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HABEAS CORPUS RESTORATION ACT OF 2007

JUNE 26, 2007.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 185]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 185), to restore habeas corpus for those detained by the United States, reports favorably thereon without amendment, and recommends that the bill do pass.

CONTENTS

I. PURPOSE OF THE HABEAS CORPUS RESTORATION ACT OF 2007

Ranking Member Specter introduced the Habeas Corpus Restoration Act of 2007 on January 4, 2007, with Chairman Leahy as the original cosponsor. Senators Feinstein, Brown, Feingold, Lautenberg, Clinton, Salazar, Dodd, Harkin, Rockefeller, Levin, Obama, Cantwell, Whitehouse, Kerry, Durbin, Biden, Kennedy, Boxer,

Bingaman, Cardin, Sanders, and Stabenow have since joined as cosponsors.

This legislation repeals those provisions of the Detainee Treatment Act of 2005 (DTA) and the Military Commissions Act of 2006 (MCA) that eliminated the jurisdiction of any court to hear or consider applications for a writ of habeas corpus filed by aliens who have been determined by the United States to be properly detained as enemy combatants, or are awaiting such determination. The legislation would therefore permit detainees held by the United States Government as enemy combatants, or as potential enemy combatants, to file writs of habeas corpus and other related actions in the United States District Courts, subject to limitations on habeas that pre-dated the DTA. It also allows courts to consider legal challenges to military commissions only as provided by the Uniform Code of Military Justice or by a habeas corpus proceeding.

A. BACKGROUND

1. Brief History of the Great Writ

The writ of habeas corpus protects individuals against unlawful exercises of state power. It provides the means for a person detained by the state to require that the government demonstrate to a neutral judge that there is a factual and legal basis for his or her detention. The writ has roots at least as far back as 16th century England, and beginning with Parliament's passage of the Habeas Corpus Act of 1679, this protection became known as the "Great Writ."

Habeas corpus has long been a cornerstone of Anglo-Saxon and American legal traditions. At English common law, courts exercised habeas jurisdiction not only within the Crown's formal territorial limits, but also over other areas over which the Crown exercised sovereign control. The Great Writ was imported into the laws of all 13 American colonies, and it was one of the first subjects to which the first Congress turned its attention. The Judiciary Act of 1789 specifically empowered federal courts to issue writs of habeas corpus "for the purpose of an inquiry into the cause of commitment."

Habeas corpus is also the only common law writ mentioned in the Constitution. Article I, section 9 provides that the "Writ of Habeas Corpus shall not be suspended, unless when in Cases of rebellion or invasion the public Safety may require it." Thus, the Founders clearly established their intention that habeas corpus serve as a bulwark of individual liberty. Indeed, habeas has only been suspended four times in American history—including twice during the Civil War when the safety of Washington, D.C. was threatened by mobs in Maryland—and the writ has never been suspended absent an active insurrection or invasion.

The right of enemy aliens to petition for habeas relief in U.S. courts is also well-established. While there is no precise historical analogue to the detainees presently held at Guantanamo Bay, United States courts have entertained habeas claims by aliens who were being held as enemy combatants. For example, in *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court allowed a habeas challenge brought by a group of German saboteurs held for law of war offenses to go forward, reasoning that, "[i]n view of the public importance of the questions raised by their petitions and of the

duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty," the cases must be allowed to proceed. The Supreme Court also exercised habeas jurisdiction over an enemy alien in *In re Yamashita*, 327 U.S. 1 (1946), in which a Japanese general stood accused of war crimes.[1]

Throughout American history, the writ has served to guarantee people seized and detained by the government the right to question the grounds for their detention, and has been available to citizens, non-citizens, slaves, and alleged enemies. The writ has served as a critical check on arbitrary and unlawful executive detention as well as, more recently, a legal tool for bringing post-conviction, collateral challenges in criminal cases.

2. Recent developments in Habeas Corpus Law

Shortly after the September 11, 2001 attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks * * * or harbored such organizations or persons." The United States then conducted a military campaign in Afghanistan against al Qaeda and the Taliban regime that had supported al Qaeda.

In February 2002, following the collapse of the Taliban regime, the White House determined that while Taliban detainees are covered under the Geneva Conventions, Al Qaeda detainees are not. The White House further declared that none of the detainees qualified for prisoner-of-war (POW) status, deemed all detainees "unlawful enemy combatants," and asserted the right to detain them without trial indefinitely. Around this same time, the U.S. Government began holding non-citizens captured abroad at the U.S. naval base at Guantanamo Bay, Cuba, and declared that certain of these detainees would, at an appropriate time, be tried by military commissions to be convened at Guantanamo Bay.

By mid-2002, the Guantanamo detainees began filing habeas petitions in the United States District Court for the District of Columbia, challenging the conditions of their confinement, access to counsel and, most fundamentally, their status as enemy combatants. These habeas cases proceeded before several district judges, but the court agreed to deal with all administrative matters before a single judge. During these proceedings, no judge ordered the release of any petitioner, and no judge ordered a change in the conditions of confinement or treatment of any Guantanamo detainee.

In June 2004, the U.S. Supreme Court decided the first appeal of a jurisdictional dismissal of a detainee habeas case involving an alien held at Guantanamo Bay. In *Rasul* v. *Bush,* 542 U.S. 466 (2004), the Court ruled that the federal habeas statute (28 U.S.C. §2241) conferred on district courts jurisdiction to hear challenges of aliens held at Guantanamo Bay. The Court based its jurisdictional ruling in part on its finding that the United States exercises ple-

[1] Scholars have identified one case in which a U.S. court actually granted habeas relief to an enemy alien. See Gerald L. Neuman and Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d 39, 42 (discussing unreported case of *United States* v. *Thomas Williams*, in which Chief Justice Marshall, riding circuit, granted relief to an alien enemy combatant irregularly detained).

nary and exclusive jurisdiction over Guantanamo Bay. The Court confirmed that, at common law, courts exercised habeas jurisdiction over the claims of aliens detained outside the territorial ambit of the British Empire, and it also observed that the reach of the habeas statute had expanded over the past two centuries. Following *Rasul,* the Pentagon established administrative hearings, called "Combatant Status Review Tribunals" (CSRTs), to permit detainees to contest their status as "enemy combatants." This led to the filing of additional habeas petitions in the District Court for the District of Columbia.

In the last two years, Congress has twice sought to divest the courts of jurisdiction to hear habeas challenges by detainees. In December 2005, Congress passed the DTA which, among other things, attempted to strip the courts of jurisdiction to hear detainees' challenges by eliminating the federal courts' statutory authority over habeas claims by aliens detained at Guantanamo Bay. In *Hamdan* v. *Rumsfeld,* 126 S. Ct. 2749 (2006), however, the Supreme Court rejected the view that the DTA left it without jurisdiction to review a pending habeas challenge to the validity of military commissions established by President Bush to try suspected terrorists.

Following the Court's decision in *Hamdan,* and taking only a few weeks from the introduction of the bill to final passage, the 109th Congress in September 2006 passed the MCA, which authorized President Bush to convene military commissions to try the Guantanamo detainees. The MCA also amended the DTA to definitively restrict access to federal courts by all alien enemy combatants, and those awaiting determination whether or not they were enemy combatants, by eliminating pending and future habeas claims other than the limited review of military proceedings permitted under the DTA.

In February 2007, a panel of the United States Court of Appeals for the D.C. Circuit, in *Boumediene* v. *Rumsfeld,* 476 F.3d 981, ruled 2–1 that the section of the MCA that deprives courts of jurisdiction over habeas petitions of aliens detained as enemy combatants at Guantanamo Bay does not violate the Suspension Clause of the Constitution, because the Constitution confers no rights on aliens without property or presence in the United States. On April 2, 2007, the Supreme Court declined to review the decision.

B. NEED FOR LEGISLATION

Habeas corpus allows someone who is imprisoned by the government to challenge his or her detention in court. It is enshrined in the Constitution, and Justice Antonin Scalia has recently referred to it as "the very core of liberty secured by our Anglo-Saxon system of separated powers." *Hamdi* v. *Rumsfeld,* 542 U.S. 507, 554 (2004). The last Congress's decision to strip habeas rights from any non-citizen held as a possible enemy combatant, including not only Guantanamo detainees, but also any of the at least 12 million lawful permanent residents in this country, and to give the Executive the unilateral authority to detain indefinitely those merely suspected of being "enemy combatants," was a historic mistake that this legislation will correct.

The legislation is needed for several reasons. First, the DTA and MCA give far too much power to the Executive to detain alleged enemy combatants—potentially forever—with no meaningful check

by another branch of government. Specifically, the DTA and MCA permanently eliminated the right of habeas corpus for any non-citizen determined to be an enemy combatant, or even "awaiting" such a determination. A mere accusation by the Executive is therefore sufficient to deny the time-honored right of habeas corpus, and that determination is unreviewable for as long as the government chooses. No administration can be trusted with that kind of power. That is why our Founders included habeas protections in the Constitution and permitted suspension only in certain specified and catastrophic types of declared national emergencies.

Carving out an exception to this long-established legal principle for the sake of expediency was a mistake. Indeed, senior government and military officials have stated that the Executive detained many of the Guantanamo detainees in error. See Tim Golden and Don Van Natta, Jr., "U.S. Said to Overstate Value of Guantanamo Detainees," New York Times, June 21, 2004. In fact, the government has said that the vast majority will never be tried by a military commission and, without habeas rights, they will have no means to challenge their detention before an independent court. Restoring habeas would prevent the possibility that others in the future who are innocent and wrongly detained could spend their entire lives in prison, without charge, in the custody of the U.S. Government.

Second, it is important to note that the sweep of the MCA goes well beyond the few hundred detainees currently held at Guantanamo Bay. By its terms, the MCA threatens the civil liberties of millions of United States residents, including at least 12 million lawful permanent residents of the United States who work and pay taxes in this country. Under current law, any of these people can be detained forever, without the ability to challenge their detention in federal court, simply on the Executive's assertion that they are awaiting determination as to their status.[2] At the Senate Judiciary Committee's hearing on this issue on May 22, 2007, Stanford Law Professor Mariano-Florentino Cuellar emphasized the MCA's potentially disproportionate impact on the Latino population: "I think it is very important for people who are members of the Latino community * * * to be vigilant and understand that laws can be used in ways other than the way they were intended to be used." Those legal immigrants whose rights have been stripped away, Professor Cuellar observed, pay billions of dollars in taxes to the U.S. Government, meet particular labor demands, and their children grow up to take important positions in American society.

Third, in passing the DTA and MCA, Congress failed to create an adequate substitute for habeas corpus. Absent a congressional finding that there is an on-going "rebellion" or "invasion," the constitutionality of the MCA's habeas provision is suspect. The U.S. Supreme Court held in *Swain* v. *Pressley,* 430 U.S. 372 (1977), that any alternative to habeas must be "adequate and effective" to test

[2] In a recent divided Fourth Circuit decision, the majority included language strongly suggesting that legal residents detained in the United States generally would be entitled to constitutional habeas rights, which were not limited by the MCA, and that those held "awaiting" determination cannot be held indefinitely. Al-Marri v. Wright, No. 06-7427. However, the Government in that case argued that the MCA did strip habeas rights from a legal resident detained in the United States, including one indefinitely awaiting a status determination. This Fourth Circuit panel recognized the core importance of habeas rights in our legal and constitutional tradition, but the Executive has not, and there is no guarantee that future courts will—which is why Congress needs to act now.

the legality of a person's detention. But the CSRTs, the current alternative to habeas, lack even the most basic of protections that habeas provides, including the right to counsel and the right to be heard by an impartial judge. Rear Admiral Donald J. Guter, Dean of Duquesne Law School and former Judge Advocate General of the Navy, stressed at the Committee hearing that the CSRT process, which he referred to as a "black hole," is unfair, inaccurate, and inconsistent. He cautioned, "You can run somebody through a CSRT and then never charge them, and without habeas, their case is never to be heard."[3] William Howard Taft IV, former Deputy Secretary of Defense under President George H. W. Bush, and a former State Department advisor in the current administration, has argued that CSRTs are not an adequate substitute for habeas, even if CSRTs were to be improved. He wrote in response to written questions from this Committee, "I do not believe relating the ability of alien detainees in Guantanamo to bring habeas corpus petitions to the CSRT process would be desirable."

The D.C. Circuit-based review process established by the DTA is also inferior to habeas review because it is restricted to considering only whether the status determination complied with the protocols established for CSRTs. This circumscribed review forecloses the kind of searching inquiry into the factual basis for detention that habeas allows. The judicial review theoretically permits the court to consider whether the CSRT determination comports with the Constitution, but this review is hollow in view of the D.C. Circuit's ruling in Boumediene that the detainees have no constitutional rights.[4] George Washington University Law Professor Orin Kerr said in testimony at the Committee's hearing, "the alternative remedy provided by the DTA seems poorly designed to permit an adequate and effective hearing on any legal rights that the detainees may have." In a written response to questions, Professor Cuellar added that the DTA/MCA review process prohibits both "review of cases where no final determination is ever made (because a decision is indefinitely delayed)" and "the type of case-by-case determination striking a reasonable balance between societal and governmental interests that is historically associated with habeas review." Simply put, a detention review procedure predicated on the acceptance of findings from an inherently flawed CSRT hearing cannot and does not provide the protections that independent review under habeas has made available for centuries.

Finally, the United States has a clear strategic interest in restoring the Great Writ. The elimination of basic legal rights undermines our ability to achieve justice and to win our struggle against terrorism. Leading former military lawyers, like Rear Admiral Guter, tell us that by stripping our alleged enemies of basic rights, we are providing a pretext for those who capture our troops or civilians to deny them basic rights. Diplomats and foreign policy specialists like William H. Taft IV lament that stripping the courts of

[3] Lieutenant Colonel Stephen Abraham, a military lawyer who participated in CSRTs, said in a sworn affidavit that the CSRT process was "fundamentally flawed" and that superiors pressured the officers on CSRT panels to find detainees to be enemy combatants. See Carol D. Leonig and Josh White, "An Ex-Member Calls Detainee Panels Unfair," Washington Post, June 23, 2007.

[4] This ruling appears to be in tension with *Rasul's* pre-DTA/MCA holding that statutory habeas rights extended to Guantanamo Bay. It is hard to see a principled distinction for why U.S. statutory law would extend to Guantanamo Bay, while the U.S. Constitution's protections would not.

habeas jurisdiction sacrificed an important opportunity to enhance the credibility of the Guantanamo detention system. In a written response following the hearing, Mr. Taft summed up: "I do not believe that the international community accepts the legitimacy of the CSRT process. Habeas corpus proceedings, on the other hand, are widely recognized as a legitimate method of determining whether a person is being lawfully held in custody." Military and diplomatic experts say that, not only will restoring habeas to detainees not be harmful to our security and our fight against terrorism, but it will improve our strategic and diplomatic position in the world and remove a rallying point for our enemies. Speaking on Meet the Press earlier this month, former Secretary of State Gen. Colin Powell explained that "Guantanamo has become a major, major problem for * * * the way the world perceives America. And if it was up to me, I would close Guantanamo not tomorrow, but this afternoon." Powell explained, "The concern was, 'Well, then they'll have access to lawyers, then they'll have access to writs of habeas corpus.' So what? Let them. Isn't that what our system's all about?" The significant benefits of restoring habeas corpus rights to American strategic and policy interests and to our legal system make this legislation appropriate and necessary, regardless of what the Supreme Court ultimately decides about the constitutionality of the MCA.

The habeas rights to be restored by this legislation have a sound grounding in historical precedent. As the U.S. Supreme Court recently noted in *Rasul,* American courts and their British antecedents routinely assumed jurisdiction over habeas claims made by aliens, even if most of those claims were ultimately denied on the merits. See, e.g., *R.* v. *Shiever,* 97 Eng. Rep. 551 (K.B. 1759); *Case of Three Spanish Sailors,* Eng. Rep. 1010 (K.B. 1779); In re *Yamashita,* 327 U.S. 1 (1946); *Ex Parte Quirin,* 317 U.S. 1 (1942). If habeas was available to enemy alien prisoners of war in the two World War II-era cases cited above, who had already benefited from some kind of judicial proceedings or military commissions, then surely habeas must be available to those who seek to challenge executive detention without having had the benefit of any process in accordance with the law of war. Further, the contention by critics of this legislation that the United States has never granted habeas corpus relief to an enemy alien is not only incorrect, see supra note 1, but it is also irrelevant. The fact that enemy alien habeas petitioners rarely find relief in U.S. courts is evidence that habeas can be relied upon as a necessary, but reasonable, check on executive power, and underscores the feasibility of continuing this historic practice.[5] As in the past, non-citizen detainees suspected of being enemy combatants should at least have the right to go into an independent court to assert that they are being held in error—but, as in the past, a court may only grant habeas relief if the petitioner is able to in fact establish this error.

Restoring habeas will not invite habeas litigation from abroad. The Supreme Court in *Rasul* relied upon Guantanamo Bay's standing as a de facto U.S. territory in ruling that statutory habeas reaches the Guantanamo detainees. Courts have found no jurisdic-

[5] Indeed, those Guantanamo detainees who have been released since 9/11—discussed at length by critics of this legislation—have been freed by the military following its own process, not by federal judges on habeas review.

tion for similar claims in recent cases of detainees captured, detained, and held in Iraq. Rear Admiral Guter noted in written responses to the Committee, "Historically, our courts consistently have denied habeas to those held outside the sovereign territory of the United States. *Rasul* did not alter this notion." [6] The specter of courts being flooded by international habeas petitions also makes no sense in light of recent history. There was no flood of habeas litigation between the 2004 *Rasul* decision validating the extension of habeas rights to a territory outside of the United States and the passage of the MCA in late-2006, which conclusively took away that right. See also Congressional Budget Office Cost Estimate (included in this Report) ("[G]iven the number of cases in the federal system (the United States was a defendant in approximately 4,600 habeas corpus cases in 2006), this increase [in habeas petitions following the passage of S. 185] would likely be insignificant" [and] "would have no significant cost over the 2008–2012 period."). Consistent with *Rasul,* the Committee, in reporting this bill, does not intend to confer new habeas jurisdiction for detainees outside of the United States and U.S.-controlled territory. As noted above, courts have found no jurisdiction for similar claims from detainees captured, detained, and held in Iraq.[7]

Finally, the critics' assertion that habeas proceedings in federal court will somehow lead to the sharing of classified information with terrorists demeans our federal judiciary and ignores the procedures established by this body to insure that classified information is safeguarded in federal proceedings. All federal judges are cleared to view classified information, and they have significant discretion in determining what kinds of evidence to consider, and what witnesses, if any, to allow, in habeas proceedings, which lack many of the protections for defendants present in actual trials. Many detainee habeas claims could therefore be resolved with no recourse to classified documents at all after a determination by a judge that such evidence is not needed to make the baseline showing that the detainee is properly held. Where classified evidence is relevant, courts and judges are well-equipped to deal with such evidence without compromising national security. A distinguished group of former federal judges noted in a letter to Congress last fall that the federal courts have long effectively and efficiently handled habeas complaints and cases involving classified and top secret information, and that "the habeas statute and rules provide federal judges ample tools for controlling and safeguarding the flow of information in court." Indeed, the United States District Court in Washington, D.C. entertained dozens of detainee habeas petitions involving clas-

[6] Harvard Law Professor Gerald L. Neuman confirmed in an April 26, 2007 letter to House Armed Services Committee Chairman Ike Skelton that *Rasul* does not provide a basis for the exercise of habeas jurisdiction in Iraq, Afghanistan or elsewhere. Professor Neuman concluded, "Taken either separately or together, the majority and concurring opinions in *Rasul* make clear that habeas corpus jurisdiction extended to foreign nationals held outside the sovereign territory of the United States because of factors specific to Guantanamo, the plenary and exclusive authority exercised there as a result of the indefinite continuation of a colonial-era lease from Cuba. Moreover, the focus of the Justices was on the nature of the U.S. power over an entire territory, not merely on power over a person or building. There is no other country in which the United States has been granted comparable authority."

[7] The claim that this bill would create new statutory habeas rights that would have led to many thousands of petitions during World War II is specious. Statutory habeas emerged from the first act passed by the nation's first Congress (the Judiciary Act of 1789), was readily available during World War II, and did not prompt a burdensome surge of petitions. This bill would simply foster a return to the pre-DTA/MCA status quo—the legal system that was in place during World War II.

sified information between 2002 and 2005, using well- established procedures for dealing with such evidence, including a protective order entered into by all parties to the litigation. Federal judges can and will resume this practice of efficiently handling habeas petitions while safeguarding national security interests when habeas rights are restored.

The Committee is mindful that the Habeas Corpus Restoration Act of 2007 does not remove language contained in the Detainee Treatment Act that sets up a review process for CSRT determinations in the U.S. Court of Appeals for the D.C. Circuit. The Committee does not view that language as somehow restricting the filing of habeas petitions to the U.S. Court of Appeals for the D.C. Circuit. It is the intent of this Committee that the Habeas Corpus Restoration Act restore jurisdiction to issue writs of habeas corpus to all courts that would have had such jurisdiction prior to the enactment of the DTA. Although the U.S. Court of Appeals for the D.C. Circuit retains exclusive jurisdiction over ordinary challenges to the final decisions of CSRTs, the federal district courts, and other courts with the power to issue writs of habeas corpus, will have the authority to consider habeas corpus challenges to the legitimacy of the tribunals themselves, to the underlying decisions, and to the basis for detention, whether or not a detainee has gone through a CSRT.

Based on this country's fundamental, longstanding commitment to habeas review of executive detention, fidelity to our constitutional values, and advancement of our strategic interests, it is critical that the habeas-stripping language in the DTA and MCA be eliminated and that habeas rights for those detained by the U.S. Government be fully restored.

II. History of the Bill and Committee Consideration

A. HEARING

On May 22, 2007, the Judiciary Committee held a hearing on "Restoring Habeas Corpus: Protecting American Values and the Great Writ," which examined the public policy and constitutional implications of Congress's decision to eliminate statutory habeas rights for those the U.S. Government deems "enemy combatants." At the hearing, the former Judge Advocate General of the U.S. Navy, Rear Admiral Donald J. Guter, and William H. Taft IV, former Deputy Secretary of Defense under President George H.W. Bush and a former senior State Department advisor in the current administration, testified that removing the fundamental protection that habeas provides does not make us safer against acts of terrorism, but instead leads us away from American values and the image we have earned as a nation that promotes and lives by the rule of law. Admiral Guter testified that habeas corpus is not a special right; but is instead what we expect for our citizens and military personnel abroad, and what we should extend to all persons. Mr. Taft pointed out that civilian court review of military determinations greatly enhances the proceedings' legitimacy, and that civilian courts are well-positioned to handle—and in fact did handle prior to the MCA—habeas challenges by detainees.

Attorney David B. Rivkin, Jr., testifying against restoring detainees' habeas rights, maintained that the procedures erected by the

DTA and MCA are fair because they provide detainees with sufficient judicial process. Two law professors—Orin Kerr of George Washington University and Mariano-Florentino Cuellar of Stanford University—countered this notion, arguing that, in view of recent Supreme Court precedent, Congress may have exceeded its constitutional authority by stripping away habeas rights from the detainees without providing a constitutionally adequate alternative. Professor Cuellar also pointed out that the law currently permits the creation of a "massive unaccountable detention system" that could be used against any one of the more than 12 million U.S. lawful permanent residents, including millions of such persons of Latino origin.

Mr. Rivkin also argued that the CSRTs provide more rights to detainees than what the Geneva Conventions require. But Mr. Taft pointed out that the Geneva Conventions—and the U.S.'s own regulations—require a hearing at or near the time of capture to determine whether the person is in fact a prisoner of war who can lawfully be detained. A hearing at or near the time and place of capture allows for greater accuracy, and cannot be replicated later. Mr. Taft pointed out in written testimony that, even if CSRTs are more elaborate than hearings pursuant to the Geneva Conventions, habeas corpus proceedings' determinations are more reliable than CSRT hearings.

B. LEGISLATIVE HISTORY

On September 27, 2006, Senator Specter introduced an amendment to the Military Commissions Act, Amendment 5087 to S. 3930, striking the MCA's habeas provision. Senator Leahy and seven other senators co-sponsored the amendment. The amendment was briefly debated and then failed on a vote of 48–51 on September 28, 2006.

On December 5, 2006, Senator Specter introduced S. 4081, the Habeas Corpus Restoration Act of 2006, with Senator Leahy as the original cosponsor. This bill, which is identical to the Habeas Corpus Restoration Act of 2007, went slightly further than Amendment 5087, reversing the habeas-stripping provision in the DTA as well as that in the MCA.

On January 4, 2007, Senators Specter and Leahy introduced the Habeas Corpus Restoration Act of 2007. On February 28, 2007, Senator Specter submitted a version of the bill, with Senator Leahy and four other co-sponsors, as Amendment 286 to S. 4, the Improving America's Security Act of 2007. The amendment was ruled nongermane by the chair.

After the Senate Judiciary Committee's hearing on May 22, 2007, the Habeas Corpus Restoration Act was considered by the Committee on June 7, 2007. The Committee voted 11–8 to report the bill favorably to the Senate, without amendment.

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Sec. 1. Short title.

This section provides that the legislation may be cited as the "Habeas Corpus Restoration Act of 2007."

Sec. 2. Restoration of habeas corpus for those detained by the United States.

This section repeals those provisions of the DTA and the MCA that eliminated the jurisdiction of any court to hear or consider applications for a writ of habeas corpus and other related legal actions filed by aliens who have been determined to be enemy combatants or are awaiting such determination. This section thus restores habeas corpus rights and similar legal rights as they existed prior to the enactment of the DTA in 2005. This section also allows courts to consider legal challenges to military commissions only as provided by the Uniform Code of Military Justice or by a habeas corpus proceeding.

IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

JUNE 12, 2007.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 185, the Habeas Corpus restoration Act of 2007.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Daniel Hopple.

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 185—Habeas Corpus Restoration Act of 2007

S. 185 would eliminate provisions of current law that limit the jurisdiction of federal courts over applications for a writ of habeas corpus (a judicial order requiring that a prisoner be brought before a court to determine whether that person's detention or imprisonment is lawful) or other judicial action filed by, or on behalf of, an alien detained by the United States as an enemy combatant. CBO expects that allowing those detainees greater access to the federal court system would have an insignificant effect on overall caseload. As such, CBO estimates that implementing S. 185 would have no significant cost over the next five years. Enacting this legislation would not affect direct spending or revenues.

In 2006, the Congress enacted the Military Commissions Act of 2006 (Public Law 109–366). This act limited the right to habeas corpus for detainees of the U.S. military considered to be enemy combatants. By restoring this right, CBO expects that the number of habeas corpus petitions filed and heard in federal court would increase. However, given the number of cases in the federal system (the United States was a defendant in approximately 4,600 habeas corpus cases in 2006), this increase would likely be insignificant. As such, CBO estimates that implementing S. 185 would have no significant cost over the 2008–2012 period.

S. 185 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Daniel Hoople. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Evaluation

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S.185.

VI. Conclusion

Passage of the Habeas Corpus Restoration Act of 2007, S. 185, will restore the basic and essential right to challenge arbitrary detention by the Government to non-citizens, including the 12 million lawful permanent residents currently in this country, who under current law may be held forever with no recourse to challenge their detention in court. This legislation will contribute to renewed global respect for American values and the rule of law.

VII. Additional and Minority Views

A. Minority Views of Senators Kyl, Sessions, Graham, Cornyn, and Coburn

At least 30 detainees who have been released from the Guantanamo Bay detention facility have since returned to waging war against the United States and its allies. A dozen released detainees have been killed in battle by U.S. forces, while others have been recaptured. Two released detainees later became regional commanders for Taliban forces. One released Guantanamo detainee later attacked U.S. and allied soldiers in Afghanistan, killing three Afghan soldiers. Another former detainee has killed an Afghan judge. One released detainee led a terrorist attack on a hotel in Pakistan, and also led a kidnapping raid that resulted in the death of a Chinese civilian. This former detainee recently told Pakistani journalists that he plans to "fight America and its allies until the very end."[1]

This bill would create an impossible situation for the military with regard to classified evidence, forcing our government to either expose highly sensitive intelligence sources and methods to Al Qaida or to release committed terrorists. It would make it impossible for the United States to detain large numbers of enemy war prisoners inside this country, as it did during World War II. It would prevent effective interrogation of Al Qaida detainees, denying us the sole means by which we have learned of a number of terrorists plots and terrorist networks in recent years. It ignores the existing system for reviewing detentions, which provides an adequate process for correcting mistakes while also protecting America's interests. And this bill has absolutely no basis in American law or in the long history of the writ of habeas corpus. All of these reasons contribute to our decision to oppose this legislation.

But the principal reason why we object to S. 185 is because, by empowering civilian judges to override the military's determination that an alien should be detained as an enemy combatant, this legislation inevitably will allow more Al Qaida detainees to return to waging war against the United States. Federal judges, who have no specialized knowledge of foreign battlefields or the nature of enemy terrorist networks, do not know better than the military who is an enemy combatant. If this bill were signed into law, it is inevitable that more civilians would be killed by released Guantanamo detainees. And it is very likely that American soldiers would be killed as well. This is a price that our nation should not be forced to bear.

[1] *See generally* news stories included in Attachment A to these views.

SHARING CLASSIFIED EVIDENCE WITH AL QAIDA

In habeas litigation, not only the detainee's lawyer, but the detainee himself would have a presumptive right to review classified evidence that is used in the government's case. Under the Classified Information Procedures Act, which governs the use of classified evidence in federal court, the government can redact or summarize evidence, but it must always provide the detainee with an "adequate substitute" for that evidence. If the government could not provide an adequate substitute to a Guantanamo detainee, it would either have to provide the evidence itself to the detainee, or forego using that evidence.

Most, if not all, of the evidence in the United States's possession regarding a Guantanamo detainee will be classified. The United States would thus repeatedly face the Hobson's choice of either compromising highly sensitive information by providing "adequate substitutes"—the repeated use of which itself would allow Al Qaida to piece together sensitive information—or foregoing the use of what is likely to be the most important evidence against a detainee, and thus running the risk that the detainee will be released.

Moreover, much of the government's most sensitive information regarding a detainee will never be provided to the government's trial attorneys. Under the current detention-review system, which is very protective of classified evidence, U.S. intelligence agencies already balk at providing some non-exculpatory information to military review panels. Their willingness to do so will not be enhanced by this bill. U.S. intelligence agencies—as well as the foreign governments that provide some of the most valuable intelligence about the Al Qaida network—will simply refuse to release that information for use in an adversary proceeding run by civilian lawyers in which the detainee and his counsel will have a presumptive right of access to that evidence. U.S. intelligence agencies will not be willing to compromise their intelligence-gathering sources and methods, and many foreign governments (particularly those of the Middle East) will not be willing to reveal the fact that they share intelligence with the United States. If forced to choose between exposing such information and allowing an Al Qaida member to go free, they will allow the terrorist to go free.

Finally, we know from hard experience that providing classified or other sensitive information to Al Qaida members is a very bad idea. For example, during the 1995 federal prosecution in New York of the so-called blind sheikh, Omar Abdel Rahman, prosecutors turned over the names of 200 unindicted coconspirators to the defense. The prosecutors were required to do so under the civilian criminal justice system's discovery rules, which require that large amounts of evidence be turned over to the defense. The judge warned the defense that the information could only be used to prepare for trial and not for other purposes. Nevertheless, within 10 days of being turned over to the defense, this information found its way to Sudan and into the hands of Osama bin Laden. U.S. District Judge Michael B. Mukasey, who presided over the case, explained "[t]hat [the] list was in downtown Khartoum within 10 days * * * [a]nd [bin Ladin] was aware within 10 days * * * that

the government was on his trail." By providing classified evidence to the defense in that terrorism case, we had effectively informed al Qaida as to which of its agents we had uncovered.

In another case in which terrorists were tried in the civilian criminal justice system, testimony about the use of cell phones tipped off terrorists as to how the government was monitoring terrorist networks. Again according to Judge Mukasey, "there was a piece of innocuous testimony about the delivery of a battery for a cell phone." This testimony alerted terrorists to government surveillance, "and as a result [their] communication network shut down within days and intelligence was lost to the government forever, intelligence that might have prevented who knows what."

This bill repeats the mistakes of the past—of treating the war with Al Qaida like a criminal-justice investigation. The bill would force the United States to choose between compromising information that could be used to prevent future terrorist attacks, and letting captured terrorists go free. That is not a choice that our nation should be forced to make.

500,000 HABEAS LAWSUITS DURING WORLD WAR II?

The negative consequences of this bill would not be confined to the present war with Al Qaida. Despite the coyness of its repeal of a repeal of litigation rights, the bill clearly is intended to confer the right to file habeas and prison-conditions lawsuits on enemy war prisoners held in Guantanamo Bay. If courts have jurisdiction over claims filed by enemy combatants held in Cuba, it would appear unavoidable that litigation rights also would attach to enemy combatants held in prison camps inside the United States. And if the U.S. military's "jurisdiction and control" over Guantanamo is enough to extend habeas jurisdiction there, it is not apparent what principled basis would remain for denying the same rights to any prisoner of war held at any U.S. military base or prison camp anywhere in the world.

Consider how this bill's legal regime would have operated had it been in place during World War II. The United States detained over 2 million German and Japanese war prisoners during World War II—including 425,000 who were held in prison camps inside the United States. Do the sponsors of this bill really believe that the United States should have been forced, at the height of war against Germany and Japan, to defend against 425,000 habeas petitions filed by enemy war prisoners? Do the sponsors of this bill really believe that, while our armed forces were engaged in a life-or-death struggle with Germany and Japan, our government should have been required to litigate against hundreds of thousands of conditions-of-confinement lawsuits filed by captured enemy soldiers? Should our government have been forced to provide each of these hundreds of thousands of prisoners of war with translators and counsel? With discovery rights? The right to compel witnesses? The right to adequate summaries of classified evidence?

As absurd as these scenarios may seem—and we certainly do hope that they seem absurd to you—please ask yourself how such scenarios could be avoided if this bill were signed into law and the United States were once again forced to fight a major war. Even if the bill were construed to extend overseas only to Cuba and no-

where else, it would certainly apply to enemy combatants detained inside the United States. (Surely the United States could not have defeated federal courts' post-*Rasul*, pre-DTA jurisdiction over Guantanamo detainees by transferring the detainees to the United States.)

Why should our nation be prevented from holding enemy war prisoners inside the United States? In a major war in which our soldiers capture hundreds of thousands or even millions of enemy soldiers, it is likely that the United States will be the safest and most secure place to detain enemy P.O.W.s. Camps located near the scene of fighting risk being attacked and overrun by the enemy, and third countries willing to accommodate prison camps filled with hostile troops are few and far between. Why should our military be prevented from holding enemy P.O.W.s during wartime in the place where it will be safest to do so? Or should the United States really have been forced to defend against half a million habeas petitions in 1944?

We certainly cannot assume that the United States will never again be obliged to fight a major war. And in such a circumstance, this bill would require our government to either hold large numbers of enemy P.O.W.s in locations that may jeopardize our own soldiers' safety, or endure a habeas-litigation tempest of biblical proportions. There is no reason to place our nation in such a situation.

AL QAIDA SUBPOENAS FOR AMERICAN SOLDIERS

Giving the Al Qaida detainees at Guantanamo habeas-litigation rights also means giving them the power to compel witnesses. In the context of enemy-combatant detention, the most relevant witnesses typically will be the soldiers who captured the detainees. In other words, our own soldiers or those of our allies could be recalled from the battlefield (or from civilian life) to be cross-examined by the very enemy combatants whom they captured. Stuart Taylor described in a recent column the questions that the grant of such procedural rights would raise:

> Should a Marine sergeant be pulled out of combat in Afghanistan and flown around the world to testify at a detention hearing about when, where, how, and why he had captured the detainee? What if the Northern Alliance or some other ally made the capture? And should the military be ordered to deliver high-level Qaeda prisoners to be cross-examined by other detainees and their lawyers?

As the Supreme Court observed in *Johnson* v. *Eisentrager,* "[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home." It would also be difficult to conceive of a process that would be more insulting to our own soldiers. Our troops should not be subject to subpoena by Al Qaida.

CUTTING OFF INTELLIGENCE ABOUT TERRORIST ATTACKS AND AL QAIDA NETWORKS

Keeping captured terrorists out of the court system is also critical to conducting effective interrogation. And it is interrogation of captured terrorists that has proved to be the most important source of intelligence in the war with Al Qaida.

Under the former *Rasul*-based system, shortly after Al Qaida and Taliban detainees arrived at Guantanamo Bay, they were told that they had the right to challenge their detention in federal court and that they had the right to a lawyer. Detainees routinely exercised both rights. Lawyers inevitably told their clients not to talk to the military. And mere notice of the availability of court proceedings gave detainees hope that they could win release by fighting their detention rather than by cooperating with their captors.

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

> DIA's approach to interrogation is largely dependent upon creating an atmosphere of dependency and trust between the subject and the interrogator. Developing the kind of relationship of trust and dependency necessary for effective interrogations is a process that can take a significant amount of time. There are numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began.
>
> Anything that threatens the perceived dependency and trust between the subject and interrogator directly threatens the value of interrogation as an intelligence gathering tool. Even seemingly minor interruptions can have profound psychological impacts on the delicate subject-interrogator relationship. Any insertion of counsel into the subject-interrogator relationship, for example—even if only for a limited duration or for a specific purpose—can undo months of work and may permanently shut down the interrogation process.

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

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

On September 6 of last year, when the President announced the transfer of 14 high-value terrorism detainees to Guantanamo, he also described information that the United States had obtained by

interrogating these detainees.[2] Abu Zubaydah was captured by U.S. forces several months after the September 11 attacks. Under interrogation, he revealed that Khalid Sheikh Mohammed was the principal organizer of the September 11 attacks. Zubaydah also described a terrorist attack that Al Qaida operatives were planning to launch inside this country—an attack of which the United States had no previous knowledge. Zubaydah described the operatives involved in this attack and where they were located. This information allowed the United States to capture these operatives—one while he was traveling to the United States. Zubaydah also revealed the identity of another September 11 plotter, Ramzi bin al Shibh, and provided information that led to his capture. U.S. forces then interrogated bin al Shibh. Information that both he and Zubaydah provided helped lead to the capture of Khalid Sheikh Mohammed.

Under interrogation, Khalid Sheikh Mohammed provided information that helped stop another planned terrorist attack on the United States. K.S.M. also provided information that led to the capture of a terrorist named Zubair. And K.S.M.'s interrogation also led to the identification and capture of an entire 17-member Jemaah Islamiya terrorist cell in Southeast Asia.

Information obtained from interrogation of terrorists detained by the United States also helped to stop a planned truck-bomb attack on U.S. troops in Djibouti. Interrogation helped stop a planned car-bomb attack on the U.S. embassy in Pakistan. And it helped stop a plot to hijack passengers planes and crash them into Heathrow airport in London. The President stated in his September 6 remarks that "[i]nformation from terrorists in CIA custody has played a role in the capture or questioning of nearly every senior al Qaida member or associate detained by the U.S. and its allies." He concluded by noting that Al Qaida members subjected to interrogation by U.S. forces:

> have painted a picture of al Qaeda's structure and financing, and communications and logistics. They identified al Qaeda's travel routes and safe havens, and explained how al Qaeda's senior leadership communicates with its operatives in places like Iraq. They provided information that * * * has allowed us to make sense of documents and computer records that we have seized in terrorist raids. They've identified voices in recordings of intercepted calls, and helped us understand the meaning of potentially critical terrorist communications.
>
> [Were it not for information obtained through interrogation], our intelligence community believes that al Qaeda and its allies would have succeeded in launching another attack against the American homeland. By giving us information about terrorist plans we could not get anywhere else, this [interrogation] program has saved innocent lives.

If this bill is enacted, and Al Qaida terrorists are given the right to challenge their detention in federal court, we will never obtain some of the information that we otherwise would have obtained through interrogation. Once a terrorist meets with a lawyer and is

[2] An extended excerpt of the President's remarks is included in Attachment B to these views.

told that he will be allowed to continue his war against the United States through our courts, he will not develop the relationship of trust and dependency upon his interrogator that makes ordinary interrogation techniques effective. Under this bill's legal regime, it is inevitable that invaluable information would be lost. It is inevitable that senior Al Qaida operatives would not be captured, it is inevitable that Al Qaida networks and cells would not be broken up, and it is inevitable that some planned terrorist attacks would not be prevented. These consequences alone are reason to reject this bill.

THE CURRENT SYSTEM STRIKES THE RIGHT BALANCE

The United States already provides Guantanamo detainees with procedures that are more than adequate to review their detentions and correct any mistakes. The U.S. military reviews a detainee's status in the theater where he is captured, it reviews his case again at Guantanamo in a hearing before a three-officer Combatant Status Review Tribunal (CSRT), and it conducts another hearing every year thereafter to consider new evidence and whether the detainee still poses a threat. And in the 2005 Detainee Treatment Act, Congress authorized the D.C. Circuit and Supreme Court to decide whether a detainee's CSRT hearing was properly conducted and whether the military's procedures are constitutional. Such access to domestic courts is not provided to enemy combatants by any other nation and has no precedent in our own history.

The procedures that the United States affords to the Al Qaida detainees at Guantanamo also exceed the rights than Article V of the Geneva Conventions guarantees to lawful enemy war prisoners. Consider several features of the CSRT and DTA system that exceed Geneva Convention protections:

• In a CSRT, a commissioned officer is appointed to serve as a personal representative "to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses." This personal representative must search for exculpatory evidence that may "suggest that the detainee should not be designated as an enemy combatant." Article V of the Geneva Conventions does not provide a lawful enemy combatant with any such representative or assistant.

• In the CSRT system, a detainee is entitled to receive a prehearing summary of evidence that will be used against him. Article V of the Geneva Conventions does not provide a war prisoner with any summary of the evidence against him.

• A CSRT is subject to several levels of review. It is subject to review by a judge advocate officer, who acts as the Legal Advisor to the tribunal process. The Legal Advisor reviews each CSRT decision for legal sufficiency. Each detention is also reviewed every year by an Administrative Review Board (ARB), which asks whether the detainee continues to pose a threat to the United States. The U.S. military has also recently adopted procedures pursuant to which it will reconvene a CSRT for a prisoner if the military discovers substantial new evidence that the detainee is not an enemy combatant. And finally, each detainee also has the right to appeal the decision of the CSRT to the U.S. Court of Appeals for the District of Columbia, which is charged with evaluating whether the

tribunal complied with the law and whether those rules and procedures are constitutional. Finally, the detainee may seek additional review by filing a writ of certiorari to the U.S. Supreme Court. By contrast, the Geneva Conventions provide for no review at all of the decisions of an Article V tribunal—there is no review by a legal representative, no administrative review, no review even if new evidence is uncovered, and absolutely no judicial review whatsoever. None of these rights is provided to lawful enemy war prisoners under the Geneva Conventions. But all of them are provided by the United States to the detainees held at Guantanamo.

Some critics of the Guantanamo detentions have argued that CSRTs are inferior to Geneva Convention Article V hearings. The argument that is made is that Article V hearings are conducted in the immediate time and place of the capture, and that therefore the detainee is supposedly able to present fresh evidence. This mischaracterization of Article V hearings was rebutted by Mr. David Rivkin at this committee's May 14 hearing on detainees. Mr. Rivkin noted that Article V hearings typically do not take place until days or weeks after the capture. He also noted that Article V hearings do not provide the detainee with anyone who is assigned to assist him, and they do not require that all information in the government's possession pertaining to the detainee be assembled and summarized for the detainee.

Mr. Rivkin further elaborated on the differences between Article V hearings and CSRTs in his answer to a written question that Senator Kyl submitted to him following the hearing.[3] He stated:

> Article V of the Third Geneva Convention of 12 August 1949 Relative to the Treatment of Prisoners of War reads as follows:
>
> "The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."
>
> The treaty offers no definition of a "competent tribunal," nor does it provide for the assistance of counsel or any other due process rights in particular. According to the International Committee of the Red Cross's 1960 commentary on this provision, it was "based on the view that decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank."
>
> It is my understanding that this provision has been variously interpreted by the states parties. However, the United States has outlined its Article V procedures as part of Army Regulation 190–8 (Oct. 1, 1997) ("AR 190–8").

[3] Mr. Rivkin's full answers to Senator Kyl's questions are included as Attachment C to these views. These answers include a chart that usefully captures all of the differences between CSRTs and Article V hearings.

> Under section 1–6 of that provision "Tribunals," detainees are not entitled to the assistance of counsel, or any other type of advisor, the Government is not required to assemble and present all of the information it may have on a particular individual, and no particular timeframe is established for the hearing.

At the September 25, 2006, hearing before the Judiciary Committee on the Military Commissions Act, committee witness Brad Berenson testified that "[n]o nation on the face of the earth in any previous conflict has given people they have captured anything like [the procedures provided by CSRTs and the DTA], and none does so today." Similarly, committee witness David Rivkin testified at the same hearing that "[t]he level of due process that these detainees are getting [under CSRTs and the DTA] far exceeds the level of due process accorded to any combatants, captured combatants, lawful or unlawful, in any war in human history." Mr. Rivkin added: "We are giving [alien enemy combatants] a lot more * * * then they are legally entitled to under either international [law] or the law in the U.S. Constitution."

The first round of CSRTs that were conducted for the detainees at Guantanamo Bay required 6 months to complete. Over 200 Defense Department employees worked to track down all available evidence about the detainees from military files and from U.S. intelligence agencies, and to compile a record for the tribunals to review. All exculpatory evidence in the possession of any element of the United States Government was included in that record. The tribunals themselves were conducted by experienced military officers. And the Defense Department conducts an additional hearing every year to reevaluate whether the detainee still poses a danger and should be held.

Those critics of the Guantanamo detentions who casually condemn the CSRT and DTA system—often the same critics who hold up the Geneva Conventions as their personal gold standard—are ignorant of the nature of the CSRTs, of the Geneva Conventions, and of the actual practices of other nations. The CSRTs exceed the standards of the Geneva Conventions and they exceed the process provided by any other nation to captured war prisoners. The CSRTs provide a thorough review of each detainee's case that is more than adequate to identify a mistaken detention. The fact that the CSRTs do so without compromising classified evidence or preventing effective interrogation of Al Qaida may carry no weight in their favor with Guantanamo's foreign critics, but it should carry heavy weight with those institutions charged with protecting the interests of the American people.

THIS BILL HAS NO BASIS IN LAW OR HISTORY

The United States Constitution does not require that the writ of habeas corpus be extended to alien enemy combatants. The writ of habeas corpus can trace its origins back to the Magna Carta of the 13th Century, and, in the nearly 800 years of the writ's existence, no English or American court has ever granted habeas relief to alien enemy soldiers captured during wartime.

Indeed, over half a century ago, the U.S. Supreme Court in *Johnson* v. *Eisentrager* rejected the notion that the Constitution extends habeas rights to enemy war prisoners. As the Court held, "No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it."

This bill, S. 185, is titled the "Habeas Corpus Restoration Act." It purports to "restore" habeas rights to the enemy combatants held at Guantanamo. Yet prior to the *Rasul* decision in June 2004, no court had ever held that alien enemy soldiers are entitled to seek the writ of habeas corpus. There is no habeas right to "restore" to alien enemy combatants.

In written questions to following last month's hearing, Senator Kyl asked witnesses who testified in favor of this bill if they could cite any case prior to *Rasul* v. *Bush* in which any common law court, going back over the entire 800-year history of the writ of habeas corpus, had ever granted relief to an alien enemy combatant on a habeas corpus petition. No one was able to cite a single case that even colorably supports the proposition that enemy war prisoners are entitled to seek the writ of habeas corpus.

The majority, as well as Professor Mariano-Florentino Cuellar, cite *Ex parte Quirin*, 317 U.S. 1 (1942), and *Application of Yamashita*, 327 U.S. 1 (1946), as precedent for extending habeas rights to enemy combatants. Each of these cases only allowed war prisoners to challenge their trial by military commission. It did not allow them to use habeas or any other writ to challenge their detention. *Quirin* involved a habeas petition filed on behalf of six German saboteurs who were captured after arriving on the U.S. East Coast by submarine. The Supreme Court entertained a challenge to the saboteurs' trial by military commission. The court upheld the convictions and death sentences and the petitioners were all executed. Although *Quirin* did allow alien enemy combatants to file habeas petitions, these petitions only challenged military commissions, not detention. *Yamashita* is the same. In that case, the Supreme Court entertained a habeas application by a Japanese General who had been convicted of war crimes by a military commission and sentenced to death. The Supreme Court found that the President had the power to convene such commissions, and petitioner was executed. Again, the case did not involve a challenge to detention.

The majority, Professor Cuellar, and Admiral Donald Guter all cite as precedent for extending habeas to enemy combatants the 18th and early 19th century cases of *Rex* v. *Shiever*, 97 Eng. Rep. 551 (K.B. 1759); *The Case of Three Spanish Sailors*, Eng. Rep. 1010 (K.B. 1779); and *Lockington* v. *Smith*, 15 F. Cas. 758 (No. 8,448) (CCD Pa. 1817). The notion that these cases establish such a precedent is adequately analyzed and dismissed in the D.C. Circuit's opinion in *Boumediene* v. *Bush*, 476 F.3d 981, 988–89 (D.C. Cir. 2007), and the U.S. District Court's opinion in *Hamdan* v. *Rumsfeld*, 464 F.Supp.2d 9, 16–17 & nn.10–11 (D.D.C. 2006). Anyone seeking an authoritative analysis of these three cases should consult those two opinions. The most compelling and thorough analysis of these cases, however, appears in the Criminal Justice Legal Foundation's district court amicus brief in the *Hamdan* case. The

following passages, with most citations omitted, are taken from pages 20–24 of that brief:

> A number of early cases have been cited for the proposition that the common law writ extended to aliens, but on closer examination each of these cases either extends habeas relief to a person who is "part of the population," denies relief without distinguishing the merits from the jurisdiction, or supports the argument that aliens captured as enemies by the military and otherwise unconnected with the country are not eligible for habeas relief.
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> * * * * * * *
>
> Petitioner cites *Lockington* v. *Smith* as an example of early American courts hearing "enemy aliens' habeas petitions," but this is neither a habeas case nor a case of an enemy captured in hostilities. Lockington was a British merchant living and doing business in the United States when the War of 1812 was declared. In obedience to a presidential order, he reported himself and was confined until he agreed to parole terms, after unsuccessfully seeking habeas relief. The case cited is a suit for damages, decided well after the end of the war. In any event, Lockington was not a battlefield captive, but a "part of the population" as that term was later used in The Japanese Immigrant Case.
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> * * * * * * *
>
> *The Case of the Three Spanish Sailors* is a case of the second type. The three sailors were undisputedly captured as enemy aliens and prisoners of war in the first instance, but they claimed they had ceased to be such by their voluntary service on an English merchant vessel. The holding was that on their own showing, they were enemy aliens and prisoners of war and as such the courts "can give them no redress." The court went on to say that if their allegations were true "it is probable they may find some relief from the Board of Admiralty."
>
> Even in the modern era, the line between jurisdiction and merits is sometimes obscure. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 112–113 (1998) (Stevens, J., concurring in the judgment). It may be clear that a party is not entitled to relief without being clear whether the reason is jurisdictional or substantive. To conclude on the basis of this sketchy report that the court actually grappled with and decided a subtle distinction is quite a stretch. The court simply decided on the pleadings that the petitioners could get no relief from the judiciary and had to ask the executive.
>
> *King* v. *Schiever*, 97 Eng. Rep. 551 (K. B. 1759) is arguably a case of the second type in one report, but it appears to be a case of the third type in another. Schiever was a Swedish subject who claimed he had been forced into service on a French privateer before that ship was captured by the English and he was made a prisoner of war. The report of this case simply states that, "the Court thought this

man, upon his own showing, clearly a prisoner of war, and lawfully detained as such. Therefore they Denied the motion." Id., at 552 (footnote omitted). This summary description is consistent with the *Three Spanish Sailors*' case. Another report of the same case, *Schiever's Case*, 96 Eng. Rep. 1249 (K. B. 1759) gives a more extended report of the holding.

"He is the King's prisoner of war, and we have nothing to do in that case, nor can we grant an habeas corpus to remove prisoners of war. His being a native of the nation not at war does not alter the case, for by that rule many French prisoners might be set at liberty, as they have regiments of many other kingdoms in their service, as Germans, Italians, &c.

"But, if the case be as this man represents it, he will be discharged upon application to a Secretary of State." Id., at 1249.

In other words, the court did not adjudicate whether his detention as a prisoner of war was proper and expressed an opinion that it was not if his allegations were true, yet the court washed its hands of the case anyway. This case illustrates that while some aliens could seek habeas corpus in English courts, an alien captured during hostilities and held as a prisoner of war could not. Even where he alleged he was being wrongfully held and should not have been a prisoner of war, his remedy was with the executive branch and not with the judiciary.

An English commentator cites *Three Spanish Sailors* and *Schiever* as examples of the common assertion that "a prisoner of war has no standing to apply for a writ of habeas corpus." R. Sharpe, The Law of Habeas Corpus 112 (1976). Sharpe goes on to criticize this assertion and maintain that it is a question of substance and not standing, but he cites only modern authority for that proposition. See id., at 113. Whether Sharpe is correct about modern English law is irrelevant to the present case. The question is whether the adjudication of rights of aliens captured in hostilities and held as prisoners by the military was within the "Privilege of the Writ of Habeas Corpus" as it was understood in 1789. In the cases from that era, every such applicant was turned away without judicial relief, even when they may have been wrongfully held.

The question has now been extensively litigated at all levels of the federal courts over the last several years. Yet proponents of extending habeas litigation rights to alien enemy war prisoners are unable to identify one case out of 800 years of common law history in which an enemy soldier was ever allowed to use habeas to challenge his detention. This absence speaks volumes and should be conclusive of the constitutional question of whether habeas rights extend to enemy war prisoners.

HAMDI

During the debate on the Military Commissions Act, Senator Specter quoted a passage from 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.

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

1. 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."

(Emphasis added in all quotations.) 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.

2. Another aspect of the case that augurs against interpreting the *Hamdi* plurality opinion 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 combatants' 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.

3. 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, we 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." Such an extension, had Justice O'Connor intended it, certainly would not be an action on which she would have believed that "all agree."

RASUL

Earlier this year, Senator Specter criticized the U.S. Court of Appeals for the District of Columbia Circuit's decision in *Boumediene* v. *Bush.* That decision upheld the recently enacted Military Com-

mission Act's bar on lawsuits brought by enemy combatants held at Guantanamo Bay. Senator Specter argued that the Guantanamo detainees have a constitutional right to bring these lawsuits, and he predicted that *Boumediene* will be overruled. He based his argument largely on the Supreme Court's 2004 decision in *Rasul* v. *Bush.* Senator Specter argued that *Rasul*'s ruling that habeas extends to Guantanamo Bay was a constitutional ruling. He based his argument on *Rasul*'s discussion of the 18th century common law of habeas corpus. Senator Specter also argued that Justice Scalia's opinion in *Rasul* acknowledged that *Rasul* overruled *Johnson* v. *Eisentrager,* the landmark decision establishing that captured enemy combatants do not enjoy the privilege of litigation.

Of course, with 5 votes, the *Rasul* Court could have grafted a habeas right for alien enemy combatants onto the Constitution. We believe that to do so would have been deeply irresponsible, and we believe that this is clearly not what the court did in *Rasul*.

In support of his interpretation of *Rasul*, Senator Specter argued that Justice Scalia's opinion in *Rasul* noted that the *Rasul* majority overruled *Eisentrager,* which had denied litigation rights to alien enemy combatants. In response, we would first note that Justice Scalia's opinion in *Rasul* was a dissenting opinion. As any lawyer knows, a dissenting opinion's characterization of a court's holding is hardly authoritative. An argument about what a case means that is based primarily on the dissent is inherently a weak argument.

Moreover, we do not think that Justice Scalia's dissenting opinion in *Rasul* is in any way inconsistent with the notion that *Eisentrager*'s constitutional holding remains good law, and that the constitutional right of habeas corpus does not extend to alien enemy soldiers. Justice Scalia makes clear in his dissent that he is accusing the majority only of overruling Eisentrager's statutory holding, not its constitutional holding.

Justice Scalia begins, at page 493 of his dissent, by quoting the following passage from Eisentrager: "Nothing in the text of the Constitution extends such a right"—a right of habeas corpus for war prisoners held overseas—"nor does anything in our statutes." It is Justice Scalia who italicized the absence of a statutory right when quoting this passage. He then went on to note:

Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today. To do so neatly and cleanly, it must either argue that our decision in *Braden* overruled *Eisentrager,* or admit that it is overruling *Eisentrager.*"

In this passage, Justice Scalia does accuse the *Rasul* majority of overruling *Eisentrager,* but he also makes clear that he only accuses it of overruling *Eisentrager*'s statutory holding, not its constitutional holding.

But the argument that *Rasul* v. *Bush*'s holding was only statutory, and did not extend constitutional rights to enemy combatants, is supported by more than just Justice Scalia's dissent. The majority opinion itself repeatedly and clearly indicates that the holding in that case is only statutory, not based on the Constitution. At page 475 of the opinion, for example, the majority clearly states that "[t]he question now before us is whether the habeas *statute* confers a right to judicial review" of the detention of the detainees

at Guantanamo Bay. (Emphasis added.) Thus the court was careful to make clear that it was the habeas statute that it was interpreting, not the Constitution.

On the next page, when distinguishing *Eisentrager,* the *Rasul* majority opinion states that "*Eisentgrager* made quite clear that [its analysis was] relevant only to the question of the prisoner's constitutional entitlement to habeas corpus. The court had far less to say on the question of the petitioner's statutory right to habeas corpus." This italicized emphasis is in Justice Stevens's opinion.

Finally, at page 478, when explaining how it would distinguish the holding in *Eisentrager*, the majority stated: "Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review."

This statement could not be clearer that *Rasul* only addressed the petitioners' statutory right to habeas, not any constitutional right. The court stated that statutory changes—or rather, changes in the interpretation of statutes—made it unnecessary to reach any constitutional questions in *Rasul*.

Senator Specter's other main argument for his interpretation of *Rasul* is that the majority opinion's discussion of 18th century common law is a constitutionally binding interpretation of the scope of the writ. Our response is that this may be so, but it is not relevant to the constitutionality of the Military Commissions Act. The discussion in *Rasul* that Senator Specter cites is about how far the writ applies overseas. It is not about whether the writ ever applies to alien enemy soldiers.

Rasul's discussion of the common law of habeas corpus appears in Part IV of the majority decision—after the court had already decided that the statutory right extended to the detainees at Guantanamo. This part of *Rasul* is devoted to responding to the argument that the presumption against extraterritorial application of legislation requires that the habeas statute be construed not to extend to Guantanamo Bay. Justice Stevens stated that "[w]hatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within 'the territorial jurisdiction' of the United States." Justice Stevens then asserted that at common law the writ applied to aliens held overseas, and he went on to describe common law cases that he characterized as extending the writ to aliens held at places outside of the "sovereign territory of the realm."

Whatever the merits of Justice Stevens's historical analysis, it is used in *Rasul* only to rebut the presumption against extraterritoriality. It is used to argue that the writ presumptively does extend overseas. But this part of *Rasul* does not address the central question raised by the Military Commissions Act: whether alien enemy soldiers, wherever they are held, are constitutionally entitled to seek the writ of habeas corpus. Regardless of whether the writ applies to other aliens held at U.S. facilities overseas, the writ does not—it has never been extended—to alien enemy combat-

ants detained during wartime, whether those soldiers are held inside or outside of the United States.

None of the common law decisions that Justice Stevens discusses in Part IV of his opinion granted habeas relief to an alien enemy war prisoner. That is because, as we noted earlier, in the history of habeas corpus, prior to *Rasul*, alien enemy war prisoners have never been found to be entitled to the writ. *Rasul*'s historical analysis can be cited for the proposition that the writ extends extraterritorially, even to aliens. But its discussion does not address the question that we are concerned with here today: whether the writ extends to alien enemy soldiers.

Indeed, at one point in its discussion, the *Rasul* opinion does tend to confirm that the common-law habeas right does not extend to enemy soldiers. In its exploration of the scope "historical core" of the common-law writ, *Rasul* quotes a passage from the Supreme Court's prior decision in *Shaughnessy* v. *United States,* which noted that executive imprisonment has long been considered oppressive and lawless, and that no man should be detained except under "the law of the land." As *Rasul* notes, this commentary on the historical scope of the writ came from Justice Jackson.

Just three years before he wrote the passage in *Shaugnessy* that is quoted in *Rasul*, here is something else that Justice Jackson said about the scope of the writ. Here is what he said in *Johnson* v. *Eisentrager* about the notion that the writ extends to alien enemy war prisoners: "No decision of this Court supports such a view. None of the learned commentators on our Constitution has ever hinted at it. The practice of every modern government is opposed to it."

Again, this passage is from the same source that the *Rasul* majority quotes to establish the historical scope of the writ. The writ upholds and enforces the law of the land, but the law of the land does not extend litigation privileges to aliens with whom we are at war.

Allow us to cite another, more recent source in support of our argument: Mr. Benjamin Wittes. Mr. Wittes writes op-eds for the Washington Post, is a scholar at the Brookings Institution, and generally has unimpeachable liberal credentials. Yet this is what he had to say, in a recent column in The New Republic, about the D.C. Circuit's decision in *Boumediene* upholding the Military Commissions Act:

> The [*Boumediene*] court held both that Congress—not the executive branch—stripped the courts of jurisdiction to hear lawsuits from detainees at Guantánamo, and that it had the constitutional power to do so. As a legal matter, the decision is correct. And, if and when the Supreme Court reverses it, as it may do, the decision won't be any less correct. The reversal will signify only that a majority of justices no longer wishes to honor the precedents that still bind the lower courts.
>
> As the case heads towards the Supremes, you'll no doubt hear a lot about suspension of the Great Writ of habeas corpus—the ancient device by which courts evaluate the legality of detentions. And you'll also hear a lot about Guantánamo as a legal "black hole." It's all a lot of rot,

really, albeit rot a majority of the justices might well adopt.

* * * * * * *

Until the advent of the war on terrorism, nobody seriously believed that the federal courts would entertain challenges by aliens who had never set foot in this country to overseas military detentions—or, at least, nobody thought so who had read the Supreme Court's emphatic pronouncement on the subject. "We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction," the Court wrote in 1950. "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes."

* * * * * * *

Notwithstanding the passionate dissent in the D.C. Circuit case, the notion that [the Military Commissions Act] somehow suspends the writ—a step the Constitution forbids except in cases of rebellion or invasion—is not credible. As a legal matter, it merely restores a status quo that had been relatively uncontroversial for the five decades preceding the September 11 attacks—that federal courts don't supervise the overseas detentions of prisoners of war or unlawful combatants. The demand that they do so now is not one the Constitution makes.

CONCLUSION

It would be highly impractical and dangerous to American interests to extend habeas rights to enemy war prisoners. It is also unnecessary in light of the process and rights already afforded to the Guantanamo detainees by the Military Commissions Acts, the Detainee Treatment Act, Combat Status Review Tribunals, and in D.C. Circuit Court and Supreme Court review. CSRT hearings and limited DTA review strike the right balance between the need for process and the exigencies of fighting a war with Al Qaida. The process that currently exists ensures that the persons being held are enemy combatants who pose a threat to the United States; it is consistent with the realities of warfare, and it does not undermine the war against Al Qaida.

We would ask those who support this bill to consider some of the questions that we have posed here. Why are we "restoring" a habeas right to detainees captured in the war with Al Qaida when habeas has never been extended to captured enemy soldiers in the entire 800 year history of the writ? Why are we giving Al Qaida and Taliban detainees a litigation right that has never been extended by any nation to any enemy combatant in the history of armed conflict? Should the 425,000 enemy combatants held inside this country during World War II have been allowed to sue us in our courts? Do we really want to make it impossible for our government to hold captured enemy soldiers in prison camps inside this country if we are once again forced to fight a major war? And finally, isn't 30 released Guantanamo detainees who have returned

to waging war against us enough? Is this bill worth allowing even one civilian or American soldier to be killed by a former detainee?

We think that the answers to all of these questions are obvious, and we are disappointed to see this committee evade the reality of the situation.

JON KYL.
JEFF SESSIONS.
LINDSEY GRAHAM.
JOHN CORNYN.
TOM COBURN.

ATTACHMENT A

[From CNN, May 14, 2007]

U.S. DIVULGES NEW DETAILS ON RELEASED GITMO INMATES

WASHINGTON (Reuters).—The Pentagon on Monday released the names of six former Guantanamo detainees who U.S. officials say re-emerged as Islamist fighters in Afghanistan after their release from the U.S. military prison in Cuba.

The Defense Department said three of those released from the prison for suspected militants resurfaced as senior Islamist fighters in Afghanistan while a fourth was later identified as having been a Taliban deputy defense minister.

The six were among 30 former detainees who the Pentagon said have rejoined the fight against U.S. and coalition forces since their release from Guantanamo. All told, about 390 detainees have been released or transferred from the prison.

"While we have long maintained that we would like to close Guantanamo, there are a number of highly dangerous men who if released would pose a grave danger to the public," explained Pentagon spokesman, Navy Cmdr. J.D. Gordon.

Pentagon officials said the detainees lied about their past by claiming to be farmers, truck drivers, cooks, small-scale merchants or low-level combatants—assertions that were sometimes backed up by fellow inmates.

The disclosure comes as the Pentagon prepares a major analysis of classified detainee records that could be used to rebut critics who have called for the prison's closure by saying many of the 775 detainees who have been held at Guantanamo are innocent.

Defense officials said the large-scale analysis has been under way for several months and could result in the release of new unclassified information on detainees by early summer.

The Guantanamo prison now has about 385 inmates. Records on 517 current and former detainees show that 95 percent have been members of or associated with al Qaeda or the Taliban and that 73 percent participated in hostilities against U.S. or coalition forces, defense officials said.

The analysis is a response to a series of highly critical reports by Seton Hall University law professor Mark Denbeaux, which determined only a small number of Guantanamo detainees had fought against U.S. forces.

Among the six detainees identified on Monday was Mohamed Yusif Yaqub, who the Pentagon said assumed control of Taliban operations in southern Afghanistan after his release from Guantanamo, and died fighting U.S. forces on May 7, 2004.

Abdullah Mahsud was released only to become a militant leader within the Mahsud tribe in southern Waziristan with ties to the Taliban and al Qaeda. He directed the October 2004 kidnapping of two Chinese engineers in Pakistan, the Pentagon said.

Maulavi Abdul Ghaffar became the Taliban's regional commander in Uruzgan and Helmand provinces after his release and was killed in a raid by Afghan security forces on September 25, 2004, the Pentagon said.

Abdul Rahman Noor was released in July 2003 and was later identified as the man described in an October 7, 2001, interview with Al Jazeera television network as the "deputy defense minister of the Taliban," the Pentagon said.

[From the Washington Post, Oct. 22, 2004]

RELEASED DETAINEES REJOINING THE FIGHT

(By John Mintz)

At least 10 detainees released from the Guantanamo Bay prison after U.S. officials concluded they posed little threat have been recaptured or killed fighting U.S. or coalition forces in Pakistan and Afghanistan, according to Pentagon officials.

One of the repatriated prisoners is still at large after taking leadership of a militant faction in Pakistan and aligning himself with al Qaeda, Pakistani officials said. In telephone calls to Pakistani reporters, he has bragged that he tricked his U.S. interrogators into believing he was someone else.

Another returned captive is an Afghan teenager who had spent two years at a special compound for young detainees at the military prison in Cuba, where he learned English, played sports and watched videos, informed sources said. U.S. officials believed they had persuaded him to abandon his life with the Taliban, but recently the young man, now 18, was recaptured with other Taliban fighters near Kandahar, Afghanistan, according to the sources, who asked for anonymity because they were discussing sensitive military information.

The cases demonstrate the difficulty Washington faces in deciding when alleged al Qaeda and Taliban detainees should be freed, amid pressure from foreign governments and human rights groups that have denounced U.S. officials for detaining the Guantanamo Bay captives for years without due-process rights, military officials said.

"Reports that former detainees have rejoined al Qaeda and the Taliban are evidence that these individuals are fanatical and particularly deceptive," said a Pentagon spokesman, Navy Lt. Cmdr. Flex Plexico. "From the beginning, we have recognized that there are inherent risks in determining when an individual detainee no longer had to be held at Guantanamo Bay."

The latest case emerged two weeks ago when two Chinese engineers working on a dam project in Pakistan's lawless Waziristan region were kidnapped. The commander of a tribal militant group, Abdullah Mehsud, 29, told reporters by satellite phone that his followers were responsible for the abductions.

Mehsud said he spent two years at Guantanamo Bay after being captured in 2002 in Afghanistan fighting alongside the Taliban. At the time he was carrying a false Afghan identity card, and while in custody he maintained the fiction that he was an innocent Afghan tribesman, he said. U.S. officials never realized he was a Pakistani with deep ties to militants in both countries, he added.

"I managed to keep my Pakistani identity hidden all these years," he told Gulf News in a recent interview. Since his return

to Pakistan in March, Pakistani newspapers have written lengthy accounts of Mehsud's hair and looks, and the powerful appeal to militants of his fiery denunciations of the United States. "We would fight America and its allies," he said in one interview, "until the very end."

Last week Pakistani commandos freed one of the abducted Chinese engineers in a raid on a mud-walled compound in which five militants and the other hostage were killed.

The 10 or more returning militants are but a fraction of the 202 Guantanamo Bay detainees who have been returned to their homelands. Of that group, 146 were freed outright, and 56 were transferred to the custody of their home governments. Many of those men have since been freed.

Mark Jacobson, a former special assistant for detainee policy in the Defense Department who now teaches at Ohio State University, estimated that as many as 25 former detainees have taken up arms again. "You can't trust them when they say they're not terrorists," he said.

A U.S. defense official who helps oversee the prisoners added: "We could have said we'll accept no risks and refused to release anyone. But we've regarded that option as not humane, and not practical, and one that makes the U.S. government appear unreasonable."

Another former Guantanamo Bay prisoner was killed in southern Afghanistan last month after a shootout with Afghan forces. Maulvi Ghafar was a senior Taliban commander when he was captured in late 2001. No information has emerged about what he told interrogators in Guantanamo Bay, but in several cases U.S. officials have released detainees they knew to have served with the Taliban if they swore off violence in written agreements.

Returned to Afghanistan in February, Ghafar resumed his post as a top Taliban commander, and his forces ambushed and killed a U.N. engineer and three Afghan soldiers, Afghan officials said, according to news accounts.

A third released Taliban commander died in an ambush this summer. Mullah Shahzada, who apparently convinced U.S. officials that he had sworn off violence, rejoined the Taliban as soon as he was freed in mid-2003, sources with knowledge of his situation said.

The Afghan teenager who was recaptured recently had been kidnapped and possibly abused by the Taliban before he was apprehended the first time in 2001. After almost three years living with other young detainees in a seaside house at Guantanamo Bay, he was returned in January of this year to his country, where he was to be monitored by Afghan officials and private contractors. But the program failed and he fell back in with the Taliban, one source said.

"Someone dropped the ball in Afghanistan," the source said.

One former detainee who has not yet been able to take up arms is Slimane Hadj Abderrahmane, a Dane who also signed a promise to renounce violence. But in recent months he has told Danish media that he considers the written oath "toilet paper," stated his plans to join the war in Chechnya and said Denmark's prime minister is a valid target for terrorists.

Human rights activists said the cases of unrepentant militants do not undercut their assertions that the United States is violating the rights of Guantanamo Bay inmates.

"This doesn't alter the injustice, or support the administration's argument that setting aside their rights is justified," said Alistair Hodgett, a spokesman for Amnesty International.

ATTACHMENT B

PRESIDENT GEORGE W. BUSH

SEPTEMBER 6, 2006

* * * * * * *

Within months of September the 11th, 2001, we captured a man known as Abu Zubaydah. We believe that Zubaydah was a senior terrorist leader and a trusted associate of Osama bin Laden. Our intelligence community believes he had run a terrorist camp in Afghanistan where some of the 9/11 hijackers trained, and that he helped smuggle al Qaeda leaders out of Afghanistan after coalition forces arrived to liberate that country. Zubaydah was severely wounded during the firefight that brought him into custody—and he survived only because of the medical care arranged by the CIA.

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

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

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

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

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

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

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

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

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

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

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

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

ATTACHMENT C

DAVID RIVKIN—ANSWERS TO QUESTIONS POSED BY SENATOR JON KYL

Question 1. Do you believe that foreign governments would stop criticizing the detention of the individuals now held at Guantanamo Bay if the Guantanamo facility were closed and those detainees were instead held inside the United States?

Answer. It is, of course, impossible to predict with any certainty what foreign states may do in any given circumstance. However, my own belief is that most of the critics of the current American policy of detaining enemy combatants captured in the war on terror at the Guantanamo base would not stop their attacks if the detainees were transferred to facilities in the United States. For many, if not most, of the critics Guantanamo is only part of their objection to U.S. policy. They believe that the United States is not, and should not claim to be, engaged in a legally cognizable armed conflict with al Qaeda, and that it should use its criminal justice system to meet the threat posed by trans-national terror. This was, of course, largely the status quo before the September 11 attacks.

Therefore, unless the United States were prepared to limit or eliminate its military response to al Qaeda and other jihadi groups, it can expect that foreign criticism will continue even if the Guantanamo detention facilities are closed.

Question 2. During questioning by Senator Durbin, you stated that unlike CSRT hearings, Article V hearings do not provide the detainee with anyone who is assigned to assist him, Article V hearings do not require that all information in the government's possession pertaining to the detainee be assembled, and Article V hearings do not determine whether the detainee is "innocent" and should be released, but only whether the detainee should be held as an unlawful or lawful combatant. You also noted that Article V hearings offer the detainee no opportunity to present witnesses, and that such hearings typically do not take place until days or weeks after the capture. Please elaborate on these remarks. Is this summary of your testimony accurate? Is there any way in which Article V hearings provide procedural or other rights to a detainee that are superior to those afforded in a CSRT hearing?

Answer. Article V of the Third Geneva Convention of 12 August 1949 Relative to the Treatment of Prisoners of War reads as follows:

> The present Convention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

The treaty offers no definition of a "competent tribunal," nor does it provide for the assistance of counsel or any other due process rights in particular. According to the International Committee of

the Red Cross's 1960 commentary on this provision, it was "based on the view that decisions which might have the gravest consequences should not be left to a single person, who might often be of subordinate rank."

It is my understanding that this provision has been variously interpreted by the states parties. However, the United States has outlined its Article V procedures as part of Army Regulation 190–8 (Oct. 1, 1997) ("AR 190–8"). Under section 1–6 of that provision "Tribunals", detainees are not entitled to the assistance of counsel, or any other type of advisor, the Government is not required to assemble and present all of the information it may have on a particular individual, and no particular timeframe is established for the hearing.

In addition, although Article V itself does not require that detainees be permitted to call or question witnesses, or that they may be freed upon conclusion of a hearing, the United States under AR 190–8 has chosen to permit detainees to call witnesses if such are reasonably available (or to submit written statements if they are not), and to question witnesses called by the Tribunal. In addition, under the U.S. rule, one of the possible board determinations is that the individual is an "innocent civilian who should be immediately returned to his home or released." To this extent, my statements before the committee must be corrected.

With respect to the overall comparison between the due process provided by an Article V tribunal and a CSRT, I offer the following materials drawn from a working document prepared by the Defense Department which, I believe, very well illustrates the differences between Article V hearings and CSRTS. I believe this also shows that the CSRT process is at least as protective (and often more so) of the individual detainee's interest than are Article V hearings:

CSRT PROCESS AT GUANTANAMO

Article 5 of the Third Geneva Convention requires a tribunal to determine whether a belligerent, or combatant, is entitled to prisoner of war (POW) status under the Convention only if there is doubt as to whether the combatant is entitled to such status. The President has determined that those combatants who are a part of al-Qaeda, the Taliban or their affiliates and supporters, or who support such forces do not meet the Geneva Convention's criteria for POW status. Because there is no doubt under international law about whether al-Qaida, the Taliban, their affiliates and supporters, are entitled to POW status (they are not) there is no need or requirement to convene tribunals under Article 5 of the Third Geneva Convention in order to review individually whether each enemy combatant detained at Guantanamo is entitled to POW status.

In evaluating the entitlements of a U.S. citizen designated as an enemy combatant, a plurality of the U.S. Supreme Court in *Hamdi* held that the Due Process Clause of the U.S. Constitution requires "notice of the factual basis for [the citizen-detainee's] classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." A plurality of the Court further observed: "There remains the possibility that the [due process]

standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal," and proffered as a benchmark for comparison the procedures found in Army Regulation (AR) 190–8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, October 1, 1997. In a conflict in which the Third Geneva Convention applies, U.S. forces use the procedures found in AR 190–8 to conduct Article 5 tribunals when such tribunals are required.

As a result of Supreme Court decisions in June 2004 (*Rasul, Hamdi*), the U.S. Government on July 7, 2004, established the Combatant Status Review Tribunal (CSRT) process at Guantanamo Bay Naval Base, Cuba. The CSRT process supplements DoD's already existing screening procedures and provides an opportunity for detainees to contest their designation as enemy combatants, and thereby the basis for their detention. Consistent with the Supreme Court guidance applicable to situations involving U.S. citizens, the tribunals draw upon procedures found in AR 190–8.

The below chart compares the CSRT procedures with the procedures found in AR 190–8:

Characteristic	Army Regulation 190–8	CSRT
Applicability of proceeding.	Person who has committed a belligerent act and is in the custody of the U.S. Armed Forces.	All detainees at GTMO. The President has previously determined that al Qaeda and Taliban detainees are not entitled to POW status.
Frequency of review	No provision for more than one review	One-time. Can be reconvened to re-evaluate a detainee's status in light of new information.
Notice provided to detainee.	Advised of rights at the beginning of the hearing.	Advised of rights in advance of and at beginning of the hearing. The detainee is provided with an unclassified summary of the evidence in advance of the hearing.
Tribunal composition	The Tribunal is composed of 3 commissioned officers including at least one field grade officer.	The Tribunal is composed of 3 neutral commissioned officers not involved in the capture or detention of the detainee. All are field grade officers, and the senior member is an 0–6 (Colonel/Navy Captain).
	Recorder: Non-voting officer, preferably a member of the Judge Advocate General's Corps (JAG). The Recorder prepares the record of the Tribunal and forwards it to the first Staff Judge Advocate (SJA) in the internment facility's chain of command.	Recorder: Non-voting officer serving in the grade of 0–3 (Captain/Navy Lieutenant) or above. The Recorder prepares the record of the Tribunal and forwards it for a legal review.
	Legal adviser: None for the Tribunal. The record of every Tribunal proceeding resulting in the denial of POW status is reviewed for legal sufficiency when the record is received at the office of the SJA for the convening authority.	Legal Adviser: A JAG is available to advise the Tribunal on legal and procedural matters. The record of every Tribunal is reviewed for legal sufficiency by a JAG.
	Person to provide assistance to the detainee: None..	Personal Representative: Each detainee has the assistance of a personal representative (PR). The PR meets with the detainee to explain the CSRT process and assists the detainee in reviewing relevant unclassified information, preparing and presenting information, and questioning witnesses at the CSRT. The personal representative is an officer serving in the grade of 0–4 or above.
Participation by military judges.	None ..... However, preference is to have a JAG serve as the non-voting recorder.	None. However, one of the voting officers must be a JAG.

Characteristic	Army Regulation 190–8	CSRT
Attendance by detainee	The detainee is allowed to attend all open sessions, which includes all proceedings except those involving deliberation and voting by members, and testimony or other matters that would compromise national security if held in the open.	Same as under AR 190–8.
Witnesses	Detainee may call witnesses if they are reasonably available and can question the witnesses called by the Tribunal. If requested witnesses are not reasonably available, written statements are permitted.	Detainee may call witnesses if they are relevant and reasonably available, and can question the witnesses called by the Tribunal. If requested witnesses are not reasonably available, written statements are permitted. Telephonic or videoconference testimony is also permitted.
	The commanders of military witnesses determine whether they are reasonably available.	The President of the Tribunal determines whether witnesses are relevant and reasonably available.
Detainee testimony	Detainee may testify or otherwise address the Tribunal, but cannot be compelled to testify.	Same.
Standard of proof	Preponderance of evidence	Preponderance of evidence.
	Majority vote	Majority vote
		There is a rebuttable presumption that the government evidence submitted by the recorder is genuine and accurate.
Presumption of status	A person shall enjoy the protection of the Third Geneva Convention until such time as his or her status has been determined by a competent tribunal.	Protected (POW) status not applicable. As to enemy combatant status, prior to the CSRT, presumably any battlefield and subsequent determinations of each Guantanamo detainee who was initially detained by DoD have found the detainee to be an enemy combatant.
		The CSRT process is a fact-based proceeding to determine whether each detainee is still properly classified as an enemy combatant, and to permit each detainee the opportunity to contest such designation.
Type of evidence considered. Is coercion evaluated?	Testimonial and written evidence is permitted.	Testimonial and written evidence is permitted.
	AR 190–8 contains no requirement to evaluate whether statements were the result of coercion.	The Detainee Treatment Act (DTA) requires the CSRT to assess whether any statement being considered by the CSRT was obtained as a result of coercion and the probative value, if any, of such statement.
Access to evidence by detainee.	None	The detainee may review unclassified information relating to the basis for his or her detention. The detainee also has the opportunity to present reasonably available information relevant to why the detainee should not be classified as an enemy combatant.
		Evidence on the detainee's behalf may be presented in documentary form and through written statements, preferably sworn.
		The detainee's Personal Representative (PR) shall have the opportunity to review the government information relevant to the detainee and to consult with the detainee concerning his or her status as an enemy combatant and any challenge thereto—the PR may only share unclassified portions of the government information with the detainee.
		The President of the Tribunal is the decision authority on the relevance and reasonable availability of evidence.

Characteristic	Army Regulation 190–8	CSRT
Assistance provided to detainee.	Interpreter provided if necessary	Interpreter provided if necessary. A Personal Representative (PR) is provided to every detainee. The PR meets with the detainee to explain the CSRT process, assist the detainee in participating in the process, and assist the detainee in collecting relevant and reasonably available information in preparation for the CSRT.
Further review of decision outside of the Department of Defense.	None	Under the Detainee Treatment Act and the Military Commissions Act, the Court of Appeals for the District of Columbia has the authority to determine if the detainee's CSRT was conducted consistent with the standards and procedures for CSRTs. The Court of Appeals also has the authority to determine whether those standards and procedures are consistent with the Constitution and laws of the United States, to the extent they are applicable at Guantanamo.

B. Additional Views of Senators Graham, Sessions, and Kyl

The Habeas Corpus Restoration Act of 2007, S.185, seeks to affirmatively provide, for the first time ever, habeas corpus rights to alien terrorists. While the Supreme Court has previously held that existing statutes had expanded enough over the years to provide habeas corpus access to alien terrorists, this would be the first time that a statute was developed with the sole goal of extending habeas corpus rights to alien terrorists.

Throughout our history, habeas corpus protections have provided an essential tool for the citizens to protect themselves from the government. However, the Supreme Court has also observed that "[t]he writ has potentialities for evil as well as for good. Abuse of the writ may undermine the orderly administration of justice and therefore weaken the forces of authority that are essential for civilization." *McCleskey* v. *Zant,* 499 U.S. 467, 496 (U.S. 1991)(quoting *Brown* v. *Allen,* 344 U.S. 443, 512 (1952) (opinion of Frankfurter, J.)).

That is exactly the case here.

And those who support this bill should not just take Justice Frankfurter's word for it. We also have the benefit of experience and stated intentions to guide us. Regarding experience, here are some examples of habeas claims detainees have pursued in the past:

1. A Canadian detainee who threw a grenade that killed an Army medic in firefight and who comes from family with long-standing al-Qaeda ties sought a preliminary injunction forbidding interrogation of him.

2. A number of Kuwaiti detainees sought court orders requiring 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. An Egyptian detainee whose Combatant Status Review Tribunal found that he was no longer an enemy combatant, and who was therefore due to be released by the United States, filed a motion to block his repatriation to Egypt.

4. A high level al-Qaeda detainee complained about base security procedures, the 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. A detainee accused the 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. Another detainne filed an "emergency" motion seeking a court order requiring GTMO to set aside its normal security policies and show detainees DVDs that are purported to be family videos.

7. One detainee filed a request that, as a condition of a stay of litigation pending related appeals, the Court involve itself in his medical situation and second-guess the provision of medical care and other conditions of confinement by medical experts.

8. A Kuwaiti detainee was unsatisfied with the Koran he was provided by military officials, and sought a court order that detainees be allowed to keep various other supplementary religious materials, such as a "tafsir" or 4–volume Koran with commentary, in their cells.

While proponents of this legislation like to talk of high-minded principle, these examples show that the terrorist detainees view habeas corpus somewhat differently. They view it as just another tool in their war against us. And it is not surprising that they would, given that their lawyers tell them they should. Indeed, one of their lawyers has stated:

> "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 these 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?" (Onnesha Roychoudhuri, The Torn Fabric of the Law: An Interview with Michael Ratner, Mother Jones Magazine, March 21, 2005.)

Extending habeas protections to those such as Khalid Sheikh Mohammed is not only foolhardy, it is dangerous. As we have learned in the past, information given to alien terrorists during court battles inevitably enhances the terrorists' intelligence-gathering capabilities.

In the end, this issue comes down to where the nation should place its trust. Should the nation trust its military to protect it while serving as a shining example of American values? Or is the military incapable of doing so, and therefore in need of being told how to conduct the war by federal courts? Do we need al-Qaeda being able to subpoena and depose our soldiers? Questioning whether our soldiers delivered their mail promptly? Or did not supply them with meals at the proper temperature?

Do we trust al-Qaeda members like Khalid Shiekh Mohammed not to abuse the privilege this bill would extend to them?

LINDSEY GRAHAM.
JEFF SESSIONS.
JON KYL.

VIII. CHANGES IN EXISTING LAW MADE BY THE BILL AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 185, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

28 U.S.C. § 2241

§ 2241. Power to grant writ

* * * * * * *

[(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.]

10 U.S.C. § 950j

§ 950j. Finality or proceedings, findings, and sentences

* * * * * * *

(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.]*LIMITED REVIEW OF MILITARY COMMISSION PROCEDURES AND ACTIONS.—Except as otherwise provided in this chapter or in section 2241 of title 28 or any other habeas corpus provision, and notwithstanding any other provision of law, 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.

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