MILITARY COMMISSIONS

Mr. DODD. Mr. President, America was attacked on September 11, 2001, by a ruthless enemy of our Nation. It is my strong belief, as I believe it is the belief of all of us in this Chamber, that those who are responsible for orchestrating this plot and anyone else who seeks to do harm to our country and citizens should be brought to the bar of justice and punished severely. On that I presume there is no debate whatsoever.

These are extraordinary times, and we must act in a way that fully safeguards America's national security. That is why I support the concept of military commissions: to protect U.S. intelligence and expedite judicial proceedings vital to military action under the Uniform Code of Military Justice. As we develop such means, we must also ensure our actions are not counterproductive to our overall effort to protect America at all levels.

The administration and the Republican leadership on this issue would have the American people believe—and this is the unfortunate point—that the war on terror requires us to make a choice, both here in this Chamber and across the country, between protecting America from terrorism and the choice of upholding the basic tenets upon which our Nation was founded—but not both. This canard, in my view, has been showcased far too often.

I fully reject that reasoning. Americans throughout the previous 200 years have as well. We can and must balance our responsibilities to bring terrorists to justice while at the same time protecting what it means to be an American. To choose the rule of law over the passion of the moment takes courage, but it is the right thing to do if we are to uphold the values of equal justice and due process that are codified in our Constitution.

Our Founding Fathers established the legal framework of our country on the premise that those in government are not infallible. America's leaders knew this 60 years ago when they determined how to deal with Nazi leaders guilty of horrendous crimes. There were strong and persuasive voices at that time crying out for the summary execution of those men who had commanded with ruthless efficiency the slaughter of 6 million innocent Jews and 5 million other innocent men and women. After World War Two, our country was forced to decide whether the accused criminals deserved trial or execution.

There was an article written recently by Professor Luban, a professor at Georgetown University, titled ''Forget Nuremberg—How Bush's new torture bill eviscerates the promise of Nuremberg.'' I ask unanimous consent that the entire article be printed in the RECORD.

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

FORGET NUREMBERG: HOW BUSH'S NEW TORTURE BILL EVISCERATES THE PROMISE OF NUREMBERG

(By David J. Luban)

The burning question is: What did the Bush administration do to break John McCain when a North Vietnamese prison camp couldn't do it?

Could it have been ''ego up''? I'm told ego up is not possible with a U.S. senator. That probably also rules out ego down. Fear up harsh? McCain doesn't have the reputation of someone who scares easily. False flag? Did he think they were sending him to the vice president's office? No, he already knew he was in the vice president's office. Wait, I think I know the answer: futility—which the Army's old field manual on interrogation defined as explaining rationally to the prisoner why holding out is hopeless. Yes, the explanation must be that the Bush lawyers would have successfully loopholed any law McCain might write, so why bother? Futility might have done the trick.

How else can we explain McCain's surrender this week on the torture issue, one on which he has been as passionate in the past as Lindsey Graham was on secret evidence?

Marty Lederman at Balkinization explains here and here some of the worst bits of the proposed ''compromise legislation'' on detainee treatment. But the fact is, virtually every word of the proposed bill is a capitulation, including ''and'' and ''the.'' And yesterday's draft is even worse than last week's. It unexpectedly broadens the already broad definition of ''unlawful enemy combatant'' to include those who fight against the United States as well as those who give them ''material support''—a legal term that appears to include anyone who has ever provided lodging or given a cell phone to a Taliban foot soldier out of sympathy with his cause. Now, not only the foot soldier but also his mom can be detained indefinitely at Guantanamo.

But the real tragedy of the so-called compromise is what it does to the legacy of Nuremberg—a legacy we would have been celebrating next week at the 60th anniversary of the judgment.

What does the bill do to Nuremberg? Section 8(a)(2) holds that when it comes to applying the War Crimes Act, ''No foreign or international sources 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 2441(d).'' That means the customary international law of war is henceforth expelled from U.S. war-crime law—ironic, to say the least, because it was the U.S. Army's Lieber Code that formed the basis for the Law of Armed Conflict and that launched the entire worldwide enterprise of codifying genuinely international humanitarian law.

Ironic also because our own military takes customary LOAC as its guide and uses it to train officers and interrogators. Apparently there is no need to do that anymore, at least when it comes to war crimes. That means goodbye, International Committee of the Red Cross; the Swiss can go back to their fondue and cuckoo clocks. It also means goodbye, jurisprudence of the Yugoslav tribunal, which the United States was instrumental in forming.

And also goodbye, Nuremberg.

Sept. 30 and Oct. 1 mark the 60th anniversary of the tribunal's judgment. If the opening chapters of Telford Taylor's superb The Anatomy of the Nuremberg Trials make one thing crystal clear, it's the burning desire of the United States to create international law using those trials. Great Britain initially opposed the Nuremberg trials and urged simply shooting top Nazis, out of fear they would use the trials for propaganda. Stalin favored conducting trials, but only to establish punishments, not guilt. Like Great Britain, he thought punishing the top Nazis should be a political, and not a legal, decision. The trials happened as they did only because the United States insisted on them for purposes of establishing future law—a task that summary justice at executive sayso could never have done.

At the London conference that wrote the Nuremberg Charter, France and Russia both objected to criminalizing aggressive war for anybody but the Axis countries. But Supreme Court Justice Robert Jackson, the American representative, insisted that creating universally binding international law was the prime purpose of the tribunal.

A compromise left the international status of Nuremberg law ambiguous—the tribunal's jurisdiction covered only the Axis countries, but nowhere does the charter suggest that the crimes it was trying were only crimes if committed by the Axis powers. Because of this ambiguity, the status of the Nuremberg principles as international law was not established until 1950, when the U.N. General Assembly proclaimed seven Nuremberg Principles to be international law. The American agenda had finally prevailed.

Well, forget all that as well. The Nuremberg Principles, like the entire body of international humanitarian law, will now have no purchase in the war-crimes law of the United States. Who cares whether they were our idea in the first place? Principle VI of the Nuremberg seven defines war crimes as ''violations of the laws or customs of war, which include, but are not limited to . . . ill-treatment of prisoners of war.'' Forget ''customs of war''—that sounds like customary international law, which has no place in our courts anymore. Forget ''ill-treatment''—it's too vague. Take this one: Principle II, ''The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.'' Section 8(a)(2) sneers at responsibility under international law. Or Principle IV: ''The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law , provided a moral choice was in fact possible to him.'' Moral, shmoral. The question is, do you want the program or don't you?

The Nuremberg trials presupposed something about the human conscience: that moral choice doesn't take its cues solely from narrow legalisms and technicalities. The new detainee bill takes precisely the opposite stance: Technicality now triumphs over conscience, and even over common sense. The bill introduces the possibility for a new cottage industry: the jurisprudence of pain. It systematically distinguishes ''severe pain''—the hallmark of torture—from (mere) ''serious'' pain—the hallmark of cruel and degrading treatment, usually thought to denote mistreatment short of torture. But then it defines serious physical pain as ''bodily injury that involves . . . extreme physical pain.'' To untutored ears, ''extreme'' sounds very similar to ''severe''; indeed, it sounds even worse than ''severe.'' But in any case, it certainly sounds worse than ''serious.'' Administration lawyers can have a field day rating painful interrogation tactics on the Three Adjective Scale, leaving the rest of us to shake our heads at the essential lunacy of the enterprise.

And then there is section 8(3), which says that ''the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions.'' Section (B) makes it clear that his interpretation ''shall be authoritative (as to non-grave breach provisions).''

On Aug. 1, 2006, The Onion ran a story headlined ''Bush Grants Self Permission To Grant More Power to Self.'' It began: ''In a decisive 1-0 decision Monday, President Bush voted to grant the president the constitutional power to grant himself additional powers.'' It ended thusly: ''Republicans fearful that the president's new power undermines their ability to grant him power have proposed a new law that would allow senators to permit him to grant himself power.'' How life imitates art! In the end, the three courageous Republican holdouts didn't want the president unilaterally trashing Geneva. Now it turns out that the principle they were fighting for was simply Congress' prerogative to grant him the unreviewable power to do so.

Mr. DODD. He pointed out something that needs to be made clear. He said:

Make one thing crystal clear, it's the burning desire of the United States to create international law using those trials. Great Britain initially opposed the Nuremberg trials and urged simply shooting top Nazis out of fear, they would use the trials for propaganda. Stalin favored conducting trials only to establish punishments, not guilt. Like Great Britain, he thought punishing the top Nazis should be a political, and not a legal, decision. The trials happened as they did only because the United States insisted on them for purposes of establishing future law—a task that summary justice at executive say-so could never have done.

At the London conference that wrote the Nuremberg Charter, France and Russia both objected to criminalizing aggressive war for anybody but the Axis countries. But Supreme Court Justice Robert Jackson, the American representative insisted that creating universally binding international law was the prime purpose of the tribunal.

And he prevailed in that argument.

The history is particularly poignant to me because my father, who served in this body, from whose desk I speak this morning, served as Robert Jackson's No. 2, as the executive trial counsel at Nuremberg. Mr. President, the Nuremberg trials rendered their first judgment 60 years ago. What an irony indeed that 60 years ago this Saturday, one of the great, if not the greatest, trials of the 20th century was taking us to a point where we are now codifying and moving to international law. The enemies of the United States were not given the opportunity to walk away from their crimes. Rather, they were given the right to face their accusers, the right to confront evidence against them, the right to a fair trial. Underlying that decision was the conviction that this Nation must not tailor its most fundamental principles to the conflict of the moment and the recognition that if we did, we would be walking in the very footsteps of the enemies we despised.

As we approach this 60th anniversary, I think it is important to reflect on the implications of the past as we face new challenges, new enemies, and new decisions. Much as our actions in the postwar period affected our Nation's standing in the world, so, too, do our actions in the post- 9/11 era.

The Armed Services Committee, and I have great respect for my friend, JOHN WARNER, decided not to rubberstamp the administration's legislation. Instead they worked in a bipartisan way to craft a more narrowly tailored approach. Unfortunately, the bill we are discussing today is not the one that passed out of that committee. The bill before us today was worked out between several of our Republican colleagues and the White House and does not contain the improvements over the Bush administration's original proposal. I remain concerned about several provisions in the pending legislation.

The bill would strip detainees of their habeas corpus rights. The eloquent remarks of ARLEN SPECTER yesterday should be read by everyone. This longstanding tradition of our country that is about to be abandoned here will be one of the great mistakes I think history will record. There are strong beliefs among Senators on both sides that this provision is not only inadvisable but flatly unconstitutional as well. We must do everything in our power to protect our country from threats to our national security, but it is also incumbent upon every one of us to protect the very foundation upon which our Nation was established. This legislation will not achieve those aims.

I support the efforts, certainly of those who are trying to improve this bill, but I wish to conclude these remarks by quoting Justice Jackson. Justice Jackson said at the conclusion of the Nuremberg trials:

We must never forget that the record on which we judge these defendants today—is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well.

To rubberstamp the administration's bill, in my view, would poison one of the most fundamental principles of American democracy. I urge my colleagues not to move in that direction.

Also, if I can, I wish to read from this article which was written by Mr. Luban, talking about the Nuremberg trials, because it is an important moment in our history. He said:

The Nuremberg trials presupposed something about the human conscience: that moral choice doesn't take its cues solely from narrow legalisms and technicalities. The new detainee bill takes precisely the opposite stance: technicality now triumphs over conscience, and even over common sense. The bill introduces the possibility for a new cottage industry: the jurisprudence of pain. It systematically distinguished ''severe pain''—the hallmark of torture—from mere ''serious'' pain—the hallmark of cruel and degrading treatment, usually thought to denote mistreatment short of torture. But then it defines serious pain as ''bodily injury that involves . . . extreme physical pain.'' To untutored ears, ''extreme'' sounds very similar to ''severe''; indeed, it sounds even worse than ''severe.'' But in any case, it certainly sounds worse than ''serious.''

Administration lawyers can have a field day in the coming years reading painful interrogation tactics on the Three Adjective Scale, leaving the rest of us to shake our heads at the essential lunacy of the enterprise.

It is about conscience. It is the fundamental principle which we enshrined and fought for. It was the United States of America that stood and insisted that our allies try to do something to avoid future conflicts, 60 years ago this Saturday. To watch the Senate, on the anniversary of the Nuremberg trials, step away from that great tradition, those great principles enshrined at that time, I think is one of the saddest days I have ever seen in this Senate in my almost 30 years serving in this body.

I hope my colleagues, with a few days to go before the election, put this aside. Let's come back afterward and think more clearly. Too much of politics is written into these decisions. This is the United States of America.

The PRESIDING OFFICER (Ms. Murkowski). The time of the Senator has expired.

Mr. DODD. I yield the floor.

Several Senators addressed the Chair.

Mr. WARNER. Madam President, will the distinguished leader allow me to say a few words?

I listened very intently. The Senator from Connecticut and I have, over many years, formed a very close personal and professional working relationship. I know the deep, abiding respect you have for your father and his work, particularly at that historic moment in the history of world jurisprudence, the Nuremberg trials. I regret that you perceive that this bill on the floor falls short of your idea of the goals. But I assure you the group with which I worked did everything we could—and I think we have succeeded, I say in all respects—certainly with regard to the 1949 treaty, which, as you know, was in four parts, and the Common Article 3 to all four of those treaties, preserving this Nation's obligations under that treaty.

So while we have our differences, I just wish to conclude that I respect you greatly for the admiration you have for your father, as do I have for my father, who was a doctor during that period. I thank you for the opportunity to listen to you.

Mr. DODD. If I may respond to my colleague from Virginia, for whom I have the greatest respect, it is not only my love and affection for my father; more importantly, it is my love and affection for what he and a group of Americans did at a time when others said abandon the rule of law: They stood up at a time when it was tempting not to do so. World opinion certainly was against them in many ways. These were dreadful human beings. These people murdered millions, incinerated millions of people. Yet people such as my father and Robert Jackson and others stood up and said: No, we are going to be different than they are. The rule of law is so critically important to us that we want to show the civility of this great country of ours and how the last part of the 20th century can be conducted differently. It is not just my affection for my father; it is more the affection for what they did in

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