and authorized at the time they were undertaken. However, we addressed that problem with the enactment of the Detainee Treatment Act last year. That law provides a defense to any U.S. agent who engaged in specific operational practices that were officially authorized or rea-

sonably believed to be lawful at the time they were undertaken.

This bill, however, goes far beyond protecting the front line interrogators and agents who believed that their actions were lawful: it changes the law to ensure that the administration officials who provided the authorization and knew or should have known that there was no legal basis for that authorization, will not be held accountable for their actions.

Last year, this Congress took an important stand for the rule of law by enacting the McCain amendment, which prohibits the cruel, inhuman, or degrading treatment of detainees in the custody of any U.S. agency anywhere in the world. That landmark provision is at risk of being rendered meaningless, if we establish rules ensuring that it can never be enforced.

We need to provide the administration with the tools that are needed to prosecute unlawful enemy combatants for any war crimes that they may have committed. However, we should not do so in a way that is inconsistent with our own values as a Nation. We need to practice what we preach to the rest of the world.

The bill before us will put our own troops who might be captured in future conflicts at risk if other countries decide to apply similar standards to us, is likely to result in the reversal of convictions on appeal, and is inconsistent with American values. For these reasons, I will vote no on final passage.

THE PRESIDING OFFICER. The minority leader.

MR. REID. Mr. President, it is my understanding I am to speak and the majority leader will speak and then we will vote; is that true?

THE PRESIDING OFFICER. That is correct.

MR. REID. Mr. President, on a bright and sunny September morning 5 years ago, history changed in an instant. Our Nation was attacked. Nearly 3,000 of our citizens were murdered, and our lives as we knew them were forever changed.

The family members of those who died that day and we, their fellow Americans, have been waiting 5 years for those who masterminded that outrageous terrorist attack to be brought to justice. Osama bin Laden, a man whom we have seen on videotape bragging and laughing about his role in conceiving this deed, remains at large 5 years later. The American people are justifiably frustrated that he has not been caught. They have a right to ask whether our military and intelligence resources were unwisely diverted from that solemn task.

But some of Osama bin Laden's lieutenants were captured overseas years ago. There is no disagreement whatsoever between Republicans and Democrats on the need to bring these people to justice. We all want to make sure the President has the tools he needs to make this happen.

For 5 years, Democrats stood ready to work with the President and the Republican Congress to establish sound

procedures for military tribunals. Mr. President, why do you think the Democratic ranking member of the Judiciary Committee has been so outraged at what has been going on? He is outraged because as the top Democrat on the Judiciary Committee, he introduced a bill in 2002 to solve the problems that are now before the Senate—4 years ago. No wonder he is incensed.

Unfortunately, President Bush chose to ignore Senator LEAHY and the Congress and ignore the advice of uniformed military professionals. He set up a flawed and imbalanced military tribunal system that failed to prosecute a single terrorist. Not surprisingly, it was ruled unconstitutional by the U.S. Supreme Court.

Forced by the Court decision to ask Congress for help, the Bush administration initially asked us, the Congress, to rubberstamp basically the same system that the Supreme Court struck down. Their proposal for one-sided trials and murky interrogation rules was opposed by such well-respected leaders as GEN Colin Powell and former Secretary of State George Shultz, both Republicans, and many others, Democrats and Republicans.

I must say, a handful of principled Republican Senators, led by the chairman of the Armed Services Committee, Senator WARNER, Senator GRAHAM from South Carolina, and Senator MCCAIN from Arizona stepped forward and forced the White House to back down from the worst elements of its extreme proposal. I appreciate the position of those Republican Senators, the names I have given you.

I repeat, Mr. President, I admire their courage. I appreciate the improvements they managed to make in this bill. But for them what is before us would be a lot worse.

However, since those Senators announced their agreement with the administration last Friday, the compromise has become much worse. The bill before us now looks more and more like the administration bill these Senators fought so hard against.

I believe the bill approved by the Senate Armed Services Committee would have given the President all necessary authority. It was supported by the chairman and a bipartisan majority of that committee, as well as our Nation's uniformed military lawyers.

The bill before us diverges from the committee bill in many ways, but let me talk about two.

First, it makes less clear that the United States will abide by our obligations under the Geneva Conventions. The President says the United States does not engage in torture and there should be no ambiguity on that point, but this bill gives the President authority to reinterpret our obligations and limits judicial oversight of that process, putting our own troops at risk on the battlefield.

A four-star general, former Secretary of State, former Chairman of the Joint Chiefs of Staff, GEN Colin Powell, wrote:

The world is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.

Second, this bill authorizes a vast expansion of the President's power to detain people, even U.S. citizens, indefinitely and without charge. There are no procedures for doing so. There is no due process provided, and no time limit on the detention is set.

At the same time, the bill would deprive Federal judges of the power to review the legality of many such detentions. Judges—all judges—would have no power to review the legality of many such detentions. This is true even in the case of a lawful permanent resident arrested and held in the United States, and even if that person happens to be completely innocent.

The Framers of our Constitution understood the need for checks and balances. This bill has thrown that principle right out the window.

Many of the worst provisions were not in the committee-reported bill and were not in the compromise announced last Friday. They were added over the weekend. Remember, there was a bill that was put before the Senate last Thursday, and from Thursday to Monday, it changed after, I say, back-room meetings with White House lawyers.

We have tried to improve this legislation. My friend, the ranking member of the Armed Services Committee, Senator CARL LEVIN, proposed to substitute the bipartisan bill reported by the Armed Services Committee. That amendment was rejected basically on a party-line vote.

Senators SPECTER and LEAHY, the two Members who are responsible for the Judiciary Committee, the chairman and ranking member, offered an amendment to restore the right of judicial review. This amendment was rejected on a party-line vote.

And Senator ROCKEFELLER, the ranking Democrat on the Intelligence Committee, offered an amendment to improve congressional oversight of the CIA programs. This amendment was rejected on a party-line vote.

Senator KENNEDY offered an amendment to clarify that inhumane interrogation tactics prohibited by the Army Field Manual could not be used on Americans or on others. That amendment was rejected on a party-line vote.

Senator BYRD, who has seen things come and go in this body and who has been a Member of Congress for more than 50 years, offered an amendment to sunset military commissions so Congress would be required to reconsider this far-reaching authority after 5 years of having it in effect. That commonsense, realistic amendment was rejected on a party-line vote.

I personally believe, having been in a few courtrooms, that this legislation is unconstitutional. It will certainly be struck down by the Supreme Court in the years ahead, and when that hap-

pens, we will be back here debating how to bring terrorists to justice.

The families of the 9/11 victims and the Nation have been waiting 5 years for the perpetrators of these attacks to be brought to justice. They should not have to wait longer. We should get this right now; we should do it right. We are not doing so by passing this bill.

The national security policies of this administration and this Republican Congress may have been tough, but they certainly haven't been smart. The American people are paying a tremendous price for their mistakes. History will judge our actions here today. I am convinced that future generations will view passage of this bill as a grave error. I will be recorded as voting against this piece of legislation.

Mr. President, I dislike, I find repulsive, and I do not condone these evil and horrible people, these terrorists. They should be brought before the bar of justice and given what they deserve. For 5 years, that has not been the case. We Democrats want terrorists brought to justice quickly and in a way in keeping with our Constitution and, in this manner, give honor to the sacrifices made by American patriots in days past.

I yield the floor.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. FRIST. Mr. President, for the past month we have debated how best to keep America safe. On one point I know all of our colleagues agree is that Khalid Sheikh Mohammed should be brought to justice. He should be prosecuted for masterminding the mass murders of almost 3,000 Americans on September 11. I know the American people and the families of those victims share that goal.

Every terrorist should be held accountable for their crimes against the innocent, against our enduring freedoms, against the values that we all share. Unfortunately, due to the Supreme Court's decision in *Hamdan v. Rumsfeld*, prosecutions of suspected terrorists like Khalid Sheikh Mohammed are at a stand-still, and these prosecutions will remain at a stand-still until we act to authorize military commissions to try these suspected terrorists.

In addition to halting prosecutions of suspected terrorists, the *Hamdan* decision has undermined effective interrogation methods employed by our intelligence community. These methods yield critical information that allows us to prevent terrorist attacks and to save innocent lives. The information provided by these enemy combatants is our primary source—our best source—of reliable intelligence.

Past interrogations have guided us to the precise location of terrorists in hiding, explained how al-Qaida leaders communicate with operatives in Iraq, and identified voices in intercepted calls. Without this information, we fight a blind war.

The bill we will vote on in a few minutes addresses the concerns raised by

the Hamdan decision. It provides the legislative framework authorizing military tribunals to prosecute suspected terrorists. It ensures certain protections and rights for the accused such as the right to counsel and the right to exclude evidence obtained through torture.

At the same time, the bill recognizes that because we are at war with a different type of enemy, we should not try terrorist detainees in the same way as our uniformed military or civilian criminals.

The bill also protects classified information from terrorists who could exploit it to plan another terrorist attack.

Finally, the bill allows key intelligence programs to continue while ensuring that our detention and interrogation methods comply with both domestic and international laws, including Geneva Conventions Common Article 3.

The bottom line is the bill before us allows us to bring terrorists to justice through full and fair military trials while preserving intelligence programs—intelligence programs that have disrupted terrorist plots and saved countless American lives.

Our national security demands that we pass this bill tonight. We need this tool in the war on terror. In the 5 years since 9/11 we have not suffered another terrorist attack on U.S. soil. One reason we have remained safe is by staying on the offense against emerging threats. This bill is another offensive strike against terrorism.

For the safety and security of the American people, Mr. President, I urge my colleagues to join us in supporting the Military Commission Act of 2006.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The question is, Shall the bill, as amended, pass?

The yeas and nays have been ordered. The clerk will call the roll.

The legislative clerk called the roll.

Mr. MCCONNELL. The following Senator was necessarily absent: the Senator from Maine (Ms. SNOWE).

Further, if present and voting, the Senator from Maine (Ms. SNOWE) would have voted "yea."

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

The result was announced—yeas 65, nays 34, as follows:

[Rollcall Vote No. 259 Leg.]

YEAS—65

Alexander Burns Collins
Allard Burr Cornyn
Allen Carper Craig
Bennett Chambliss Crapo
Bond Coburn DeMint
Brownback Cochran DeWine
Bunning Coleman Dole

Domenici Lautenberg Santorum
Ensign Lieberman Sessions
Enzi Lott Shelby
Frist Lugar Smith
Graham Martinez Specter
Grassley McCain Stabenow
Gregg McConnell Stevens
Hagel Menendez Sununu
Hatch Murkowski Talent
Hutchison Nelson (FL) Thomas
Inhofe Nelson (NE) Thune
Isakson Pryor Roberts
Johnson Rockefeller Vitter
Kyl Rockefeller Voinovich
Landrieu Salazar Warner

NAYS—34

Akaka Dodd Levin
Baucus Dorgan Lincoln
Bayh Durbin Mikulski
Biden Feingold Murray
Bingaman Feinstein Obama
Boxer Harkin Reed
Byrd Inouye Reid
Cantwell Jeffords Sarbanes
Chafee Kennedy Schumer
Clinton Kerry Wyden
Conrad Kohl
Dayton Leahy

NOT VOTING—1

Snowe

The bill (S. 3930), as amended, was passed, as follows:

S. 3930

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Military Commissions Act of 2006".

(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
Sec. 2. Construction of Presidential authority to establish military commissions.
Sec. 3. Military commissions.
Sec. 4. Amendments to Uniform Code of Military Justice.
Sec. 5. Treaty obligations not establishing grounds for certain claims.
Sec. 6. Implementation of treaty obligations.
Sec. 7. Habeas corpus matters.
Sec. 8. Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel.
Sec. 9. Review of judgments of military commissions.
Sec. 10. Detention covered by review of decisions of Combatant Status Review Tribunals of propriety of detention.

SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President under the Constitution of the United States and laws of the United States to establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require.

SEC. 3. MILITARY COMMISSIONS.

(a) MILITARY COMMISSIONS.—
(1) IN GENERAL.—Subtitle A of title 10, United States Code, is amended by inserting after chapter 47 the following new chapter:

CHAPTER 47A—MILITARY COMMISSIONS

- Subchapter
I. General Provisions 948a
II. Composition of Military Commissions 948h
III. Pre-Trial Procedure 948q

- IV. Trial Procedure 949a
V. Sentences 949s
VI. Post-Trial Procedure and Review of Military Commissions 950a
VII. Punitive Matters 950p
SUBCHAPTER I—GENERAL PROVISIONS
Sec.
948a. Definitions.
948b. Military commissions generally.
948c. Persons subject to military commissions.
948d. Jurisdiction of military commissions.
948e. Annual report to congressional committees.

§ 948a. Definitions

In this chapter:

(1) UNLAWFUL ENEMY COMBATANT.—(A) The term 'unlawful enemy combatant' means—

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

(B) CO-BELLIGERENT.—In this paragraph, the term 'co-belligerent', with respect to the United States, means any State or armed force joining and directly engaged with the United States in hostilities or directly supporting hostilities against a common enemy.

(2) LAWFUL ENEMY COMBATANT.—The term 'lawful enemy combatant' means a person who is—

(A) a member of the regular forces of a State party engaged in hostilities against the United States;

(B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or

(C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.

(3) ALIEN.—The term 'alien' means a person who is not a citizen of the United States.

(4) CLASSIFIED INFORMATION.—The term 'classified information' means the following:

(A) Any information or material that has been determined by the United States Government pursuant to statute, Executive order, or regulation to require protection against unauthorized disclosure for reasons of national security.

(B) Any restricted data, as that term is defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

(5) GENEVA CONVENTIONS.—The term 'Geneva Conventions' means the international conventions signed at Geneva on August 12, 1949.

§ 948b. Military commissions generally

(a) PURPOSE.—This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

(b) AUTHORITY FOR MILITARY COMMISSIONS UNDER THIS CHAPTER.—The President is authorized to establish military commissions under this chapter for offenses triable by

military commission as provided in this chapter.

“(c) CONSTRUCTION OF PROVISIONS.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.

“(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—(1) The following provisions of this title shall not apply to trial by military commission under this chapter:

“(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

“(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.

“(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pre-trial investigation.

“(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter only to the extent provided by this chapter.

“(e) TREATMENT OF RULINGS AND PRECEDENTS.—The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial convened under chapter 47 of this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, decision, or other determination of a court-martial convened under that chapter.

“(f) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.

“(g) GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

“§ 948c. Persons subject to military commissions

“Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

“§ 948d. Jurisdiction of military commissions

“(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

“(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of war are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense made punishable under this chapter.

“(c) DETERMINATION OF UNLAWFUL ENEMY COMBATANT STATUS DISPOSITIVE.—A finding, whether before, on, or after the date of the enactment of the Military Commissions Act of 2006, by a Combatant Status Review Tribunal or another competent tribunal estab-

lished under the authority of the President or the Secretary of Defense that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter.

“(d) PUNISHMENTS.—A military commission under this chapter may, under such limitations as the Secretary of Defense may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when authorized under this chapter or the law of war.

“§ 948e. Annual report to congressional committees

“(a) ANNUAL REPORT REQUIRED.—Not later than December 31 each year, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report on any trials conducted by military commissions under this chapter during such year.

“(b) FORM.—Each report under this section shall be submitted in unclassified form, but may include a classified annex.

“SUBCHAPTER II—COMPOSITION OF MILITARY COMMISSIONS

“Sec.

“948h. Who may convene military commissions.

“948i. Who may serve on military commissions.

“948j. Military judge of a military commission.

“948k. Detail of trial counsel and defense counsel.

“948l. Detail or employment of reporters and interpreters.

“948m. Number of members; excuse of members; absent and additional members.

“§ 948h. Who may convene military commissions

“Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.

“§ 948i. Who may serve on military commissions

“(a) IN GENERAL.—Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter.

“(b) DETAIL OF MEMBERS.—When convening a military commission under this chapter, the convening authority shall detail as members of the commission such members of the armed forces eligible under subsection (a), as in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a military commission when such member is the accuser or a witness for the prosecution or has acted as an investigator or counsel in the same case.

“(c) EXCUSE OF MEMBERS.—Before a military commission under this chapter is assembled for the trial of a case, the convening authority may excuse a member from participating in the case.

“§ 948j. Military judge of a military commission

“(a) DETAIL OF MILITARY JUDGE.—A military judge shall be detailed to each military commission under this chapter. The Secretary of Defense shall prescribe regulations providing for the manner in which military judges are so detailed to military commissions. The military judge shall preside over each military commission to which he has been detailed.

“(b) QUALIFICATIONS.—A military judge shall be a commissioned officer of the armed

forces who is a member of the bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of this title (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such military judge is a member.

“(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person is eligible to act as military judge in a case of a military commission under this chapter if he is the accuser or a witness or has acted as investigator or a counsel in the same case.

“(d) CONSULTATION WITH MEMBERS; INELIGIBILITY TO VOTE.—A military judge detailed to a military commission under this chapter may not consult with the members of the commission except in the presence of the accused (except as otherwise provided in section 949d of this title), trial counsel, and defense counsel, nor may he vote with the members of the commission.

“(e) OTHER DUTIES.—A commissioned officer who is certified to be qualified for duty as a military judge of a military commission under this chapter may perform such other duties as are assigned to him by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

“(f) PROHIBITION ON EVALUATION OF FITNESS BY CONVENING AUTHORITY.—The convening authority of a military commission under this chapter shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to the military commission which relates to his performance of duty as a military judge on the military commission.

“§ 948k. Detail of trial counsel and defense counsel

“(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial counsel and military defense counsel shall be detailed for each military commission under this chapter.

“(2) Assistant trial counsel and assistant and associate defense counsel may be detailed for a military commission under this chapter.

“(3) Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused.

“(4) The Secretary of Defense shall prescribe regulations providing for the manner in which trial counsel and military defense counsel are detailed for military commissions under this chapter and for the persons who are authorized to detail such counsel for such commissions.

“(b) TRIAL COUNSEL.—Subject to subsection (e), trial counsel detailed for a military commission under this chapter must be—

“(1) a judge advocate (as that term is defined in section 801 of this title (article 1 of the Uniform Code of Military Justice) who—

“(A) is a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

“(B) is certified as competent to perform duties as trial counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member; or

“(2) a civilian who—

“(A) is a member of the bar of a Federal court or of the highest court of a State; and

“(B) is otherwise qualified to practice before the military commission pursuant to regulations prescribed by the Secretary of Defense.

“(c) MILITARY DEFENSE COUNSEL.—Subject to subsection (e), military defense counsel detailed for a military commission under

this chapter must be a judge advocate (as so defined) who is—

“(1) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and

“(2) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed force of which he is a member.

“(d) CHIEF PROSECUTOR; CHIEF DEFENSE COUNSEL.—(1) The Chief Prosecutor in a military commission under this chapter shall meet the requirements set forth in subsection (b)(1).

“(2) The Chief Defense Counsel in a military commission under this chapter shall meet the requirements set forth in subsection (c)(1).

“(e) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person who has acted as an investigator, military judge, or member of a military commission under this chapter in any case may act later as trial counsel or military defense counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may act later in the same case for the defense, nor may any person who has acted for the defense before a military commission under this chapter act later in the same case for the prosecution.

“§ 948l. Detail or employment of reporters and interpreters

“(a) COURT REPORTERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter shall detail to or employ for the commission qualified court reporters, who shall make a verbatim recording of the proceedings of and testimony taken before the commission.

“(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission under this chapter may detail to or employ for the military commission interpreters who shall interpret for the commission and, as necessary, for trial counsel and defense counsel and for the accused.

“(c) TRANSCRIPT; RECORD.—The transcript of a military commission under this chapter shall be under the control of the convening authority of the commission, who shall also be responsible for preparing the record of the proceedings.

“§ 948m. Number of members; excuse of members; absent and additional members

“(a) NUMBER OF MEMBERS.—(1) A military commission under this chapter shall, except as provided in paragraph (2), have at least five members.

“(2) In a case in which the accused before a military commission under this chapter may be sentenced to a penalty of death, the military commission shall have the number of members prescribed by section 949m(c) of this title.

“(b) EXCUSE OF MEMBERS.—No member of a military commission under this chapter may be absent or excused after the military commission has been assembled for the trial of a case unless excused—

“(1) as a result of challenge;

“(2) by the military judge for physical disability or other good cause; or

“(3) by order of the convening authority for good cause.

“(c) ABSENT AND ADDITIONAL MEMBERS.—Whenever a military commission under this chapter is reduced below the number of members required by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide not less than such number. The trial may proceed with the new members present after the recorded evidence previously introduced before the members has been read to

the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

“SUBCHAPTER III—PRE-TRIAL PROCEDURE

“Sec.

“948q. Charges and specifications.

“948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements.

“948s. Service of charges.

“§ 948q. Charges and specifications

“(a) CHARGES AND SPECIFICATIONS.—Charges and specifications against an accused in a military commission under this chapter shall be signed by a person subject to chapter 47 of this title under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

“(1) that the signer has personal knowledge of, or reason to believe, the matters set forth therein; and

“(2) that they are true in fact to the best of the signer's knowledge and belief.

“(b) NOTICE TO ACCUSED.—Upon the swearing of the charges and specifications in accordance with subsection (a), the accused shall be informed of the charges against him as soon as practicable.

“§ 948r. Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements

“(a) IN GENERAL.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.

“(b) EXCLUSION OF STATEMENTS OBTAINED BY TORTURE.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.

“(c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

“(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and

“(2) the interests of justice would best be served by admission of the statement into evidence.

“(d) STATEMENTS OBTAINED AFTER ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

“(1) the totality of the circumstances renders the statement 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 to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.

“§ 948s. Service of charges

“The trial counsel assigned to a case before a military commission under this chapter shall cause to be served upon the accused and military defense counsel a copy of the charges upon which trial is to be had. Such charges shall be served in English and, if appropriate, in another language that the accused understands. Such service shall be made sufficiently in advance of trial to prepare a defense.

“SUBCHAPTER IV—TRIAL PROCEDURE

“Sec.

“949a. Rules.

“949b. Unlawfully influencing action of military commission.

“949c. Duties of trial counsel and defense counsel.

“949d. Sessions.

“949e. Continuances.

“949f. Challenges.

“949g. Oaths.

“949h. Former jeopardy.

“949i. Pleas of the accused.

“949j. Opportunity to obtain witnesses and other evidence.

“949k. Defense of lack of mental responsibility.

“949l. Voting and rulings.

“949m. Number of votes required.

“949n. Military commission to announce action.

“949o. Record of trial.

“§ 949a. Rules

“(a) PROCEDURES AND RULES OF EVIDENCE.—Pretrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial. Such procedures and rules of evidence may not be contrary to or inconsistent with this chapter.

“(b) RULES FOR MILITARY COMMISSION.—(1) Notwithstanding any departures from the law and the rules of evidence in trial by general courts-martial authorized by subsection (a), the procedures and rules of evidence in trials by military commission under this chapter shall include the following:

“(A) The accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing, as provided for by this chapter.

“(B) The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.

“(C) The accused shall receive the assistance of counsel as provided for by section 948k.

“(D) The accused shall be permitted to represent himself, as provided for by paragraph (3).

“(2) In establishing procedures and rules of evidence for military commission proceedings, the Secretary of Defense may prescribe the following provisions:

“(A) Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.

“(B) Evidence 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.

“(C) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.

“(D) Evidence shall be admitted as authentic so long as—

“(i) the military judge of the military commission determines that there is sufficient basis to find that the evidence is what it is claimed to be; and

“(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

“(E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.

“(ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

“(F) The military judge shall exclude any evidence the probative value of which is substantially outweighed—

“(i) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or

“(ii) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

“(3)(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (1)(D) shall conform his deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

“(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (1)(D). In such case, the detailed defense counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

“(C) DELEGATION OF AUTHORITY TO PRESCRIBE REGULATIONS.—The Secretary of Defense may delegate the authority of the Secretary to prescribe regulations under this chapter.

“(d) NOTIFICATION TO CONGRESSIONAL COMMITTEES OF CHANGES TO PROCEDURES.—Not later than 60 days before the date on which any proposed modification of the procedures in effect for military commissions under this chapter goes into effect, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the modification.

“§ 949b. Unlawfully influencing action of military commission

“(a) IN GENERAL.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

“(2) No person may attempt to coerce or, by any unauthorized means, influence—

“(A) the action of a military commission under this chapter, or any member thereof,

in reaching the findings or sentence in any case;

“(B) the action of any convening, approving, or reviewing authority with respect to his judicial acts; or

“(C) the exercise of professional judgment by trial counsel or defense counsel.

“(3) Paragraphs (1) and (2) do not apply with respect to—

“(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

“(B) statements and instructions given in open proceedings by a military judge or counsel.

“(b) PROHIBITION ON CONSIDERATION OF ACTIONS ON COMMISSION IN EVALUATION OF FITNESS.—In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

“(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

“(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

“§ 949c. Duties of trial counsel and defense counsel

“(a) TRIAL COUNSEL.—The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.

“(b) DEFENSE COUNSEL.—(1) The accused shall be represented in his defense before a military commission under this chapter as provided in this subsection.

“(2) The accused shall be represented by military counsel detailed under section 948k of this title.

“(3) The accused may be represented by civilian counsel if retained by the accused, but only if such civilian counsel—

“(A) is a United States citizen;

“(B) is admitted to the practice of law in a State, district, or possession of the United States or before a Federal court;

“(C) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;

“(D) has been determined to be eligible for access to classified information that is classified at the level Secret or higher; and

“(E) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.

“(4) Civilian defense counsel shall protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information and may not divulge such information to any person not authorized to receive it.

“(5) If the accused is represented by civilian counsel, detailed military counsel shall act as associate counsel.

“(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 948k of this title to detail counsel, in that person's sole discretion, may detail additional military counsel to represent the accused.

“(7) Defense counsel may cross-examine each witness for the prosecution who testi-

fies before a military commission under this chapter.

“§ 949d. Sessions

“(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—(1) At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of—

“(A) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

“(B) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members;

“(C) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused; and

“(D) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 949a of this title and which does not require the presence of the members.

“(2) Except as provided in subsections (c) and (e), any proceedings under paragraph (1) shall—

“(A) be conducted in the presence of the accused, defense counsel, and trial counsel; and

“(B) be made part of the record.

“(b) PROCEEDINGS IN PRESENCE OF ACCUSED.—Except as provided in subsections (c) and (e), all proceedings of a military commission under this chapter, including any consultation of the members with the military judge or counsel, shall—

“(1) be in the presence of the accused, defense counsel, and trial counsel; and

“(2) be made a part of the record.

“(c) DELIBERATION OR VOTE OF MEMBERS.—When the members of a military commission under this chapter deliberate or vote, only the members may be present.

“(d) CLOSURE OF PROCEEDINGS.—(1) The military judge may close to the public all or part of the proceedings of a military commission under this chapter, but only in accordance with this subsection.

“(2) The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

“(A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or

“(B) ensure the physical safety of individuals.

“(3) A finding under paragraph (2) may be based upon a presentation, including a presentation ex parte or in camera, by either trial counsel or defense counsel.

“(e) EXCLUSION OF ACCUSED FROM CERTAIN PROCEEDINGS.—The military judge may exclude the accused from any portion of a proceeding upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom—

“(1) to ensure the physical safety of individuals; or

“(2) to prevent disruption of the proceedings by the accused.

“(f) PROTECTION OF CLASSIFIED INFORMATION.—

“(1) NATIONAL SECURITY PRIVILEGE.—(A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security. The rule in the preceding sentence applies to all stages of the proceedings of military commissions under this chapter.

“(B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or government agency concerned based on a finding by the head of that department or agency that—

“(i) the information is properly classified; and

“(ii) disclosure of the information would be detrimental to the national security.

“(C) A person who may claim the privilege referred to in subparagraph (A) may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in subparagraph (B) on behalf of such person. The authority of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

“(2) INTRODUCTION OF CLASSIFIED INFORMATION.—

“(A) ALTERNATIVES TO DISCLOSURE.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

“(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission;

“(ii) the substitution of a portion or summary of the information for such classified documents; or

“(iii) the substitution of a statement of relevant facts that the classified information would tend to prove.

“(B) PROTECTION OF SOURCES, METHODS, OR ACTIVITIES.—The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

“(C) ASSERTION OF NATIONAL SECURITY PRIVILEGE AT TRIAL.—During the examination of any witness, trial counsel may object to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such an objection, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

“(3) CONSIDERATION OF PRIVILEGE AND RELATED MATERIALS.—A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

“(4) ADDITIONAL REGULATIONS.—The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the use and protection of classified information during proceedings of military commissions under this chapter. A report on any regulations so prescribed, or modified, shall be submitted to the Committees on Armed Services of the Senate and the House of Representatives not later than 60 days before the

date on which such regulations or modifications, as the case may be, go into effect.

“§ 949e. Continuances

“The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

“§ 949f. Challenges

“(a) CHALLENGES AUTHORIZED.—The military judge and members of a military commission under this chapter may be challenged by the accused or trial counsel for cause stated to the commission. The military judge shall determine the relevance and validity of challenges for cause. The military judge may not receive a challenge to more than one person at a time. Challenges by trial counsel shall ordinarily be presented and decided before those by the accused are offered.

“(b) PEREMPTORY CHALLENGES.—Each accused and the trial counsel are entitled to one peremptory challenge. The military judge may not be challenged except for cause.

“(c) CHALLENGES AGAINST ADDITIONAL MEMBERS.—Whenever additional members are detailed to a military commission under this chapter, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.

“§ 949g. Oaths

“(a) IN GENERAL.—(1) Before performing their respective duties in a military commission under this chapter, military judges, members, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

“(2) The form of the oath required by paragraph (1), the time and place of the taking thereof, the manner of recording the same, and whether the oath shall be taken for all cases in which duties are to be performed or for a particular case, shall be as prescribed in regulations of the Secretary of Defense. Those regulations may provide that—

“(A) an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty; and

“(B) if such an oath is taken, such oath need not again be taken at the time the judge advocate or other person is detailed to that duty.

“(b) WITNESSES.—Each witness before a military commission under this chapter shall be examined on oath.

“§ 949h. Former jeopardy

“(a) IN GENERAL.—No person may, without his consent, be tried by a military commission under this chapter a second time for the same offense.

“(b) SCOPE OF TRIAL.—No proceeding in which the accused has been found guilty by military commission under this chapter upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

“§ 949i. Pleas of the accused

“(a) ENTRY OF PLEA OF NOT GUILTY.—If an accused in a military commission under this chapter after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the military commission shall proceed as though the accused had pleaded not guilty.

“(b) FINDING OF GUILT AFTER GUILTY PLEA.—With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

“§ 949j. Opportunity to obtain witnesses and other evidence

“(a) RIGHT OF DEFENSE COUNSEL.—Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

“(b) PROCESS FOR COMPULSION.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

“(1) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

“(2) shall run to any place where the United States shall have jurisdiction thereof.

“(c) PROTECTION OF CLASSIFIED INFORMATION.—(1) With respect to the discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

“(A) the deletion of specified items of classified information from documents to be made available to the accused;

“(B) the substitution of a portion or summary of the information for such classified documents; or

“(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

“(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified. The military judge may require trial counsel to provide, to the extent practicable, an unclassified summary of the sources, methods, or activities by which the United States acquired such evidence.

“(d) EXCULPATORY EVIDENCE.—(1) As soon as practicable, trial counsel shall disclose to the defense the existence of any evidence known to trial counsel that reasonably tends to exculpate the accused. Where exculpatory evidence is classified, the accused shall be provided with an adequate substitute in accordance with the procedures under subsection (c).

“(2) In this subsection, the term ‘evidence known to trial counsel’, in the case of exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title.

“§ 949k. Defense of lack of mental responsibility

“(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense in a trial by military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

“(b) BURDEN OF PROOF.—The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

“(c) FINDINGS FOLLOWING ASSERTION OF DEFENSE.—Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue in a military commission under this chapter, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

“(1) guilty;

“(2) not guilty; or

“(3) subject to subsection (d), not guilty by reason of lack of mental responsibility.

“(d) MAJORITY VOTE REQUIRED FOR FINDING.—The accused shall be found not guilty by reason of lack of mental responsibility under subsection (c)(3) only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

“§ 949l. Voting and rulings

“(a) VOTE BY SECRET WRITTEN BALLOT.—Voting by members of a military commission under this chapter on the findings and on the sentence shall be by secret written ballot.

“(b) RULINGS.—(1) The military judge in a military commission under this chapter shall rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.

“(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.

“(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote is taken of the findings of a military commission under this chapter, the military judge shall, in the presence of the accused and counsel, instruct the members as to the elements of the offense and charge the members—

“(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt;

“(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

“(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

“(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

“§ 949m. Number of votes required

“(a) CONVICTION.—No person may be convicted by a military commission under this chapter of any offense, except as provided in section 949i(b) of this title or by concurrence of two-thirds of the members present at the time the vote is taken.

“(b) SENTENCES.—(1) No person may be sentenced by a military commission to suffer death, except insofar as—

“(A) the penalty of death is expressly authorized under this chapter or the law of war for an offense of which the accused has been found guilty;

“(B) trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial;

“(C) the accused is convicted of the offense by the concurrence of all the members present at the time the vote is taken; and

“(D) all the members present at the time the vote is taken concur in the sentence of death.

“(2) No person may be sentenced to life imprisonment, or to confinement for more than 10 years, by a military commission under this chapter except by the concurrence of three-fourths of the members present at the time the vote is taken.

“(3) All other sentences shall be determined by a military commission by the concurrence of two-thirds of the members present at the time the vote is taken.

“(c) NUMBER OF MEMBERS REQUIRED FOR PENALTY OF DEATH.—(1) Except as provided in paragraph (2), in a case in which the penalty of death is sought, the number of members of the military commission under this chapter shall be not less than 12.

“(2) In any case described in paragraph (1) in which 12 members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and the military commission may be assembled, and the trial held, with not fewer than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.

“§ 949n. Military commission to announce action

“A military commission under this chapter shall announce its findings and sentence to the parties as soon as determined.

“§ 949o. Record of trial

“(a) RECORD; AUTHENTICATION.—Each military commission under this chapter shall keep a separate, verbatim, record of the proceedings in each case brought before it, and the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided in regulations prescribed by the Secretary of Defense, the record of a military commission under this chapter may contain a classified annex.

“(b) COMPLETE RECORD REQUIRED.—A complete record of the proceedings and testimony shall be prepared in every military commission under this chapter.

“(c) PROVISION OF COPY TO ACCUSED.—A copy of the record of the proceedings of the military commission under this chapter shall be given the accused as soon as it is authenticated. If the record contains classified information, or a classified annex, the accused shall be given a redacted version of the record consistent with the requirements of section 949d of this title. Defense counsel shall have access to the unredacted record, as provided in regulations prescribed by the Secretary of Defense.

“SUBCHAPTER V—SENTENCES

“Sec.

“949s. Cruel or unusual punishments prohibited.

“949t. Maximum limits.

“949u. Execution of confinement.

“§ 949s. Cruel or unusual punishments prohibited

“Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by a military commission under this chapter or inflicted under this chapter upon any person subject to this chapter. The

use of irons, single or double, except for the purpose of safe custody, is prohibited under this chapter.

“§ 949t. Maximum limits

“The punishment which a military commission under this chapter may direct for an offense may not exceed such limits as the President or Secretary of Defense may prescribe for that offense.

“§ 949u. Execution of confinement

“(a) IN GENERAL.—Under such regulations as the Secretary of Defense may prescribe, a sentence of confinement adjudged by a military commission under this chapter may be carried into execution by confinement—

“(1) in any place of confinement under the control of any of the armed forces; or

“(2) in any penal or correctional institution under the control of the United States or its allies, or which the United States may be allowed to use.

“(b) TREATMENT DURING CONFINEMENT BY OTHER THAN THE ARMED FORCES.—Persons confined under subsection (a)(2) in a penal or correctional institution not under the control of an armed force are subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, District of Columbia, or place in which the institution is situated.

“SUBCHAPTER VI—POST-TRIAL PROCEDURE AND REVIEW OF MILITARY COMMISSIONS

“Sec.

“950a. Error of law; lesser included offense.

“950b. Review by the convening authority.

“950c. Appellate referral; waiver or withdrawal of appeal.

“950d. Appeal by the United States.

“950e. Rehearings.

“950f. Review by Court of Military Commission Review.

“950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court.

“950h. Appellate counsel.

“950i. Execution of sentence; procedures for execution of sentence of death.

“950j. Finality or proceedings, findings, and sentences.

“§ 950a. Error of law; lesser included offense

“(a) ERROR OF LAW.—A finding or sentence of a military commission under this chapter may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.

“(b) LESSER INCLUDED OFFENSE.—Any reviewing authority with the power to approve or affirm a finding of guilty by a military commission under this chapter may approve or affirm, instead, so much of the finding as includes a lesser included offense.

“§ 950b. Review by the convening authority

“(a) NOTICE TO CONVENING AUTHORITY OF FINDINGS AND SENTENCE.—The findings and sentence of a military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

“(b) SUBMITTAL OF MATTERS BY ACCUSED TO CONVENING AUTHORITY.—(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence of the military commission under this chapter.

“(2)(A) Except as provided in subparagraph (B), a submittal under paragraph (1) shall be made in writing within 20 days after the accused has been given an authenticated record of trial under section 949o(c) of this title.

“(B) If the accused shows that additional time is required for the accused to make a

submittal under paragraph (1), the convening authority may, for good cause, extend the applicable period under subparagraph (A) for not more than an additional 20 days.

“(3) The accused may waive his right to make a submittal to the convening authority under paragraph (1). Such a waiver shall be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submittal under this subsection shall be deemed to have expired upon the submittal of a waiver under this paragraph to the convening authority.

“(C) ACTION BY CONVENING AUTHORITY.—(1) The authority under this subsection to modify the findings and sentence of a military commission under this chapter is a matter of the sole discretion and prerogative of the convening authority.

“(2)(A) The convening authority shall take action on the sentence of a military commission under this chapter.

“(B) Subject to regulations prescribed by the Secretary of Defense, action on the sentence under this paragraph may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier.

“(C) In taking action under this paragraph, the convening authority may, in his sole discretion, approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase a sentence beyond that which is found by the military commission.

“(3) The convening authority is not required to take action on the findings of a military commission under this chapter. If the convening authority takes action on the findings, the convening authority may, in his sole discretion, may—

“(A) dismiss any charge or specification by setting aside a finding of guilty thereto; or

“(B) change a finding of guilty to a charge to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge.

“(4) The convening authority shall serve on the accused or on defense counsel notice of any action taken by the convening authority under this subsection.

“(d) ORDER OF REVISION OR REHEARING.—(1) Subject to paragraphs (2) and (3), the convening authority of a military commission under this chapter may, in his sole discretion, order a proceeding in revision or a rehearing.

“(2)(A) Except as provided in subparagraph (B), a proceeding in revision may be ordered by the convening authority if—

“(i) there is an apparent error or omission in the record; or

“(ii) the record shows improper or inconsistent action by the military commission with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused.

“(B) In no case may a proceeding in revision—

“(i) reconsider a finding of not guilty of a specification or a ruling which amounts to a finding of not guilty;

“(ii) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation; or

“(iii) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

“(3) A rehearing may be ordered by the convening authority if the convening authority disapproves the findings and sentence and states the reasons for disapproval of the findings. If the convening authority disapproves the finding and sentence and does

not order a rehearing, the convening authority shall dismiss the charges. A rehearing as to the findings may not be ordered by the convening authority when there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered by the convening authority if the convening authority disapproves the sentence.

“§ 950c. Appellate referral; waiver or withdrawal of appeal

“(A) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.—Except as provided under subsection (b), in each case in which the final decision of a military commission (as approved by the convening authority) includes a finding of guilty, the convening authority shall refer the case to the Court of Military Commission Review. Any such referral shall be made in accordance with procedures prescribed under regulations of the Secretary.

“(b) WAIVER OF RIGHT OF REVIEW.—(1) In each case subject to appellate review under section 950f of this title, except a case in which the sentence as approved under section 950b of this title extends to death, the accused may file with the convening authority a statement expressly waiving the right of the accused to such review.

“(2) A waiver under paragraph (1) shall be signed by both the accused and a defense counsel.

“(3) A waiver under paragraph (1) must be filed, if at all, within 10 days after notice on the action is served on the accused or on defense counsel under section 950b(c)(4) of this title. The convening authority, for good cause, may extend the period for such filing by not more than 30 days.

“(c) WITHDRAWAL OF APPEAL.—Except in a case in which the sentence as approved under section 950b of this title extends to death, the accused may withdraw an appeal at any time.

“(d) EFFECT OF WAIVER OR WITHDRAWAL.—A waiver of the right to appellate review or the withdrawal of an appeal under this section bars review under section 950f of this title.

“§ 950d. Appeal by the United States

“(a) INTERLOCUTORY APPEAL.—(1) Except as provided in paragraph (2), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the Court of Military Commission Review of any order or ruling of the military judge that—

“(A) terminates proceedings of the military commission with respect to a charge or specification;

“(B) excludes evidence that is substantial proof of a fact material in the proceeding; or

“(C) relates to a matter under subsection (d), (e), or (f) of section 949d of this title or section 949j(c) of this title.

“(2) The United States may not appeal under paragraph (1) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

“(b) NOTICE OF APPEAL.—The United States shall take an appeal of an order or ruling under subsection (a) by filing a notice of appeal with the military judge within five days after the date of such order or ruling.

“(c) APPEAL.—An appeal under this section shall be forwarded, by means specified in regulations prescribed the Secretary of Defense, directly to the Court of Military Commission Review. In ruling on an appeal under this section, the Court may act only with respect to matters of law.

“(d) APPEAL FROM ADVERSE RULING.—The United States may appeal an adverse ruling on an appeal under subsection (c) to the United States Court of Appeals for the District of Columbia Circuit by filing a petition

for review in the Court of Appeals within 10 days after the date of such ruling. Review under this subsection shall be at the discretion of the Court of Appeals.

“§ 950e. Rehearings

“(a) COMPOSITION OF MILITARY COMMISSION FOR REHEARING.—Each rehearing under this chapter shall take place before a military commission under this chapter composed of members who were not members of the military commission which first heard the case.

“(b) SCOPE OF REHEARING.—(1) Upon a rehearing—

“(A) the accused may not be tried for any offense of which he was found not guilty by the first military commission; and

“(B) no sentence in excess of or more than the original sentence may be imposed unless—

“(i) the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings; or

“(ii) the sentence prescribed for the offense is mandatory.

“(2) Upon a rehearing, if the sentence approved after the first military commission was in accordance with a pretrial agreement and the accused at the rehearing changes his plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with pretrial agreement, the sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first military commission.

“§ 950f. Review by Court of Military Commission Review

“(a) ESTABLISHMENT.—The Secretary of Defense shall establish a Court of Military Commission Review which shall be composed of one or more panels, and each such panel shall be composed of not less than three appellate military judges. For the purpose of reviewing military commission decisions under this chapter, the court may sit in panels or as a whole in accordance with rules prescribed by the Secretary.

“(b) APPELLATE MILITARY JUDGES.—The Secretary shall assign appellate military judges to a Court of Military Commission Review. Each appellate military judge shall meet the qualifications for military judges prescribed by section 948j(b) of this title or shall be a civilian with comparable qualifications. No person may be serve as an appellate military judge in any case in which that person acted as a military judge, counsel, or reviewing official.

“(c) CASES TO BE REVIEWED.—The Court of Military Commission Review, in accordance with procedures prescribed under regulations of the Secretary, shall review the record in each case that is referred to the Court by the convening authority under section 950c of this title with respect to any matter of law raised by the accused.

“(d) SCOPE OF REVIEW.—In a case reviewed by the Court of Military Commission Review under this section, the Court may act only with respect to matters of law.

“§ 950g. Review by the United States Court of Appeals for the District of Columbia Circuit and the Supreme Court

“(a) EXCLUSIVE APPELLATE JURISDICTION.—(1)(A) Except as provided in subparagraph (B), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority) under this chapter.

“(B) The Court of Appeals may not review the final judgment until all other appeals under this chapter have been waived or exhausted.

“(2) A petition for review must be filed by the accused in the Court of Appeals not later than 20 days after the date on which—

“(A) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

“(B) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review under section 950f of this title.

“(b) STANDARD FOR REVIEW.—In a case reviewed by it under this section, the Court of Appeals may act only with respect to matters of law.

“(c) SCOPE OF REVIEW.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

“(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

“(2) to the extent applicable, the Constitution and the laws of the United States.

“(d) SUPREME COURT.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

“§ 950h. Appellate counsel

“(a) APPOINTMENT.—The Secretary of Defense shall, by regulation, establish procedures for the appointment of appellate counsel for the United States and for the accused in military commissions under this chapter. Appellate counsel shall meet the qualifications for counsel appearing before military commissions under this chapter.

“(b) REPRESENTATION OF UNITED STATES.—Appellate counsel appointed under subsection (a)—

“(1) shall represent the United States in any appeal or review proceeding under this chapter before the Court of Military Commission Review; and

“(2) may, when requested to do so by the Attorney General in a case arising under this chapter, represent the United States before the United States Court of Appeals for the District of Columbia Circuit or the Supreme Court.

“(c) REPRESENTATION OF ACCUSED.—The accused shall be represented by appellate counsel appointed under subsection (a) before the Court of Military Commission Review, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court, and by civilian counsel if retained by the accused. Any such civilian counsel shall meet the qualifications under paragraph (3) of section 949c(b) of this title for civilian counsel appearing before military commissions under this chapter and shall be subject to the requirements of paragraph (4) of that section.

“§ 950i. Execution of sentence; procedures for execution of sentence of death

“(a) IN GENERAL.—The Secretary of Defense is authorized to carry out a sentence imposed by a military commission under this chapter in accordance with such procedures as the Secretary may prescribe.

“(b) EXECUTION OF SENTENCE OF DEATH ONLY UPON APPROVAL BY THE PRESIDENT.—If the sentence of a military commission under this chapter extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.

“(c) EXECUTION OF SENTENCE OF DEATH ONLY UPON FINAL JUDGMENT OF LEGALITY OF PROCEEDINGS.—(1) If the sentence of a military commission under this chapter extends to death, the sentence may not be executed until there is a final judgment as to the legality of the proceedings (and with respect to death, approval under subsection (b)).

“(2) A judgment as to legality of proceedings is final for purposes of paragraph (1) when—

“(A) the time for the accused to file a petition for review by the Court of Appeals for the District of Columbia Circuit has expired and the accused has not filed a timely petition for such review and the case is not otherwise under review by that Court; or

“(B) review is completed in accordance with the judgment of the United States Court of Appeals for the District of Columbia Circuit and—

“(i) a petition for a writ of certiorari is not timely filed;

“(ii) such a petition is denied by the Supreme Court; or

“(iii) review is otherwise completed in accordance with the judgment of the Supreme Court.

“(d) SUSPENSION OF SENTENCE.—The Secretary of the Defense, or the convening authority acting on the case (if other than the Secretary), may suspend the execution of any sentence or part thereof in the case, except a sentence of death.

“§ 950j. Finality or proceedings, findings, and sentences

“(a) FINALITY.—The appellate review of records of trial provided by this chapter, and the proceedings, findings, and sentences of military commissions as approved, reviewed, or affirmed as required by this chapter, are final and conclusive. Orders publishing the proceedings of military commissions under this chapter are binding upon all departments, courts, agencies, and officers of the United States, except as otherwise provided by the President.

“(b) PROVISIONS OF CHAPTER SOLE BASIS FOR REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.

“SUBCHAPTER VII—PUNITIVE MATTERS

“Sec.

“950p. Statement of substantive offenses.

“950q. Principals.

“950r. Accessory after the fact.

“950s. Conviction of lesser included offense.

“950t. Attempts.

“950u. Solicitation.

“950v. Crimes triable by military commissions.

“950w. Perjury and obstruction of justice; contempt.

“§ 950p. Statement of substantive offenses

“(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

“(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.

“§ 950q. Principals

“Any person is punishable as a principal under this chapter who—

“(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;

“(2) causes an act to be done which if directly performed by him would be punishable by this chapter; or

“(3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

“§ 950r. Accessory after the fact

“Any person subject to this chapter who, knowing that an offense punishable by this chapter has been committed, receives, comforts, or assists the offender in order to hinder or prevent his apprehension, trial, or punishment shall be punished as a military commission under this chapter may direct.

“§ 950s. Conviction of lesser included offense

“An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an attempt to commit either the offense charged or an offense necessarily included therein.

“§ 950t. Attempts

“(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter may direct.

“(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense.

“(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

“§ 950u. Solicitation

“Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

“§ 950v. Crimes triable by military commissions

“(a) DEFINITIONS AND CONSTRUCTION.—In this section:

“(1) MILITARY OBJECTIVE.—The term ‘military objective’ means—

“(A) combatants; and

“(B) those objects during an armed conflict—

“(i) which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability; and

“(ii) the total or partial destruction, capture, or neutralization of which would constitute a definite military advantage to the attacker under the circumstances at the time of the attack.

“(2) PROTECTED PERSON.—The term ‘protected person’ means any person entitled to protection under one or more of the Geneva Conventions, including—

“(A) civilians not taking an active part in hostilities;

“(B) military personnel placed hors de combat by sickness, wounds, or detention; and

“(C) military medical or religious personnel.

“(3) PROTECTED PROPERTY.—The term ‘protected property’ means property specifically protected by the law of war (such as buildings dedicated to religion, education, art,

science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected), if such property is not being used for military purposes or is not otherwise a military objective. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not include civilian property that is a military objective.

“(4) CONSTRUCTION.—The intent specified for an offense under paragraph (1), (2), (3), (4), or (12) of subsection (b) precludes the applicability of such offense with regard to—

“(A) collateral damage; or

“(B) death, damage, or injury incident to a lawful attack.

“(b) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limitation:

“(1) MURDER OF PROTECTED PERSONS.—Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punishment as a military commission under this chapter may direct.

“(2) ATTACKING CIVILIANS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian population as such, or individual civilians not taking active part in hostilities, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(3) ATTACKING CIVILIAN OBJECTS.—Any person subject to this chapter who intentionally engages in an attack upon a civilian object that is not a military objective shall be punished as a military commission under this chapter may direct.

“(4) ATTACKING PROTECTED PROPERTY.—Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commission under this chapter may direct.

“(5) PILLAGING.—Any person subject to this chapter who intentionally and in the absence of military necessity appropriates or seizes property for private or personal use, without the consent of a person with authority to permit such appropriation or seizure, shall be punished as a military commission under this chapter may direct.

“(6) DENYING QUARTER.—Any person subject to this chapter who, with effective command or control over subordinate groups, declares, orders, or otherwise indicates to those groups that there shall be no survivors or surrender accepted, with the intent to threaten an adversary or to conduct hostilities such that there would be no survivors or surrender accepted, shall be punished as a military commission under this chapter may direct.

“(7) TAKING HOSTAGES.—Any person subject to this chapter who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(8) EMPLOYING POISON OR SIMILAR WEAPONS.—Any person subject to this chapter who

intentionally, as a method of warfare, employs a substance or weapon that releases a substance that causes death or serious and lasting damage to health in the ordinary course of events, through its asphyxiating, bacteriological, or toxic properties, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(9) USING PROTECTED PERSONS AS A SHIELD.—Any person subject to this chapter who positions, or otherwise takes advantage of, a protected person with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(10) USING PROTECTED PROPERTY AS A SHIELD.—Any person subject to this chapter who positions, or otherwise takes advantage of the location of, protected property with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, shall be punished as a military commission under this chapter may direct.

“(11) TORTURE.—

“(A) OFFENSE.—Any person subject to this chapter who commits an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(B) SEVERE MENTAL PAIN OR SUFFERING DEFINED.—In this section, the term ‘severe mental pain or suffering’ has the meaning given that term in section 2340(2) of title 18.

“(12) CRUEL OR INHUMAN TREATMENT.—

“(A) OFFENSE.—Any person subject to this chapter who commits 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 shall be punished, if death results to the victim, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to the victim, by such punishment, other than death, as a military commission under this chapter may direct.

“(B) DEFINITIONS.—In this paragraph:

“(i) The term ‘serious physical pain or suffering’ means bodily injury that involves—

“(I) a substantial risk of death;

“(II) extreme physical pain;

“(III) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

“(IV) significant loss or impairment of the function of a bodily member, organ, or mental faculty.

“(ii) The term ‘severe mental pain or suffering’ has the meaning given that term in section 2340(2) of title 18.

“(iii) The term ‘serious mental pain or suffering’ has the meaning given the term ‘se-

vere mental pain or suffering’ in section 2340(2) of title 18, except that—

“(I) the term ‘serious’ shall replace the term ‘severe’ where it appears; and

“(II) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term ‘serious and non-transitory mental harm (which need not be prolonged)’ shall replace the term ‘prolonged mental harm’ where it appears.

“(13) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—

“(A) OFFENSE.—Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(B) SERIOUS BODILY INJURY DEFINED.—In this paragraph, the term ‘serious bodily injury’ means bodily injury which involves—

“(i) a substantial risk of death;

“(ii) extreme physical pain;

“(iii) protracted and obvious disfigurement; or

“(iv) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

“(14) MUTILATING OR MAIMING.—Any person subject to this chapter who intentionally injures one or more protected persons by disfiguring the person or persons by any mutilation of the person or persons, or by permanently disabling any member, limb, or organ of the body of the person or persons, without any legitimate medical or dental purpose, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(15) MURDER IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

“(16) DESTRUCTION OF PROPERTY IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally destroys property belonging to another person in violation of the law of war shall be punished as a military commission under this chapter may direct.

“(17) USING TREACHERY OR PERFDY.—Any person subject to this chapter who, after inviting the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing such person or persons shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(18) IMPROPERLY USING A FLAG OF TRUCE.—Any person subject to this chapter who uses a flag of truce to feign an intention to negotiate, surrender, or otherwise suspend hostilities when there is no such intention shall be punished as a military commission under this chapter may direct.

“(19) IMPROPERLY USING A DISTINCTIVE EMBLEM.—Any person subject to this chapter who intentionally uses a distinctive emblem

recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.

“(20) INTENTIONALLY MISTREATING A DEAD BODY.—Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessity, shall be punished as a military commission under this chapter may direct.

“(21) RAPE.—Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.

“(22) SEXUAL ASSAULT OR ABUSE.—Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct.

“(23) HIJACKING OR HAZARDING A VESSEL OR AIRCRAFT.—Any person subject to this chapter who intentionally seizes, exercises unauthorized control over, or endangers the safe navigation of a vessel or aircraft that is not a legitimate military objective shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(24) TERRORISM.—Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“(25) PROVIDING MATERIAL SUPPORT FOR TERRORISM.—

“(A) OFFENSE.—Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24)), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism (as so set forth), shall be punished as a military commission under this chapter may direct.

“(B) MATERIAL SUPPORT OR RESOURCES DEFINED.—In this paragraph, the term ‘material support or resources’ has the meaning given that term in section 2339A(b) of title 18.

“(26) WRONGFULLY AIDING THE ENEMY.—Any person subject to this chapter who, in breach of an allegiance or duty to the United States, knowingly and intentionally aids an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

“(27) SPYING.—Any person subject to this chapter who with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a for-

eign power, collects or attempts to collect information by clandestine means or while acting under false pretenses, for the purpose of conveying such information to an enemy of the United States, or one of the co-belligerents of the enemy, shall be punished by death or such other punishment as a military commission under this chapter may direct.

“(28) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

“§950w. Perjury and obstruction of justice; contempt

“(a) PERJURY AND OBSTRUCTION OF JUSTICE.—A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to military commissions under this chapter.

“(b) CONTEMPT.—A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.”

(2) TABLES OF CHAPTERS AMENDMENTS.—The tables of chapters at the beginning of subtitle A, and at the beginning of part II of subtitle A, of title 10, United States Code, are each amended by inserting after the item relating to chapter 47 the following new item:

“47A. Military Commissions 948a”.

(b) SUBMITTAL OF PROCEDURES TO CONGRESS.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions prescribed under chapter 47A of title 10, United States Code (as added by subsection (a)).

SEC. 4. AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.

(a) CONFORMING AMENDMENTS.—Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended as follows:

(1) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) (article 2(a)) is amended by adding at the end the following new paragraph:

“(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.”

(2) EXCLUSION OF APPLICABILITY TO CHAPTER 47A COMMISSIONS.—Sections 821, 828, 848, 850(a), 904, and 906 (articles 21, 28, 48, 50(a), 104, and 106) are amended by adding at the end the following new sentence: “This section does not apply to a military commission established under chapter 47A of this title.”

(3) INAPPLICABILITY OF REQUIREMENTS RELATING TO REGULATIONS.—Section 836 (article 36) is amended—

(A) in subsection (a), by inserting “, except as provided in chapter 47A of this title,” after “but which may not”; and

(B) in subsection (b), by inserting before the period at the end “, except insofar as applicable to military commissions established under chapter 47A of this title”.

(b) PUNITIVE ARTICLE OF CONSPIRACY.—Section 881 of title 10, United States Code (arti-

cle 81 of the Uniform Code of Military Justice), is amended—

(1) by inserting “(a)” before “Any person”; and

(2) by adding at the end the following new subsection:

“(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.”

SEC. 5. TREATY OBLIGATIONS NOT ESTABLISHING GROUNDS FOR CERTAIN CLAIMS.

(a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

(b) GENEVA CONVENTIONS DEFINED.—In this section, the term “Geneva Conventions” means—

(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3114);

(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

SEC. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) IMPLEMENTATION OF TREATY OBLIGATIONS.—

(1) IN GENERAL.—The acts enumerated in subsection (d) of section 2441 of title 18, United States Code, as added by subsection (b) of this section, and in subsection (c) of this section, constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law.

(2) PROHIBITION ON GRAVE BREACHES.—The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated in subsection (d) of such section 2441.

(3) INTERPRETATION BY THE PRESIDENT.—

(A) As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(B) The President shall issue interpretations described by subparagraph (A) by Executive Order published in the Federal Register.

(C) Any Executive Order published under this paragraph shall be authoritative (except

as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.

(4) DEFINITIONS.—In this subsection:

(A) GENEVA CONVENTIONS.—The term “Geneva Conventions” means—

(i) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3217);

(ii) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217);

(iii) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316); and

(iv) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3516).

(B) THIRD GENEVA CONVENTION.—The term “Third Geneva Convention” means the international convention referred to in subparagraph (A)(iii).

(b) REVISION TO WAR CRIMES OFFENSE UNDER FEDERAL CRIMINAL CODE.—

(1) IN GENERAL.—Section 2441 of title 18, United States Code, is amended—

(A) in subsection (c), by striking paragraph (3) and inserting the following new paragraph (3):

“(3) which constitutes a grave breach of common Article 3 (as defined in subsection (d) when committed in the context of and in association with an armed conflict not of an international character; or”;

(B) by adding at the end the following new subsection:

“(d) COMMON ARTICLE 3 VIOLATIONS.—

“(1) PROHIBITED CONDUCT.—In subsection (c)(3), the term ‘grave breach of common Article 3’ means any conduct (such conduct constituting a grave breach of common Article 3 of the international conventions done at Geneva August 12, 1949), as follows:

“(A) TORTURE.—The act of a person who commits, or conspires or attempts to commit, an act specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control for the purpose of obtaining information or a confession, punishment, intimidation, coercion, or any reason based on discrimination of any kind.

“(B) CRUEL OR INHUMAN 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.

“(C) PERFORMING BIOLOGICAL EXPERIMENTS.—The act of a person who subjects, or conspires or attempts to subject, one or more persons within his custody or physical control to biological experiments without a legitimate medical or dental purpose and in so doing endangers the body or health of such person or persons.

“(D) MURDER.—The act of a person who intentionally kills, or conspires or attempts to kill, or kills whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause.

“(E) MUTILATION OR MAIMING.—The act of a person who intentionally injures, or con-

spires or attempts to injure, or injures whether intentionally or unintentionally in the course of committing any other offense under this subsection, one or more persons taking no active part in the hostilities, including those placed out of combat by sickness, wounds, detention, or any other cause, by disfiguring the person or persons by any mutilation thereof or by permanently disabling any member, limb, or organ of his body, without any legitimate medical or dental purpose.

“(F) INTENTIONALLY CAUSING SERIOUS BODILY INJURY.—The act of a person who intentionally causes, or conspires or attempts to cause, serious bodily injury to one or more persons, including lawful combatants, in violation of the law of war.

“(G) RAPE.—The act of a person who forcibly or with coercion or threat of force wrongfully invades, or conspires or attempts to invade, the body of a person by penetrating, however slightly, the anal or genital opening of the victim with any part of the body of the accused, or with any foreign object.

“(H) SEXUAL ASSAULT OR ABUSE.—The act of a person who forcibly or with coercion or threat of force engages, or conspires or attempts to engage, in sexual contact with one or more persons, or causes, or conspires or attempts to cause, one or more persons to engage in sexual contact.

“(I) TAKING HOSTAGES.—The act of a person who, having knowingly seized or detained one or more persons, threatens to kill, injure, or continue to detain such person or persons with the intent of compelling any nation, person other than the hostage, or group of persons to act or refrain from acting as an explicit or implicit condition for the safety or release of such person or persons.

“(2) DEFINITIONS.—In the case of an offense under subsection (a) by reason of subsection (c)(3)—

“(A) the term ‘severe mental pain or suffering’ shall be applied for purposes of paragraphs (1)(A) and (1)(B) in accordance with the meaning given that term in section 2340(2) of this title;

“(B) the term ‘serious bodily injury’ shall be applied for purposes of paragraph (1)(F) in accordance with the meaning given that term in section 113(b)(2) of this title;

“(C) the term ‘sexual contact’ shall be applied for purposes of paragraph (1)(G) in accordance with the meaning given that term in section 2246(3) of this title;

“(D) the term ‘serious physical pain or suffering’ shall be applied for purposes of paragraph (1)(B) as meaning bodily injury that involves—

“(i) a substantial risk of death;

“(ii) extreme physical pain;

“(iii) a burn or physical disfigurement of a serious nature (other than cuts, abrasions, or bruises); or

“(iv) significant loss or impairment of the function of a bodily member, organ, or mental faculty; and

“(E) the term ‘serious mental pain or suffering’ shall be applied for purposes of paragraph (1)(B) in accordance with the meaning given the term ‘severe mental pain or suffering’ (as defined in section 2340(2) of this title), except that—

“(i) the term ‘serious’ shall replace the term ‘severe’ where it appears; and

“(ii) as to conduct occurring after the date of the enactment of the Military Commissions Act of 2006, the term ‘serious and non-transitory mental harm (which need not be prolonged)’ shall replace the term ‘prolonged mental harm’ where it appears.

“(3) INAPPLICABILITY OF CERTAIN PROVISIONS WITH RESPECT TO COLLATERAL DAMAGE OR INCIDENT OF LAWFUL ATTACK.—The intent speci-

fied for the conduct stated in subparagraphs (D), (E), and (F) or paragraph (1) precludes the applicability of those subparagraphs to an offense under subsection (a) by reasons of subsection (c)(3) with respect to—

“(A) collateral damage; or

“(B) death, damage, or injury incident to a lawful attack.

“(4) INAPPLICABILITY OF TAKING HOSTAGES TO PRISONER EXCHANGE.—Paragraph (1)(I) does not apply to an offense under subsection (a) by reason of subsection (c)(3) in the case of a prisoner exchange during wartime.

“(5) DEFINITION OF GRAVE BREACHES.—The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article.”.

(2) RETROACTIVE APPLICABILITY.—The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002(e)(7) of Public Law 107–273).

(c) ADDITIONAL PROHIBITION ON CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT.—

(1) IN GENERAL.—No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(2) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this subsection, the term “cruel, inhuman, or degrading treatment or punishment” means cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984.

(3) COMPLIANCE.—The President shall take action to ensure compliance with this subsection, including through the establishment of administrative rules and procedures.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, is amended by striking both the subsection (e) added by section 1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by added by section 1405(e)(1) of Public Law 109–163 (119 Stat. 3477) and inserting the following new subsection (e):

“(e)(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

“(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”.

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and

shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.

SEC. 8. REVISIONS TO DETAINEE TREATMENT ACT OF 2005 RELATING TO PROTECTION OF CERTAIN UNITED STATES GOVERNMENT PERSONNEL.

(a) COUNSEL AND INVESTIGATIONS.—Section 1004(b) of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd-1(b)) is amended—

(1) by striking “may provide” and inserting “shall provide”;

(2) by inserting “or investigation” after “criminal prosecution”; and

(3) by inserting “whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies,” after “described in that subsection”.

(b) PROTECTION OF PERSONNEL.—Section 1004 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd-1) shall apply with respect to any criminal prosecution that—

(1) relates to the detention and interrogation of aliens described in such section;

(2) is grounded in section 2441(c)(3) of title 18, United States Code; and

(3) relates to actions occurring between September 11, 2001, and December 30, 2005.

SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.

Section 1005(e)(3) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2740; 10 U.S.C. 801 note) is amended—

(1) in subparagraph (A), by striking “pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military order)” and inserting “by a military commission under chapter 47A of title 10, United States Code”;

(2) by striking subparagraph (B) and inserting the following new subparagraph (B):

“(B) GRANT OF REVIEW.—Review under this paragraph shall be as of right.”;

(3) in subparagraph (C)—

(A) in clause (i)—

(i) by striking “pursuant to the military order” and inserting “by a military commission”; and

(ii) by striking “at Guantanamo Bay, Cuba”; and

(B) in clause (ii), by striking “pursuant to such military order” and inserting “by the military commission”; and

(4) in subparagraph (D)(i), by striking “specified in the military order” and inserting “specified for a military commission”.

SEC. 10. DETENTION COVERED BY REVIEW OF DECISIONS OF COMBATANT STATUS REVIEW TRIBUNALS OF PROPRIETY OF DETENTION.

Section 1005(e)(2)(B)(i) of the Detainee Treatment Act of 2005 (title X of Public Law 109-148; 119 Stat. 2742; 10 U.S.C. 801 note) is amended by striking “the Department of Defense at Guantanamo Bay, Cuba” and inserting “the United States”.

Mr. WARNER. Mr. President, I move to reconsider the vote.

Mr. ENZI. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WARNER. Mr. President, I thank the Presiding Officer.

This matter has now been brought to conclusion.

I yield the floor.

**SECURE FENCE ACT OF 2006—
Resumed**

CLOTURE MOTION

The PRESIDING OFFICER (Mr. ALLEN). Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The legislative clerk read as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on Calendar No. 615, H.R. 6061, a bill to establish operational control over the international land and maritime borders of the United States.

Bill Frist, Lamar Alexander, Richard Burr, Gordon Smith, John Thune, Johnny Isakson, John Cornyn, Judd Gregg, Jim Inhofe, Saxby Chambliss, Sam Brownback, Tom Coburn, Jeff Sessions, Richard Shelby, Craig Thomas, Michael B. Enzi, Lisa Murkowski.

Mr. BYRD. Mr. President, I support cloture on H.R. 6061, the Secure Fence Act. The sooner the Congress passes this bill, the sooner the Congress can put aside the misguided amnesty legislation passed by the Senate earlier this year. The American people have listened and rejected the call to offer U.S. citizenship to illegal aliens. They have said NO to amnesty! Hallelujah!

Comprehensive immigration reform is a euphemism for amnesty, and I oppose it absolutely and unequivocally. I voted against the amnesty bill passed by the Senate, and I will continue to vote against amnesty as long as I am in the Senate.

I have seen how amnesties encourage illegal immigration, with the amnesties of the 1980s and 1990s corresponding with an unprecedented rise in the population of unlawful aliens.

I have seen how amnesties open the border to terrorists, with the perpetrators of terrorist plots against our country taking advantage of amnesties to circumvent the regular border and immigration checks.

I have seen how amnesties afford special rules to some immigrants. Amnesty undermines that great and egalitarian American promise that the rules will be applied equally and fairly to everyone.

We are a nation of immigrants to be sure, but that does not mean that we are obligated to give away U.S. citizenship. According to immigration experts, until 1986, the Congress never granted amnesty to any generation of immigrants. The Congress encouraged immigrants to learn the Constitutional principles of our Government and the history of our country. Immigrants learned English, and tried to assimilate. U.S. citizenship was their reward. The Congress did not reward illegal aliens with U.S. citizenship.

Now that this idea of amnesty has been rejected by the Congress, perhaps the administration will begin, at long last, to focus its efforts on actually reducing the number of illegal aliens already in the country. Such an effort will require a significant investment of

funds to hire law enforcement and border security agents, and to give them the resources and equipment they need to do their job. In the years immediately after the September 11 attacks, those funds had not only been left out of the President's annual budgets but had been continuously blocked by the White House in the appropriations process. I and others tried to add funds where possible, but not until recently did the administration begin to respond to the inadequacies along the border. So much more is required and needs to be done.

The bill before the Senate today is a good bill. It would authorize two-layer fencing along the southern border where our security is weakest, and set timetables to which the Congress can hold the administration. But this bill will amount to little or no protection without the resources to implement it. The administration must do more. Without its continued support and a committed effort to prevent illegal immigration, the protective barrier called for in this bill will amount to nothing more than a line drawn in the sands of our porous Southern border.

Mr. KENNEDY. Mr. President, now we have 4 minutes that can be equally divided between those in favor and those in opposition; am I correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. Mr. President, I yield myself 2 minutes.

Let us review where we in the Senate have been on the issue of immigration.

Last May, we passed by 63 votes, with 1 favorable vote missing, a comprehensive measure to try to deal with a complex and difficult issue. The House of Representatives passed this bill, but they refused to meet with the Senate of the United States. The House of Representatives held 60 hearings all over the country at taxpayers' expense—millions and millions of dollars. What do they come up with? After all the pounding and finger-pointing, they came up with an 800-mile fence.

Listen to Governor Napolitano: You show me a 50-foot fence, and I will show you a 51-foot ladder.

This is a feel-good bumper-sticker vote. It is not going to work. Why? Because half of all the undocumented come here legally. They don't come over the fence.

Do you hear us? This is going to cost \$9 billion.

Listen to what Secretary Chertoff said about this issue. Secretary Chertoff said: “Don't give us old fences. Give us 20th century solutions.” Tom Ridge, the former head of Homeland Security, said the same thing.

This is a waste of money. Let us do what we should have done in the first place. Let us sit down with the House, the way this institution is supposed to work, rather than just take what is served up by the House of Representatives that said take it or leave it. That is what they are saying to the Senate.

We have had a good debate which resulted in a comprehensive measure. Let