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RESTORING HABEAS CORPUS: PROTECTING AMERICAN VALUES AND THE GREAT WRIT

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TUESDAY, MAY 22, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 10:02 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Durbin, Whitehouse, and Specter.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Today the Judiciary Committee turns its attention to a top legislative priority that Senator Specter and I have set for this year: restoring the Great Writ of habeas corpus, and the accountability and balance it allows. And I thank our distinguished panel of witnesses for appearing here today. They illustrate the broad agreement among people of diverse political beliefs and backgrounds that the mistake committed in the Military Commissions Act of 2006 must be corrected.

It seems that habeas corpus was recklessly undermined in last year's legislation. Senator Specter and I urged caution before taking that dangerous step. We did several times on the floor, but we fell just a few votes shy on our amendment to restore these protections. It is now 6 months later. The election is behind us, and I hope that the new Senate will reconsider this historic error in judgment and set the matter right. It is urgent that we restore our legal traditions and reestablish this fundamental check on the ability of the Government to lock someone away without meaningful judicial review of its action, and the time to act is now.

I commend Senator Specter, my friend of decades who feels as passionately as I do about this issue, for helping us plan this hearing. He and I introduced the Habeas Corpus Restoration Act of 2007 on the very first day of this Congress.

The Military Commissions Act, passed hastily in the weeks leading up to last year's election, was a profound mistake, and its elimination of habeas corpus rights was its worst error. Like the internment of Japanese-Americans during World War II, the elimination of habeas rights was an action driven by fear and it is another stain on America's reputation in the world.

This Great Writ is the legal process that guarantees an opportunity to go to court and challenge the abuse of power by the Gov-

ernment. The Military Commissions Act rolled back these protections by eliminating that right, permanently, for any non-citizen labeled an enemy combatant. In fact, a detainee does not have to be found to be an enemy combatant; it is enough for the Government to say someone is "awaiting" determination of that status, that they have not had this determination, but they are awaiting such a determination.

Now, the sweep of this habeas provision goes far beyond the few hundred detainees currently held at Guantanamo Bay. It includes an estimated 12 million lawful—lawful—permanent residents in the United States today. These are lawful residents of the U.S., people who work pay taxes, abide by our laws, and should be entitled to fair treatment. After all—you know, it seems almost a cliche to say it—it is the American way. We expect these rights in America. We tell the rest of the world that we stand for these rights. But under this law, this current law, any of these people can be detained, forever, without any ability to challenge their detention in court. I look forward to hearing from Professor Cuéllar and others who can elaborate on this disastrous change and its potentially disproportionate impact on the Latino population, which accounts for so many of the country's hard-working legal immigrants.

Since last fall, I have been talking about a nightmare scenario in which a hard-working legal permanent resident who makes an innocent donation to a charity, perhaps a Muslim charity, to help poor people around the world—which would be, of course, in the finest American tradition. So many of us have made contributions to help poor people. But maybe that charity is secretly suspected by the Government to have a tie, however tenuous, to terrorist groups. Based on that suspected tie, perhaps combined with an overzealous neighbor reporting suspicious behavior, having seen people of a different culture or color visiting, or with information secretly obtained from a cursory review of the person's library borrowings, the permanent resident could be brought in for questioning, denied a lawyer, confined, and even tortured. Such a person would have no ability to go to court to plead his or her innocence—no ability for years, for decades, or even forever.

When I first spelled out this nightmare scenario, many people viewed it as a far-fetched hypothetical just made for purposes of debating. But, sadly, it was not. Last November, just after enactment of these provisions, this was confirmed by the Department of Justice in a legal brief submitted in Federal court in Virginia. The U.S. Government, seeking to dismiss a detainee's habeas case, said that the Military Commissions Act allows the Government to detain any non-citizen designated as an enemy combatant without giving that person any ability to challenge his detention in court. And this is not just at Guantanamo Bay. The Justice Department said it is true even for somebody arrested and imprisoned in the United States.

Now, I was shocked when Attorney General Gonzales maintained at a hearing earlier this year that our Constitution does not provide a right to habeas corpus. Sometimes, I have found that the Attorney General is not necessarily the last word on legal thought in this country. But more damaging was the Senate's decision over our opposition to remove this vital check that our legal system pro-

vides against the Government arbitrarily detaining people for life without charge. That is wrong. It is unconstitutional. It is profoundly un-American.

Our leading military lawyers, like Admiral Guter, tell us that eliminating key rights for detainees hinders the safety of our troops and the effectiveness of our defense. Diplomats and foreign policy specialists, like Mr. Taft, tell us that eliminating habeas rights reduces our influence in the world. Top legal scholars and conservatives like Kenneth Starr, Professor Richard Epstein, and David Keene, head of the American Conservative Union, agree that this change betrays centuries of legal tradition and practice. Professor David Gushee, head of Evangelicals for Human Rights, submitted a declaration signed by evangelical leaders nationwide, which refers to the elimination of habeas rights and related changes as "deeply lamentable" and "fraught with danger to basic human rights."

The elimination of basic legal rights undermines, not strengthens, our ability to achieve justice. It is from strength that America should defend our values and our way of life. It is from the strength of our freedoms, our Constitution, and the rule of law that we can prevail. We can ensure our security without giving up our liberty. I will keep working on this issue until we restore those fundamental checks and balances.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman, for the outstanding work you are doing on this Committee and have done for 33 years and for your leadership role generally, but especially on efforts to change the statute which limits habeas corpus rights.

It is surprising to me that it is necessary to change the statute in light of the decision by the Supreme Court of the United States in the *Rasul* case. That case made it explicit, although not the holding, that the Great Writ of Habeas Corpus apply to the detainees at Guantanamo and that they were entitled to due process of law and a hearing.

The holding did limit it to the statutory right. There are two rights to habeas corpus: the one provided by statute and the one provided by the Great Writ. But the opinion of the Court in *Rasul* made it plain that the Great Writ applied to the Guantanamo detainees when they said, "Application of the habeas corpus statute to persons detained at Guantanamo is consistent with the historic reach of the writ of habeas." And the Court went on to note, "Lord Mansfield wrote in 1759 that, 'Even if a territory was no part of the realm, there was no doubt as to the court's power to issue writs of habeas if the territory was under the subjection of the Crown.'"

So that there really is no doubt that the Supreme Court viewed the constitutional Great Writ as being applicable to Guantanamo. So that I would disagree with you on one small point, Mr. Chairman, where you say we are going to restore the Great Writ. The

Great Writ does not need restoring because it is always here. It is just a question of recognizing its application to Guantanamo.

It is hard for me to understand how the circuit court could flout the authority of the Supreme Court. And then it is equally beyond my comprehension how the Supreme Court could not say to the circuit court the most fundamental rule is that circuit courts have to follow the Supreme Court. But the Supreme Court did not do that, and there is speculation the Supreme Court did not do that because Justice Stevens, who could have provided the fourth vote for cert., and the author of *Rasul*, was concerned that Justice Kennedy would reverse *Rasul*, along with the four who had already taken a position.

Well, if you talk about inside baseball or inside the Beltway or inside the Supreme Court, that is pretty hard to fathom. But that is at least an explanation. I would not go so far as to call it a rational explanation, but it is an explanation.

Now, that is fairly harsh lawyer talk to accuse the circuit court of not following the Supreme Court and then accuse the Supreme Court of not insisting on its authority. But I think that is what we have here, and it is very, very extraordinary, as I see it, in the history of judicial procedure in this country. But Congress can alter the situation by changing the statute which was passed. We lost 48–51. There was a very limited period of time for the consideration of the issue. I believe if we go back to the Senate and the House now, we will find a different view. I would be hopeful that if the issue reaches the President's desk that he would sign it, but candidly I doubt that. But I think we ought to put all the pressure that we can on this issue.

And then when you take the holding of the circuit court, saying that the statutory writ of habeas corpus was satisfied because of the alternative procedures, you only have to cite one case, and that is the case of *In re Guantanamo Detainee Cases*, which is cited at 355 F. Supp. 443, and the Court there reviews a transcript of the detention of someone held at Guantanamo. And the detainee is charged with associating with al Qaeda, and as printed in the report on page 23:

"Detainee: Give me his name."

"Tribunal President: I do not know."

"Detainee: How can I respond to this?"

"Detainee: I ask the interrogators to tell me who this person was. Then I could tell you if I might have known this person, but if this person is not a terrorist."

The upshot was that they did not identify the name of the person whom the detainee was alleged to have talked to, so how could he defend himself? And the transcript shows, the opinion shows, that it produced laughter in the courtroom. It was a joke.

Well, I think that is about the status of what the procedure provides, where you have an alternative remedy, the Supreme Court said in *Swain* v. *Pressley*, but that was an issue where you had a State court decide habeas corpus. And the Supreme Court was wrestling with the fact that the State court was as good as the Federal court. The limitation that they were elected did not counterbalance the adequacy of the remedy just because Federal judges have life tenure, so that you have here a proceeding which is just

totally devoid of any fundamental fairness of the way these tribunals work.

I hope that we can move this quickly in Committee. I know the Chairman will do what he can, bring it to the floor, and let the Congress speak to this issue, because the practices are, simply stated, atrocious. They are damaging to the reputation of the United States worldwide.

I regret that I am not going to be able to stay long because we are right in the midst of immigration. We brought the issue to the floor, and I am managing it on the Republican side. But my heart is right here.

Thank you, Mr. Chairman.

Chairman LEAHY. I have no doubt where your heart is, and if the Senate is going to be the conscience of the Nation, as occasionally we are, and all we should be, then we will move quickly on this and not worry about vetoes but worry about doing what is right.

Gentlemen, would you please stand and raise your right hands? Do you solemnly swear that the testimony you will give in this matter will be the truth, the whole truth, and nothing but the truth, so help you God?

Admiral GUTER. I do.

Mr. TAFT. I do.

Mr. CUÉLLAR. I do.

Mr. RIVKIN. I do.

Mr. KERR. I do.

Chairman LEAHY. Thank you.

The first witness will be Rear Admiral Donald Guter. The Admiral served in a wide variety of positions in the United States Navy, including serving as the Navy's 37th Judge Advocate General between 2000 and 2002. And after retiring from the Navy, he accepted the position as Dean of the Duquesne University School of Law, his alma mater. Prior to attending the law school there, he graduated from the University of Colorado. His personal decorations include the Defense Distinguished Service Medal and the Navy Commendation Medal.

Admiral, we are delighted to have you here. Please go ahead, sir.

STATEMENT OF REAR ADMIRAL DONALD GUTER, UNITED STATES NAVY (RET.), DEAN, DUQUESNE UNIVERSITY SCHOOL OF LAW, PITTSBURGH, PENNSYLVANIA

Admiral GUTER. Well, thank you very much, Chairman Leahy, members of the Committee. I appreciate very much the invitation to come and speak in support of the Habeas Restoration Act of 2007. I am glad you mentioned a few of those items from my biography, only because the debate in this country has become such that anytime someone supports an item like restoration of habeas, it seems like the political debate gets a little bit ugly.

I was in the Pentagon on 9/11. I lost one of my lawyers on the airplane that came back and hit the Pentagon that day, and I have lost friends since then. So I am no stranger to the struggle that we face, but I am also no stranger to the debate.

As early as 2003, I started speaking out on this subject, and you have my written statement for the record, so I would like to just come to some other points in my oral testimony.

Chairman LEAHY. Please go ahead.

Admiral GUTER. First of all, I want to state unequivocally that for me it is not about what is least required by the law or who can be more patriotic. For me, this issue is about what is best for the long-term policy for the United States, what is best for our troops, and what is best for our citizens who travel overseas.

Moreover, what is best for our chance of preserving our values? What gives us the best chance of building the alliances that we need so that we can get the cooperation from our allies, so we can get the best intelligence that we possibly can in the struggle against terrorism? What gives us the best chance of winning the hearts and minds of the people around the world? What policy serves the rule of law and international humanitarian law? What policy makes the world safer and a better place for the long term? What standard do we want to be held to ourselves? I think Senator McCain and Senator Graham said it. It is not about them. It is about us.

Habeas corpus is the basis for a civilized legal system. It protects us against an unchecked power to hold people indefinitely. This struggle is going to have no end. We have already seen the results at Guantanamo Bay. Guantanamo shows us what can happen with an unchecked power.

The United States helped codify habeas after World War II, and now it pains me to say that we lead the charge in trying to destroy it. It is unnecessary to eliminate habeas to protect the courts. They are perfectly capable of handling habeas petitions, and they have shown that. And it is also unnecessary to eliminate habeas to win this struggle.

Our country and our institutions are stronger than that. What we need to win this war is good intelligence, the cooperation of willing allies, as many as we can possibly muster. We need a strong defense. We need a strong response when we are attacked. And we have been attacked many, many times before 9/11. We also need adherence to the rule of law. That gives us the best chance to prevent future attacks and win the struggle that we are engaged in.

Thank you.

[The prepared statement of Admiral Guter appears as a submission for the record.]

Chairman LEAHY. Thank you very much, Admiral.

The next witness is William Taft IV. He is of counsel, resident in Fried, Frank's Washington, D.C., office, where he has practiced since 1992. In 2001, Mr. Taft was appointed by President Bush to serve as legal adviser to the Department of State where he served for 4 years, and then rejoined the firm. Prior to 1992, Mr. Taft was the United States Permanent Representative to NATO. He held several positions in the Department of Defense under Presidents Reagan and George H. W. Bush, including Deputy Secretary of Defense from 1984 to 1989. Mr. Taft received his B.A. from Yale University and his J.D. from Harvard Law School, so he can join the rivalry on either side between the two schools.

Mr. Taft, the floor is yours.

STATEMENT OF WILLIAM HOWARD TAFT IV, OF COUNSEL, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, WASHINGTON, D.C.

Mr. TAFT. Thank you, Mr. Chairman. Briefly, I believe that it was a mistake for Congress to take away from the detainees in Guantanamo the ability to obtain judicial review by habeas corpus of the lawfulness of their detention, and I recommend that the Congress restore that right.

Under present law detainees convicted by military commissions may obtain judicial review of their convictions after their criminal cases are concluded, and persons who are not charged with crimes, or have perhaps been acquitted of crimes but detained as enemy combatants pursuant to determinations of their status by Combatant Status Review Tribunals, may obtain review of those determinations. This review, however, does not accord the detainee the same opportunity to challenge his detention that he would have in a normal habeas corpus proceeding.

Before the enactment of the Detainee Treatment Act of 2005 and the Military Commissions Act last year, detainees were entitled under the Supreme Court's interpretation of the relevant authorities to have the lawfulness of their detention reviewed after filing petitions for habeas corpus. The benefits of this now displaced procedure were considerable, not so much, I think, for the detainees in Guantanamo, none of whom was actually released by a court, as for establishing beyond argument the legitimacy of the process for holding persons who continued to present a threat to the United States as long as the terrorists continue to pursue their war against us.

It should be recalled in considering this question that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and the Taliban as long as they pose a threat to the United States. This is black letter law of war.

Prior to the enactment of the Military Commissions Act, consistent with this principle, no court had ordered the release of any of the detainees, nor would they do so as long as they posed a threat in the ongoing conflict. Currently, this determination is made by the military with only very limited judicial review of the proceedings of the Combatant Status Review Tribunal. Having the determination made by a court following established habeas procedures would greatly enhance its credibility and be consistent with our legal tradition.

Beyond that, providing habeas corpus review of the limited number of cases at Guantanamo will impose only a very modest burden on the courts. Fewer than 400 people are currently detained at Guantanamo, and I understand that a substantial portion of these may soon return to their own countries. By comparison, the courts handle thousands of habeas petitions each year. Moreover, these Guantanamo cases are comparatively straightforward. Many detainees freely state that they would try to harm the United States if they were released. Others are known to be members of al Qaeda, have been captured while attacking our troops, or are otherwise known to pose a threat to us. Judicial review of such cases should be relatively uncomplicated when compared with the volu-

minous trial and appellate records involved in many habeas corpus cases.

In the event, however, that a court were to be presented with a case that raised serious questions about the lawfulness of detention, surely those questions should indeed be carefully considered, and no institution is better equipped by experience to do that than a court.

In proposing that we return to the system that was in place previously, I want to stress that I do not believe that this issue should be treated as a constitutional one, but simply as a matter of policy. Whether the Congress has the power to bar habeas review to aliens detained in Guantanamo is a question that could be resolved by the courts. My guess is that it probably does. But Congress should not want to bar the habeas review the Supreme Court found the aliens in Guantanamo were entitled to under our statutes. It should want instead to have the judiciary endorse the detentions of the terrorists who threaten us.

For the very reason that the law of war allows us to detain persons without charging them with criminal conduct for extended periods, it is also more important to be sure that the process for determining who those people are is beyond reproach. Unlike wars between national armies where it is easy to tell who the enemy is, identifying those terrorists we are entitled to detain because they have declared war on us is more difficult. We should take advantage of the court's expertise in performing this task.

One final point. The Supreme Court's decisions of last summer in *Hamdan* and in *Rasul* earlier involve detainees in Guantanamo and found that because of the special status of that installation, the habeas process was available to detainees there. The Court did not consider, much less determine, whether it was available in foreign lands or on the battlefield. Speaking again as a matter of policy, I think it would be entirely impractical to extend it to battlefield captures or persons who are held in foreign countries in the context of an armed conflict. In the unlikely event that the Supreme Court were to decide that it did so extend, I would certainly support a statute amending the statutory provisions on which the Court relied for its conclusion.

Mr. Chairman, thank you for the opportunity to appear before you. I have a full statement which I would like to have included in the record.

[The prepared statement of Mr. Taft appears as a submission for the record.]

Chairman LEAHY. Thank you, and your statement will be placed in the record and, of course, also as to the questions that will be asked, if afterward when you get the transcript you want to add material, naturally we will hold it open for that purpose. This is too important an issue to give short shrift to. And I have a letter from Professor Richard Epstein of Chicago that was sent to Senator Specter, and Senator Specter asked that it be included in the record, and it will be.

Now, our next witness is Professor Cuéllar who has served as Associate Professor and Deane Johnson Faculty Scholar at Stanford Law School since July of 2001. Prior to joining Stanford's faculty, he served as senior adviser to the U.S. Treasury Department's

Under Secretary for Enforcement. He clerked for Chief Judge Mary Schroeder at the U.S. Court of Appeals for the Ninth Circuit. He received his undergraduate degree from Harvard University in 1993, his J.D. from Yale Law School, and a Ph.D. in political science from Stanford.

Professor, go ahead, please.

STATEMENT OF MARIANO-FLORENTINO CUÉLLAR, PROFESSOR, STANFORD LAW SCHOOL, STANFORD, CALIFORNIA

Mr. CUÉLLAR. Thank you, Mr. Chairman and members of the Committee, for this invitation to talk about such an important issue.

Our national security today raises many complicated questions, but I humbly submit that this is not one of them. Americans have been reluctant to tamper with the writ of habeas corpus even in the Nation's darkest hours. In rare circumstances when Congress has explicitly suspended the writ in accordance with the Constitution, it has done so with limited scope and for limited durations. In fact, the overarching story reflected in the history of habeas corpus is one of balance where vigorous responses to dangers confronting the Nation are checked by constitutional and statutory protections against arbitrary executive detentions. The Military Commissions Act has eroded that longstanding commitment to balance and thereby raises in my view grave constitutional questions.

Questions are raised, for example, by the MCA's purported restrictions on habeas review of detentions involving aliens in the United States, including legal permanent residents who are here, as well as provisions constraining courts' consideration of the applicability of the Geneva Conventions to individual detainee cases. I think our institutional architecture makes it essential for Congress to consider these problems instead of simply leaving them to the courts, which were never designed to be the only branch concerned with constitutional principles.

Next, I think it is important to consider that the habeas statute is not unlike 42 U.S.C. Section 1983 or the Administrative Procedure Act in that it helps vindicate constitutional interests. The intimate connection between constitutional protection and external checks on executive authority, in fact, helps explain the resilience of the habeas corpus statutory protections over many generations. The writ has acted as a check on Executive power in a surprising array of historical circumstances, involving citizens as well as aliens, enemy combatants on U.S. territory, and enemy combatants outside U.S. territory but within its functional jurisdiction. I believe the MCA represents a break from these norms. By eviscerating external checks on the detention of aliens accused of being enemy combatants, the MCA engenders perceptions abroad that the United States detainee process is unfair, further eroding American legitimacy.

Our history underscores the foreign policy benefit of securing equal protection and fair procedures. For example, cold war policymakers pressed aggressively to expand domestic civil rights protections in order to bolster America's global standing. Indeed, recognition of the connection between balanced legal procedures and favor-

able public perceptions lies at the heart of our Nation's military doctrine.

The problems with the MCA's habeas-stripping are compounded by the characteristics of bureaucratic organizations making complicated decisions. Executive bureaucracies routinely benefit from external review when they are making such decisions. Conversely, the absence of some external check on bureaucratic performance permits, and even encourages, a variety of pathologies. In the past, such pathologies have given rise to nuclear safety violations, the destruction of the Space Shuttle Challenger, biased regulatory rules, and mistaken detentions. Even when decisionmakers possess laudable motivations, the pressures and the constraints on organizations when performing a difficult, high-profile mission can distort the work of even the best meaning executive agencies.

Finally, the MCA in its present form even has the potential to impact the status of many ordinary lawful permanent residents in the United States. While the MCA was justified primarily on the basis of facilitating our Government's efforts to detain individuals captured on foreign battlefields or actively and directly involved in terrorist operations, the reality is that the habeas-stripping provision the Military Commissions Act actually confers exceedingly vast powers to detain a far different pool of people. That section permits the indefinite detention of any alien accused of being an enemy combatant. Such accusations can include open-ended, indirect offenses, including material support of terrorism and conspiracy.

Taken together, I would submit that these features may permit the creation of a massive unaccountable detention system that could be used against any one of the millions of U.S. lawful permanent residents who have left their homelands in Latin America, Asia, Africa, and Europe to become legal members of American society. I do not believe this is what was intended. In fact, it may seem unlikely that the MCA would be used against such numerous individuals in these communities with little or no connection to terrorism. But just as the history of law in America shows a strong commitment to habeas corpus, so too does that history demonstrate how laws are often used in a manner different from what was once contemplated.

The solution is not to dismiss the threat posed by those who would harm America or its residents. It is instead to pass a fix—to pass the Habeas Restoration Act—and more generally to be mindful of the need for balance in this crucial area of law. History shows a strong pattern of congressional respect for the Great Writ. Now is the time to restore that legacy.

Thank you.

[The prepared statement of Mr. Cuéllar appears as a submission for the record.]

[Applause.]

Chairman LEAHY. As I said before, we will have order in the hearing. Expressions, honorable expressions, either for or against the testimony is inappropriate for the hearing. Obviously, it is appropriate for people to express whatever opinions they want outside the hearings.

Mr. Rivkin is a partner at Baker & Hostetler, LLP. He is a Visiting Fellow at the Nixon Center, contributing editor of the National Review magazine, a member of the United Nations Subcommission on the Promotion and Protection of Human Rights. He served under President Reagan and the current President Bush in the White House Counsel's Office, Office of the Vice President, Departments of Justice and Energy, graduated from Georgetown University School of Foreign Service. He also holds a master's degree in Soviet affairs from Georgetown and a J.D. from Columbia University Law School.

Go ahead, Mr. Rivkin.

STATEMENT OF DAVID B. RIVKIN, JR., PARTNER, BAKER & HOSTETLER LLP, WASHINGTON, D.C.

Mr. RIVKIN. Chairman Leahy, members of the Committee, I appreciate the opportunity to be here.

Fundamentally, I believe that the Military Commissions Act as well as the Detainee Treatment Act comport with the United States Constitution, actually exceed the applicable norms of international law, and are well in line with American constitutional traditions and history.

The procedures accorded under the MCA and DTA are streamlined, yet essentially fair. They furnish detainees with access to the judicial process that is sufficient to enable them to mount a meaningful challenge to their confinement. In fact, I would submit to you that they give the detainees far more due process than they ever had under any other "competent tribunals" convened under the Geneva Conventions in the past or in any past military commissions of the United States.

As we all know, under the current system, the United States Court of Appeals for the District of Columbia Circuit is the exclusive venue for handling any legal challenges by detainees. Those requirements in those statutes also limit the Court to exercising jurisdiction until after a CSRT or military commission has exercised a final decision and limit judicial review essentially to two questions: whether the CSRT or military commission operated consistent with the rules and standards adopted by it, and also whether or not the CSRT or military commission reached a decision that is "consistent with the Constitution and laws of the United States."

In my view, this scope of judicial review is not only sufficient for non-citizens held abroad, but is constitutionally sufficient for United States citizens themselves. In fact, despite all the criticism we have heard, the fact that the review does not commence at the district court level and does not follow in all particulars the existing Federal statutory habeas procedures codified at 28 U.S.C. Section 2241, does not amount to suspension of habeas corpus, and, indeed, is constitutionally unexceptional, I would submit to you that this proposition is well established by the existing Supreme Court precedents.

For example, in the 1977 Supreme Court case of *Swain* v. *Pressley* that Senator Specter references in his opening statement, the Supreme Court stated that "the substitution [for a traditional habeas procedure] of a collateral remedy which is neither inad-

equate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."

Also, contrary to assertions by many critics that the current system is deficient because it does not allow for judicial review of factual issues, I believe that the D.C. Circuit and the Supreme Court are not limited to reviewing merely the legality of CSRT or military commission procedures. This is because under the teaching of *Ex Parte Milligan*, it is unconstitutional to bring civilians before military commissions or to hold them as enemy combatants if civilian Article III courts are open and functioning. Accordingly, a detainee should be able to claim that he is not, in fact, an enemy combatant, and the relevant factual record of the CSRT or the military commission would be judicially reviewable. Indeed, I would submit that this is the very same nature of review given to Nazi saboteurs—of whom at least one was a U.S. citizen—in *Ex Parte Quirin*, in 1942, where the Supreme Court rejected their contention that they were civilians, not subject to military jurisdiction. And we all know that the Supreme Court on a number of recent occasions referred to *Quirin* as good law.

Now, I briefly want to mention that the procedures used by CSRTs and military commissions, while criticized by many people, in my view are supported by the realities that exist in the military justice system. In fact, throughout history, it has always been difficult to distinguish between irregular combatants and civilians. That is part of the reason why al Qaeda and Taliban members do not make themselves known. And, true to form, nearly all detainees claim to be shepherds, students, pilgrims, or relief workers, collude among themselves to support this position, and casually name persons thousands of miles away who can "verify" that they are not enemy combatants.

Accordingly, in my view, the only appropriate point of reference for assessing the sufficiency of procedures used by the CSRT and military commissions is to look at their historical and international counterparts, which are tribunals organized under Article 5 of Geneva Convention III to identify enemy combatants, and the military commissions used by the United States in, and in the aftermath of, World War II. I think we can say it is undisputed that the CSRTs and military commissions offer far more process to the Guantanamo detainees than either Article 5 Tribunals or World War II-style military commissions.

To be sure, I would readily stipulate that if you compare CSRTs and military commissions to civilian courts, they undoubtedly feature more austere procedures. However, as already mentioned, these bodies are meant to address a different context, a different type of procedure that is distinct from the realities of the criminal justice system. And I do not quite understand why it is a disservice to our legal traditions and to the rule of law to, in effect, say that anything that does not feature the same standards as exist in the criminal justice system is inconsistent with our values.

The last thing I would say is the fact that the Department of Defense also holds on an annual basis Administrative Review Boards, which focus primarily on the question of whether detainees held in U.S. custody pose continued danger and whether viable alternatives exist to their continued detention, further underscores the

extent to which the United States has opted to provide captured enemy combatants with additional rights that go above and beyond those required under international law and the Constitution. The practice, by the way, is historically unprecedented since the notion of enabling captured enemy combatants to be released on parole fell out of practice by the 19th century.

Thank you.

[The prepared statement of Mr. Rivkin appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Our next witness, Orin Kerr, is a professor of law at George Washington University, where he teaches courses relating to criminal law and procedure. Prior to joining the George Washington University faculty, he was a trial attorney in the Criminal Division of the United States Department of Justice. He is a graduate of Princeton University, Stanford University, Harvard Law School, and a former law clerk to Justice Anthony Kennedy of the U.S. Supreme Court.

Professor Kerr, thank you for coming. Please go ahead, sir.

STATEMENT OF ORIN KERR, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.

Mr. KERR. Thank you, Mr. Chairman. It is a pleasure and honor to be here. I would like to discuss some of the constitutional questions surrounding habeas corpus jurisdiction at Guantanamo Bay, and then I would like to put some of those questions in a broader context.

The first important constitutional question here is how to characterize Guantanamo Bay. And, in particular, is it part of the United States or is it outside the United States? If it is part of the United States, then the habeas writ presumably does extend to Guantanamo Bay. If it is outside the United States, it probably does not. And this is an issue which—it is an unusual situation in which we basically know where eight of the nine current Supreme Court Justices come down on this question, putting together the opinions in *Rasul* v. *Bush* and *Hamdan* v. *Rumsfeld*, and, in particular, right now are split, if we want to line up all the Justices and count them, is 5–3 in favor of saying that Guantanamo Bay is part of the United States, is within the territorial jurisdiction of the United States, in particular, that opinion being held, as best we can tell, by Stevens, Souter, Ginsburg, Breyer, and Justice Kennedy. And the language here I think is fairly clear. Granted, the Court has not made this holding, but there are clear indications in the *Rasul* opinion that this is where the Court is going, In particular, the *Rasul* majority where the Court states that people detained at Guantanamo Bay are "detained within the territorial jurisdiction" of the United States. It is consistent with the historical scope of the writ of habeas corpus to extend the writ to the detainees. Further Justice Kennedy's concurrence, which states that the Guantanamo Bay Naval Base is in every practical respect a U.S. territory and that the implied protection of the habeas writ extends to it.

This is fairly clear language, although the *Rasul* case was statutory, not constitutional; nonetheless, I think largely addressing the

constitutional question even though the case, formally speaking, statutory.

If it is true that that view of five Justices prevails, what that means is that the writ of habeas corpus has to extend to Guantanamo Bay either as a formal matter or as a functional matter. Either Congress has to extend the writ to Guantanamo Bay, or there has to be some sort of adequate and effective alternative collateral remedy.

The key point, I think, to the adequate and effective test under *Swain* v. *Pressley*, is that that means essentially the substantial equivalent of the actual habeas writ. So the question becomes whether the detainees, through the alternative collateral remedies, would have some way of challenging their detention, which essentially gives them the set of rights to challenge their detention they would have in a formal habeas proceeding.

We do not at this point know with great certainty as to whether the existing remedies could satisfy that test, in part because we do not know what substantive rights the detainees have, and in part because we do not know exactly what procedures the D.C. Circuit is going to follow. So at least right now we have a state of considerable uncertainty as to how that test would be satisfied. But the key point is that, either way, we end up getting to the same result. Either the writ has to extend directly to the detainees at Guantanamo Bay, or else the D.C. Circuit has to construe the Detainee Treatment Act, however persuasively, or unpersuasively, in order to essentially provide those same rights through the language of the DTA instead of through the habeas writ.

So either way, assuming that the views of those five Justices prevail, the writ must extend to Guantanamo Bay either formally or essentially through an alternative means, which just does the same thing through another way.

Finally, in terms of the security implications of restoring the writ to Guantanamo Bay as a formal matter, I think when we approach questions of the war on terror involving such a balance between security and liberty, we naturally look to the security implications. What would it mean from a security standpoint to restore the writ? And I think the key point is that the security implications of doing so are actually quite modest.

First, assuming the views of those five Justices prevail, the writ has to be there whether Congress acts formally or not, as Senator Specter had indicated. Assuming Congress does restore the writ, it is not clear that it actually makes a substantive difference in terms of the rights that are established. What would probably make the biggest difference is the speed with which the courts could get to the merits, if any, of the detainees claims. It does not mean that detainees are going to be freed from Guantanamo Bay, certainly in a way that would threaten the security of the United States. All we are talking about here is the jurisdictional question which would allow the courts to get to the merits of these issues more quickly than they otherwise would.

Thank you.

[The prepared statement of Mr. Kerr appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Let me ask a few questions. I see Senator Durbin here, and I will yield to him for questions, or Senator Feingold, if he is still here.

Proponents of this habeas-stripping provision, you have touched on this in your testimony, but they argue that we should eliminate habeas because it would help the military. They say that habeas review would hand military decisions about who was the enemy over to our Federal civilian courts. It would subject the military to all kinds of distractions and lawsuits.

Now, you spent most of your career in the military as part of the military legal system. Do you believe that allowing habeas review for detainees is harmful to the military and its mission?

Admiral GUTER. Mr. Chairman, I do not. First of all, the decision is still going to be made—the initial decision of whether to take someone into custody is still going to be made by the military on the battlefield. So all we are talking about is removing them from the battlefield immediately and then where do we take them and what do we do with them after that. So I do not think so.

Second of all, I think it goes further to your question. To respond with a little bit of respectful disagreement to Mr. Rivkin, I was there at the beginning, and the goal of putting people in Guantanamo Bay was clearly to deny them any judicial review whatsoever.

Since that time, we have been engaged in a type of reverse engineering to try to put processes and procedures in place that satisfy what we have already done to these folks in Guantanamo and other places so that we might be able to extract whatever evidence or whatever intelligence we can from them. But we have engaged in reverse engineering to do that.

The CSRTs in my judgment do not provide for a fair hearing, and I do not think the question is whether we are providing more or less protection than what we have in the past. It is whether or not they are fair. They have already—we have seen the kind of evidence that they allow. We have seen that they are inaccurate. We have seen that they are inconsistent. And I think worse than that, they still provide the potential for a black hole. You can run somebody through a CSRT and then never charge them, and without habeas, their case is never to be heard.

Chairman LEAHY. The sort of thing we criticize when other countries have done it. In fact, you say in your statement that you would hope that if you were ever detained abroad, that the United States would be able to argue for your release, but argue from the highest moral and legal grounds.

Do you think by that eliminating this habeas protection, we hurt our own credibility when we argue for the release of detainees abroad?

Admiral GUTER. I do not think there is any question, and it is not just this issue. It is many others.

Chairman LEAHY. Thank you. Professor Cuéllar, the Military Commissions Act eliminated the right to petition a court for habeas corpus for any alien—and those are words that I am quoting now from the statute—"any alien detained by the United States," and it goes on to say "who has been determined to be an enemy combatant or"—and this is the part that in my mind is somewhat like Kafka—"awaiting such determination."

Does this provision on its face appear to empower—whether the Government does this or not, does it appear to empower the Government to detain any one of the 12 million lawful permanent residents of the United States who currently work and pay taxes here indefinitely with no ability for those permanent residents to challenge their detention in Federal court?

Mr. CUÉLLAR. Mr. Chairman, I believe the short answer is yes. Just bare statutory text permits officials of the executive branch to make a judgment that someone should be accused, and the plain statutory text again provides no time limit, no indication that there has to be a review process, no indication that at any point there actually has to be a determination. And—

Chairman LEAHY. The 12 million, I mean, that is not an insignificant number of people. That is 20 times the population of my State.

Mr. CUÉLLAR. I have always thought of Vermont as being a very big State, so, yes, indeed, it is a very large number. And I think it raises quite profound constitutional questions that are perhaps not the ones that people normally think of when they think about the Military Commissions Act because they think about the rather more recent developments in cases like *Rasul*, where the question really is: What happens to people who are outside the United States?

Chairman LEAHY. But for a non-citizen awaiting such determination, that is the part that I find chilling, "awaiting such determination." That means simply on the Executive's say-so that they are awaiting determination, they could be held. They do not have access to the courts if this law is upheld. Is that correct?

Mr. CUÉLLAR. That is correct, Senator. And if I could just add one thing, in *American Trucking*, which is a very different—it is a Supreme Court case about a very different context. Justice Scalia made an interesting point that I think has relevance here. He was dealing with a situation where the Environmental Protection Agency was making the argument that they could cure a potential unconstitutional delegation problem by having narrowing regulations that took broader steps to authority and made them narrower. And Justice Scalia there pointed out that at any point the EPA could simply choose to change its regulations and we would have the unconstitutional delegation problem again.

So this is a different kind of problem, but the same objection might apply if the response from the executive branch were, well, that is the statutory text, but we have rules here that suggest that we would not actually use this degree of discretion the way that would be most troubling.

Chairman LEAHY. I use the example of somebody who contributes to a charity and they could be held pending determination, which could be a very long time. I know I have used my time. Let me ask just one last question because we have immigration on the floor, which has brought a number of Senators. Unlike you, I can see the monitor for the floor out of the corner of my eye, and there have been a number of Senators from this Committee who have been over there. But is this a matter of concern to the Latino community in this country?

Mr. CUÉLLAR. I believe it has to be, Mr. Chairman, because if you look at the history of legal immigrants in America, there are historical cycles of inclusion and rejection. And these are legal immigrants who pay billions of dollars in taxes and contribute to meeting particularly labor demands that we have and whose children grow up to take important positions in American society.

But if you look at these historical cycles, you find that at certain darker periods in our history, even people who are legally here are excluded, and sometimes under color of law. The Great Depression comes to mind. So, because of that, I think it is very important for people who are members of the Latino community and people who are not to be vigilant and understand that laws can be used in ways other than the way they were intended to be used.

Chairman LEAHY. I understand. I know some of the discrimination my Italian grandparents faced when they first came to this country, and they were here legally.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Mr. Chairman, thank you very much for this hearing and your leadership on this issue, and I thank the panel.

I want to just say a word on behalf of Senator Leahy and Senator Specter. This is important legislation, and it is long overdue. What we have heard in testimony today I think is evidence of the fact that the reputation of the United States of America is on the line.

Arthur Schlesinger, Jr., a leading historian, who recently passed away, said that the issue of torture has done more damage to the reputation of the United States than anything in modern history. I am afraid he is right. I think when we look at this issue of habeas corpus, it is another sad and troubling chapter that has been written by this administration since 9/11.

I want to salute Admiral Guter for coming here today and particularly for the Judge Advocates General. I cannot recall another time in history when this group has played such an important role in our national debate. Time and again, men and women who have agreed to serve in our military have taken on this responsibility and spoken out and reminded us that they, too, are very conscious of our need to be safe as a Nation, but also to make sure that our conduct in the treatment of our own military and prisoners is consistent with our constitutional principles. And I thank you for this. You have really been a beacon in terms of the statements that you have made and the positions that you have taken.

One can only speculate as to how long it is going to take the United States to restore its reputation in the world after these last 6 years. It will take some time. And I think that the beginning of that restoration will be the passage of the legislation which Senator Leahy and Senator Specter will bring before us. This seems so fundamental to me. About a year ago, I had a chance to visit Guantanamo. How many members of the panel have ever been to Guantanamo? Well, half of you, or three of five of you have been there. It was my first time. It is a Godforsaken place in the middle of the Caribbean, hotter than the hinges of hell, where we are holding over 400 prisoners. They told me when I went down there that

some of the prisoners that had been held for up to 4 years had been released with no charges after they determined that there was really no reason to hold them.

We know that many of the men who came to this facility were brought there as a result of their captors being paid bounties, so they came in at least under questionable circumstances, and after years, literally years of incarceration—and you have seen pictures of that incarceration—some of them were released without charges to go home—to go home and tell the story of what it was like to be a prisoner of the United States of America.

I think what we are discussing here is so fundamental in terms of basic justice that it really has to be done and done quickly, to start to restore our reputation.

Mr. Taft, you were in an unusual position as counsel at the State Department to Secretary Powell, who spoke out—

Mr. TAFT. That is right, Senator.

Senator DURBIN. Spoke out, I thought in a very clear way, about the suggestions of the White House to deviate from the standards of the Geneva Conventions. This was a moment in time when Alberto Gonzales was Counsel to the President and was suggesting some changes in conformance with the Geneva Conventions that we had followed for half a century in the United States.

Can you give us any insight into that debate within the administration between Secretary Powell and White House Counsel Gonzales on this issue?

Mr. TAFT. Well, Senator, I think that a great deal of what went on in that debate has actually been published. The various memoranda that went back and forth between Secretary Powell, myself, the Department of Justice, and the Counsel to the President—now Attorney General Gonzales—they have all been actually put in a book, and whether I could add to that with my memory now of what is 6 years old, it would be a risky business.

Quite simply I would say that the issue that we had there was whether the United States would continue to follow the policy of applying the Geneva Conventions to the people that we were capturing in the conflict in Afghanistan, whether they—

Senator DURBIN. Can you zero in on the Geneva Conventions and their applicability to the detention question, rather than the torture question? Torture has been a big issue, but can you zero in on what the Geneva Conventions require?

Mr. TAFT. The Geneva Conventions, had we followed them—and we were following them. I think it is an important point to make. Starting in October, when we went into Afghanistan, we were following the Geneva Conventions under the rules of engagement that were issued. When you capture a person there, you give them an Article 5 Tribunal. You treat them as—

Senator DURBIN. Tell me what that means, Article 5 Tribunal.

Mr. TAFT. Oh, sorry. What that means is that you do a determination as to whether they are a prisoner of war or a civilian, basically. And we—

Senator DURBIN. On a timely basis—

Mr. TAFT.—would treat them as prisoners of war regardless of whether they were entitled to that.

Senator DURBIN. On a timely basis. Is that correct?

Mr. TAFT. Oh, yes. You do it right there.

Senator DURBIN. And the reason for the timely tribunal, can you tell us for the record?

Mr. TAFT. Well, it is because a battlefield is an extremely confused area, particularly in an urban environment, which we were involved in. And you do it because the evidence is fresh; the people who were involved in taking the person into custody are right there.

Senator DURBIN. You have a greater possibility of bringing together evidence and witnesses to find out whether this person is truly an enemy combatant or a threat. Is that why the Geneva Convention Article 5 Tribunal is written as it is?

Mr. TAFT. That is correct. I do not want to suggest that this is an elaborate procedure. You can conduct a large number of these in a very short period of time, and we did that in the Iraq conflict, for example. It is usually not that hard to figure out whether a person who has just been captured that day or the day before, what he is.

Senator DURBIN. And what proportion of the people now held in detention at Guantanamo do you believe have had these Article 5 Tribunals?

Mr. TAFT. I think formally the Article 5 Tribunals, maybe some of them had them, if they were captured before February. I do not know specifically. But after that, they would not have had them.

Senator DURBIN. I doubt that there were many.

Mr. Rivkin, you were the only one on the panel to defend this, and I want to give you your chance. But having understood what Article 5 Tribunals require and why and the fact that very few of the detainees in Guantanamo ever had an Article 5 Tribunal under the Geneva Convention, we are now saying that we will take as an alternative the CSRTs, these other tribunals, which these tribunals, these trials take place much later, and under circumstances which I think you would have to concede would prejudice the detainee because they cannot have access to classified information, they may not have representation of counsel, they may not have access to evidence. We have an administration that wanted to deny access of counsel at one point, frequent access of counsel to these same detainees.

So when you reach a conclusion that you feel the current system is consistent with Geneva Conventions, how do you reconcile the difference between a timely Article 5 Tribunal where evidence and witnesses are available with these tribunals, which may take place years later with virtually no evidence and/or witnesses available for the detainee to call?

Mr. RIVKIN. Senator Durbin, I understand that question. Let me say a couple of things here—and, again, we are talking about a different issue. Let us agree the judicial review procedures we are talking about—

Senator DURBIN. Well, I think this is the starting point.

Mr. RIVKIN. Well, no, I understand. But I just wanted to—

Senator DURBIN. Because, understand, this law that was passed removes the right of the trial court to ask the factual questions. It goes straight to the circuit court appellate level. The fact finders, you have to assume the facts found by the CSRTs as your starting

point. And if you have a process that is so removed from the reality of evidence and witnesses, how can it possibly be a just process. So I will let you respond. Sorry to interrupt.

Mr. RIVKIN. No, no. You set a high burden and I will try to oblige.

First of all, contrary to a suggestion by my good colleague and friend, Mr. Taft, the word "timely" does not appear in Article 5. Point No. 1.

Point No. 2, I have actually looked carefully, as best as I can given the existing record, at the actual state practice under the Geneva Conventions. It turns out there are very few state parties that actually hold Article 5 Tribunals. Let us keep in mind that an Article 5 Tribunal, Senator Durbin, is not something that you do invariably at the front end in every capture. The predicate—I do not have it in front of me, but I am pretty sure I remember the language. The predicate is "in case of doubt." So you do Article 5 hearings in case of doubt.

To the extent they do have few parties under Geneva who have actually held Article 5 Tribunals, you are absolutely right, they typically take place pretty close to capture—not instantaneously, but sometimes several days or several weeks thereafter. Let me submit to you, though, they are enormous austere. They are so austere that they make the CSRT process—that you correctly point out is quite austere compared with our civilian trials—look like a king's ransom by comparison.

For example, the typical Article 5 Tribunals would involve several officers sitting in a tent somewhere in the desert and sort of eyeballing the defendant. Not only is the person not represented by counsel, not represented by any representative, like in the case of CSRT, there are no witnesses. There may be a linguistic problem. In many senses, an Article 5 Tribunal is a kind of a common-sense eyeballing the person: "Do I believe him or not?"

So the reason, by the way, we have not had Article 5 Tribunals being administered in a fashion that is timely is because of the unique circumstances of capture. Let me say this: If you actually capture somebody on a battlefield and a person is out of uniform and claims that he is an innocent shepherd and he just happened to be wandering through, and you have people who captured him, you may hold an Article 5 Tribunal there and then. But if the person actually is brought to you by somebody else and by the time he gets to your hands, it was several weeks later, the notion that you may not give him that original austere Article 5 hearing is not unusual.

So what you gain on the CSRT side, while there is a delay, is a great deal more due process than anybody has ever received in an Article 5. And that—

Senator DURBIN. You think the CSRTs are a due process tribunal?

Mr. RIVKIN. I would say to you that CSRTs provide you a lot more due process than a typical Article 5 hearing. Again, you have people spending maybe 5 or 10 minutes with a detainee, three officers sitting in a tent in the desert; there is no effort to assemble information.

Senator DURBIN. The Chair has been very kind in allowing me to go beyond my time here, but I just want to say that I would struggle with the concept of due process, when I cannot even view the evidence against me, when I cannot even conceivably call a witness in my own defense, because this tribunal is taking place years after I was detained and thousands of miles from where the witnesses could be found.

Mr. RIVKIN. But, Senator, with respect—

Senator DURBIN. That is the—no, I am going to finish, and then you may say what you like. But that is not consistent with any concept of due process, being able to confront the witnesses and being able to produce evidence in your own defense.

And I might also add to you that the CSRTs fall short of the Article 5 Tribunals in one very important respect: CSRTs are not empowered to conclude that a detainee is a POW—the precise question that the Article 5 Tribunals must answer. They cannot do this because the President has already stated categorically none of these detainees are POWs. So they cannot even have the same starting point here. And then to add insult to constitutional injury here, we remove habeas corpus from this whole concept and this whole proceeding, except in the most remote circumstances where a circuit court is looking at a CSRT finding.

So I struggle with your conclusion that the CSRTs, as currently written, are a better deal for a detainee than an Article 5 Tribunal or that they are consistent with the constitutional concepts of due process of habeas corpus. I do not agree with that. I was one of 34 to vote against it. And I am glad that Senator Leahy and others are pushing this forward.

I welcome any of your comments.

Mr. RIVKIN. Very briefly, my only point, Senator Durbin, was that in a typical Article 5 Tribunal, you do not have an opportunity to call witnesses; you do not have an opportunity to call anybody to assist you. You cannot marshall any evidence. Everything in life is a question of comparing two different baselines. CSRTs are undoubtedly very deficient compared to most civilian trials we are used to, but compared with these very austere Article 5 proceedings, you do have a considerably greater degree of due process.

Now, very briefly, you mentioned one excellent point. The typical question in an Article 5 hearing is not—I repeat, not—are you a civilian? Everybody captured is presumed to be at least a POW. So in a typical Article 5 Tribunal, your choice is between being held to be an unlawful combatant, in which case you have fewer rights, or being a POW. In either instance, you get held for the duration of hostilities. In a CSRT, you are actually being asked a better question: whether or not you are a civilian. If you are a civilian, you get released. And, in fact, I have looked at the statistics that get published. On 28 occasions, CSRTs found individuals to be civilians; those individuals were released.

I do not understand the argument that it is better for you to be in a situation of choosing between being a POW and being an unlawful enemy combatant when the conclusion is in either case you get held for the duration of hostilities, versus the other outcome, you are a civilian or an unlawful combatant—

Senator DURBIN. Please excuse us.

Chairman LEAHY. We will have order. We will have order in the hearing. The witnesses are entitled to be heard. The Senator from Illinois has asked a very valid question, and I—are you satisfied with the answer?

Senator DURBIN. I am just going to conclude by saying these Article 5 Tribunals can also find innocence, which the CSRTs cannot. They can decide whether you are an enemy combatant or you are not, period. And they are at least—we have tried through Army regulations to have these timely tribunals so evidence and witnesses are available. It is the American way, or at least it was until this administration.

Thank you, Mr. Chairman.

Chairman LEAHY. I would say to the Senator from Illinois that he need not apologize for the extra time he took. We are taking probably more time in this hearing than was allowed for the debate on this issue when we made what is, in the Chairman's view, a colossal mistake in trying to reverse habeas corpus to the extent we did.

Senator Feingold?

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Thank you, Mr. Chairman, for holding this critically important hearing. The current situation is untenable. Detainees at Guantanamo who have been held for years but have not been tried or even charged with any war crime should have a meaningful opportunity to challenge their detention in court. This is the core purpose of habeas corpus, that the Government should not have the power to detain people indefinitely and arbitrarily.

As a group of retired judges wrote to Congress last year, habeas corpus "safeguards the most hallowed judicial role in our constitutional democracy—ensuring that no man is imprisoned unlawfully." I believe that the Congress' elimination of that safeguard last year in the Military Commissions Act was a grave error. We must fix that mistake. It is that simple.

To be true to our Nation's proud traditions and principles, we must restore the writ of habeas corpus, and we must make it clear that we do not permit our Government to pick people up off the street, even in U.S. cities, and detain them indefinitely without court review. That has never been and must never be what America is about.

Thanks to all the witnesses. Mr. Taft, let me ask you, I am a member of the Foreign Relations Committee, and in that regard I am concerned about the effect of our detention policies on our relationships and credibility overseas. And I would also ask Admiral Guter to respond to this. Have Guantanamo Bay, the Military Commissions Act, and the denial of habeas corpus harmed those relationships and the United States' ability to accomplish other objectives worldwide? We will start with Mr. Taft.

Mr. TAFT. I would say, Senator Feingold, that there have been difficulties about our detention practices in Guantanamo Bay, even with our very close allies. With the United Kingdom and with Australia, for example, there were very difficult negotiations over the terms on which we were holding their nationals, as well as with

other states whose nationals we were holding, particularly our European allies. I think Sweden, Denmark, and some other states that had nationals there engaged in extremely difficult negotiations that we had to go through with them.

More broadly, I do feel that if the United States were to extend the—or put back in place what was there, the right to have the lawfulness of the detention determined in a court pursuant to habeas corpus proceedings, that would be a very welcome step in the rest of the world, and it would, I think—and as I said in my testimony, the main thing for me would be that the detentions that continue—and most of them will because most of the people, as far as I can tell, actually should be being detained. They would then be being detained pursuant to a court order, an impartial determination, or a determination by an impartial forum, and after full investigation, and that would really, I think, put a stop to the idea that we are detaining people with very inadequate examination of the basis for holding them.

Senator FEINGOLD. Thank you, sir.

Admiral Guter?

Admiral GUTER. Well, I agree with Mr. Taft, and I am not sure that I could add too much to it, except to say that it is also had the unfortunate effect of having some states that do not have the robust respect for democracy and the rule of law that we have cite our policies and procedures, and specifically Guantanamo, to justify their own actions.

Senator FEINGOLD. Thank you.

Some have argued that the D.C. Circuit's review of decisions by the Combatant Status Review Tribunals provides adequate court review of those who have not been charged with any crime, making habeas corpus unnecessary and redundant. And I think Senator Durbin was addressing this. I would ask Professor Kerr, how do you respond to that assertion?

Mr. KERR. Thank you, Senator Feingold. I think it is really -the honest answer is that it is too early to tell because we do not quite know what the D.C. Circuit is going to do in terms of the procedure it is going to use to review the CSRT decisions.

The D.C. Circuit held argument in a case, *Bismullah* and *Parhat*, just last week in which it was beginning to ponder these questions, in particular trying to consider the question of what is the record that the D.C. Circuit should use to review what the CSRT has done. So without knowing that, it is a little premature to answer the question. However, the indications are that what the Detainee Treatment Act has done are probably not sufficient, for the reason that the Detainee Treatment Act does not appear to contemplate the full, sort of complete hearing that the habeas writ would allow.

It is possible that the D.C. Circuit will say, in effect, we are going to interpret this law in a way that creates this full set of hearings, in which case it really does not matter whether the statute is restored or not, because there is the same set of rights just at the appellate stage rather than district court stage. But at least based on the text of the Detainee Treatment Act, that seems unlikely, and it seems that the current law would not provide for this adequate and effective hearing.

Senator FEINGOLD. And, Professor Kerr, how do you respond to those who argue that if we restore habeas corpus, detainees in the United States' custody in Afghanistan or Iraq are going to flood the Federal courts with habeas petitions? Is that really a concern?

Mr. KERR. Whether it is a concern in part depends on how you construe the *Rasul* case. It is unclear under the *Rasul* case whether that case provides a statutory writ to a detainee held anywhere or whether it only applies to Guantanamo Bay. Justice Scalia's dissent suggests that it applies worldwide. On the other hand, there is language in the majority opinion that suggests it is really just about Guantanamo Bay. Either way, certainly it would be possible to restore the writ just so it would be available to Guantanamo Bay. And that is where, really, the rationale of *Rasul* is, I think, at its strongest, this notion of Guantanamo Bay being within the territorial jurisdiction of the U.S., and, therefore, that there is no reason the writ would have to extend beyond Guantanamo Bay.

Senator FEINGOLD. Thank you.

Senator Whitehouse?

Senator WHITEHOUSE. Thank you, Mr. Chairman.

[Laughter.]

Senator FEINGOLD. By default only, and now you are the Chairman.

STATEMENT OF HON. SHELDON WHITEHOUSE, A U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator WHITEHOUSE. [Presiding.] I would like to just followup a little bit on some of the points that Senator Feingold was making, in the general category of the example we set around the world, which I see as having three potential dimensions:

One is kind of specific reciprocity—"If you are going to treat people this way, so can we"—and what it does to our ability to argue for better treatment for Americans and others who are held without habeas corpus and without other basic democratic and civil liberties rights.

The second is a sort of more general, for want of a better word, dumbing down of the basic principles of combat, of civil rights, of treatment of detainees around the world, and the extent to which our leadership either increases or decreases, I guess you might say, the general water level in the world on that, raising it or lowering it, and what effect you think this has had.

And the third is the more general force of our image in the world, and I come at this with a little bit of a bias. I was a Foreign Service kid growing up and traveled quite a lot and got a pretty good indoctrination into how important America's image in the world is. And it strikes me that when a father or mother in some hamlet or village steps out into the morning, the biggest force we have at our disposal as America is what their aspirations are and how we figure into them. And if in hamlets and villages and little dirty high-risk apartment buildings and tough neighborhoods around the world those families step out into that day and their vision for their children is to have them live in a country like America and to have American rights and privileges be the type of thing that they aspire to, that is a pretty good world for us to live in.

If, on the other hand, they step out into the world and they question whether we really offer anything valuable and they are looking elsewhere for their aspirations—to Islamic fundamentalism, for instance, but there are many, many alternatives—I think something very grievous has been done to our capacity and to our force as a Nation.

I would be interested in your thoughts on those three specific levels. Do you think it is sensible to think about it in those three ways—the specific reciprocity, the sort of general water level of rights, and then the sense of value that—I should not say the "sense of value"—the real value that we get as Americans when the sense of our country is a favorable one throughout the world?

Mr. TAFT. Senator, let me maybe just try. I can easily address the first two points—the reciprocity point and the general degradation of protections around the world, but perhaps other panelists will have other things to say on it.

The reason I want to respond is that, in fact, those two points were points that we made in the discussion in early 2002, Secretary Powell and myself, in urging that we adhere to the Geneva Conventions and treat the people we were taking into custody, in fact, as prisoners of war, give them all of those privileges, which we thought would be the best way to proceed. And the reasons for that were exactly the same ones that led us in the Vietnam conflict to adopt that policy vis-a-vis the Viet Cong. Even though they were not entitled to POW status, we gave it to them. And the reasons were the treatment of our troops when they fall into enemy hands and the reciprocity point that you made and also the fact that by raising the standard of treatment above what perhaps was legally required, you do raise the standard all around the world, and it certainly will help not just your own troops if they fall into enemy hands, but other countries' troops and other combatants who otherwise might be dreadfully abused if taken.

So both of those points were certainly part of the arguments that we were making in proposing to stick with the Geneva Conventions at that time and accord POW status to everybody.

Senator WHITEHOUSE. Thank you.

Mr. RIVKIN. Let me try to shed some additional light. You are asking good questions. This is a good way of structuring the discussion about what is a very complex issue and frequently gets simplistic answers. Let me try to slice it this way.

There are some difficult questions here and there are some easy ones. The easy one to me is the notion that we somehow are going to encourage people, particularly authoritarian and dictatorial regimes, to actually treat their prisoners more harshly, to torture their prisoners, to detain people without any justification. I think, frankly, it is an easy point to rebut because these people have been torturing and mistreating their citizens for a hell of a long time, in many instances long before the United States even was created as an independent country. They do not need to be taught by us. Any claims to the contrary by them, which typically come from the most dictatorial regimes, are a mere justificiation.

I also, frankly, do not buy the argument that the revelations or debates about the finer points of habeas corpus play a significant, incremental, delta role in encouraging the jihadists to hate us

more, because they hate us for so many reasons that it is difficult for me to imagine that that is really meaningful, especially coming from people who themselves—

Senator WHITEHOUSE. I may not have made my point as clearly. Certainly there are people who hate us and the jihadists hate us. My point was more the average uninvolved person, someone who is waking up in some little village in some faraway place, going out to take care of their family and to try to work to improve their lives. My proposition is that if they aspire to what we represent, if they think that America is a wonderful country, then we can make an awful lot of mistakes if that is the prevailing view of the world and still come out all right.

If, on the other hand, they are skeptical of our good will, they do not aspire to follow our system, then even if we get an awful lot of things right, we are still in a very difficult position in the world, and how we influence that I think is more important than trying to win the hearts and minds of an active America-hating jihadi. They need to be treated rather differently, I think.

Mr. RIVKIN. You are absolutely right. Again, this is a difficult question. I was just merely trying to take off the table what I think are easy questions.

Now, on the question of people who are open-minded, who would like to emulate us, allies, et cetera, et cetera, this is a genuinely difficult question. I think it would be foolish to deny that we have gotten a huge black eye because of the totality of our legal policies in the war on terror. It is a fact.

My problem, frankly, is that there are such fundamental differences between us and many of our allies on a whole range of legal issues—I call it the "legal architecture of war." But I just do not buy the notion that if we tweak habeas a little bit, if we tweak the CSRTs in a way that some people on the panel may like—and even I could probably live with—that it will make a meaningful difference. Not to spend too much time on it, but I think, unfortunately, the problem with most of our allies is they fundamentally are not serious about war as an incident of statecraft. They are not interested in a traditional law of war architecture. Their preference, and I think honestly felt preference, is to use the criminal justice paradigm, and anything, Senator Whitehouse, that falls short of that paradigm would be utterly objectionable to them. And while I do not have the experience of negotiating with Europeans, being somewhat of a sucker for punishment, I regularly get on BBC and various other European networks, and I can tell you from the tenor of questions, nothing—and I mean nothing—short of the full-fledged application of criminal justice paradigm would satisfy them. And even that is not sufficient because we get regularly slammed in instances where we process somebody through district court.

My point is we have to be clear about what it would take to have a meaningful difference in the way the world looks at us, and it is not, repeat not, getting back to Section 2241. And I am not even trying to suggest if it is worth it, but, look, we have disagreements with people about what constitutes permissible collateral damage. We have disagreements with people about many other issues relat-

ing to the key legal sinews about war, and are we prepared to just change all of that?

My problem with the Europeans, frankly, is they have never been serious about not just being against something, but for something. If it were up to me, I would love to internationalize Guantanamo. I would love to close Guantanamo and move it to some other place where Europeans can work with us on both detaining and interrogating—providing due process to those people. But in discussions I have had with European officials and scholars, they have zero interest in that.

So all I am trying to say is it is a very difficult and very complex problem, and it does not do justice to it to suggest if we tweak the system a little bit here we are going to get some dramatic results in terms of greater appreciation for American reputation.

Senator WHITEHOUSE. Mr. Chairman, sorry.

Chairman LEAHY. [Presiding.] No. If you have other questions, please feel free.

Senator WHITEHOUSE. No, thank you.

Chairman LEAHY. I do not think what we are talking about is tweaking the system. We are talking about a very, very major restoration of rights. And I think that when you talk about the Europeans, can we find some other place where we can do this, the problem is we did not really care much about what their opinion was when we got ourselves in this mess to begin with. We just went ahead and did it and told Old Europe that they could play catch-up ball if they wanted. Not the best way to get support. And, frankly, we have to start reintroducing America to the rest of the world. We have a great deal to be proud of in this country. We have done some wonderful things, and I think if we correct some mistakes, then we start the reintroducing. But you do not start the reintroducing by saying it is our way or no way. And too much of the attitude was that.

I think of the strong support we had the day after 9/11 when Le Monde, a newspaper often critical of us, the headlines read, "Today we are all Americans." That is not the Le Monde you read today.

I thank you all for being here. If others have questions, we will followup with them. I know you have all taken a great deal of time. You have expressed your opinions very candidly. If any of you want to add further based on either the questions or the answers of anybody else, if you want to supplement the record, of course, I will keep it open for that.

We stand in recess.

[Whereupon, at 11:31 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

ANSWERS TO WRITTEN QUESTIONS FOLLOWING THE MAY 22, 2007 HEARING ON "RESTORING HABEAS CORPUS: PROTECTING AMERICAN VALUES AND THE GREAT WRIT"

Mariano-Florentino Cuéllar
Professor and Deane F. Johnson Faculty Scholar
Stanford Law School

QUESTIONS FROM SENATOR KYL

1. CAN YOU CITE ANY CASES WHERE HABEAS CORPUS RELIEF WAS GRANTED TO AN ALIEN DETAINED BY THE MILITARY AS AN ENEMY COMBATANT? FEEL FREE TO CITE ANY CASE FROM THE LAST 800 YEARS.

History amply demonstrates the relevance of habeas corpus in regulating the detention of aliens labeled as enemy combatants in the American and British legal systems. On a number of occasions, American courts have properly exercised jurisdiction over habeas corpus petitions filed by aliens detained by the military as enemy combatants. Examples include Ex parte Quirin, 317 U.S. 1 (1942), and In re Yamashita, 327 U.S. 1 (1946). British decisions evince a similar pattern, where common law habeas courts allowed alleged enemy aliens or prisoners of war to present evidence that they did not fall within a category of persons lawfully subject to detention. *See*, e.g., R. v. Shiever, 97 Eng. Rep. 441 (K.B. 1759)(affidavit evidence considered by habeas court, which concluded that alien detainee was properly confined as a prisoner of war); Case of Three Spanish Sailors, 96 Eng. Rep. 1010 (K.B. 1779)(habeas court evaluating affidavit evidence supporting the release of detained aliens, but ultimately concluding that they were appropriately confined). Courts have also exercised jurisdiction over the habeas corpus petitions of aliens designated as enemy combatants but detained by civil authorities, and in some cases have granted relief to the petitioners. *See* Lockington's Case, Bright. (N.P.) 269 (Pa. 1813-14)(habeas petition from a British resident of Philadelphia held as an enemy combatant); Gerald L. Neuman and Charles F. Hobson, *John Marshall and the Enemy Alien*, 9 Green Bag 2d 39 (discussing the unreported case of United States v. Thomas Williams, in which Chief Justice Marshall, riding circuit, granted relief to an alien enemy combatant irregularly detained).

Although courts have not deemed it necessary to grant relief in any of the previously-cited cases involving detention by military authorities, they have repeatedly reached the merits of the aliens' habeas corpus petitions, thereby providing detainees with an opportunity to challenge their detention before an external adjudicator. When courts are in a position to provide meaningful review, the availability of such review in principle can yield a constructive impact on the bureaucracies involved even if very few cases (or no cases) actually result in relief being granted. Moreover, American and British courts' willingness to defer to executive determinations even as they exercise habeas corpus jurisdiction in enemy combatant cases demonstrates the feasibility of continuing this historical pattern.

2. CAN YOU CITE ANY EXAMPLE OF A FOREIGN NATION THAT ALLOWS NON-CITIZEN ENEMY SOLDIERS CAPTURED DURING WAR TO USE THE NATION'S DOMESTIC COURTS TO CHALLENGE THEIR DETENTION?

Israel has an established tradition of providing non-citizen belligerents judicial review in domestic courts. In addition, some British cases also suggest that alleged enemy combatants captured during war could obtain access to domestic courts to challenge their detention. *See*, e.g., R. v. Shiever, 97 Eng. Rep. 551 (K.B. 1759).

The Israeli experience provides an instructive example of how a nation can administer a military detention system under the review of domestic courts. Under Israel's Basic Law, any law restricting personal freedom must "comply with the ethical values of the State of Israel... and not exceed necessity." *See* Basic Law: Human Dignity and Freedom, 1992, S.H. 1391, art. 8, in Israel's Written Constitution (3d ed. 1999). Current Israeli law allows the Minister of Defense to issue an order of detention whenever he "has reasonable cause to believe that reasons of state security or public security require that a particular person be detained." The authorities can then detain a person for a maximum of 48 hours before the detention order must be submitted to a domestic court judge for review. The judge then reviews whether alternative means (other than the special detention provisions invoked by the Defense Secretary) are available to meet the state's security needs, and whether there is a reasonable basis for military detention. If the detention order is upheld, a judge must review it again every three months. The Israeli scheme also guarantees various procedural protections for detainees, including access to counsel at regular intervals, the right to know the reasons for detention, and to be present in court for all legal proceedings (unless a judge makes an exception to this last provision on the basis of state security).

Military authorities operating in the West Bank and Gaza have more flexibility, but even in this context, they remain subject to judicial oversight from domestic courts. While various orders have made it possible for authorities to hold individuals for a period of days before seeking judicial approval, military personnel must eventually account for their decision to detain an individual before a court. During the last fifteen years, moreover, the Israeli Supreme court has progressively moved to dismantle certain doctrinal barriers to judicial review that could occasionally pose a problem for detainees, such as standing and justiciability. *See generally* Stephen J. Schulhofer, Checks and Balances in Wartime: American, British, and Israeli Experiences, 102 Mich. L. Rev. 1906, 1931 (2004). As Schulohfer notes:

> [T]here is no doubt that from the perspective of the Israelis themselves, the country faces a grave security situation, , with every-present danger to its military forces and civilian population centers, a potentially never-ending threat that challenges its capacity to survive as an independent nation. Nevertheless, Israeli courts have put in place a strong, increasingly robust system of judicial checks. Accountability in national security cases extends not only to law-enforcement actions within Israel proper but also to detentions that result from military operations targeting "unlawful combatants" in territories not judicially part of Israel itself. Military and executive officials seem to accept the court decisions imposing these safeguards. And through more than twenty years of experience, during which the terrorist threat and the judicial checking power have both

> intensified, there has been no major effort to flout these safeguards openly or to overturn them by legislation.

Id.

When comparing American procedures to those of other nations or time-periods, policymakers should bear in mind that some features of the current conflict make external checks more important than before. The present conflict is less bounded in terms of time and place than other conflicts. *Cf.* Rasul v. Bush, 542 U.S. 466, 485 (2004)("What is presently at stake is... whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing"). Far from diminishing the importance of review, such conditions arguably make it more important. Because the theater of war is less bound by conventional limits, many of the traditional, contemporary factual correlates tending to indicate that someone is a combatant subject to detention may not arise. In order to strike a balance between providing flexibility for vigorous executive action in a nontraditional conflict and placing limits on authorities not bound by time and place, enemy combatant designations in our present circumstances are likely to reap pronounced benefits from meaningful external review.

3. SHOULD HABEAS LITIGATION RIGHTS BE EXTENDED TO ALIEN ENEMY COMBATANTS HELD IN IRAQ OR AFGHANISTAN?

The availability of habeas review for individuals held in long-term detention in a jurisdiction controlled exclusively by the United States is especially critical. *See* Rasul v. Bush, 542 U.S. 466, 481-482 (2004); *id.* at 487-488 (Kennedy, J., concurring)("The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without benefit of any legal proceeding to determine their status."). External review in such circumstances vindicates the role of the rule of law in jurisdictions controlled by the United States, the considerable interests of detained individuals, and the importance of providing some means of generating feedback allowing executive bureaucracies to better focus their scarce resources on the most deserving targets.

The challenges raised by any potential extension of habeas corpus jurisdiction to detainees in Iraq and Afghanistan are unquestionably more complex. Nonetheless, some scholars have argued that highly deferential review could play a laudable role even in such instances, particularly in the case of long-term detainees with no alternative means of challenging the factual or legal basis of their detention. *See generally* David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B.C. Third World L.J. 125 (2005).

4. AS PART OF CSRTS OR OTHER MILITARY HEARINGS TO REVIEW THEIR DETENTION, ENEMY COMBATANTS HELD BY THE U.S. MILITARY IN IRAQ SHOULD BE PROVIDED WITH COUNSEL, WITH

THE RIGHT TO COMPEL WITNESSES TO TESTIFY, AND WITH A RIGHT OF ACCESS TO THE CONTENTS OF CLASSIFIED EVIDENCE?

There should be sufficient procedural protections to vindicate the interests of the individuals involved without unduly burdening the government's capacity to conduct vital natural security operations in an effective manner. In most cases, I believe this means that it is critical to provide meaningful access to counsel, and provision of key evidence that is implicated in the charges against detained individuals. Nonetheless, the precise details of what would be appropriate depends to some extent on the context. The type of habeas review that courts could provide should be sensitive to those contextual circumstances.

5. WAS JOHNSON V. EISENTRAGER CORRECTLY DECIED?

Johnson v. Eisentrager, 339 U.S. 763 (1950), addressed the specific issue of whether German nationals, confined in custody of the United States Army in Germany following conviction by a military commission for conduct undertaken in the course of a traditional armed conflict, had the right to test the legality of their detention through the writ of habeas corpus. The *Eisentrager* majority achieved a reasonable resolution of the issue before the Court at the time. Its analysis turned in large measure on the existence of a traditional armed conflict between the United States and the aliens' nation of citizenship. The Court noted that the "security and protection enjoyed [by an alien] while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us," *Eisentrager*, 339 U.S. at 771. When the alien's country is at war with the United States, our government can safely assume that the "alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy." *Id.* at 772. In applying this analysis, the Court underscored "the vitality of a [United States] citizen's claims upon his government for protection," *Id.* at 769, while also recognizing that some aliens merit important constitutional guarantees, such as due process under the Fourteenth Amendment. *Id.*, at 771.

In Rasul v. United States, 542 U.S. 466 (2004), the Supreme Court raised questions about the scope of the holding in *Eisentrager*. While the *Rasul* Court technically limited its holding to statutory habeas corpus rights – which may be limited by Congress – the Supreme Court nonetheless concluded that Guantanmo Bay, Cuba, was a territory within the jurisdiction and exclusive control of the United States. As a result, the holding in *Eisentrager* may no longer be a reliable indicator with respect to the availability of constitutional habeas corpus protections for Guantanamo detainees.

An important touchstone of the Court's analysis in *Rasul* was the distinction of the Guantanamo petitioners that were the subject of that case compared to those in *Eisentrager*:

> Petitioners in [*Rasul*] differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny

> that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Rasul, 542 U.S. at 476.

In short, the Court assigned considerable weight in *Rasul* to distinctions in the extent to which the United States exercised territorial control over the relevant jurisdiction, while also recognizing some important distinctions in the type of conflict in which petitioners were allegedly involved. By finding that a range of contextual factors could influence whether statutory habeas rights existed for aliens held beyond the territory of the United States, the Court implied that questions about the availability of external review were not suitable for resolution on purely on the basis of whether the alien being detained by the military was held in custody within U.S. territory or beyond its borders.

Rasul is not the only recent instance where a member of the Court siding with the majority on the judgment considered the alternatives to expansive readings of *Eisentrager*. In United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), Justice Kennedy provided the fifth vote in a five to four decision and filed a concurring opinion. This opinion suggests that some model of intermediate protection may apply to aliens where United States action overseas entails fundamental or prolonged intrusions on liberty or bodily integrity. *Verdugo-Urquidez*, 494 U.S. at 278. The arguments raised in these opinions suggest that, while *Eisentrager* remains an important holding with respect to the specific issues raised there, its present and future scope is likely to be limited to particular circumstances closely analogous, and the consequences of its application must be carefully considered.

6. IS IT ILLEGAL FOR THE UNITED STATES TO USE DRONE AIRCRAFT FOR TARGETED KILLINGS OF SUSPECTED AL QAEDA LEADERS IN AREAS OUTSIDE OF IRAQ AND AFGHANISTAN?

In my view, this question is substantially beyond the scope of the hearing, and I have not had recent occasion to think about it closely. Nonetheless, the following sources and arguments are among the ones that should be included in any analysis of the question posed. Executive Order 12,333 explicitly states that "[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination." *See* Exec. Order No. 12,333, 3 C.F.R. 300, 213 (1982). However, some instances involving the targeted application of force to individuals do not constitute assassination under international humanitarian law. The law of war establishes that targeting command and control structures in the course of an armed conflict may be permissible. *See*, e.g., Norman G. Printer, Jr., *The Use of Force Against Non-State Actors Under International Law: An Analysis of the U.S. Predator Strike in Yemen*, 8 UCLA J. Int'l & Foreign Aff. 331 (2003). The legality of such applications of force

depends on the extent of compliance with requirements involving both the *jus ad bellum* and *jus in bello* doctrines constituting the law of war. The relevant requirements associated with these doctrines encompass matters such as whether the targeted individuals are parties to an armed conflict, necessity, discrimination, and proportionality. Policymakers facing such questions must make intricate, fact-specific contextual judgments in order to determine the scope of permissible action.

QUESTIONS FROM SENATOR BIDEN

1. IS IT NOT SO (BASED ON YOUR TESTIMONY) THAT GRANTING HABEAS RIGHTS TO ALIEN DETAINEES BY AMENDING 28 U.S.C. SECTION 2241 WOULD BE THE BEST WAY OF SAFEGUARDING CONSTITUTIONAL RIGHTS, RATHER THAN SIMPLY STRIKING FROM THE MILITARY COMMISSIONS ACT AND DETAINEE TREATMENT ACT THE PROVISIONS DENYING THOSE RIGHTS?

The Court has long held that Congress must speak clearly before it concludes that habeas review is unavailable. This presumption is implicit in seminal cases governing the habeas rights of aliens. *See*, e.g., INS v. St. Cyr, 533 U.S. 289 (2001). The presumption that Congress must speak clearly if habeas rights are to be deemed restricted in any way encompasses cases involving citizens as well as aliens, and civilians as well as alleged enemy combatants. Accordingly, statutory changes that strike the habeas stripping provisions of the Military Commissions Act and the Detainee Treatment Act can be expected to have an important legal effect by restoring the status quo ante, where the habeas statute was widely understood to give courts jurisdiction over duly filed habeas petitions unless this was clearly contrary to an express congressional effort to limit the habeas statute itself. Although further changing the habeas statute itself to explicitly include alien detainees could further clarify the matter, such a move could also raise questions about the presumptive scope of the habeas statute to situations not explicitly mentioned in that statute.

2. IN LIGHT OF THE CONCERN ABOUT PERCEPTIONS ABROAD, WOULD THE FOLLOWING PROCEDURAL SAFEGUARDS BE PRUDENT IMPROVEMENTS? (A) ALLOWING ALIEN DETAINEES TO INVOKE HABEAS RIGHTS EITHER AFTER THEIR CSRT STATUS DETERMINATIONS OR AFTER HAVING BEEN DETAINED FOR 60 DAYS WITHOUT SUCH A DETERMINATION, AND (B) EXPANDING THE SCOPE OF JUDICIAL REVIEW BEYOND THE CONSTITUTIONALITY OF CSRT PROCEDURES AND THE TRIBUNAL'S ADHERENCE TO THOSE PROCEDURES.

Both of these changes would be an improvement. Permitting habeas corpus review to occur after CSRT determinations or after detention for 60 days would resolve basic problems currently affecting the detention and determination system. The basic architecture of international humanitarian law contemplated a situation where status

determinations affecting combatants (or alleged combatants) would occur soon after capture. The administrative mechanisms our government uses to handle status determinations should be designed to facilitate decisionmakers' efforts to navigate potentially complex factual and legal questions. Even in traditional battlefield settings, some of these questions are difficult to resolve within days of an individual's detention as a putative enemy combatant. The challenges associated with combating terrorism – where some belligerents may be particularly eager to blend in with civilian populations despite the prohibitions on such conduct in international humanitarian law – may pose additional difficulties for speedy determinations. For all these reasons, the determination system should permit individuals who bear at least some indications of being enemy combatants to be detained for a short period of time without a more substantial determination.

At the same time, it is critical to place sensible limits – such as 60 days -- on that period of detention without any review. After this period, it is quite likely that some of the evidence and information that would be valuable in making determinations could degrade substantially, and the additional security value of postponing determinations is likely to be marginal. Moreover, courts providing habeas review of determinations could adjust the precise contours of their scope of review to take account of the continuing challenges faced by responsible government officials exercising reasonable authority to detain combatants.

It is also critical to permit judicial review of determinations beyond the constitutionality of CSRT procedures and the Tribunal's adherence to those procedures. The truncated review currently allowed under the MCA seems to permit some detainees to challenge the overall constitutionality of status determination procedures and overall compliance with those procedures. What this scheme does not permit is review of cases where no final determination is ever made (because a decision is indefinitely delayed), oversight of confinement conditions, or the type of case-by-case determination striking a reasonable balance between societal and governmental interests that is historically associated with review of habeas petitions. Part of the problem is with the determination procedures themselves, which establish a presumption that the government's evidence is genuine and accurate, and deny basic protections to detainees. At the margin, judgments some cases may be distorted quite profoundly by these rules, while others may not. *See* David Martin, *Judicial Review and the MCA: On Striking the Right Balance*, 101 Am. Journal of Int'l Law (2007)(forthcoming). Across-the-board constitutional determinations, by their nature, cannot reasonably be expected to take account of how factual ambiguities, legal uncertainties, and bureaucratic judgments operate in individual cases.

June 10, 2007

Honorable Patrick Leahy
Chairman, Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, D.C. 20510
(Attention Jennifer Leathers, Hearing Clerk)

Dear Senator Leahy:

Thank you for the opportunity to answer follow-up written questions from the Committee members as a result of my testimony at the United States Senate Judiciary Committee hearing regarding "Restoring Habeas Corpus: Protecting American Values and the Great Writ" on May 22, 2007. I departed for Beijing, China with the Duquesne University School of Law's summer China program on June 7th and will not return until June 23rd, ten days after the deadline for submission of these answers. I received your May 30th letter of request on June 5th, just before my departure and have limited resources here, but I will do my best to be responsive to all questions with the materials that I brought with me.

I begin with Senator Kyl and would ask that I be permitted to combine his first two questions as they lend themselves to one answer. The questions are:

1. You state in your testimony that "habeas corpus is not a special right, it is what we expect for our citizens and military personnel abroad and it is what we should extend to all human beings." Can you cite a single recorded English or American case prior to *Rasul v. Bush* in which a court has granted relief on a *habeas corpus* petition filed by an alien detained by the military as an enemy combatant?

2. Can you cite an example of a foreign nation that allows non-citizen enemy soldiers captured during war to use that nation's domestic courts to challenge their detention?

According to information compiled and provided by Human Rights First:

> English common law habeas *did* provide habeas for those being held as alien enemies. Common law habeas courts would consider whether an alien was, in fact, an enemy alien or prisoner of war, and allowed an alien to present evidence that he did not fall within that category. See, e.g., *R v. Shiever*, 97 Eng. Rep. 551 (K.B. 1759) (habeas court considering affidavit evidence and concluding that detainee was properly held as a prisoner of war); *Case of Three Spanish Sailors,* Eng. Rep. 1010 (K.B. 1779) (habeas court examining affidavit supporting detained aliens release, but ultimately concluding they are in fact alien enemies); *Lockington's Case*, Bright (N.P.) 269, 288-9 (Pa. 1813) (alien enemy could

submit an affidavit to show that he was not in fact an alien enemy); R.J. Sharpe, *THE LAW OF HABEAS CORPUS* (2D ED 1989), AT 115-16 (describing that common law habeas courts investigate whether the detainee is "both in fact and law" an enemy alien or a prisoner of war").

Moreover, the administration's definition of enemy combatant is so broad as to cover any non-national the president deems to be associated with the enemy. Habeas developed *precisely* to provide a check in such situations and to prevent the King from unilaterally labeling persons the "enemy" and throwing them in a dungeon. (Note: all emphasis in the original.)

3. Do you believe that, as part of CSRT or other military hearings to review their detention, enemy combatants held by the U.S. military in Iraq or Afghanistan should be:

    A. provided with counsel?

No. Battlefield detentions that result from a hearing that is relatively contemporaneous to capture by *U.S. military forces* should not require that the detainee be provided with counsel.

    B. provided with the right to compel witnesses to testify?

No. Reasonably available witness should be questioned as a matter of policy. Compulsory production of witnesses, however, should not be required.

    C. provided with a right of access to the contents of classified evidence?

No.

4. 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?

Detention at Guantanamo Bay is not being criticized because of the location of the facility but because of the treatment afforded to the detainees. That said, Guantanamo Bay has become a symbol of the policies of the administration. Transfer of the detainees to a secure location in the United States would, therefore, and in my opinion, result in relief from a degree of criticism only if accompanied by policies that emphasize the long tradition of our country to provide humane treatment and fair processes to those we detain.

Question from Senator Leahy:

Could you respond to the argument often cited by those supporting the habeas-stripping provision in the Military Commissions Act, that restoring habeas will lead to "judges on the battlefield" and force federal courts to consider habeas claims from large numbers of detainees held by the United States military throughout the world?

This concern, in my opinion, is unfounded. I feel competent to respond to the question as I believe the argument was advanced as an over-reaction to the U.S. Supreme Court ruling in *Rasul v. Bush*, a case in which I filed a supporting amicus brief. Historically, our courts consistently have denied habeas to those held outside the sovereign territory of the United States. *Rasul* did not alter this notion. Rather, it was based on the singularly unique relationship between the United States and Cuba whereby our exclusive control over Guantanamo Bay, which can only be extinguished by voluntary agreement by both parties, was seen by the Supreme Court, correctly, as the legal equivalent of sovereignty. This condition does not exist in any other country on the globe.

Questions from Senator Biden:

1. In your testimony, you asked how we can win the ideological side of this war with policies that are in opposition to our own ideologies. In light of that concern, would you consider the following procedural safeguards to be prudent improvements? Please elaborate as you see fit.

    1) Amending 28 U.S.C § 2241 to grant habeas corpus rights to alien detainees rather than merely striking from the Military Commissions Act and Detainee Treatment Act the provisions that deny those rights;

I would favor such an amendment because it would bring needed clarity to an area of the law that now has become ambiguous. I would, however, draft the amendment so that it would not enlarge the territorial jurisdiction of United States courts.

    2) Allowing alien detainees to invoke habeas rights either after their CSRT status determination or after having been detained for 60 days without such a determination;

Again, assuming accepted limits on territorial jurisdiction (to include Guantanamo Bay), habeas rights are necessary to avoid the "legal black hole" that our policies have created. In my opinion, and as stated in my testimony on May 22nd, the CSRT process is fundamentally flawed. A detainee can be processed and then never charged, enabling the government to hold him indefinitely. Habeas is the accepted means by which a civilized legal system prevents such an abuse by the executive.

3) Expanding the scope of judicial review beyond the constitutionality of CSRT procedures and the Tribunal's adherence to those procedures

Yes. Because of the administrations proclivity to keep reinventing the CSRTs without producing a fundamentally fair and acceptable process, the preferred (and perhaps only effective) corrective measure would be to expand the scope of judicial review to all aspects of the procedures and findings of the CSRT.

Again, thank you, Mr. Chairman, and all members of the Committee for this opportunity to respond to your questions. You have my best wishes as you consider the competing concerns of the protection of the rule of law and the security of our nation.

Sincerely,

/s/

Donald J. Guter
Rear Admiral, USN (ret.)
Dean
Duquesne University School of Law

WRITTEN QUESTIONS FROM SENATOR KYL, MAY 22 2007 HEARING
RESPONSES OF ORIN KERR

1A. Assuming that the Constitution's text, structure, and history afford an appropriate basis for interpreting that document, . . . [d]o you believe that the Constitution actually does require that habeas-litigation rights be extended to aliens detained by the military as enemy combatants at the U.S. Naval Base in Guantanamo Bay, Cuba?

I think the Constitution's text, structure, and history do not resolve this particular question. The text and structure shed no light on the scope of the writ, as compared to when it can be suspended. Further, as far as I know we have no guidance as to what the Framers intended as to the scope of habeas corpus. If the question is whether extending habeas corpus would be consistent with the historical scope of the writ, I tend to find Justice Scalia's historical view expressed in his dissent in *Rasul v. Bush* to be more persuasive than the historical view offered by Justice Stevens in his majority opinion. However, I am not an expert in the historical scope of habeas corpus, so I would need to do more research to offer a more definitive answer.

1B. Assuming that the Constitution's text, structure, and history afford an appropriate basis for interpreting that document, . . . [d]o you believe that the Constitution requires that habeas-litigation rights be extended to aliens detained by the military as enemy combatants in Iraq or Afghanistan?

I think the Constitution's text, structure, and history do not resolve this particular question. However, I believe that extending habeas corpus to aliens detained in Iraq or Afghanistan would be inconsistent with the historical scope of the writ as applied at common law. The strongest case for habeas jurisdiction at Guantanamo Bay rests on the notion that Guantanamo Bay is a U.S. territory for habeas purposes. However, Iraq and Afghanistan clearly are not part of any U.S. territory. Therefore the Constitution does not provide alien detainees held in Iraq or Afghanistan with a right to habeas corpus.

1C. Can you cite a single recorded English or American case prior to *Rasul v. Bush* which a court has granted relief on a habeas corpus petition filed by an alien detained by the military as an enemy combatant? Please feel free to cite any case decided during the last 800 years.

No, I cannot.

2. Do you believe that, as part of CSRT or other military hearings to review their detention, enemy combatants held by the U.S. military in Iraq or Afghanistan should be:

A. Provided with counsel, B. Provided with the right to compel witnesses to testify, or C. Provided with a right of access to the contents of classified evidence?

I am not a policy expert in such matters, so I must stress that my own views are tentative and subject to change. As a matter of policy, however, I tend to think the answer to such questions depends on how long the individuals have been or may be detained. If detention is relatively brief, on the order of weeks or months, I do not believe any such rights should be afforded to such detainees. On the other hand, if the detention is long-term, such as years, decades, or even life, then some of these rights may become appropriate. In such a setting, I think it is appropriate that the detainee should receive a hearing on whether he is an enemy combatant in which he is appointed a representative to argue on his behalf. While I do not think the detainee should have a personal right to compel witnesses or access classified evidence, I think it may be possible to allow the detainee's representative to have such rights in some circumstances.

3. Do you believe that Johnson v. Eisentrager, 339 U.S. 763 (1950), was correctly decided?

I believe the result in *Eisentrager* was correct. The Court's opinion is terribly confusing, however. I greatly admire the work of Justice Robert H. Jackson, the author of the *Eisentrager* majority opinion, but this particular opinion is remarkably opaque. Given that, it is difficult to assess the merits of the individual arguments the opinion contains.

WRITTEN QUESTIONS FROM SENATOR BIDEN, MAY 22 2007 HEARING
RESPONSES OF ORIN KERR

1. Please describe the ways in which review at the trial level would help to make adequate and effective the review of a detainee's legal rights.

Review at the trial level would facilitate the collection of evidence, the creation of a record, and the finding of any facts that need to be found. Habeas proceedings normally begin at the trial court. Because the test for adequacy and effectiveness is relative to the usual habeas writ, the trial court is the natural starting point to ensure that proceedings are adequate and affective. At the appellate level, the analogous step would be to appoint a special master pursuant to the Federal Rules of Appellate Procedure. However, lodging jurisdiction in the trial court avoids the need for this step and provides an established set of procedural rules to be followed.

2. You testified about your concern that the Detainee Treatment Act and Military Commissions Act did not allow for an "adequate and effective" alternative means of judicial review. In light of that concern, would you consider the following procedural safeguards to be prudent improvements?

1) Amending 28 U.S.C. 2241 to grant habeas corpus rights to alien detainees rather than merely striking from the MCA and DTA the provisions that deny those rights.

Any restoration of the habeas writ would avoid the need to determine if alternate procedures are "adequate and effective."

2) Allowing alien detainees to invoke habeas rights either after their CSRT status determinations or after having been detained for 60 days without such a determination.

I believe that such a legal rule would be held to be "adequate and effective" by the courts.

3) Expanding the scope of judicial review beyond the constitutionality of CSRT procedures and the Tribunal's adherence to those procedures.

Assuming that a detainee is entitled to habeas corpus rights as a matter of constitutional law, expanding the scope of judicial review beyond the constitutionality of CSRT procedures and the Tribunal's adherence to those procedures would be a helpful step to ensure that the alternative collateral remedy satisfies the constitutional requirement.

ANSWERS FROM DAVID B. RIVKIN, JR. 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 reevaluate 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. 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 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 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.

Characteristic	Army Regulation 190-8	CSRT
	the internment facility's chain of command. 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. Person to provide assistance to the detainee: None.	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. 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.
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. The commanders of military witnesses determine whether they are reasonably available.	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 President of the Tribunal determines whether witnesses are relevant and reasonably available.

Characteristic	Army Regulation 190-8	CSRT
Detainee testimony	Detainee may testify or otherwise address the Tribunal, but cannot be compelled to testify.	Same.
Standard of proof	Preponderance of evidence. Majority vote.	Preponderance of evidence 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. AR 190-8 contains no requirement to evaluate whether statements were the result of coercion.	Testimonial and written evidence is permitted. 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

Characteristic	Army Regulation 190-8	CSRT
		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.
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.

Responses of William H. Taft IV to questions submitted by Senator Kyl

1. You state in you testimony that "identifying those terrorists we are entitled to detain because they have declared war on us is * * * difficult. We should take advantage of the court's expertise in performing this task."

A. Do you believe that the federal judiciary has greater expertise than does the military in determining whether an individual is an enemy combatant?

B. Do you believe that the federal judiciary has a better understanding than does the military of the nature of the Taliban and the Al Qaeda terrorist network and other groups fighting U.S. soldiers in Afghanistan and Iraq?

2. During questioning by Senator Durbin, Mr. Rivkin stated that CSRT hearings give a detainee a great deal more due process than does the typical Geneva Convention article V hearing. Mr. Rivkin 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. Mr. Rivkin 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. Do you have any reason to disagree with Mr. Rivkin's characterization of the nature of Article V. hearings?

3. Do you believe that habeas-litigation rights should be extended to alien enemy combatants who are captured and held in Iraq or Afghanistan?

4. Do you believe that, as part of CSRT or other military hearings to review their detention, enemy combatants held by the U.S. military in Iraq or Afghanistan should be:

A. provided with counsel?

B. provided with the right to compel witnesses to testify?

C. provided with a right to access to the contents of classified evidence?

5. Do you believe that *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950), was correctly decided?

Answer 1.A. Yes. The military's determinations have been made hastily and, upon review, it has developed that they were incorrect in dozens of cases—between five and ten percent of the time for persons held in Guantanamo.

Answer 1.B. No. The military has a better understanding of the nature of our enemies in Afghanistan and Iraq than federal judges do.

Answer 2. Mr. Rivkin correctly described the nature of an Article V hearing. CSRT hearings are more elaborate and their determinations more reliable than Article V hearings. *Habeas corpus*

proceedings are more elaborate and their determinations more reliable than CSRT hearings.

Answer 3. No. As I stated in my testimony, if the courts were to interpret our statutes to extend *habeas corpus* jurisdiction to aliens in Iraq or Afghanistan, I would support legislation to amend the statutory provisions on which the courts relied for the conclusion.

Answer 4. A, B, and C. I would not extend these rights to person being held in Iraq or Afghanistan under U.S. law. Our forces in Iraq and Afghanistan should comply with Iraq and Afghan law in detaining persons in those countries.

Answer 5. Yes, I believe *Eisentrager* was correctly decided.

Response to a question from Senator Biden

1. In your testimony, you were rightly concerned with the importance of demonstrating to the international community the legitimacy of the CSRT determinations. In light of that concern, would you consider the following procedural safeguards to be prudent improvements? Please elaborate as you see fit.

1) Amending 28 U.S.C. § 2241 to grant habeas corpus rights to alien detainees, rather than merely striking from the Military Commissions Act and Detainee Treatment Act the provisions that deny those rights;
2) Allowing alien detainees to invoke habeas rights either after their CSRT status determinations or after having been detained for 60 days without such a determination;
3) Expanding the scope of judicial review the beyond constitutionality of CSRT procedures and the Tribunal's adherence to those procedures.

Answer 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. Amending 28 U.S.C. § 2241 to grant *habeas corpus* rights to alien detainees in Guantanamo or striking the provisions of the MCA that eliminated those rights would both be effective. I do not believe relating the ability of alien detainees in Guantanamo to bring *habeas corpus* petitions to the CSRT process would be desirable.

SUBMISSIONS FOR THE RECORD

May 21, 2007

The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
United States Senate Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

We strongly support your legislation to restore habeas corpus for detainees in US custody.

The Military Commissions Act eliminated the right to file a Writ for Habeas Corpus, for any non-citizen determined to be an enemy combatant, or even "awaiting" such a determination. That includes millions of non-US citizens who may be long-term Legal Permanent Residents, or legal visitors, students, temporary workers, or even refugees or asylees in the US.

There are millions of foreign-born legal residents in the US who are legally authorized to live and work in the US for months, years, and even indefinitely. These foreign born residents may be citizens of other countries, or even be stateless. However they are living among us with US citizens spouses and children, working in highly skilled and low skilled jobs, studying, teaching, building, discovering, inventing, caring, and investing in our communities in countless ways, and contributing positively to our valued way of life. However, this law treats these valued residents as second-class citizens. This new law provides that non-citizens can be detained, forever, without any ability to challenge their detention in federal court – or anywhere else – simply on the Government's say-so that they are awaiting determination whether they are enemy combatants.

The denial of habeas corpus to these foreign nationals, who live among us, is not in our nations best interest. We cannot hope to maintain a just society while eliminating basic legal and human rights for a considerable segment of our population, based on their immigration classification. Legal immigrants are an essential part of the fabric of our American way of life. Depriving them of the protection from arbitrary arrests and unlimited detention will not only harm immigrants, it will harm our communities and our economy. The right to habeas corpus is a vital check that our legal system provides against Government abuse. The right to file for habeas corpus ensures accountability, accuracy, and credibility.

We urge that Congress to restore habeas corpus for all people who live in the US, regardless of their immigration status, and thus show the world that our legal principals and rule of law apply to all who reside in this country and not just those who are lucky enough to be US citizens.

We hope that Congress will act quickly to pass this legislation.
Sincerely,

Carlina Tapia-Ruano
President
American Immigration Lawyers Association
Washington, DC

May-17-07 04:01pm From- 2123986634 T-374 P.002 F-042

NEW YORK CITY BAR

BARRY M. KAMINS
PRESIDENT
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May 16, 2007

Hon. Patrick J. Leahy, Chairman
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Hon. Arlen Specter, Ranking Member
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Re: Restoration of Habeas Corpus

Dear Senators Leahy and Specter:

I am writing on behalf of the Association of the Bar of the City of New York to express the Association's strong support for S. 185, which you jointly introduced, entitled a bill "To Restore habeas corpus for those detained by the United States." The bill, among other things, would amend 28 U.S.C. § 2241 by striking out subsection (e), the provision inserted by the Detainee Treatment Act ("DTA") and the Military Commission Act ("MCA") stripping courts of habeas corpus jurisdiction with respect to aliens detained as "enemy combatants."

I understand that the Senate Judiciary Committee will be holding hearings on this bill and the subject of restoring habeas in the coming week. I have written to you and other members of Congress twice in the last two months, emphasizing the Association's deep concerns about the denial of habeas corpus to these detainees. We hope the hearings you are holding will be the impetus for immediate and urgent action to restore habeas corpus review for these detainees.

Many of these detainees have already been detained for over five years without charges and without any meaningful process to determine the legitimacy of their detention. The Supreme Court, apparently based on its own institutional principles of restraint, has delayed taking up the issue of the validity of the habeas stripping provisions at least pending the exhaustion of the D.C. Circuit's review, pursuant to the DTA, of the detainees' status determinations.

05/17/2007 4:12PM

That process of review only means more delay and moreover is so limited that it is likely to prove inadequate. As we previously urged, Congress has a duty immediately to correct this grave injustice and stain on our Nation's reputation for fairness and support for the rule of law, without waiting for action by the courts.

For your convenience, I am attaching another copy of the Association's Report concerning the restoration of habeas corpus and the March 6, 2007 letter transmitting it, and a copy of our letter dated April 3, 2007, again urging prompt Congressional action to restore habeas corpus, in the wake of the Supreme Court's denial of certiorari in the cases seeking review of the habeas stripping provisions. These documents explain in greater detail why such action by Congress is immediately needed.

Sincerely,

Barry Kamins

Barry M. Kamins

cc: Senate Judiciary Committee
Senator Hillary Clinton
New York City Congressional Delegation

NEW YORK CITY BAR

BARRY M. KAMINS
PRESIDENT
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March 6, 2007

Hon. Patrick J. Leahy, Chairman
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, DC 205109-4502

Hon. John Conyers, Jr., Chairman
House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515-2214

Hon. Arlen Specter, Ranking Member
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, DC 20510-3802

Hon. Lamar S. Smith, Ranking Member
House Judiciary Committee
2409 Rayburn House Office Building
Washington, DC 20515-4321

Re: Restoration of Habeas Corpus and Judicial Enforcement of the Geneva Conventions

Dear Senator Leahy, Senator Specter, Representative Conyers and Representative Smith:

The Association of the Bar of the City of New York ("the Association") submits the attached Report urging Congress to amend the Military Commissions Act of 2006 ("MCA") by eliminating restrictions it imposes on habeas corpus jurisdiction and restoring the federal habeas corpus statute as it read prior to the enactment of the Detainee Treatment Act ("DTA").[1] The Report also asks that Congress amend the MCA by eliminating provisions that interfere with the judiciary's role in interpreting and enforcing the Geneva Conventions.

The new Congress has commenced its work with the declared interest in promoting respect for the rule of law as an integral part of our national security agenda. We applaud this new emphasis. The enclosed Report addresses the issues that the Association believes require Congress' most immediate attention. We recognize a number of other important issues raised by the MCA and Administration practices also deserve attention in the effort to restore our Nation's reputation as a model for justice and the rule of law. Accordingly, in the next months the Association also will be submitting the results of its study and analysis of several of those issues.

[1] Founded in 1870, the Association is an independent non-governmental organization with a membership of more than 22,000 lawyers, judges, law professors and government officials, principally from New York City but also from throughout the United States and from 50 other countries.

Restoring Habeas Corpus and the Judiciary's Role
in Enforcing the Geneva Conventions

As Thomas Jefferson emphasized in his First Inaugural Address, "freedom of the person under the protection of habeas corpus" is one of the six "essential principles of our Government." The enclosed Report reflects our deep concerns about the provisions of the MCA, and predecessor provisions in the DTA, that purport to eliminate habeas corpus jurisdiction for alien detainees labeled "enemy combatants." The MCA amends the federal habeas corpus statute to bar non-citizens from petitioning the courts for habeas corpus to challenge the lawfulness of their detentions if they were "determined by the United States to have been properly detained as enemy combatants or are awaiting such determination". The Government has attempted to give these provisions the broadest application, for example maintaining that an alien lawfully residing in the United States may be arrested in his home in the United States and held indefinitely without any opportunity to judicially challenge his detention merely because the President labels him an "enemy combatant." Most recently, the D.C. Circuit Court of Appeals read the MCA to deprive Guantánamo detainees of any right to petition for habeas corpus,[2] thus nullifying the rights previously established by the Supreme Court in *Rasul*.[3]

The act of stripping detainees of the Great Writ is at odds with the most fundamental Anglo-American traditions of justice and has been viewed around the world as a departure from our commitment to equal justice under law for all. The enclosed Report, therefore, urges Congress to restore habeas corpus jurisdiction as it existed prior to the MCA and DTA and as it was interpreted in *Rasul*.

The Report also addresses MCA provisions that undermine the judiciary's role in enforcing and interpreting the Geneva Conventions. As the Report explains, these provisions effectively render the Conventions unenforceable except as a matter of Presidential grace. Senators Warner, McCain and Graham expressed concern that the White House's initial formulation of the MCA would undermine America's commitment to the Geneva Conventions and related law. Fidelity to the values and the letter of the Geneva Conventions means fidelity to our own values concerning the humane treatment of prisoners, forged in the crucibles of our Revolution and Civil War. These provisions cast doubt on our commitment to these values. Moreover, we embrace the Founders' view that it is the special province of the courts to interpret and enforce our treaty obligations. Accordingly, our Report urges Congress to strike all provisions of the MCA which purport to restrict reliance upon the Geneva Conventions as a source of law and guidance for the courts.

We note that proposed legislation put forward by Senators Dodd, Leahy, Feingold and Menendez entitled the "Restoring the Constitution Act of 2007" would achieve many of the objectives we support in our Report.

Other Concerns

The Report transmitted today does not reflect the full scope of our engagement with issues in this area. We will be addressing several further concerns in greater detail in the near future:

Procedures for Military Commissions. The MCA would allow the use in trials before military commissions of testimony obtained by coercion, as well as hearsay offered by the prosecution unless an accused can show that the hearsay is unreliable. This is an almost impossible burden because the accused is denied access to information about the sources and methods by which the hearsay was obtained and will have no way to challenge it. Congress

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[2] Boumediene v. Bush, No. 5062, Al-Odah v. Bush, No. 5064 (D.C. Cir. February 20, 2007)

[3] Rasul v. Bush, 542 U.S. 466 (2004)

should reexamine these provisions, which conflict with our most rudimentary concepts of fair process.

The Department of Defense has also offered rules of procedure to govern proposed military commissions. It prepared these rules in secret and spurned offers from this and other bar associations to review and comment on them. We expect to furnish you shortly with our comments on these rules. In the meantime, we encourage Congress to convene hearings on these rules and allow the opportunity for comment which the Department of Defense has sought to avoid.

Defining War Crimes. Another area of concern is the practice of introducing in the MCA new definitions of "war crimes" that reach only a subset of the war crimes as defined by the War Crimes Act of 1996 and that exist today under the Geneva Conventions, in particular as regards the interpretation and enforcement of Common Article 3. The Association urges Congress to carefully reconsider these deviations and return to prior U.S. practice.

The Concept of Enemy Combatant. The Administration has greatly expanded the concept of "enemy combatant" as a means of indefinitely imprisoning persons allegedly suspected of engaging in or supporting terrorism without charges and without any of the protections of the criminal justice system. This concept -- originally used to allow the detention of enemy soldiers captured during hostilities on a battlefield -- has been so stretched by the Administration that, as it acknowledged in court proceedings, it could even include a "little old lady in Switzerland who writes checks to what she thinks is a charity in Afghanistan but ... really is a front for al-Qaeda." In Re Guantánamo Detainee Cases, 355 F.Supp. 2d 443, 475 (D. D.C. 2005). We hope to provide our views on this problem in the near future.

Extraordinary Renditions and Black Sites. We urge Congress to investigate the practice known as "extraordinary renditions", which involves the kidnapping and transfer of suspected terrorists for interrogation in countries known to engage in torture. The cases of Maher Arar and Khaled El Masri are notorious examples of this activity that violates domestic and international law. Its damaging effect on our reputation and international relationships is evidenced by recent criminal prosecutions in Germany and Italy indicting CIA agents and condemnation by the Council of Europe.

We hope the attached Report is useful. We look forward to supporting Congress' work on these issues in the coming session.

Respectfully submitted,

Barry Kamins

Barry M. Kamins

Enclosure

NEW YORK
CITY BAR

REPORT CONCERNING PROVISIONS OF THE MILITARY COMMISSIONS ACT OF 2006 RESTRICTING HABEAS CORPUS JURISDICTION AND INTERFERING WITH JUDICIAL ENFORCEMENT OF THE GENEVA CONVENTIONS

MARCH 2007

Introduction

The Association of the Bar of the City of New York (the "Association") submits this Report to urge repeal of Section 7 of the Military Commissions Act of 2006 ("MCA") insofar as it strips federal courts of their statutory jurisdiction to entertain habeas corpus petitions from non-U.S. citizens ("aliens") detained by the United States as "enemy combatants."[1] This provision condemns persons detained by the Executive—many of whom may be completely innocent and wrongfully detained on the basis of mistaken or false information[2]—to indefinite imprisonment, without any opportunity to challenge their detention through a procedure even remotely resembling due process. It violates our most basic notions of justice and the long-established role of the judiciary as a check on the Executive's power to deprive persons of their liberty, a role that has its roots in Magna Carta. Congress, therefore, should act promptly to restore the statutory right of habeas corpus as it existed prior to the enactment of the MCA and the Detainee Treatment Act of 2005 ("DTA")[3] and as it was interpreted in *Rasul* v. *Bush*.[4]

The Association also urges repeal of provisions of Sections 5 and 6 of the MCA that purport to bar any person from seeking judicial enforcement of rights guaranteed them by the Geneva Conventions, that seem to prevent courts from considering foreign or international courts' interpretations of the Conventions, and that might be read to expand the deference due the President's interpretations of the Conventions.[5] By barring individuals from judicially

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1 Military Commissions Act (MCA) of 2006, Pub. L. No. 109-366, §7, 120 Stat. 2600, 2636 (2006). This provision is codified at 28 U.S.C. § 2241(e)(1).

2 This point is made in the report widely referred to as "the Seton Hall Report," in which Department of Defense documentation of detainees' CSRT proceedings were reviewed. JOSHUA DENBEAUX & MARK DENBEAUX, NO-HEARING HEARINGS: CSRT: THE MODERN HABEAS CORPUS? (2006), *available at* http://law.shu.edu/news/final_no_hearing_hearings_report.pdf (hereinafter SETON HALL REPORT)

3 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005).

4 542 U.S. 466 (2004).

5 This Report is directed to MCA provisions affecting the role of the Judiciary. A subsequent report will address military commissions procedures. However, we note that Section 3 of the MCA purports

enforcing the protections guaranteed by the Geneva Conventions and by interfering with the Judiciary's role in interpreting and enforcing them, these provisions would effectively render the Conventions unenforceable, except at the unreviewable discretion of the Executive. Sections 5 and 6 therefore cast doubt on the sincerity of the United States' commitment to the Conventions and ultimately undermine the protections we expect others to afford our own armed forces.

I. The Stripping of Habeas Jurisdiction

Congress initially sought to strip courts of jurisdiction to entertain habeas petitions of detainees at Guantánamo by enacting the DTA in 2005. In *Hamdan* v. *Rumsfeld*, however, the Supreme Court held that the DTA did not strip federal courts of jurisdiction to entertain pending habeas petitions.[6] Section 7 of the MCA purports to address that aspect of *Hamdan*, and also deletes language in the DTA that limited the scope of the habeas stripping provision to detainees at Guantánamo.

Specifically, Section 7(a) of the MCA amends the habeas statute by providing, in part:

> 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.[7]

Section 7(a) further provides:

> [N]o court, judge, or justice 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 condition of detention brought by any alien who is or was detained by the United Sates and who was determined to have been an enemy combatant or is awaiting such a determination.[8]

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to bar invocation of the Geneva Conventions before military commissions in the same way Section 5 does in judicial proceedings. We therefore also urge repeal of Section 3 of the MCA.

[6] 126 S. Ct. 2749, 2769 (2006).

[7] 28 U.S.C. § 2241(e)(1).

[8] 28 U.S.C. § 2241(e)(2) (emphasis added).

The term "enemy combatant" is not defined by the MCA for purposes of the jurisdiction-stripping provisions. However, Section 7 seems to contemplate the definition used by the Department of Defense ("DoD") in Combatant Status Review Tribunals ("CSRTs") for determining a detainee's status as an "enemy combatant," namely: "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners . . . [including] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[9]

The limitations imposed on jurisdiction by Section 7(a) are subject to a single exception for limited review by the D.C. Circuit in certain narrow circumstances, as discussed below.

Section 7(b) of the Act provides that the provisions of Section 7(a) are effective immediately upon enactment and apply "to all cases, without exception, pending on or after the date of enactment, which relate to any aspect of the detention, transfer, treatment, trial, or condition of detention of an alien detained since September 11, 2001."[10]

There are now pending before the courts numerous questions about the scope and constitutional validity of the habeas-stripping provisions of Section 7. The Constitution forbids Congress from suspending the writ of habeas corpus except temporarily and only "when in Cases of Rebellion or Invasion the public Safety may Require it."[11] Recently, in a 2-1 decision, the D.C. Circuit Court of Appeals held that the MCA required the dismissal of 63 pending habeas corpus petitions of Guantánamo detainees, reasoning that the Suspension Clause did not deprive Congress of the power to deny habeas corpus to Guantánamo detainees because, as aliens detained outside the sovereign territory of the United States, such individuals do not have a

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[9] Memorandum from Deputy Secretary of Defense Paul Wolfowitz to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunals (Jul. 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf.

[10] MCA § 7(b).

[11] U.S. CONST. art. I, § 9, cl. 2.

constitutional right to habeas, or indeed, any other constitutional rights.[12] A strongly worded dissent challenged this holding, arguing that the majority misread the relevant common law precedent defining the scope of habeas corpus jurisdiction at the time the Constitution was adopted, which the Suspension Clause was intended to preserve.[13] The dissent also argued that the majority misread the Supreme Court's *Rasul* decision—which previously confirmed the habeas corpus rights of Guantánamo detainees—as merely a statutory construction, ignoring its broader language suggesting that the habeas rights of Guantánamo detainees have a constitutional basis.[14] Petitioners are seeking Supreme Court review of this split decision. Another case pending in the Fourth Circuit raises, among other questions, the issue of whether Section 7 was intended to deny habeas to aliens lawfully residing and detained in the United States.[15]

We submit that Congress should not await judicial resolution of these and other issues concerning the habeas-stripping provisions. For regardless of whether Congress has the power to impose such restrictions on habeas corpus jurisdiction, they are wrong as a matter of policy and never should have been enacted. Such restrictions perpetuate an ongoing injustice that continues to damage the Nation's reputation in the world community. For the reasons discussed below, we submit that considerations of fairness and justice long reflected by habeas corpus, as well as the best interests of the United States, require the prompt repeal of these habeas-stripping provisions.

II. The Unjust Impact of the Stripping of Habeas Jurisdiction

The MCA's removal of habeas jurisdiction deprives alien detainees, imprisoned without charges—possibly for the rest of their lives—of their only hope of challenging that confinement

[12] Boumediene v. Bush & Al Odah v. United States, Nos. 05-5062 & 05-5064, 2007 WL 506581, at *4-8 (D.C. Cir. Feb. 20, 2007).
[13] *Id.* at *12-17 (Rogers, J., dissenting).
[14] *Id.* at *15.
[15] *See* Al-Marri v. Wright, No. 06-7427 (4th Cir. 2007).

in proceedings affording them due process before a neutral arbiter. In addition, our recent detention policies have already severely damaged the reputation of the United States in the international community. Thus, the habeas-stripping provisions not only may perpetuate the injustice of indefinite imprisonment without charge, but also will exacerbate the damage to our world image.

Proponents of the habeas-stripping provision argue that alien detainees at Guantánamo are not entitled to the protections of habeas corpus because they are "terrorists" and the "worst of a very bad lot";[16] that granting them habeas would be unprecedented under the Law of War and comparable to claiming that the thousands of Axis prisoners of war captured in World War II were entitled to habeas;[17] and that the detainees already receive adequate due process and judicial review under procedures established by the DoD following the Supreme Court's decision in *Hamdi* v. *Rumsfeld*.[18] None of these arguments can be sustained.

Whether these detainees are "terrorists" is a question that must be determined by a fair and lawful process. Indeed, the sweeping assumption that all the detainees are "terrorists" has proven dangerously overbroad. Approximately half of the individuals who have been held at Guantánamo, in some cases for several years, have been subsequently released due to a lack of any evidence of wrongdoing.[19] An additional 85 of the 393 detainees who remain in detention at Guantánamo have been found to pose no threat,[20] but have had their release or transfer delayed because they might be tortured if they are returned to their home countries or because their home

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[16] Carol D. Leonnig & Julie Tate, *Some at Guantánamo Mark 5 Years in Limbo*, WASH. POST, Jan. 16, 2007, at A1 (quoting Vice President Cheney).

[17] *See* Government's Supplemental Brief Addressing the Military Commissions Act, Boumediene v. Bush & Al Odah v. United States, Nos. 05-5062 & 05-5064, at 13-16 (D.C. Cir. Nov. 13, 2006).

[18] Hamdi v. Rumsfeld, 542 U.S. 507, 525 (2004) (plurality opinion).

[19] *See* Leonnig & Tate, *supra* note 16.

[20] *See* Press Release, U.S. Department of Defense, Detainee Transfer Announced (Feb. 21, 2007), *available at* http://www.defenselink.mil.

countries will not accept the conditions that the United States seeks to impose.[21] Moreover, many detainees who remain in custody at Guantánamo and elsewhere were seized by unreliable third parties enticed by the large bounties paid to them by U.S. forces in exchange for turning over alleged supporters of Al-Qaeda or the Taliban.[22] As DoD data has revealed, 86% of those detained at Guantánamo who were picked up in Afghanistan were arrested not by the U.S. military but by Pakistani or Northern Alliance forces and then turned over to the United States.[23]

In short, the danger that many of those who remain in custody at Guantánamo and at other sites have been wrongly seized is very high. As the *Washington Post* recently reported, detainees such as Gholam Ruhani and Shakhrukh Hamiduva remain in captivity, despite significant evidence that they are not guilty of any crime but were simply in the wrong place at the wrong time.[24] Stories such as these underline the error made by those who analogize these detainees to prisoners of war captured on the battlefield during World War II. Many of the Guantánamo detainees were not captured on the battlefield, and they were not wearing the recognizable uniform of an opposing army in a declared war between nation states. Rather they were turned over to U.S. forces under unclear circumstances, far from any battlefield, by third parties with unknown and potentially self-interested agendas. Even those captured on or near a

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21 *See* Leonnig & Tate, *supra* note 16.

22 The caption of one poster distributed by the CIA throughout Afghanistan in the aftermath of September 11th, read: "You can receive millions of dollars for helping the Anti-Taliban Force catch Al-Qaida and Taliban murderers. This is enough money to take care of your family, your village, your tribe for the rest of your life. Pay for livestock and doctors and school books and housing for all your people." Afghanistan Leaflets, http://www.psywarrior.com/afghanleaf40.html (last visited February 1, 2007).

23 JOSHUA DENBEAUX & MARK DENBEAUX, REPORT ON GUANTANAMO DETAINEES, A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA 3 (2006), *available at* http://law.shu.edu/aaafinal.pdf.

24 *See* Leonnig & Tate, *supra* note 16.

battlefield may have been non-combatants who were in the area for non-hostile reasons and picked up through mistaken or false information.[25]

Moreover, unlike prisoners held during conventional wars, these detainees are being held in a "war on terror" with no foreseeable end, and thus face possible imprisonment for the rest of their lives. The stripping of habeas jurisdiction means that these detainees will not be afforded any opportunity to challenge their detention in a fair, adversarial process before a neutral arbiter.

Habeas proceedings traditionally have afforded broad review, including a searching factual and legal inquiry into the government's proffered basis for detention.[26] Further, an individual imprisoned by the Executive without charge was historically entitled "to present his own factual case to rebut the Government's return."[27] This approach to the review of Executive detention was developed and maintained over the centuries as a crucial means of preventing abuses of power. As described below, however, the kind of review now provided to detainees stands in sharp contrast to this tradition.

Most of these detainees will never be charged with a crime or tried by military commission. The United States has indicated that only 60 to 80 of the Guantánamo detainees will ever be brought before a military commission.[28] Thus, the great majority of Guantánamo detainees will have access only to a Combatant Status Review Tribunal ("CSRT"), an entity

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[25] *See, e.g., Hamdi*, 542 U.S. at 534 (noting that basic due process is needed to ensure "that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error"); Steve Duin, *Justice a Casualty of War*, THE OREGONIAN, Jan. 16, 2007, at C01 (outlining the weak evidence against detainee Adel Hamad, a charity worker).

[26] *See e.g., Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807); Goldswain's Case, (1778) 96 Eng. Rep. 711 (K.B.). While the Government has contested this account of habeas review, it mistakenly relies on post-conviction habeas cases where the petitioner already had a full trial of the charges against him. Government's Supplemental Brief Addressing the Military Commissions Act, *supra* note 17, at 23-25.

[27] *Hamdi*, 542 U.S. at 538.

[28] Sara Wood, *DoD Releases Military Commissions Manual*, AM. FORCES INFO. SERVICE, Jan. 18, 2007, *available at* http://www.defenselink.mil/news/NewsArticle.aspx?ID=2745. We put aside questions about the fairness of the procedures governing trials by military commission, which will be addressed in a subsequent report.

specifically established by DoD to review the status of Guantánamo detainees.[29] As provided by the DTA, the final decisions of these CSRTs are subject to a limited review in the D.C. Circuit. As detailed below, this scheme provides nothing approaching due process or the searching inquiry into the legal and factual bases of a detention available under habeas corpus.[30]

Finally, nothing in the MCA or any other law or regulation entitles a detainee to receive even the limited review provided by a CSRT. Hence, it is possible that some detainees may be imprisoned indefinitely without any review whatsoever.

A. Combatant Status Review Tribunals

CSRTs were established by the DoD in response to the Supreme Court's 2004 decisions in *Rasul*[31] and *Hamdi*.[32] *Rasul* construed the habeas corpus statute, as it then read, to provide jurisdiction over habeas petitions from Guantánamo detainees.[33] *Hamdi* held that a U.S. citizen

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[29] Neither of these procedures is available to an estimated 14,000 detainees in Iraq, Afghanistan, and other locations outside the United States, as the CSRT procedure is established only for Guantánamo. Memorandum from Deputy Secretary of Defense Gordon England, Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantánamo Bay, Cuba (Jul. 14, 2006), *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf (hereinafter CSRT Implementation Memo). In *Al-Marri*, the government claims that it would give a CSRT to an alien resident of the United States, alleged to be an enemy combatant and who is detained in the United States. *See* Respondent-Appellee's Motion to Dismiss for Lack of Jurisdiction and Proposed Briefing Schedule, Al-Marri v. Wright, No. 06-7427, at 4-5 (4th Cir. Nov. 13, 2006). It appears, however, that to provide the CSRT, he would need to be removed to Guantánamo. Moreover, the government also claims in *Al-Marri* that an alien can fall within the habeas-stripping provisions merely on the determination of the President that he can be detained as an "enemy combatant." *Id.* If that view were accepted, no judicial review whatsoever would be available to Al-Marri, as the D.C. Circuit review is limited to review of final CSRT decisions. *See* DTA § 1005(e)(2).

[30] *See* Supplemental Brief of Amici Curiae of British and American Constitutional Scholars Listed Herein in Support of Petitioners Addressing Section 1005 of the Detainee Treatment Act of 2005, *Boumediene & Al Odah*, Nos. 05-5062 & 05-5064, at 12 (D.C. Cir. Jan. 25, 2006).

[31] 542 U.S. 466 (2004).

[32] 542 U.S. 507 (2004).

[33] *Rasul*, 542 U.S. at 481. In *Rasul*, the Supreme Court was construing the habeas statute, but its analysis suggests that detainees at Guantánamo also have a constitutional right to habeas. *See id.* at 482 (noting that at common law "the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of 'the extent and nature of the jurisdiction or dominion exercised in fact by the Crown.'" (quoting *Ex parte* Mwenya, (1960) 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M.R.)); *see also id.* at 483, n. 15 ("[P]etitioners' allegations . . .

captured on the battlefield while engaged in combat against the U.S. and detained first at Guantánamo and then in the U.S. was entitled to due process, which, at a minimum requires notice of the basis for his detention, a fair opportunity to be heard before a neutral decisionmaker, and access to counsel.[34] Read with *Rasul*, *Hamdi* might be construed to have imposed the same due process requirements for alien detainees at Guantánamo.

Shortly after these decisions, DoD established the CSRT procedure for Guantánamo detainees, ostensibly to comply with *Hamdi*. This procedure, however, lacks even the minimal requirements established by the Court.[35] Detainees are not brought before a neutral decision maker, but before military officials who are notified that the detainee's status as an enemy combatant has already been established "through multiple levels of review by officers of the Department of Defense."[36] The detainees are not permitted the advice of lawyers. Rather, they are "assisted" by a "personal representative" who does not serve as an advocate for the detainee; communications between the detainee and the personal representative are not confidential and may be revealed by the personal representative to the CSRT.[37] Detainees are not permitted to see any of the classified evidence upon which their enemy combatant status determination was

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unquestionably describe custody in violation of the Constitution or laws or treaties of the United States." (internal quotations and citations omitted)).

34 *Hamdi*, 542 U.S. at 529-533.

35 We note that these procedures were established by the *Hamdi* plurality with the caveat that its decision was limited to the specific facts alleged there, involving a detainee captured on the battlefield in Afghanistan engaged in combat against the United States. *Id.* at 518. In that narrow context, the Court also indicated that hearsay might be admissible if reliable. *Id.* at 533-34. Greater due process protections under *Hamdi*'s balancing test may be required where the detainee was captured far from a battlefield and not engaged overtly in any combat against U.S. forces.

36 *See* CSRT Implementation Memo, *supra* note 29.

37 *See id.* at enclosure (3) (instructing personal representative to tell the detainee: "I am neither a lawyer nor your advocate, but have . . . the responsibility of assisting your preparation for the [CSRT]. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing.").

based.[38] Even though the CSRT procedures purportedly afford the detainees the right to call witness if "reasonably available,"[39] DoD data reveals that detainees are routinely denied requests to call witnesses, even when such witnesses are also detained at Guantánamo.[40] Additionally, the CSRT is not bound by any rules of evidence, is free to rely on hearsay, and is not restricted from basing its determination on testimony elicited by torture or other coercive means.[41] All of the government's evidence, which the detainee is given little to no opportunity to see or to contest, is then entitled to a rebuttable presumption and is evaluated using the preponderance-of-the-evidence standard of proof.[42] Far from giving the detainees a fair opportunity, required by *Hamdi*, to rebut the favorable presumption given the government's evidence, these procedures turn CSRTs into sham proceedings that do not remotely satisfy the requirements of *Hamdi*, due process, or the ideals of fundamental fairness for which the U.S. has long been known.[43]

B. D.C. Circuit Review of CSRTs

The MCA permits those who have been afforded a CSRT the right to seek review of final CSRT decisions in the D.C. Circuit Court of Appeals, as provided in the DTA.[44] The scope of that review is extremely narrow, however. It is limited to determining whether the CSRT proceedings conformed to the standards and procedures specified by the Secretary of Defense.[45] No provision is made to permit the detainee to submit any evidence. As a result, review by the D.C. Circuit appears confined to the deeply flawed record generated by the CSRT, where the

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[38] *Id.* at enclosure (1) (stating that the detainee shall be provided with notice of the unclassified factual basis for his detention).
[39] *Id.*
[40] *See* SETON HALL REPORT, *supra* note 2, at 2-3.
[41] CSRT Implementation Memo, *supra* note 29, at enclosure (1).
[42] *Id.*
[43] *See* SETON HALL REPORT, *supra* note 2.
[44] MCA § 9 (amending DTA § 1005(e)(2) and providing that the D.C. Circuit "shall have exclusive jurisdiction to determine the validity of any final decision of a Combatant Status Review Tribunal that an alien is properly detained as an enemy combatant.").
[45] DTA § 1005(e)(2)(C)(i).

detainee had no realistic opportunity to challenge, and in many respects to even see,[46] the government's evidence, let alone to call witnesses or present evidence of his own. While the D.C. Circuit also is permitted to determine if the standards and procedures of the CSRT are consistent with the Constitution and laws of the United States, it only can do so "to the extent the Constitution and laws of the United States are applicable."[47]

As noted, the D.C. Circuit recently held that Guantánamo detainees, as aliens outside the sovereign territory of the United States, have no rights to habeas, or indeed any other rights, under the Constitution.[48] Moreover, it is not clear whether the D.C. Circuit has been given authority to consider the fundamental question of whether the detentions—as distinct from the DoD standards and procedures—are constitutional. Thus, it is not clear that the D.C. Circuit review can provide the most fundamental function of habeas: a review of whether the detention is lawful under the Constitution and laws of the United States.[49]

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Congress' failure to provide alien detainees with an adequate Article III substitute for habeas raises serious constitutional issues. The constitutional justification for the suspension of habeas—rebellion or invasion—is clearly absent. Congress therefore could not constitutionally deny habeas corpus to U.S. citizens or to aliens lawfully residing in the U.S. without providing such a substitute.[50] The question now pending before the courts is whether the constitutional

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[46] *See* SETON HALL REPORT, *supra* note 2, at 2-3.
[47] DTA § 1005(e)(2)(C)(ii).
[48] *Boumediene & Al Odah*, at *4-8.
[49] 18 U.S.C. § 2241(c)(3).
[50] INS v. St. Cyr, 533 U.S. 289, 305 (2001) (noting that "a serious Suspension Clause issue would be presented if . . . [the] statutes have withdrawn [habeas] power from federal judges and provided no adequate substitute for its exercise"); Swain v. Pressley, 430 U.S. 372, 381 (1977). In her dissent, Judge Rogers concluded that "Congress in enacting the MCA has revoked the writ of habeas corpus where it would have issued under the common law in 1789, without providing an adequate alternative. . . ." *Boumediene & Al Odah*, at *17-19.

right to habeas or an adequate Article III substitute must also be provided to alien detainees imprisoned under the exclusive jurisdiction of the United States at Guantánamo.

The Association submits that whether or not the denial of habeas to these aliens is constitutional, Congress should not deny them a statutory right to habeas. The fact is that detainees imprisoned by the United States, possibly for life, are being denied a meaningful avenue for challenging that confinement before a neutral arbiter in a proceeding affording them due process. This violates every notion of elemental justice and should shock the conscience of every American who cherishes the rule of law. Accordingly, the Association urges Congress to repeal the provisions of Section 7 of the MCA that strip the courts of habeas jurisdiction and to restore the statutory right to habeas corpus as it existed prior to the enactment of the DTA.

III. Limiting the Force and Effect of the Geneva Conventions

The Association also urges repeal of several other sections of the MCA, which purport to insulate the Executive's interpretation and application of the Geneva Conventions from judicial scrutiny.

The broadest of these limiting provisions is MCA Section 5(a),[51] which states:

> No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or its States or territories.

Section 3 of the MCA contains a similar provision, which states that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." These litigant-focused provisions are complemented by two provisions aimed at the courts' engagement with the Conventions. The first, MCA Section 6(a)(2), states that "[n]o foreign or international source of law shall supply a basis for a rule of

[51] This provision is codified at 28 U.S.C. § 2241.

decision in the courts of the United States in interpreting the prohibitions enumerated in" the MCA's amendments to the War Crimes Act that narrow the scope of violations of common Article 3 of the Conventions prosecutable under that Act.[52] The second, Section 6(a)(3), provides that "the President has the authority for the United States to interpret the meaning and application of the Geneva Conventions," and that "[a]ny Executive Order published under this paragraph shall be authoritative (except as to grave breaches of common Article 3) as a matter of United States law, in the same manner as other administrative regulations."[53]

These provisions belie our declared adherence to the Conventions, undermine the constitutional function of our judiciary, and diminish our standing in the eyes of the world. The MCA repeatedly declares that the United States is bound by and complies with the Geneva Conventions.[54] In direct contradiction to these declarations, however, these provisions could be read to render the conventions unenforceable by the very persons whose rights they are intended to protect and deprive the Conventions of their force by making compliance with them a matter of Executive grace rather than legal obligation. As Senator Edward Kennedy noted during the debate on the MCA, the ultimate result of the Act will be that "the President's interpretation [of the Conventions] may well likely escape judicial review."[55] Indeed, the MCA could be

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[52] 18 U.S.C. § 2441.

[53] *Id.*

[54] For example, 10 U.S.C. § 948b(f) states that a commission established under the MCA "is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions," and 18 U.S.C. § 2441 similarly declares that the MCA's amendments to the War Crimes Act "fully satisfy the obligation under Article 129 of the Third Geneva Convention to provide effective penal sanctions for grave breaches [of common Article 3]." In addition, 18 U.S.C. § 2441(5) states that "[t]he definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the full scope of United States obligations under that Article."

[55] 152 Cong. Rec. S10,400 (Sept. 28, 2006). Numerous commentators agree with this interpretation. *See, e.g.*, HUMAN RIGHTS WATCH, Q AND A: MILITARY COMMISSIONS ACT OF 2006, at 11 (2006) ("The additional provisions that preclude any person from invoking the Geneva Conventions as a source of rights in an action against any U.S. official will make it difficult, if not impossible for individuals to challenge presidential interpretations of the Conventions."); Post of Professor Martin

interpreted to give the President essentially unreviewable authority to determine numerous crucial questions regarding the applicability of the Geneva Conventions, including whom the Conventions protect and which "aggressive" interrogation techniques—other than those "grave breaches" of common Article 3 falling within the War Crimes Act—violate the Conventions.

Whether or not this arrangement is constitutional, it is an unjustifiable assault on the federal judiciary and the status of treaties as the "supreme Law of the land" under our Constitution.[56] As Alexander Hamilton wrote in *The Federalist* No. 22:

> Laws are a dead letter without courts to expound and define their true meaning and operation. The treaties of the United States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as respects individuals, must, like all other laws, be ascertained by judicial determinations.

Writing for the Supreme Court, Chief Justice John Roberts recently reaffirmed this proposition, stating that "[i]f treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department.'"[57] These provisions of the MCA interfere with the courts' core function as the interpreter and enforcer of our nation's treaties and call into question our commitment to the Geneva Conventions.

The prohibition on the use of foreign and international law as a "basis for a rule of decision" in interpreting the Conventions, as enforced by the War Crimes Act, is also misguided. Even Justice Antonin Scalia—an ardent opponent of the use of foreign and international authority in interpreting our domestic laws—acknowledges that he "will use it in the

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Lederman on Balkinization, Sept. 22, 2006, http://balkin.blogspot.com/2006/09/three-of-most-significant-problems.html ("What this means, in effect, is that the President's interpretation and application of the Geneva Conventions will be virtually unreviewable, no matter who the affected parties may be, in this and other armed conflicts, now and in the future . . . across the board.").

[56] U.S. CONST., art. VI, § 2.

[57] Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2684 (2006) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

interpretation of a treaty" because "the object of a treaty being to come up with a text that is the same for all the countries, we should defer to the views of other signatories, much as we defer to the view of agencies."[58] The MCA, however, seems to forbid this practice, despite the fact that foreign and international authorities are the most well-developed sources of law interpreting the Geneva Conventions.

Similarly, in seeming to expand the deference otherwise due the President's interpretations of the Conventions—which frequently have been opposed by the relevant experts within the administration[59]—the MCA may prevent courts from making their own judgments regarding the reliability of those interpretations, as they do in all other areas of administrative law. While deference is ordinarily due the President's interpretations of a treaty, such deference is inappropriate where the interpretation is contrary to the treaty's plain language or structure, would lead to unreasonable results, or would contradict well-established practices or understandings of the signatories.[60] To the extent that the MCA seeks to expand the deference due such interpretations, it wrongfully interferes with the courts' ability to reject plainly unsound interpretations of the Conventions.

As the International Committee of the Red Cross has emphasized, the Conventions were designed "first and foremost to protect individuals, and not to serve State interests."[61] The effect of the MCA's review-limiting provisions, however, is to deprive these individuals of their ability

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[58] *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521 (2005).

[59] *See* Neal Kumar Katyal, Hamdan v. Rumsfeld: *The Legal Academy Goes To Practice*, 120 HARV. L. REV. 65, 111 (2006) (detailing the dissent within the Bush Administration regarding the President's interpretation of the Conventions).

[60] See United States v. Stuart, 489 U.S. 353, 365-66 (1989); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 259 (1984); Perkins v. Elg, 307 U.S. 325, 348-49 (1939); Johnson v. Browne, 205 U.S. 309, 316-22 (1907).

[61] 4 INT'L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (1958), *cited in Hamdan*, 126 S.Ct. at 2794 n.57.

to enforce these rights if their captors choose not to recognize them. In taking this position, the MCA announces to others that we do not share their view of the importance of the rights guaranteed by the Conventions, which, in turn, exposes our nation to scorn and our troops to reciprocal treatment.[62] We believe that this is a profoundly unwise and dangerous development.

Finally, these provisions may be unconstitutional as well as inadvisable. The MCA's directive that "no person" can "invoke" the Geneva Conventions "as a source of rights" in suits against the government and its officials is an unusual one. In fact, no similar provision appears in the United States Code. This broad language, however, suggests that the intent of the MCA is to leave the Conventions on the books while simultaneously undermining them by forbidding litigants from invoking their protections. Some have argued that this legislative sleight-of-hand violates separation-of-powers principles by impermissibly obstructing the exercise of the judicial powers granted by Article III.[63] Thus, in *Legal Services Corporation* v. *Velazquez*,[64] the Court held that Congress violates the First Amendment and Article III when it "seek[s] to prohibit the analysis of certain legal issues and to truncate presentation to the courts," and that the Court would be "vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[65]

The MCA's apparent ban on courts' consideration of foreign and international law in interpreting the Conventions also raises constitutional questions, as there is some uncertainty about the extent to which Congress can control the courts' interpretive techniques through statutory mandates requiring or forbidding the use of certain interpretive resources. Professor

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[62] *See generally* Amicus Curiae Brief of Retired Generals and Admirals et al. in Support of Petitioner, *Hamdan*, 126 S.Ct. 2749 (No. 05-184).

[63] *See* Plaintiffs' Supplemental Memorandum of Law Responding to Defendants' Notice of Supplemental Authority, *In re*: Iraq and Afghanistan Detainees Litigation, Misc. No. 06-145, at 13-14 (D.D.C. Nov. 28, 2006) (raising this argument).

[64] 531 U.S. 533 (2001)

[65] *Id.* at 545, 548.

Gary Lawson, for example, contends that separation-of-powers principles must include "an independent judicial power to ascertain, interpret, and apply the relevant law,"[66] and he concludes that "Congress cannot tell the courts how to reason any more than it can tell the courts how to decide."[67]

But whether or not these legal arguments would ultimately convince a court to invalidate these provisions of the MCA, the Association strongly believes that they should be repealed. As Representative Jerrold Nadler stated during the legislative debate on the MCA, it is "simply wrong and hypocritical" to both "hope that other civilized powers will abide by [the Conventions]" and make known that "we are not going to allow our courts to enforce them."[68] By pursuing this disingenuous course of action, we not only damage our standing in the world community, but we also give others an excuse to undermine the Conventions' protections, ultimately to the detriment of our own armed forces. In explaining his vote for the MCA, Senator John McCain reaffirmed his belief that Congress remained committed to the Geneva Conventions, stating that "the [MCA] does not redefine the Geneva Conventions in any way."[69] Whether or not this is true, the fact remains that the MCA has rendered the Conventions effectively unenforceable.

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[66] Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 212 (2001).

[67] *Id.*; *see also* Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 707 (1995) (reaching the same conclusion). Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2109 (2002), offers an opposing view, arguing that "[t]here is no general, Article III objection that developing interpretive methodology is an inalienable judicial prerogative."

[68] H. COMM. ON THE JUDICIARY, MILITARY COMMISSIONS ACT OF 2006, H.R. Rep. No. 109-664, pt. 2, at 173 (Sept. 25, 2006)

[69] 152 Cong. Rec. S10274 (Sept. 27, 2006).

NEW YORK CITY BAR

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April 3, 2007

Hon. Patrick J. Leahy, Chairman
Senate Committee on the Judiciary
433 Russell Senate Office Building
Washington, D.C. 20510-4502

Hon. John Conyers, Jr., Chairman
House Judiciary Committee
2426 Rayburn House Office Building
Washington, DC 20515-2214

Hon. Arlen Specter, Ranking Member
Senate Committee on the Judiciary
711 Hart Senate Office Building
Washington, D.C. 20510-3802

Hon. Lamar S. Smith, Ranking Member
House Judiciary Committee
2409 Rayburn House Office Building
Washington, DC 20515-4321

Re: Restoration of Habeas Corpus

Dear Senator Leahy, Senator Specter, Representative Conyers and Representative Smith:

I write on behalf of the Association of the Bar of the City of New York to urge once again that Congress take immediate action to eliminate provisions of the Military Commissions Act and the Detainee Treatment Act that strip the courts' jurisdiction to entertain habeas petitions from alien detainees held as "enemy combatants".

Our letter to you of March 6, 2007 and the accompanying Report detailed the reasons why the habeas stripping provisions should be promptly eliminated. The Supreme Court's denial of certiorari yesterday to review the constitutionality of these provisions at this time only makes it more urgent that Congress take action as soon as possible to right this grave injustice and remove this stain on our Nation's traditions of fair process and the rule of law.

Many of the detainees at Guantanamo have been imprisoned for more than five years. The Supreme Court's decision to delay review of their plight pending proceedings in the D.C. Circuit under the Detainee Treatment Act provisions for limited review of decisions of Combatant Status Review Tribunals ("CSRTs") will mean that these prisoners – many of whom may be innocent of any wrongdoing – will have to suffer further confinement perhaps for years. Our Report analyzes in detail why the CSRT process is essentially a sham and why the limited D.C. Circuit review of CSRT decisions is inadequate without more stringent fact-finding procedures.

While the Court has institutional reasons for delaying review of constitutional questions, Congress has no justification for allowing prisoners to remain confined without prompt review of their detention pursuant to habeas corpus. Further delay only exacerbates injustice and the severe damage already done to our Nation's reputation. The denial of habeas review has already been condemned by our closest allies in the fight against international terrorism as a grave violation of the rule of law and the standards of civilized nations.

We, therefore, urge you to act now, without further delay, to remove the habeas stripping provisions and restore our Nation's standing as a symbol of justice and the rule of law.

Sincerely,

Barry Kamins

Barry M. Kamins

Statement of Mariano-Florentino Cuéllar
Associate Professor and Deane F. Johnson Faculty Scholar
Stanford Law School

before the

Senate Committee on the Judiciary

concerning

Restoring Habeas Corpus: Protecting American Values and the Great Writ

May 22, 2007

Mr. Chairman, Senator Specter, and members of the Committee on the Judiciary:

Thank you for inviting me to address the relationship between habeas corpus, executive discretion, and national security – an issue that has occasioned much debate among legal scholars, lawyers, lawmakers, and the public in recent years. This issue has taken on particular urgency given the recent passage of the Military Commissions Act (MCA).[1] Section 1005(e)(1) of this Act strips American courts of jurisdiction to consider habeas corpus applications involving aliens accused of being enemy combatants, effectively allowing any decisionmaker appointed by the President to detain an alien indefinitely by merely accusing her of being an enemy combatant. In what follows, I analyze this provision in light of history, American legal traditions, and the institutional realities affecting the performance of executive bureaucracies.

Historically, Americans have been reluctant to tamper with the writ of habeas corpus even during some of the nation's most trying hours. Despite the evolving security threats our nation has faced over the years, the writ has remained a key part of our legal system, enshrined in constitutional doctrine and congressional statute. It has been used by American citizens as well as aliens, by combatants as well as noncombatants, and by individuals held within the borders of the United States and beyond those borders, in territories under the control of the

[1] 10 U.S.C. §§ 948-950 (2006).

United States.[2] In rare circumstances, when Congress has explicitly suspended the writ in accordance with the Constitution, generally it has done so within carefully-prescribed limits. While neither the elected branches of government nor courts have acted perfectly during every period in history, the overarching story reflected in the history of habeas corpus is one of balance. In that story, vigorous responses to dangers confronting the nation are checked by constitutional and statutory protections against arbitrary executive detentions.

The MCA has eroded that longstanding commitment to balance. To grasp the extent of this erosion, one must appreciate that the development of a robust habeas corpus doctrine predates the American Republic. At English common law, courts exercised habeas jurisdiction not only within a state's formal territorial limits, but also over any areas where a government exercised sovereign control.[3] Since early in our own history, American constitutional law assigned an important role to habeas corpus in vindicating due process interests. Habeas corpus was explicitly recognized in the Constitution, which prohibits any suspension of the "Privilege of the Writ of Habeas Corpus... unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, 9, cl. 2. Further developments in the doctrine have expanded habeas corpus beyond its 18th century limits. At its core, however, the writ has remained a vehicle for reviewing the legality of executive detention, and thereby, for creating an administrative and judicial mechanism vindicating critical due process interests.[4]

The preceding history underscores why the MCA raises such serious constitutional questions. The gravest questions arise from the MCA's purported restrictions on habeas review of detentions involving aliens in the United States. Another possible problem involves provisions constraining courts' consideration of the applicability of the Geneva Conventions. Our institutional architecture makes it essential for Congress to consider these problems instead of simply leaving them to the courts, which were not designed to be the only branch concerned with constitutional principles.[5]

Just as constitutional rights can be placed at risk by problematic statutes or arbitrary executive actions, so too can such rights be

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[2] *See* Ex Parte Milligan 4 Wall. 2, 18 L. Ed. 281 (1866), Ex Parte Quirin, 317 U.S. 1 (1942), In re Yamashita, 327 U.S. 1 (1942), Rasul v. Bush, 542 U.S. 466 (2004).

[3] *See* King v. Overton, 1 Sid. 287, 82 Eng. Rep. 1173 (K.B. 1168); King v. Salmon, 2 Keble 450, 84 Eng. Rep. 282 (K.B.1669)].

[4] *See* INS v. St. Cyr, 533 U.S. 289, 301 (2001).

[5] *See generally* LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

appropriately safeguarded through statutory mechanisms that ensure a proper balance between the need for vigorous executive action and accountability. The intimate connection between constitutional protection and external checks on executive authority helps explain the resilience of statutory habeas provisions. The writ of habeas corpus has acted as a check on executive power in a surprising array of historical circumstances, involving citizens as well as aliens, enemy combatants on U.S. territory, and enemy combatants outside the U.S. but within its functional jurisdiction.[6] In short, the statutory history of habeas corpus gives effect to both constitutional protections as well as a broader concern with the need for accountability.

In contrast, the MCA's habeas-stripping provisions reflect little attention to balancing the interests of the state with those of accused individuals, and even less attention to the multiple ways in which those provisions can erode accountability, and public perceptions of legitimacy at home and abroad. By eviscerating external checks on the detention of aliens accused of being enemy combatants, the MCA engenders perceptions abroad that the U.S. detainee process is unfair, further eroding American legitimacy. Our history underscores the foreign policy benefit of securing equal protection and fair procedures. For example, Cold War policymakers pressed aggressively to expand domestic civil rights protections in order to bolster America's global standing.[7] Indeed, recognition of the connection between balanced legal procedures and favorable public perceptions lies at the heart of our nation's military doctrine.[8]

The problems with the MCA's habeas-stripping are compounded by the characteristics of bureaucratic organizations. Executive bureaucracies routinely benefit from external review when they are making complicated decisions. Conversely, the absence of some external check on bureaucratic performance permits, and even encourages, a variety of pathologies. In the past, such pathologies have given rise to nuclear safety violations, the destruction of the Space Shuttle

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[6] *See* Zadvydas v. Davis, 533 U.S. 678 (2001), INS v. St. Cyr, 533 U.S. 289 (2001), Ex Parte Milligan, 4 Wall. at 2, Ex Parte Quirin, 317 at 1, In re Yamashita, 327 U.S. at 1, Rasul v. Bush, 542 U.S. at 466. While enemy combatants have been given leave to apply for habeas relief and general prisoners of war have not, the latter benefit from the protections of the law of war, which entitle them to a status determination soon after capture in the field.

[7] *See* Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

[8] *See* U.S. Army's Counterinsurgency Manual, *quoted in* Letter from Rear Admiral Don Guter, USN (Ret.) et al. to the Honorable Patrick Leahy, Chairman, Senate Committee on the Judiciary, United States Senate, Washington, DC 20510 (March 7, 2007).

Challenger, biased regulatory rules, and mistaken detentions.[9] Even when decisionmakers possess laudable motivations, the pressures and constraints that organizations face can distort the work of executive agencies. Instances of outright malfeasance and bad faith may be rare in detentions. Nonetheless, the absence of external review makes it easier for some decisionmakers to promote appealing impressions of their effectiveness by subtly downplaying errors when they do occur, and for still others to simply fail to correct mistakes that cannot be reliably discovered without an external check.[10] Yet neither the MCA nor the Defense Department's implementing regulations have established a credible system auditing detainee decisions to manage the risks created as a result of restrained external review. Moreover, the justification for eviscerating habeas review is unpersuasive. Specifically, there is no compelling reason to believe that habeas review would overburden the detention system. History has instead shown such review to encompass a measure of flexibility, with courts adjusting its stringency to account for practical circumstances.

Finally, the MCA in its present form even has the potential to impact the status of many ordinary lawful permanent residents in the United States. While the MCA was justified primarily on the basis of facilitating our government's efforts to detain individuals captured on foreign battlefields or actively undertaking terrorist operations, the literal terms of Section 1005 actually confer exceedingly vast powers to detain a far different pool of people. Section 1005(e)(1) permits the indefinite detention of *any* alien accused of being an enemy combatant. Such accusations can include open-ended, indirect offenses, including material support of terrorism and conspiracy.[11] While provisions for punishing such offenses already exist under federal criminal law, some of the potential problems with open-ended, indirect offenses in that context are mitigated by the presence of external review and more demanding evidence standards. The MCA lacks both. Moreover, the MCA permits detentions of alleged enemy combatants to continue indefinitely because no limit is placed on detentions before there is a determination of

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[9] *See generally* SCOTT SAGAN, THE LIMITS OF SAFETY: ORGANIZATIONS, ACCIDENTS, AND NUCLEAR WEAPONS (1993); CHARLES PERROW, NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES (1984); DIANE VAUGHAN, THE CHALLENGER LAUNCH DECISION: RISKY TECHNOLOGY, CULTURE, AND DEVIANCE AT NASA (1996); STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993); OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003).

[10] *See* Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006).

[11] Section 950v (25).

whether the individual is in fact an enemy combatant. The MCA specifically exempts from its coverage those individuals who are considered to be "lawful" combatants.[12] The problem with this provision is that the framework set up by the MCA insulates from meaningful review the very determination of whether an individual is in fact a lawful combatant.

Taken together, these features may permit the creation of a massive unaccountable detention system that could be used against any one of the millions of U.S. lawful permanent residents who have left their homelands in Latin America, Asia, Africa, and Europe to become legal members of American society. The history of these lawful permanent resident communities has been marked by significant contributions to American life as well as concerted efforts for legal and social inclusion.[13] The MCA cuts against such inclusion. It may seem unlikely that the MCA would be used against numerous individuals in these communities with little or no connection to terrorism. But just as the history of law in America shows a strong commitment to habeas corpus, so too does that history demonstrate how laws are often used in a manner different from what was once contemplated. Recently, for example, the Inspector General of the Justice Department reported that the FBI was using National Security Letters under the Patriot Act for purposes that did not involve terrorism.[14]

Although the preceding observations augur in favor of restoring habeas protections, it is worth acknowledging some of the objections that have been raised to such a move. Some observers question whether habeas corpus should have much application outside the context of traditional domestic criminal law. In fact, habeas corpus has not been confined to traditional criminal proceedings at all. Enemy combatants have sought habeas relief just as individuals convicted in domestic criminal proceedings have.[15] Nor is it the case that jurisdiction over habeas review is confined strictly to a nation's territory. As the Supreme Court explained in Rasul, both British and American precedents establish that habeas jurisdiction can extend to areas within a nation's sovereign control but beyond its borders. Giving the present system an opportunity to demonstrate its effectiveness without restoring habeas is also difficult to justify, as habeas review has proven to be critical in revealing the flaws of detention systems in the past.[16] Finally, there is

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[12] Section 948a (2).

[13] *See* Graham v. Richardson, 403 U.S. 365 (1971).

[14] OFFICE OF THE INSPECTOR GENERAL, U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007).

[15] Ex Parte Milligan, 4 Wall. at 2, Ex Parte Quirin, 317 at 1.

[16] *See* Rasul, 542 U.S. at 466.

little basis for concerns that restoration of habeas would open the floodgates to challenges from individuals held by the U.S. abroad. While the Court in Rasul established that even detainees in Guantanamo merit access to the writ, the holding turned primarily on the unusual degree of United States authority over Guantanamo, where our nation indefinitely exercises complete control and jurisdiction by the express terms of its agreement with Cuba. The holding is therefore unlikely to be extended to areas where the United States is not exercising authority and control similar to what our nation wields in Guantanamo.

Even if the preceding objections to restoring habeas corpus are not persuasive, it is important to acknowledge the security challenges we Americans face at this point in our history. The solution to the risks of arbitrary executive coercion made possible by the MCA is not to dismiss the threat posed by those who would harm America or its residents. It is instead to pass the Habeas Restoration Act, and more generally, to be mindful of the need for balance in this crucial area of law. Such balance can be better assured if Congress carefully weighs the risks that laws will be used in unintended ways – far removed from their original justification – and if Congress considers the value of continuing a long tradition of legislative respect for the role of habeas review as an external check on the bureaucratic power to coerce and detain. History shows a nearly unbroken pattern of Congressional respect for the great writ. Now is the time to restore that legacy.

Thank you very much. I would be pleased to answer any of your questions.

Richard A. Epstein
4824 So. Woodlawn Avenue
Chicago, IL 60615

May 17, 2007

The Honorable Arlen Specter
Ranking Member, Senate Judiciary Committee
Dirksen Senate Office Building, Room 152
Washington, D.C. 20510

Re: S. 185

Dear Senator Specter:

I am writing this short letter to you to express my strong support for S. 185, which seeks in a sensible fashion to undo much of the serious damage to our constitutional structure that has been wrought by the Military Commissions Act of 2006, insofar as it removed all of the traditional protections that the writ of Habeas Corpus long supplied to individuals, citizens and aliens alike, who seek to challenge the legality of their detentions before an independent federal judge. The current provisions of the MCA read like a Kafkaesque novel in which the word of an anonymous government official is sufficient to allow the detention of any and all aliens found either in the United States or abroad. The key provision of the MCA that accomplishes this result currently reads "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."

As written, this provision draws no distinction among various kinds of aliens. Those who are lawfully in the United States, even as permanent aliens, are treated the same as enemy combatants found in uniform abroad. The current provisions of the MCA are deliberately faceless. No person in authority must answer by name for the acts of detention for which they are responsible, for MCA allows the "United States" as a national abstraction to make this decision for which no government official from the President on down must stand accountable. Nor does the MCA state whether a mere anonymous say-so counts as a determination of combatant status, or whether someone, let alone who, has to review the evidence before the writ of habeas corpus is lost. Nor need the government run the charade at all: it can make sure that detainees are kept "awaiting" a determination, say, forever.

This conscious disregard of traditional practice in the United States counts as an affront to the rudimentary principles of fair play that has commended itself to every court

that does not model itself on the old English Star Chamber. It is, moreover, impossible to justify this limitation on ordinary protections on the grounds that the MCA, as now constituted offers a modern substitute *of equal worth* for the traditional writ of habeas corpus in the form of a hearing, maybe, before the newly refurbished Combat Status Review Tribunals. There may be no magic in the Latin words habeas corpus. But if the name does not matter, the protections do: do people held against their will have a chance to challenge the legality of their confinement in a regular proceeding before a neutral official? In my view, they do. The huge doubt over the legality of many individual incarcerations make it evident that some hearing should be allowed to determine the legality of the confinement. Whether people are held in the United States or abroad should not make any difference to the overall analysis, for the Due Process Clause of the Fifth Amendment to the Constitution contains no explicit territorial limitation on the protections of due process, which are consciously extended, by use of the word "person" to citizen and alien alike. Similarly "the privilege of the writ of habeas corpus" extends to all persons, not just citizens, and it too cannot be suspended "unless when in cases of Rebellion or invasion the public safety may require it." I realize that there are some judicial decisions that seek to narrow the scope of the writ of Habeas Corpus, but none go so far as the MCA, which in my judgment is unconstitutional in its present form, and never should have been enacted into law in the first place.

In this light, it is most welcome that S. 185 works to repeal 28 U.S.C § 2241(e) and to replace 10 U.S.C. § 950j(b), with the new provision set out in S. 185. As I read the provision, it removes the most disgraceful portions of the MCA by repealing the provisions of the current law that bar any court from hearing applications for habeas corpus filed by aliens whom the United States has determined should be detained as enemy combatants, or who are awaiting such determinations. This is an important return toward normal procedures that predated the MCA. At this point I express no opinion whether the remaining bar on judicial review of military procedures that is preserved in the new section (b) is adequate for all occasions, for that discussion can wait for another day. The first order of business is to pass this bill, and I urge the Senate to do so as quickly as possible.

Sincerely yours,

Richard A. Epstein

Dr. David P. Gushee
Evangelicals for Human Rights
156 Claiborne Drive
Jackson, TN 38305

May 18, 2007

The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Specter,

I write to express my support for your legislation to restore habeas corpus for detainees in US custody. My comments come to you both as an individual and on behalf of a large group of evangelical Christian leaders. And my concerns relate not just to the habeas issue but to the broader treatment of detainees in the war on terror.

Let me start by introducing you to a major declaration on detainee-related issues that I have been involved in developing and circulating over the last year.

"An Evangelical Declaration Against Torture: Protecting Human Rights in an Age of Terror" is a lengthy theological/ethical analysis of a variety of issues raised by the conduct of the war on terror. (The statement is attached with this letter, along with a partial signatory list. I commend the entire statement for your consideration.) It was drafted by a team of scholars, under my leadership, representing a new organization called Evangelicals for Human Rights. I am pleased to report that in March 2007, the declaration was approved by the board of directors of the National Association of Evangelicals (NAE), an organization representing 60 denominations, 45,000 churches, and 30 million evangelical Christians. Together with the distinguished list of signatories from beyond the NAE, the declaration can be said to represent a very wide and significant swath of evangelical Christians in America.

The heart of the document is an affirmation of our shared Christian belief in the sanctity of every human life, and therefore our commitment to respect the human rights of every person. The signatories agree that our nation does face determined adversaries who do not operate according to civilized norms. But we believe that we must not allow the behavior of others to determine our own behavior. We write (section 1.6):

> The question we now face is how we protect our society (and other societies) from further terrorist acts within a framework of moral and legal norms. As American Christians, we are above all motivated by a desire that our nation's actions would be consistent with foundational Christian moral norms. We believe that a scrupulous commitment to human rights, among which is the right not to be tortured, is one of these Christian moral convictions.

Towards the end of our declaration we broaden our horizon of concern to include human rights issues other than torture that are raised by the conduct of the war on terror and the laws that

have been passed to facilitate that war, including the Military Commissions Act of 2006. Allow me to quote section 6.14 in full:

> Various procedural issues in the Military Commissions Act are also troubling. The new law does not allow terrorism suspects to challenge their detention or treatment through traditional *habeas corpus* petitions. It permits prosecutors, under certain conditions, to use evidence collected through hearsay or through coercion to seek criminal convictions. The legislation also rejects any right to a speedy trial, and it empowers U.S. officials to detain indefinitely anyone it determines to have "purposefully and materially" supported anti-U.S. hostilities. These provisions are deeply lamentable, in part because of their substance, and in part because they create the conditions in which further prisoner abuse is made more likely. They violate basic principles of due process that have been developed in Western judicial systems, including our own, for centuries. Anti-U.S. "hostilities" is a vague term that a future administration can use against anyone perceived as its enemy. We see this as fraught with danger to basic human rights.

It is apparent from this statement that the signatories are concerned not only about torture, and not only about habeas corpus, but about a large number of the provisions of the Military Commissions Act. Our concern is that these provisions represent a violation of our own national values, and that together they make more likely further violations of those values and of the basic God-given rights of human beings made in God's image.

Speaking as an individual, as a Christian citizen, I support the effort you are making to restore habeas corpus for detainees in US custody. I urge you to lead in the reconsideration of the full panoply of legal and moral issues raised here. And in light of the fairly wide support offered within the evangelical community to "An Evangelical Declaration Against Torture: Protecting Human Rights in an Age of Terror," I believe that my convictions on this issue represent the views of millions of evangelical Christians.

Sincerely,

David P. Gushee
Chair, Evangelicals for Human Rights
Jackson, Tennessee

BIOGRAPHICAL INFORMATION: Educated at The College of William and Mary, Southern Baptist Theological Seminary, and Union Theological Seminary (NY), David P. Gushee is University Fellow and Graves Professor of Moral Philosophy at Union University (a Baptist institution located in Jackson, Tennessee), a columnist for *Christianity Today* magazine, and Chair of Evangelicals for Human Rights.

AN EVANGELICAL DECLARATION AGAINST TORTURE:
PROTECTING HUMAN RIGHTS IN AN AGE OF TERROR:

1. Introduction

1.1 The sanctity of human life, a moral status irrevocably bestowed by the Creator upon each person and confirmed in the costly atoning sacrifice of Christ on the Cross, is desecrated each day in many ways around the globe. Because we are Christians who are commanded by our Lord Jesus Christ to love God with all of our being and to love our neighbors as ourselves (Mt. 22:36-40), this mistreatment of human persons comes before us as a source of sorrow and a call to action.

1.2 *All* humans who are mistreated or tormented are *somebody's* brothers and sisters, sons and daughters, parents and grandparents. We must think of them as we would our own children or parents. They are, by Jesus' definition, our neighbors (Lk. 10:25-37). They are "the least of these," and so in them and through them we encounter God himself (Mt. 25:31-46). "When human lives are endangered, when human dignity is in jeopardy, national borders and sensitivities become irrelevant," Elie Wiesel declares. "Silence encourages the tormentor, never the tormented."[1]

1.3 However remote to us may be the victim of torture, abuse, or mistreatment, Christians must seek to develop the moral imagination to enter into the suffering of all who are victimized. Having personally witnessed the horrors of the Cambodian genocide of the 1970s, Robert A. Evans writes: "The motivation of basic human rights can never again become a matter of statistics, or theory, or strategy, or legislation, or judicial decision. It will always be, for me, the violation of the dignity of other children of God."[2] Commitment to a transcendent moral vision of human dignity which is rooted in the concrete reality of particular suffering human beings motivates the signers of this statement as well.

1.4 The authors and signatories of this declaration are evangelical Christians and citizens of the United States. As Christians, we long to obey the moral demands of our faith as articulated in the Scriptures. We seek to serve Jesus Christ, who alone is Lord of our lives, of the church, of our nation, and of the world. As citizens, we bring our Christian convictions to bear on the most important matters that arise in the life of our democracy, for the health of our nation and its impact on the lives of people around the world. We know that we may not always succeed in shaping the laws and policies of the United

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[1] Wiesel, Elie. "Acceptance Speech for 1986 Nobel Peace Prize." Oslo, December 10, 1986. http://www.eliewieselfiundation.org/ElieWiesel/speech.html, September 28, 2006.

[2] Robert A. Evans and Alice Frazer Evans, *Human Rights: A Dialogue Between the First and Third Worlds* (Maryknoll, NY: Orbis Books, 1988), 3-4.

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States in the way we believe they should be shaped. But we must, on all occasions, attempt to bear faithful Christian moral witness.

1.5 The immediate occasion for this declaration is the intense debate that has occurred in our country since 2004 over the use of torture and cruel, inhuman, and degrading treatment of those who are detained by our nation and other nations in the "war on terror."[3] In 2005-2006 this debate evolved into a broader discussion of policies related to the legal standards that would be employed in detaining, trying, transferring, or punishing suspected terrorists in what is turning out to be a lengthy struggle against individuals and groups engaged in terrorist plots and acts against our nation.

1.6 This cluster of issues would not have arisen if not for the horrifying and heinous attacks of 9/11, which took nearly 3,000 lives and constituted a mass violation of the very moral standards we witness to in this declaration. The U.S. response to these attacks, including intensified intelligence activities, the invasion of Afghanistan, and later the much-debated invasion of Iraq, has led to the apprehension of thousands of "enemy combatants," terrorists, suspected terrorists, and others. The question we now face is how we protect our society (and other societies) from further terrorist acts within a framework of moral and legal norms. As American Christians, we are above all motivated by a desire that our nation's actions would be consistent with foundational Christian moral norms. We believe that a scrupulous commitment to human rights, among which is the right not to be tortured, is one of these Christian moral convictions.

2. The Sanctity of Human Life

"And God said, 'Let us make human beings in our image, in our likeness. ...So God created human beings in his own image, in the image of God he created them; male and female he created them."

Genesis 1:26a, 27

2.1 We ground our commitment to human rights, including the rights of suspected terrorists, in the core Christian belief that human life is sacred. Evangelicals join a vast array of other Christian groups and thinkers—Roman Catholics, mainline Protestants, Eastern Orthodox, and others—in a long history of reflection and activism on behalf of this critical yet threatened moral conviction.

2.2 The sanctity of life is the conviction that all human beings, in any and every state of consciousness or self-awareness, of any and every race, color, ethnicity, level of intelligence, religion, language, nationality, gender, character, behavior, physical ability/disability, potential, class, social status, etc., of any and every particular quality of relationship to the viewing subject, are to be perceived as sacred, as persons of equal and

[3] We use quotation marks for this term because we are not convinced of the precision or cogency of a war on "terror," which is at one level a tactic (terrorism) and at another level a feeling (terror). We do not use the term with quotation marks in order to downplay the significance of the terrorist acts that have been directed at other nations and our nation in the past two decades.

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immeasurable worth and of inviolable dignity. Therefore they must be treated with the reverence and respect commensurate with this elevated moral status. This begins with a commitment to the preservation of their lives and protection of their basic rights. Understood in all of its fullness, it includes a commitment to the flourishing of every person's life.[4]

2.3 Christian belief in the sanctity of human life is rooted in themes that work their way through the entire biblical canon as well as much of Jewish, Christian, and Western moral thought. Rightly understood, the sanctity of life is a moral norm that both summarizes and transcends all other particular norms in Christian moral thought.

2.4 Scripture reveals that life is sacred. Humans, in particular, are given life by the breath of God (Gen. 2:7) and are made in the image of God (Gen. 1:26-28). The imago Dei serves as a common denominator for all of humanity. Every human being, therefore, deserves respect.

2.5 The sanctity of life is emphasized in legal and covenantal texts in Scripture. Murder is forbidden because human beings are made in the image of God; this theme is evident in the covenants both with Noah and with Moses (Gen. 9:5-6; Ex. 20:13). Everyone has a duty to conserve and respect human life (Gen. 9:5; 4:8-10, 15), and to accept responsibility for the life of their fellow humans (Gen. 4:9; Dt. 21:1-9). Human life is sacred because it is "precious" to God (Ps. 116:15) and must therefore be precious to us as well. The prophets remind Israel of the value of human life, especially life at its most vulnerable (Is. 1:17; Jer. 7:6; Zech. 7:10).

2.6 The incarnation (Jn. 1:1, 14) permanently and decisively elevates the value of human life. It reveals a God who is not dispassionate, but deeply moved by the brokenness of creation.[5] The incarnation demonstrates the extraordinary value God places upon human life. It also signifies a mysterious bridging of the gap between God and humanity. Henceforth, the human experience in its joys and sorrows is inscribed upon the very Person of God in a new way. Furthermore, the Holy Spirit participates in human pathos with groans and sighs too deep for words. The cries of the tortured are in a very real sense, then, the cries of the Spirit.

2.7 Jesus Christ, God-made-flesh, taught the dignity of human life and practiced it in his treatment of those around him. He reaffirmed the biblical commands which are intended to protect human life. He diagnosed the vicious patterns of sinful behavior that lead us to violate God's commands, and the sickness of the heart and mind that lie behind that sinful behavior. He offered teachings amounting to transforming initiatives to enable us to obey God's will. This is most clearly illustrated in his single largest block of teaching, the Sermon on the Mount (Mt. 5-7).

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[4] David P. Gushee, *The Sanctity of Life: A Christian Exploration* (Grand Rapids: Eerdmans, forthcoming).

[5] *IVP New Dictionary of Christian Ethics and Pastoral Theology,* ed. David J. Atkinson, et al (Downers Grove, IL: Intervarsity Press, 1995) 757-758.

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2.8 In his ministry, Jesus in all contexts treated persons as sacred in God's sight. This was especially apparent in the way he treated the marginalized: women, the sick, the dead, the poor, people of bad reputation, children, and enemies of Israel such as tax collectors, Roman soldiers, and gentiles in general. He explicitly affirms the worth of human beings in his teaching (Lk. 12:24; Mt. 6:26; 12:11-12). He taught peacemaking rather than violence, and on the Cross forgave those who assisted in killing him. He also stood with both the Law and the prophets before him in condemning injustice in its various forms: economic, political, military, and religious (cf. Mt. 23). The justice teachings of Jesus are closely related to a commitment to life's sanctity and serve as a fundamental building block of a Christian commitment to human rights.

2.9 For many centuries, Jesus' teaching about the "least of these" (Mt. 25:31-46) has been especially significant for shaping a Christian moral vision of the sanctity of every human life. Not only does this familiar "sheep and goats" parable emphasize the centrality of practical deeds of service to the least, the last, and the lost, it also teaches us to *see Jesus in* the hungry, the stranger, the naked, the sick, and the imprisoned: "as you did it unto the least of these, you did it unto me" (Mt. 25:40). This dramatic shift of moral vision has profound implications for how we as Christians think about our nation's imprisoned, sometimes hungry, sometimes sick, sometimes naked strangers.

2.10 Ultimately, it is the Cross of Jesus Christ that demonstrates how much God values human life. God-in-flesh dies, at human hands, for human beings who do not love him and are not worthy of his costly sacrifice. "While we were yet sinners, Christ died for us." Radical human equality is emphasized in the reason for this death, the universality of its scope, and the equality of its impact. At the Cross and in the Resurrection, by saying *no* to his Son's cry of dereliction, God says *yes* to all of derelict humanity.

2.11 Considered etymologically, a sacred thing is something that has already been sanctified, dedicated, consecrated, venerated, or hallowed. One might say, then, that our holy God has transferred his holiness onto us and therefore sanctified each person. This confers upon each of us a dignity that our attitudes, attributes, and activities neither deserve nor can nullify.[6]

2.12 In his *Gospel of Life*, Pope John Paul II asserts the sacred value of human life "from its very beginning until its end." He urges a fight against "the culture of death" and a holistic and comprehensive struggle to protect vulnerable humans, sacred in God's sight.

2.13 John Paul II is among those who have made the connection explicit: the concept of human rights is inextricably bound to the belief that human life is sacred and therefore must be held in the highest respect. "Upon the recognition of this right, every human community and the political community itself are founded."[7] Indeed, by focusing on human rights, we direct our attention and energy to those who need it most—those

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[6] Gushee, *The Sanctity of Life*, 3.

[7] Pope John Paul II, *The Gospel of Life*, (New York: Random House, Inc., 1995), 2-4.

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image-bearers whose dignity is being violated.[8] Human rights are not first of all about "my rights," but about the rights of the vulnerable and the violated. And they are about responsibility, indeed obligation, to defend the weak. All people, all societies, and all nations have a responsibility to ensure human rights.

2.14 We believe that a commitment to human rights is strengthened profoundly by the kinds of theological commitments just articulated. They are certainly our convictions. We are very happy to work with persons of other faiths and no faith on behalf of human rights, but as evangelicals our convictions are rooted in God's love and the dignity it gives to all human beings.

3. Human Rights

"Defend the weak and the fatherless; uphold the cause of the poor and the oppressed. Rescue the weak and the needy."

Psalms 82:3-4a

3.1 Human rights *function* to protect the dignity of human life.[9] Because human rights guard what God has made sacred, they cannot be cancelled by any other concern, nor can they be bracketed off as irrelevant in exigent circumstances. This is in contrast to the view that a right can be cancelled or overridden. Human rights are a decisive factor in determining how all persons must be treated in all circumstances.[10] Rights correlate with duties—fundamentally, a duty to protect those whose God-given rights are about to be, or are being, violated.[11] Those who affirm a belief in human rights implicitly accept for themselves a range of moral obligations.[12] Affirmation of human rights and their corresponding duties is an important dimension of Christian belief, and also widely shared by persons of other faiths.

3.2 Human rights place a shield around people, even when (especially when) our hearts cry out for vengeance. It is precisely when we are most inclined to abandon a commitment to human rights that we most need to reaffirm that commitment.[13] The creation of a social

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[8] Glen Stassen, "Foreword," in Christopher D. Marshall, *Crowned with Glory and Honor: Human Rights in the Biblical Tradition,* vol. 6, 11-14, *Studies in Peace and Scripture* (Telford, PA: Pandora Press U.S., 2001), 11.

[9] Per Sundman, "Human Rights, Justification, and Christian Ethics" (Ph. D. diss., Uppsala University, 1996), 41.

[10] Sundman, 45.

[11] Stassen, "Foreword," 12.

[12] Christopher D. Marshall, *Crowned with Glory and Honor: Human Rights in the Biblical Tradition,* vol.6, *Studies in Peace and Scripture* (Telford, PA: Pandora Press U.S., 2001), 34.

[13] An example from another context helps illustrate our point. In 2000, a young teenage girl in New Zealand was abducted by a neighbor. She was sexually violated, and then buried alive. She died a horrible death. The murderer was tried, convicted, and imprisoned for life according to the laws of New Zealand, but this

order in which such legal and moral norms are honored even in the teeth of popular sentiment is both a high human achievement, and a fragile one.

3.3 Human rights apply to all humans. The rights people have are theirs by virtue of being human, made in God's image. Persons can never be stripped of their humanity, regardless of their actions or of others' actions toward them. In social contract theory human rights are called *unalienable* rights. Unalienable rights are absolute and completely inviolable; a person cannot legitimately cease to have those rights, whether through waiver, fault, or another's act.[14] This is not biblical vocabulary, but it does seem to us consistent with a biblical understanding of human rights. Consider the way in which even Cain was protected by the divine "mark," and legal provision to protect the rights of killers was made in the Old Testament through the cities of refuge and the processes of judgment required there (Num. 35:9-34).

3.4 Some Christians reject human rights language because they have witnessed its abuse. They have heard numerous groups claim a right to engage in certain behaviors as expressions of their human rights. Many morally troublesome agendas are punctuated with "rights-talk," thereby cheapening those rights that are indeed both unalienable and threatened.[15] But the solution is not to abandon talk of rights. It is instead to clarify the range of legitimate rights-claims.

3.5 A variety of approaches can be taken to articulate and organize claims about human rights. An expansive approach argues that there are three dimensions of human rights, and all must be equally valued by any society that respects any of them: the right to certain freedoms, especially including religious liberty, the right to participate in community, and the right to have basic needs met. [16]

3.6 If one takes a more constrained approach to human rights, such as the view which confines human rights to "negative rights," i.e., that which the state may not do to us, the issues under discussion in this declaration still fall well within the boundaries of legitimate human rights-claims.

3.7 Human life is expressed through physicality, and the well-being of persons is tied to their physical existence. Therefore, humans must have the right to security of person. This

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did not satisfy the girl's stepfather. He was subsequently convicted for repeatedly hurling murderous threats at her killer. Hailed as a hero, the stepfather had overwhelming public opinion in his favor. One supporter said of the girl's killer, "When you commit that kind of crime, you give up your rights. That kind of person is not even human." A columnist for the *New Zealand Herald*, however, wrote in support of the judge's decision. Criticizing the public's lust for vengeance, he insisted that even the murderers of children "still have basic human rights and a decent society ensures those rights are upheld."

[14] Sundman, 38, 44.

[15] Mary Ann Glendon, *Rights Talk*. New York: Free Press, 2004.

[16] Glen H. Stassen, *Just Peacemaking: Transforming Initiatives for Justice and Peace* (Louisville: Westminster/ John Knox Press, 1992), 138, 159.

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includes the right not to have one's life taken unjustly (equivalent to the right to life), the right not to have one's body mutilated, and the right not to be abused, maimed, tortured, molested, or starved (sometimes called the right to bodily integrity or the right to remain whole). The right not to be arbitrarily detained (an aspect of due process) and the *writ of habeus corpus* are also based specifically on the concept of bodily rights. In particular, the *writ of habeus corpus* is based on the right not to have the government arbitrarily detain one's body.

4. The Christian History of Human Rights

"Thus says the Lord: 'Do justice and righteousness, and deliver from the hand of the oppressor him who has been robbed. And do no wrong or violence to the alien, the fatherless, and the widow, nor shed any blood."

Jeremiah 22:3

4.1 Contrary to a common misunderstanding, one that has weakened Christian support for human rights, human rights are not an Enlightenment notion, and certainly not to be seen as an Enlightenment *fiction*. Rooted in Scripture, the concept of human rights was suggested as far back as the 12th century, and can be traced into the modern period through a variety of routes, all of them versions of Christianity. Heirs to the English Christian traditions find especially important the work of Richard Overton, an English Christian thinker of the 17th century. In 1645, Overton wrote *The Arraignment of Mr. Persecution,* basing his argument on reason, experience, and Scripture. The book was penned during a time of great oppression of religious nonconformists in England. Overton proclaimed the equal rights of Jews, Muslims, atheists, Catholics, Protestants, and all humankind.[17]

4.2 Thus human rights ideas developed in the English-speaking world during a movement for religious liberty among "free church" Puritans in England, and later among religious dissenters in North America like Roger Williams, and not first among Enlightenment rationalists.[18] The concept of human rights flourished in the 17th and 18th centuries with documents such as the American *Declaration of Independence* (1776), the French Assembly's *Declaration of the Rights of Man and of the Citizen* (1789), and Thomas Paine's *The Rights of Man* expressing the belief in "natural rights."[19] More secularized versions of human rights should be seen as derivatives of an earlier, explicitly Christian, articulation.

4.3 The late 19th century proved an inhospitable environment for belief in "natural rights" worldwide, in both philosophical and political arenas. However, the totalitarian assault on human dignity in the first half of the 20th century, especially by Nazi Germany, Stalinist

[17] Christopher D. Marshall, 148.

[18] Michael Westmoreland White, "Setting the Record Straight: Christian Faith, Human Rights, and the Enlightenment," *Annual of the Society of Christian Ethics* (1995), 75-96.

[19] Christopher D. Marshall, 29.

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Russia, and Imperialist Japan, led to a reinterpretation of traditional natural-rights talk in the direction of "human rights."[20] Reacting to the devastation of the Nazi regime, and responding to the struggle by colonies for independence from their colonial masters, human rights gained worldwide momentum once again. Shortly after World War II, the United Nations Declaration of Human Rights was written, and then signed by the vast majority of nations.[21] The United States played a key role in drafting and advancing this UN Declaration. Many deeply committed Christians were involved in this process. Evangelicals struggled with the secular grounding of the Declaration's norms, but both then and now embrace its primary principles.

4.4 The Roman Catholic Church and the second Vatican Council (1962-1965) brought about another development in the maturation of the concept of human rights. Strongly affirming religious liberty after centuries of teaching otherwise, the Vatican II leaders, as with Overton, articulated strong concern for world peace and drew the connections between war and the violation of human rights. [22] A similar emphasis on human rights appears in many of the documents of the global ecumenical movement, as well as mainline Protestant theologians such as Reinhold Niebuhr. Meanwhile, the social movement of the 1950s and 1960s for African-American civil rights provided a powerful articulation of a heartfelt human rights ethic. It is hard to avoid the conclusion that an emphasis on human rights was very nearly a Christian consensus by the late 20th century.

4.5 Yet talk of human rights evokes opposition as well. We have already noted theological and philosophical objections. But throughout history the primary opposition to a concept of human rights has emerged most intensely from privileged groups (religious, economic, political, ethnic, etc.) determined to maintain their unjust advantages or resist challenges to their mistreatment of those whom they dominated. Meanwhile, support for human rights has helped to spread democracy and in general to break the power of unjust social structures.[23]

4.6 Love for one's neighbor should motivate the believer to act in the interests of those whose rights we are responsible to defend. Commitment to human rights can be seen as a systematic way to look out for the interests of others, and thus as an expression of Christian love. This is now the overwhelming consensus of the Christian community.

5. Ethical Implications of Human Rights

"Father to the fatherless, a defender of widows, is God in his holy dwelling. God sets the lonely in families, he leads out the prisoners with singing."
Psalms 68:5-6

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[20] Christopher D. Marshall, 29-30.

[21] Stassen, "Foreword," 11-12.

[22] Stassen, *Just Peacemaking*, 156.

[23] Stassen, "Foreword," 13.

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Principles

5.1 It is vital for the future of any good society and for the development of democracy that we, as citizens of the United States and as Christians belonging to the Body of Christ, promote and protect the innate dignity of the human person and therefore honor human rights. In the last century we have witnessed far too many attempts to abolish that divine value in humanity, and to treat human beings in ways far worse than bestial. However, as Pope John Paul II stated, the sanctity of life is a value "which no individual, no majority and no State can ever create, modify or destroy, but must only acknowledge, respect and promote."[24]

5.2 Even when a person has done wrong, poses a threat, or has information necessary to prevent a terrorist attack, he or she is still a human being made in God's image, still a person of immeasurable worth. The crime we abhor, but we must distinguish the error from the person in error. A person might do inhuman acts, but is never inhuman.[25] This distinction is excruciatingly difficult to make, which is all the more reason why we must be vigilant in doing so.

Responsibilities

Individual Responsibility

5.3 As individuals we are responsible for protecting the dignity of others, as the Good Samaritan did when he went out of his way to minister to the victim he found along his path (Lk. 10:25-37). The Lord brings justice, and governments have resources not available to individuals, but that does not release each of us from the obligation to make an urgent and concerted effort to raise every bearer of the image of God to the dignified level at which he or she was intended by the Creator.[26]

5.4 We live in a free society, a representative democracy, and while only a few may be direct perpetrators of human rights violations or even torture, we all share the responsibility because we are the citizens on whose behalf interrogators and military personnel are working. Whether we commit an offense against humanity, or simply sin by refusing to speak up for someone who is being victimized, as individuals and a society we are accountable for the indignities that are authorized and carried out by our nation.[27] We

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[24] Pope John Paul II, 129.

[25] *Vatican II: The Conciliar and Post Conciliar Documents,* 64, Austin Flannery, O. P. ed., PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, *"Gaudium et Spes"* (December 7, 1965), 929.

[26] Paul Marshall, "Human Rights," *Toward An Evangelical Public Policy*, ed. Ronald J. Sider and Diane Knippers (Grand Rapids: Baker Books, 2005), 313.

[27] Evans and Evans, 3.

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each have responsibility to exercise our right/obligation to participate in the deliberative processes of our democracy. Those who have greater social or political power have even greater moral responsibility to act.

The Role of the Church

5.5 The churches have a very important responsibility to prepare their members to be faithful disciples of Christ who witness in and to the various contexts in which we find ourselves. Church leaders have a critical role in equipping Christians to think and respond biblically in all major areas of life, including the one we are considering here. One aspect of this discipling process is to help congregants prepare for the exercise of their citizenship responsibilities. Evangelicals alone make up one quarter of all voters in the United States. As evangelicals we are keenly aware of the gravity of our responsibility, and many of us have joined in articulating our own public ethical vision in a document released in 2004, and endorsed by all forty-three members of the Board of the National Association of Evangelicals, "For the Health of the Nation."[28]

The Role of the State

5.6 The government inevitably plays a central role in a nation's treatment of human beings and respect for human life. Unless human rights are embedded in a nation's constitutional documents, in its legislation, and in fair court procedures, and there is governmental respect for international laws that protect human rights, rights-claims can become mere abstractions that are not implemented in practice. In light of the sinfulness of humanity there is a need for the protection and restraint of laws.

5.7 Governments should be legally obligated to protect basic human rights. The U.S. government certainly is so obligated.

5.8 It is striking that calls in the 1970s and 1980s for the U.S. to advance global human rights initially assumed that human rights were an unquestioned part of our own constitutional order. The idea was to spread that vision around the world. Evangelicals have been deeply invested in that project. We have pressed for the rights of religious liberty, especially where religious minorities have been persecuted, for the rights of victims of sex trafficking, and for human rights in countries oppressed by dictatorships. Now we find ourselves having to turn our gaze homeward again, to the eroding human rights protections of our own practices.

5.9 The goal of a nation that advances human rights for all is one that has been articulated by our current president and members of his administration. President George W. Bush has described the United States as being born from a "simple dream of dignity." [29] The

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[28] "For the Health of the Nation," in *Toward an Evangelical Public Policy,* ed. Ronald J. Sider and Diane Knippers, 363-375, (Grand Rapids: Baker Books, 2005), 363.

[29] Julie A. Mertus, *Bait and Switch: Human Rights and U.S. Foreign Policy* (New York: Routledge, 2004), 57.

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American spirit, he has asserted, is "generous and strong and decent, not because we believe in ourselves, but because we hold beliefs beyond ourselves."[30]

5.10 This dream was not lost after 9/11. On October 31, 2001, Lorne W. Craner, Assistant Secretary for the Bureau of Democracy, Human Rights, and Labor, stated: "maintaining the focus on human rights and democracy worldwide is an integral part of our response to the attack [on 9/11]. ... We are proud to bear the mantle of leadership in international human rights in this century."[31] President Bush's speeches are full of belief in the dignity of every human life, regardless of political or national distinctions. "The American flag stands for more than our power and our interests," he has said. "Our founders dedicated this country to the cause of human dignity, the rights of every person, and the possibilities of every life."[32]

5.11 In light of these appealing words, it is clear to us that the terrorist attacks that jolted the nation in 2001 have blurred our national moral vision. National resolve, normally a virtue, can be misdirected, leading to the violation of human rights when it is allowed to overthrow our better selves. As the founding fathers intended, we have checks and balances within our Constitution's framework where Congress and the courts operate to check the presidency and thereby protect human rights. This is how it should be. Meanwhile, the United Nations Human Rights Charter and the great number of other human rights documents to which America has added its name serve as additional boundary-setters, so that the government does not act rashly or unjustly.

5.12 The current administration has at times used language that is rich with respect for human rights, even after 9/11. Today this language is less frequently heard, and our actions as a nation do not consistently reflect the values once articulated. Yet there is a structure of national and international principles and laws that can help us to regain our moral footing, and in some ways have already begun to do so.

6. Legal Structures regarding Human Rights

"A ruler who lacks understanding is a cruel oppressor, but he who hates unjust gain will prolong his days."

Proverbs 28:16

International Law

6.1 The Geneva Conventions, the Convention Against Torture, and many other treaties outlining human rights are in place so each signatory nation is held accountable.[33]

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[30] Mertus, 57.

[31] Mertus, 58

[32] Mertus, 58.

[33] As of March 18, 2007, parts of section 6 have been amended or revised in order to sharpen the treatment of issues related to international law.

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6.2 With a raging "war on terror," American policymakers and interrogators have faced the temptation of looking to torture, and to cruel, inhuman, or degrading treatment of their detainees in Iraq, Afghanistan, Guantánamo, and other U.S. detention centers. Torture has often been a temptation (and far too many times a practice) in other countries facing perceived or actual security threats. Despite these abuses, the ban on torture in the Geneva Convention and of the Convention Against Torture is unambiguous.[34]

6.3 Article 3 of the 3rd Geneva Convention (1949)[35] says:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[36]

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[34] United Nations Convention Against Torture, United Nations Department of Public Record (New York, February 4, 1985).

[35] A dispute is still working its way through the judicial system regarding the scope of Common Article 3 of the Geneva Conventions. As President Bush has interpreted the treaty text, Common Article 3 applies only to civil wars completely internal to one signatory state. In *Hamdan v. Rumsfeld,* volume 126 Supreme Court Reporter page 2749 (2006), the Supreme Court disagreed. Although there are serious arguments on both sides of this issue, in the interest of the most expansive understanding and protection of human rights we support the broader interpretation of Article 3

[36] Geneva Convention (III): Relative to the Treatment of Prisoners of War (Geneva, 12 August 1949).

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6.4 Article 2 of the UN Convention Against Torture states: "No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture."[37] The U.N. *International Covenant on Civil and Political Rights* (ICCPR--1966) states in article 7 that "no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[38] Article 10 of the ICCPR also establishes a particular right to be treated in a humane and dignified manner for accused or detained persons deprived of their personal liberty.[39] This code of conduct is further clarified in the United Nations High Commission on Human Rights *Civil and Political Rights, Including the Questions of Torture and Detention* (2005). Cruel, inhuman, or degrading treatment (CIDT), although falling short of torture, is still completely prohibited along with all forms of torture. "The overriding factor at the core of the prohibition of CIDT is the concept of [the] powerlessness of the victim."[40]

6.5 International treaties provide *no loopholes* for justifying torture. The ICCPR treaty says that although "in time of public emergency which threatens the life of the nation ... the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, ... *no derogation from [article] 7... may be made under this provision.*"[41] Likewise, the U.N. Convention Against Torture allows no exceptions for torture whatsoever.[42]

6.6 The United States is a signatory to all of these international treaties and declarations. We have also historically incorporated their principles into military doctrine. However, these practices have come into question during the last five years. We believe that this has been

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[37] United Nations Convention Against Torture, United Nations Department of Public Record (New York, February 4, 1985).

[38] The United States took a reservation to this provision that says: "[T]he United States considers itself bound by article 7 to the extent that `cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." Our treaty obligation extends only to degrading treatment that is also "cruel and unusual" and that violates the Fifth, Eighth, and/or Fourteenth Amendment.

[39] *Civil and Political Rights, Including the Questions of Torture and Detention,* 13.

[40] United Nations High Commission on Human Rights, *Civil and Political Rights, Including the Questions of Torture and Detention,* United Nations Department of Public Record (Geneva, Switzerland, December 23, 2005), 13.

[41] *International Covenant on Civil and Political Rights,* United Nations General Assembly Resolution 2200A [XX1] (16 December 1966), accessible at http://www.cirp.org/library/ethics/UN-covenant (September 15, 2006); (italics added).

[42] United Nations Convention Against Torture, United Nations Department of Public Record (New York, February 4, 1985).

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a mistake, and we support a return to full adherence to the straightforward meaning of international conventions against torture.

U.S. Law

6.7 The United States has often sought to position itself as being on the side of the oppressed, including soldiers imprisoned under unjust or cruel circumstances. The Fifth, Eighth, and Fourteenth Amendments prohibit cruel, unusual and inhumane treatment, and congress has also enacted laws unequivocally banning torture.[43] During the American Revolution, our soldiers were mistreated by the British. Our nation has worked diligently since then to provide legal protection to any person in the custody of the enemy through laws of war.[44] The Geneva Conventions and the Additional Protocols of 1977 are the most recent version of this protection.[45] In 1996, the United States adopted the War Crimes Act, which imposed felony criminal liability on persons that commit "grave breaches" of the Geneva Conventions.[46] It must be remembered that the United States has historically been a *leader* in pressing for such safeguards, not just a reluctant signatory.

6.8 Since human rights first became a prominent issue in the 20th century, the United Nations and the United States have continued to make additions to former agreements, treaties, and statements in order to make them as comprehensive and relevant as possible. This is what a democracy should always be doing. Human rights have always been, and always will be, under attack. However, a democracy works to guard against such violations of human rights through its laws. Its very identity depends upon the confidence that violations of human rights, such as torture, are prohibited.[47]

6.9 Between 9/11 and January 2006, tens of thousands had been detained in U.S. detention centers.[48] The vast majority of these detainees were released without charge. It is important to remember that detention policies pertain to persons, most of whom will end up being charged with no crime and being viewed as no threat to our nation.

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[43] Title 18 of the *United States Code* section 2340-2340a and Title 42 of the *United States Code* section 2000dd.

[44] David Gushee and Cliff Kirkpatrick, "Rights of Detainees Must Not Be Violated," *Commercial Appeal,* (September 27, 2006).

[45] The Additional Protocols of 1977 were an opportunity for the U.S. to join the international community in updating the Geneva Conventions. Unfortunately, however, the Reagan administration chose not to do so.

[46] Section 2 of the *War Crimes Act of 1996*, title 18 of the *United States Code* section 2401.

[47] Michael Ignatieff, "Evil Under Interrogation," *Financial Times* (London, May 15, 2004), accessed at http://www.ksg.harvard.edu/news/opeds/2004/ignatieff_torture_ft_051504.htm.

[48] Katherine Shrader, "U.S. Has Detained 83,000 in War on Terror," Associated Press, November 16, 2005, accessed online at www.sunherald.com, 11/25/05.

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6.10 The boundaries of what is legally and morally permissible in war have been crossed in the current "war on terror." The evidence of acts of torture or cruel, inhuman, and degrading treatment against U.S. detainees, especially in Iraq's Abu Ghraib prison, in Afghanistan's Bagram Air Base, in CIA black sites, and at the hands of other nations, has been documented by numerous researchers, including those serving the U.S. government itself. Revelations of these outrages against human dignity led to intense pressure on the federal government to return to its earlier rejection of torture and to clarify its detention and interrogation policies.

6.11 Commendably, the U.S. Army Field Manual, last revised in 1992, has recently undergone more changes in light of recent events. Specific cruel, inhuman, and degrading practices that had taken place at least sporadically from 2002-2006 are now overtly banned. In addition to the general language of the 1992 edition, which prohibited "acts of violence or intimidation, including physical or mental torture, threats [or] insults, ... as a means of or aid to interrogation,"[49] there is now also more specific wording prohibiting military personnel from engaging in the behavior that put Abu Ghraib in the headlines. Beating prisoners, sexually humiliating them, threatening them with dogs, depriving them of food and water, performing mock executions, shocking them with electricity, burning them, causing other types of pain, and "waterboarding," are all explicitly banned.[50] The Pentagon is to be commended for this strong and positive revision of the Army Field Manual. It should become the policy of every agency of the United States government.[51]

6.12 Tragically, however, despite the military's commendable efforts to remove itself from any involvement with torture, the current administration has decided to retain morally questionable interrogation techniques among the options available to our intelligence agencies. For some time it did so without any form of public disclosure or oversight. In 2006 the administration moved its policies more fully into the light of day, pressing for legislation to authorize what it wanted to do.

6.13 The most recent legislation regarding these issues was signed into law in October 2006.[52] From a human rights perspective, the Military Commissions Act includes numerous problematic provisions, such as one in which CIA officials are not required to submit to

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[49] "Intelligence Interrogation." U.S. Army Field Manual 34-52. September 28, 1992.

[50] "Human Intelligence Collector Operations." U.S. Army Field Manual 2-22.3. September 6, 2006.

[51] The U.S. has a moral obligation to train our military personnel in the best way to meet combat contingencies. That necessitates tough training in survival, escape, evasion, and rescue techniques. Also, history demonstrates that our enemies often do not observe standards of international law or the Geneva Convention. Therefore, part of military training involves sleep deprivation, exhaustive marches, food deprivation, and even some pain or discomfort. While this training is closely monitored to guard against abuses, it also must be sufficiently rigorous to arm the individual with physical, psychological, and mental coping skills to endure the unimaginable if taken as a prisoner of war. The signatories understand that this is part of military training and do not intend to condemn it.

[52] *Military Commissions Act of 2006*, 120 Statutes at Large 2600, Public Law 109-366 (October 17, 2006). Many of the act's sections are codified at title 10 United States Code section 948a and following.

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congressional oversight, and are not held to the same standards as the U.S. military. CIA "black sites" may continue to exist, with interrogation rules established by the president but not specified publicly and now removed from the ability of either Congress or judicial authority to review.[53] This could prove to be a recipe for cruel, inhuman, and degrading treatment of detainees, without the Constitution's checks and balances so crucial for American justice.

6.14 Various procedural issues in the Military Commissions Act are also troubling. The new law does not allow terrorism suspects to challenge their detention or treatment through traditional *habeas corpus* petitions.[54] It permits prosecutors, under certain conditions, to use evidence collected through hearsay or through coercion to seek criminal convictions.[55] The legislation also rejects any right to a speedy trial,[56] and it empowers

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[53] President George W. Bush, in a speech made at the signing of the *Military Commissions Act of 2006*, Washington, D.C., October 17, 2006.

[54] Section 7 of the *Military Commissions Act*, title 28 *United States Code* section 2241.

"(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."

[55] Section 3 of the *Military Commissions Act,* title 10 of the *United States Code* section 948r and section 949a.

"948r(c) STATEMENTS OBTAINED BEFORE ENACTMENT OF DETAINEE TREATMENT ACT OF 2005.—A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—
"(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
"(2) the interests of justice would best be served by admission of the statement into evidence."

"949a(E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.
"(ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if

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U.S. officials to detain indefinitely anyone it determines to have "purposefully and materially" supported anti-U.S. hostilities.[57] These provisions are deeply lamentable, in part because of their substance, and in part because they create the conditions in which further prisoner abuse is made more likely. They violate basic principles of due process that have been developed in Western judicial systems, including our own, for centuries. Anti-U.S. "hostilities" is a vague term that a future administration can use against anyone perceived as its enemy.[58] We see this as fraught with danger to basic human rights.

7. Conclusion: Human Rights in an Age of Terror

"And the Lord said, 'What have you done? The voice of your brother's blood is crying to me from the ground."

Genesis 4:10

7.1 The terrorist attacks of 9/11 and the attacks that followed blatantly violated human rights in the most outrageous manner imaginable. We declare without hesitation that the terrorist attacks in New York, Washington, London, Madrid, Bali, Casablanca, Amman, and other locations around the globe were heinous assaults on human life. We condemn these worldwide terrorist activities and the radical ideologues that foment them.

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the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value."

[56] Section 3 of the *Military Commissions Act,* title 10 *United States Code* section 948b.

"(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—(1) The following provisions of this title shall not apply to trial by military commission under this chapter:
"(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courtsmartial relating to speedy trial."

[57] Section 3 of the *Military Commissions Act,* title 10 of the *United States Code* section 948a.

"(1) UNLAWFUL ENEMY COMBATANT.—(A) The term 'unlawful enemy combatant' means—
"(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or
"(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense."

[58] Section 3 of the *Military Commissions Act,* title 10 of the *United States Code* section 948a.

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7.2 It is certainly the responsibility of a nation's government to protect its people from such callous and cruel disregard of human life.[59] Our military and intelligence forces have worked diligently to prevent further attacks. But such efforts must not include measures that violate our own core values.

7.3 Our current circumstances and national security concerns do not present us with distinctively new temptations regarding the violation of human rights in relation to interrogation policies, torture, and the legal rights of detainees. Our nation's founders anticipated security threats in the 18th century; indeed, one could argue that they faced a far more threatening security environment than any that we have experienced since their age. Deterring evil ends without resorting to evil means are tasks in tension, but any democracy must face dealing with this tension.

7.4 A significant challenge presented to us as we focus on deterring terrorism is not that terrorism is unprecedented, but that as it spreads and intensifies, terrorism is deeply frightening to people and unsettling to our way of life. The principle that we must "discharge duties to those who have violated their duties to us" seems even more difficult to bear.[60] It also makes it all the more necessary to be vigilant about guarding those moral boundaries.

7.5 Torture is but one of many violations of human rights. Sadly there are more. Even forty years ago, Vatican II was able to list the following such violations:

> The varieties of crime are numerous: all offenses against life itself, such as murder, genocide, abortion, euthanasia and willful suicide; all violations of the integrity of the human person, such as mutilation, physical and mental torture, undue psychological pressures, all offenses against human dignity, such as subhuman living conditions, arbitrary imprisonment, deportation, slavery, prostitution, the selling of women and children, degrading working conditions where men are treated as mere tools for profit rather than free and responsible persons: all these and the like are criminal: they poison civilization; and they debase the perpetrators more than the victims and militate against the honor of the creator.[61]

7.6 Slavery, human and sexual trafficking, genocide, prison rape, abortion, euthanasia, unethical human experimentation—these are some of the other human rights violations listed by the National Association of Evangelicals in its "For the Health of the Nation"

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[59] The majority of the signatories of this document stand in the just-war tradition. Those who are pacifists believe government should carry out its important responsibilities using non-lethal methods.

[60] Ignatieff.

[61] *Vatican II,* 928.

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statement of 2004.[62] As evangelicals, we are deeply concerned about all violations of human rights. We want to lead the way in honoring and defending human rights wherever they are threatened.

7.7 We gratefully acknowledge our brothers and sisters in other Christian traditions for their thoughtful and Spirit-led work in the area of human rights. In recent times, evangelicals have joined with others to articulate an increasingly vigorous human rights ethic. The Board of the National Association of Evangelicals, representing over 30 million evangelical Christians, in 2004 unanimously approved a statement of social responsibility, which declared that "because God created human beings in his image, we are endowed with rights and responsibilities. ... Governments should be constitutionally obligated to protect basic human rights." Among those rights articulated in this statement is the right to live "without fear of torture."[63] Little did the NAE know how relevant that particular provision would soon become.

7.8 As evangelicals, we are first obligated to be faithful to Christ and his teaching. We are to be Kingdom people, disciples who think biblically about all things. In this particular situation, discipleship requires a clear word from us to our nation and its leaders. We must continue to discuss the moral problems associated with our treatment of detainees both in recent years and still today. Indeed, all citizens in a democracy must step up to the challenge we now face. The enormous burden of defending the human rights of United States citizens while also respecting those of the (suspected and actual) enemy is not one to be carried by our president alone.[64] As fellow Christians, fellow citizens, and fellow human beings, we let our leaders down by remaining silent.

7.9 When torture is employed by a state, that act communicates to the world and to one's own people that human lives are not sacred, that they are not reflections of the Creator, that they are expendable, exploitable, and disposable, and that their intrinsic value can be overridden by utilitarian arguments that trump that value.[65] These are claims that no one who confesses Christ as Lord can accept.

7.10 The most widely publicized acts of torture by the U.S. came on the heels of the 9/11 attack. As our nation mobilized, the eyes of the Muslim world were on the U.S. and how a Western civilization – in their eyes a Christian civilization – would respond to such barbarism. In this setting, that our actions were not bound by principles of human rights that we in the West profess was rightly seen by Muslims as hypocrisy and thus all the more damaging.

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[62] "For the Health of the Nation,"363, 370.

[63] "For the Health of the Nation," 373.

[64] Haugen.

[65] Ignatieff.

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7.11 Human rights must be protected for all humankind. A commitment to life's sacredness and to human rights is a seamless garment. It cannot be torn anywhere without compromising its integrity everywhere.

7.12 Therefore:

(a) We renounce the use of torture and cruel, inhuman, and degrading treatment by any branch of our government (or any other government)—even in the current circumstance of a war between the United States and various radical terrorist groups.

(b) We call for the extension of basic human rights and procedural protections to all persons held in United States custody now or in the future, wherever and by whomever they are held.

(c) We call for every agency of the United States government to join with the United States military and to state publicly its commitment to the terms of the Geneva Conventions related to the treatment of prisoners, especially Common Article 3.

(d) We call for the legislative or judicial reversal of those executive and legislative provisions that violate the moral and legal standards articulated in this declaration.

7.13 We make these renunciations and calls for action as Christians and as U.S. citizens. Undoubtedly there are occasions where the demands of Christian discipleship and American citizenship conflict. This is not one of them. Returning to the absolute commitment to human rights outlined here is right in terms of Christian convictions and right in terms of the interests of our nation. We commend these moral commitments to our fellow believers, and our fellow citizens, for such a time as this.

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April 30, 2007

The Honorable Members of the United States Senate
The Honorable Members of the United States House
of Representatives
Washington, DC 20510

Re: Pending Efforts to Restore *Habeas Corpus* Jurisdiction Relating to Guantánamo Prisoners

Dear Honorable Members of the United States Senate and Honorable Members of the United States House of Representatives:

We are former United States Attorneys and former senior officials in the United States Department of Justice who ask that you support pending efforts to ensure that the United States District Court in Washington, D.C. has jurisdiction over *habeas corpus* claims brought by Guantánamo Bay prisoners. As you may know, in *Rasul v. Bush*, 542 U.S. 466 (2004) and *Hamdan v. Rumsfeld,* 126 S. Ct. 2749 (2006), the United States Supreme Court ruled that the district courts have jurisdiction to hear those claims. However, in the Detainee Treatment Act (2005) and the Military Commissions Act (2006), Congress enacted measures that purported to strip the district court of jurisdiction over the petitions of the prisoners. The Court of Appeals for the District of Columbia recently voted 2-1 that the congressional enactments deprive the district court of jurisdiction to hear the petitions, and the United States Supreme Court denied certiorari, with three justices dissenting and two others stating that this was not the time to grant review.

We urge you to support ongoing legislative efforts to restore the traditional power of all courts in our federal judiciary to hear and decide *habeas corpus* petitions.

Some of us are Republicans and some of us are Democrats. What we have in common is that each of us is proud to have served this country as a federal prosecutor. As United States Attorneys and senior DOJ officials, it was our duty to prosecute – on behalf of all citizens – offenses against the United States, and we swore an oath to faithfully execute that duty.

It was fundamentally important to us that the justice system be both effective and fair. We took pride in being an integral part of a system that provided every defendant with fundamental rights, including the right to *habeas corpus*, the right against self-incrimination, the right to an attorney, and the right to a fair trial. While serving the United States, we were committed to due process and the rule of law, the pillars of our nation's proud legal tradition. We continue to believe strongly in these principles.

Currently, only ten of the approximately 385 men held at Guantánamo have been charged with war crimes before military commissions, and plans have been announced to charge 14 more men who were transferred in 2006 to Guantánamo from CIA prisons. That leaves approximately 360 men who may never be brought before a military commission. For these men, *habeas corpus* is the only meaningful method to challenge the legality of their detention. They filed petitions for *habeas corpus* years ago, but none has yet been heard.

The right of *habeas corpus* was enshrined in the Constitution by our Founding Fathers so that anyone the Executive detains may challenge the lawfulness of his detention. It is a vital part of our system of checks and balances, and an important safeguard against mistakes which may be made even by well-intentioned government officials. The rights the American justice system provides to those imprisoned promote the credibility and validity of the system itself. If the men at Guantánamo are not provided these rights, a cloud will always remain over the validity of their detention.

We urge you to uphold the fundamental rights that countless Americans have fought and died for by ensuring that the men at Guantánamo have the right to challenge their detentions in a court of law. Thank you very much for your consideration of the views expressed in this letter.

Sincerely,

Robert L. Barr, Jr.
United States Attorney for the
Northern District of Georgia
(1986-1990)

Alan D. Bersin
United States Attorney for the
Southern District of California
(1993-1998)

Rebecca Betts
United States Attorney for the
Southern District of West Virginia
(1994-2001)

Michael R. Bromwich
Inspector General of the United States
(1994-1999)

Robert C. Bundy
United States Attorney for the
District of Alaska
(1994-2001)

James B. Burns
United States Attorney for the
Northern District of Illinois
(1993-1997)

A. Bates Butler III
United States Attorney for the
District of Arizona
(1980-1981)

David J. Cannon
United States Attorney for the
Eastern District of Wisconsin
(1969-1973)

Zachary W. Carter
United States Attorney for the
Eastern District of New York
(1993-1999)

Paul E. Coggins
United States Attorney for the
Northern District of Texas
(1993-2001)

Michael H. Dettmer
United States Attorney for the
Western District of Michigan
(1994-2001)

W. Thomas Dillard
United States Attorney for the
Eastern District of Tennessee
(1981)
United States Attorney for the
Northern District of Florida
(1983-1986)

Edward L. Dowd
United States Attorney for the
Eastern District of Missouri
(1993-1999)

Frederick J. Hess
United States Attorney for the
Southern District of Illinois
(1977, 1982-1993)

Stephen B. Higgins
United States Attorney for the
Eastern District of Missouri
(1990-1993)

Melvin W. Kahle, Jr.
United States Attorney for the
Northern District of West Virginia
(1999-2001)

W. A. Kimbrough, Jr.
United States Attorney for the
Southern District of Alabama
(1977-1981)

Scott R. Lassar
United States Attorney for the
Northern District of Illinois
(1997-2001)

Philip Allen Lacovara
Deputy Solicitor General of the United States
for Criminal and National Security Matters
(1972-1973)
Counsel to the Watergate Special Prosecutor
(1973-1974)

David L. Lillehaug
United States Attorney for the
District of Minnesota
(1994-1998)

Jay P. McCloskey
United States Attorney for the
District of Maine
(1993-2001)

Kenneth J. Mighell
United States Attorney for the
Northern District of Texas
(1977-1981)

H. James Pickerstein
United States Attorney for the
District of Connecticut
(1974)

Janet Reno
Attorney General of the United States
(1993-2001)

William W. Robertson
United States Attorney for the
District of New Jersey
(1980-1981)

James K. Robinson
United States Attorney for the
Eastern District of Michigan
(1977-1980)
Assistant Attorney General, Criminal Division
(1998-2001)

Richard A. Rossman
United States Attorney for the
Eastern District of Michigan
(1980-1981)

David M. Satz, Jr.
United States Attorney for the
District of New Jersey
(1961-1969)

John R. Schmidt
Associate Attorney General of the United States
(1993-1997)

William S. Sessions
United States Attorney for the
Western District of Texas
(1971-1974)

Barry A. Short
United States Attorney for the
Eastern District of Missouri
(1976-1977)

Earl J. Silbert
United States Attorney for the
District of Columbia
(1974-1979)

Charles J. Stevens
United States Attorney for the
Eastern District of California
(1993-1997)

Thomas P. Sullivan
United States Attorney for the
Northern District of Illinois
(1977-1981)

Stanley A. Twardy, Jr.
United States Attorney for the
District of Connecticut
(1985-1991)

Anton R. Valukas
United States Attorney for the
Northern District of Illinois
(1985-1989)

Edward G. Warin
United States Attorney for the
District of Nebraska
(1977-1981)

Dan K. Webb
United States Attorney for the
Northern District of Illinois
(1981-1985)

Francis M. Wikstrom
United States Attorney for the
District of Utah
(1981)

William D. Wilmoth
United States Attorney for the
Northern District of West Virginia
(1993-1999)

Date: 5/21/2007 Time: 5:40 PM To: Leahy, Sen. Patrick @ 224-3479
Page: 001

The Constitution Project

May 21, 2007

Dear Senator:

I am writing in connection with the Senate Judiciary Committee's hearing tomorrow on "Restoring Habeas Corpus: Protecting American Values and the Great Writ." I am forwarding letters by nine prominent conservative leaders as well as the Constitution Project's statement by a bipartisan group of over forty-five legal and policy experts, all of which urge Congress to restore the *habeas corpus* jurisdiction eliminated by the Military Commissions Act.

The authors of the letters are Colonel Lawrence B. Wilkerson, U.S. Army (Ret.), former chief of staff to Secretary of State Colin Powell; William Sessions, former Director of the Federal Bureau of Investigation and federal judge; Alberto Mora, former General Counsel for the United States Navy; David Keene, Chairman of the American Conservative Union; John Whitehead, President of the Rutherford Institute; Bruce Fein, Chairman of the American Freedom Agenda and Deputy Attorney General in the Reagan administration; Richard Epstein, professor of law at the University of Chicago and Senior Fellow at the Hoover Institution; Bob Barr, 21st Century Liberties Chair at the American Conservative Union and former member of Congress (R-GA); and Don Wallace, Jr., professor at Georgetown University Law Center and Chairman of the International Law Institute.

I hope you find these materials helpful.

Sincerely,

Sharon Bradford Franklin

Sharon Bradford Franklin
Senior Counsel

1025 Vermont Avenue, NW, Third Floor, Washington, DC 20005 • tel 202-580-6920 fax 202-580-6929 • www.constitutionproject.org

05/21/2007 5:47PM

Lawrence B. Wilkerson
Colonel, U.S. Army (Retired)
7312 Rockford Drive
Falls Church, Virginia 22043-2931

3 May 2007

Dear Members of Congress:

I served for thirty-one years in the United States Army and, from 2002 to 2005, as Chief of Staff to Secretary of State Colin Powell, and am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system. I am aware that Abraham Lincoln suspended these rights in our Civil War. But I believe that had Lincoln survived to read it, he would have applauded the Supreme Court decision in 1866 that restored these rights. I also know that no matter how desperate our Civil War was at times, no one seriously believed it would endure for several decades. The so-called war on terror may do just that. We cannot afford to become so accustomed to a deprivation of these rights.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

Lawrence B. Wilkerson

Holland+Knight

Tel 202 955 3000
Fax 202 955 5564

Holland & Knight LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, D.C. 20006
www.hklaw.com

May 4, 2007

Dear Members of Congress:

I am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. I am a former Chief Judge in the United States District Court for the Western District of Texas and served as Director of the Federal Bureau of Investigation. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

William S. Sessions

Alberto J. Mora
6 Mission Hills Circle
Rogers, AR 72758

May 7, 2007

Dear Members of Congress:

I served as General Counsel to the Department of the Navy earlier in the current administration and am writing to urge that you restore the habeas corpus rights eliminated by the enactment of the Military Commissions Act last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances.

Habeas corpus rights represent the essence of the American legal system, a manifestation of fundamental fairness. But restoration of these rights is required not only as a matter of consistency with our values and legal system. In the War on Terror, the extension of habeas rights to potentially long-term detainees helps etch the sharpest possible distinction between ourselves and our adversaries at no real cost to our security. At the same time, it helps establish a common legal framework with our traditional allies – which we do not now have – for the prosecution of the war. Such a framework, and the broad-based alliances it can facilitate, is a war-fighting necessity in this type of war. Its absence reduces our defenses.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these rights.

Sincerely,

Alberto Mora

THE
AMERICAN
CONSERVATIVE
UNION

May 7, 2007

Dear Members of Congress:

I am writing to you today both as Chairman of the American Conservative Union and as Co-chair of the Constitution Project's Liberty & Security Initiative to urge your support of action to restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year.

The world wide struggle in which our nation is today engaged is one we must win and I agree completely with those who argue that our government needs the powers necessary both to pursue that struggle to a victorious conclusion and to protect the US homeland from terrorist attack, but that does not mean that we simply ignore the traditional American constitutional and common law rights that have made our regard for human liberty unique in world history.

Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

David Keene

American Conservative Union
1007 Cameron Street Alexandria, VA 22314
(P) 703.836.8602 (F) 703.836.8606
www.conservative.org

THE RUTHERFORD INSTITUTE

INTERNATIONAL HEADQUARTERS
Post Office Box 7482
Charlottesville, Virginia 22906-7482

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 - 1789
www.rutherford.org

Dear Members of Congress:

I urge you to restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year.

Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

As a constitutional attorney who has served as president of The Rutherford Institute for the past 25 years, I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely yours,

John W. Whitehead
President

Enclosure

American Freedom Agenda

910 SEVENTEENTH STREET, NW SUITE 800
WASHINGTON, DC 20006
TELEPHONE: 202-775-1776, FACSIMILE: 202-478-1664
WWW.AMERICANFREEDOMAGENDA.ORG

May 4, 2007

Dear Members of Congress:

I served as Associate Deputy Attorney General in the Reagan Administration and am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the rule of law.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,

Bruce Fein
Chairman
American Freedom Agenda

Richard A. Epstein
4824 So. Woodlawn Avenue
Chicago, IL 60615

May 4, 2007

Dear Members of Congress:

I understand that the Congress is now considering the possibility of restoring the *habeas corpus* rights that were eliminated by the enactment of the Military Commissions Act (MCA) last year. It is an issue to which I have devoted much thought as both a professor of law at the University of Chicago and a Senior Fellow at the Hoover Institution. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. That broad coalition understood that excessive uses of government power against any individual, either domestic or foreign, constitutes a threat to our democratic institutions that should be opposed by all persons regardless of their political persuasion. I shall not recount in this covering letter the arguments that stirred our coalition to action. But I have taken the liberty of enclosing the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement rightly notes that the writ of *habeas corpus* is of greatest importance in instances of executive detention without charge, as is now possible under the MCA.

Congress's unwise decision to block the use of *habeas corpus* should be of great concern to all Americans, no matter what their political philosophy. I urge you to support legislation that will restore the right to *habeas corpus* that was stripped away in the MCA.

Sincerely,

Richard Epstein /TB

Richard Epstein

BOB BARR
Member of Congress, 1995 - 2003

May 2, 2007

Dear Members of Congress:

As a former Member of Congress (R-GA), I respectfully urge that you restore the fundamental *habeas corpus* rights eliminated by the enactment last year of the Military Commissions Act (MCA). Earlier this year, I was pleased to join with a broad, bipartisan group of over 45 legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

With best wishes,

Bob Barr
Member of Congress, 1995 - 2003

900 Circle 75 Parkway, Suite 1280 • Atlanta, Georgia 30339 • 770/836-1776 • Fax 678/384-5745

INTERNATIONAL LAW INSTITUTE

Don Wallace, Jr.
Chairman, and Professor of Law,
Georgetown University Law Center

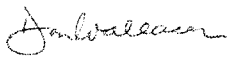
May 1, 2007

Dear Members of Congress:

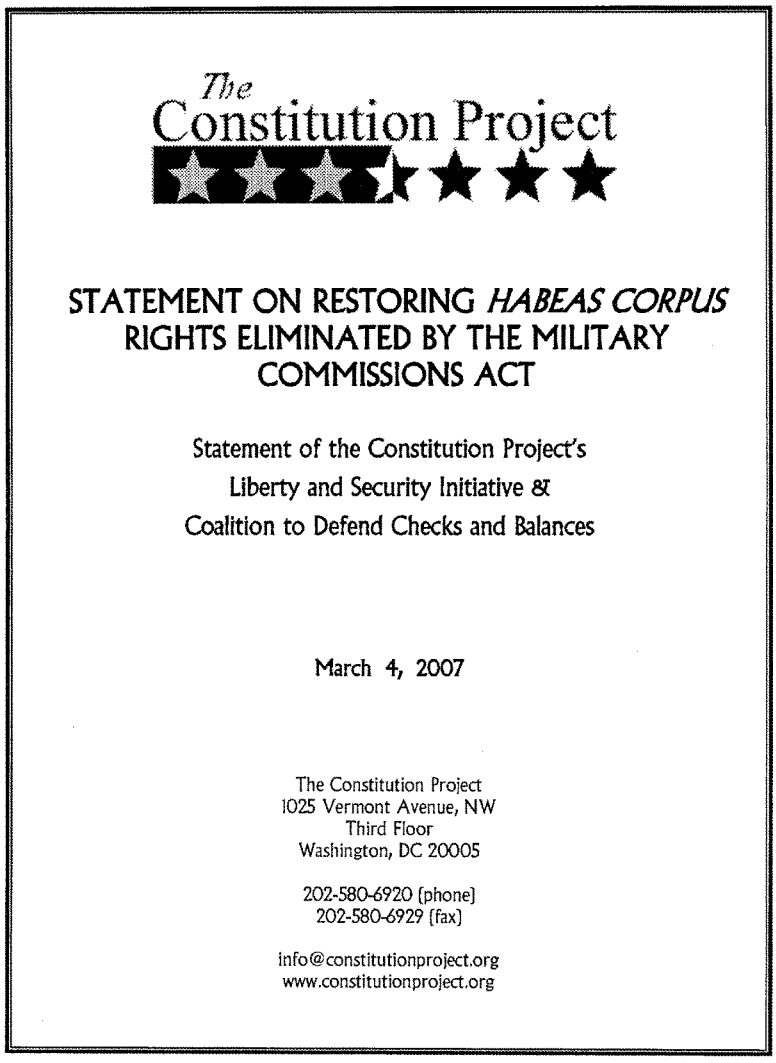
I am a professor at Georgetown University Law Center and serve as Chairman of the International Law Institute, and am writing to urge that you restore the *habeas corpus* rights eliminated by the enactment of the Military Commissions Act (MCA) last year. Earlier this year, I was pleased to join with a broad, bipartisan group of over forty-five legal and policy experts in a statement urging restoration of these rights. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

I believe that this issue should unite all Americans, no matter what their political philosophy, and I urge you to support legislation that will restore these *habeas corpus* rights.

Sincerely,



The Foundry Building • 1055 Thomas Jefferson St. NW • Washington, DC 20007, USA
Telephone • (202) 247-6006 • Fax (202) 247-6010 • wallace@ili.org • www.ili.org



STATEMENT ON RESTORING *HABEAS CORPUS* RIGHTS ELIMINATED BY THE MILITARY COMMISSIONS ACT

Statement of the Constitution Project's
Liberty and Security Initiative &
Coalition to Defend Checks and Balances

March 4, 2007

The Constitution Project
1025 Vermont Avenue, NW
Third Floor
Washington, DC 20005

202-580-6920 (phone)
202-580-6929 (fax)

info@constitutionproject.org
www.constitutionproject.org

STATEMENT ON RESTORING *HABEAS CORPUS* RIGHTS ELIMINATED BY THE MILITARY COMMISSIONS ACT*

We, the undersigned members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances, are deeply troubled by the recent legislation eliminating *habeas corpus* for certain non-citizens detained by the United States. We recommend that Congress vote to restore federal court jurisdiction to hear these *habeas corpus* petitions.

Habeas corpus has for centuries served as the preeminent safeguard of individual liberty and the separation of powers by providing meaningful judicial review of executive action. In 2004, the United States Supreme Court upheld the right of Guantanamo detainees to file *habeas corpus* petitions to challenge the lawfulness of their indefinite detentions.

Nevertheless, in October 2006, Congress enacted the Military Commissions Act ("MCA") eliminating *habeas corpus* for certain aliens held by the United States as "enemy combatants." While we recognize the need to detain foreign terrorists to protect national security, we do not believe repealing federal court jurisdiction over *habeas corpus* serves that goal. On the contrary, *habeas corpus* is crucial to ensure that the government's detention power is exercised wisely, lawfully, and consistently with American values.

The protections of *habeas corpus* have always been most critical in cases of executive detention without charge. In these circumstances, *habeas corpus* proceedings afford prisoners a meaningful opportunity to be heard before a neutral decisionmaker.

The unconventional nature of the current "war on terrorism" makes *habeas corpus* more, not less, important. Unlike in traditional conflicts, there is no clearly defined enemy, no identifiable battlefield, and no foreseeable end. The administration claims the power to imprison individuals without charge indefinitely, potentially forever. For that reason, it is essential that there be a meaningful process to prevent the United States from detaining people without legal

* The Constitution Project sincerely thanks Jonathan Hafetz, Litigation Director, Liberty & National Security Project, Brennan Center for Justice at NYU School of Law, for sharing his expertise on this subject and for his guidance in drafting this statement.

authority or mistakenly depriving innocent people of their liberty. *Habeas corpus* provides that process.

Habeas corpus is particularly important because of the way in which many detainees at Guantanamo came into U.S. custody. Most detainees were captured far from an active battlefield; many were sold for bounty by Afghani warlords to the Northern Alliance before being handed over to American forces. And, unlike in previous conflicts, the U.S. military did not provide a prompt hearing to determine a detainee's status, as the Geneva Conventions and U.S. army regulations require. As the Supreme Court has made clear, in the absence of such process *habeas corpus* is necessary to ensure that legal and factual errors are corrected and detention decisions are viewed as legitimate.

We recognize that the Military Commissions Act and the Detainee Treatment Act of 2005 provide detainees at Guantanamo with hearings before a Combatant Status Review Tribunal ("CSRT"), and that the CSRT decisions may be reviewed by the United States Court of Appeals for the D.C. Circuit. But we believe that this review scheme cannot replace *habeas corpus* for two principal reasons.

First, the CSRT process lacks the basic hallmarks of due process. Among other problems, it relies on secret evidence, denies detainees the chance to present evidence in their favor, and prohibits the assistance of counsel. In addition, the process permits the tribunal to rely on evidence obtained by coercion. Second, the D.C. Circuit's review is limited to what will inevitably be an inherently flawed record created by the CSRT. Unlike a U.S. district court judge hearing a *habeas corpus* petition, the D.C. Circuit cannot consider evidence or make its own findings of fact, and, therefore, it cannot rectify the CSRT's inherent procedural flaws.

The result does not provide these prisoners the process which they are due. The government has detained prisoners for more than five years without a meaningful opportunity to be heard, and has failed to create an adequate substitute for *habeas corpus*.

Restoring *habeas corpus* is also important to protecting Americans overseas. The United

States cannot expect other nations to afford our citizens the basic guarantees provided by *habeas corpus* unless we provide those guarantees to others.

If the United States is going to establish a system of indefinite detention without charge, it must at least ensure there is a meaningful process to determine it is holding the right people. When no such process has been provided, as in the case of Guantanamo detainees, *habeas corpus* supplies the critical fail-safe procedure to ensure that the executive has complied with the Constitution and laws of the United States. We also believe that in our constitutional system of checks and balances, it is unwise for the legislative branch to limit an established and traditional avenue of judicial review.

America's detention policy has undermined its reputation in the international community and weakened support for the fight against terrorism, particularly in the Arab world. Restoring *habeas corpus* would help repair the damage and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy. Therefore, we urge Congress to restore the *habeas corpus* rights that were eliminated by the Military Commissions Act.

Members of the Constitution Project's Liberty and Security Committee & Coalition to Defend Checks and Balances Endorsing the Statement on Restoring *Habeas Corpus* Rights Eliminated by the Military Commissions Act*

Floyd Abrams, Partner, Cahill Gordon & Reindel LLP

Azizah al-Hibri, Professor, The T.C. Williams School of Law, University of Richmond; President, Karamah: Muslim Women Lawyers for Human Rights

Bob Barr, Former Member of Congress (R-GA); CEO, Liberty Strategies, LLC; the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union; Chairman of Patriots to Restore Checks and Balances; Practicing Attorney; Consultant on Privacy Matters for the ACLU

David Birenbaum, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson LLP; Senior Scholar, Woodrow Wilson International Center for Scholars; former US Ambassador to the UN for UN Management and Reform, 1994-96

Christopher Bryant, Professor of Law, University of Cincinnati; former Assistant to the Senate Legal Counsel, 1997-99

David Cole, Professor, Georgetown University Law Center

Phillip J. Cooper, Professor, Mark O. Hatfield School of Government, Portland State University

John J. Curtin, Jr., Bingham McCutchen LLP; former President, American Bar Association

John W. Dean, Former Counsel to President Richard Nixon

Mickey Edwards, Lecturer at the Woodrow Wilson School of Public and International Affairs, Princeton University; former Member of Congress (R-OK) and Chairman of the House Republican Policy Committee

Richard Epstein, James Parker Hall Distinguished Service Professor of Law, The University of Chicago; Peter and Kirsten Bedford Senior Fellow, The Hoover Institution

Bruce Fein, Constitutional Lawyer and International Consultant at Bruce Fein & Associates and The Lichfield Group; former Associate Deputy Attorney General, Reagan Administration

Eugene R. Fidell, President, National Institute of Military Justice; Partner, Feldesman Tucker Leifer Fidell LLP

Louis Fisher, Specialist in Constitutional Law, Law Library, Library of Congress

Melvin A. Goodman, Senior Fellow, Director of the National Security Project, Center for International Policy

Morton H. Halperin, Director of U.S. Advocacy, Open Society Policy Center; Senior Vice President, Center for American Progress; Director of the Policy Planning Staff, Department of State, Clinton Administration

Philip Heymann, James Barr Ames Professor of Law, Harvard Law School; Deputy Attorney General, Clinton Administration

Robert E. Hunter, Former U.S. Ambassador to NATO, 1993-98

David Kay, Former Head of the Iraq Survey Group and Special Adviser on the Search for Iraqi Weapons of Mass Destruction to the Director of Central Intelligence

David Keene, Chairman, American Conservative Union

Christopher S. Kelley, Visiting Assistant Professor of Political Science, Miami University (OH)

Harold Hongju Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School; Assistant Secretary of State for Democracy, Human Rights and Labor, 1998-2001

David Lawrence, Jr., President, Early Childhood Initiative Foundation; former Publisher, *Miami Herald* and *Detroit Free Press*

Thomas Mann, Senior Fellow and W. Averell Harriman Chair, Governance Studies Program, the Brookings Institution

Joseph Margulies, Deputy Director, MacArthur Justice Center; Associate Clinical Professor, Northwestern University School of Law

Alberto Mora, Former General Counsel, Department of the Navy

Norman Ornstein, Resident Scholar, the American Enterprise Institute

Thomas R. Pickering, Former Undersecretary of State for Political Affairs 1997-2000; United States Ambassador and Representative to the United Nations, 1989-1992

Jack Rakove, W. R. Coe Professor of History and American Studies and Professor of Political Science, Stanford University

Peter Raven-Hansen, Professor, Glen Earl Weston Research Professor, George Washington Law School

L. Michael Seidman, Professor, Georgetown University Law Center

William S. Sessions, Former Director, Federal Bureau of Investigation; former Chief Judge, United States District Court for the Western District of Texas

Jerome J. Shestack, Partner, Wolf, Block, Schorr and Solis-Cohen LLP; former President, American Bar Association

John Shore, Founder and President, noborg LLC; former Senior Advisor for Science and Technology to Senator Patrick Leahy

Neal Sonnett, Chair, American Bar Association Task Force on Treatment of Enemy Combatants and Task Force on Domestic Surveillance in the Fight Against Terrorism

Suzanne E. Spaulding, Principal, Bingham Consulting Group; former Chief Counsel for Senate and House Intelligence Committees; former Executive Director of National Terrorism Commission; former Assistant General Counsel of CIA

Geoffrey Stone, Harry Kalven, Jr. Distinguished Service Professor of Law, the University of Chicago

Jane Stromseth, Professor, Georgetown University Law Center

William H. Taft, IV, Of Counsel, Fried, Frank, Harris, Shriver & Jacobson; former Legal

Advisor, Department of State, George W. Bush Administration; Deputy Secretary of Defense, Reagan Administration

John Terzano, Vice President, Veterans for America

James A. Thurber, Director and Distinguished Professor, Center for Congressional and Presidential Studies, American University

Charles Tiefer, General Counsel (Acting), 1993-94, Solicitor and Deputy General Counsel, 1984-95, U.S. House of Representatives

Patricia Wald, Former Chief Judge, U.S. Court of Appeals for D.C. Circuit

Don Wallace, Jr., Professor, Georgetown University Law Center; Chairman, International Law Institute, Washington, DC

John W. Whitehead, President, the Rutherford Institute

Lawrence B. Wilkerson, Col, USA (Ret), Visiting Pamela C. Harriman Professor of Government at the College of William and Mary; Professorial Lecturer in the University Honors Program at the George Washington University; former Chief of Staff to Secretary of State Colin Powell

Roger Wilkins, Clarence J. Robinson Professor of History and American Culture, George Mason University; former Director of U. S. Community Relations Service, Johnson Administration

**Affiliations Listed for Identification Purposes Only*

Statement of Donald J. Guter
Rear Admiral, Judge Advocate General's Corps, U. S. Navy (Ret.)
Dean, Duquesne University School of Law

Senate Committee on the Judiciary
Hearing on
Restoring Habeas Corpus: Protecting American Values and the Great Writ

May 22, 2007

Chairman Leahy and members of the Senate Judiciary Committee, thank you for the opportunity to speak in support of the Habeas Corpus Restoration Act of 2007 (S. 185). Passage of this bill is necessary to repeal provisions of the Military Commissions Act of 2006 that removed this fundamental protection from those detained in the "war on terror." By taking this action we will, as the title of this hearing suggests, protect American values--for habeas corpus is not a special right, it is what we expect for our citizens and military personnel abroad and it is what we should extend to all human beings.

In July 2003, one year after retiring from active duty and having served the final two years of my three decades in service as the Judge Advocate General of the Navy, I had the honor of speaking to about 300 attorneys and guests at the retirement ceremony for our senior military judge at the Washington Navy Yard. In my remarks, I warned of the erosion of civil liberties in the name of security, and I specifically mentioned habeas corpus as a fundamental right that had been suspended temporarily during the War Between the States and during World War II. As we know, each of those wars ended after four years and the equilibrium between security and civil liberties was restored. One key difference in today's struggle is that there is no foreseeable end to terrorism. (We seem to have chosen 9-11 as the beginning of this struggle, but we all know the long history of terrorist attacks on our country and our interests, at home and abroad.)

In 2003, our senior intelligence analysts were already saying that this "war" would be endless. I do not believe anyone could argue otherwise today. Despite my remarks that day, I was confident that congress and the judiciary would temper the predictable erosion of civil liberties that is always fueled by fear. I was proud of my own senator from Pennsylvania, Senator Specter, Senator Levin, and you, Mr. Chairman, when you tried to remove the habeas stripping provision from last year's Military Commissions Act. That effort barely failed; this bill says that it is never too late to do the right thing. The stripping of habeas was an historic and monumental misstep that continues to take us down a path that leads us away from our values and the image we have earned as a nation that promotes and lives by the rule of law.

Just a few weeks ago, on May 4th, the Director of the CIA, General Michael V. Hayden, USAF, came to Duquesne University to deliver the commencement address to the undergraduates. I admire this Pittsburgh native and alumnus, but in my opinion his mixed message illustrates the challenge we face as we seek to achieve a security-civil liberties balance. He described his confirmation hearing using a football metaphor. He said that we could not win the war by playing a foot inside the line, that we had to walk right up to the line, and that sometimes we had to get chalk on our boots. Then he said the following (as quoted from the next morning's Pittsburgh Post-Gazette):

"The defining national security challenge of your generation is terrorism—particularly that committed by al-Qaida, its associates, and those inspired by it. Speaking as the director of an agency whose officers are on the front lines of this war, I can tell you that it won't be won strictly by killing and capturing terrorists. Operations like that are necessary, and we will continue to do them aggressively, effectively, and within the law." But defeating terrorism, he said, means "winning the ideological side of this war, the war of ideas. We must defeat the worldview responsible for producing terrorists who hate America and the principles that we and our partners uphold."

I want to pose a question at this point. How can we "win the ideological side of this war, the war of ideas" with the policies we have adopted since 9-11, policies that are in opposition to our own ideologies, political ideas, and values? Even former Secretary of Defense Rumsfeld questioned whether our tactics and policies are creating more terrorists than we are killing and capturing. And worst of all, the recent study of the mental health of our own Soldiers and Marines indicates that we are eroding their ethics and values. How can we win a war on terror when we are losing the hearts and minds of our own fighting men and women?

The Combatant Status Review Tribunals (CSRTs) and the limited review accorded to them are fundamentally flawed processes. They allow secret and hearsay evidence; evidence acquired through "enhanced interrogation techniques"; lawyers are not permitted to assist the accused; and review is then limited to whether the government has followed its own flawed procedures. Yet these procedures provide the basis for indefinite incarceration. If that is not enough to condemn this entire construct, we have the most recent reports that, after a unanimous finding that a detainee is not an enemy combatant, hearings are repeated again and again until a detainee is classified, to the satisfaction of Pentagon reviewers, as an enemy combatant. Is it really too much to ask, as the Supreme Court opined in June 2004, that detainees are entitled to a "fair opportunity to rebut the government's factual assertions before a neutral decision maker [?]"

When I and other retired military officers took up the cause of preserving habeas corpus, our primary focus was on the detainees at Guantanamo Bay. The Military Commissions Act, however, goes much farther, reaching the 12 million lawful permanent residents in the United States as well as visitors to our country. As a military officer, and today, I enjoy traveling abroad. Next month my wife and I are going to China as part of the Duquesne University School of Law summer program in Beijing. I do not know about

members of this committee, but every time I venture outside our borders, I now consider how we have structured our laws in the United States. In this uncertain world of terrorism, I worry not so much about my physical safety as about whether some country might try to detain me in like manner by bringing allegations that I am then not permitted to challenge in a fair hearing.

Mr. Chairman, I have read your factual "nightmare scenario" in your April 26, 2007, testimony before the Senate Armed Services Committee. This is my nightmare scenario, and I would not wish it on anyone else. At a minimum, I want my country to hold the moral high ground as a platform upon which to argue for my release. In discarding habeas corpus, we are not nibbling around the edges of our valued civil liberties; we are throwing overboard one of our core principles—the right to challenge detention for life without charge.

Let me close with the words and sentiment of the open letter to congress that I signed during the fight we waged against habeas stripping. Other nations look to us for leadership and they follow our lead. We are the bright light of the world. Every step we take that dims that bright shining light undermines our role as a world leader. As we limit the rights of human beings, even those of the enemy, we become more like the enemy. That makes us weaker and imperils our valiant troops, serving not just in Iraq and Afghanistan, but around the globe.

I, therefore, respectfully suggest that passage of the Habeas Corpus Restoration Act of 2007 will not just restore this fundamental human right, it will be a positive factor in restoring our standing in the world community, and it will honor our brave men and women in uniform who fight on our behalf for this and other basic freedoms each and every day.

Thank you.

REAR ADMIRAL DON GUTER, USN (RET.)
REAR ADMIRAL JOHN D. HUTSON, USN (RET.)
BRIGADIER GENERAL DAVID M. BRAHMS, USMC (RET.)
BRIGADIER GENERAL JAMES P. CULLEN, USA (RET.)

March 7, 2007

The Honorable Patrick Leahy, Chairman
The Honorable Arlen Specter, Ranking Member
Senate Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

We strongly support your legislation to restore habeas corpus for detainees in US custody. We hope that it quickly becomes law.

Known as the "Great Writ," habeas corpus is the legal proceeding that allows individuals a chance to contest the legality of their detention. It has a long pedigree in Anglo Saxon jurisprudence, dating back to 13th Century England when it established the principle that even Kings are bound by the rule of law. Our Founding Fathers enshrined the writ in the Constitution, describing it as one of the essential components of a free nation.

In discarding habeas corpus, we are jettisoning one of the core principles of our nation precisely when we should be showcasing to the world our respect for the rule of law and basic rights. These are the characteristics that make our nation great. These are the values our men and women in uniform are fighting to preserve.

Abiding by these principles is critical to defeating terrorist enemies. The U.S. Army's Counterinsurgency Manual, which outlines our strategy against non-traditional foes like al Qaeda, makes clear that victory depends on building the support of local populations where our enemies operate through the legitimate exercise of our power. The Manual states: "Respect for preexisting and impersonal legal rules can provide the key to gaining widespread and enduring societal support. . . . Illegitimate actions," including "unlawful detention, torture, and punishment without trial . . . are self-defeating, even against insurgents who conceal themselves amid non-combatants and flout the law." Our enemies have used our detention of prisoners without trial or access to courts to undermine the legitimacy of our actions and to build support for their despicable cause.

It is certainly true that prisoners of war have never been given access to courts to challenge their detention. But the United States does have a history of providing access to courts to those who have not been granted POW status and are instead being held as unlawful combatants, as are the detainees in this conflict. See., e.g., Ex Parte Quirin, 317 U.S. 1 (1942) (rejecting the claim that the Court could not review the habeas claim of enemy aliens held for law of war violations).

POWs are combatants held according to internationally prescribed rules, and are released at the end of the war in which they fought. In a traditional war, it is generally easy to determine who is a combatant and governed by these special rules. But the war we are fighting today is different. Detainees held at Guantanamo Bay were captured in 14 countries around the world, including places as far away from any traditional battlefield as Thailand, Gambia, and Russia. Some were sold to the United States by bounty hunters. Our enemies blend into the civilian population, making the practice of identifying them more

difficult. For all these reasons, the possibility of making mistakes is much higher than in a traditional conflict. In such a situation, it is incumbent on our nation to ensure that there is an independent review of the decision to detain.

The denial of habeas corpus also threatens to harm our national interests by placing American civilians at risk. Imagine if an enemy of the United States arrested an American citizen - a nurse or interpreter or employee of a military contractor - because they once provided assistance to our armed forces, and held that American without charge or opportunity to challenge their detention in court. We would be outraged, and rightly so. Yet, this is the precedent we are setting by holding without charge those deemed to have aided the enemy and denying them access to a court that could review the basis of their detention.

A judicial check on the decision to detain is in the best tradition of the United States - a tradition that ensures accountability, accuracy, and credibility. Restoring habeas corpus will help ensure that we are detaining the right people and showcase to the world our respect for the rule of law and the values that distinguish America from our enemies.

We hope that Congress will act quickly to pass this legislation.

Sincerely,

Rear Admiral Don Guter, USN (Ret.)
Rear Admiral John D. Hutson, USN (Ret.)
Brigadier General David M. Brahms, USMC (Ret.)
Brigadier General James P. Cullen, USA (Ret.)

BIOGRAPHICAL INFORMATION

Rear Admiral Don Guter, USN (Ret.)
Admiral Guter served in the U.S. Navy for 32 years, concluding his career as the Navy's Judge Advocate General from 2000 to 2002. Admiral Guter currently serves as the Dean of Duquesne University Law School in Pittsburgh, PA.

Rear Admiral John D. Hutson, JAGC, USN (Ret.)
Rear Admiral John D. Hutson served in the U. S. Navy from 1973 to 2000. He was the Navy's Judge Advocate General from 1997 to 2000. Admiral Hutson now serves as President and Dean of the Franklin Pierce Law Center in Concord, New Hampshire. He also joined Human Rights First's Board of Directors in 2005.

Brigadier General David M. Brahms, USMC (Ret.)
General Brahms served in the Marine Corps from 1963-1988. He served as the Marine Corps' senior legal adviser from 1983 until his retirement in 1988. General Brahms currently practices law in Carlsbad, California and sits on the board of directors of the Judge Advocates Association.

Brigadier General James P. Cullen, USA (Ret.)
Mr. Cullen is a retired Brigadier General in the United States Army Reserve Judge Advocate General's Corps and last served as the Chief Judge (IMA) of the U.S. Army Court of Criminal Appeals. He currently practices law in New York City.

JCPA
JEWISH COUNCIL
FOR PUBLIC AFFAIRS

May 21, 2007

Senator Patrick Leahy
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Arlen Specter
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Leahy and Senator Specter,

In the story of creation, in the first chapter of the first book of the Torah, God creates mankind. In Genesis 1:27, God creates human beings "*b'tzelem elohim*" or "in the image of God". This phrase profoundly influences our world view and our understanding of human dignity. We are deeply committed to treating all people with the respect. This respect extends to even those who commit the most horrific and abominable acts. Our tradition also teaches of our moral imperative to seek justice. Deuteronomy 16:20 reads "*tzedek tzedek tirdof* (justice, justice shall you pursue)." Jewish theologians and commentators explain that the word *tzedek* is used twice because it is not enough to simply pursue justice, justice must be pursued justly. Both of these concepts, the dignity of all people and the imperative of a just justice system, are central to our morals and ethics. Unfortunately, some of our government's policies contradict our values. Last year, as a part of the Military Commissions Act of 2006, the United States government took the unprecedented step of eliminating Habeas Corpus. This neither treats people with dignity nor justly pursues justice. On behalf of the Jewish Council for Public Affairs, I strongly urge the repeal of these provisions and thank you for your work on the Habeas Corpus Restoration Act.

The Jewish Council for Public Affairs (JCPA) is the national coordinating body and umbrella agency for Jewish organizations addressing public policy concerns. Our membership includes 13 national organizations and 125 local Jewish Community Relations Councils. JCPA is charged with the responsibility of building a consensus position on public policy issues among our

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membership. Our views are informed both by our commitment to as strong, vibrant, and pluralistic United States and our Jewish values.

In 2006, as a part of the Military Commissions Act, Congress eliminated the ability of the federal courts to hear certain Habeas petitions. In an effort to prevent accused terrorists from challenging their detention in federal courts, Congress undermined the civil liberties of all Americans and compromised our national values. Habeas Corpus is the most fundamental of judicial proceedings. It ensures that the government cannot imprison a person without reason. This notion is central to our understanding of liberty and human dignity. Habeas provides both a judicial check on executive power and ensures justice is sought fairly.

As Americans, we are committed to the traditional elements of western and American law. Habeas Corpus is a proceeding with deep historical roots. Habeas Corpus was fixed in American law through its inclusion in the Constitution. Article I, Section 9 states "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion…" We are troubled by the elimination of Habeas Corpus and question the constitutionality of these provisions.

In this time of challenges and threats to our security, it is essential that we hold firm to our values. Compromising principles reduces our moral authority worldwide. We fear that without the United States as leader in the pursuit of justice and the protection of human rights and dignity, both may be diminished. Equally as important, we fear that we may be diminished. Our commitment to upholding our values and promoting a more just world remains steadfast. We must show strength by adhering to morals and ethics and not be intimidated into neglecting our traditional values.

Once again, I thank you for you sponsorship of the Habeas Corpus Restoration Act. Your passionate leadership on this issue is inspiring and empowering.

Sincerely,

Hadar Susskind
Washington Director
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STATEMENT OF DAVID A. KEENE
SUBMITTED May 21, 2007

My name is David A. Keene. I am currently serving both as Chairman of the American Conservative Union and Co-Chair of the Constitution Project's Liberty & Security Initiative. I am submitting this statement to urge your support for the restoration of the *habeas corpus* jurisdiction eliminated by the Military Commissions Act (MCA).

Since 9/11 the Executive Branch has requested and Congress has granted extraordinary powers to identify, pursue and eliminate threats to the safety of this country and her citizens. Data mining, controversial aspects of the USA Patriot Act, the establishment of Military Commissions and tremendous leeway in the treatment of terrorists and suspected terrorists have all been sought in the name of fighting the war on terror.

I am one who believes that Congress has been correct in granting much of the power sought because of the need to deal with a new kind of enemy in an age of technological advancements that might otherwise have given our enemies an advantage that we could not match. The foiling of numerous follow-up attempts by terrorist elements and the fact that we have successfully avoided another attack on our citizens within our borders is testimony to the effective way in which those charged with our protection have pursued their mission using the traditional and newly granted powers available to them.

On the other hand, I believe it is wise at all times to look at any request for more governmental power critically if not cynically. Those charged with protecting us naturally want all the power and flexibility they can get to pursue their mission and forget that in protecting us there always exists the danger that they and we will forget or damage the essence of what we are and what they are trying so desperately to protect.

Throughout our history, there have been those who in times of danger have been all too willing to trade some of the freedoms that make up the core of the American experiment for just a little more security and those charged with providing that security

have always been ready and willing to broker the exchange. They are willing because they believe in their mission and want to do all that is humanly possible to accomplish that mission and there is little doubt that traditional, constitutional and legal strictures designed to protect the rights of the innocent and guilty alike make their job a little harder than might be the case if they didn't have to observe those limits. But it is those guarantees and those limits on the power of government that make this country unique in world history. It is that uniqueness that they are charged with protecting.

A few days after the terrorist attacks in New York and here, then Defense Secretary Don Rumsfeld said that if we changed the way we live as a result of the terrorist threat we face, the terrorists will have won. The question we have to ask as we pursue victory over those who would destroy our way of life and the values that make our way of life possible is whether the steps we take to achieve victory risk the destruction of who we are. It is vital that we preserve the traditional American constitutional and common law rights that have made our regard for human liberty unique in world history.

Earlier this year, I was pleased to join with a broad, bipartisan group of more than forty-five legal and policy experts in a statement urging restoration of the *habeas* jurisdiction stripped by the MCA. I have enclosed the statement, which was issued by members of the Constitution Project's Liberty and Security Committee and the Project's Coalition to Defend Checks and Balances. The statement notes that *habeas corpus* rights are most critical in situations of executive detention without charge and that these rights represent the essence of the American legal system.

Throughout our nation's history, the "Great Writ of *Habeas Corpus*" has served as a fundamental safeguard for individual liberty by enabling prisoners to challenge their detentions and to obtain meaningful judicial review by a neutral decision maker. *Habeas corpus* rights have been recognized for non-citizens as well as citizens. Thus, in 2004, in the case *Rasul v. Bush,* the United States Supreme Court upheld the jurisdiction of federal courts to hear *habeas corpus* petitions filed by Guantanamo detainees to challenge the lawfulness of their indefinite detentions.

However, the MCA passed by Congress last fall included a provision eliminating *habeas corpus* for certain aliens held by the United States as "enemy combatants." Although I agree that our government must and does have the power to detain foreign

terrorists to protect national security, repealing federal court jurisdiction over *habeas corpus* does not serve that goal. It is crucial that we maintain *habeas corpus* to ensure that we are detaining the right people and complying with the rule of law.

In fact, *habeas corpus* review is especially important now *because of* the particular nature of the current "war on terrorism." Studies of the Defense Department's own documents show that the majority of the Guantanamo detainees were not captured on the battlefield, and many were turned in by bounty hunters.

Moreover, this conflict has no foreseeable end, which means, quite simply, that our government is claiming the power to imprison people without charge indefinitely, potentially forever. *Habeas* review can help separate the "wheat" from the "chaff" and ensure that our government only detains people when it has a proper legal and factual basis for doing so. If we are to hold people indefinitely without charge, we should at the very least ensure there is a meaningful process to determine that we are holding the right people.

The executive branch argues that it has provided an adequate substitute for *habeas* review through the Combatant Status Review Tribunal ("CSRT") hearings and the limited review of these decisions by the U.S. Court of Appeals for the D.C. Circuit. This claim is absurd. The token review provided by the CSRT process does not even approach the meaningful judicial review that would be provided by restoration of *habeas corpus*. First, the CSRT process lacks the basic hallmarks of due process. Among other problems, it relies on secret evidence, denies detainees the chance to present evidence in their favor, and prohibits the basic right of the assistance of counsel. In addition, the process permits the tribunal to rely on evidence obtained by coercion. Second, the D.C. Circuit's review is limited to what will inevitably be an inherently flawed record created by the CSRT. Unlike a U.S. district court judge hearing of a *habeas corpus* petition, the D.C. Circuit cannot consider evidence or make its own findings of fact, and, therefore, it cannot rectify the CSRT's inherent procedural flaws.

Restoring *habeas corpus* is also important to protecting Americans overseas. The United States cannot expect other nations to afford our citizens the basic guarantees provided by *habeas corpus* unless we provide those guarantees to others. America's detention policy has undermined its reputation in the international community and

weakened support for the fight against terrorism, particularly in the Arab world. Restoring *habeas corpus* would help repair the damage and demonstrate America's commitment to a tough, but rights-respecting counter-terrorism policy.

Having said this, however, I am concerned not so much by what others might think of us or do as a result of our policies, but of what the cavalier dismissal of fundamental rights says about who we are.

Therefore, I urge Congress to restore the *habeas corpus* jurisdiction that was eliminated by the Military Commissions Act because of who we are and what this great nation represents. Congress should act to preserve our constitutional system of checks and balances, and restore this established and traditional avenue of judicial review.

Statement of Senator Edward M. Kennedy
on the Writ of Habeas Corpus
Tuesday, May 22, 2007

The writ of habeas corpus protects one of our most fundamental guarantees: that the Executive may not arbitrarily deprive persons of liberty. This Administration has consistently undermined this protection, arguing that neither the Constitution nor statutory habeas applies to enemy combatants held at Guantanamo Bay and elsewhere. It's an affront to the rule of law, and it's almost surely unconstitutional.

For centuries, the writ of habeas corpus has been a cornerstone of the rule of law in Anglo-American jurisprudence. Since the Second Magna Carta in 1679, it has served as a primary means to challenge unlawful government detention. Literally, the writ means "have a body," i.e. the person detained, brought before a court or judge to consider the legality of the detention. The writ was used to prevent indefinite detention and ensure that individuals could not be held long without indictment or trial. It requires the government to persuade, a court that it has, a legal basis for decision, to deprive persons of their liberty.

The Framers considered this principle so important that the writ of habeas corpus is the only common law writ enshrined in the Constitution. Article I, Section 9, Clause 2, specifically states, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

9/11 was a tragic day for our country, but we did not set aside the Constitution or the rule of law after those vicious attacks. We did not decide as a nation to stoop to the level of the terrorists. In fact, we have always been united in our belief that an essential part of winning the war on terrorism and protecting the nation is safeguarding the values that Americans stand for, both at home and around the globe.

Instead of standing by these principles, however, the Administration used 9/11 to justify abandoning this and other basic American values. It claimed that persons labeled enemy combatants in the war in Afghanistan were not subject to the basic human rights protections of the Geneva Conventions, which Alberto Gonzales described as "quaint." In the Bybee Torture Memorandum, the Administration took the outrageous position that torture was limited to conduct that caused pain equivalent to, "organ failure, impairment of bodily function, or even death." When the President grudgingly signed the Detainee Treatment Act prohibiting cruel, inhumane and degrading treatment of detainees, he issued a signing statement indicating he would ignore the law whenever he saw fit.

The Administration also established detention facilities outside the U.S. to avoid the reach of U.S. courts and basic legal protections. It planned to hold these combatants indefinitely and try them in Executive-run military commissions. These commissions have severely limited the rights of alleged enemy combatants. Accused individuals have no access to the evidence which the government claims it possesses and no ability to mount a meaningful defense. The tribunals are a sham and an insult to the rule of law.

Following the Supreme Court's repudiation of the Administration's effort to evade the jurisdiction of U.S. courts in *Hamdi v. Rumsfeld*, the Administration convinced Congress to add language to the Detainee Treatment Act which attempted to strip the Supreme Court of jurisdiction over habeas corpus petitions by detainees at Guantanamo Bay.

The Administration's lawlessness failed again. The Supreme Court in *Hamdan v. Rumsfeld* held that the Court retained jurisdiction and that the military commissions did not satisfy the Geneva Conventions. Justice Stevens reminded the Administration that "in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law." Sadly, the Administration and Congress responded by reauthorizing military tribunals and stripping courts of jurisdiction to hear habeas petitions from enemy combatants.

Today, our government continues to subject detainees held as enemy combatants at Guantanamo Bay and elsewhere to unfair Combatant Status Review Tribunals and military commissions. As a result, hundreds have no access to Article 3 courts. The Administration asserts the right to hold them indefinitely. The result has been disastrous, both at home and abroad. As a first step, we should restore access to the writ of habeas corpus, one of our most fundamental guarantees. I thank the Chairman for convening this important hearing to start us down the road to restoration of this most cherished right.

Statement of Orin S. Kerr
Professor of Law, George Washington University Law School
Before the Senate Judiciary Committee
May 22, 2007

Mr. Chairman and members of the Committee, my name is Orin Kerr, and I am a professor of law at George Washington University Law School. I am honored to have been invited to testify today about habeas corpus jurisdiction over the claims of alien detainees held at Guantanamo Bay.

I will make two points. First, it appears likely that the Supreme Court would hold that the writ of habeas corpus must be available to the detainees as a matter of constitutional law. Second, if this is true, then the Constitution requires a judicial forum that provides the detainees with an effective opportunity to test the legality of their detention. It is uncertain but unlikely that the judicial review presently available to the detainees is adequate to satisfy this standard. Taking these two points together, there is a significant possibility that the absence of habeas corpus jurisdiction over the detainee claims at Guantanamo Bay violates the Suspension Clause of the Constitution.

1. The Writ of Habeas Corpus and Guantanamo Bay

My first point, that the Supreme Court would likely hold that the writ must be available to the detainees, is based on the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004). In *Rasul*, the Supreme Court held that the then-existing version of 28 U.S.C. § 2241 provided a statutory basis for extending habeas jurisdiction to the claims of alien detainees held at Guantanamo Bay. Importantly, the Court's holding in *Rasul* was statutory rather than constitutional. Specifically, the Court held that § 2241 provided federal jurisdiction over the detainees' claims because their custodians were "within the[] respective jurisdictions" of federal district courts. At the same time, the opinions filed in the case contain language suggesting that a majority of the Court considers Guantanamo Bay to be part of United States territory for purposes of the writ of habeas corpus. If so, the writ of habeas corpus must extend to the detainees at Guantanamo Bay absent a valid suspension of the writ.

Three passages in the *Rasul* opinions suggest this result. The first appears in the majority opinion by Justice Stevens – which was joined by Justices O'Connor, Souter, Ginsburg, and Breyer – in a section discussing whether a presumption exists against extraterritorial application of the habeas statutes. According to the Court's opinion, the

answer was not relevant because Guantanamo Bay is within the United States' territorial jurisdiction:

> Whatever 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. Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 69 S.Ct. 575, 93 L.Ed. 680 (1949). By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934 Treaty, Art. III.

Rasul, 542 U.S. at 480-81.

The second passage suggesting a constitutional requirement of habeas corpus jurisdiction at Guantanamo Bay appears on the next page of the majority opinion, in a discussion of whether allowing jurisdiction over the detainees' claims was consistent with the history of the writ. Justice Stevens' opinion for the Court concluded that habeas jurisdiction over the detainee claims was indeed consistent with history:

> Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm, as well as the claims of persons detained in the so-called "exempt jurisdictions," where ordinary writs did not run, and all other dominions under the sovereign's control. As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." King v. Cowle, 2 Burr. 834, 854-855, 97 Eng. Rep. 587, 598-599 (K.B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." Ex parte Mwenya, [1960] 1 Q.B. 241, 303 (C.A.) (Lord Evershed, M. R.).

Rasul, 542 U.S. at 481-82. The Court bolstered this analysis with several long footnotes, including one directly taking on Justice Scalia's contrary view that extending the writ to alien detainees at Guantanamo Bay was historically unprecedented. *See id.* at 482, n.11-n.14.

The third relevant passage in the *Rasul* opinions is Justice Kennedy's separate concurring opinion. Justice Kennedy rejected the statutory interpretation of the *Rasul* majority and instead addressed the constitutional question. In his view, federal courts

had jurisdiction over the detainees' claims in large part due to the specific status of Guantanamo Bay. Justice Kennedy explained:

> Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S.-Cuba, Art. III, T.S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it.

542 U.S. at 487 (Kennedy, J., concurring).

What do these three passages tell us? They indicate that a majority of the current Justices – specifically, Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer – views Guantanamo Bay as part of the United States for habeas purposes. They indicate that a majority of the current Justices likely would hold that the writ of habeas corpus must therefore extend to Guantanamo Bay as a matter of constitutional law. If so, the writ or its equivalent must be made available to the detainees.

It is true that a divided panel of the D.C. Circuit recently reached a contrary result. *See Boumediene v. Bush*, 476 F.3d 981 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007). However, the reasoning in that decision is in obvious tension with the Supreme Court's language in *Rasul*. In *Boumediene*, the D.C. Circuit concluded that Guantanamo Bay is part of Cuba, not the United States, and that application of the habeas statute to persons detained at the base would not be consistent with the historical reach of the writ of habeas corpus. Judge Randolph rejected the relevance of *Rasul* in a short footnote. *See id.* at 992 n.10. Although the Supreme Court denied certiorari in *Boumediene* for procedural reasons, it seems highly likely that the Court will agree to resolve this issue in a future case. Given that Judge Randolph's approach in *Boumediene* is in obvious tension with the language found in the majority and concurring opinions in *Rasul*, it seems likely that a majority of the Supreme Court will view the case differently than did the D.C. Circuit in *Boumediene*.

2. Providing an "Adequate and Effective" Forum

If the detainees at Guantanamo Bay have a constitutional right to the writ of habeas corpus, Congress must provide a judicial forum that will provide the detainees

with an effective opportunity to litigate the legality of their detention. Congress cannot withdraw the writ unless it provides an "adequate and effective" alternative remedy, Swain v. Pressley, 430 U.S. 372 (1977), or else Congress suspends the writ "in Cases of Rebellion or Invasion." U.S. Const. Art I. Sec 9, Cl. 2. Because there is broad agreement that Congress has not suspended the writ under the Suspension Clause, the key question is whether Congress's alternative means of judicial review of executive detention are "adequate and effective."

Although courts have not explained in detail what makes an alternative collateral remedy adequate and effective, existing precedents suggest that an adequate and effective collateral remedy is a remedy that provides the substantial equivalent of a traditional habeas writ. Put another way, alternatives to habeas corpus are "adequate and effective" only when they largely recreate the opportunities conferred by the traditional form of habeas relief. *See, e.g.,* Sanders v. United States, 373 U.S. 1, 14 (1963) (stating in *dictum* that the creation of any "substantial procedural hurdles" which made a remedy "less swift and imperative" than the traditional writ of habeas corpus would engender "the gravest constitutional doubts" under the Suspension Clause); United States v. Hayman, 342 U.S. 205 (1952) (suggesting that a judicial hearing without the presence of the detainee was not adequate and effective remedy); Pressley, 430 U.S. at 384 (concluding that vesting collateral relief in judges that lack life tenure does not render an otherwise-identical remedy "inadequate and ineffective"); Alexandre v. U.S. Attorney General, 452 F.3d 1204, 1205-06 (11th Cir.2006) (holding that 2005 provisions of REAL ID Act concerning alien deportation that provides alternative mechanisms for challenging deportation "does not violate the Suspension Clause of the Constitution because it provides. . . the same review as that formerly afforded in habeas corpus").

Does the form of judicial review presently provided to the detainees satisfy this standard? The answer is uncertain today for two reasons. First, it remains very unclear what the detainees' substantive or procedural rights may be, if any, rendering it difficult to know whether the provisions of current law are adequate to vindicate them. It is possible that the detainees have no rights, but it is possible that they do. *Compare* Khalid v. Bush, 355 F. Supp.2d 311 (D.D.C. 2005) *with* In re Guantanamo Detainee Cases, 355 F. Supp.2d 443 (D.D.C. 2005). If the detainees have some rights, the extent of those rights may hinge on where individual detainees were captured, how long they have been held, and the status of ongoing military operations at the time judicial review is sought. *See* Boumediene v. Bush, 127 S. Ct. 1478, 1479 (2007) (Breyer, J., joined by Souter, J., and Ginsburg, J., dissenting from the denial of certiorari).

Second, the scope of judicial review currently afforded the detainees remains uncertain. The key provision is Section 1005 of the Detainee Treatment Act (DTA) or 2005, Pub.L. 109-148. The DTA lodges exclusive jurisdiction in the D.C. Circuit, but it does not explain what procedures the D.C. Circuit must use to review determinations of the Combatant Status Review Tribunals (CSRTs). The D.C. Circuit has only just begun to hear cases on what kind of procedures it will follow to review CRST decisions. Just last week, the D.C. Circuit held oral argument in *Bismullah v. Gates* (06-1197) and

Parhat v. Gates (06-1397). Those combined cases may help determine the scope of the D.C. Circuit's review, and in particular the scope of the record the D.C. Circuit will use. Without knowing what procedures the D.C. Circuit will follow, and without knowing what rights the individual detainees have, any effort to determine whether the procedures are adequate to adjudicate those rights must be speculative.

Despite these uncertainties, there are very significant reasons to doubt that the DTA provides a constitutionally adequate form of judicial review. The reason is that "adequate and effective" collateral remedies mean adequate and effective *judicial* remedies. For purposes of the Suspension Clause, the constitutional question is whether the scope of *judicial review* of the executive detention is adequate and effective, not whether the process received by the detainees is adequate and effective. By its terms, however, the DTA permits only a very limited role for Article III courts. According to the DTA, the D.C. Circuit can only inquire as to two questions when reviewing the CSRT's decisions:

> (i) whether the status determination of the Combatant Status Review Tribunal with regard to such alien was consistent with the standards and procedures specified by the Secretary of Defense for Combatant Status Review Tribunals (including the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence); and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.

DTA, § 1005(e)(2)(c).

Judicial review provided by § 1005(e)(2)(c)(i) is very narrow. The CSRT procedures do not resemble those of a trial. The detainee is not represented by an advocate, and the detainee's access to evidence is sharply limited. As a result, judicial review limited to whether the status determination complied with the rules for CSRTs is not the same as judicial review of whether the detainee is in fact an enemy combatant.

Judicial review provided by § 1005(e)(2)(c)(ii) is potentially much broader, but may also be insufficient. Even assuming that § 1005(e)(2)(c)(ii) permits the D.C. Circuit to review fully the legal and constitutional adequacy of the CSRT proceedings, by its terms this language does not appear to permit the D.C. Circuit to consider what standards and procedures *in federal court* are needed to vindicate the detainees' rights. If adjudicating the detainee's legal claims requires hearings in federal court beyond the narrow bounds of that provided in § 1005(e)(2)(c), it seems that the DTA does not allow them. This is all the more problematic given that the DTA lodges judicial review in an appellate court, the D.C. Circuit, instead of a trial court. A trial court has standard procedures for collecting evidence and developing a record. An appellate court does not.

As a result, 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.

Restoring statutory habeas right at Guantanamo Bay would resolve these legal uncertainties. If Congress does not restore habeas rights at Guantanamo Bay, there is a significant possibility that its removal of habeas jurisdiction over the detainee claims at Guantanamo Bay will be held to violate the Suspension Clause of the Constitution.

Thank you again for the opportunity to testify today. I look forward to your questions.

STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON
"RESTORING HABEAS CORPUS:
PROTECTING AMERICAN VALUES AND THE GREAT WRIT"
MAY 22, 2007

Today, the Judiciary Committee turns its attention to a top legislative priority that the Ranking Member and I have set for this year: Restoring the Great Writ of habeas corpus, and the accountability and balance it allows. I thank our distinguished panel of witnesses for appearing here today. They illustrate the broad agreement among people of diverse political beliefs and backgrounds that the mistake committed in the Military Commissions Act of 2006 must be corrected.

Habeas corpus was recklessly undermined in last year's legislation. Senator Specter and I urged caution before taking that dangerous step, but fell just a few votes shy on our amendment to restore these protections. It is now six months later with the election behind us. I hope that the new Senate will reconsider this historic error in judgment and set the matter right. It is urgent that we restore our legal traditions and reestablish this fundamental check on the ability of the Government to lock someone away without meaningful judicial review of its action. The time to act is now.

I commend Senator Specter, who feels as passionately as I do about this issue, for helping to plan this hearing. Senator Specter and I together introduced the Habeas Corpus Restoration Act of 2007, (S.185), on the first day of this Congress. This bipartisan bill has 16 co-sponsors.

The Military Commissions Act, passed hastily in the weeks leading up to last year's election, was a profound mistake, and its elimination of habeas corpus rights was its worst error. Like the internment of Japanese Americans during World War II, the elimination of habeas rights was an action driven by fear and another stain on America's reputation in the world.

Justice Scalia wrote in the *Hamdi* case: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." The remedy that secures that most basic of freedoms is habeas corpus. It provides a check against arbitrary detentions and constitutional violations.

This Great Writ is the legal process that guarantees an opportunity to go to court and challenge the abuse of power by the Government. The Military Commissions Act rolled back these protections by eliminating that right, permanently, for any non-citizen labeled an enemy combatant. In fact, a detainee does not have to found to be an enemy combatant; it is enough for the Government to say someone is "awaiting" determination of that status.

The sweep of this habeas provision goes far beyond the few hundred detainees currently held at Guantanamo Bay, and includes an estimated 12 million lawful permanent

residents in the United States today. These are lawful residents of the United States, people who work and pay taxes, people who abide by our laws and should be entitled to fair treatment. These are people we have traditionally welcomed to our shores and invited to experience the freedoms that made America the most admired country in the world. Under this law, any of these people can be detained, forever, without any ability to challenge their detention in court. I look forward to hearing from Professor Cuellar and others who can elaborate on this disastrous change, and its potentially disproportionate impact on the Latino population, which accounts for so many of the country's hard-working legal immigrants.

Since last fall, I have been talking about a nightmare scenario in which a hard-working legal permanent resident who makes an innocent donation to a charity, perhaps a Muslim charity, to help poor people around the world in the finest American tradition. Maybe that charity is secretly suspected by the Government to have a tie, however tenuous, to terrorist groups. Based on that suspected "tie," perhaps combined with an overzealous neighbor reporting "suspicious behavior," having seen people of a different culture visiting, or with information secretly obtained from a cursory review of the person's library borrowings, the permanent resident could be brought in for questioning, denied a lawyer, confined, and even tortured. Such a person would have no ability to go to court to plead his or her innocence – for years, for decades, forever.

This is the kind of "disappearance" that America has criticized and condemned in parts of the world ruled by autocratic regimes. That is not America. When I first spelled out this nightmare scenario, many people viewed it as a far-fetched hypothetical, but sadly it was not.

Last November, just after enactment of these provisions, this was confirmed by the Department of Justice in a legal brief submitted in federal court in Virginia. The U.S. Government, seeking to dismiss a detainee's habeas case, said that the Military Commissions Act allows the Government to detain any non-citizen designated as an enemy combatant without giving that person any ability to challenge his detention in court. And this is not just at Guantanamo Bay for those whom this Administration likes to call the worst of the worst. The Justice Department said it is true even for someone arrested and imprisoned in the United States.

I was shocked when Attorney General Gonzales maintained at a hearing earlier this year that our Constitution does not provide a right to habeas corpus. But more damaging was the Senate's decision over our opposition to remove this vital check that our legal system provides against the Government arbitrarily detaining people for life without charge. This is wrong. It is unconstitutional. It is un-American

We all want to make America safe from terrorism. But I implore those who supported this change to think about whether eliminating habeas truly makes America safer in the world, and whether it comports with the values, liberties, and legal traditions we hold most dear. I hope this hearing will help convince all in Congress that it does none of those things.

Our leading military lawyers, like Admiral Guter, tell us that eliminating key rights for detainees hinders the safety of our troops and the effectiveness of our defense. Diplomats and foreign policy specialists, like Mr. Taft, tell us that eliminating habeas rights reduces our influence in the world. Immigration attorneys and academics tell us that our Nation's hard-working immigrants are at risk from this change.

Top legal scholars, and conservatives like Kenneth Starr, Professor Richard Epstein, and David Keene, head of the American Conservative Union, agree that this change betrays centuries of legal tradition and practice. Professor David Gushee, head of Evangelicals for Human Rights, submitted a declaration signed by evangelical leaders nationwide, which refers to the elimination of habeas rights and related changes as "deeply lamentable" and "fraught with danger to basic human rights."

Senator Specter and I have both supported the notion of effective and efficient military tribunals to bring terrorists to justice. Long before this Administration had to be ordered by the Supreme Court to revisit its unilateral practices, both Senator Specter and I had introduced military commission legislation in 2002.

The elimination of basic legal rights undermines, not strengthens, our ability to achieve justice. It is from strength that America should defend our values and our way of life. It is from the strength of our freedoms, our Constitution, and the rule of law that we can prevail. We can ensure our security without giving up our liberty. I will keep working on this issue until we restore the checks and balances that are fundamental to preserving the liberties that define us as a Nation.

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To Members of Congress:

The undersigned retired federal judges write to express our deep concern about the lawfulness of Section 6 of the proposed Military Commissions Act of 2006 ("MCA"). The MCA threatens to strip the federal courts of jurisdiction to test the lawfulness of Executive detention at the Guantánamo Bay Naval Station and elsewhere outside the United States. Section 6 applies "to all cases, *without exception*, pending on or after the date of the enactment of [the MCA] which relate to any aspect of the detention, treatment, or trial of an alien detained outside of the United States . . . since September 11, 2001."

We applaud Congress for taking action establishing procedures to try individuals for war crimes and, in particular, Senator Warner, Senator Graham, and others for ensuring that those procedures prohibit the use of secret evidence and evidence gained by coercion. Revoking habeas corpus, however, creates the perverse incentive of allowing individuals to be detained indefinitely on that very basis by stripping the federal courts of their historic inquiry into the lawfulness of a prisoner's confinement.

More than two years ago, the United States Supreme Court ruled in *Rasul v. Bush*, 542 U.S. 466 (2004), that detainees at Guantánamo have the right to challenge their detention in federal court by habeas corpus. Last December, Congress passed the Detainee Treatment Act, eliminating jurisdiction over *future* habeas petitions filed by prisoners at Guantánamo, but expressly preserving existing jurisdiction over pending cases. In June, the Supreme Court affirmed in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), that the federal courts have the power to hear those pending cases. These cases should be heard by the federal courts for the reasons that follow.

The habeas petitions ask whether there is a sufficient factual and legal basis for a prisoner's detention. This inquiry is at once simple and momentous. Simple because it is an easy matter for judges to make this determination – federal judges have been doing this every day, in every courtroom in the country, since this Nation's founding. Momentous because it safeguards the most hallowed judicial role in our constitutional democracy – ensuring that no man is imprisoned unlawfully. Without habeas, federal courts will lose the power to conduct this inquiry.

We are told this legislation is important to the ineffable demands of national security, and that permitting the courts to play their traditional role will somehow undermine the military's effort in fighting terrorism. But this concern is simply misplaced. For decades, federal courts have successfully managed both civil and criminal cases involving classified and top secret information. Invariably, those cases were resolved fairly and expeditiously, without compromising the interests of this country. The habeas statute and rules provide federal judges ample tools for controlling and safeguarding the flow of information in court, and we are confident that Guantánamo detainee cases can be handled under existing procedures.

Furthermore, depriving the courts of habeas jurisdiction will jeopardize the Judiciary's ability to ensure that Executive detentions are not grounded on torture or other abuse. Senator John McCain and others have rightly insisted that the proposed military commissions established to try terror suspects of war crimes must not be permitted to rely on evidence secured by unlawful coercion. But stripping district courts of habeas jurisdiction would undermine this goal by permitting the Executive to detain without trial based on the same coerced evidence.

Finally, eliminating habeas jurisdiction would raise serious concerns under the Suspension Clause of the Constitution. The writ has been suspended only four times in our Nation's history, and never under circumstances like the present. Congress cannot suspend the writ at will, even during wartime, but only in "Cases of Rebellion or Invasion [when] the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. Congress would thus be skating on thin constitutional ice in depriving the federal courts of their power to hear the cases of Guantánamo detainees. At a minimum, Section 6 would guarantee that these cases would be mired in protracted litigation for years to come. If one goal of the provision is to bring these cases to a speedy conclusion, we can assure you from our considerable experience that eliminating habeas would be counterproductive.

For two hundred years, the federal judiciary has maintained Chief Justice Marshall's solemn admonition that ours is a government of laws, and not of men. The proposed legislation imperils this proud history by abandoning the Great Writ to the siren call of military necessity. We urge you to remove the provision stripping habeas jurisdiction from the proposed Military Commissions Act of 2006 and to reject any legislation that deprives the federal courts of habeas jurisdiction over pending Guantánamo detainee cases.

Respectfully,

Judge John J. Gibbons
U. S. Court of Appeals for the Third Circuit (1969 – 1987)
Chief Judge of the U.S. Court of Appeals for the Third Circuit (1987 – 1990)

Judge Shirley M. Hufstedler
U. S. Court of Appeals for the Ninth Circuit (1968 – 1979)

Judge Nathaniel R. Jones
U. S. Court of Appeals for the Sixth Circuit (1979 – 2002)

Judge Timothy K. Lewis
U. S. District Court, Western District of Pennsylvania (1991 – 1992)
U. S. Court of Appeals for the Third Circuit (1992 – 1999)

Judge William A. Norris
U.S. Court of Appeals for the Ninth Circuit (1980 – 1997)

Judge George C. Pratt
U. S. District Court, Eastern District of New York (1976 – 1982)
U. S. Court of Appeals for the Second Circuit (1982 – 1995)

Judge H. Lee Sarokin
U.S. District Court for the District of New Jersey (1979 – 1994)
U.S. Court of Appeals for the Third Circuit (1994 – 1996)

William S. Sessions
U.S. District Court, Western District of Texas (1974 – 1980)
Chief Judge of the U.S. District Court, Western District of Texas
(1980 – 1987)

Judge Patricia M. Wald
U.S. Court of Appeals for District of Columbia Circuit (1979 – 1999)
Chief Judge of the U.S. Court of Appeals for District of Columbia Circuit
(1986 – 1991)

Testimony of David B. Rivkin, Jr.
Partner, Baker & Hostetler LLP

Senate Committee on the Judiciary

Tuesday, May 22, 2007

I would like to thank the Senate Committee on the Judiciary for inviting me to share my views at the hearing on "Restoring Habeas Corpus: Protecting American Values and the Great Writ." Fundamentally, I believe that the current Military Commissions Act of 2006 ("MCA") and the Detainee Treatment Act ("DTA") comport with the United States Constitution, exceed the applicable international law of armed conflict ("LOAC") standards, and are well in line with America's constitutional tradition and values. Accordingly, any "restoration" would be providing unlawful enemy combatants and alleged unlawful enemy combatants with far more process than they have been entitled to in U.S. history.

The MCA and DTA procedures are streamlined, yet fair. They provide detainees with judicial process that is more than sufficient to enable them to mount a meaningful challenge at the appropriate time to their detention. These procedures are constitutionally sufficient and give to the detainees far more due process than they have had under any other "competent tribunals" convened under the Geneva Conventions in the past, or in any past Military Commission.

Under the current system, the United States Court of Appeals for the District of Columbia Circuit is the exclusive venue for handling any legal challenges by detainees. The DTA and MCA also limit the Court to exercising jurisdiction until after a CSRT or Military Commission has exercised a final decision, and limit judicial review essentially to two questions: whether the CSRT or Military Commission operated consistent with the rules and standards adopted by it, and whether the CSRT or Military Commission reached a decision that is "consistent with the Constitution and laws of the United States."

In my view, this scope of judicial review is not only sufficient for non-citizens held abroad, but is constitutionally sufficient for United States citizens themselves. In this regard, the fact that the review does not commence at the district court level, and does not follow in all particulars the existing federal statutory habeas procedures codified at 28 U.S. § 2241, is constitutionally unexceptional. Indeed, it certainly does not constitute a suspension of habeas

corpus. This proposition is well-established by the existing Supreme Court precedents. For example, in *Swain v. Pressley*, 430 U.S. 372, 381 (1977), the Supreme Court stated that "the substitution [for a traditional habeas procedure] of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus." More recently, the Supreme Court held in *INS v. St. Cyr*, 533 U.S. 289, 314 (2001), that this habeas-type review could be had in a United States court of appeals. Hence, the DTA and MCA set up a perfectly permissible form of statutorily-conferred habeas review by the D.C. Circuit.

Also, contrary to the critics' assertions that the current habeas system is deficient because it does not allow for the judicial review of factual issues, I believe that the D.C. Circuit and Supreme Court are not limited to reviewing merely the legality of CSRT or Military Commission procedures. Under *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), it is unconstitutional to bring civilians before Military Commissions or to hold them as enemy combatants if civilian Article III courts are open and functioning. Accordingly, a detainee should be able to claim that he is not, in fact, an enemy combatant, and the relevant factual record of the CSRT or the Military Commission would be judicially reviewable. In this regard, the DTA and MCA language clearly allows such a review and the D.C. Circuit will have access to the entire factual record, generated by a CSRT or Military Commission, including the classified portions thereof.

Indeed, this is the same type of review given to Nazi saboteurs (of whom at least one was a U.S. citizen) in *Ex Parte Quirin*, 317 U.S. 1 (1942), where the Supreme Court rejected their contention that they were civilians, not subject to military jurisdiction. It is also supported by the Supreme Court's recent opinion in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which emphasizes that the government needs to provide "credible evidence" that the detainee is, in fact, an enemy combatant, and the burden then shifts to the detainee to offer more persuasive evidence that he is not an enemy combatant. To be sure, habeas review of this factual determination should not be *de novo*, but instead should be based on the Supreme Court's "credible evidence" standard. This concept comports both with the U.S. Constitution and LOAC.

Recently, the D.C. Circuit upheld the constitutionality of the MCA against attack by detainees, who were asserting preexisting habeas claims in *Boumediene v. Bush*, No. 05-5062 (D.C. Cir. 2007), *cert. den'd*, 547 U.S. ___ (2007), against challenges that the scheme violates the Constitution's "Suspension Clause," which states that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended,

unless in cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2. In the case of the *Boumediene* petitioners, it is my understanding that these detainees have all had their status reviewed and confirmed by CSRTs, and now have separate habeas corpus actions in the D.C. Circuit challenging their detention.

I would also like to address briefly the procedures used by CSRTs and Military Commissions. While many have criticized the procedures used by these bodies, the practical realities of the situation support the current DTA and MCA procedures. The fact is that, throughout history, it has been difficult to distinguish between irregular combatants and civilians. That is part of the reason why Taliban and al Qaeda members do not make themselves known. And, true to form, nearly all detainees claim to be shepherds, students, pilgrims, or relief workers, collude amongst themselves to support their stories, and name persons thousands of miles away who can "verify" that they are not enemy combatants.

Accordingly, the only appropriate point of reference for assessing the sufficiency of procedures used by the CSRTs and Military Commissions is their historical and international counterparts – Tribunals organized under Article 5 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War of August 12, 1949 to identify enemy combatants, and the Military Commissions used by the United States in, and in the aftermath of, World War II. Here, it is undisputed that the CSRTs and Military Commissions offer far more process to the Guantanamo detainees than either Article 5 Tribunals or World War II-style Military Commissions.

To be sure, if you compare the CSRTs and Military Commissions to civilian courts, they undoubtedly feature more austere procedures. However, the CSRTs and Military Commissions are meant to address a military reality that is quite different and distinct from the realities of the criminal justice system, and it does disservice both to our legal traditions and to the "rule of law" to pretend otherwise. The simple fact is that up to today, our legal institutions have recognized the propriety of using specialized military bodies in time of war, where civilian courts lack competence. This should continue.

The fact that DOD also holds on an annual basis Administrative Review Boards ("ARBs"), which focus primarily on the question of whether detainees held in U.S. custody pose continued danger and whether viable alternatives exist to their continued detention further underscores the extent to which the United States has opted to provide captured enemy combatants with additional rights, that go above

and beyond those required under LOAC or the Constitution. The current U.S. practice of releasing captured enemy combatants before the end of hostilities is historically unprecedented, since the notion of enabling captured enemy combatants to be released "on parole" fell out of practice by the late 19th Century.

Similarly, persons determined to be unlawful enemy combatants have historically been punished harshly irrespective of the extent to which they personally were involved in any specific combat activities, primarily because unlawful combatancy was viewed a supremely dangerous phenomenon, to be suppressed and delegitimized. By contrast, the current U.S. practice has been not to prosecute, at least so far, the vast majority of individuals determined to be unlawful enemy combatants. The fact that this procedural and substantive generosity has not been widely hailed and appears not to even been noticed by most of the critics is unfortunate.

Finally, I would like to comment briefly on one aspect of the various schemes being considered to effect the so-called restoration of habeas corpus for captured unlawful enemy combatants. As I understand it, S. 576, the "Restoring the Constitution Act of 2007" is the leading vehicle for bringing about this result. In my view, the Act's repeal of the MCA and DTA-related revisions to 28 U.S.C. § 2241, the federal habeas corpus statute, is particularly ill-advised at this time. This is because all, or nearly all, Guantanamo-based detainees currently have habeas corpus petitions challenging their status determination pending in the D.C. Circuit. These petitions were stayed pending the resolution of the pre-existing habeas petitions, which were dismissed in *Boumediene*. As a result, the D.C. Circuit will begin reviewing CSRT decisions shortly, and the detainees will have received judicial review of their determinations in the relatively near future, with Supreme Court review also almost certainly forthcoming.

The Restoring the Constitution Act or any other similar legislative vehicles would almost certainly short-circuit this process, very likely leading to vexatious litigation about what is being reviewed in what habeas corpus petition, the effects of preclusion doctrines on subsequent habeas petitions, and the like. I would respectfully urge the Senate not to proceed down this path, but instead wait for final judicial resolution of pending habeas corpus petitions before acting further.

TESTIMONY OF
WILLIAM H. TAFT, IV
SENATE COMMITTEE ON THE JUDICIARY
MAY 22, 2007

Mr. Chairman and Members of the Committee:

I am pleased to appear in response to your invitation to discuss the provisions of the Military Commissions Act relating to judicial review of the detention of persons at Guantanamo Bay. I testified recently on this subject before the House Committee on Armed Services. I welcome the interest that both houses of Congress are taking in this matter.

Briefly, I believe it was a mistake for Congress to take away from the detainees at Guantanamo the ability to obtain judicial review by habeas corpus of the lawfulness of their detention, and I recommend that Congress restore it.

As I understand it, under present law detainees convicted by military commissions may obtain judicial review of their convictions after their criminal cases are concluded, and persons who are not charged with crimes, or have perhaps been acquitted of crimes, but detained as enemy combatants pursuant to determinations of their status by Combatant Status Review Tribunals may obtain review of those determinations. That review, however, does not accord the detainee the same opportunity to challenge his detention that he would have in a normal habeas corpus proceeding. Before the enactment of the Military Commissions Act last year, detainees were entitled under the Supreme Court's interpretation of the relevant authorities to have the lawfulness of their detention reviewed after filing petitions for habeas corpus. The benefits of this displaced procedure were considerable, not so much for the detainees in Guantanamo–none of whom was released by a court -- as for establishing beyond argument the legitimacy of holding persons who continued to present a threat to the United States as long as the terrorists continue to pursue their war against us.

It should be recalled, in considering this question, that the Supreme Court has on two occasions affirmed the lawfulness of detaining persons captured in the conflict with al Qaeda and

the Taliban as long as they pose a threat to the United States. This is black letter law of war. Prior to the enactment of the Military Commissions Act, consistent with this principle, no court had ordered the release of any of the detainees. Nor will they do so as long as it is shown that the detainee poses a threat in the ongoing conflict. Currently, this determination is made by the military with only very limited judicial review of the proceedings of the Combatant Status Review Tribunal involved. Having the determination made by a court following established habeas procedures would greatly enhance its credibility and be consistent with our legal tradition.

Beyond that, providing habeas corpus review of the limited number of cases at Guantanamo will impose only a very modest burden on the courts. Fewer than four hundred people are currently detained at Guantanamo, and I understand that a substantial number of these may soon return to their own countries. By comparison, the courts handle many thousands of habeas petitions each year. As I say also, the cases are comparatively straightforward. Many detainees freely state that they would try to harm the United States if they are released. Others are known to be members of al Qaeda, have been captured while attacking our troops, or are otherwise known to pose a threat to us. In short, I have to believe that each of the detainees at Guantanamo is there for a good reason. Judicial review of such cases should be relatively uncomplicated when compared with the voluminous trial and appellate records involved in most habeas cases. In the event, however, that a court were to be presented with a case that raised serious questions about the lawfulness of detention, surely those questions should indeed be carefully considered, and no institution is better equipped by experience to do that than a court.

In proposing that we return to the system that was in place previously, I want to stress that I do not believe this issue should be treated as a constitutional one, but simply as a matter of policy. Whether Congress has the power to bar habeas review to aliens detained in Guantanamo is a question that will be resolved by the courts. My guess is that it probably does, but five justices of the Supreme Court could eventually let us all know whether I am right or not. But Congress should not want to bar the habeas review the Supreme Court found the aliens in

Guantanamo were entitled to under our statutes. It should want, instead, to have the judiciary endorse the detention of the terrorists who threaten us. For the very reason that the law of war allows us to detain persons without charging them with criminal conduct for extended periods, it is all the more important to be sure that the process for determining who those people are is beyond reproach. Unlike wars between national armies, where it's easy to tell who the enemy is, identifying those terrorists we are entitled to detain because they have declared war on us is more difficult. We should take advantage of the courts' expertise in performing this task.

One final point. The Supreme Court's decision of last summer involved detainees at Guantanamo and found that because of the special status of that installation, the habeas process was available to detainees there under our laws. It did not consider, much less determine, whether it was available in foreign lands or on the battlefield. Speaking again as a matter of policy, I think it would be entirely impractical to extend it to battlefield captures or persons being held in foreign countries in the context of an armed conflict. In the unlikely event that the Supreme Court were to decide that it did so extend, I would certainly support a statute amending the statutory provisions on which the Court relied for its conclusion.

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It is often said that the war with the terrorists calls for new approaches, melding traditional law enforcement procedures with the law of war. Guantanamo is a good example of this. The detainees there are held pursuant to the law of war, but the term of their detention is so long and indeterminate that it has many of the characteristics of a criminal punishment. The fact that each terrorist has made an individual choice to fight us, rather than being conscripted by his government, reinforces this criminal law perspective. Extending habeas review to determine the lawfulness of detaining the terrorist combatants, as has not been done in previous wars for enemy prisoners, seems to me an appropriate acknowledgement of the new situation that the conflict with the terrorists has created for us.

Mr. Chairman, thank you for this opportunity to appear before your committee. This concludes my testimony. I look forward to answering your questions.