MILITARY COMMISSIONS ACT OF 2006

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

The assistant legislative clerk read as follows:

A bill (S. 3930) to authorize trial by military commission for violations of the law of war, and for other purposes.

Pending:

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

The PRESIDING OFFICER. The Senator from Virginia.

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

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

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

Mr. LEVIN. To my side?

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

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

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

Mr. LEVIN. All time is allocated?

The PRESIDING OFFICER. Correct.

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

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

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

Mr. WARNER. Madam President, we will proceed on Specter's amendment. In due course, I will have time to comment on my colleague's 30 seconds. I want to keep this thing in an orderly progression. I would like to add the Senator from Texas, Mr. CORNYN, in the unanimous consent agreement to be recognized as one of the wrap-up speakers on those in opposition to the amendment.

I yield the floor.

The PRESIDING OFFICER. The Senator from Arizona is recognized.

Mr. KYL. Madam President, yesterday Senator SPECTER argued that one sentence in the Hamdi opinion that refers to habeas corpus rights is applicable to all 'individuals' inside the United States indicates that alien enemy combatants have constitutional habeas rights when they are held inside this country. I believe that Senator SPECTER is incorrect, for the following reasons: (1) The Hamdi plurality repeatedly makes clear that ‘the threshold question before us is whether the Executive has the authority to detain citizens who qualify as “enemy combatants.”’ The plurality expressly frames the issue before it in terms of the rights of citizens no fewer than eight times.

(2) Elsewhere the Hamdi plurality criticized a rule that would remove a detainee's right to hold someone as an enemy combatant turn on whether they are held inside or outside of the United States. The plurality characterized such a rule as creating ‘perverse incentives,’ noted that it would simply encourage the military to hold detainees abroad, and concluded that it should not create a ‘determinative constitutional difference.’

Mr. LEVIN. The same effect would, of course, be felt if enemy soldiers' habeas rights were made turn on whether they were held inside or outside of the United States. The fact that the Hamdi plurality rejected this type of geographical gamesmanship in one context casts doubt on the theory that it would work in a closely related context.

(3) Had Hamdi extended habeas rights to alien enemy combatants held inside the United States, that would have been a major ruling of tremendous consequence. Because courts typically do not hide elephants in mouseholes, cf. Whitman v. ATA, it is fair to conclude that no such groundbreaking ruling is squirreled away in one ambiguous sentence in the Hamdi plurality opinion on the floor Wednesday evening.

I presented the argument: the context casts doubt on the theory that the Hamdi plurality intended to extend habeas corpus rights to all combatants held within the United States, and concluded that it should not create a ‘determinative constitutional difference.’ The same effect would, of course, be felt if enemy soldiers' habeas rights were made turn on whether they were held inside or outside of the United States. The plurality characterized such a rule as creating ‘perverse incentives,’ noted that it would simply encourage the military to hold detainees abroad, and concluded that it should not create a ‘determinative constitutional difference.’

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I presented the argument: the Hamdi plurality cast doubt on the theory that the Hamdi plurality intended to extend habeas corpus rights to alien enemy soldiers held during wartime. Senator SPECTER responded by quoting from a passage in Justice O'Connor's plurality opinion in Hamdi v. Rumsfeld, 532 U.S. 567 (2001), that he believes establishes that alien combatants are entitled to habeas rights if they are held within the United States. That statement, towards the beginning of section III.A of the court's opinion, is a part of a statement of general principles, and concludes that, absent suspension, habeas corpus remains available to every ‘individual’ within the United States. Senator
SPECTER reads this statement, unadorned by any qualification as to whether the individual in question is a U.S. citizen, an illegal immigrant, or an alien enemy combatant, to stand for the proposition that even the latter has a constitutional right to habeas corpus when held within the United States. I would suggest that this single, ambiguous statement cannot be construed to bear that much weight, for three reasons.

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

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

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

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

Finally, Senator SPECTER's argument that the ambiguous reference to "individuals" on page 526 of Hamdi extends habeas rights to foreign enemy combatants held inside U.S. territory is inconsistent with the common sense interpretive rule that one does not "hide elephants in mouseholes." Whitman v. American Trucking Associations, 531 U.S. 457, 468 (2001). Although this rule of construction is supplied by the court to our enactments, I see no reason why its logic would not operate when applied in reverse, by members of this body to the court's opinions.

For the Hamdi court to have extended constitutional habeas rights to alien enemy soldiers held inside the United States would have been a major decision of enormous consequence to our nation's warmaking ability. As the Hamdi plurality itself noted, "determination to prevent a combatant's return to the battlefield is a fundamental incidence of waging war." As I noted yesterday, during World War II the United States detained over 425,000 enemy war prisoners inside the United States. Yet as Rear Admiral Hutson—no supporter of section 7 of the MCA—noted in his testimony at Monday's Judiciary Committee hearing, aside from one petition filed by an American of Italian descent, no habeas petitions challenging detention were filed by any of these World War II enemy combatants. It is simply inconceivable that all of the 425,000 enemy combatants held inside the United States during this period could have been allowed to sue our government in our courts to challenge their detention. And were their right to do so made to turn on whether they were held inside or outside of the United States, our Armed Forces inevitably would have been forced to accommodate them in foreign territory. And since holding enemy combatants near the war zone is neither practical nor safe, our nation's whole ability to fight a war would be made to turn on whether we would have some third country where we could hold enemy war prisoners. I would submit that this elephant of a result simply will not fit in the small space for it created by the one ambiguous passage in the Hamdi plurality opinion.

For these three reasons, I believe that Senator SPECTER is incorrect to interpret the Hamdi plurality opinion to extend constitutional habeas corpus rights to alien enemy combatants held inside the United States. Just to conclude by summarizing the point as follows: On eight separate times, the plurality opinion in Hamdi refers to the rights of citizens. That is the only reason this is what it rules on. This is our holding. At no point does it extend it to citizens. There is one sentence rather loosely framed that refers to individuals. Had the courts in that decision intended to apply the habeas right to all individuals in the United States rather than citizens, it would most assuredly have said so.

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

The PRESIDING OFFICER. The Senator from Pennsylvania is recognized.

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

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

The Senator from Arizona can argue all he wants about inferences, but that is not the case before the court. This language speaks to the rights of individuals. And Justice O'Connor knows the difference between referring to an individual or referring to a citizen or referring to an alien. And "individuals" covers both citizens and aliens.

Following the reference to individuals is the citation of the constitutional provision that you can't suspend
habeas corpus except in time of rebellion or invasion.

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

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

I yield the floor.

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

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

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

The PRESIDING OFFICER. Thirty minutes.

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

The PRESIDING OFFICER. The Senator from Vermont.

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

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

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

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

Take an example. Imagine you are a law-abiding, lawful, permanent resident, and in your spare time you do charitable giving to international relief agencies to lend a helping hand in disasters. You send money abroad to those in need. You are selecting hand in disasters. You send money to national relief agencies to lend a helping hand, and in your spare time you do charitable fundraising for international relief agencies. You do not discriminate on the grounds of religion. Then one day there is a knock on your door. The Government thinks that the Muslim charity you sent money to may be funneling money to terrorists and thinks you may be involved.

You knock on your door. The Government says the neighbor who saw a group of Muslims come to your House has reported "suspicious behavior." You are brought in for questioning.

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

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

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

As Justice Scalia stated in the Hamdi case:

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

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

Habeas corpus does not give you any new rights, it just guarantees you have a chance to ask for your basic freedom. If we pass this bill today, that will be gone for the 12 million lawful, permanent resident who live and work among us, to say nothing of the millions of other legal immigrants and visitors who we welcome to our shores each year. That will be gone for another estimated 11 million immigrants the Senate has been working to bring out of the shadows with comprehensive immigration reform.

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

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

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

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

This bill is designed instead to sweep others into the net. It would not even require an administrative determination that the Government's suspicions have a reasonable basis in fact. By its plain language, it would deny all access to the courts to any alien picked up anywhere in the world and suspected of possibly supporting enemies of the United States. That is why the definition of enemy combatant has been so expansively redefined behind closed doors in the dark of night.

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

It brings to mind that famous passage in "A Man for All Seasons." Thomas More is talking to his protege, Roper, regarding to the effect that England is planted thick like a forest with laws. He said, Would you cut down those laws to get after the devil? And Roper said, of course I would cut down all the laws in England to get the devil. And then More said, Oh, and when the last law was down and the devil turned on you, what will protect you?
This legislation is cutting down laws that protect all 100 of us, and now almost 300 million Americans. It is amazing the Senate would be talking about doing something such as this, especially after the example of Guantanamo. We can pick up people intentionally or by mistake and hold them forever.

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

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

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

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

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

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

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

In fact, the irony is this conservative Supreme Court—seven out of nine members are Republicans—has been the only check on the Bush-Cheney administration because Congress has not had the courage to do that. Congress has not had the courage to uphold its own oath of office. This bill, the Congress will have completed the job of eviscerating its role as a check and balance on the administration. The Senate has turned its back on the Warner-Levin bill, a bipartisan bill reported by the Committee on Armed Services, so it can jam through the Bush-Cheney bill. This bill gives up the ghost. It is not a check on the administration but a voucher for future wrongdoing.

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

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

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

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

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

I ask unanimous consent to have printed in the CONGRESSIONAL RECORD, as follows:

SEPTEMBER 27, 2006.

To United States Senators and Members of Congress:

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

Although the Military Commissions Act of 2006 (S. 3929/S. 3930) was drafted to improve and codify military commission procedures following the Supreme Court’s June 2006 decision in Hamdan v. Rumsfeld, it summarily eliminates the right of habeas corpus for those detained by the Government who have been or may be deemed to be enemy combatants: Detainees will have no ability to challenge the conditions of their detention in any court unless the Government decides to try them before a military commission. Those who are not tried will have no recourse to any independent court at any time. Enacting this provision into law would be a grievous error. As several witnesses testified before the Senate Judiciary Committee on Monday, Article I, Section 9 Constitution grants Congress power to make laws necessary and proper for carrying into execution its powers. Any protections embodied in these bills would be rendered worthless unless the courts can hold the executive accountable to enforce the law. Moreover, the bills ignore a central teaching of the Supreme Court’s decision in Hamdan v. Rumsfeld: the importance of shared institutional powers and checks and balances creates a sustainable response to the war on terror. Absent effective judicial review, there will be no way to enforce any of the limitations in the bill that Congress is seeking to place upon the executive’s claimed powers.

We recognize the need to prevent and punish crimes of terrorism, to investigate and prosecute such crimes. But depriving our courts of jurisdiction to determine whether the executive has acted properly when it detains individuals in ways that endanger the rights of our own soldiers and nationals abroad, by limiting our ability to demand
that they be provided the protections that we deny to others. Eliminating effective ju-
icial review of executive acts as significant as detention and domestic surveillance can-
not be justified by the principles of trans-
parency and rule of law on which our con-
stitutional democracy rests.

The Congress would gravely deserve our global war-fighting efforts by enacting bills that seek to combat ter-
rorism by stripping judicial review. We re-
spectfully urge you to amend the judicial re-
view provisions of the Military Commissions Act and the National Security Surveillance
Act to ensure that the rights granted by those bills will be enforceable and reviewable in a court of law.

Sincerely,

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

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

Katharine T. Bartlett, Dean and A. Ken-
neth Pye Professor of Law, Duke Law School.

Molly K. Beutz, Yale Law School.

Harold Hongju Koh, Dean and Gerard C. &
Bernice W. Baruch Professor of Inter-
national Law, Yale Law School.

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

Lydia Pallis Lasco, Interim Dean and Pro-
fessor of Law, Lewis & Clark Law School.

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

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

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

Katherine S. Broderick, Dean and Pro-
fessor, University of the District of COLUM-
bia, David A. Clarke School of Law.

Brian Bromberg, Dean and Professor, Loyola
Law School.

Robert Butler, Dean and Professor of Law,
University of Puerta Rico.

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

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

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

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

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

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

Philip J. McConnaughey, Dean and Donald
J. Fauquier Professor of Law, The Pennsyl-
 vania State University, Dickinson School of
Law.

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

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

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

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

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

Maureen A. O'Rourke, Dean and Professor
of Law, Michaels Faculty Research Scholar,
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Margaret L. Presland, Elmer Sahlstrom
Senior Fellow, University of Oregon Law
School.

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

Stephen Dycus, Professor, Vermont Law
School.

Allen K. Easley, President and Dean, Will-
iam Mitchell College of Law.

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

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

Stephen J. Friedman, Dean, Pace Univer-
sity School of Law.

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

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

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

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

Don Guter, Dean, Duquesne University
School of Law.

Jack A. Guttenberg Dean and Professor of
Law, LeRooy Fernald, Dean and Professor, North-
ern Illinois University College of Law.

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

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

Efren Riveras Ramos, Dean, School of Law,
University of Puerto Rico.

William J. Rich, Interim Dean and Pro-
fessor of Law, Washburn University School
of Law.

James V. Rowan, Associate Dean, North-
eastern University School of Law, Boston,
Massachusetts.

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

David Rudenstein, Dean, Cardozo School of
Law.

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

Joseph D. Harbaugh, Dean and Professor,
Shepard Broad Law Center, Nova South-
eastern University, South Beach, Florida.

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

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

José Roberto Jua´rez, Jr., Dean and Pro-
fessor of Law, University of Denver Sturm
College of Law.

W. H. Knight, Jr., Dean and Professor, Uni-
versity of Washington School of Law
Se-
attle, Washington.

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

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

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

Aviam Soifer, Dean and Professor, William
S. Richardson School of Law, University of
Hawaii.

Emily A. Spieler, Dean, Edwin Hadley Profes-
or of Law, Northeastern University School
of Law.

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

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

Steven L. Willborn, Dean & Schmoker Pro-
fessor of Law, William H. Bowen School
of Law, University of Nebraska Col-
lege of Law.

Frank H. Wu, Dean, Wayne State Univer-
sity Law School.

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

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

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

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

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

Compare that to section 7 of the cur-
rent bill. The current bill does not pro-
vide for judicial review. It would pro-
hibit that. It does not even require certi-
fication by the Attorney General that the alien is a terrorist. It would apply
if the alien was “awaiting” a Govern-
ment determination whether the alien is an “enemy combatant.” And it is
limited to seven days. It would en-
able the Government to detain an alien for life without any recourse whatso-
ever to justice.

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

Sincerely,

September 28, 2006

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

And now, think of those people who have been attacked on our soil in our history, the Congress that passed the PATRIOT Act rightly concluded that a suspension of the writ would not be justified. But now, 6 weeks before a midterm election, we have a bill that, Senator CORNYN for such time as the chairman would approve, I would ask for 3 minutes.

The PRESIDING OFFICER. The Senator from Alabama.

Mr. SESSIONS. The Senator from Alabama.

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

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

Second, my time is limited, and I have been so impressed with the debate that has gone on with Senators KYL and LEAHY and our colleagues that I associate myself generally with those remarks, but I want to recall that in a spate of an effort to appease critics and those who had “vague concerns,” not too many years ago, this Congress passed legislation that said that CIA-gathered information could not be shared with the FBI. We passed a law in this Congress to appease the left in America, the critics of our efforts against the terrorists. And we have put a wall between the CIA and FBI.

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

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

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

Mr. FEINGOLD addressed the Chair.

The PRESIDING OFFICER. The Senator from Wisconsin.

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

The PRESIDING OFFICER. The Senator from Wisconsin.

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

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

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

I have hoped that we would take this opportunity to pass legislation that allows us to proceed in accordance with our Constitution and our values, but these trials, conducted appropriately, have the potential to demonstrate to
the world that our democratic constitutional system of government is our greatest strength in fighting those who attack us.

That is why I am saddened I must oppose this legislation because the trials conducted under this legislation send a very different signal to the world, one that I fear will put our troops and personnel in jeopardy both now and in future conflicts. To take just a few examples, this legislation would permit an individual to be convicted of a capital offense without habeas corpus, and hear say, would not allow full judicial review of the conviction, and yet would allow someone convicted under these rules to be put to death. That is just simply unacceptable.

Not only that, this legislation would deny detainees at Guantanamo Bay and elsewhere—people who have been held for years but have not been tried or even charged with any crime—the ability to challenge their detention in court. No individual is better than that originally proposed by the President, which would have largely codified the procedures the Supreme Court has already rejected. And that is thanks to the efforts of some of my Republican colleagues, for whom I have great respect and admiration. But this bill remains deeply flawed, and I cannot support it.

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

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

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

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

Some have suggested that terrorists who take up arms against this country should not be allowed to challenge their detention in court before a neutral decision-maker. The alternative is to allow people to indefinitely and arbitrarily be detained and held in the United States, anywhere and everywhere, and designated by the government as an enemy combatant. And it would do so in the face of years of abuses of power that—that far—have been reined in primarily through habeas corpus challenges in our Federal courts.

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

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

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

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

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

To proclaim democratic government to the rest of the world as the supreme form of government at the very moment we eliminate the most important avenue of relief from arbitrary governmental detention will not serve our interests well.

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

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

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

In closing, let me do something I do not do very often, and that is quote my former colleague, John Ashcroft. According to the New York Times, in a private meeting of high-level officials in 2005 about the military commission structure, then-Attorney General Ashcroft reportedly said:

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

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

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

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

It goes without saying that this is not a new concept. Habeas corpus is a longstanding vital part of our American tradition, and is enshrined in the U.S. Constitution, article 1, section 9, where it states:

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

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

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

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

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

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

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

Yet by stripping the habeas corpus rights of any individual who the executive branch decides to designate as an enemy combatant, that is precisely
where we end up—with an executive branch subject to no external check whatsoever. With an executive branch that is king.

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

That raises another point. People who are actually subject to trial by military commission will at least be able to argue their innocence before some tribunal, even if I have grave con-
cerns about how those military com-
misions would proceed under this leg-
islation. Those who have been charged with any crime will have no guar
teed venue in which to proclaim and prove their innocence. As three re-
tired generals and admirals explained in a letter to Congress:

The creation of a military com-
mission to try terrorism offenders
will only serve to harm others' percep-
tion of our system of government.

Let's not go down this road. Let's re-
move this provision from the bill.

As is already clear, I'm not the only
one who has serious concerns about
this provision. There is bipartisan sup-
sport for this amendment. And Congress has received numerous letters object-
ing to the habeas provision, including from Kenneth Starr; a group of former
diplomats; two different groups of law
professors; a group of retired judges; and a group of retired generals. Many,
including the American Bar Association, have reservations about this par-
ticular provision of the bill.

They have reservations not because they sympathize with suspected terror-
ists. Not because they are soft on na-
tional security. Not because they don't
understand the threat we face. No.
They, and we in the Senate who sup-
port this amendment, are concerned about this provision because we care
about the Constitution, because we care about the image that America pre-
sents to the world as we fight the ter-
rorists. Because we know that the writ
of habeas corpus provides one of the
most significant protections of human
freedom against arbitrary government
action ever created. If we sacrifice it
here, we will head down a road that
history will judge harshly and our de-
sendants will regret.

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

For two hundred years, the federal judici-
ary has maintained Chief Justice Marshall’s solemn admonition that ours is a govern-
ment of laws, and not of men. The proposed
legislation imperils this proud history by abandoning the Great Writ.

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

Madam President, I yield the floor.

The PRESIDING OFFICER. The Sen-
ator from Texas.

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

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

Mr. CORNYN. First of all, Madam
President, I would like to point out
there are many myths about this legis-
lation. We need to get to the facts and
get to the truth so people can under-
stand what the choices are.

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

I think our colleagues need to be re-
mined of legislation which we passed
in December of 2005, known as the De-
tainee Treatment Act. When people
come here and suggest that we are striping all legal rights from terror-
ists who are detained at Guantanamo Bay, they are simply flying in the face of the Detainee Treatment Act that we passed in December 2005, which pro-
vides not only a review through a com-
batant status review tribunal, with elaborately procedures to make sure there is a fair hearing, but then a right to appeal to the Columbia Circuit Court of Appeals, not only to make sure that the right standards were applied—that is, whether the military applied the right rules to the
fact also to attack the constitu-
tionality of the significant provisions
that they chose to do so. So those who claim we are simply stripping habeas corpus rights are simply flying in the face of the facts as laid out in the Detainee
Treatment Act.

Now, the question may be: Are we
going to provide what the law requires?
Are we going to provide additional
rights and privileges that some would like to confer upon these high-value
detainees located at Guantanamo Bay? The fact is, as is already
pro-
ponents of this amendment propose would be to divert our soldiers from the
combatant status review tribunal, with elaborately procedures to make sure there is a fair hearing, but then a right to appeal to the Columbia Circuit Court of Appeals, not only to make sure that the right standards were applied—that is, whether the military applied the right rules to the
fact also to attack the constitu-
tionality of the significant provisions
that they chose to do so. So those who claim we are simply stripping habeas corpus rights are simply flying in the face of the facts as laid out in the Detainee
Treatment Act.

We have provided an avenue or a process by which these detainees can have their rights protected, such rights as they have been unlawful combat-
ants attacking innocent civilians.

America is conferring rights upon them that we do not have to confer, but we are conferring them because we believe that right to be their own, and we ought to be consistent with our Con-
stitution and with the decisions of the U.S. Supreme Court.
The last thing I would think any of us would want to do would be to tie the hands of our soldiers to permit terrorists to sue U.S. troops in Federal court at will.

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

The Senator from Missouri is recognized.

Mr. BOND. Mr. President, I ask unanimous consent for 10 minutes from Senator Wicker on the bill.

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

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

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

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

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

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

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

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

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

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

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

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

Many on the other side voted against the PATRIOT Act.

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

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

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

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

Some congressional Democrats voted to cut and run from Iraq. Nothing would embolden terrorists more than to see the U.S. turn tail and run home. Osama bin Laden cited America quitting Somalia, and failing to respond to the U.S.S. Cole bombing, as signs of U.S. weakness and vulnerability. We all know what happened later.

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

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

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

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

In my meetings with intelligence officials both abroad and here at home I have heard repeatedly how the disclosure, not only of classified information, but also of our interrogation techniques, or our exceptional treatment of potential terrorists is going to undermine our ability to get information.

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

If we lay out precisely the techniques that will get information from enemy combatants in the Federal Register, they will be in an al-Qaeda training manual within 48 hours.

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

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

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

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

One other thing is important. Some would propose exposing our terror fighters to legal liability. They oppose giving our terror fighters certainty and clarity in how to go about their jobs.

They leave them vulnerable to prosecution and handcuff their efforts and leave the rest of us vulnerable to terror plots that went undiscovered.

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

The problem we have is that if the critics take away the valuable tools we have in breaking apart terror plots, we are going to be significantly less safe. As the President said, the CIA interrogation program has already succeeded in breaking apart terror conspiracies and preventing several terror attacks.

Critics within the program are preventing us from punishing terrorists and gaining valuable information that could prevent future attacks.

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

Critics are being tough on targets. Terrorists argue that we should treat them like prisoners of war under the
Geneva Conventions. Article 72 of the Geneva Conventions on treatment of prisoners of war says POWs shall be allowed to receive parcels containing foodstuffs. Is that what critics think the 9/11 Commission conspirators deserve to receive care packages?

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

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

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

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

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

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

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

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

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

What do critics think would happen if we torture these terrorists? Could they be satisfied with only name, rank and serial number? Would they have us say to our terror suspects, “Oh gosh darn, I was so hoping you would willingly tell us your terror plots. Oh well, here’s your 50 Swiss franc advance pay. Don’t get too many La-Z-Boy care packages, we’ve scheduled a dentist appointment for you for Tuesday.”

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

These people flew airplanes into buildings for heaven’s sake, or should I say the hell’s sake. America must fight with honor. We must fight from the moral high ground. But do not tell me we lack a moral basis for our fight against terror. Show me someone who doubts America’s moral basis in this fight against terror and I will show you someone who has lost their own moral compass.

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

We cannot fall into the traps our terror war critics suggest: handcuffing our law enforcement and intelligence agents, blocking our terror fighting leadership, releasing and spreading our terror suspects, or intentionally causing great suffering or serious injury.

The Geneva Conventions are a shield to protect us from attack. Article 72 requires us to give our POWs a place to live, food, medical care. Article 71 says POWs shall be allowed to send and receive letters and cards. Article 60 requires us to grant all POWs monthly advances of pay. It says how much: below sergeant, 8 Swiss francs; officers, 50 Swiss francs; generals, 75 Swiss francs.

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

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

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

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

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

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

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

What do critics think would happen if we torture these terrorists? Could they be satisfied with only name, rank and serial number? Would they have us say to our terror suspects, “Oh gosh darn, I was so hoping you would willingly tell us your terror plots. Oh well, here’s your 50 Swiss franc advance pay. Don’t get too many La-Z-Boy care packages, we’ve scheduled a dentist appointment for you for Tuesday.”

Of course not, that would be absurd to think that terrorists will willingly tell us their plots. Terror war critics have been telling us for too many Larry King and Order TV shows if they think some hokey good cop—bad cop law enforcement approach will work on al-Qaida.
Guantanamo, described how he was held for years, even though he had never been a terrorist or a soldier. He was never even on a battlefield. He had been sold by Pakistani bounty hunters to the United States military for $5,000. Qassim said he was only detained because of the availability of habeas corpus that this mistake was able to be corrected. That is why Senator SPECTER’s amendment is right.

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

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

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

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

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

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

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

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

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

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

The Founding Fathers created specific constitutional limitations. And since that time the United States has been at the forefront of demanding humane treatment of all people. We must not turn our back on these fundamental principles.

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

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

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

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

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

I know this is an unusual war, and I don’t know its duration. No one fully does. But I am concerned that it be true to our Constitution and to the rule of law, we have to be true to that law.

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

I am reminded of the words of Thomas Jefferson who once said: The habeas corpus secures every man here, alien or citizen, against everything which is not law, whatever shape it may assume.

On another occasion he said: I would rather be exposed to the inconveniences attending too much liberty than to those attending too small a degree of it.

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

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

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

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

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

Stripping courts of their authority to hear habeas claims is a frontal attack on our judiciary and its institutions, as well as our civil rights laws. Habeas corpus is a cornerstone principle of the rule of law. To quote: “History shows that in the wrong hands, the power to jail people without showing cause is a tool of despotism.”

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

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

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

I suppose what brings me to the floor today is my memory of my study of the law. While I was in law school, I was particularly taken with the study of the Nuremberg trials. The words of...
Justice Robert H. Jackson inspired me then and inspire me still. He was our chief counsel for the allied powers. What he said on that occasion in his closing address to the international military tribunal is an inspiration. Said Mr. Jackson:

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

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

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

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Pennsylvania.

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

I yield the floor.

The PRESIDING OFFICER. The Senator from Michigan.

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

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

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

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

Unlike the provision that was included in the Detainee Treatment Act last year, this court-stripping provision would apply on a world-wide basis, not just at Guantanamo. It would apply to detainees of all Federal agencies, not just DOD. It would apply to aliens who were subjected to torture and cruel and inhuman treatment, without any evidence that he was an enemy combatant or that he supported any terrorist group. Under this habeas corpus court-provided jurisdiction, this provision would have no legal remedy in the U.S. courts even after he was finally released from illegal detention, unless the United States acknowledges that it made a mistake when it determined that he was an enemy combatant.

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

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

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

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

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

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

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

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

We urge you to oppose any further erosion of the proper authority of our courts and to reject any provision that would strip the courts of habeas jurisdiction.

As Alexander Hamilton and James Madison emphasized in the Federalist Papers, the writ of habeas corpus embodies principles fundamental to our nation. It is the essence of the rule of law, ensuring that neither king nor executive may deprive a citizen of liberty without some independent review to ensure that the detention has a reasonable basis in law and fact. That right must be preserved. For us all to work toward our security, they are what our country stands for.

We have received similar letters from nine distinguished retired Federal
Some persons detained at Guantánamo may be terrorists guilty of plotting against the people and the Government of these United States. Of course terrorists must be properly detained and prosecuted for their evil deeds. But Pentagon officials maintain that some of these detainees may be persons simply swept up because they were in the wrong place at the wrong time. How can we know which truly deserve to be held and tried as enemy combatants if we abolish the legal right of the incarcerated to fairly challenge their detention in court.

The provision in the bill before us deprives Federal courts of jurisdiction over matters of law that are clearly entrusted to them by the Constitution of the United States. The Constitution is clear on this point: The only two instances in which habeas corpus may be suspended are in the case of a rebellion or an invasion. We are not in the midst of a rebellion, and there is no invasion.

It is inconceivable that those who drafted the Constitution deliberately used the word “suspended.” They did not say that habeas corpus could be forever denied, abolished, revoked, or eliminated. They said that, in only two instances, it could be revoked temporarily, not forever. Not like in this bill.

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

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

The Constitution of the United States is a time-tested contract between the people and their Government, for which thousands of American military men and women have died. Why would we seek to violate its terms? Aren’t we fighting the terrorists precisely to preserve individual liberties and the rule of law? If we as a people jettison the very democratic ideals that have made our Nation great and we become, instead, exactly like those whom we seek to imprison—standing for nothing and capable of anything—then what are we fighting for? I am proposing that we respect the moral compass our forefathers enshrined in our Constitution—what is right, what is wrong. I have tried to balance the interests of our troops and the interests of our own, for centuries. The outrageous provision we are considering today could imply that the courts, not just suspects picked up overseas but even those taken into custody on U.S. soil.

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

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

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

Hon. BILL FRIST, Majority Leader, U.S. Senate, Washington, DC.
Hon. DENNIS HASTERT, Speaker, House of Representatives, Washington, DC.
Hon. HARRY REID, Democratic Leader, U.S. Senate, Washington, DC.
Hon. NANCY DALY, Democratic Leader, House of Representatives, Washington, DC.

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

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

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

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

Respectfully, (100 Signatures)

The PRESIDING OFFICER. Who yields time?

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

The PRESIDING OFFICER. On which side?

Mr. GRAHAM. On the Warner side.

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

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

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

Mr. GRAHAM. Mr. President, this has been a very spirited debate and I am going to give you a spirited answer as well.

One of the issues that we are dealing with is whether or not we are going to allow military tribunals to be used to try enemy combatants.

Some persons detained at Guantánamo may be terrorists guilty of plotting against the people and the Government of these United States. Of course terrorists must be properly detained and prosecuted for their evil deeds. But Pentagon officials maintain that some of these detainees may be persons simply swept up because they were in the wrong place at the wrong time.

How can we know which truly deserve to be held and tried as enemy combatants if we abolish the legal right of the incarcerated to fairly challenge their detention in court?

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

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

I am proposing that we respect the moral compass our forefathers enshrined in our Constitution—what is right, what is wrong. I have tried to balance the interests of our troops and the interests of our own, for centuries.
of our country when it comes to dealing with people who find themselves in our capture.

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

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

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

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

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

I agree with that.

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

I agree with that.

It would be difficult to devise a more effective tool for commanders than to allow the very enemies he has ordered to refuse submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home.

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

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

What is the functional alternative for this body and our country is to allow the military to do what they are best at doing: controlling the battlefield. Let them define who an enemy combatant is under the Geneva Conventions requirements. Under the Combatant Status Review Tribunal system, which is Geneva Conventions compliant, in my opinion, and let the Federal courts come in after they made their decision to see if the military applied the correct law, the procedures were followed, and the evidence justifies the decision of the military.

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

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

Mr. GRAHAM. Mr. President, I will ask unanimous consent to have printed in the RECORD, if I may, examples of the habeas petitions filed on behalf of detainees against our troops. There being none, the material was ordered to be printed in the RECORD, as follows:

EXAMPLES OF HABEAS PETITIONS FILED OF BEHALF OF DETAINEES

1. Canadian detainee who threw a grenade that killed an American—Kuwaiti detainees seek court order that they be allowed to keep the device and to access to their own commissary. The motion was ordered to be printed in the RECORD.

2. “Al Odah motion for dictionary internet search”—Kuwaiti detainees seek court order that they be allowed to use their dictionary on the internet. The motion was ordered to be printed in the RECORD.

3. “Al Odah motion for video and internet”—Kuwaiti detainees seek court order that they be allowed to watch videos on the internet. The motion was ordered to be printed in the RECORD.

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

The PRESIDING OFFICER. There is 12 minutes remaining.

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

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

Mr. SPECTER. I thank my distinguished colleague.

Mr. President, I fully realize it is unpopular to speak for aliens, unpopular to speak on what might be interpreted to be in favor of enemy combatants, but that is not what this Senator is doing. What I am trying to establish is common sense and I am proposing the Combatant Status Review Tribunal system which is Geneva Conventions compliant, in my opinion, and let the Federal courts come in after they made their decision to see if the military applied the correct law, the procedures were followed, and the evidence justifies the decision of the military.

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4. “Petitioners’ opposition”—Filing by Kuwaiti detainees seeking the set aside of their internet and video rights. The motion was ordered to be printed in the RECORD.

5. “Motion for PI re Medical Records”—Motion by detainee accusing military of lying about the provision of medical care. The motion was ordered to be printed in the RECORD.

6. “Al Odah—Emergency Motion re DVDS”—Emergency motion seeking court order requiring GTMO to set aside its normal security policies and allow detainees to use DVDS that are purported to be helpful. The motion was ordered to be printed in the RECORD.

7. “Petitioners’ Supp. Opposition”—Filing by detainee requesting that, as a condition of his release, he be permitted to have the use of his personal belongings. The motion was ordered to be printed in the RECORD.

8. “Al Odah Supplement to PI Motion”—Motion by Kuwaiti detainees unsatisfied with the Koran they are provided as standard issue by GTMO, seeking court order that they be allowed to keep various other supplementary religious materials, such as a “Koran in Arabic,” or 4-volume Koran with commentaries, in their cells.
take him across State lines, have a feigned hanging, extract a confession, and use that to convict him. That was done by the Federal courts.

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

There are four fundamental, undeniable principles and facts involved in the habeas corpus revolution of the last century, and that revolution applies to aliens. The first undeniable principle is that a statute cannot overrule a Supreme Court decision on constitutional grounds, and a statute cannot contradict an explicit constitutional provision.

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

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

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

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

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

Then Justice Stevens cites the constitutional provision.

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

Justice Stevens went on to say that:

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

What this bill would do in striking habeas corpus and take a daily based society back some 900 years to King John at Runnymede which led to the adoption of the Magna Charta in 1215, which is the antecedent for habeas corpus and was the basis for including in the Constitution of the United States the principle that habeas corpus may not be suspended.

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

Mr. President, how much time do I have?

The PRESIDING OFFICER. There is 3½ minutes remaining.

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

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

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

The argument is made that the Secretary of Defense does not mean to exclude on its face a factual determination as to what happens to the detainee.

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

Another one applied for a motion that would allow them to change their cellmates. He sought an order transferring him to the least onerous condition at Gitmo. He asked the court to allow him to keep any books and reading materials sent to him and report to the court on his opportunities for exercise, communication, recreation and worship.

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

I yield back.

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

The PRESIDING OFFICER. There is no time remaining.
Mr. WARNER. I ask for the yeas and nays.

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

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

The legislative clerk called the roll.

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

Mr. CONRAD. Are there any other Senators in the Chamber desiring to vote?

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

[Yorill Vote No. 255 Leg.]

YEAS—48

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

NAYS—51

Alexander DeMint Lugar
Allard DeWine Martinez
Allen Dole McCain
Bennett Domenici McConnell
Bond Enzi Murkowski
Brownback Enzi Nelson (NB)
Bunning Frist Roberts
Burton Graham Sessions
Burris Grassley Sessions
Chambliss Gregg Shelby
Colburn Hagel Stevens
Cochrane Hatch Talent
Coleman Hutchinson Thomas
Collins Inouye Thune
Cornyn Isakson Vitter
Craig Kyl Voinovich
Crapo Leahy Warner

NOT VOTING—1

Snowe

The amendment (No. 5087) was rejected.

Mr. WARNER. I move to reconsider the vote.

Mr. BOND. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

Mr. WARNER. Mr. President, the managers of this bill have notified me that there are still three amendments remaining, one by Senator ROCHEFELLER, one by Senator KENNEDY, one from Senator BYRD. If I understand from my distinguished ranking member, we will proceed to the amendment of Senator ROCHEFELLER.

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

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

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

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

The PRESIDING OFFICER. That is correct.

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

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

Mr. ROCHEFELLER. If the situation is it is deducted from this Senator’s time, I would correct.

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

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

The PRESIDING OFFICER. That is correct.

The Senator from West Virginia.

AMENDMENT NO. 5095

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

The PRESIDING OFFICER. The clerk will report.

The Senator from West Virginia, [Mr. ROCKEFELLER], for himself, Mrs. CLINTON, Mr. WYDEN, Ms. MIKULSKI and Mr. FEINGOLD, proposes an amendment, in the name of the Senator from West Virginia, the amendment (No. 5087) was rejeeted.

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

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

The amendment is as follows:

SEC. 11. OVERSIGHT OF CENTRAL INTELLIGENCE AGENCY PROGRAMS.

(1) QUARTERLY REPORTS REQUIRED.—Not later than three months after the enactment of this Act, and every three months thereafter, the Director of the Central Intelligence Agency shall submit to the congressional intelligence committees a report on the detention who was transferred out of the detention program of the Central Intelligence Agency, each report under paragraph (1) shall include (but not be limited to), for the period covered by such report, the following: (A) For each detainee who was transferred to the custody of the Department of Defense for prosecution before a military commision, the name of the detainee and a description of the activities that may be the subject of the prosecution.

(b) DIRECTOR OF CENTRAL INTELLIGENCE AGENCY REPORTS ON DETENTION AND INTERROGATION PROGRAM.— (A) DESCRIPTION OF EACH INTERROGATION TECHNIQUE AND GUIDELINES.—In addition to any other matter necessary to keep the congressional intelligence committees fully and currently informed about transfers out of the detention program of the Central Intelligence Agency, each report under paragraph (1) shall include (but not be limited to), for the period covered by such report, the following: (A) A description of any detention facility operated or used by the Central Intelligence Agency.

(B) A description of the detainee population, including— (i) the name of each detainee; (ii) where each detainee was apprehended; (iii) the date of any rendition process of which each detainee is being held; and (iv) where each detainee is being held.

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

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

(E) The actual use of interrogation techniques.

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

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

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

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

(2) ELEMENTS.—In addition to any other matter necessary to keep the congressional intelligence committees fully and currently informed about transfers out of the detention program of the Central Intelligence Agency, each report under paragraph (1) shall include (but not be limited to), for the period covered by such report, the following: (A) For each detainee who was transferred to the custody of the Department of Defense for prosecution before a military commision, the name of the detainee and a description of the activities that may be the subject of the prosecution.

(b) FOR EACH DETAINEE WHO WAS TRANSFERRED TO THE CUSTODY OF THE DEPARTMENT OF DEFENSE FOR ANY OTHER PURPOSE, THE NAME OF THE DETAINEE AND THE PURPOSE OF THE TRANSFER.

(C) FOR EACH DETAINEE WHO WAS TRANSFERRED TO THE CUSTODY OF THE ATTORNEY GENERAL FOR PROSECUTION IN A UNITED STATES DISTRICT COURT, THE NAME OF THE DETAINEE AND A DESCRIPTION OF THE ACTIVITIES THAT MAY BE THE SUBJECT OF THE PROSECUTION.

(D) FOR EACH DETAINEE WHO WAS RENDERED OR OTHERWISE TRANSFERRED TO THE CUSTODY OF ANOTHER NATION—(i) THE NAME OF THE DETAINEE AND A DESCRIPTION OF THE SUSPECTED TERRORIST ACTIVITIES OF THE DETAINEE;

(ii) THE RENDITION PROCESS, INCLUDING THE LOCATIONS AND CUSTODY FROM, THROUGH, AND TO WHICH THE DETAINEE WAS RENDERED; AND

(iii) THE KNOWLEDGE, PARTICIPATION, AND APPROVAL OF FOREIGN GOVERNMENTS IN THE RENDITION PROCESS.

(E) FOR EACH DETAINEE WHO WAS RENDERED OR OTHERWISE TRANSFERRED TO THE CUSTODY OF ANOTHER NATION—(i) THE NAME OF THE DETAINEE AND A DESCRIPTION OF THE SUSPECTED TERRORIST ACTIVITIES OF THE DETAINEE;

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(iii) THE KNOWLEDGE, PARTICIPATION, AND APPROVAL OF FOREIGN GOVERNMENTS IN THE RENDITION PROCESS.

(F) FOR EACH DETAINEE WHO WAS RENDERED OR OTHERWISE TRANSFERRED TO THE CUSTODY OF ANOTHER NATION—(i) THE NAME OF THE DETAINEE AND A DESCRIPTION OF THE SUSPECTED TERRORIST ACTIVITIES OF THE DETAINEE;

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(G) FOR EACH DETAINEE WHO WAS RENDERED OR OTHERWISE TRANSFERRED TO THE CUSTODY OF ANOTHER NATION—(i) THE NAME OF THE DETAINEE AND A DESCRIPTION OF THE SUSPECTED TERRORIST ACTIVITIES OF THE DETAINEE;

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(ii) THE RENDITION PROCESS, INCLUDING THE LOCATIONS AND CUSTODY FROM, THROUGH, AND TO WHICH THE DETAINEE WAS RENDERED; AND

(iii) THE KNOWLEDGE, PARTICIPATION, AND APPROVAL OF FOREIGN GOVERNMENTS IN THE RENDITION PROCESS.
(iii) the information provided to United States intelligence agencies by foreign governments relating to the interrogation of the detainee;

(iv) the current status of the detainee;

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

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

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

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

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

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

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

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

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

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

(4) CERTIFICATION OF COMPLIANCE.—Not later than three months after the date of the enactment of this Act and annually thereafter, the Director of the Central Intelligence Agency shall certify in writing to the congressional intelligence committees in both the House and the Senate detailing the detention, interrogation, and rendition facilities, how they are operated, and how they are used by the CIA.

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

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

This issue of the effectiveness of interrogation techniques is incredibly important and often overlooked as an aspect of the debate over the CIA program.

Interrogations that coerce information can produce bad intelligence—not necessarily, but they can produce misleading intelligence—fabricated intelligence to get out of the treatment, information that can harm, not help, our efforts to locate and capture terrorists.

Second, my amendment would require the Director of the CIA to produce a quarterly report to all members of the Intelligence Committees on the disposition of each detainee transferred out of the CIA prisons, whether the detainee was transferred to the Department of Defense for prosecution before a military commissioner for further detention, whether the detainee was transferred to the custody of the Attorney General to stand trial in civil court, or whether the detainee wasrendered or otherwise transferred to the custody of another nation.

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

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

We have been told by CIA leaders that the agency does not want to be—that convenience is that they do not want to be the prison warden for the United States Government. The goal of the CIA program should be to obtain, through lawful means, intelligence information that can identify or track down future terrorist suspects, and in the process of their interrogations, keep them in the dark by an administration which ignored the legal requirement to keep the Congress fully and currently informed on all intelligence activities.

The amendment offers a reverse of the executive branch’s 4-year policy of indifference toward Congress.

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

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

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

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

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

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

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

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

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

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

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

Those who have taken the time to read through the bill we are debating will find the word “coercion” repeatedly in the text of the legislation. Coercion is a fitting word when considering Senate Finance Committee Chairman Levin’s amendment that was rushed into voting on a bill with far-reaching legal and national security implications.

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

I say that because the Senate Intelligence Committee is the only Senate committee responsible for authorizing CIA activities and the only committee briefed on classified details of the CIA’s detention and interrogation program. We were denied an opportunity to consider this bill, in fact, on sequential referral, which is our due.

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

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

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

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

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

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

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

I thank the President Officer and yield the floor.

The PRESIDING OFFICER. The Senator from Massachusetts.

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

Mr. KERRY. Yes.

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

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

The Senator from Massachusetts is recognized.

Mr. KERRY. Mr. President, the last week before we leave for a long recess has always been extraordinarily busy—particularly when an election is only 42 days away. But, sadly, this has become too much the way the Senate does business and often its most important business.

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

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

Four years ago, we were in a similar situation. An Iraq war resolution was rushed through the Senate because of election-year politics—a political calendar, not a statesman’s calendar. And 4 years later, the price we are paying is that we will be seen as saying it is not us, but the President and an administration that we would trust.

Today, we face a different choice—to prevent an irreversible mistake, not to correct one. It is to stand and be counted with those who say that does not limit our power but magnifies our influence in the world?

Does it make clear that the U.S. Government recognizes beyond any doubt that the protections of the Geneva Conventions have to be applied to prisoners in order to comply with the law, restore our moral authority, and best protect American troops? Does it make clear that the United States of America does not engage in torture, period?

Despite protests to the contrary, I believe the answer is clearly no. I wish it were not so. I wish this compromise actually protected the integrity and letter and spirit of the Geneva Conventions. But it does not. In fact, I regret to say, despite the words and the protests to the contrary, this bill permits torture. This bill gives the President the discretion to interpret the meaning and application of the Geneva Conventions. It gives confusing definitions of “torture” and “cruel and inhuman treatment” that are inconsistent with the Geneva Conventions. This bill gives the President the authority to interpret the law.

Mr. President, the debate we have on this bill is not 4 years ago, the price we are paying is moral authority, blur lines that for decades have been absolute, then no speech, no rhetoric, and no promise can restore it.

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Mr. President, the debate we have on this bill is not
been telling people it gives them what they wanted. The only guarantee we have that these provisions will prohibit torture is the word of the President. Well, I wish I could say the word of the President were enough on an issue as fundamental as torture. But we have been down this road before.

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

The President said he agreed with Senator McCain’s antitorture provi-sions in the Detainee Treatment Act. Yet he issued a signing statement re-serving the right to ignore them. Are we supposed to trust that word?

He says flatly that “The United States does not torture, but” then he tries to push the Congress into allowing him to do exactly that. And even here, he seems to subtly subvert the interpreta-tions of the Geneva Conventions to the Federal Register. Yet his Press Secretary announced that the ad-ministration may not need to comply with that requirement. And we are sup-posed to trust that?

Obviously, another significant prob-lem with this bill is the unconstitu-tional limitation of the writ of habeas corpus. It is extraordinary to me that in 2 hours, and a few minutes of a vote, the Senate is doing away with some-thing as specific as habeas corpus, of which the Constitution says: “[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”

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

The United States needs to retain its moral authority to win the war on ter-ror. We all want to win it. We all want to continue fighting our enemies in Iraq and beyond but how to do it best. My soldiers and I learned the hard way that policy at the point of a gun cannot, by itself, create de-mocracy. The success of America’s fight against terrorism depends more on the strength of its moral integrity than on troop numbers in Iraq or the flexibility of interroga-tion options.

I wish I could say this compromise serves America’s moral mission and protects us. We don’t. No eloquence we can bring to this debate can change what this bill fails to do.

We have been told in press reports that it is a great compromise between the White House and my good friends, Senator McCain, Senator Warner, and Senator Graham. We have been told that it protects the “integrity and letter and spirit of the Geneva Conven-tions.”

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

We are supposed to believe that there is an effective check on this expanse of Presidential power with the require-ment that the President’s interpreta-tions be published in the Federal Reg-ister.

We shouldn’t kid ourselves. Let’s as-sume the President publishes his inter-pretations of this under the Geneva Convention. The interpreta-tion, like the language in this bill, is vague and inconclusive. A concerned Senator or Congresswoman calls for oversight. Unless he or she is in the majority at the time, there won’t be a hearing. Let’s assume they are in the majority and get a hearing. Do we really think a bill will get through both houses of Congress? A bill that directly contradicts a Presidential interpreta-tion of a matter of national security? For my guess is that it won’t happen, but maybe it will. Assume it does. The bill has no effect until the President actu-ally signs it. So, unless the President chooses to reverse himself, all the power remains in the President’s hands. And all the while, America’s moral authority is in tatters, Ameri-can troops are in greater jeopardy, and the war on terror is set back.

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

What are we left with? Unfettered Presidential power to interpret what—other than the statutorily proscribed “grave violations”—violates the Gene-va Conventions. No wonder the Presi-dent was so confident that his CIA pro-gram could continue as is. He gets to decide what is torture. And as the ad-ministration have spent years now try-ing to blur.

Presidential discretion is not the only problem. The definition of what constitutes “grave breaches” of Article 3 is murky. Even the White House has not consistent with either the Detainee Treatment Act or the recently revised Army Field Manual. These documents prohibit “crueI, inhumane, or degrad-ing treatment” defined as the cruel, inhuman, and inhumane treatment and punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments.” The definition is supported by an ex-tensive body of case law evaluating what treatment is required by our con-stitutional standards of “dignity, civ-ilization, humanity, decency, and funda-mental fairness.” And, I think quite tellingly, it is substantially similar to the definition that my good friend, Senator McCain, chose to include in his bill. And there is simply no reason why the standard adopted by the Army Field Manual and the Detainee Treat-ment Act, which this Congress has al-ready approved, should not apply for all interrogations in all circumstances.

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

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

The word of the President. I wish I could say the words of the President were enough on an issue as funda-mental as torture. Fifty years ago, President Kennedy sent his Secretary of State abroad on a crisis mission—to...
prove to our allies that Soviet missiles were being held in Cuba. The Secretary of State brought photos of the missiles. As he prepared to take them from his briefcase, our ally, a foreign head of state said, simply, “put them away. The President of the United States is good enough for me.”

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

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

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

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

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

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

That’s wrong, profoundly wrong. The President’s experts have told him that not only does torture put our troops at risk and undermine our moral authority, but torture does not work. As LTG John Kimmons, the Army’s deputy chief of staff for intelligence, put it:

“Good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tell us that. Any piece of intelligence which is obtained under duress, through the use of abusive techniques, will be unreliable. And additionally, it would do more harm than good when it inevitably became known that abusive practices were used. We can’t afford to get it wrong.”

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

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

“Congress should act cautiously to strike a balance between the need to detain enemy combatants during the present conflict and the need to honor the historic privilege of the writ of habeas corpus.”

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

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

“Think of what this means. This bill is giving the administration the power to pick up any non-U.S. citizen inside or outside of the United States, determine in their sole and unreviewable discretion that he is an unlawful combatant, and hold him in jail—be it Guantanamo Bay or a secret CIA prison—indeed, anywhere the President or the Secretary of Defense determines a person is an enemy combatant, that is the end of the story—even if the determination is based on evidence that even a military commission would not be allowed to consider because it is so unreliable.

That person would never get the chance to challenge his detention; to prove that he is not, in fact, an enemy combatant.

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

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

The PRESIDING OFFICER. The Senator from Missouri has expired 5 minutes.

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

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

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

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

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

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

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

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

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

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

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

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

Mr. President, what we would just order in this amendment is that every 3 months the Attorney General—a very simple question: Do we believe the techniques by the Attorney General, that description will be in al-Qaida and Hezbollah and all of the other terrorist organizations’ playbook. They will train their assets that: This is what you must be expected to do, and Allah wants you to resist these techniques.

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

Mr. BOND. Yes, I am happy to.

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

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

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

I thank the Chair.

Mr. ROCKEFELLER. That is simply not true.

The PRESIDING OFFICER. Who yields time?

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

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

Mr. DOMENICI. Mr. President, I will speak on this vital subject. I rise to speak in support of the Military Commissions Act of 2006. First off, we must all ask ourselves a very simple question: Do we believe the United States must have a terrorist attack prevention program? I submit that the answer is a clear and resounding yes. I believe the American people expect us to have a strong terrorist attack prevention program and that they believe if we don’t, we are derelict in our duty. They know that we are at risk, that this is a war, and that there are many people out there who are waiting to do damage and harm to our people. To have anything less than a terrorist prevention program, which is the best we can put together, is shortsighted. I cannot support any legislation that would prevent the CIA from protecting America and its citizens.

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

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

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

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

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

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

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

Additionally, such petitions are often frivolous and disrupt operations at Guantanamo Bay. Examples of the frivolous petitions that have been filed include an al-Qaida terrorist complaining
about base security procedures, speed of mail delivery, and medical treatment; as well as a detainee asking that normal security policies be set aside so that he could be shown DVDs that are alleged to be family videos. Such petitions are not necessary.

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

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

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

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

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

We must remember that we are dealing with terrorists who know no limits, follow no rules, have no orderliness in their actions. Mr. President, I oppose the amendment by the Committee, Senator FELDER, who is vice chairman of our committee. The amendment calls for yet another unnecessary and repetitive requirement of reporting.

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

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

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

I yield the floor.

The PRESIDING OFFICER. Who yields time?

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

The PRESIDING OFFICER. The Senator from Kansas is recognized.

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

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

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I yield the floor.

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

Mr. WARNER. Mr. President, I wonder if I may engage my distinguished chairman in a colloquy. I am privileged to speak on his committee. Some years ago I served on the committee and at one time was vice chairman of the committee. So I draw on, if I may say...
with some modesty, a long experience of working with the Intelligence Committee, and, as the chairman knows, the chairman and ranking member of the Armed Services Committee have always had a role of participation in his committee, I guess if I can add up all those years as chairman and ranking, it is about 12 or 15, I think, of my 28 years on the Armed Services Committee. I have watched this committee and have been a participant for many years.

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

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

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

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

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

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

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

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

Mr. WARNER. Mr. President, I thank the Chair. I yield the floor.

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

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

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

Mr. ROCKEFELLER. Mr. President, I have a one-page summary. Some of the arguments I have heard are absolutely incredible. The fact of the matter is there isn't any reporting done. For 4 years this has gone on. People say: Just call them in; call in the head of the CIA, who ever it is, before the committee. That doesn't yield information. We have so many requests for information from the CIA that have not been responded to. The response to the committee because they don't want to be responsive to the committee, because they are directed not
Mr. President, this amendment just simply requires regular reports on detention and interrogation programs. It will give us access to legal opinions. It is essential that this amendment be adopted.

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

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

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

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

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

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

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

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

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

Another year of stonewalling, of denial, of coverup by the Department of Justice. I haven’t asked, haven’t asked twice. I have probably asked a dozen times for the Bybee memo, and my good friend, the chairman of the Armed Services Committee, has asked for the Bybee memo, without any luck. So the idea that all we have to do is ask is simply wrong.

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

Mr. LEVIN. Mr. President, I ask unanimous consent that the balance of his time to the Senator from Michigan for use on the bill?

Mr. ROCKEFELLER. Without objection.

Mr. LEVIN. Mr. President, I ask unanimous consent that the balance of his time to the Senator from Michigan for use on the bill?

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

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

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

Mr. WARNER. Therefore, I believe all time has been yielded back on both sides, and we can prepare the floor now for the receiving of an amendment.
from the distinguished Senator from Massachusetts.
I yield the floor.
The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

AMENDMENT NO. 5088

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

The PRESIDING OFFICER. The Senator from Massachusetts [Mr. KEN- NEDY] proposes an amendment numbered 5088.

Mr. KENNEDY. Mr. President, I ask unanimous consent that the reading of the amendment be dispensed with. The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

AMENDMENT NO. 5088

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

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

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

(A) the United States has historically in- 

terpreted the law of war and the Geneva Con- 

ventions, including in particular common 

Article 3, to prohibit a wide variety of cruel, 

inhuman, and degrading treatment of mem- 

bers of the United States Armed Forces and 

United States citizens;

(B) American senators, with the U.S. Senate, 

after the events during the September 11, 

2001 attacks, expressed an intention to pro- 

tect American service members and aid 

workers from torture,

(C) this Act and the amendments made by 

this Act preserve the capacity of the United 

States to prosecute nationals of enemy pow- 

ers for engaging in acts against members of 

the United States armed forces and United 

States citizens that have been prosecuted by 

the United States as war crimes in the past; and

(D) should any United States person to 

whom the Geneva Conventions apply be sub- 

jected to any of the following acts, the 

United States would consider such act to 

constitute a punishable offense under com- 

mon Article 3 and would act accordingly. 

Such acts, each of which is prohibited by the 

Army Field Manual include forcing the per- 

son to stand in a painful or degrading posi- 

tion; subjecting the person to psychological 

pressure, to include threats of bodily harm 

or deprivation of liberty without regard to 

cause of the threats; depriving the person 

of necessary food, water, and medical care.

The amendment has sown confusion about our 

position. If this amendment is passed, it would 

likely prevent us from being able to prosecute 

former enemy military personnel who committed 

treason, or those engaged in status activities 

that are not captured in the Geneva Conven- 

tions. It would also prevent us from being 

able to prosecute former enemy military 

personnel who committed war crimes in 

the past. It is saying we in the United States 

are not going to tolerate those abuses if 

we consider them to be torture. If we do 

not consider them to be torture, we are 

going to tolerate those techniques if 

any of our military personnel are 

captured. But not all of the people who 

are representing the United States in the 

war on terror are wearing a uniform. 

For example, we have SEALs, we have 
some special operations, special forces, 
we have CIA agents. We have contrac- 
 tors and aid workers. We have more people 

around the world looking out after our 

security interests than any other country in 

the world.

What does this amendment say? Well, 

it says in the United States are not 

going to tolerate these techniques if 

any of our military personnel are 

captured. But not all of the people who 

are representing the United States in the 

war on terror are wearing a uniform. 

For example, we have SEALs, we have 
some special operations, special forces, 
we have CIA agents. We have contrac- 	ors and aid workers. We have more people 

around the world looking out after our 

security interests than any other country in 

the world.

What does this amendment say? Well, 

if our military personnel are not going 

to do that, those we capture, we are say- 
ing to countries around the world: You 
cannot do this against any American 

personnel you are going to capture in 

this war on terror, or in any other con- 

flict. This amendment is about pro- 
tecting our people who are 

involved in the war on terror. It is saying 
to foreign countries: If you use any of 

these techniques, the United States 

will say this is a war crime and you 

will be held accountable. How can any- 

body be against that? This administra- 
tion has so many confusion about our 

commitments to the Geneva Conven- 

tions, so that protection does not exist 

now. That protection does not exist 

now. Restoring that protection is basi- 

cally what this amendment is all 

about.

I am not going to take much time, but I 

just want to remind our col- 

leagues about how we viewed some of 

these techniques in our conflicts in 

previous wars.

On the issue of waterboarding, the 

United States charged Yukio Asano, a 

Japanese officer on May 1 to 28, 1947, 

with war crimes. The offenses were re- 
counted by John Henry Burton, a civil- 

tian victim:

After taking me down into the hallway 

they laid me out on a stretcher and strapped 

me on. The stretcher was then stood on end 

with my head almost touching the floor and 

my feet in the air. They then began pouring 

water over my face and at times it was im- 

possible for me to breathe without sucking 

in water. The torture continued and contin- 

ued. Yukio Asano was sentenced to fifteen 

years of hard labor. We punished people with 

fifteen years of hard labor when waterboarding was used against Americans in World War II.

What about the case of Matsukichi Muta, another Japanese officer, tried on April 15 to 25, 1947, for, among other charges, causing a prisoner to receive shocks of electricity and beating pris- 

oners. Shocks of electricity. He was 

sentenced to death by hanging. Death 

by hanging. We could go on.

In another case prosecuted from 

March 3 to April 30, 1948—the Japanese 

officer was sentenced for exposing pris- 

oners to extreme cold temperatures, 

forcing them to spend long periods of 
time in the nude, making the prisoner 

stand in the cold for long periods of time 

after being exposed to extreme cold 

weather, or medical care.

Mr. KENNEDY. Mr. President, I have 

here before me the Department of 

Army regulations and rules for interro- 
gation which are prohib- 

ited and it lists these: forcing the per- 

son to be naked, perform sexual acts, 
or pose in a sexual manner; applying 

beatings, electric shock, burns, or 

other forms of physical 

pain; waterboarding; using dogs; 

inducing hypothermia or heat injury; con- 
ducting mock executions; depriving 
the person of necessary food, 

water, and medical care.

These techniques are prohibited by 

the Department of Defense. Those tech- 
niques are prohibited from being used 

against adversaries in any kind of 

a conflict, blatant violations the require- 
ments, and what 

I would consider to be torture. Cer- 

tainly the Army and Department of 

Defense have effectively found that out 

that these techniques do not work. 

They have banned them and there has 

not been any going on it.

What does our amendment say? Well, 

it says we in the United States are not 

going to tolerate those techniques if 

any of our military personnel are captu-

red. But not all of the people who 

are representing the United States in the 

war on terror are wearing a uniform. 

For example, we have SEALs, we have 
some special operations, special forces, 
we have CIA agents. We have contrac-
tors and aid workers. We have more 

people around the world looking out after 

our security interests than any other 

country in the world.

Mr. WARNER. Mr. President, I have 

charge to the officer received 15 years of hard labor. 

Fifteen years.

We didn’t tolerate those abuses, and 

we should not tolerate those abuses in-

volved in the war on terror. It is saying 

we in the United States are not 

going to be taken in the war on terror. That 

is what this amendment is all about. It 

will tell the Secretary of State to noti-

fy every signatory from 194 nations, 

that if any of their governments are 

going to use any of these techniques on 

Americans that are taken in this 

war on terror, that we will consider 

this a violation of the Geneva Conven- 
tions and that they will be account-

able.

This is to protect our servicemen 

and servicewomen, those who are in the 

intelligence agencies, those performing 

dangerous duties, those who are not 

wearing the uniform in their battle 

against terror. We are putting every-

one on notice.

We did not make up this list. All 

these techniques are taken right out of 

the Defense Department’s code of con-

duct for interrogations.

I would take more time and review 

for my colleagues, where we tried indi-

viduals in World War II and sentenced 

individually who performed these kinds 

of abuses on Americans to long periods 

of incarceration and even to death.

I reserve the remainder of my time.

The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, at this 

moment I suggest the absence of a 

quorum, with the time not chargeable 

to either side.

Mr. KENNEDY addressed the Chair.

Mr. WARNER. I beg your pardon. 

I thought my colleague yielded the floor.

Mr. KENNEDY. I did. If you want to 
yield your time, I wouldn’t object to it, 

but I object if you are calling for equal 

times, caused of hard 

Mr. WARNER. No, I said charged to 

neither side. The PRESIDING OFFICER. Without 

objection, it is so ordered.
Mr. KENNEDY. Mr. President, I ask unanimous consent the order for the quorum call be rescinded.

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

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

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

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

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

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

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

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

And it talks about the circumstances—

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

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

We heard a great deal from the administration, from the President, that he wanted specificity in the War Crimes Act and the Geneva Conventions in terms of what is permitted and what is not permitted. He felt those terms are too vague. Well, on that he is right. There is confusion in the world. There is confusion in the world about our commitment to the Geneva Conventions and what we think it means. There is a good deal of confusion in the world in the wake of what happened at Abu Ghraib. There we found out that these harsh interrogation techniques had been used. Sure, we have had 10 different reviews of what happened over there. What we always find out is it is the lower lights, the corporals and the sergeants who are the ones being tried and convicted. Those in the higher ranks are not. No one has stood up and said clearly, those are violations of the Geneva Conventions. So we have Abu Ghraib, which all of us remember. And it has caused confusion.

We have heard testimonies in Guantánamo—the conduct of General Miller, who brought these harsh interrogation techniques to Guantánamo at Secretary Rumsfeld’s direction. When the Armed Services Committee questioned his whole standard of conduct, he said the reason was he was required to avoid coming up and facing the music. This caused confusion about our commitments to the Geneva Conventions.

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

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

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

Then we have tried to clarify our commitment. We have the action in the Senate of the United States, by a vote of 90 to 9, accepting Senator McCaIN’s Amendment to prohibit cruel, inhumane, and degrading treatment. I think it is in Title 10, Chapter 71, on the law of the land; to say we are not interested in torture. Senator McCaIN understands. He believes that waterboarding is torture. He believes using dogs is torture. This is not complicated. We don’t have to cause confusion. We have it written down on this list of prohibited techniques. It is not my list of prohibited techniques, but it is written down by the Department of Defense. This amendment says if a foreign country is going to practice these kinds of behaviors, an American national who is out there in the war on terror and is being picked up, we are going to consider this to be a war crime. This is about protecting Americans.

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

Looking back in history, at the end of World War II and otherwise, we are all familiar with the different examples where these techniques—frighteningly familiar to the series of techniques used in Iraq and Guantánamo—and are often frequently used against Americans.

I am reminded—I gave illustrations: electric shocks, waterboarding, hypothermia, heat injury. We all remember the 52 American hostages who were held in the U.S. Embassy in Iran. They were subjected to the mock executions. The PRESIDING OFFICER. The Senator has used 5 minutes.

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

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

The Department of Defense has found these areas to be off limits for the military that it was talking about. We are saying is if other countries are going to do that to Americans, they are going to be held accountable.

This is about protecting Americans. That is the least we ought to be able to do for those who are risking their lives in very difficult circumstances.

I yield the floor.

Mr. LEVIN. Mr. President, I suggest the absence of a quorum and ask unanimous consent that the time not be charged to either side.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mrs. CLINTON. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

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

Mrs. CLINTON. Mr. President, the Senate is currently debating a bill on how we treat detainees in our custody, and, more broadly, on how we treat the principles on which our Nation was founded.

The implications are far reaching for our national security interests abroad; the rights of Americans at home, our reputation in the world; and the safety of our troops.

The threat posed by the evil and nihilistic movement that has spawned terrorist networks is real and gravely serious. We must do all we can to defeat the enemy with all the tools in our arsenal and every resource at our disposal. All of us are dedicated to defeating this enemy.

The challenge before us on this bill, in the final days of session before the November election, is to rise above partisanship and find a solution that serves our national security interests. I fear that there are those who place a strategy for winning elections ahead of our national strategy for winning the war on terrorism.

Democrats and Republicans alike believe that terrorists must be caught,
captured, and sentenced. I believe that there can be no mercy for those who perpetrated 9/11 and other crimes against humanity. But in the process of accomplishing that I believe we must hold on to our values and set an example our country now to be careful not again. Those captured are going nowhere—they are in jail now—so we should follow the duty given us by the Supreme Court and carefully craft the right piece of legislation to try them. The President acted without authority and I am our duty now to see that this President just the right amount of authority to get the job done and no more.

During the Revolutionary War, between the signing of the Declaration of Independence, which set our founding ideals to paper, and the writing of our Constitution, which fortified those ideals under the rule of law, our values—our beliefs as Americans—were already being tested.

We were at war and victory was hardly assured, in fact the situation was closer to the opposite. New York City and Long Island had been captured. General George Washington and the Continental Army retreated across New Jersey from Pennsylvania, suffering tremendous casualties and a body blow to the cause of American independence.

It was at this time, among these soldiers at this moment of defeat and despair, that Thomas Paine would write, "These are the times that try men's souls." Soon afterward, Washington led his soldiers across the Delaware River and onto victory in the Battle of Trenton. There he captured nearly 1,000 foreign mercenaries and he faced a crucial choice.

How would General Washington treat these men? The British had already committed atrocities against Americans, including torture. As David Hackett Fischer describes in his Pulitzer Prize winning book, "Washington's Crossing," thousands of American prisoners of war were "treated with extraordinary cruelty by British captors."

There are accounts of injured soldiers who surrendered being murdered in stead of quartered, countless Americans dying in prison hulks in New York harbor, starvation and other acts of inhumanity perpetrated against Americans confined to churches in New York City.

Can you imagine.

The light of our ideals shone dimly in those early dark days, years from an end to the conflict, years before our improbable triumph and the birth of our democracy.

General Washington wasn't that far from where the Continental Congress had met and signed the Declaration of Independence. But it is easy to imagine how far that must have seemed. General Washington announced a decision unique in human history, sending the following words and orders for handling prisoners: "Treat them with humanity, and let them have no reason to complain of our Copying the brutal example of the British Army in their treatment of our unfortunate brethren."

Therefore, George Washington, our commander-in-chief before he was our President, laid down the indelible marker of our Nation's values even as the nation was struggling to become a Nation—and his courageous act reminds us that America was born out of faith in certain basic principles. In fact, it is these principles that made and still make our country exceptional and allow us to serve as an example. We are not bound together as a nation by bloodlines. We are not bound by ancient history; our Nation is a new nation. Above all, we are bound by our values.

George Washington understood that how you treat enemy combatants can reverberate around the world. We must convict and punish the guilty in a way that reinforces their guilt before the world and does not undermine our constitutional values.

There is another element to this. I can't go back in history and read General Washington's mind, of course, but one purpose of the rule of law is to organize a society's response to violence. Allowing coercion, coercive treatment, and tormentous actions toward prisoners, not only violates the fundamental rule of law and the institutionalization of justice, but it helps to radicalize those who are tortured.

Zawahiri, Laden's second in command, the architect of many of the attacks on our country, throughout Europe and the world, has said repeatedly that it is his experience that torture of innocents is central to radicalization.

Zawahiri has said over and over again that being tortured is at the root of jihad; the experience of being tortured has a long history of serving radicalized populations; abusing prisoners is a prime cause of radicalization.

For the safety of our soldiers and the reputation of our Nation, it is far more important to take the time to do this job right than to do it quickly and badly. There is no reason we need to rush to judgment. This broken process that has allowed policies behind it will cost our Nation dearly. I fear also that it will cost our men and women in uniform. The Supreme Court laid out the clear consequences of that.

September 12, 2006.

Hon. John Warner, Chairman, Hon. Carl Levin, Ranking Member, Senate Armed Services Committee, U.S. Senate, Washington, DC.

Dear Chairman Warner and Senator Levin: As retired military leaders of the U.S. Armed Forces and former officials of the Department of Defense, we write to express our profound concern about a key provision of S. 3861, the Military Commissions Act of 2006, which passed last week in both chambers of the President. We believe that the language that would redefine Common Article 3 of the Geneva Conventions as equivalent to the standards contained in the Detainee Treatment Act violates the core principles of the Geneva Conventions and poses a grave threat to American service-members, now and in future wars.

We supported your efforts last year to clarify that all detainees in U.S. custody must be treated with humanity, particularly important, because the Administration determined that it was not bound by the basic humane treatment standards contained in Geneva, Common Article 3. Now that the Supreme Court has made clear that treatment of al Qaeda prisoners is governed by the Geneva Convention standards, the Administration is seeking to redefine Common Article 3, so as to downgrade those standards. We urge you to reject this effort.

Common Article 3 of the Geneva Conventions provides the minimum standards for humane treatment and fair justice that apply to anyone captured in armed conflict. These standards were specifically designed to ensure that those captured, whether they are the other, more extensive, protections of the Conventions are treated in accordance with the values of civilized nations. The framers of the Conventions, in particular, wanted to ensure that Common Article 3 would apply in situations where a state party to the treaty, like the United States, fights an adversary that is not a party, including irregular forces like al Qaeda. The United States military has abided by the basic requirements of Common Article 3 in every conflict since the Conventions were adopted. In each case, we applied the Geneva Conventions—including, at a minimum, Common Article 3—even to enemies that systematically violated the Conventions themselves.

We have abided by this standard in our own conduct for a simple reason: the same standard serves to protect American service- men and women when they engage in conflicts covered by Common Article 3. Preserving the integrity and honor has become increasingly important in recent years when our adversaries often are non-nation states. Congress acted in 1997 to further this goal by criminalizing the violation of Common Article 3 in the War Crimes Act, enabling us to hold accountable those who abuse our captured personnel, no matter the nature of the armed conflict.

If any agency of the U.S. government is excused from compliance with these standards, or if we seek to redefine what Common Article 3 requires, we should ensure that our enemies will take notice of the technical distinctions when they hold U.S. prisoners captive. If degradation, humiliation, physical or mental brutality is decriminalized or considered permissible under a restrictive interpretation of Common Article 3, we will forfeit all credible objections to such brutality be inflicted upon American prisoners.

This is not just a theoretical concern. We have people deployed right now in theaters where Common Article 3 is the only source of legal protection should they be captured.

If we allow that standard to be eroded, we put their safety at grave risk. Last week, the Department of Defense issued a Directive reaffirming that the military will uphold the requirements of Common Article 3 for all prisoners in its custody. We welcome this new policy. Our servicemen and women have operated for too
long with unclear and unlawful guidance on detainee treatment, and some have been left to take the blame when things went wrong. The guidance is now clear.

But that clarity will be short-lived if the approach taken by Administration’s bill prevails. In contrast to the Pentagon’s new rules governing the interrogation of some circumstances, the bill would limit our definition of Common Article 3’s terms by introducing a flexible, sliding scale that might allow certain coercive interrogation techniques in some circumstances, while forbidding them under others. This would replace an absolute standard—Common Article 3—with a relative one. To do so will only create further confusion.

Moreover, were we to take this step, we would be viewed by the rest of the world as having formally renounced the clear strictures of the Geneva Conventions. Our enemies would be encouraged to interpret the Conventions in their own way as well, placing our troops in jeopardy in Shadrif conflicts. And American moral authority in the war would be further damaged.

All of this is unnecessary. As the senior serving Judge Advocates General recently testified, our armed forces have trained to Common Article 3 and can live within its requirements while waging the war on terror effectively.

As the United States has greater exposure militarily than any other nation, we have long understood the reciprocal nature of Geneva Conventions. That is why we believe—and the United States has always asserted—that a broad interpretation of Common Article 3 is vital to the safety of U.S. personnel. But the Administration’s bill would put us on the opposite side of that argument. We urge you to consider the impact that redefine Common Article 3 would have on Americans who put their lives at risk in defense of our Nation. We believe their interests, and their safety and protection should be your highest priority as you address this issue.

With respect,
Joseph P. Cullen, USA (Ret.);
Brigadier General Evelyn P. Foote, USA (Ret.);
Brigadier General David R. Irvine, USA (Ret.);
Brigadier General John H. Johns, USA (Ret.);
Brigadier General Richard O’Meara, USA (Ret.);
Brigadier General Murray G. Sagsven, USA (Ret.);
Brigadier General John K. Schmitt, USA (Ret.);
Brigadier General Anthony Verrengia, USAF (Ret.);
Brigadier General Stephen X. Xenakis, USA (Ret.);
Ambassador Pete Peterson, USA (Ret.);
Lawrence Wilkerson, USA (Ret.); Honorable Richard Danzig; Honorable William H. Taft IV; Frank Kendall III Esq.

The American Jewish Committee,

Dear Senator: We write on behalf of the American Jewish Committee, a national human relations organization with over 150,000 members and supporters represented by 32 regional chapters, to urge you to oppose the compromise Military Commissions Act of 2006, S. 3930, and to vote against attaching the bill to H.R. 6061, absent correcting amendments.

To be sure, the compromise that produced the current bill resulted in the welcome addition of provisions making clear that the humane treatment standards of Common Article 3 of the Geneva Conventions provide a floor for the treatment of detainees as well as specifying that serious violations are war crimes. Nevertheless, S. 3930 is unacceptable in its present form for the following reasons:

The bill arguably opens the door to the use of interrogation techniques prohibited by the Geneva Conventions.

It opens the door to the admission of evidence in military commissions obtained by coercive techniques in contravention of constitutional standards and international treaty.

It permits the prosecution to introduce evidence that has not been provided to a defendant in a form sufficient to allow him or her to participate in the preparation of his or her defense.

It unduly restricts defendants’ access to exculpatory evidence available to the government.

It unduly restricts access to the courts by habeas corpus and appeal.

It interprets the definition of Common Article 3 violations to exclude sexual assaults such as those that occurred at Abu Ghraib.

There is no doubt that the authorities entrusted with our troops’ protection have not been afforded the resources and tools necessary to protect us from the serious threat that terrorists continue to pose to all Americans, and, indeed, the civilized world. But the homeland can be secured in a fashion consistent with the values of due process and fair treatment for which Americans have fought and for which they continue to fight. We urge you to revisit and revise this legislation so that it accords with our highest principles.

Respectfully,
Robert Goodkind, President.
Richard T. Poltin, Legislative Director and Counsel

The Association of the Bar of the City of New York,


Hon. Bill Frist,
U.S. Senate Majority Leader,
Washington, DC.

Dear Majority Leader Frist: I am writing on behalf of the American Jewish Committee to urge you to oppose the Administration’s proposed Military Commissions Act of 2006 (the “Act”). The Association is an independent non-governmental organization of more than 22,000 lawyers, judges, law professors and government officials. Founded in 1870, the Association has a long history of dedication to human rights and the rule of law and has a particularly deep historical engagement with the law of armed conflict and military justice.

The Association has now reviewed the amended version of the Act introduced on September 22, 2006, following the compromise agreement between Senators Warner, McCain and Graham, on one side, and the Administration. The compromise addresses two distinct aspects of the Administration’s proposal: first, the opposition of the military commissions which have been envisioned, and second, aspects of United States enforcement of its treaty obligations under the Geneva Conventions.

We will address our concerns in this order, keeping in mind particularly the position of our members who may be called upon to serve as defense counsel, prosecutors and judges in the new court-martial system.

The compromise clarifies many of the most important failings of the prior draft by bringing the military commissions process into alignment with the Uniform Code of Military Justice and the Manual on Courts-Martial. The Association shares the view presented by the service secretaries general that the existing court-martial system, which in many respects is exemplary, provides an appropriate process for trial of traditional battlefield defendants as well as the control structures of terrorist organizations engaged in combat with the United States, and that the commissions should closely follow the procedures provided here in that regard are therefore welcome.

However, the bill gives the military judge discretion to admit coerced testimony if, as will presumably be the case, the coercion occurred before the enactment of the Detainee Treatment Act on December 31, 2005. Here we can also advocate the position of our members who presently or may in the future serve their nation in the uniformed services. The changes provided here in that regard are therefore welcome.

The enforcement provisions raise far more troubling issues. In particular, we are concerned by the definition of “cruel treatment” which does not correspond to the existing law interpreting and enforcing Common Article 3’s notion of “cruel treatment.” The definition incorporates a category of “wounding physical pain” which does not correspond to our understanding of that term. The definition of “cruel treatment” as the infliction of severe physical pain is clearly meant to encompass a variety of acts not necessarily intended to cause injury or death. The definition fails to encompass a variety of acts not necessarily intended to cause injury or death. The definition provides for a narrower definition of “cruel treatment” than the existing law.

Together, the enforcement provisions raise troubling questions. In particular, we are concerned by the definition of “cruel treatment” which does not correspond to the existing law interpreting and enforcing Common Article 3’s notion of “cruel treatment.” The definition incorporates a category of “wounding physical pain” which does not correspond to our understanding of that term. The definition of “cruel treatment” as the infliction of severe physical pain is clearly meant to encompass a variety of acts not necessarily intended to cause injury or death. The definition fails to encompass a variety of acts not necessarily intended to cause injury or death. The definition provides for a narrower definition of “cruel treatment” than the existing law.

We are dismayed by the Administration’s decision to adopt coerced testimony if, as will presumably be the case, the coercion occurred before the enactment of the Detainee Treatment Act on December 31, 2005. Here we can also advocate the position of our members who presently or may in the future serve their nation in the uniformed services. The changes provided here in that regard are therefore welcome.

However, the bill gives the military judge discretion to admit coerced testimony if, as will presumably be the case, the coercion occurred before the enactment of the Detainee Treatment Act on December 31, 2005. Here we can also advocate the position of our members who presently or may in the future serve their nation in the uniformed services. The changes provided here in that regard are therefore welcome.
standing, and hypothermia or cold cell if indeed they are not precluded as outright torture. However, the language of the current draft would create a crime defined in terms different from the proposed Geneva Conventions, thereby introducing ambiguity where none previously existed.

This ambiguity produces risks for United States personnel. It suggests that the military who employ techniques such as waterboarding, long-standing time, and hypothermia on Americans cannot be charged for war crimes. Moreover, Common Article 3 contains important protections for United States personnel who do not qualify for prisoner of war treatment under the Geneva Convention. This may include reconnaissance personnel, special forces operatives, private military contractors and intelligence service personnel. The language of Common Article 3 standards thus directly imperils the safety of United States personnel in future conflicts. We strongly share the perspective of five former chairs of the Joint Chiefs of Staff in their appeal to Congress to avoid any erosion of these protections.

The draft also seeks to strike the ability of hundreds of detainees held as “enemy combatants” to seek review of their cases through petitions of habeas corpus. The Great Writ has long been viewed as one of the most fundamental rights under our legal system. It is an essential guarantor of justice in difficult cases, particularly in a conflict, where there may be no alternative to indefinite detention or imprisonment without the right to due process and lack truly independent judicial review. This ambiguity produces risks for United States personnel since it suggests that those who bear the Imago Dei—some from FBI agents—that prisoners have been strip-searched, naked, sexually humiliated, chained to the floor, and left to defecate on themselves. These and other practices like “waterboarding”—(in which a detainee is made to feel as if he is being drowned)—may or may not meet the technical definition of torture, but most, these practices are cruel, inhuman, and degrading.

Today, the question before the Congress is whether it will support Sen. McCain’s efforts to make it clear to the world that the U.S. has outlawed such abuse or support an Administration proposal which creates grave ambiguity about whether prisoners can legally be abused in secret prisons without Red Cross access.

Evangelicals have often supported the Administration on public policy questions because they believe that the fundamental moral issues of marriage, abortion, and bioethics were the most important moral issues of our day. However, the language of the current draft could allow serious ambiguities still remain—ambiguities that carry heavy moral implications and that are intended to preserve options that some would rather not pursuing.

The terrorist attacks of September 11 were one of the most heinous acts ever visited upon this nation. The Commander in Chief must provide U.S. authorities with the practical tools and policies to fight a committed, well-resourced, and immoral terrorist threat. At the same time, the President must also defend the deepest and best values of our moral tradition. As Christians from the evangelical tradition, we support Senator McCain and his colleagues in their effort to defend the personal moral values of this nation which are embodied in our laws and our moral tradition. The Congress must send an unequivocal message that cruel, inhuman and degrading treatment has no place in our society and violates our most cherished moral convictions.

We do not believe that the United States should unilaterally abandon its commitment to the Geneva Conventions, but we do propose that the Administration’s ill-conceived proposals which will make us both less safe and less proud as a nation.

Sincerely,

Marilynn Rosenthal, Nicholas H. Ruth, Adele Welty, Nissa Youngren, Terry Greene, John LeBlanc, Andrea LeBlanc, Ryan Amundson, Barry Amundson, Colleen Kelly, Terry Kay Rockefeller, Paul Harris, David Potorti, Donna Marsh O’Connor, Kjell Youngren, Blake Allison, Tia Kminek, Jennifer Glick, Lorie Van Auker, Cindy Kleinberg, Anthony Aversano, Paula Shapiro, Valerie Lucznikowska, Lloyd Glick, James and Patricia Perry, Anna M. Mukerjee, Marion Kminek, Allison Rosenberger-Torres, Kelly Campbell, Bruce Wallace, John M. Leinung, Kristen Breitweiser, Patricia Casazza, Michael Casazza, Loretta J. Filipov, Apolline Lufkin, Joan Glick

September 28, 2006

To: RE EVANGELICAL LEADERS

Re: RE EVANGELICAL religious leaders speak out against cruel, inhuman, degrading treatment.

DEAR MEMBERS OF CONGRESS: The Congress faces a defining question of morality in the coming hours and days—whether Americans to inflict cruel and degrading treatment on suspected terrorist detainees. We are writing to express our strong support for the efforts by Senators and the Administration to protect the rights of Americans to create a system of strong, bipartisan majority of the Senate armed services paramilitary professionals. Erosion of our Committee on Military Affairs and the policy that results is a travesty. Fellow Senators, the process for debating far-reaching legislation that will define the conduct of our Nation’s conduct in the world and the rights of Americans here at home. And we are debating it too hastily in a debate too steeped in electoral politics.

The Senate, under the authority of the Republican majority and with the blessing and encouragement of the Bush-Cheney administration, is doing a great disservice to our history, our principles, our citizens, and our soldiers.

The deliberative process is being broken under the pressure of partisanship and the policy that results is a travesty. Fellow Senators, the process for debating this legislation to correct the administration’s missteps has not been fitted the “world’s greatest deliberative body.” Legitimate, serious concerns raised by our senior military and intelligence community have been marginalized, difficult issues glossed over, and in some cases, if not actually shut out in order to pass a misconceived bill before Senators return home to campaign for reelection.
The question before us is whether this Congress will follow the decision of the Supreme Court and create a better system that withstands judicial examination—or attempt to confound that decision, a strategy destined to fail again. The bill before us allows the admission into evidence of statements derived through cruel, inhuman and degrading interrogation. That sets a dangerous precedent that will endanger our own men and women in uniform overseas. Will our enemies be less likely to surrender? Will informants be less likely to come forward? Will our soldiers be more likely to face torture if captured? Will and degrading treatment obtain be less reliable? These are the questions we should be asking. And based on what we know about warfare from listening to those who have fought for our country, the answers do not support this bill. As Lieutenant John F. Kimmons, the Army’s Deputy Chief of Staff for Intelligence said, “No good intelligence is going to come from abusive interrogation practices.”

The bill makes significant changes to the War Crimes Act. As it is now written, the War Crimes Act makes it a federal crime for any soldier or national of the U.S. to violate, among other things, Common Article 3 of the Geneva Conventions in an armed conflict not of an international character. The administration has voiced concern that Common Article—which prohibits “cruel treatment or torture,” “outrages against human dignity,” and “humiliating and degrading treatment”—sets out an intolerably vague standard on which to base criminal liability, and may expose CIA agents to jail sentences for rough interrogation tactics used in questioning detainees.

As this Supreme Court noted, the Bush administration’s previous military commission system had failed to follow the Constitution and the law in its treatment of detainees. As the Supreme Court noted, the Bush administration has been operating under a system that undermines our Nation’s commitment to the rule of law.

The bill has several other flaws as well. This bill would not only deny detainees habeas corpus rights—a process that would allow them to challenge the very validity of their confinement—it would deny these rights to lawful immigrants living in the United States. If enacted, this law would give license to this Administration to pick people up off the streets of the United States and hold them indefinitely without charges and without legal recourse. Americans believe that our defendants, no matter who they are, should be able to hear the evidence against them. The bill we are considering does away with this right, instead providing the accused with only the right to respond to the evidence admitted against him. How can someone respond to evidence they have not seen?

At the very least, this is worth a debate on the merits, not on the politics. This is worth putting aside our differences—it is too important.

Our values are central. Our national security interests in the world are vital. And nothing should be of greater concern to those of us in this chamber than the young men and women who are, right now, wearing our Nation’s uniform, serving in dangerous territory.

After all, our standing, our morality, our beliefs are tested in this Chamber and their impact and their consequences are tested under fire, they are tested when American lives are on the line, they are tested when our strength and ideals are questioned by our friends and by our enemies.

When our soldiers face an enemy, when our soldiers are in danger, that is when our decisions in this Chamber will be felt. Will that enemy surrender? Or will he continue to fight, with fear for how he might be treated and with hope directed not at us, but at the patriot wearing our uniform whose life is on the line?

When our Nation seeks to lead the world in service to our interests and our values, will we still be able to lead by example?

Our values, our history, our interests, and our military and intelligence experts all point to one answer. Vladmir Bukovsky, who spent nearly 12 years in Soviet prisons, labor camps, and psychiatric institutions for non-violent human rights activities had this to say. ‘If Vice President Cheney is right, that some ‘cruel, inhumane, or degrading’ treatment of captives is a necessary tool for winning the war on terrorism, then the war is lost already.”

Let’s pass a bill that’s been honestly and openly debated, not hastily cobbled together.

Let’s pass a bill that unites us, not divides us.

Let’s pass a bill that strengthens our moral standing in the world, that declares clearly that we will not retreat from our values before the terrorists.
We will not give up who we are. We will not be shaken by fear and intimidation. We will not give one inch to the evil and nihilistic extremists who have set their sights on our way of life.

I say with confidence and without fear that we are the United States of America, and that we stand now and forever for our enduring values to people around the world, to our friends, to our enemies, to anyone and everyone.

Before George Washington crossed the Delaware, before he could achieve that long-needed victory, before the tide would turn, before he ordered that prisoners be treated humanely, he ordered that his soldiers read Thomas Paine's writing. He ordered that they read about the ideals for which they would fight, the principles at stake, the importance of this American project.

Now we find ourselves at a moment when we feel threatened, when the world seems to have grown more dangerous, when our Nation needs to ready itself for a long and difficult struggle against a new and dangerous enemy that means us great harm.

Just as Washington faced a hard choice up to us to decide how we wage this struggle and not up to the fear fostered by terrorists. We decide.

This is a moment where we need to remind ourselves of the confidence, fearlessness, and bravery of George Washington—then we will know that we cannot, we must not, subvert our ideals—we can and must use them to win.

Finally, we have a choice before us. I hope we make the right choice. I fear that we will not; that we will be once again back in the Supreme Court, and we will be once again held up to the world as failing our own high standards.

When our soldiers face an enemy, when our soldiers are in danger, will that enemy surrender if he thinks he will be tortured? Will he continue to fight? How will our men and women be treated?

I listened very carefully to what my colleague from Virginia, the Chairman of the Armed Services Committee, had to say about this amendment. He stated:

No Senator Kennedy's amendment, depending on how the votes come, and I'm on the opinion that this chamber will reject it, I don't want that rejection to be misconstrued by the world in any way as asserting that the practices in the amendment are consistent with the Geneva Convention or that they could legitimately be employed against our troops or anyone else.

Mr. LEVIN. Mr. President, the Kennedy amendment, I am afraid that others involved in the war on terror and everyone, any of those countries that are going to practice activities prohibited by the field manual, that I consider to be torture, are going to be held by the United States interrogation committing a war crime. This is important. It is essential. It is necessary.

The general concept was improved without objection a number of years ago in the wake of the Vietnam situation, regarding the definition of war crimes. We ought to restate and recommit ourselves to protecting Americans involved in the war on terror and ensure they will not be subject to these activities.

At the present time, without this amendment, it will be left open. If we accept this amendment, it would make it clear it is prohibited. That is what I should do.

I withdraw the remainder of my time.

The PRESIDING OFFICER (Mr. ALEXANDER). The Senator from Virginia.

Mr. WARNER. Mr. President, I suggest the absence of a quorum and that it not be chargeable to either side.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the order for the quorum call be dispensed with.

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

Mr. LEVIN. Mr. President, the Kennedy amendment would require the Secretary of State to notify other countries around the world that seven specific categories of actions, each of which is specifically prohibited by the Army Field Manual, are punishable offenses under common Article 3 of the Geneva Conventions that would be prosecuted as war crimes if applied to any United States person. Those seven categories of actions are: (1) Forcing the detainee to be naked, perform sexual acts, or pose in a sexual manner; (2) applying beatings, electric shock, burns, or other forms of physical pain; (3) “waterboarding”; (4) using military working dogs; (5) inducing hypothermia or heat injury; (6) conducting mock executions; and (7) depriving the detainee of necessary food, water, or medical care.

Mr. LEVIN. Mr. President, I yield myself 4 minutes.

Mr. President, I want to point out why this is so necessary and so essential. In reviewing the underlying legislation, if you look under the provisions dealing with definitions on page 70 and 71, and then read on, you will find that it is difficult to read that without having a sense of the kind of vagueness which I think surrounds prohibited interrogation techniques. It talks about substantial risks and to a certain physical pain. But the statute does not have specifics to define the areas which are prohibited. The techniques in my amendment are the same ones the Department of the Army and, to my best knowledge, our colleague and friend from Arizona has identified. Voting for my amendment would provide those specifics.

The President has asked for specificity, but he has refused to say whether Common Article 3 would prohibit these kinds of acts. That has left the world doubting our commitment to Common Article 3 and has endangered our people around the globe—those who are working for the United States in the war on terror. The administration’s obfuscation comes at a great risk.

This amendment provides the clarity and sends a message to the world that these techniques are prohibited. They are prohibited from our military bringing any of those countries that are going to practice activities prohibited by the field manual, that I consider to be torture, are going to be held by the United States interrogation committing a war crime. This is important. It is essential. It is necessary.

The legislative clerk proceeded to call the roll.

Mr. BYRD. Mr. President, I ask unanimous consent that the pending amendment be laid aside so that I may offer an amendment.
the times remaining under the control of the Senator from Virginia and the Senator from Michigan remain in place. We will now, to accommodate our distinguished senior colleague, go off of the Kennedy amendment and proceed to the Byrd amendment.

The PRESIDING OFFICER. That would be the case.

Without objection, it is so ordered.

The Senator from West Virginia is recognized.

AMENDMENT NO. 5104

(Purpose: To prohibit the establishment of new military commissions after December 31, 2011)

Mr. BYRD. Mr. President, I thank the Chair, and I also thank my very able and distinguished friend from Virginia.

Mr. President, I shall offer an amendment today that provides a 5-year sun- set to any Presidential authorization of any military commission enacted under the legislation currently being debated. I am certain that the Senate will offer this amendment today that Congress to retain its power of oversight and as an important check on future executive actions.

As we stand here now, Members are readying themselves to beat a path home to their States—I understand that—and their constituents. It is no coincidence that we have seen before the feverish climate of a looming election, the most important business of the Senate may infiltrate. I have seen that happen over the years. This is no surprise. We have seen before the fever of politics can undermine the serious business of the Congress once November and the winds of November draw nigh. We have seen the mistakes that can come when Congress rushes to legislate without the benefit of thorough vetting by committees, without adequate debate, without the opportunity to offer amendments.

Likewise, when legislation is pushed as a means of political showboating—we all know what that is—instead of by a diligent commitment to our constitutional duties, the results can be disastrous. In fact, there have been various proposals to bring congressional oversight to the military tribunals which were first authorized in November, 2001. Senators SPECTER, LEAHY, and DURBIN were instrumental in attempting to push back against unilateral action by the President to establish these commissions. These attempts were to reassert the power of the Congress—yes, the constitutional duty embodied in Article I of this Constitution that is vested in the Congress and in the Congress alone, to make our country’s laws and specifically to make rules concerning captures on land and water.

Let me say that again. I will repeat the verbiage of the Constitution: to make our country’s laws and specifically to make rules concerning captures on land and water.

Nothing came of these proposals. Since then, the Congress has ignored its responsibilities and this most important issue has been shoved aside.

What is this new impetus spurriug congressional action and a renewed interest in the issue? Did Congress find its way back to embracing its Article I duty? Did the branch that wake up to realize it is not within its purview to dictate the laws of the land? No, it was the Supreme Court’s decision in the Hamdan case.

While the President grabbed the wheel and the Court stepped in to remind us of the separation of powers and the constitutional role of each branch, thank God. Yes, thank God for the separation of powers envisioned by our forefathers. Thank God for the Supreme Court. Yes, I said this before; I say it again: Thank God for the Supreme Court.

It is no coincidence that the traditional pathways of legislation through the committee and amendment process and ample opportunity for debate have been lost against the enactment of bad, bills.

This is the way the Senate was designed to operate and this is how it separates in the best interests of the people.

Unfortunately, because of the timing of the Supreme Court’s decision and the charged atmosphere of the midterm elections, we are again confronted with slap-happy legislation that is changing by the minute.

The bill reported by the Senate Committee on Armed Services, which I supported, was the product of a thorough process, a deliberative process. Unfortunately, this bill’s progress was halted by the administration’s objections, and the product suffered mightily. Then, in closed-door negotiations with the White House, many of the successes announced less than a week ago in the previous version were shredded.

When the administration met stiff opposition—by former JAG—judge advocate general—officers and previous members of its own Cabinet, it realized it must come back to the table. Last Friday’s version of the bill was superseded by Monday’s version, and changes are still forthcoming. In such a frenzied, frenetic, and uncertain state, who really knows the nature of the beast? This bill could very well be the most important piece of legislation—certainly one of the most important pieces of legislation—that this Congress enacts, and the adoption of my amendment, which I shall offer, ensures—ensures—a reasonable review of the law authorizing military tribunals.

There is nothing more important to scrutinize than the process of bringing suspected terrorists to justice for their crimes in a fair proceeding, without the taint—which the taint—of a kangaroo court. Those are the values of our country. We dare not handle the matter sloppily. The Supreme Court has once struck down the President’s approach to military commissions, has it not? Do we want the product of this debate subject to the same fate? Do we want it struck down also?

The original authorization of the PATRIOT Act is a case study of the risks we run in legislating from the hip—and how, in our haste, we cannot afford to get this wrong. As with the PATRIOT Act, my amendment offers us an opportunity to provide a remedy for the unanticipated consequences that may arise as a result of our hasty action. Along with the sweeping changes made by the PATRIOT Act, the great hope included in it was the review that was required by the sunset provision. Everyone knows the saying: “Hindsight is 20–20.” But the type of this congressional oversight gives us the opportunity both to strengthen the parts of the law that may be found to be weak, and to right the wrongs of past transgressions.

So if we will not today legislate in a climate of steady deliberation, then let us at least prescribe for ourselves an antidote for any self-inflicted wounds. Let us prescribe for ourselves the remedy of reason—this amendment. Let this be the age of reason once more. Sunset provisions have historically been used to repair the unforeseen consequences of action in haste. You have heard that haste makes waste. If ever there were a case of legislation that cries out to be reviewed with the benefit of hindsight, it is the current bill.

My amendment, which I hold in my hand, provides the use of that authority through a 5-year sunset provision. Now, what is wrong with that? There is nothing wrong with that—a 5-year sunset provision. And I thank Senator OBAMA and I thank Senator CLINTON for their cosponsorship of my amendment. I urge my colleagues to support it.

Mr. President, I send my amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The assistant legislative clerk read as follows:

The Senator from West Virginia (Mr. BYRD), for himself and Mr. OBAMA, and Mrs. CLINTON, proposes an amendment numbered S10385:

On page 5, line 19, add at the end the following: “The authority of the President to establish new military commissions under this section shall expire on December 31, 2011. However, the expiration of that authority shall not be construed to prohibit the conduct of the finality of the proceedings of a military commission established under this section before that date.”
The PRESIDING OFFICER. Who yields time?

Mr. WARNER. Mr. President, we are about to receive a copy of the amendment. But I listened very carefully to my colleague’s speech, and I can’t help but agree that the exercise of executive authority must also be construed within the constitutional responsibilities and how, also, it should not try to discharge its constitutional responsibilities. And I guess my opposition falls, most respectfully, in the latter category because I find this Congress has a very high degree of vigilance in overseeing the exercise of the executive powers as it relates to the war against those whom I view as jihadists, those who have no respect for, indeed, the religion which they have ostensibly committed their lives to, act, have no respect for human life, including their human life.

It is a most unusual period in the history of our great Republic. The good Senator, having been a part of this Chamber for nearly a half century, has seen many history unfold. The one that I have had the privilege to serve in the Senate and I have often discussed the War II period. That is when my grasp of history began to come into focus. And, indeed, the Senator himself was engaged in his activities in the war effort, as we all were in this Nation.

The ensuing conflicts, while they have been not exactly like World War II, have been basically engaging those individuals acting in what we refer to as their adhering to a state, an existing government that has promulgated rules and regulations, such as they may be, for the orders issued to their troops, most of whom wore uniforms, certainly to a large degree in the war that followed right after World War II, the rest of those individuals in that conflict had some vestige of a uniform, conducting their warfare under state-sponsored regulations. I had a minor part in that conflict and remember it quite well.

Vietnam came along, and there we saw the beginning of the blurring of state sponsored. Nevertheless, it was present. The uniforms certainly lacked the clarity that had been in previous conflicts. And on the history goes.

But on this bill, I say to my good friend, the Senator from West Virginia. And I think our President, given his duty as Commander in Chief under the Constitution, has to be given the maximum flexibility as to how he deals with these situations. We see that in a variety of issues around here. But, nevertheless, it is the exercise of executive authority, and that exercise of executive authority must also be subject to the oversight of the Congress of the United States.

But for the broad powers conferred on the executive branch to carry out its duty to defend the Nation in the ongoing threat against what we generally refer to as terrorism—but more specifically the militant jihadists—we have to fight with every single tool we have at our disposal, consistent with the law of this Nation and international law. And, therefore, we are here in this particular time addressing it. The President, for meting out justice, a measure of justice, to certain individuals who have been apprehended in the course of the war against this militant jihadist terrorist group.

I find it remarkable, as I have worked it through with my other colleagues, that they are alien, they are unlawful by all international standards in the manner they conduct the war. Yet this great Nation, from the passage of this bill, is going to mete out a measure of justice as we understand it.

Now, the Senator’s concern is—and it always should be; it goes back to the time of George Washington and the Congress at that time—the fear of the overreach of power within the powers of the executive branch. But I think to put a clause and restriction, such as the Senator recommends in his amendment, into this bill would, in a sense, inhibit the ability of the President to rapidly exercise all the tools at his disposal.

I say to the Senator, your bill says: The authority of the President to establish new military commissions under this section shall expire. . . . However, the expiration of this authority shall not be construed to prohibit the conduct to finality of any proceedings of a military commission established under this section before that date.

That could be misconstrued. This war we are engaged in, we are not only the war in Afghanistan and Iraq today. We see where it could spread across our globe and has—not to the degree of the significance of Iraq or Afghanistan, but it has spread. Other nations have become alarmed to the threat, subject to the overt actions such as took place in Spain and other places of the world. We should not have overhanging this important bill any such restriction as you wish to impose by virtue of what we commonly call a sunset. I think that would not be correct. It could send the wrong message.

We have to rely upon the integrity of the two branches of the Congress to be ever watchful in their oversight, ever unrestrained in the authority they have given the President. As we commonly say around here, what the Congress does one day, it can undo the next day.

If, in the course of exercising our authority under the doctrine of the separation of powers—how many times have I heard the distinguished Senator from West Virginia discuss the doctrine of the separation of powers? So often. I remember when we were vigilantly trying to protect those powers reserved unto the Congress from an encroachment by the executive branch.

So for that reason I most respectfully say that I do not and I urge other colleagues not to support this amendment but to continue in their trust in this institution, in the Senate and in the House, to exercise their constitutional responsibilities in such a way that we will not let the executive branch at any time transcend what we believe are certain parameters we have set for this bill regarding the trials and the conduct of interrogations.

I think an extraordinary legislation that I was privileged to be involved in, which garnered 90-some votes, was the Senate bill sponsored by our distinguished colleague, Mr. McCaIN. That was landmark legislation. From that legislation has come now what we call the Army Field Manual, in which we published to the world what America will do in connection with those persons—the unlawful aliens who come into our custody by virtue of our military operations, and how they will be dealt with in the course of interrogation. That was an extraordinary assertion by the Congress, within the parameters of its powers, that they should do, the executive branch.

But a sunset date for the authority to hold military commissions, in my judgment, is not in the best interests, at this time in this war, of our country. If I am there in future debates. How much time do I have remaining?

The PRESIDING OFFICER. Nineteen minutes 20 seconds.

Mr. WARNER. Mr. President, I thank the Chair, and I yield the floor.

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

Mr. BYRD. Mr. President, the Senator knows my great respect for him. It is an abiding respect. When I look at him, I see a man—a Member of this Senate—who has had vast experience and worn many coats of honor. I see a man who stands by his word, who keeps his word, and is always very meticulously in criticizing another Senator or criticizing legislation. He is most circumspect, most respectful to his colleagues, and most respectful to the Constitution. But I am abhorrent—I cannot write very well anymore. I would like to be able to write down words that other Senators have said. But I cannot write. So I may have misinterpreted, or I may misstate the words. But I cannot understand why this legislation would not be in the best interests of my country.

I believe the Senator said—he certainly implied strongly—that this legislation would not be in the best interests of our country. If I am wrong, I know the Senator will correct me. Let me read, though, the amendment:

On page 5, line 19, add at the end the following: “the authority of the President to establish new military commissions under this section shall expire on December 31, 2011. However, the expiration of this section shall not be construed to prohibit the conduct to finality of any proceedings of a military commission established under this section before that date.”

Mr. President, what is wrong with that language? How would that language not be in the interest of our country? I think we are all subject to
error. Adam and Eve were driven from the Garden of Eden because of error. So from the very beginning of history, the very history of mankind, this race of human beings, there has been evidence of errors, mistakes. People did not foresee the future, and this language is a proof of that.

What is wrong with providing an expiration date for the authority given to the President in this bill, after a period of 5 years? Can we not be mistaken? Might we not see the day when we wish that that authority not be carried forward? I think that there would be a strong bipartisan desire to review this? Five years is a long time. Five years is ample time.

So I must say that I am somewhat surprised that my friend, the great Senator from Virginia, would seek to oppose this amendment. Let me read it once again. This is nothing new, having sunset provisions in bills. I think they are good. We can always review them, and if mistakes have not been made, we can renew them. There is that opportunity, that guarantee that there will come a time when this legislation will be reviewed. Only the word of Almighty God is so perfect that there is no sunset provision in the Holy Writ. No. But the sunset provision there is with us, and the time will come when all of us will take a voyage into the sunset. Mr. WARNER. May I reply at the appropriate time?

Mr. BYRD. Absolutely. I will yield right away.

Mr. WARNER. Many times, the two of us have stood right here and had our debates together. It is one of those rich moments in the history of this institution when two colleagues, without all of the prepared text and so forth, can draw upon their experience and knowledge and their own love for the Constitution of the United States and engage.

I say to my good friend, 3 weeks ago, there were headlines that these Senators were in rebellion against their President, three Senators were dis- senting, and on and on it went. Well, the fact is, the three of us—and there were others who shared our views, but somehow the three of us were singled out—believed as a matter of conscience we were concerned about an issue.

The concern was that the bill proposed by the administration, in our judgment, could be construed as in some way—maybe we were wrong—in indicating that America was not going to follow the treaties of 1949—most particularly, Common Article 3. Common Article 3 means that article in each of these three treaties. As my good friend knows—and we draw on our own individual recollections about the horrors of World War II. I was involved in the foreign battlefield. We certainly knew about it back here at home and studied it. I was a youngster, a skinny youngster in my last year in the Navy. So much of our history was very conscious of what was going on, and the frightful treatment of human beings as a consequence of that war.

The world then came together—and I say the world—and that and enacted these three treaties. The United States was in the lead of putting those treaties in. Those treaties were for the purpose of ensuring that future mankind, generations, hopefully, would not experience the horrors of billions of people experienced by death and maiming—not only soldiers but civilians.

Mr. President, we believed that the administration's approach to this could be interpreted by the world as somehow we were not behind those treaties. If we were to put a sunset in here after all of the deliberation and all of the work on the current bill that is before this body, it could once again raise the specter that, well, if in fact that the United States was trying to not live up to the treaties that brought on this debate in the Senate, then at the end of 5 years we go back to where we were. That could happen. We do not want to send that message. We want to send a message that this Nation has reconciled, hopefully, this body, as we vote this afternoon, and will send a strong bipartisan message that we are reconciled behind this legislation to ensure that in the end we are going to live fully within the confines of the treaties of 1949.

Mr. BYRD. We are not dealing with the treaties of 1949. Mr. WARNER. I respectfully say that our bill does, in my judgment. Clearly, it constitutes an affirmation of the treaties. I would not want to send a message at this time that there could come a point, namely, December 31, 2011, that some as we have given about those treaties might expire. That is what concerns me.

Mr. BYRD. Mr. President, I am almost speechless. I listened to the words that have just been uttered by my friend. My amendment does not affect, in any way, the portions of this bill that relate to the Geneva Conventions. It sunsets only the authority of the President to convene military commissions and, of course, Senate can renew that authority. That is done in many instances here. I think it is insurance for our country and the welfare of our country and the welfare of the people who serve in the military.

We say 5 years. Do we want to make that 6 years? Do we want to make it 7 years? Fine. It will expire at that time. It simply means that the Senate and the House take a look at it again and renew it. Why not?

Mr. WARNER. I say to my friend, Mr. President, from a technical standpoint, he is correct. He is going in there and inculcating out regarding commissions. But the whole debate has been focused around how. We will conduct ourselves in accordance with the common understanding of Article 3, particularly.

So while the Senator, in his very fine and precise way of dealing with the legislation, takes out just that, it might not be fully understood beyond our shores. The headline could go out that there is going to be an expiration.

I say to my good friend, it is just not wise to go in and try and put any imprint on this that expiration could occur. It could raise, again, the debate, and I do not think that is in the interest of the country. I think this debate, this legislation has been settled, and I think what has ever the President's intention in the course of the preparation of his legislation, but some fear it could.

Mr. BYRD. Mr. President, it could be a Democratic President, as far as I am concerned. I think it is the part of the Senate in conducting its constitutional oversight, to say that we will do it this far and then we will take another look at it in the light of the new day, in the light of the new times, the new circumstances; we will take another look at it. We are not passing any judgment on that legislation 5 years out.

I am flabbergasted—flabbergasted—that my friend would take umbrage at this legislation.

I only have a few minutes left. Mr. LEVIN. Will the Senator from West Virginia yield for 3 minutes?

Mr. BYRD. Yes. I yield 3 minutes.

Mr. LEVIN. Will the Senator from West Virginia yield for 3 minutes?

Mr. BYRD. Yes, I yield 3 minutes.

Mr. LEVIN. Mr. President, I think the Senator from Virginia is, more than any other person in the history of this body, the custodian in his person of the Constitution of the United States. The bill that is before us obviously raises a number of very significant issues involving our Constitution.

What the amendment of Senator BYRD does very wisely is say that after 5 years, let us double back and doublecheck—double back and doublecheck—so that we can be confident that what we have done comports with the Constitution of the United States. This amendment does it very carefully. It does not disturb any pending proceeding under the commission. The Senator from West Virginia is, more than any other person in the history of this body, the custodian in his person of the Constitution of the United States. The bill that is before us obviously raises a number of very significant issues involving our Constitution.

We ought to heed the words of Senator BYRD, who understands the importance of this Constitution and that this body be the guardian of the Constitution. We are the body that must protect this Constitution.

Mr. BYRD. Yes.

Mr. LEVIN. And this, as he puts it, is an insurance policy that we will do just that.

Mr. BYRD. Yes.

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

The PRESIDENT pro tempore. Without objection, it is so ordered.
Mr. BYRD. Mr. President, I have 4 minutes remaining; do I?

The PRESIDING OFFICER. The Senator has 5 minutes 14 seconds remaining.

Mr. BYRD. I yield 5 minutes to my friend, the distinguished Senator from Illinois, Mr. OBAMA.

The PRESIDING OFFICER. The Senator from Illinois is recognized.

Mr. OBAMA. Mr. President, I thank my dear friend and colleague from West Virginia.

I am proud to be sponsoring this amendment with the senior Senator from West Virginia. He is absolutely right that Congress has abrogated its oversight responsibilities, and one way to reverse that troubling trend is to adopt a sunset provision in this bill. We did it in the PATRIOT Act, and that allowed us to make important revisions to the bill that reflected our experience about what worked and what didn't work. It didn't work during the previous 5 years. We should do that again with this important piece of legislation.

It is important to note that this is not a conventional war we are fighting, as has been noted oftentimes by our President and on the other side of the aisle. We don't know when this war against terrorism might end. There is no emperor to sign a surrender document. As a consequence, unless we build into our own processes some mechanism to oversee what we are doing, it will be just another way we are going to have an open-ended situation, not just for this particular President but for every President for the foreseeable future. And we will not have any formal mechanism to require us to take a look and to make sure it is being done right.

This amendment would make a significant improvement to the existing legislation, and it is one of those amendments that would, in normal circumstances, I believe, garner strong bipartisan support. Unfortunately, we are not in normal circumstances.

Let me take a few minutes to speak more broadly about the bill before us.

I may have only been in this body for a short while, but I am not naive to the political considerations that go along with many of the decisions we make here. I realize that soon—perhaps today, perhaps tomorrow—we will adjourn for the fall. The campaigning will begin in earnest. There are going to be attack ads and negative mail pieces criticizing people who don't vote for this legislation as caring more about the rights of terrorists than the protection of Americans. And I know that this vote was specifically designed and timed to add more fuel to the fire. Yet, while I know all of this, I am still disappointed because what we are doing here today, a debate over the fundamental human rights of theaccused, should be bigger than politics. This is serious and this is somber, as the President noted today, and was insisting that this is supposed to be our primary concern. He is absolutely right it should be our primary concern—which is why we should be approaching this with a somberness and seriousness that this administration has not displayed with this legislation.

And instead of not just suspending, but eliminating, the right of habeas corpus—the seven-century-old right of individuals to challenge the terms of their own detention, we could have given the accused one chance—one single chance—to ask the Government whether they are being held and what they are being charged with.

But politics won today. Politics won. The administration got its vote, and now it will have its victory lap, and now they will be able to go out on the campaign trail and tell the American people that they were the ones who were tough on the terrorists.

And yet, we have a bill that gives the terrorist mastermind of 9/11 his day in court, but not the innocent people we may have accidentally rounded up and mistaken for terrorists—people who may stay in prison for the rest of their lives.

And yet, we have a report authored by sixteen of our own Government's intelligence agencies, a previous draft of which described, and I quote, "... actions by the United States government that were determined to have stoked the jihad movement, like the indefinite detention of prisoners at Guantanamo Bay.

And yet, we have al-Qaeda and the Taliban regrouping in Afghanistan while we look the other way. We have a war in Iraq that our own Government's intelligence says is serving as al-Qaeda's best recruitment tool. And we have recommendations from the bipartisan 9/11 commission that we still refuse to implement 5 years after the fact.

The problem with this bill is not that it is too tough on terrorists. The problem with this bill is that it is sloppy. And the reason it is sloppy is because we rushed it to serve political purposes instead of taking the time to do the job right.

I have heard, for example, the argument that it should be military courts, and not Federal judges, who should make decisions on these detainees. I actually agree with that.

The problem is that the structure of the military proceedings has been poorly thought through. Indeed, the regulations that are supposed to be governing administrative hearings for these detainees, which should have been issued months ago, still haven't been issued. Instead, we have rushed this bill or any President—to decide what does and does not constitute torture, we could have left the definition up to our own laws and to the Geneva Conventions, as we would have if we passed the bill that the Armed Services committee showed us how to do it.

All of us, Democrats and Republicans, want to do whatever it takes to track down terrorists and bring them to justice as swiftly as possible. All of us want to give our President every tool we have. I am sure all of us were willing to do that in this bill. Anyone who says otherwise is lying to the American people.

In the 5 years the President's system of military tribunals has existed, the fact is not one terrorist has been tried, not one has been convicted, and in the end, the Supreme Court of the United States found the whole thing unconstitutional because we were rushing through a process and not overseeing it with sufficient care. Which is why we are here today.

We could have fixed all this several years ago in a way that allows us to detain and interrogate and try suspected terrorists while still protecting the accidentally accused from spending their lives locked away in Guantanamo Bay. Easily. This was not an either-or question. We could do that still.

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

Mr. WARNER. We are under fairly tight time control, but I will give the Senator from Illinois a minute.

Mr. OBAMA. I will conclude, then. I appreciate the Senator from Virginia.

Instead of giving this President—or any President—to decide what does and does not constitute torture, we could have left the definition up to our own laws and to the Geneva Conventions, as we would have if we passed the bill that the Armed Services committee showed us how to do it.

Instead of detainees arriving at Guantanamo and facing a Combatant Status Review Tribunal that allows them no real chance to prove their innocence with evidence or a lawyer, we could have developed a real military system of justice that would sort out the suspected terrorists from the accidentally accused.
State, I hope God has mercy on their soul, because I certainly do not.

For those who our Government sus-
spects of terror, I support whatever tools are necessary to try them and un-
cover their plot.

We also know that some have been detain-
ed who have no connection to terror whatsoever. We have already
had reports from the CIA and various generals over the last few years saying that many of the detainees at Guanta-
namo Bay have been there—as one U.S. commander of Guantanamo told the Wall Street Journal, “Some-
times, we just didn’t get the right folks.” And we all know about the re-
cent case of the Canadian man who was suspected of terrorist connections, de-
tained in New York, sent to Syria, and tortured, only to find out later that it
was all a case of mistaken identity and poor information. In the future, people
like this may never have a chance to prove their innocence. They may re-
main forever away from home.

The sad part about all of this is that this betrayal of American values is un-
necessary.

We could have drafted a bipartisan, well-structured bill that provided ade-
quate due process through the military courts, had an effective review process
that would’ve prevented frivolous law-
suits being filed and kept lawyers from clogging our courts, but upheld the
basic ideals that have made this coun-
try great.

Instead, what we have is a flawed document that in fact betrays the best
instincts of some of my colleagues on both sides of the aisle—those who worked in a bipartisan fashion in the
 Armed Services Committee to craft a bill that we could have been proud of.
And they essentially got steamrolled by this administration and by the im-
peratives of November 7.

That is not how we should be doing busi-
ness in the U.S. Senate, and that is not how we should be prosecuting this
war on terrorism. When we are sloppy and cut corners, we are undermining
those very virtues of America that will
lead us to success in winning this war.
At bare minimum, I hope we can at
least pass this provision so that cooler
heads can prevail after the silly season
of politics is over.

I conclude by saying this: Senator BYRD has spent more time in this
Chamber than many of us combined. He has seen the ebb and flow of politics
in this Nation. He understands that sometimes we get caught up in the heat
of the moment. The design of the Senate has been to cool those passions and
try step back and take a somber look and a careful look at what we are doing.

Passions never flare up more than
during times where we feel threatened.
I strongly urge, despite my great admi-
raton for one of the sponsors of the under-
ing bill, that we accept this ex-
terordinarily modest amendment that
would allow us to go back in 5 years’
time and make sure that we are doing

serves American ideals. American val-
ues, and ultimately will make us more
successful in prosecuting the war on
terror about which all of us are con-
cerned.

Thank you, Mr. President. Mr. BYRD. Mr. President, I ask the dis-
guished Senator from Virginia, may I have 10 seconds?

Mr. WARNER. I am going to give the
Senator more than 10 seconds. I have
have to do a unanimous consent request on behalf of the leadership.

ORDER VITIATED—S. 295

I ask unanimous consent that the order with respect to S. 295 be vitiated.
The PRESIDING OFFICER. Is there objection?
Mr. LEVIN. Reserving the right to object.

No objection.
Mr. WARNER. I understand there is no objection. Will the Chair kindly
rule?

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

The Senator from Virginia is recognized.

Mr. WARNER. Mr. President, I yield such time as Mr. BYRD wishes to take.

The PRESIDING OFFICER. The Sen-
ator from West Virginia.

Mr. BYRD. Mr. President, I thank my friend from Virginia. I merely wanted
to thank the distinguished Senator from Illinois, Mr. OBAMA, for his state-
ment. I think it was well said, I think
it was wise, and I thank him for his
strong support of this amendment.

I also close by asking that the clerk
once again read this amendment. I will
then yield the floor. I thank the Sen-
ator from Virginia.

Mr. WARNER. Mr. President, I say to
my good friend, I fully understand
what you endeavor to do here, and I re-
spectfully strongly disagree with it. I
think many of us share this. This is
going to be a very long war against
those people whom we generically call
terrorists. And I support—I support
this President and his successor must
have the authority to continue to con-
duct these courts-martial—these trials
under these commissions—and not send
out a signal to terrorists: If you get
captured, this thing may end.

Mr. WARNER. If you are not caught
within this period of time, when this
went into effect, then you are no
longer going to be held accountable. I,
myself, on this side of this body, do
regret that this Nation or other na-
tions or a consortium of nations have
not captured Osama bin Laden. There
is a debate going on about that, and I
am not going to get into that debate,
but the fact is he is still at large. There
could be other Osama bin Ladens, and
it may take years to apprehend them,
no matter how diligently we pursue
them. We cannot send out a signal that
at this definitive time, it is the respon-
sibility of the President, of the execu-
tive branch, to hold those accountable
for crimes against humanity. They
would not be held accountable if this
provision went into power.

Need I remind this institution of the
most elementary fact that every Sen-
ator understands, that what we do one
day can be changed the next. If there
comes a time when we feel this Presi-
dent or a subsequent President does
not have authority consistent with
this act, Congress can step in, and with
a more powerful action than a sunset,
a very definitive action.

Mr. President, it is my understanding
I have a few minutes left under this
amendment.

The PRESIDING OFFICER (Mr. COLEMAN). The time of the Senator from Virginia is 9 1/2 minutes.

Mr. WARNER. I would like to have
that time transferred under my time
on the bill as a whole. I hope Senator
CORNYN, who has expressed an interest
in this, gets the opportunity to use
that time to address this amendment.

Now, Mr. President, as I look at the
number of Senators who are desiring to
speak on my side—and I think that
may be helpful if you could. I say to my colleague, the ranking member,
check on the other side—we still have
some debate, and we are prepared to
take into debate on the Kennedy amend-
ment now. Therefore, I will undertake
to do that just as soon as I finish.

But then we are in that time period
where all time has expired or utilized
or otherwise allocated on the several
amendments. We will soon receive an
indication from the leadership as to
time that just as soon as I finish.

So I am going to manage that as fair-
ly and as equitably as I can. That is
what we propose to do. I will go into
the subject of the Kennedy amendment
right now.

The PRESIDING OFFICER. The Senator
from Michigan is recognized.

Mr. LEVIN. Mr. President, I am afraid
that the way this now is set up, the Senator from Virginia has about
six speakers who will have time, and
the time for the other two Senators, I
hope to have time for Senator HUTCHISON, Senator CHAMBLISS, and again Senator CORNYN, Senator GRASSLEY, and Senator MCCONNELL, the distinguished major-
ity whip.

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and as equitably as I can. That is
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ity whip.

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and as equitably as I can. That is
what we propose to do. I will go into
the subject of the Kennedy amendment
right now.
Mr. LEVIN. How much time all together on the majority side?

The PRESIDING OFFICER. On the bill, 50 minutes; on the Kennedy amendment, 30 minutes.

Mr. LEVIN. I think everybody ought to recognize that on a bill we are in. I hope we will withhold our comments until those on the other side who have been indicated as having time allocated to them speak so that we will have some time to respond to them.

The PRESIDING OFFICER. The Senator from Virginia is recognized.

AMENDMENT NO. 5088

Mr. WARNER. Mr. President, I would now like to address the amendment offered by the senior Senator from Massachusetts.

I have read this very carefully and I have studied it. I say to my good friend. There are certain aspects of this amendment that are well-intentioned. But I strongly oppose it, and I do encourage colleagues to oppose it, because if one of the sensitive powers is involved here, and that is the subject on which this Chamber has resonated many times. But here I find the amendment invades the authority of the executive branch in the area of the conduct of its affairs by directing the Secretary of State to notify other state parties to the Geneva Conventions of certain U.S. interpretations of the Geneva Conventions, in particular Common Article 3 and the law of war.

It is up to the executive branch in its discretion to take such actions in terms of its relations with other states in this world—not the Congress directing that they must do so—such communications with foreign governments. But in the balance of powers, it is beyond the purview of the Congress to say to the Secretary of State: You shall do thus and so.

This bill speaks for itself by defining grave breaches of Common Article 3 of the Geneva Conventions. These are clearly prohibited by our bill. Rather than listing specific techniques, Congress has exercised its proper constitutional role by defining such conduct in broad terms as a crime under the War Crimes Act. The techniques in Senator Kennedy's amendment are not consistent with the Common Article 3 and would strongly protest their use against our troops or any others. So I say with respect to my good friend, this is not an amendment that I would in any way want to be a part of this bill.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I would like to inquire of the Senator from Virginia, and I yield myself 3 minutes. As I understand, one of the reasons this amendment is being rejected is because it is going to place on our State Department to notify the 194 countries that we expect, if these techniques are used against Americans, they would be considered a war crime. That is a possible difficulty for us? That is a burden for us? I mean, is he objecting because, we can't foresee all of the different kinds of techniques that might be used against individuals and therefore we shouldn't list these. We list them in the Army Field Manual specifically pulled out of the air; they are listed specifically in the Army Field Manual. That is where they come from. And a number of the Members on the other side of the aisle have said that those techniques are prohibited. So we have taken the Department of Defense list and incorporated it.

Then the last argument is that: Well, if it is rejected, we don't want this to be interpreted as a green light for these techniques. There must be stronger arguments. Maybe I am missing something around here. With all respect, I have difficulty in understanding why the Senator from Virginia, the chairman of the Armed Services Committee, does not address the fundamental issue which is included in this amendment, and that is this amendment protects Americans who are out on the front lines of the war on terror, the SEALs, the CIA, others who are fighting, and it gives them authority: Yes we have to fight. Yes we should continue to do so.

Mr. WARNER. I yield myself 1 minute.

The PRESIDING OFFICER. The Senator has consumed 3 minutes. Mr. KENNEDY. I yield myself 1 minute. I want to put in the RECORD the excellent letter from Jack Vessey, who is a distinguished former Joint Chief of Staff:

I continue to read and hear that we are facing a different enemy in the war on terror. No matter how true that may be, inhumane and cruel acts of warfare are not only forbidden to enemies we have faced in the past. In my short 46 years in the armed forces, Americans confronted the horrors of the prison camps of the Japanese in the years between World War II and Korea, the North Koreans in 1950 to 1953, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations in World War II. Through those years, we held to our own values. We should continue to do so.

The Kennedy amendment does it. That is what this amendment is about. I reserve the remainder of my time.

I ask unanimous consent the letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows: SEPTEMBER 12, 2006.

Hon. John McCain, U.S. Senate, Washington, DC.

DEAR SENATOR MCCAIN: Sometimes, the news is a little garbled by the time it reaches the forest of North-central Minnesota. I call you recent reports that the Congress is considering legislation which might relax the United States support for adherence to Common Article 3 of the Geneva Convention. If that is true, it would seem to weaken the effect of the McCain Amendment on torture of last year. If such legislation is being considered, I fear that it may weaken America in two respects. First, it would undermine the moral basis which has generally guided our conduct in war throughout our history. Second, it could undermine a legal argument for the mistreatment of Americans being held prisoner in time of war.

In 1980, 3 years after the creation of the Department of Defense, the then Secretary of Defense, General George C. Marshall, issued a small booklet titled The Armed Forces Officer which summarized the laws and traditions that governed our Armed Forces through the years. As the Senate deals with the issue it might consider a short quote from the last chapter of that book which General Marshall sent to every American Officer. The last chapter is titled "Americans in Combat" and it lists 29 general propositions which govern Americans in war. Number XXV, which I long ago underlined in my copy, reads as follows:
The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In short wars, we do not torture helpless non-combatants, if it is within our power to avoid so doing. Wanton killing, torture, cruelty or the working of unusual hardship on others or the populace is not justified in any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes.

For the long term interest of the United States as a nation and for the safety of our own forces in battle, we should continue to maintain those principles. I continue to read and hear that we are facing a "different enemy" in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950–53, and the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi's holocaust depredations. Through it all, perhaps through it we held to our own values. We should continue to do so.

Thank you for your personal courage in making those values, both the spoken word and the closed letter. In waging war, we do not terrorize our enemies—this bill applies to the trial of illegal enemy combatants. We afford lawful enemy combatants or legal enemy combatants, it does not make no pretense whatsoever of conformity with even minimal standards of treatment—this bill applies to the trial of illegal enemy combatants. Those desiring to speak to the bill, with the exception of Senator McCain, would they kindly come down and utilize this time before the amendments come.

I am not in the business of trying to amend your amendment, Mr. President.

Mr. KENNEDY. Would the Senator support it if we changed it to "shall," that you, the chairman of our committee, will make that request and the President will go ahead and notify and make that request and the Senate shall notify, at that juncture where we will consider the statements of others, very important statements to be made. I listed them in a recitation of those who have indicated their desire to speak. But I also bring to the attention of the body that I have just been told by the leadership they are anxious to proceed to the vote on the floor of the Senate. At this time I would ask—if I can get my colleague's attention—that there be yeas and nays on all of the pending amendments.

The PRESIDING OFFICER. Without objection, the yeas and nays may be requested on all pending amendments.

Mr. LEVIN. Will the Senator withhold that request for 2 minutes? Will the Senator withhold?

Mr. WARNER. Sure.

Mr. President, we will now put in a quorum call to accommodate the ranking member, such that the time is not charged to either side.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

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

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

Mr. WARNER. Mr. President, the managers—that is, the leaders from their respective leaders, are endeavoring to do the following. There are three amendments to be voted on and then final passage. We hope to have as much time used on the bill as we can, to be consumed prior to the initiation of the votes. But then subsequent to the three votes, there will be a block of time. A Senator on this side has reserved 12 minutes. I intend to reserve, on my side, time to Senator McCain. I am trying to work in that category of time following the votes. But until we are able to reconcile this, I ask that we now proceed.

Let me allow the Senator from Georgia to proceed. He has indicated a desire to speak for 5 or so minutes at this time. But I hope Senators are following what the two managers are saying. Those desiring to speak on the bill, with the exception of Senator McCain, would they kindly come down and utilize this time before the amendments start?

I yield the floor.

The PRESIDING OFFICER. The Senator from Georgia.

Mr. CHAMBLISS. Mr. President, I rise today in support of the Military Commissions Act of 2006. This historic legislation is the result of much work, thought, and debate.

I commend the administration, I commend Senator McCain, Senator Graham, and all those who were involved in the ultimate compromise we have come to on this very sensitive and very complex issue. I am pleased we were able to find common ground on this critical issue and ensure that the President can authorize the appropriate agencies to move forward with an appropriate interrogation program.

There is no question that this program provides essential intelligence that is vital to America's success in the war on terrorism. At the same time, it honors our agreement under the Geneva Conventions and underscores to other nations that America is a nation of laws. This has been a difficult issue and both sides worked so diligently to achieve this result. In this new era of threats, where the stark and sober reality is that America must confront international terrorists committed to the destruction of our nation, passage of this bill is absolutely necessary. Our prior concept of war has been completely altered, as we learned so tragically on September 11, 2001. We must address threats in a different way. If we are going to be in the business of terrorist activity, we need to be able to get critical information to do so.

There has been much discussion during the course of the drafting of this bill about the rule of law, and the rule of law relative to detainees is, indeed, reflected in this bill. It provides for tribunals, for judges, for counsel, for discovery, and for rules of evidence.

Most importantly, however, in my view, is that while this bill provides important rule of law procedures for illegal enemy combatants, it does not give them the same protections which we afford lawful enemy combatants or our own military personnel, and that is a critical distinction. And that is how it ought to be. We have made that distinction for no other reason than to provide incentive for every nation across the world to observe international agreements for the proper treatment of captives. It bears repeating this bill applies to the trial of illegal enemy combatants—those who make no pretense whatsoever of conformity with even minimal standards or international norms of civilized behavior when it comes to the treatment of those they capture. We hear repeatedly that we should be concerned about what we do, for fear that we encourage others to treat our captured service men and women in a similar manner. But let's be very clear here and state where every American knows to be true. The al-Qaeda terrorists treat our captured service men and women by beheading them and by dragging their bodies through the streets.
They need no encouragement or excuse for their actions by reference to our treatment of their captives. As a result of the Supreme Court’s ruling, we are creating military commissions that provide rule of law protections which are embodied in this bill—courts, judges, legal counsel, and rules of evidence. So this bill appropriately meets our international obligations and America’s sense of what is right and it is in keeping with our higher values.

However, this bill will allow the President to move forward with a terrorist interrogation program that will ensure that we continue to get critical information about those who are plotting to carry out hateful acts against America and against Americans.

I commend the President for his determination to respond to the new reality confronting us. I commend Chairman Warner and my colleagues on the Armed Services Committee who worked in good faith to craft a bill which is the right bill to respond to the challenges we face. And again, I am pleased we were able to find common ground on this critical issue and ensure that the President can move forward with an appropriate interrogation program.

I think it is important that we send a bill to the White House, to the desk of the President that is exactly the same as the bill that has already been passed by the House so we can put this program in place immediately. The way we do that is to continue to defeat all the amendments that have been put forward, and that we send the President the same bill that has already been passed by the House so that this program can be reinitiated immediately.

I yield the floor.

Mr. WARNER. Mr. President, I thank our distinguished colleague from Georgia, a very valued member of the Armed Services Committee who has from time to time participated in the extensive deliberations and consultations on how the original bill which we worked on should be shaped and finally amended. I thank him.

Again, I call to the attention of colleagues that I shall put in a quorum for the purpose of trying to accommodate Members on my side who desire to speak.

I now see the distinguished Senator from South Carolina. We are prepared to allocate to him such time as he may desire. How much time does he need?

Mr. GRAHAM. Would 15 minutes be OK?

Mr. WARNER. Yes.

Mr. GRAHAM. Mr. President, in 15 minutes I will try to explain the processes as I know it to be in terms of how we arrived at this moment.

No. 1, I am glad we are here. I think the country is better off having the bill voted on in the current fashion.

I have gotten to know Senator Warner very well over the last 30 days. I had a high opinion of the Senator before this process started, but I, quite frankly, am in awe of his ability to stand up for the institution as a U.S. Senator, who was a former Secretary of the Navy who I thought had a balanced approach about what we are trying to do.

It is no secret that Senator McCain is one of my closest friends in this body, and I respect him in so many ways. But unlike myself and most of us, Senator McCain paid a heavy price while serving this country. He and his colleagues in Vietnam were treated very poorly as prisoners of war. When he speaks about the Geneva Conventions, he does so as someone who has been in an environment where the Conventions would not apply. But Senator McCain believes very strongly in the Geneva Conventions. When it comes to the Vietnam war, he has told me more than once that if it were insurrection of the United States and the international community that constantly pushed back against the North Vietnamese, he thought the torture would have continued and all of them would eventually be killed. But the North Vietnamese became concerned about international criticism after a point in time.

While the Geneva Conventions were not applied evenly by any means, it did have an effect on the North Vietnamese.

I have been a military lawyer for over 20 years. I have had the honor of wearing the Air Force uniform while serving my country and being around great men and women in uniform. It has been one of the highlights of my life. I have never been shot at. The only people who wanted to kill me were probably some of my clients. But I do appreciate why the Geneva Conventions exist because it is not the law that armed conflict is a body of law unique to itself and has a rich tradition in our country and throughout the world and it will work to make us safe and live within our values if we properly apply it.

The reason we are here is because the Supreme Court ruled in the Hamdan case that the military commissions authorized by the President were in violation of Common Article 3 of the Geneva Conventions. They were not regularly constituted courts.

It surprised me greatly that the Supreme Court would find that the Geneva Conventions applied to the war on terror. It was President Bush’s assumption and mine, quite frankly, that humanitarian treatment would be the standard. But this enemy doesn’t wear a uniform; it operates outside the Conventions, doesn’t represent a nation, and, therefore, would not be covered. But the Supreme Court came to a different conclusion. Thus, we are here.

I say to my fellow Americans, it is not a weakness, it is strength that we have three branches of government. It is not healthy for one branch of government to dominate the other two at a time of stress.

I have pushed back against the administration when I believed they were pushing the executive power of the inherent authority of the President too far, so though we are in a time of war, there is plenty of room for the Congress and the courts.

What I tried to do in helping draft this bill, working with the President and working with our friends on the other side, is come up with a product that would create the balance that I think would serve us well.

My basic proposition that I have applied to the problem is we are at war, that 9/11 was an act of war, and since that moment in time our Nation has been at war with enemy combatants who do not wear a uniform, who do not represent a nation but are warriors for their cause, just as dedicated as Hitler was to his cause, and they are just as vicious and barbaric as any enemy we have ever fought. But we don’t need to be like them to win. As a matter of fact, we need to show the world that we are different than them.

When the Geneva Conventions were applied to the war on terror, we had a problem. We had to renew the Military Commission Tribunal in line with Common Article 3. Common Article 3 is a mini-human-rights tree that is common to all four Convention articles. You have one about lawful combatants and unlawful combatants, civilians and wounded people. Common Article 3 is throughout all of the treaties regarding the Geneva Conventions. It says you would have to have a regularly constituted court to pass judgment or render sentences against those who are in your charge during time of war; that is, unlawful combatants.

The problem with the military commission order authorized by the President was that it deviated from the formal Code of Military Justice, the court-martial model, without showing a practical reason. The Uniform Code of Military Justice, it says military commissions are authorized, but they need to be like the court-martial system to the extent practicable.

What I am proud of is we have created a new military commission based on UCMJ and deviations are there because of the practical need. A court martial is not the right forum to try enemy combatants—non-citizen terrorists—the military commission is the right forum, but we are basing what we are doing on UCMJ. While there are practical differences, I think, will be sustained by the Court.

The confrontation rights that were originally posed by the administration gave me great concern. I do not believe that to win this war we need to create a procedure which will then receive evidence classified in nature, convict the accused, and the accused never knows what the jury had to render a
verdict upon, could not answer that accusation, rebut or examine the evidence.

That was the proposal which I thought went too far and that would come back to haunt us. As a result of this compromise, it has been taken out.

We have a national security privilege available to the Government to protect that prosecutor’s file from being given over to the defense or to the accused so our sensitive information will be protected. We will now allow the prosecutor to give that to the jury and let them bring it out on the side of the accused and the accused never knowing what he was convicted upon. That could come back to haunt us if one of our soldiers falls into enemy hands.

We would not want a future conviction based on evidence that our soldiers and CIA operative never saw. I think we have a military commission model that affords due process under the law but creates our Nation can be proud of, that will work in a way to render justice, and if a condition is ab- stained, it will be something we can be proud of as a nation. I am hopeful that the world would see the condition based not on vengeance.

My goal is to render justice to the terrorists, even though they will not render justice to us. That is a big distinction.

People ask me, Why do you care about the Geneva Conventions? These people will cut our heads off and they will kill us all. You are absolutely right. Why do I care?

Because I am an American. And we have led the way for over 50-something years when it comes to the Geneva Conventions applications.

I am also a military lawyer, and I can tell every Member of this body—some of them have served in combat unlike myself; some know better than I. But I flew in Somalia. A helicopter pilot was captured by militia in Somalia. We dropped leaflets all over the city of Mogadishu. We told the militia leaders, “If you harm a helicopter pilot, you will be a war criminal.” We blared that throughout town on loudspeakers with helicopters. After a period of time, they got the message, and he was released.

We had two pilots shot down over Libya when Reagan bombed Qadhafi. I was the active duty in the Air Force. We told Qadhafi directly and indirectly, if they harm these two pilots, they will be in violation of the Geneva Conventions, and we will hunt you down to the ends of the Earth.

I want to be able to say in future wars that there is no reason to abandon our Geneva Conventions obligations to render justice to these terrorists.

So not only do we have a military commission model that is Geneva Conventions compliant; we have a model that I think we should be proud of as a nation.

The idea that the changes between the committee bill and the compromise represents some grave departure, quite frankly, I vehementely disagree with. I didn’t get into this discussion and political fight to take all the heat that we have taken to turn around and do something that undercuts the purpose of being involved in it to begin with. The compromise that will be used in a military commission trial of an enemy combatant was adopted from the International Criminal Court.

I will place into the RECORD statements from every Judge Advocate General in front of the services that have certified from their point of view that the evidentiary standard that the judge will apply to any statements coming into evidence against an enemy combatant are legally sufficient, will not harm our standing in the world, and, in fact, are the model of the International Criminal Court which try the war criminals on a routine basis.

The provision I added, along with Senator MCCAIN, dealing with the provisions of the Detainee Treatment Act, 5th, 8th, and 14th amendment concepts within the Detainee Treatment Act, will also be a standard in the future designed to reinforce the relevance of the Detainee Treatment Act in our national policy, in our legal system, not to undermine anything but to enforce the concept the Detainee Treatment Act and the judicial standard that our military judges will apply to terrorists accused in the same that is applied in the International Criminal Court.

I have been a member of the JAG court for over 20 years. I have had the honor of serving with many men and women who will be in that court-martial scene. The chief prosecutor, Moe Davis, I met as a captain. There is no finer officer in the military than Colonel Davis. He is committed to render justice. I am very proud of the fact that the men and women who will be doing these military commissions believe in our policies and anybody I have ever met, and they want to render justice.

What else do we try to accomplish? We reauthorize the military commissions in a way to be Geneva Conventions-compliant to afford the defendants accused due process in the way that will not come back to haunt us.

What else did we have to do with? A CIA program that is classified in nature. There is a debate in this country: Should we have a CIA interrogation program classified in nature that would allow techniques not in the Army Field Manual to get good intelligence from high value targets? The answer, from my point of view, is yes, we should, but not because we want to torture anybody, because we want to be humane as a nation. The reason we need a CIA program classified in nature to get good information is because in this war information saves just as much as anything.

Mutual assured destruction was the concept of the Cold War, where if the Soviet Union attacked us, they knew with certainty they would be wiped out. That concept doesn’t work when your enemy doesn’t mind killing themselves when they kill you. The only way we will protect ourselves effectively is to know what they are up to before they act. That is the reason that out is to have good intelligence. But you have to do it with your value system.

Abu Ghraib was an aberration, but it hurt this country because the world believes America has adopted techniques and tactics that are not of who we are, we lose our standing. So what we did regarding the CIA, we redefined the War Crimes Act to meet our Geneva Conventions obligations. The test for the Congress was, how can you have a clandestine CIA program and then not run afoul of the Geneva Conventions? What are the Geneva Conventions requirements of every country? That is the treaty, we are talking about.

In Article 129 and 130 of the Geneva Conventions, it puts the burden on each country to do it internally, to create laws to discipline their own personnel. The War Crimes Act is subject to being punished as a felon. We added three other crimes we came up with ourselves.

Torture has always been a crime, so anyone who comes to the Senate and says the United States engages in torture, condemns torture, that this agreement somehow legitimizes torture, you don’t have to worry what you are talking about. Torture is a crime in America. If someone is engaged in it, they are subject to being a felon, subject to the penalty of death. Not only is torture a war crime, it is a physical injury, cruel and inhumane treatment mentally and physically of a detainee is a crime under title 18 of the war crimes statute.

Every CIA agent, every military member now has the guidance they need to understand the law. Before we got involved, our title 18 War Crimes Act was hopelessly confusing. I couldn’t understand it. We brought clarity. We have reined in the program. We have created a program that we can do. We can aggressively interrogate, but we will not run afoul of the Geneva Conventions. We are not going to let our people commit felonies in the name of getting good information, but now they know what they can and cannot do.

Who complies with that treaty? Who is it within our Government who would implement our obligations under the treaty? The Congress has decided what war crimes would be to prohibit grave breaches of the treaty. The President, this President, like every other President, implements treaties. So what we
They are bringing every kind of action sued by the people we are fighting. Over 200 cases have been filed. It is impeding the war effort.

A judge should not make a military decision during a time of war. The military is far more capable of determining who an enemy combatant is than a Federal judge. They are not trained to do that.

We have replaced a system where the judges of this country can take over military decisions and allow judges to review military decisions, once made, for legal sufficiency. That is the way every other country in the world does it. Habeas has no place in this war for enemy prisoners. The Germans and the Japanese—no prisoner in the history of the United States has ever been able to go to a Federal court and sue the people they are fighting who are protecting us against the enemy. We are allowing the Federal courts to review every military decision made about an enemy combatant as to whether they made the right decision and whether the procedures they used are constitutional. We have rejected the idea as a Congress of allowing the courts to run the war when it comes to defining who an enemy combatant is. That is a decision which needs to be made. It is not destroying the writ of habeas corpus. It is having a rational, balanced approach to where the judges can play a meaningful role in time of war and not play a role they are not equipped to play. This will mean nothing if it does not withstand court scrutiny.

I hope soon we will have an overwhelming vote for the final product after the amendments are disposed of. My goal for 2 years has been to try to find national unity, to have the Congress, the executive branch, and eventually the courts on the same sheet of music where we can tell the world at large that we have detention policies, confinement policies that not only are humane and just but will allow us to protect ourselves from a vicious enemy and live up to our obligations as a nation. We are very close to that day coming.

I thank every Member of this Senate who has worked to make this product better. When you cast a vote, please remember, we are at war, we are not fighting crime.

Mr. WARNER. Mr. President, we now have an additional speaker, the Senator from Texas.

As the Senator from South Carolina has just completed his remarks, I have to say it has been an unusual experience for all of us these past weeks. Working together with Senator MCCAIN and the Senator from South Carolina has enabled this Senate to proceed in a way that is consistent with Senate practice—we go through a bill, have a markup, and then proceed to work on a product. It brought together the consensus.

I say to my friend from South Carolina, although I have had some modest experience as Secretary of the Navy dealing with court-martials, and, indeed, when I was a young officer in the Marines, I was involved in court-martials, the Senate brought together, in the deliberations, the very special expertise of the years he has had.

Now he is a full colonel in the U.S. Air Force and a Judge Advocate General recognition. I thank the Senator for the valuable contribution he has made into the series of bills we have had—putting into those bills matters which he believed were in the best interests of the men and women of the Armed Forces and, indeed, his consultation throughout this process with the Judge Advocate Generals and other past and present Judge Advocates and some of the younger officers who will be future Judge Advocate Generals. I thank the Senator from South Carolina for his contribution to this deliberative process in the Senate.

Now I yield the floor to our last speaker before we proceed to the votes. As I understand, we will be voting at the conclusion of this statement?

Mr. LEVIN. I don’t know if the unanimous consent agreement has been finished yet. That is our hope.

Mr. WARNER. We are finishing a unanimous consent request, but I alert the Senate that it is my strong hope and prediction we will soon be voting in sequence on three amendments.

I yield the floor.

The PRESIDING OFFICER. The Senator from Texas.

Mr. CORNYN. Mr. President, I first compliment the distinguished chairman of the Senate Committee on Armed Services, the Senator from Virginia, for being the calm and steady hand on the rudder during the course of the discussions and debates involving the important piece of legislation. His work and demeanor have always been constructive and civil, and any disagreements we have had are belying of the great traditions of this institution. I thank him for that.

Mr. WARNER. If I may, I thank the Senator from Texas. Several times we came to the Senator’s office in the course of the deliberations on this bill because the Senator, too, brings to the debate a vast experience, having risen through the ranks of the legal profession to become a judge in his State. The Senator is very well equipped and did provide a very valuable input into this debate.

Mr. CORNYN. My thanks to the Senator from Virginia—nothing could be further from the truth. In fact, what this bill does is make sure that the provisions of the Detainee Treatment Act,
which were passed in December of 2005 in this same Senate, that ban torture, cruel, inhuman, and degrading treatment of detainees, that we comply with those laws which reflect upon our international treaty obligations as well as our domestic laws and which reflect our American values.

We are a nation at war. But there is no equivalency with the way this war is fought and prosecuted by the United States and our allies, no equivalency with the war in which the war is prosecuted by our enemies. We have learned that our enemies have been at war against us for much longer than just September 11, 2001, and date back many years before we even realized America was under attack.

We know that this enemy, represented by Islamic extremism, justifies the use of murder against innocent civilians in order to accomplish its goals. America complies with all of its international treaty obligations and domestic laws. What this bill is about is to try to provide our intelligence authorities the clear direction they need so they know how to comply with those laws and, at the same time, preserve an absolute means of collecting intelligence through the interrogation of high-value detainees at Guantanamo Bay.

But no civilian employee of the U.S. Government working at the CIA or elsewhere is going to risk their career, their reputation, and their assets using some sort of cloudy law or gray law that does not make clear what is permitted and what is not permitted. This bill we are prepared to pass in a few minutes provides that kind of clear direction. What it says is that we in the U.S. Congress are stepping up to take the responsibility ourselves to provide that kind of clarity that will allow our intelligence authorities to gain this important intelligence while at the same time be secure in the knowledge that what they are doing fully complies with our law, including our international treaty obligations.

We know the aggressive interrogation techniques that are legal under the provisions of the McCain amendment in the Detainee Treatment Act have provided much valuable intelligence that has saved American lives. We know the CIA’s high-value terrorist detainees have provided the names of other terrorist attacks on the United States of America or our allies.

Unfortunately, it is an enemy that has engaged in a global war on terror, and that is absolutely true. But it does not necessarily tell us who that enemy is. Unfortunately, it is an enemy that has hijacked one of the world’s great religions, Islam, in pursuit of their extremist goals that justifies the murder of innocent civilians in order to accomplish those goals.

Let me just say a word about who that enemy is. We have heard we are engaged in a global war on terror, and that is absolutely true. But it does not necessarily tell us who that enemy is. Unquestionably, it is an enemy that threatens to use their power, their reputation, and their assets using some sort of cloudy law or gray law. They know how to comply with those laws.

I am asking my colleagues to do their duty and to pass this bill so that we may interrogate these captured terrorists to the fullest extent of the law. To suggest that we are somehow torturing individuals or violating our own laws that we passed just last year in the Detainee Treatment Act under the McCain amendment banning torture, cruel and inhuman treatment, is absolutely untrue and irresponsible. The American people have a right to believe we will use every legal tool available to us to help keep them safe against this new and different type of enemy. Unfortunately, the bill we are considering here today does not make clear what is permitted versus what is prohibited and is necessary by providing a gray zone as opposed to absolute clarity insofar as it is within our power to give it so that we may interrogate these captured terrorists to the fullest extent of the law.

Some say we are somehow torturing individuals or violating our own laws that we passed just last year in the Detainee Treatment Act under the McCain amendment banning torture, cruel and inhuman treatment, is absolutely untrue and irresponsible. The American people have a right to believe we will use every legal tool available to us to help keep them safe against this new and different type of enemy.

Let me just say a word about who that enemy is. We have heard we are engaged in a global war on terror, and that is absolutely true. But it does not necessarily tell us who that enemy is. Unfortunately, it is an enemy that has hijacked one of the world’s great religions, Islam, in pursuit of their extremist goals that justifies the murder of innocent civilians in order to accomplish those goals.

Some on the Senate floor have said this debate is all about Iraq. It is not just about Iraq. If it were just about Iraq, how would those critics explain the attempted terrorist plot that was broken up at Heathrow Airport just a few short weeks after the attacks in Madrid or Beslan in Russia or Bali or elsewhere or, for that matter, New York and Washington, DC?

The fact is, we have prevented another terrorist attack on our own soil by using this interrogation program to allow us to detect and deter and disrupt terrorist activity, and the fact we have also taken the fight on the offensive where the terrorists plot, plan, train, and try to export their terrorist attacks to the United States and elsewhere.

If we would do what some would apparently want us to do and simply pull the covers over our head and wish the problem away, we would be acting like a false sense of security, in preventing another terrorist attack on our own soil, after 5 years from September 11, 2001.

So, Mr. President, I hope our colleagues will vote against these ill-advised amendments to this bill and will send a clean bill to be reconciled with the House version and sent to the President right away so that before too long we can see that some of the war criminals who sit detained at Guantanamo Bay may be brought to justice, people like Khalid Shaikh Mohammed, who was the mastermind of the 9/11 plot that killed nearly 3,000 Americans.

Mr. President, I yield the floor.

The PRESIDING OFFICER (Mr. CHAFEE). The Senator from Virginia.

Mr. WARNER. Mr. President, I thank my distinguished colleague from Texas. He has been a valuable addition to those who are trying to structure this piece of legislation.

Momentarily, I will seek a unanimous consent request ordering the members to remain between Senators.

Mr. CHAFEE. Some 31⁄2 minutes; am I correct?

Mr. KENNEDY. Then, I would ask Senator Warner to bring his amendment now.

Mr. WARNER. That is correct. I say unanimous consent.

Mr. KENNEDY. Mr. President, just quickly, the proceedings we are going to have—if I can inquire—I use the 3 minutes, and then we are moving toward a series of votes; is that right?

Mr. WARNER. That is correct. I say to the Senator from Virginia.

Mr. KENNEDY. Then, I would ask when I have 30 seconds left—Mr. President, I have 3½ minutes; am I correct?

The PRESIDING OFFICER. Three minutes.

Mr. KENNEDY. Three minutes.

Mr. WARNER. Mr. President, I may have misunderstood my colleague. That is the 3 minutes remaining on your amendment held in abeyance.

Mr. KENNEDY. That is correct.

Mr. President, I yield myself the 3 minutes.

The PRESIDING OFFICER. The amendment is in the hands of Mr. Kennedy.

Mr. President, just for the benefit of the membership, in my hand is the Army manual. In the Army manual are the prohibitions for instructions to all the interrogators of the United States, that they cannot use these kinds of harsh tactics which have been recognized by Members as torture.

This amendment says any country is going to use these similar tactics against those who would be representing the United States in the war on terror—for example, the Central Intelligence Agency; for example, the SEALs; for example, contractors working for the intelligence agencies—then they will have committed a war crime.

I reviewed earlier in the debate where we have prosecuted Japanese and other war crimes, giving them 10 or 15 years, while these people will not face the same consequences.

So, Mr. President, I hope our colleagues will vote against these ill-advised amendments to this bill and will send a clean bill to be reconciled with the House version and sent to the President right away so that before too long we can see that some of the war criminals who sit detained at Guantanamo Bay may be brought to justice, people like Khalid Shaikh Mohammed, who was the mastermind of the 9/11 plot that killed nearly 3,000 Americans.

Mr. President, I yield the floor.
because it violates the Constitution because it is instructing—instructing—the President of the United States through the State Department to notify the 194 countries.

Well, we thought it was not unconstitutional on the Port Security Act, when we said:

When the Secretary...after conducting an assessment...decides that an airport does not maintain and carry out effective security, the Secretary...shall notify the appropriate authorities of the government of the foreign country.

Here is port security.

Here is on the pollution issues: The State shall notify without delay foreign states concerned.

That is the second one.

And I have the third illustration in terms of foreign carriers.

In 15 minutes we got these cases. And here we are going to say we are going to refuse to protect Americans who are on the cutting edge of the war on terror because we will not let our State Department go on an e-mail and notify the 192 countries because that is unconstitutional. The chairman of the Armed Services Committee feels that way, we could strike that provision and just say it is the policy of the United States. Then we would not be instructing anyone. Either way, this is about protecting Americans. It is about protecting Americans.

I believe those Americans who are out there in the hills and in the mountains of Afghanistan today and tonight, those people who are in the hills and mountains and deserts of Iraq, those people who are out in Southeast Asia or all over the world in order to try to deal with the problems of terrorism ought to know, if they are in danger of getting captured, if any of their host countries are going to perform any kind of procedure and torture on them, they will be war criminals.

That is what this amendment is about. I hope it will be accepted. It should be.

Mr. ROCKEFELLER. Mr. President, I yield what time I have to my ranking member.

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

Mr. WARNER. Mr. President, at this time we are waiting for clearance by the leadership of the United States. But I will ask at this time we get the yeas and nays on all the votes, the amendments, and final passage.

Mr. ROCKEFELLER. Mr. President, without objection, does any unanimous consent request allow me to close on my amendment for 2 minutes?

Mr. WARNER. Mr. President, the amendment as presently drafted, gives 2 minutes to each side for the purpose of addressing amendments.

Mr. ROCKEFELLER. I think the Senator.

Mr. WARNER. Mr. President, I once again restate the request for the yeas and nays on the amendments and final passage, unanimous consent that it be in order to ask for the yeas and nays on the amendments and final passage.

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

Mr. WARNER. Mr. President, I ask for the yeas and nays on the amendments and final passage.

The PRESIDING OFFICER. Is there a sufficient second?
or when the status of any individual detainee promptly notify the committee when any
would brief the SSCI on how CIA would exe-
upon passage of new detainee legislation, I
previously not made available to SSCI mem-
SSCI membership on key aspects of the de-
ing the entire SSCI membership.

Mr. ROCKERFELLER. Mr. President, how much time do I have remaining?
The PRESIDING OFFICER. The Sen-
atore’s time has expired.
Mr. WARNER. Mr. President, I ask unanimous consent that this letter be printed in the RECORD.
There being no objection, the mate-
rial was ordered to be printed in the RECORD, as follows:

CENTRAL INTELLIGENCE AGENCY,

Hon. PAT ROBERTS,
Chairman, Select Committee on Intelligence,
United States Senate, Washington, DC.

DEAR MR. CHAIRMAN: I write today regarding the Rockefeller amendment to the mili-
tary commissions legislation now pending on the Senate floor. The CIA strongly opposes adoption of the Rockefeller amendment.

Since the inception of its detention pro-
gram, the CIA has a strong and consistent record of keeping its oversight committees fully and currently informed of critical as-
pects of the program. Further, the bipartisan leadership of Congress has been briefed regu-
larly by the CIA on this program since its in-
ception, and I personally briefed the Major-
ity and Minority Leaders of the Senate only weeks ago. The CIA remains committed to a
frank and open dialogue with the Congress on detailed aspects of the detainees program,
while ensuring the secrecy of this particu-
larly sensitive activity. Senate adoption of the Rockefeller amendment would go far be-
yond traditional CIA reports to Congress by mandating detailed information about as-
sets, names, locations and individuals in-
volved in sensitive operations. In addition,
detailing in public law the amount of sen-
sitive information that CIA must provide to
sets, methods, locations and individuals in-
volved in sensitive operations. In addition,
detailing in public law the amount of sen-
sitive information that CIA must provide to

Since becoming Director of the CIA, I have made every effort to keep your committee apprised of the status of the detainee pro-
gram. In July, I updated you and SSCI Vice
Chairman Rockefeller on the program, shar-
ing sensitive aspects, including information about specific detainees, examples of action-
able information provided from the program and about ways in which the program could
continue to be successful in the future. Fol-
lowing this briefing and despite its highly sensitive nature, at your request—and that of Sen. Rockefeller—I fully supported brief-
ing the entire SSCI membership.

On September 6, 2008, I briefed the full SSCI on key aspects of the de-
tainee program, providing a level of detail previously not made available to SSCI mem-
bers. I made clear to the committee that upon passage of new detainee legislation, I
would brief the SSCI on how CIA would exe-
cute the future program and I agreed to
promptly notify the committee when any
modifications to the program were proposed or when the status of any individual detainee changed.

Upon Senate passage of the military com-
missions legislation, I stand ready to again
brief your committee and the bipartisan Sen-
tate leadership on the future of the detainee
program.

Sincerely,
MICHAEL V. HAYDEN,
General, USAF Director.

Mr. WARNER. Mr. President, are we prepared to move to a vote?
The PRESIDING OFFICER. Yes. The question is on agreeing to the amend-
ment of the Senator from West Vir-
ginia.
The yeas and nays have been ordered. The clerk will call the roll.
The assistant legislative clerk called the roll.
Mr. MCCONNELL. The following Sen-
ator was necessitated absent: the Sen-
or from Maine (Ms. SNOWE).
The PRESIDING OFFICER. Are there any other Senators in the Chamber de-
siring to vote?
The result was announced—yeas 46, nays 53, as follows:

[Rollcall Vote No. 256 Leg.]

<table>
<thead>
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<th>Yeas</th>
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Mr. BYRD. Mr. President, do I have any time remaining?
The PRESIDING OFFICER. The Sen-
ator from Virginia is recognized.
Mr. BYRD. This amendment will not set any terrorists free. Let Senators who are here 5 years from now take a
new look on the basis of experience and make a decision in the light of the then circumstances. That is all I am asking.
This is nothing new.
The PRESIDING OFFICER. Is there further debate on the amendment? If
not, the question is on agreeing to the
Byrd amendment No. 5095.
The yeas and nays have been ordered. The clerk will call the roll.
The legislative clerk called the roll.
Mr. MCCONNELL. The following Sen-
or was necessitated absent: the Sen-
or from Maine (Ms. SNOWE).
The PRESIDING OFFICER. Are there any other Senators in the Chamber de-
siring to vote?
The result was announced—yeas 47, nays 52, as follows:

[Rollcall Vote No. 257 Leg.]

<table>
<thead>
<tr>
<th>Yeas</th>
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The amendment (No. 5088) was rejected.

Mr. WARNER. Mr. President, I move to reconsider the vote.

Mr. MCCONNELL. I ask the Presiding Officer to read the unanimous consent that is in place so all Members understand what is to take place.

The PRESIDING OFFICER. Senator Leahy will be recognized for his remaining 12 minutes. Senator LEVIN is under the control of 4 minutes. Senator WARNER is under the control of 16 minutes, to be followed by closing remarks by the two leaders. Following that time, the Senate will proceed to pass the bill. Further, that there then be 5 minutes equally divided prior to the vote on the motion to invoke cloture on border fence legislation.

Mr. WARNER. The Chair will now recognize Senator LEAHY?

Mr. LEVIN. Mr. President, my understanding is that was the allocation of time, not necessarily the order of speaking.

The PRESIDING OFFICER. The amendment does not appear to be in any particular order.

Mr. WARNER. Mr. President, at the appropriate time, I will allocate 14 minutes to the distinguished Senator from Arizona, Mr. MCCAIN.

At this point in time, I recognize the extraordinary contributions of the staff persons who worked on this bill, and I shall include the entire list.

We worked under the direction of Charlie Abell, Scott Stucky, David Morriss, Rick DeBobes, Peter Levine, Chris Paul, Pablo Chavez, Richard Fontaine, Jen Olson, Adam Brake, James Galyean, and legislative counsel Charlie Armstrong.

I assure Members it was a challenge from beginning to end. I cannot recall seeing a more professional group of staffers serving their Members in the Senate.

Mr. LEVIN. I suggest the absence of a quorum, and I ask unanimous consent that the time not be charged to either side or to any party.

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

The clerk will call the roll.
The assistant legislative clerk proceeded to call the roll.

Mr. INHOFE. I ask unanimous consent that the order for the quorum call be rescinded.

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

UNANIMOUS CONSENT REQUEST—S. 2781

Mr. INHOFE. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Calendar 625, S. 2781, and I ask unanimous consent that the committee-reported amendment be, for the third time, passed and the motion to reconsider be laid upon the table.

Mr. JEFFORDS. I object. I agree that wastewater security is an important issue. In fact, it is made even more important because the Homeland Security appropriations conferences have exempted these facilities from security requirements—a decision that I understand was due in large part to the Senator’s opposition including these facilities within the protections of that bill.

Although I would like to have seen stronger chemical security provisions than we have here, I understand that the committee-reported amendment is, for the third time, passed and the motion to reconsider be laid upon the table.

Mr. LEVIN. Senators WARNER and McCAIN, first, I say my good friend from Michigan that this legislation clearly defines grave breaches of Common Article 3, which are criminalized and ultimately punishable by death. It is critical for the American public to understand that we are not criminalizing breaches of Common Article 3 that rise to the level of a felony. Such acts—including cruel or inhuman treatment, torture, rape, and murder, among others—will clearly be considered war crimes.

Where the President may exercise his authority to interpret treaty obligations is in the area of “nongrave” breaches of the Geneva Conventions—that breaches that do not rise to the level of a felony. In interpreting the conventions in this manner, the President is bound by the conventions themselves. Nothing in this bill gives the President the authority to modify the conventions or our obligations under those treaties. That is the core of this legislation.

Mr. WARNER. I concur with the Senator from Arizona.

Mr. LEVIN. Would you agree that nothing in this provision, gives the President, or could give the President, the authority to modify the requirements of the Detainee Treatment Act? Mr. WARNER. The purpose of this legislation is to strengthen, not to weaken or modify, the Detainee Treatment Act. For the first time, this legislation is required to “take action to ensure compliance” with the DTA’s prohibition on cruel, inhuman, or degrading treatment, as defined in the U.S. regulations to the Convention Against Torture. He is directed to do so through, among other actions, the establishment of administrative rules and procedures. Nothing in this legislation authorizes the President to modify the requirements of the DTA, which were enshrined in a law passed last December. I would point out as well to the distinguished ranking member that the President himself never proposed to weaken the DTA. Rather, he proposed to make the DTA tantamount to compliance with Common Article 3 of the Geneva Conventions. That proposal is not included in this legislation.

Mr. McCAIN. I agree entirely with Senator Warner’s amendments.

Mr. LEVIN. Would you agree that any interpretation issued by the President under this section would only be valid if it is consistent with U.S. obligations under the Geneva Conventions and the Detainee Treatment Act?

Mr. McCAIN. That is correct.

Mr. WARNER. I agree.

Mr. LEVIN. Section 8(b) of the bill would amend the War Crimes Act to add that only ‘‘grave breaches’’ of Common Article 3 of the Geneva Conventions constitute war crimes under U.S. law. The provision goes on to define those grave breaches to include, among other things, torture, and cruel or inhuman treatment. The term ‘‘cruel or inhuman treatment’’ is defined to include acts ‘‘intended to inflict severe or serious physical or mental pain or suffering.’’

Would you agree that the changes to the War Crimes Act in section 8(b) do not authorize the President to modify U.S. obligations under the Geneva Conventions or under the Detainee Treatment Act?

Mr. McCAIN. The changes to the War Crimes Act are actually a responsible modification in order to better comply with America’s obligations under the Geneva Conventions to provide effective penal sanction for grave breaches of Common Article 3. It is important to note, as has the Senator from Michigan, that in this section ‘‘cruel or inhuman treatment’’ is defined for purposes of the War Crimes Act only. It does not infringe, supplant, or in any way alter the definition of cruel, inhuman, or degrading treatment or punishment prohibited in the DTA and defined therein with reference to the 5th, 8th, and 14th amendments to the U.S. Constitution. Nor do the changes to the War Crimes Act alter U.S. obligations under the Geneva Conventions.

Mr. WARNER. I would associate myself with the comments from the Senator from Arizona.

Mr. LEVIN. Would you agree that nothing in this section or in this bill requires or should be interpreted to authorize any modification to the new Army Field Manual on interrogation procedures, which was issued last month and provides important guidance to our soldiers on the field as to what is and is not permitted to the interrogation of detainees?

Mr. WARNER. The Executive branch has the authority to modify the Army Field Manual on Intelligence Interrogation at any time. I welcomed the new version of the field manual issued last
month and agree that it provides critical guidance to our soldiers in the field. That said, the content of the field manual is an issue separate from those at issue in this bill, and it was not my intent to effect any change in the field manual through this legislation.

Mr. McCAIN. I concur wholeheartedly with the Senator from Virginia. As the Senator from Virginia is aware, there is a provision in the bill before the Senate that defines “cruel and inhuman treatment” under the War Crimes Act. I would note first that this definition is limited to criminal offenses under the War Crimes Act and is distinct from the broader prohibition contained in the Detainee Treatment Act. That act defined the term “cruel, inhuman and degrading treatment” with reference to the reservation the United States took to the Convention Against Torture.

In the war crimes section of this bill, cruel and inhuman treatment is defined. It is intended to include physical or mental pain or suffering. It further makes clear that such mental suffering need not be prolonged to be prohibited. The mental suffering need only be more than transitory. It is important to note that the “nontransitory” requirement applies to the harm, not to the act producing the harm. Thus if a U.S. soldier is, for example, subjected to some terrible technique that lasts for a brief time but that causes serious and nontransitory mental harm, a criminal act has occurred.

Mr. WARNER. That is my understanding and intent as well, and I agree with the Senator’s other clarifying remarks.

The same section, the term “serious physical pain or suffering” is defined as a bodily injury that involves one of four characteristics: “a substantial risk of death,” “extreme physical pain,” “serious physical injury,” or “serious mental injury.” I do not believe that the term “bodily injury” adds a separate requirement which must be met for an act to constitute serious physical pain or suffering.

Mr. McCAIN. I am of the same view. Mr. LEVIN. And would the Senator from Arizona agree with my view that section 8(a)(3) does not make lawful or permissible the authority to be held lawful or permissible the authority to be lawful or permissible any abuse of a detainee that is not permitted by Common Article 3 or the Detainee Treatment Act?

Mr. McCAIN. I do agree.

Mr. WARNER. I agree with both of my colleagues.

Mr. KENNEDY. Mr. President, in times of war, our obligation is to protect our Nation and to protect those men and women who risk their lives to defend it. This bill falls that duty. By failing to renounce torture, it inflames an already dangerous world and makes new enemies for America in our war against terror. This puts cause or people and our troops at greater risk. That is why so many respected military leaders oppose this bill.

Throughout our history, America has led the world in promoting human rights and decency. We have fought wars against tyranny and oppression. Our enemies have used cruel and inhuman tactics that were rightly and roundly condemned by the civilized world. We maintained American strength and honor by refusing to stoop to the level of our enemies. And we should not stoop to the level of the terrorists in the war on terror.

I rise to express my profound opposition to this bill both in terms of its substance and the procedure by which it reached the floor. The Armed Services Committee reported out a bill that I supported. That bill was not perfect, but it preserved our commitment to the Geneva Conventions, limited the possibility that detainees would be treated abusively and set up procedures for court trials that generally respected the fundamental requirements of fairness.

Republican members of the Armed Services Committee then began a process of secret negotiation with the White House that resulted in a bill that is far worse than the committee bill. Indeed, we have continued to see changes in that bill as it has been moved toward the floor in a rush to achieve passage before the Senate recesses for the election. This rush to passage to serve a political agenda is no way to produce careful and thoughtful legislation on profound issues of national security and civil liberties. At this point, most Members of this body hardly know what they are being asked to approve.

The bill as it now appears on the floor works profound and disastrous changes in our law.

This legislation sets out an overly broad definition of unlawful enemy combatant. This definition would allow the President to pick up anyone citizen and legal residents included anywhere around the world, and throw them into prison in Guantanamo without even charging or trying them. These people would never get a day in court to prove their innocence. There is no check whatsoever on the President’s ability to detain people in an arbitrary manner.

We already know that our military has made mistakes in detaining people. We are currently holding dozens of people at Guantanamo whom we know based on the military’s own records are not guilty of anything. Yet they have not been released.

This legislation also makes a distinction between citizens and lawful permanent residents. Citizens cannot be subject to military commissions and their flawed procedures. Yet lawful permanent residents, those green card holders who have their path to citizenship, could be sent to military commissions. Green Card holders must obey our laws, pay taxes, and register for the draft. They are serving our country in Iraq. They have an obligation to protect our laws, and they deserve the protection of those same laws.

The Geneva Conventions were adopted in the wake of the horrific atrocities during World War II. These conventions reflect the consensus on how individuals should be treated in times of war. They set a minimum floor of humane treatment for all prisoners, military and civilian alike. This floor is known as Common Article 3 because it is common to all of the conventions. Yet the bill gives the President authority to decide what conduct violates Common Article 3 of the Geneva Conventions. Again, the President’s authority to define the meaning of Common Article 3 is virtually unreviewable. He is required to publish his interpretation in the Federal Register, but the administration has already made clear that it will not make public which interrogation tactics are being used. Moreover, the bill expressly states that the Geneva Conventions cannot be relied upon in any U.S. court as a source of rights. The President’s interpretation may well likely escape judicial review, as well.

As the final method of concealing its activities, the administration has stripped the courts of their ability to review the confinement or treatment of detainees. The administration won a provision that eliminates the ability of any detainee anywhere in the world to file a habeas corpus petition challenging the justification for or conditions of his or her confinement. The provision applies to all existing petitions and would require their dismissal, including the Hamdan case itself. There is no justification for stripping courts of jurisdiction to issue the Great Writ of habeas corpus which has been a foundation of our legal system with roots in the Magna Carta.

The availability of the Great Writ is assured in the Constitution itself, which permits its suspension only in time of invasion or rebellion. This provision of the bill is most likely unconstitutional.

The administration has pursued a strategy to defeat accountability since it first began to take detainees into custody. It chose Guantanamo and secret prisons abroad because it thought U.S. law would not apply. It fought hard to prevent detainees from obtaining counsel and then argued that U.S. Courts lacked jurisdiction to hear detainees’ complaints. It sought the prohibition on habeas corpus petitions adopted in the Detainee Treatment Act and then urged courts to misconstrue it to wipe out all pending habeas cases. This new effort to prohibit habeas petitions is a continuation of this effort to escape judicial scrutiny.

The bill also for the first time in our history would authorize the introduction of evidence obtained by torture in a judicial proceeding. Our courts have always rejected this type of evidence.
because it is inconsistent with fundamental notions of justice, and also because it is unreliable. We know that detainees were subjected to harsh interrogation techniques, and made statements as a result. Under this legislation, if those statements were made prior to the passage of the McCain Amendment last winter, then they are admissible. The Congress is saying for the first time in our nation’s history that statements obtained by torture are admissible. This fact, alone, is a stunning statement of how far we have strayed from our bedrock values.

It defines conduct that can be prosecuted as a war crime in a very narrow way that appears designed to exclude many of the abusive interrogation practices that this administration has employed. While some have argued that cruel and inhumane practices such as waterboarding, induced hypothermia and sleep deprivation would surely be covered, the White House and the Republican leadership have refused to commit to this basic interpretation of the bill.

We tried to improve this bill. A number of amendments were offered and should have been adopted. I offered an amendment that responds to the lack of clarity about which practices are prohibited by the bill. Because the administration has refused to commit itself to stop using specific abusive interrogation procedures, our commitment to the standards of Common Article 3 of the Geneva Conventions is in doubt. That puts our own people at risk. As military leaders have repeatedly stated, our adherence to the Geneva Conventions is essential to protect our own people around the world. America has thousands of people across the globe who do not wear uniforms, but put their lives on the line to protect this country every day. CIA agents, Special Forces members, contractors, journalists and others will all be learning the facts about the interrogation practices based on our own military commissions.

The bill as it has reached the floor would diminish the security and safety of Americans everywhere and further erode our civil liberties. I strongly oppose this bill.

Mr. GRASSLEY. Mr. President, we hear on a daily basis about the war we are currently engaged in, the war on terror, but I don’t think most of us stop to think about what that actually means.

As citizens of the greatest country in the world, we have become so accustomed to all the rights afforded us by our Constitution that we now take them for granted. We are incredibly fortunate to live in a nation that our freedom and safety is our Government’s first priority.

We aren’t living in the world I grew up in. Our Nation was rocked to its core 5 years ago when we were attacked on our soil. Thousands of innocent Americans were murdered simply because they lived in the one country that, above all others, embodies freedom and democracy. The mastermind behind those attacks was Khalid Sheik Mohammed, who is now in custody and soon will be brought to justice.

In the aftermath of these attacks, Congress passed the so-called “Terrorist Clemency Act.” This legislation allows the President to “use all necessary force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.” President Bush used this authorization, combined with his constitutional powers to make these sorts of judgments during times of war, to try enemy combatants in military commissions.

Earlier this month, we observed the 5-year anniversary of the horrific attacks on America. I cannot imagine the reaction that would have come if, 5 years ago, Members of Congress had stood on this floor and suggested that we may want to prevent another attack on our country. Five years ago, with the images of the collapsing Twin Towers and the burning Pentagon and the smoldering Pennsylvania field seared into our memories, we said back then that we intended to protect Americans first.

In Hamdan v. Rumsfeld, which the Supreme Court decided earlier this year, the Court ruled that the administration’s use of military commissions to try unlawful enemy combatants violated international law. This decision forced our interrogators, key in defending America from terrorist attack, to curtail their investigations. Without a clarification of the vague requirements, these interrogators might be subject to prosecution for war crimes. It also brought to an end the prosecution of unlawful enemy combatants through the military commissions.

It is key to point out that military commissions have been used throughout American history to bring enemy combatants to justice since before the United States was even officially formed. George Washington used them during the American Revolution, and since our Constitution was ratified, Presidents have used military commissions to try those who seek to harm Americans during every major conflict. Some of our most popular Presidents from history have taken this route, including Abraham Lincoln and Franklin Roosevelt. Whenever the leaders of this great Nation have seen threats posed by those who refuse to abide by the rules of war, they have taken the necessary steps to protect us.

Our President has come to us and asked for help in trying these terrorists whose sole goal is to kill those who love freedom. He has asked for our help in ensuring that those investigating potential terrorist plots against our Nation and our citizens are secure from one way or another. At least we are secure from our own government.

Our Nation and our citizens are secure from the military commissions.

I firmly believe that enemy combatants in our custody enjoyed ample due process in the military commissions established by the administration, which were brought to a halt by the Supreme Court. The compromise that we are considering here today gives more rights to terrorists who were caught trying to harm America and our allies private rights of action, although it did not need to reach this point to protect them. Because of the Supreme Court’s decision in Hamdan, the only way these terrorists will be brought to justice and our interrogators will be protected for doing their jobs is for Congress to write a new law establishing the military commissions and clarifying our obligations under the Geneva Conventions.

We are not doing that in this bill. This bill affords these unlawful enemy combatants rights that they themselves would never consider granting American soldiers. It is beyond reasonable, beyond fair, and beyond time for Congress to act. We must pass this bill and reinstate the programs that, I believe, have been a crucial part of our Nation’s security over the last 5 years.

MR. WARNER. Mr. President, I ask unanimous consent to have printed in the RECORD a joint statement regarding alleged violations of the Geneva Conventions.

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

JOINT STATEMENT OF SENATORS MCCAIN, WARNER, AND GRAHAM ON INDIVIDUAL RIGHTS UNDER THE GENEVA CONVENTIONS, SEPTEMBER 28, 2006

Mr. President, we are submitting this statement into the record because it has been suggested by some that this legislation would prohibit litigants from raising alleged violations of the Geneva Conventions. This suggestion is misleading on three counts.

First, it presumes that individuals currently have a private right of action under Geneva. Secondly, it implies that the Congress is restricting individuals from raising claims that the Geneva Conventions have been violated as a collateral matter, but in fact they have an independent cause of action.

Finally, this legislation would not stop in any way a court from exercising any power it has to consider the United States’ obligations under the Geneva Conventions, regardless of what litigants say or do not say in the document that they file with the court.

The Supreme Court’s decision in Hamdan left untouched the widely-held view that the Geneva Conventions provide no private rights of action to individuals. And, in fact, the majority in Hamdan suggested that the Geneva Conventions do not afford individuals private rights of action, although it did not need to reach this point to protect them. Because of the Supreme Court’s decision in Hamdan, the only way these terrorists will be brought to justice and our interrogators will be protected for doing their jobs is for Congress to write a new law establishing the military commissions and clarifying our obligations under the Geneva Conventions.
The Republicans even voted against a bipartisan bill that came out of the Senate Armed Services Committee.

Mr. McCONNELL. Mr. President, I rise today in support of the Military Commissions Act of 2006. I support this legislation, first and foremost, because this bill recognizes that we are a Nation at war. We are a Nation at war, and we are at war with Islamic extremists. We are not conducting a law enforcement investigation against one hand tied behind our back. We are at war against extremists who want to kill our citizens, cripple our economy, and discredit the principles we hold dear—freedom and democracy.

Once you accept the premise that we are at war, the most important consideration should be, Does this bill protect the American people? I submit that this bill does just that. It does so by permitting the President's CIA interrogation program to continue. This is of profound importance. If the attacks of September 11, 2001, taught us anything, it is that self-imposed limitations on the intelligence-gathering efforts of this Nation threaten our ability to continue to protect America.

Thankfully, with the PATRIOT Act, we removed this wall of separation, and now the intelligence and law enforcement arms of our Government can share information and more effectively protect us here at home.

Another lesson of September 11 was the predictive individual should be placed on human intelligence. Prior to September 11, we were woefully deficient in our human intelligence regarding al-Qaeda. Al-Qaeda is an extremely difficult organization to infiltrate. You cannot just jump in and become a member. But interrogation offers a rare and valuable opportunity to gather vital intelligence about al-Qaeda's capabilities and plans before they attack us.

The CIA interrogation program provided crucial human intelligence that has saved American lives by helping to prevent new attacks. As the President has explained, 9/11 mastermind Khalid Shaikh Mohammed told the CIA about planned attacks on U.S. buildings in Washington, D.C. and New York. He ordered officials to set off explosives high enough in the building so the victims could not escape through the windows.

As the President also noted, the program has also yielded human intelligence regarding al-Qaeda's efforts to obtain biological weapons such as anthrax. And it has helped lead to the capture of key al-Qaeda figures, such as KSM and his accomplice, Ramzi bin al Shibh.

Another means of evaluating the importance of this program is by considering a grim hypothetical. What if al-Qaeda or other terrorists organizations were able to get their hands on nuclear, chemical, or biological weapons and were trying to attack a major U.S. city? These perversions of lives could be at stake. Under such a chilling scenario, wouldn't we want our intelligence community to have all possible tools at its disposal? Would we want our intelligence community to respond with nothing behind its back as it did before September 11?

Unfortunately, that threat is all too real. The potential for al-Qaeda to attack a U.S. city with a device that could kill millions of people reflects how vital it is to permit the intelligence community to make full use of the tools it needs to continue protecting American lives. The compromise preserves this crucial intelligence-gathering tool. If we cannot trust the CIA and others on the front lines to continue protecting America.

In addition, this bill protects classified information from being released to al-Qaeda terrorists. This is also a serious concern. The lack of intelligence officials and informants—men and women who put their lives at risk to defend this Nation—must be protected at all costs.

If we needed any reminding why terrorists should not be given sensitive information, we should just look at the prosecution of the 1993 World Trade Center bombers. According to the man who prosecuted these Islamic extremists, intelligence from U.S. Government sources was so confounding defendants through the discovery process.

This information was later delivered directly to Osama bin Laden while he was living in Sudan. Let me repeat that. Information given to the jihadist defendants was shared with al-Qaeda terrorists who tried to destroy the World Trade Center in 1993, was later given directly to bin Laden himself.

Since we are at war, we should not be revealing classified information to the enemy. That is just common sense. This bill protects classified information.

Finally, while this bill preserves our ability to continue to protect America, it also provides detainees with fair procedural rights.

In fact, this legislation provides broader protections for defendants than did Nuremberg. Liberal law professor Cass Sunstein has written that the military commissions authorized by the President in 2001 "provide far greater procedural safeguards than any previous military commission, including Nuremberg." Let me say that again: liberal law professor Cass Sunstein noted that the President's 2001 military order provided far greater procedural safeguards than any previous military commission, including Nuremberg.

The identities of U.S. intelligence from U.S. Government officials should not be shared with the enemy. The identities of U.S. intelligence officials and informants—anymore.

This system is exceedingly fair since al-Qaeda in no way follows the Geneva Conventions or any other international norm. Al-Qaeda respects no law, no authority, no legitimacy but that of its own twisted strain of radical Islam. Al-Qaeda grants no procedural rights to Americans they capture. Look at journalist Daniel Pearl, who was beheaded by al-Qaeda in Pakistan in 2002. Al-Qaeda simply executes those they capture, even civilians like Pearl. Not only do they inappropriately kill innocent civilians, they broadcast these brutal executions on the Internet for all to see.
Mr. President, I would just conclude by stating that this legislation is vitally important. It is vitally important because it is wartime legislation. It is vitally important because this bill protects our national security, it protects classified information and it protects the rights of defendants. Most important, it protects America. For these reasons, I urge its passage.

Mr. CORNYN. Mr. President, once the Military Commissions Act, MCA, is signed into law and section 7 is effective, Congress will finally accomplish what it sought to do through the Detainee Treatment Act—DTA—last year. It will finally get the lawyers out of Guantanamo Bay. It will substitute the blizzard of litigation instigated by Rasul v. Bush with a narrow DC Circuit—only review of the Combatant Status Review Tribunal—CSRT—hearings.

Perhaps even more important than the narrow standards of review created by the DTA is the fact that that review is exclusive to the court of appeals. This is by design. Courts of appeals do not hold evidentiary hearings or otherwise take in evidence outside of the administrative record. The DC Circuit will use the same criteria as established in the CSRT review provisions of the DTA. The circuit court will review the administrative record of the CSRTs to make sure that the right standards were applied, the standards that the military has established for CSRTs. The court will determine whether the CSRT system as a whole is consistent with the Constitution and with Federal statutes.

There is no invitation in the DTA or MCA to reconsider the sufficiency of the evidence. Weighing of the evidence is a function for the military when the question is whether someone is an enemy combatant. Courts simply lack the competence—the knowledge of the battlefield and the nature of our foreign wars—the judge whether particular facts show that someone is an enemy combatant. By making review exclusive to the DC Circuit, the DTA helps to ensure that the narrow review standards it sets do not somehow grow into something akin to Federal courts' habeas corpus review of State criminal convictions. The court's role under the DTA is to simply ensure that the military applied the right rules to the facts. It is not the court's role to interpret those facts and decide what they mean.

Because review under the DTA and MCA will be limited to the administrative record, there is no need for any lawyer to ever again go to Guantanamo to represent an enemy combatant challenging his detention. The military, I am certain, will make the paper record available inside the United States. This is one of the major benefits of enacting the MCA. As I and others have noted previously, the hundreds of lawyer visits to the parked legal facility they have seriously disrupted the operation of the Naval facility there. They have forced reconfiguration of the facility and consumed enormous resources, and have led to leaks of information that have made it harder for our troops there to do their job, to keep order at Guantanamo. Some of these detainee lawyers have even bragged about what we have done on the battlefield, and how they have disrupted interrogations at Guantanamo. Putting an end to that was the major purpose of the DTA. Today, with the MCA, we see to it that this goal is effectively achieved.

Another major improvement that the MCA makes to the DTA is that it tightens the bar on nonhabeas lawsuits contained in 28 U.S.C. §2241(e)(2). That paragraph, as enacted by the DTA, barred postrelease conditions-of-confinement lawsuits, but only if the detainee had been found to be properly detained as an enemy combatant by the U.S. Court of Appeals on review of a CSRT hearing. Although nothing in the DTA or MCA directly requires the military to conduct CSRTs, this limitation on the bar to nonhabeas actions effectively did compel the military to hold CSRTs—and to somehow get the detainee to appeal to the DC Circuit.

The MCA’s revision section 2242(e)(2) asserts the exclusive jurisdiction of the Federal Court of Appeals. This is not the right decision to take the individual into custody.

Mr. SESSIONS. Mr. President, I would like to make a few comments about section 7 of the bill that is before us today. This section makes a number of changes to the DTA. The Detainee Treatment Act, which was passed by the Congress and signed into law on December 30 of last year. First, section 7 will fulfill one of the original objectives of the DTA: to get the lawyers out of Guantanamo Bay. As my colleague Senator GRAHAM has noted, these lawyers have even bragged about the fact that their presence and activities at Guantanamo have made it harder for the military to do its job. Mr. Michael Ratner, the director of the Center for Constitutional Rights, which coordinated much of the detainee habeas litigation, had this to say about his activities to a magazine:

‘’The litigation is brutal for [the United States.] It’s huge. We have over one hundred lawyers now from big and small firms working to represent the detainees. Every time an attorney goes down there, it makes it much harder [for the U.S. military] to do what they’re doing. You can’t run an interrogation . . . with attorneys. What are they going to do now that we’re getting court orders to get more lawyers down there? What are the bars going to do now that we’re getting court orders to get more lawyers down there? What are the bars going to do now that we’re getting court orders to get more lawyers down there? What are the bars going to do now that we’re getting court orders to get more lawyers down there? What are the bars going to do now that we’re getting court orders to get more lawyers down there?’’

This is what Congress thought that it was putting an end to when it enacted the DTA in 2005. That act provided that “no court, justice, or judge shall have jurisdiction to hear or consider” claims filed by Guantanamo detainees, except under the review standards created by that Act. The DTA was made effective immediately upon the date of its enactment. And as Justice Scalia noted in his Hamdan v. Rumsfeld dissenting opinion, the DTA’s lack of removal made no exception for lawsuits that were pending when the statute was enacted. Justice Scalia also pointed out that “[a]n ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending on the effective date.” He also noted that up until the Hamdan decision, “one cannot cite a single case in the history of Anglo-American law in which a jurisdiction-stripping provision was denied immediate effect in effect it has not prescribed an explicit statutory reservation.’’

The Hamdan majority, on the other hand, found that the Supreme Court’s
precedents governing jurisdictional statutes were trumped in that case by a legislative intent to preserve the pending lawsuits. This congressional intent, the majority concluded, was manifested in minor changes that had been made to the language of the bill and, most expressly, in statements made by Senators regarding the intended effect of the bill. As Senator Graham has explained in detail in remarks in the CONGRESSIONAL RECORD on August 3, at 152 Cong. Rec. S9777, it appears that the Supreme Court was misled about the legislative history of the DTA by the lawyers for Hamdan. Those lawyers misrepresented the nature of the statements made in the Senate and caused the court to believe that Congress had an intent other than that reflected in the text of the statute. It certainly was not my intent, when I voted for the DTA, to exempt all of the pending Guantanamo lawsuits from the provisions of that act.

Section 7 of the Military Commissions Act fixes this feature of the DTA and ensures that there is no possibility of contempt of court. Subsection (b) provides that the bill’s revised litigation bar “shall take effect on the date of the enactment of this Act, and shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.” I don’t see how there could be any ambiguity of the effect of this act on the pending Guantanamo litigation. The MCA’s jurisdictional bar applies to that litigation “without exception.”

The new bill also bars all litigation by anyone found to have been properly detained as an enemy combatant, regardless of whether the detainee has been through the DC Circuit under the DTA or has been through a Combatant Status Review Tribunal hearing. In the previous version of this bar, the DTA, allowed detainees to bring conditions-of-confinement lawsuits after their release if their detention was not reviewed by the DC Circuit. Obviously, the Government could not force the detainee to appeal, and there are some who were released before CSRT hearings were instituted. The new bill states that as long as the military decides that it was appropriate to take the individual into custody as an enemy combatant, as a security risk in relation to a war, that person cannot turn around and sue our military after he is released. It should not be held against our soldiers that they take some day, believe good faith that he appears to be connected to hostilities against the United States, and then determine that the individual is not an enemy combatant and release the person. The fact of release should not be an invitation to take the individual into custody in the first place.

The biggest change that the MCA makes to section 2241(e) is that the new law applies globally, rather than just to Guantanamo detainees. We are legislating through this law for future generations, creating a system that will operate not only throughout this war, but for future wars in which our Nation fights. In the future, we may again find ourselves involved in an armed conflict in which we capture large numbers of enemy soldiers. It is not unlikely that the safest and most secure place to hold those soldiers will be inside the United States. The fact that we hold those enemy soldiers in this country should not be an invitation for each of them to sue our Government. We held very large numbers of enemy soldiers in this country during World War II. They did not sue our Government seeking release. The Rasul decision would seem to have required that enemy combatants held in this country during wartime be given any review of the legal process that existed to hold those soldiers in this country. It is inevitable that those held inside this country would have been allowed to sue as well. That is simply not acceptable. It would make it very difficult to fight a major war in the future if every primer detained inside this country could sue our military. Through section 7 of the MCA, we not only solve our current problems with Guantanamo, but we plan for future conflicts as well. We ensure that we can again hold enemy soldiers in prison camps inside our country if we need to, without becoming enmeshed in a tempest of litigation.

I imagine that, now that Congress has clearly shut off access to habeas lawsuits, the lawyers suing on behalf of the detainees will shift their efforts toward arguing for an expansive interpretation of the judicial review allowed under the DTA. Paragraphs 2 and 3 of the act allow the DC Circuit to review a CSRT enemy combatant determination. The Government has provided a CSRT hearing to every detainee held at Guantanamo, with the likely exception of those transferred there this month, so all of those detainees will now be allowed to seek DTA review in the DC Circuit. Paragraphs 2 and 3 allow the DC Circuit to ask whether the military applied its own standards and procedures for CSRTs and to allow the court to ask whether those standards are constitutional and are consistent with nontreaty Federal law. I think that those standards speak for themselves, that they clearly allow only a very limited review. In particular, they do not allow the courts to second-guess the military’s evidentiary findings. The courts simply are not in a position, they do not have the expertise, to judge whether particular evidence suggests that an individual is an enemy combatant.

I would like to note here that this is the consensus view of the DTA at this time, at least for now. I have no doubt that in the future, lawyers will argue that these standards invite the court to reweigh the evidence, to take in evidence outside of the CSRT record, and to decide if the military was right about its factual judgment. At this time, however, both proponents and opponents of section 7 of the MCA seem to agree on what kind of review it will allow. Earlier today, for example, I heard Senator Specter, who opposes section 7, criticize the paragraph 2 and 3 review standards on the Senate floor. Here is what the Human Rights First fact sheet says: “The DTA restricts the court to determining whether the prior CSRTs followed their own procedures. * * * * * It has been suggested that the court of appeals, in reviewing the CSRT decisions, can fix the problem simply by choosing to review the evidence itself. But that is simply not the way the statute reads. The government has taken the firm position in Bismullah that no review even of “significant exculpatory evidence” is permitted under the DTA. If Congress believes that the courts should be allowed to review the evidence and they clearly should—then it should change the statute to say so. It is no solution to hope that the courts will ignore the actual statutory language and rewrite the statute to correct the deficiency.

There you have it. Senators have been told in floor debate by the chairman of the Judiciary Committee that the DTA “excludes on its face” any factual determination with regard to the Guantanamo detainees. Now, groups lobbying Senators with regard to the MCA have pointed out that having courts make their own factual determinations, to judge the sufficiency of the evidence behind the military’s findings, “is simply not the way the statute reads.” We are informed that the Justice Department has taken the “firm position” that no evidentiary review is permitted under the DTA. And we are told that if we disagree with this system, if we think that “the facts should be known and reviewed by the evidence,” then we “should change the statute to say so.” The Senate is clearly on notice as to how the DTA review
I will close my remarks by quoting at length from the testimony of U.S. Attorney General William Barr, who spoke on the matters addressed by this legislation to the Judiciary Committee on June 15, 2005. Mr. Barr's testimony informs our understanding of the history, law, and practical reality underlying the DTA and the MCA. I would commend his statement to anyone seeking to understand these statutes and the complex relationship between the President's war-making power and the judiciary. This relationship is superficially similar to, but is fundamentally different from, the judiciary's oversight of the civilian criminal justice system. I particularly found it to be true Mr. Barr's emphasis that the proper role of the courts in this area is not accurately described as "deference" to military decisions because deference implies that the ultimate decision is made by the courts. Mr. Barr notes, "The point here is that the ultimate substantive decision rests with the President and that the courts have no authority to substitute their judgments for that of the President.'

He went on to assert: "In his presentation to the Senate Judiciary Committee on June 15, 2005, Attorney General William Barr, who spoke on the matters addressed by this legislation to the Judiciary Committee on June 15, 2005. Mr. Barr's testimony informs our understanding of the history, law, and practical reality underlying the DTA and the MCA. I would commend his statement to anyone seeking to understand these statutes and the complex relationship between the President's war-making power and the judiciary. This relationship is superficially similar to, but is fundamentally different from, the judiciary's oversight of the civilian criminal justice system. I particularly found it to be true Mr. Barr's emphasis that the proper role of the courts in this area is not accurately described as "deference" to military decisions because deference implies that the ultimate decision is made by the courts. Mr. Barr notes, "The point here is that the ultimate substantive decision rests with the President and that the courts have no authority to substitute their judgments for that of the President." However, he exempted military authorities from these principles. Attorney General Barr's testimony regarding the detention of alien enemy combatants:

The determination that a particular foreign person seized on the battlefield is an enemy combatant has always been recognized as a matter committed to the sound judgment of the Commander in Chief and his military forces. There has never been a requirement that our military engage in evidentiary proceedings to establish that each individual captured is, in fact, an enemy combatant before placing him in detention. The Guantanamo detainees are a subset of the detainees at Guantanamo, the Deputy Secretary of Defense and the Secretary of the Navy have established Combatant Status Review Tribunals ("CSRTs") to permit each detainee a fact-based review of whether they are properly classified as enemy combatants and an opportunity to contest such designation.

As to the detention of enemy combatants. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody. World War II provides a dramatic example. During that war, we held hundreds of thousands of enemy combatants in custody.
rules of the body politic. The Framers recognized that in the name of maintaining domestic tranquility an overzealous government could oppress the very body politic it is meant to protect. The government itself could become an oppressor of “the people.”

Thus our Constitution makes the fundamental efficiency in the realm of law enforcement by guaranteeing that no punishment can be meted out in the absence of virtual certainty of individual guilt. The Constitution’s Bill of Rights contains a number of specific constraints on the Executive’s law enforcement powers, many of which expressly provide for a “due process” check on executive power. In this realm, the Executive’s subjective judgments are irrelevant; it must gather and present objective evidence, and only evidence, to satisfy constitutional standards at each stage of a criminal proceeding.

The underlying premise in this realm is that it is better for society to suffer the cost of the guilty going free than mistakenly to deprive an innocent person of liberty. The situation is entirely different in armed conflict where the entire nation faces an external threat. In an armed conflict, the body politic is not using its domestic disciplinary powers to sanction an errant member, rather it is exercising its national powers to neutralize an external threat and preserve the very foundation of all our civil liberties. Here the Constitution is not concerned with handicapping the government to preserve other values. Rather it is designed to maximize the government’s efficiency to achieve victory—even at the cost of “collateral damage” that would be unacceptable in the domestic realm.

It seems to me that the kinds of military decisions—namely, those who pose a threat to our military operations—are quintessentially Executive in nature. They are not amenable to the type of process we employ in the domestic law enforcement arena. They cannot be reduced to neat legal formulas, purely objective tests and evidentiary standards. They necessarily require the exercise of prudential judgment and the weighing of risks. This is one of the reasons why the Constitution vests ultimate military decision-making in the President as Commander-in-Chief. It is the concept of the Commander-in-Chief means anything, it must mean that the office holds the final authority to direct how, and against whom, military and political objectives of the campaign.

I am not speaking here of “deference” to Presidential decisions. In some contexts, courts are fond of saying that they “owe deference” to some Executive decisions. But this suggests that the court has the ultimate decision-making authority and is only giving weight to the judgment of the Executive. This is not a question of deference—the point here is that the substantive judgment rests with the President and that courts have no authority to substitute their judgments for that of the President.

The Constitution’s grant of “Commander-in-Chief” power must, at its core, mean the plenary authority to direct military force against persons the Commander judges as a threat to the safety of our homeland, or the ultimate military and political objectives of the conflict. At the heart of these kinds of military decisions is the concept that constitutes a threat or potential threat and what level of coercive force should be employed to deal with these dangers. These decisions cannot be reduced to statutory standards or predicate threshold, that must be satisfied as a condition of the President ordering the use of military force against a particular individual. What would that standard be? Reasonable suspicion, probable cause, substantial evidence, preponderance of the evidence, or beyond reasonable doubt? Or do we really believe that the Constitution prohibits the President from using coercive military force against a foreign person—deployed to the battlefield in the context of a particular objective standard of evidentiary proof?

To let posit a battlefield scenario. American troops are pinned down by sniper fire from a village. As the troops advance, they see two men running from a building and receive reports of unconfirmed sniper fire. The troops believe they are probably a sniper team. Is it really being suggested that the Constitution vests these men with the capacity as American military or political objectives?

When do these rights arise? If the troops shoot and kill them—i.e., deprive them of life—could it be a violation of due process? Suppose they are wounded and it turns out they were not enemy forces. Does this give rise to Bivens’ Constitutional tort actions for violation of due process? Alter-native routes to organizational or systemic violations are quintessentially Executive in nature. The Supreme Court, in addition to constitutional standards at each stage of a criminal proceeding, divert resources from winning the war into demonstrating the individual “fault” of persons confronted in the field of battle, and thereby uniquely disadvantage our military vis-a-vis every other fighting force in the world.

Second, the introduction of an ultimate decision maker outside of the normal chain of command, or altogether outside the Executive Branch, would disrupt the unity chain of command and undermine the effectiveness of our military and political objectives. The impartial tribunals could literally overrule command decisions regarding battlefield tactics and set free prisoners whom American soldiers have risked or given their lives to capture. The effect of such a prospect on military discipline and morale is im-predictable to predict.

The Supreme Court’s decision in Rasul v. Bush does not undercut these long-standing principles. In Rasul, the Supreme Court acknowledged that the habeas statute applies extraterritorially— and expressly refrained from addressing these settled constitutional questions. The Court, in concluding that the habeas statute reached aliens held at Guantanamo Bay, relied on the peculiar language of the statute and the “extraordinary territorial ambit” of the writ at common law.” Of course, the idiosyncrasies of the habeas statute do not have any impact on judicial interpretation of the reach of the Fifth Amendment or the Due Process Clause. Moreover, the Court’s recognition in Rasul that the United States exercises control, but “not ultimate sovereignty” over the leased Guantanamo Bay territory, reinforces the inapplicability of the Fifth Amendment to aliens held there.

Nevertheless, even if Guantanamo Bay is somehow deemed sovereign United States territory, the Fifth Amendment is still inapplicable. The Supreme Court, in addition to the requisite delegation on sovereign United States territory, demands that the aliens only “receive constitutional protections” when they have also “developed substantial connections with this country.” Whether under the Court’s formulation, “lawful but invol-untary” presence in the United States “is not of the sort to indicate any substantial connection with our country” sufficient to trigger constitutional protections. The “voluntary connection” necessary to trigger the Fifth Amendment’s due process guarantee is somehow lacking with respect to enemy com-batants.

Whatever else may be said, there can be no dispute that these individuals did not arrive at Guantanamo Bay but rather were captured by enemy combatants that have been transported to Guantanamo Bay for detention thus are not entitled to Fifth Amendment rights. In fact, the Court’s holding that the Supreme Court’s decision in Rasul was a statutory ruling, not a constitutional
one. In other words, the Court concluded only that the federal habeas statute confers jurisdiction on federal district courts to hear claims brought by aliens detained at Guantanamo Bay. The Court nowhere suggested that the Constitution grants such aliens a right of access to American courts.

An important consequence follows: Congress could consider enacting legislation—either by creating special procedural rules for enemy aliens detainees, by requiring any such habeas petitions to be filed in a particular court, or by prohibiting enemy aliens from halting military officials into court altogether.

Mr. President, with the Military Commissions Act, the Senate today enacted Mr. Barr’s third suggestion. We create a system that is consistent with our treaty obligations but that also is consistent with military tradition and the needs of our fighting forces in a time of war. It is a system that will serve this Nation well. I look forward to that day when we can return to a day when we can call the Geneva Conventions.

Mr. HARKIN. Mr. President, since my years as a pilot with the U.S. Navy, nothing has been more important to me than protecting the American people and ensuring the security of our count

Today, we are at war with extremists who want to do grievous harm to America. We all want to fight these extremists and defeat them. We all want to ensure that those who committed or supported acts of terror are brought to justice. The only disagreement is about how best to do that. What is the smartest, most effective way to fight and defeat our enemies?

Unfortunately, as the newly declassified National Intelligence Estimate testifies very clearly, our current course is, in many ways, playing into the hands of the terrorists. It is stirring up virulent anti-Americanism around the world. It is drawing new recruits to its cause, and it is making America less safe.

We have to do a better job, and we can do a better job. It is not good enough to be strong and wrong. We need to be strong and smart. This is especially true when it comes to our policies on interrogating and trying suspected terrorists. Again, we all want to extract information from these suspects. We all want to try them and, if guilty, punish them. The only disagreement is about how best to do it. What is the smartest, most effective way to interrogate and to try these suspected terrorists?

There is plenty of evidence that our current course, which clearly includes torturing suspects and imprisoning them without trial, is not working. To take just one case in point, consider the Canadian citizen, whom we now know to be completely innocent, who was arrested in Afghanistan, had no terrorist ties, and is completely innocent.

The truth, of course, is that he was never in Afghanistan, had no terrorist ties, and is completely innocent.

The cost to the United States for this miscarriage of justice—our reputation and moral standing, has been disastrous—just as the revelations of torture and abuse at Abu Ghraib. What is more, it has endangered our troops in the field—now and in the future—should they fall into the hands of the enemy?

Again, it is not enough to be strong and smart. We need to be true to 230 years of American jurisprudence, our Constitution, and the humane values that define us as Americans.

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Again, it is not enough to be strong and smart. We need to be true to 230 years of American jurisprudence, our Constitution, and the humane values that define us as Americans.

Back during the dark days of McCarthyism in the 1950s, former Senator Joseph McCarthy went on a rampage. He accused people to the left of the United States, of which there are millions in this country, taken out of his or her home at night, and we don’t know what happens to them? They go into the dark dungeons of who knows where, Maybe Guantanamo Bay, corpus is that only independent remedy available to people being held in indefinite detention who, in fact, have no connection to terrorism.

I heard one of my colleagues on the other side of the aisle going on yesterday about this habeas provision. He went on about how habeas corpus is to protect U.S. citizens. It is in no way, he went on, aimed at protecting enemy combatants who are picked up.

Therein lies the problem. How do we know they are enemy combatants? Is it because the CIA says they are an enemy combatant? Who says they are an enemy combatant? This is not World War II, folks, where the Germans wore some side arms and the Japanese have uniforms, and the Japanese are on the other side and they have uniforms. This is an amorphous terrorist war where the terrorists don’t wear uniforms. They can be dressed like you or me. They can look just like you or me. So we don’t know.

We have instances where people have been thrown into Guantanamo, for example, and they were fingered by a neighbor who didn’t like them and wanted their property or house or didn’t like them because of something they had done to them in the past. They fingered them and said: Guess what, they are big terrorists. People were picked up and thrown in jail.

Habeas is the one provision that allows someone snatched off the streets here or anywhere else suspected of being a terrorist to at least come forward and say: What are the charges against me?

We have seen this happen in Guantanamo, people kept for months, for years, without ever having a charge filed against them, and many of them we found out were totally innocent.
What does this say to the rest of the world?

Senator Obama from Illinois told the story the other day about when he was in Chad in August and heard about an American citizen who was picked up in Sudan and held by the Sudanese. He made a point yesterday that the press got this person released. It was an American journalist. After a while, he was released.

The American journalist came back and said: I was picked up by the Sudanese officials. I asked for permission to contact the U.S. Embassy with a phone call so I could talk to our Embassy.

The Sudanese captor said: Why should we let you do that? You don’t let the people in Guantanamo Bay do that.

The use of habeas is not just to protect the people who are suspected so that we know whether they really are an enemy combatant. It is also as a protection for our troops, our soldiers, our civilians, our business people traveling around the world, people traveling on vacation, journalists, just like this one, who may be snatched, picked up by a foreign government. We want to be able to say to that government: Produce the person. What are the charges? Let us know, allow it, we are giving the green light to every other would-be dictator anywhere in the world to do the same thing—any government anywhere.

If the moral argument against torture does not appeal to any weight with this administration, they should just examine the abundant evidence that torture simply doesn’t work. This is not just my opinion, this is what the experts are saying.

Let me quote from a letter signed by 20 former U.S. Army interrogators and interrogation technicians:

Prisoner/detainee abuse and torture are to be avoided at all costs, in part because they can degrade the intelligence collection effort by interfering with a skilled interrogator’s efforts to establish rapport with the subject.

Simply put, torture does not help gather useful, reliable, actionable intelligence. In fact, it inhibits the collection of such intelligence.

Earlier this month, the U.S. Army released its new field manual 222.3: “Human Intelligence Collector Operations,” which covers interrogations by the U.S. military in detail. This manual replaces the previous manual and is required by our military personnel around the world in performing interrogations.

The Army Field Manual explicitly bans, among other things, beating prisoners, sexually humiliating them, threatening them with dogs, depriving them of food and water, performing mock executions, shocking them with electricity, burning them, causing other pain, or subjecting them to the technique called waterboarding, which simulates drowning.

So why do they torture? They torture because they believe it is a good way to get information. Under torture, prisoners say anything, they say the truth, they lie, they say whatever they think their interrogators want to hear.

But let the people in Guantanamo Bay do that.

Thirty-six years ago this summer at the height of the Vietnam war, I brought back photographs of the so-called tiger cages at Con Son Island in the North Vietnamese part of what is now South Vietnam. These were designed for prisoners who had committed no crime whatsoever, were being tortured and killed with the full knowledge and sanction of the U.S. Government. That was July of 1970 when I was a staff person in the House of Representatives working with a congressional delegation on a fact-finding trip to Vietnam.

We had all heard reports about the possible existence of these so-called tiger cages in which people were brutally tortured and killed. Our State Department and our military officials denied their existence. They said it was only Communist propaganda.

Through various sources, I thought that the reports about the tiger cages were at least credible and should be investigated further.

Thanks to the courage of Congressman William Anderson of Tennessee and Congressman Augustus Hawkins of California and to Don Luce, an American working for a nongovernmental organization, and because of the bravery of a young Vietnamese man who gave us the maps on how to find the prison, we were able to expose the tiger cages on Con Son Island.

This young Vietnamese man about whom I speak was let out of the tiger cages, but they kept his brother, and they said: If you breathe one word about this, we are going to kill your brother.

Why did they let him out of the tiger cages? Because he was president of the student body at Saigon University. What had been his crime? He had demonstrated against the war. So they picked up he and his brother and threw them in the tiger cages and tortured them.

The students refused to go back to class—this was a big deal—until they returned this young man to his university, which they did, but they kept his brother and said: If you breathe a word of this, we will kill him.

This young man decided he needed to take a chance, and he took a chance on me. He drew the maps and gave us the story on how to find these tiger cages which were very well hidden, and without the maps we would not have found them. Fortunately, I had a camera and a hidden tape recorder which proved useful when I returned to the United States.

Supporters of the war claim that the tiger cages were not all that bad. But then LIFE magazine published my pictures, and the world saw the horrific conditions where, in clear violation of the Geneva code, North Vietnamese, Vietcong, as well as civilian opponents of the war—just civilians—who committed no crimes whatsoever were all crowded together in these cages, as I said, in clear violation of the Geneva Conventions and the most fundamental principles of international law.

At the same time, the U.S. Government had been insisting that the North Vietnamese abided by the Geneva Conventions in their treatment of prisoners in North Vietnam. Yet here we were, condoning and being complicit in the torture of civilian Vietnamese, along with Vietnamese soldiers and others in clear violation of the Geneva Conventions.

We may not have known about it—our public did not know about that—but the Vietnamese sure knew about it.

I thought we had learned our lesson from that, and then I saw Abu Ghraib and thought: Wait a minute. Haven’t we learned our lesson? And, Mr. President, just as 37 years ago when the tiger cages were first talked about, they were denied—and they thought they could deny them because it was hard to get to the island. You couldn’t really get out there. As far as they were concerned, no one had pictures of it and no one had ever really escaped from there, like a Devil’s Island kind of place. So the military denied it. Our Government denied it year after year until I was able to take the pictures and bring back the evidence.

Mr. President, I submit to you and everyone here and the American people that had not that courageous soldier taken the pictures of Abu Ghraib and kept those pictures, they would have denied that ever happened. They would have denied that high Heaven that such things took place at Abu Ghraib.

Thankfully, one courageous young soldier decided this was wrong, it was inhumane, it was not upholding the high standards of America, and it was in violation of the Geneva Conventions. Had he not taken those pictures, it would be denied forever that ever happened at Abu Ghraib.

So now, as if we learned nothing from that previous tragedy of the tiger cages 36 years ago or Abu Ghraib just a couple of years ago, here we go again denying obvious instances of torture and abuse, effectively giving the green light to torture by U.S. Government agents and contractors and watering down the War Crimes Act.

This is a betrayal of our laws. It is a betrayal of our values. It is a betrayal of everything that makes us unique and proud to be Americans.

The administration apparently thinks that we will just go along with this betrayal because there is an election in 6 weeks. Apparently they think we are afraid of being branded weak on terrorism. Indeed, some are no doubt hoping that we will vote against this bill so they can brand us as a plenum against us in the election. All I can say is: Shame on them. What is more, it is not going to work. Because opposing
this bill, which would give the green light to torture, is far, far bigger than the outcome of the November election.

This is about preserving our core values as Americans. It is about standing up for our troops and ensuring that they do not become subject to the same acts of torture and retaliation. It is about standing up for American citizens, civilians, and others who may be caught up in some foreign land with false charges filed against them, and yet not even being able to contact our embassies or consulates or our American citizens. And it is about changing course and beginning to wage an effective war against the terrorists who attacked us on September 11, 2001.

It is time to quit being strong and wrong, and it is time to start being strong and smart. Being strong and wrong has been a disaster. It has bogged us down in a civil war in Iraq. It has turbocharged the terrorists. It has made America less safe. So it is time to be true to who we are as Americans. It is time to say no to indefinite—incarceration. It is time to say no to indefinite—indefinite—incarceration. It is time to take no to taking the right of someone put away to at least have the charges pressed against them. It is time to say no to torture in all its forms now and at any time in the future.

Mr. President, I yield the floor.

Mr. BIDEN. Mr. President, I want to start by complimenting Senators WARCUTTER and Senator MCCAIN and GRAHAM and the effort he has made for who we are as Americans. And it is about changing course and beginning to wage an effective war against the terrorists who attacked us on September 11, 2001.

It is time to quit being strong and wrong, and it is time to start being strong and smart. Being strong and wrong has been a disaster. It has bogged us down in a civil war in Iraq. It has turbocharged the terrorists. It has made America less safe. So it is time to be true to who we are as Americans. It is time to say no to indefinite—incarceration. It is time to say no to taking the right of someone put away to at least have the charges pressed against them. It is time to say no to torture in all its forms now and at any time in the future.

Mr. President, I yield the floor.

Mr. BIDEN. Mr. President, I want to start by complimenting Senators WARCUTTER, MCCAIN and GRAHAM and the work that they did to improve this bill, particularly in two areas.

First, our colleagues did the right thing by rejecting the attempt by the administration to reinterpret, by statute, Common Article III of the Geneva Conventions. That would have been an enormous mistake—and an invitation for other countries to define for themselves what the Geneva Conventions require.

Second, our colleagues were right to reject the use of secret evidence in military commissions. Such a proposal is not consistent with American jurisprudence, and would not have satisfied the requirements of the Supreme Court decision in Hamdan.

Overall, the bill provides a much better framework for trying unlawful enemy combatants than under the flawed order issued by the President. All this is positive, and our three colleagues deserve credit for their good work.

But the bill contains a significant flaw. It limits the right of habeas corpus in a manner that is probably unconstitutional. Don't take my word for it. Listen to the words of a conservative Republican, Kenneth Starr, who used to sit on this nation's second highest court, and is now one of the country's leading appellate advocates, in a letter written to Senator SPECTER earlier this week.

Article 1, section 9, clause 2 of the United States Constitution provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

The United States is neither in a state of rebellion nor invasion. Consequently, it is not appropriate for Congress to modify the constitutionally protected writ of habeas corpus under current events.

Accordingly, I believe this bill is likely unconstitutional. I hope that I am wrong. But I fear that I am right, and that we will be back here in a few years debating this issue again.

We had one this right—to ensure that we don't end up back here again after a new round of litigation. There was no reason to rush. No one challenges our right to detain the high-value prisoners the President just transferred to Guantanamo. We are not about to release them—or should we.

But rush we did. In the last week, there have been two different versions of the legislation that emerged from closed-door negotiations with the administration. The House may have done it so it is willing to trust the legal judgment and competence of this administration. But I am not.

Since 9/11, several major cases have gone to the Supreme Court that relate to the laws governing the war on al-Qaida and the President's powers. And the administration has been wrong too many times—wrong about whether habeas corpus rights applied to detainees in Guantanamo Bay, wrong about whether U.S. citizens detained as enemy combatants had a right to meaningful due process, and wrong about whether the military commissions established by order were legal. Simply put, I am not willing to trust the administration's legal judgment again. And it is clear that the administration has put its impront on this legislation in several troubling respects, including in the stripping of habeas rights.

In the struggle in which we are engaged against radical fundamentalists, we must be both tough and smart. This bill is not smart because it risks continued litigation about how we detain and try unlawful enemy combatants. It is also not smart because it risks continued harm to the image of the United States. The 9/11 Commission concluded that "[a]llegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need." The recently released National Intelligence Estimate makes plain that there are several factors fueling the spread of the jihadist movement, including "entrenched grievances, such as corruption, injustice, and fear of Western domination, leading to anger, humiliation, and self-hatred." The mistreatment of detainees at Abu Ghraib, and concerns about our policies governing detainees at Guantanamo Bay, undoubtedly fuel these grievances and anger against the United States.

Our detainee policies have also made it harder for our allies to support our anti-terrorism policies. We have to get this right.

Therefore, even though our colleagues achieved significant improvements, I cannot support this legislation.

Mr. WARNER. Mr. President, at this point in time I yield to the distinguished Senator from Arizona 14 minutes.

I would say that I have been privileged to be a Member of this institution for now 28 years, and I first met John McCain when I was Secretary of the Navy. So that goes back 28 plus another 5 years that I have known of JOHN MCCAIN. This Chamber, and indeed all of America, knows full well about the extraordinary record that this man has in the service of his Nation, showing selflessness, showing courage, showing foresight.

I am proud to have worked with him as a partner in these past weeks, indeed, months now, on this piece of legislation.

I just want to express my gratitude, and I think the gratitude of many people across this country, for the service he is rendering the Senate and hopefully will continue to render the Senate in the coming years.

When I step down under the caucus, it is my hope that JOHN MCCAIN is elected to succeed me as chairman of the Armed Services Committee.

But at this point in time, I am proud to yield, as manager, my time to the Senator from Arizona.

Mr. LEVIN. Mr. President, will the Senator from Arizona yield?

Mr. McCAIN. I would be glad to.

Mr. LEVIN. Mr. President, I heartily join my good friend from Virginia in his assessment of Senator McCAIN. I know there has been some disagreement as to who would go first, but that should not in any way, I hope, cloud the real affection which I think everybody in this body holds for Senator McCAIN and the effort he has made for so long to try to bring some kind of decorum to the approaches we use to people whom we detain.

I thank the Senator.

The PRESIDING OFFICER. The Senator from Arizona is recognized for 14 minutes.

Mr. McCAIN. Mr. President, I thank both my friends of many years, Senator LEVIN and Senator WARNER, for the collegiality, the bipartisanship, and the effort that we all make under the leadership of the Armed Services Committee for the betterment of the men and women who serve our country and our Nation's defense. I am honored to serve under both.

For the record, I believe I just calculated. I say to my friend from Virginia, it has been 33 years since I came home from Vietnam and found that our distinguished Secretary of the Navy was very concerned about the welfare of those who had the lack of talent that we were able to get shot down. So I thank my friend from Virginia especially, and I thank my friend from Michigan. I believe our committee conducts itself in a fashion.
which has been handed down to us from other great Members of the Senate, such as Richard Russell and others.

Mr. President, before I move on to other issues, I have heard some criticism on the Senate floor today about the way in which the bill treats admissibility of coerced testimony.

A New York Times editorial today said that in this legislation “coercion is defined in a way that exempts anything done before the passage of the 2005 Detainee Treatment Act, and anything else that the Bush administration has not decided to prosecute.”

This bill excludes any evidence obtained through illegal interrogation techniques, including those prohibited by the 2005 Detainee Treatment Act. The goal is to bolster the Detainee Treatment Act. The administration is also considering legislation to make the process of habeas corpus more difficult for detainees. We have heard about other evidentiary and procedural issues, including the ability of the accused to access to evidence and the accused’s presence throughout the trial. Specifically, it is my strong belief that evidence admitted against an accused and provided to members of a military commission must also be provided to the accused and accused’s counsel. Any evidence to be admitted outside the presence of the accused would mean the military commission could not use that evidence to convict and possibly impose a sentence that would be reversed by the court. Such a procedure is extremely problematic, both constitutionally and from a Common Article 3 perspective.

The legislation must appropriately address access to evidence and the accused’s presence during the trial. Specifically, it is my strong belief that evidence admitted against an accused and provided to members of a military commission must also be provided to the accused and accused’s counsel. Any evidence to be admitted outside the presence of the accused would mean the military commission could not use that evidence to convict and possibly impose a sentence that would be reversed by the court. Such a procedure is extremely problematic, both constitutionally and from a Common Article 3 perspective.

The accused’s presence is a critical facet of this legislation. The United States is more than a nation of laws; it is a country founded upon strong moral principles of fairness to all. Moreover, our country—to the delight of our adversaries—has been heavily criticized because the pre-Hamdan military commission process was unfair and did not afford “all the judicial guarantees which are recognized as indispen-
sable by civilized nations.”

Now is the time to correct that perception and clearly establish procedures and rules that meet that standard. These procedures and rules will do more than merely correct legal deficiencies; they will help reestablish the United States as the leading advocate of law and the principles of fairness to all.

As to the use of classified evidence, I believe the procedures of MRE 505 adequately protect national security. MRE 505 is based on the Classified Information Procedures Act (CIP A) (Title 18, U.S.C. App. III). CIP A is designed to prevent unnecessary or inadvertent disclosures of classified information and to ensure the government of the national security implications of going forward with certain evidence. MRE 505 achieves a reasonable accommodation of the United States’ interest in protecting information the accused’s need to be able to mount a defense. The rule permits in camera, ex parte consideration of the Government’s concerns by a judge, the substitution of unclassified summaries or other alternative forms of evidence, and ensures fairness to the accused. Under MRE 505, both the prosecution and the accused may present the record of the case going to the court. The accused knows all that is to be considered by the trier-of-fact, has an opportunity to respond, and is able to assist the court in the course of its inquiry.

Concerns about the admissibility of state-
matic processes, that we would consider to be unfair and ille-
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Additionally, concerns have been raised about other evidentiary and procedural issues, including the ability of the accused to represent himself, and the admissibility of hearsay, classified evidence, and an accused’s own statements. The right to be able to represent himself pro se is well recognized in our jurispru-
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The military commission process must recognize the battlefield is not an orderly place. The requirement to warn an individual before proceeding with discussion of specific issues, I would like to note that I have had the opportunity to provide comment to the DoD General Counsel and the Department of Justice regarding draft commission legislation. As of this writing, I have not seen a final version of the Administration’s draft.

Although existing courts-martial rules are not practical for the prosecution of unlawful enemy combatants, they provide a good starting point for the drafting of Commission legislation. I recommend that legislation establish the jurisdiction of military commissions, set baseline standards of structure, procedure, and evidence consistent with U.S. law and the law of war, and prescribe all substantive offenses. It is also important to support the President to promulgate supplemental rules of practice. In this regard, I believe we should follow the military justice model whereby Congress establishes the legal framework (the Uniform Code of Military Justice, or in this case a Code for Military Commissions) and the President promulgates the rules of practice (a Manual for Courts-Martial, or in this case a Manual for Military Commissions).

Within that context, I recommend that the jurisdiction of military commissions be expanded to permit prosecution of all unlawful enemy combatants who engage in or attempt to engage in hostilities against the United States. In my view, we need the military to prosecute before military commissions irregular belligerents who violate the laws of war while acting on behalf of foreign governments as well as terrorists not associated with al Qaida and/or the Taliban.

With regard to baseline standards of structure, procedure, and evidence, it is critically important that independent military judges preside at military commissions and have authority to make final rulings on all matters of law. Similarly, defense counsel must have an independent reporting chain of command, free from both actual and perceived influence of prosecution and convening authorities.

The introduction of evidence outside the presence of an accused is, in my view, inconsistent with our war. The Supreme Court held in Hamdan v. Rumsfeld, 128 S.Ct. 2749 (2006), that absent a sufficient practical need to deviate from existing U.S. laws and criminal trial procedures, an accused must be present at trial and have access to all evidence presented against him. A four-justice plurality also opined that Article 3 of the 1949 Geneva Conventions requires, at a minimum, that an accused be present at trial and have access to the evidence. Justice Kennedy, who was not part of the plurality, further signaled in a separate concurring opinion that introduction of evidence outside the presence of the accused “troses the very core of the military court and, if done to the prejudice of the accused would be grounds for reversal. Furthermore, as a matter of policy, adopting such practices might encourage others to reciprocate in kind against U.S. service members held in captivity.

I recommend that the legislation adopt Military Rule of Evidence 505 (M.R.E. 505), which is partly based on the Classified Information Procedures Act (CIPA). M.R.E. 505 permits a military judge to conduct an ex parte review of the Government’s interest in protecting classified information and encourages the substitution of unclassified summaries or other forms of evidence in lieu of the classified information. This type of procedure ensures that classified information is not disclosed under circumstances that could injure national security.

While it is true that application of a M.R.E. 505 process might conceivably result in the Government being unable to introduce evidence against an accused under certain circumstances, it is my view that we are better prepared for the law of war, which requires that we afford even terrorists the judicial guarantees which are recognized as indispensable amongst civilized peoples to promote justice. For it is that very same law that allows us to hold terrorists for the duration of hostilities, however long those hostilities might last.

With regard to hearsay evidence, I have no objection to the introduction of hearsay evidence so long as the evidentiary standard is clarified to exclude information that is unreliable, not probative, unfairly prejudicial, confusing, or misleading, or when such exclusion is necessary to protect the integrity of the proceedings. Such an approach would be consistent with the practice of international war crimes tribunals supported by the United States in Rwanda and the former Yugoslavia. Those tribunals satisfy the requirements of the law of war including Common Article 3 of the Geneva Conventions of 1949.

With regard to statements alleged to have been derived from coercion, the presiding military judge should be given discretion and authority to inquire into the underlying factual circumstances and exclude any statement derived from coercion, in order to protect the integrity of the proceedings. As I noted earlier, the legislation should enumerate all offenses triable by military commission. Conspiracy should be included, but only conspiracies to commit one of the substantive offenses specifically enumerated and there must be a requirement to prove the defendant was committed an act in furtherance of the conspiracy. This would mean, for example, that conspiracy to commit murder in violation of the laws of war might, and is, consistent with affiliation with a terrorist organization, standing alone, would not be cognizable.

I also recommend that the Government follow the common Article 3 of the Geneva Conventions. Common Article 3 is a baseline standard that U.S. Armed Forces have trained to for decades. It specifies that military commissions may not impose any new requirements on us. However, if Congress desires to clarify the Common Article 3 phrase “outrages upon personal dignity, in particular humiliating and degrading treatment,” this would be beneficial. The legislation might consider requiring an objective standard be used in interpreting this phrase, and define the language to encompass willful acts of violence, brutality, or physical injury, and so severely humiliating or degrading as to constitute an attack on human dignity. Examples of such conduct include forcing detainees to perform sexual acts, threatening a detainee with sexual mutilation, systematically beating detainees, and forcing them into slavery. Only in this way will we accurately reflect established war crimes jurisprudence and adoption would prevent the perception that we are attempting to abrogate our obligations under the 1949 Geneva Conventions.

Thank you again for this opportunity to provide personal comment on military commissions legislation. I hope that this information is helpful.

Sincerely,

[Signature]


Hon. John Mccain,
Russell Senate Office Building, Washington, DC.

DEAR SenaTOR McCAIN. Thank you for your letter of August 23, 2006 requesting my personal views on military commission legislation.

Before proceeding with discussion of specific issues, I would like to note that I have had the opportunity to provide comment to the DoD General Counsel and the Department of Justice regarding draft commission legislation. As of this writing, I have not seen a final version of the Administration’s draft.

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And the other two Judge Advocate Generals say the same thing, that the provisions of this bill are exactly in line with their opinions. Frankly, that had a great deal of weight in our adopting them.

Almost exactly 3 months ago, the Supreme Court decided the groundbreaking case of Hamdan v. Rumsfeld. In that case, a majority of the Court ruled that the military procedures used to try detainees held at Guantanamo Bay fell short of the standards set forth in the Uniform Code of Military Justice and the Geneva Conventions.

The Court also determined that Common Article 3 of the Geneva Conventions applies to al-Qaida because our conflict with that terrorist organization is “not of an international character.” Some of my colleagues may disagree with the Court’s decision, but once issued it became the law of the land.

Unfortunately, the Hamdan decision left in its wake a void and uncertainty that Congress needed to address—and address quickly—in order to continue fighting the war on terrorism. I believe this act allows us to do that in a way that protects our soldiers and other personnel fighting on the front lines and respects core American principles of justice. I would like to thank Senators Graham and Warner and many others for their unceasing work on this bill.

I would like to take a few moments to describe some of the key elements of the legislation.

As is by now well known, Senators Warner, Graham, and I, and others, have resisted any redefinition or modification of our Nation’s obligations under Common Article 3 of the Geneva Conventions. We did so because we care deeply about legal protections for American fighting men and women and about America’s moral standing in the world. More than 50 retired military generals and admirals expressed grave concern about redefining our Geneva obligations, including five former Chairmen of the Joint Chiefs of Staff.

Mr. President, I ask unanimous consent to have printed in the RECORD letters from GEN Colin Powell, GEN Jack Vessey, and GEN Hugh Shelton, and a letter from the former Commandant of the Marine Corps, General Krulak.

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

SEPTEMBER 13, 2006.

DEAR SENATOR MCCAIN: I just returned to town and learned about the debate taking place in Congress to redefine Common Article 3 of the Geneva Convention. I do not support such a step and believe it would be inconsistent with the McCain amendment on torture which I supported last year.

I have attached an eloquent letter sent to you by one of my distinguished predecessors as Chairman of the Joint Chiefs of Staff, General Jack Vessey. I fully endorse it. I also fully endorse the statement of the Department of Defense that the United States military is beginning to doubt the moral basis of our fight against terrorism. To redefine Common Article 3 would add to those doubts. Furthermore, it would put our own troops at risk.

I am as familiar with The Armed Forces Officer as is Jack Vessey. He has seen all the horrors of World War II and General George C. Marshall, then Secretary of Defense, used it to tell the world and to our troops that we could not negotiate with those who had any interest in weakening American support for Common Article 3 of the Geneva

September 28, 2006

Hon. John McCain, U.S. Senate, Washington, DC.

Dear Senator McCain: Sometimes, the news is a little garbled by the time it reaches the forests of North-central Minnesota, but I call your attention to recent reports that the Congress is considering legislation which might relax the United States’ support for adherence to Common Article 3 of the Geneva Convention. If that is true, it would seem to weaken the effect of the McCain Amendment on torture of last year. If such legislation is being considered, I fear that it may weaken America in two respects: first, it would undermine the moral basis which has generally guided our conduct in war throughout our history. Second, it could give opponents a legal argument for mistreatment of Americans being held prisoner in time of war.

In 1950, 3 years after the creation of the Department of Defense, the then Secretary of Defense, General George C. Marshall, issued a small book, titled The Armed Forces Officer. The book summarized the laws and traditions that governed our Armed Forces throughout the years. As related to the issue, it might consider a short quote from the last chapter of that book which General Marshall sent to every American Officer. The last chapter is titled “Americans in Combat” and it lists 29 general propositions which govern the conduct of Americans in war. Number XV, which I long ago underlined in my copy, reads as follows:

“The United States abides by the laws of war. Its Armed Forces, in their dealing with all other peoples, are expected to comply with the laws of war, in the spirit and the letter. In waging war, we do not tolerate helpless non-combatants, if it is within our power to avoid so doing. Wanton killing, torture, cruelty or the working of unusual hard- ship, as well as any form of punishment is not justified in any circumstance. Likewise, respect for the reign of law, as that term is understood in the United States, is expected to follow the flag wherever it goes.”

For the long term interest of the United States as a nation and for the safety of our own forces in battle, we should continue to maintain those principles. I continue to read and to hear that we are facing a “different enemy” in the war on terror; no matter how true that may be, inhumanity and cruelty are not new to warfare nor to enemies we have faced in the past. In my short 46 years in the Armed Forces, Americans confronted the horrors of the prison camps of the Japanese in World War II, the North Koreans in 1950–53 or the North Vietnamese in the long years of the Vietnam War, as well as knowledge of the Nazi’s holocaust depredations in World War II. Through those years, we have held to our own values. We should continue to do so.

Thank you for your own personal courage in maintaining those values, both in war and in peacetime. I am confident that you will continue to work toward resolution of this important issue in a manner that will serve our Nation and our armed forces well.

Very respectfully,

James C. Walker, Brigadier General, USMC, Staff Judge Advocate to the Commandant.

Mr. MCCAIN. Mr. President, the JAG of the Air Force says:

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General Colin L. Powell, USA (Ret.).

September 12, 2006.
Hon. John McCain,  
U.S. Senate,  
Washington, DC.

Dear Senator McCain: I have followed with great interest the debate over whether to redefine in law Common Article 3 of the Geneva Convention. I join my distinguished predecessors as Chairman of the Joint Chiefs of Staff, Generals Vessey and Powell, in expressing concern regarding the contemplated change. I believe, when we take to our efforts to win America’s wars and protect American soldiers.

Common Article 3 and associated Geneva provisions have offered legal protections to our troops since 1949. American soldiers are trained to Geneva standards and, in some cases, these standards constitute the only protections remaining after capture. Given our military’s extraordinary presence around the world, Geneva protections are critical.

Should the Congress redefine Common Article 3 in domestic statute, the United States would be inviting similar reciprocal action by other parties to the treaty. Such an action would send a terrible signal to other nations that the United States is attempting to water down its obligations under Geneva. At a time when we are deeply engaged in a war of ideas, I believe this would be an egregious mistake. I firmly believe that not only is such a move unnecessary, it potentially subjects our men and women serving in harm’s way to unnecessary danger.

The legislation sponsored by Senator Warner, which would enumerate war crime offenses while remaining silent on America’s obligations under Common Article 3, is a better course of action. By doing so, our men and women in field will have the clarity they require, we can still interrogate terrorists, and our service personnel will have the undiluted protections offered by the Geneva Convention.

Respectfully,  
General H. Hugh Shelton.

Senator McCain: This is the first time I have written about the administration policy regarding the war against terror but my professionalism and my conscience leads me to comment on the proposed ‘redefinition/change’ to the Geneva Convention.

My concerns are as follows:

1. A redefinition or reinterpretation of the Geneva Convention, a document that has been taught to every recruit and officer candidate since its inception, would immediately attack the moral dimension with which every Soldier, Sailor, Marine and Airman is inculcated during their time as a volunteer. I believe that it gives amnesty to U.S. personnel who may have committed war crimes and damaging to the United States’ respect in the world. It is important to remember that the Geneva Convention is based on the ethical and the moral values that we hold dear.

2. The mothers and fathers who give their sons and daughters to care brought their children up to do ‘right’ and to obey the law . . . to take the moral high ground. We do this parents a grave disservice by “legalizing” a different standard for their children.

3. The other two points that concern me is how does this fit into the laws governing warfare and as a nation. The unintended consequence of this type of action is that it opens the door for other nations to make interpretations of their own . . . across a gamut of issues. The world is a dangerous place and our actions might well serve as precedent during the first battle of the NEXT war.

4. Finally, Duty-Honor-Country and Semper Fidelis are NOT just “bumber stickers.” These words, and others like them, form the ethos of our Armed Forces. When you start to tamper with the laws governing warfare . . . laws recognized by countries around the world . . . you run the risk of bringing into question the very ethos that these men and women hold dear.

Semper Fidelis,  
C.C. Krulak,  
General, USMC (Ret),  
31st Commandant of the Marine Corps.

Mr. McCain, These men express one common view: that modifying the Geneva Convention would be a terrible mistake and would put our personnel at greater risk in this war and the next. If America is seen to be doing anything other than upholding the letter and spirit of the conventions, it will be harder to defeat our enemies. I am pleased that this legislation before the Senate does not amend, redefine, or modify the Geneva Conventions in any way. The conventions are preserved intact.

The bill does provide needed clarity for our personnel about what activities constitute war crimes. For the first time, there will be a list of nine specific activities that constitute criminal violations of Common Article 3, punishable by imprisonment or even death. This list provides specific guidance about specific interrogation methods that may be prohibited. But it is unreasonable to suggest that any legislation could provide an explicit and all-inclusive list of what specific activities are illegal and which are permitted. Still, I am confident that the categories included in this section will criminalize certain interrogation techniques, like waterboarding and other techniques that cause serious pain or suffering that need not be prolonged. I emphasize ‘that need not be prolonged.’

Some critics of this legislation have asserted that it gives amnesty to U.S. personnel who may have committed war crimes and damaging to the United States’ respect in the world. It is important to remember that the Geneva Convention is based on the ethical and the moral values that we hold dear.

In short, whereas last year only one law—the torture statute—was deemed to apply to the treatment of all enemy detainees, now there is a set of overlapping and comprehensive legal standards that are in force: the Detainee Treatment Act, with its prohibition on cruel, inhuman, and degrading treatment as defined by the fifth, eighth, and fourteenth amendments to the Constitution, Common Article 3 of the Geneva Conventions, and the War Crimes Act. This legislation will allow—my colleagues, have no doubt—this legislation will allow the CIA to continue interrogating prisoners within the boundaries established in the bill.

Let me state this flatly: It was never our purpose to prevent the CIA from detaining and interrogating terrorists. On the contrary, it is important to the war on terror that the CIA have the ability to do so. At the same time, the CIA’s interrogation program has to abide by the rules, including the standards of the Detainee Treatment Act.
I, like many of my colleagues, find troubling the reports that our intelligence personnel feel compelled to purchase liability insurance because of the lack of legal clarity that exists in the wake of the Hamdan decision. This legislation provides an affirmative defense for Government personnel prosecuted under the War Crimes Act for actions they reasonably believed to be legal at the time. That is a long-standing precedent. In addition, it would potentially create a right to action against our personnel based on a violation of the Geneva Conventions. The intent of this provision is to protect officers, employees, members of the Armed Forces, and other agents of the United States from suits for money damages or any other lawsuits that could harm the financial well-being of our personnel who were engaged in lawful—‘I emphasize “lawful”—activities.

It is important to note, however, that the fact that the Geneva Conventions lack a private right of action—and the fact that this legislation does not create such a right—has absolutely no bearing on whether the Conventions are binding on the executive branch. Even if the Geneva Conventions do not establish a right of action—our personnel for money damages, the President and his subordinates are nevertheless bound to comply with Geneva. That is clear to me and to all who have negotiated this legislation in good faith.

The Geneva Conventions are the highest law for our personnel, and this unparalleled exposure only strengthens the Geneva Conventions. The future will never have to ask, with the kind of trial which they, in the days of their pomp and power, never gave to any man. But fairness is not weakness. The extraordinary fairness and the courage of our servicemen and our captives is an attribute of our strength.”

He was right and his wisdom was echoed this week at our Judiciary Committee hearing when Admiral Hamilton, the former Commander of Guantanamo, testified that fairness and lawfulness are our greatest strengths. This legislation doesn’t live up to that ideal. It strips away fairness.

The actions by the U.S. Government, this administration, for all its talk of strength, have made us less safe, and its current proposal is one that smacks of weakness and shivering fear. Its legislative demands reflect a cowing country that is succumbing to the threat of terrorism. I believe we Americans should be a leader in the fight for human rights and the rule of law, and that will strengthen us in our fight against terrorists.

We have taken our eye off the ball in this fight against terrorists. That is essentially what all of our intelligence agencies concluded in the National Intelligence Estimate that the administration had for six months while this was rolling along, but that they only shared a part of this past weekend. Our retooled and reorganized intelligence agencies, with leadership handpicked by the administration, have concluded, contrary to the campaign rhetoric of the President and Vice President, that the Iraq war has become a “cause celebre” that has inspired a new generation of terrorists. It hasn’t stopped terrorists, it has inspired new terrorists. By detaining our enemies we have also been recruiting more. Detainees are being recruited at Abu Ghraib, at secret CIA prisons, and that by torturers in other countries to whom we have turned over people, have become other “causes celebre” and recruiting tools for our enemies.

Surely, the continued occupation of Iraq, when close to three-quarters of Iraqis want U.S. forces to depart their country, is another circumstance being exploited by enemies to demonize our great country.

Passing laws that remove the remaining checks against mistreatment of prisoners will not help us win the battle for the hearts and minds of the generation of young people around the world being recruited by Osama bin Laden and al-Qaida. Authorizing indefinite detention of anybody the Government designates, without any proceeding or without any recourse, putting them into the secret prisons we condemned during the Cold War, is another circumstance that claims the United States would do. That is not what American values, our traditions, and our rule of law would have us do.
This is not just a bad bill, this is truly a dangerous bill.

I have been asking Secretary Rumsfeld’s question for the last several weeks: whether our actions are eliminating more of our enemies than we are creating. But now we understand that we are doing the reverse. We are eliminating our enemies at a rate that is more rapid than what we are eliminating. Our intelligence agencies agree that the global jihadist movement is spreading and adapting; it is “increasing in both number and geographic dispersion.” We are pursuing our enemies more at risk.

“If this trend continues,” our intelligence agencies say, that is, if we do not wise up and change course and adopt a winning new strategy, “threats to U.S. interests at home and abroad will become more diverse, leading to increasing attacks worldwide.” Attacks have been increasing worldwide over the last 5 years of these failing policies and are, according to the judgment of our own, newly reconstituted intelligence agencies, likely to increase further in the days and months and years ahead. The intelligence agencies go on to note ominously that “new jihadist networks and cells, with anti-American agendas, are increasingly likely to conduct and further employ ‘operational threat that will grow.’” Particularly abroad “but also in the homeland.”

“This is truly chilling. The Bush-Chevron administration not only failed to stop this unacceptable enemy expansion, but in 5 years they have failed to bring Osama bin Laden to justice, even though they had him cornered at Tora Bora. They yanked the special forces out of there had him cornered at Tora Bora. They yanked the special forces out of there and against the law and on their own say-so, but now they are obtaining license—to engage in additional harsh techniques that the rest of the world will see as abusive, as cruel, as degrading, and even as torture. Fortunately, every growing number of our own people see it that way, too.

What is being lost in this debate is any notion of accountability and the guiding principles of American values and law. Where are the facts of what has happened to Mr. bin Laden in the United States? Where are the legal justifications and technicalities the administration’s lawyers have been seeking to exploit for 5 years? The Republican leadership’s legislation strips away our most basic national values without so much as an accounting of these facts and legal arguments. Senator Rockefeller’s amendment to incorporate some accountability in the process through oversight of the CIA interrogation program was unfortunately rejected by the Republican leadership in the Senate.

Secrecy for all time is to be the Republican rule of the day. Congressional oversight and balances are no more. The fundamental check that was last provided by the Supreme Court is now to be taken away. This is wrong. This should be unconstitutional. It is certainly unconscionable. This is certainly not the action of any Senate in which I have served. It is not worthy of the United States of America. What we are saying is one person will make all of the rules; there will be no checks and balances. There will be no dissent, and there will be nobody’s view, and we will remove piecemeal by single law that might have allowed checks and balances.

We are rushing through legislation that would have a devastating effect on our security and our values. I implore Senators to stop back from the brink and think about what we are doing. The President recently said that “time is of the essence” to pass legislation authorizing military commissions. The new Army Field Manual appears to outlaw several of what the Administration euphemistically calls “aggressive” tactics and that much of the world regards as torture and cruel and degrading treatment. In rejecting the Kennedy amendment today, the Senate has turned away from the wise counsel and judgment of military professionals in the White House and President’s signing statement already undermined enactment of the antitorture law.

The administration is now obtaining license—before, they just did it quietly and against the law and on their own say-so, but now they are obtaining license—to engage in additional harsh techniques that the rest of the world will see as abusive, as cruel, as degrading, and even as torture. Fortunately, every growing number of our own people see it that way, too.

Going forward, the bill departs even more radically from our most fundamental values and provisions that were profoundly troubling a week ago when the Armed Services Committee marked up the bill have gotten much worse in the course of closed-door revisions over the past week. For example, the bill has been amended to eliminate habeas corpus review even for persons inside the United States, and even for persons who have not been determined to be enemy combatants. It has moved from detention of those who are captured having taken up arms against the United States on a battlefield to millions of law-abiding Americans that this administration has targeted for unilateral actions that have left us less safe, time is now of the essence to take real steps to keep us safe from terrorism. Real steps like those included in the Real Security Act, S. 3875. We should be focusing on getting the terrorists and securing the nuclear material that this administration has allowed to the last unaccounted for around the world. We should be doing the things Senator Kerry and others are talking about, such as strengthening our special forces and winning the peace in Afghanistan.

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Senator SMITH, speaking this morning about the habeas provisions of this bill, quoted Thomas Jefferson, who said:

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

Jefferson said on another occasion: "I would rather be exposed to the inconveniences attending delay than to those attending too small a degree of it.

With this bill, the Senate reverses that profound judgment of history, chooses against liberty, and succumbs to fear.

When former Secretary of State Colin Powell wrote last week of his concerns with the administration's bill, he wrote about doubts concerning our "moral authority in the war against terrorism." This General, former head of the Joint Chiefs of Staff and former Secretary of State, was right. Now we have heard from a number of current and former diplomats, military lawyers, Federal judges, law professors and law school deans, the American Bar Association, and even the first President's Solicitor General, Kenneth Starr, that they have grave concerns with the habeas corpus stripping provisions of this bill.

I agree with Mr. Starr that we should not suspend—and we should certainly not eliminate—Habeas. I also agree with more than 300 law professors, who described an earlier, less extreme version of the habeas provisions of this bill as "unwise and contrary to the most fundamental precepts of our traditions on the rights of alien or citizen, against everything which is not law, whatever shape it may assume."

And I agree with more than 30 former U.S. Ambassadors and other senior diplomats, who say that eliminating habeas corpus for aliens detained by the United States will harm our interests abroad, and put our own military, diplomatic, and other personnel stationed abroad at risk. We cannot spread a message of freedom abroad if our message to those who come to America is that they may be detained indefinitely without any recourse to justice.

In the wake of the attacks, and in the face of the continuing terrorist threat, now is not the time for the United States to abandon its principles. Admiral Hutson was right to point out that when we do, there would be little to distinguish America from a "banana republic" or the repressive regimes against which we are trying to rally the world and the human spirit. Now is not the time to abandon American values, to shiver and quake, to rely on secret torture. Those are ways of repression and oppression, not the American way.

We need to pursue the war on terror with strength and intelligence, but we need to uphold American ideals. The President says he wants clarity as to the meaning of the Geneva Conventions and the War Crimes Act. Of course, he did not want clarity when his administration was using its twisted interpretation of the law to authorize torture and cruel and inhumane treatment. He did not want clarity when spying on Americans without warrants. And he certainly did not want clarity while keeping those rationales and programs secret from Congress. The administration does not seem to want clarity when it refuses even to tell Congress what its understanding of the law is following the withdrawal of a memo that said the President could authorize and immunize torture. That memo was withdrawn because it could not withstand the light of day.

It seems the only clarity this administration wants is a clear green light from Congress to do whatever it wants. That is not clarity. That is immunity from crime. I cannot vote for that. That is what the current legislation would give to the President on interrogation techniques and the War Crimes Act. Of course, he did not want clarity when he comes to the rights of Americans. The Senate should not be a rubber stamp for policies that undercut America's values.

In reality, we already have clarity. Senior military officers tell us they know what the Geneva Conventions require and the military personnel according to these standards. We have never had trouble urging other countries around the world to accept and enforce the provisions of the Geneva Conventions. There was enough clarity about that. What the administration appears to want, instead, is to use new legislative language to create loopholes and to narrow our obligations not to engage in cruel, degrading, and inhuman treatment.

But the new legislation muddles the waters. It saddles the War Crimes Act with a definition of cruel or inhuman treatment so oblique that it appears to permit all manner of cruel and extreme interrogation techniques. Senator Frist and the White House disavowed his statements, saying that the preferred murder techniques would or would not be allowed. That is hardly clarity; it is deliberate confusion.

Into that breach, this legislation throws the administration's solution to all problems: more Presidential power. It allows the administration to promulgate regulations about what conduct would and would not comport with the Geneva Conventions, though it does not require the President to specify which particular techniques can and cannot be used. This is a formula for still fewer checks and balances and for more abuse, secrecy, and power-grabbing. It is a formula for immunity for past and future abuses by the Executive.

I worked hard, along with many others of both parties, to pass the current version of the War Crimes Act. I think the current law is a good law, and the concerns that have been raised about it could best be addressed with minor adjustments, rather than with sweeping changes.
In 1996, working with the Department of Defense, Congress passed the War Crimes Act to provide criminal penalties for certain war crimes committed by and against Americans. The next year, again with the Pentagon’s support, Congress extended the War Crimes Act to violations of the basic line humanitarian protections afforded by Common Article 3 of the Geneva Conventions. Both measures were supported by a broad bipartisan consensus, and I was proud to sponsor the 1997 amendments.

The legislation was uncontroversial for a good reason. As I explained at the time, the purpose and effect of the War Crimes Act as amended was to provide for the implementation of America’s commitment to the basic international standards we subscribed to when we ratified the Geneva Conventions in 1955. Those standards are truly universal: They condemn war criminals whoever and wherever they are.

That is a critically important aspect of the Geneva Conventions and our own War Crimes Act. When we are dealing with fundamental norms that define the commitments of the civilized world, we cannot have one rule for us and one for them, however we define “us” and “them.” As Justice Jackson said at the Nuremberg tribunals, “We are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us.”

In that regard, I am disturbed that the legislation before us narrows the scope of the War Crimes Act to exclude certain violations of the Geneva Conventions and, perhaps more disturbingly, to retroactively immunize past violations. Neither the Congress nor the Department of Defense had any problem with the War Crimes Act when we were focused on using it to prosecute foreign perpetrators of war crimes. I am concerned that this is yet another example of this administration overruling the law and our international obligations, and seeking to immunize others to break the law. It also could well prevent us from prosecuting rogues who we all agree were out of line, like the soldiers who mistreated prisoners at Abu Ghraib.

The President said on May 5, 2004 about prisoner mistreatment at Abu Ghraib:

I view those practices as abhorrent.

He continued:

But in a democracy, as well, those mistakes will be investigated, and people will be brought to justice.

The Republican leader of the Senate said on the same day:

I rise to express my shock and condemnation of these despicable acts. The persons who carried them must face justice.

Many of the tactics used in Abu Ghraib—the use of dogs, forced nudity, humiliation of various kinds—do not appear to be covered by the narrow definitions this legislation would graft into the War Crimes Act. Despite the President’s calls for clarity, the new provisions are so purposefully ambiguous that we cannot know for sure whether they are covered. If the Abu Ghraib abuses had come to light after the perpetrators left the military, they might have been brought to justice under the administration’s formulation.

The President and the Congress should not be in the business of immunizing people who violate the law and make us less safe. If we lower our standards of domestic law to allow outrageous conduct, we can do nothing to stop other countries from doing the same. This change in our law does not prevent other countries from prosecuting our troops and personnel for violations of the Geneva Convention if they choose; it only changes our domestic law. But it could give other countries the green light to change their laws to allow them to treat our personnel in inhuman ways.

Let me be clear. There is no problem facing us about overzealous use of the War Crimes Act by prosecutors. In fact, as far as I can tell, the Ashcroft Justice Department and the Gonzales Justice Department have yet to file a single charge against anyone for a violation of the War Crimes Act. Not only have they never charged American personnel under the act, they have never used it to charge terrorists either.

This bill does not clarify the War Crimes Act. It authorizes and immunizes abhorrent conduct that violates our basic ideals. Perhaps that is why more than 40 religious organizations and human rights groups wrote to urge the Senate to take more time to consider the effects of this legislation on our safety, security, and commitment to the rule of law, and to vote against it if the serious problems in the bill are not corrected.

The proposed legislation would also allow the admission of evidence obtained through cruel and inhuman treatment into military commission proceedings. This provision would once again allow this administration to avoid all accountability for its misguided policies which have contributed to the rise of a new generation of terrorists who threaten us. Not only would the military commissions legislation before us immunize those who violated international law and stomped on basic American values, but it would allow them then to use the evidence obtained in violation of basic principles of fairness and justice.

Allowing in this evidence would violate our basic standards of fairness without increasing our security. Maher Arar, the Canadian citizen arrested by our government on bad intelligence and sent to Syria to be tortured, confessed to attending terrorist training camps. A Canadian commission investigating the confessions had no basis in fact. They merely reflected that he was being tortured, and he told his torturers what they wanted him to hear. It is only one of many such documented cases of bad information resulting from torture. We gain nothing from allowing such information.

The military commissions legislation depends in other unfortunate ways from the Warner-Levin bill. Early this week, apparently at the White House’s request, Republican drafters added a breathtakingly broad definition of “unlawful enemy combatant” which includes people—citizens and noncitizens alike—who have “purposefully and materially supported hostilities” against the United States or its allies. It also includes people determined to be unlawful enemy combatants by any “competent tribunal” established by the President or the Secretary of Defense. So the Government can select any person, including a United States citizen, whom it suspects of supporting hostilities—whatever that means—and then deny that person the rights and processes guaranteed in our country. The implications are chilling.

I am sorry the Republican leadership passed up the chance to consider and pass bipartisan legislation that would have made us safer in the fight on terrorism both by giving us the tools we need and by showing the world the values we cherish and defend. I will not participate in a legislative retreat out of weakness that undercuts everything this Nation stands for and that makes us more vulnerable and less secure.

The Senator from Vermont, consistent with my oath of office and my conscience and my commitment to the values we cherish and defend. I will not—support this bill.

The PRESIDING OFFICER (Mr. CHAFEE). Who yields time? The Senator from Michigan.

Mr. LEVIN. Mr. President, I believe I have 4 minutes allocated.

The PRESIDING OFFICER. There is 3½ minutes remaining.

Mr. LEVIN. Mr. President, less than 2 weeks ago, the Armed Services Committee voted on a military commissions bill. The committee endorsed that bill on a bipartisan basis with a 15-to-9 vote. Yesterday, 43 of us voted for the same bill on the Senate floor.

The bill would have provided the administration with the tools that it needed to detain enemy combatants, conduct interrogations, and prosecute detainees for any war crimes they may have committed.

Unfortunately, that bill went off the tracks after it was approved by the Armed Services Committee. Instead of bringing to the Senate floor the bill that had been adopted by the Armed Services Committee on a bipartisan basis, we are voting now on a dramatically different bill based on changes made at the insistence of an administration that has been relentless in its determination to legitimize the abuse of detainees. The bill authorizes the abuses, and to distort military commission procedures in order to ensure criminal convictions.
For example, the bill before us inexplicably fails to prohibit the use of statements or testimony obtained through cruel and inhuman treatment as long as those statements or testimony was obtained before December 30, 2005.

The argument has been made that the bill before us prohibits the use of statements that are obtained through torture. That was never in contention. The problem is that it permits the use of statements obtained through cruel and inhuman treatment that doesn’t meet the strict definition of torture as long as those statements were obtained before December 30, 2005.

This is a compromise on the issue of cruelty—an issue on which there should be no compromise by our Nation or by the Senate. If we compromise on that, we compromise at our peril. The men and women who represent us in uniform will be in much greater danger if we compromise on the issue of statements obtained through cruelty and inhuman treatment.

A compromise on this issue endangers our troops because if other nations apply the same standard and allow statements or confessions obtained through torture to be used at so-called trials of our citizens, we will have little ground to stand on in our objecting to them.

This bill also does many other things which are dramatic changes from the bill that the Armed Services Committee. For instance, the bill would authorize the use of evidence seized without a search warrant or other authorization, even if that evidence was seized from U.S. citizens inside the United States in clear violation of the U.S. Constitution.

Both the committee bill and the bill before us provide the executive branch with the tools it needs to hold enemy combatants accountable for any war crimes they may have committed. On this issue we are in agreement. We all agree that people who are responsible for the terrible events of September 11 and other terrorist attacks around the world should be brought to justice.

However, the bill before us differs dramatically from the Senate Armed Services Committee bipartisan-approved bill, particularly when it comes to the accountability of the administration for policies and actions leading to the abuses of detainees.

The bill before us contains provision after provision designed to ensure that the administration will not be held accountable for the abuse of prisoners in U.S. custody, for violations of U.S. law, or for the use of such tactics that have turned many in the world against us.

Over the last 2 days, we have debated the habeas corpus provision in the bill. Most of that debate has focused on the writ of habeas corpus as an individual right to challenge the lawfulness of detention. The writ of habeas corpus does not serve that purpose.

But the writ of habeas corpus has always served a second purpose as well: for its 900-year history, the writ of habeas corpus has always served as a means of making the sovereign account for its actions. By depriving detainees of the opportunity to demonstrate that they were detained in error, this bill does not serve a critical right deeply embedded in American law, it also helps ensure that the administration will not be held to account for the illegal or abusive treatment of detainees.

Indeed, the court-stripping provision in the bill does far more than just eliminate habeas corpus rights for detainees. It also prohibits the U.S. courts from hearing or considering ‘any other action against the United States or its agents relating to any aspect of the detention, treatment, or trial’ of an alien detainee. By depriving detainees of access to our courts, even if they have been subject to torture or to cruel and inhuman treatment, this provision seeks to ensure that the administration policies that appear to have violated our obligations under U.S. and international law will never be aired in court.

A number of other provisions in the bill before us appear to be directed at the same objective. For example, section 5 of the bill provides that no person—whether that person is an enemy combatant or anybody else—may invoke the Geneva Conventions as a source of rights in a habeas corpus or other proceeding in any court of the United States. Section 948b(g) of the military commissions part of the bill would similarly provide that no person subject to trial by military commission may invoke the Geneva Conventions as a source of rights. These provisions, like the habeas corpus provision, appear to be designed to ensure that administration policies that may have violated our obligations under U.S. and international law will never be aired in court.

Other provisions in the bill narrow the range of abuses that are covered by the War Crimes Act. As a result of these amendments, some actions that were war crimes at the time they took place will not be prosecutable. Indeed, because of a complex definition in the bill, some actions that violated the War Crimes Act at the time they took place and will violate that act if they take place in the future will not be prosecutable. In other words, this bill carves out a window to immunize actions of this administration from prosecution under the War Crimes Act.

The administration and its allies have argued that these provisions are necessary to protect CIA interrogators from prosecution for actions that they believed to be lawful and authorized at the time they were undertaken. However, we addressed that problem with the enactment of the Detainee Treatment Act. This law provides a defense to any U.S. agent who engaged in specific operational practices that were officially authorized or reasonably believed to be lawful at the time they were undertaken.

This bill, however, goes far beyond protecting the front line interrogators and agents who believed that their actions were lawful: it changes the law to ensure that the administration officials who provided the authorization and knew or should have known that there was no legal basis for that authorization, will not be held accountable for their actions.

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

We need to provide the administration with the tools that are needed to prosecute unlawful enemy combatants for any war crimes that they may have committed. However, we should not do so in a way that is inconsistent with our values as a Nation. It is crucial to practice what we preach to the rest of the world.

The bill before us will put our own troops who might be captured in future conflicts at risk if other countries decide to apply similar standards to us, is likely to result in the reversal of convictions on appeal, and is inconsistent with American values. For these reasons, I will vote no on final passage.

Mr. REID. Mr. President, it is my understanding I am to speak and the majority leader will speak and then we will vote—yes that true?

The PRESIDING OFFICER. The minority leader.

Mr. REID. Mr. President, on a bright and sunny September morning 5 years ago, history changed forever. Our Nation was attacked. Nearly 3,000 of our citizens were murdered, and our lives as we knew them were forever changed.

The family members of those who died that day and we, their fellow Americans, have been waiting 5 years for those who masterminded that outrageous terrorist attack to be brought to justice. Osama bin Laden, a man whom we have seen on videotape bragging and laughing about his role in conceiving this deed, remains at large 5 years later. The American people are justifiably frustrated that he has not been brought to justice. They have a right to ask whether our military and intelligence resources were unwisely diverted from that solemn task.

But some of Osama bin Laden’s lieutenants were captured overseas years ago. There is no disagreement whatsoever between Republicans and Democrats on the need to bring these people to justice. We all want to make sure the President has the tools he needs to make this happen.

For 5 years, Democrats stood ready to work with the President and the Republican Congress to establish sound
procedures for military tribunals. Mr. President, why do you think the Democratic ranking member of the Judiciary Committee has been so outraged at what has been going on? He is outraged because as the top Democrat on the Judiciary Committee, he introduced the bill in 2002 to solve the problems that are now before the Senate—4 years ago. No wonder he is incensed.

Unfortunately, President Bush chose to ignore Senator LEAHY and the Congress. He disregarded the advice of uniformed military professionals. He set up a flawed and imbalanced military tribunal system that failed to prosecute a single terrorist. Not surprisingly, it was ruled unconstitutional by the U.S. Supreme Court.

Forced by the Court decision to ask Congress for help, the Bush administration initially asked us, the Congress, to rubberstamp basically the same system that the Supreme Court struck down. Their one-sided and murky interrogation rules was opposed by such well-respected leaders as GEN Colin Powell and former Secretary of State George Shultz, both Republicans, and many others, Democrats and Republicans.

I must say, a handful of principled Republican Senators, led by the chairman of the Armed Services Committee, Senator WARNER, Senator GRAHAM from South Carolina, and Senator MCCAIN from Arizona stepped forward and forced the White House to back down from the worst elements of its extreme proposal. I appreciate the position of those Republican Senators, the names of whom I have given you.

I repeat, Mr. President, I admire their courage. I appreciate the improvements they managed to make in this bill. But for them what is before us would be a lot worse.

However, since those Senators announced their agreement with the administration last Friday, the compromise has become much worse. The bill before us now looks more and more like the old bill. Senator KENNEDY offered an amendment to substitute the bipartisan bill reported by the Armed Services Committee. That amendment was rejected basically on a party-line vote.

Every terrorist should be held accountable for their crimes against the innocent, against our enduring freedoms, against the values that we all share. Unfortunately, due to the Supreme Court’s decision in Hamdan v. Rumsfeld, prosecutions of suspected terrorists like Khalid Sheikh Mohammed are at a stand-still, and these prosecutions will remain at a stand-still until we act to authorize military commissions to try these suspected terrorists.

In addition to halting prosecutions of suspected terrorists, the Hamdan decision has undermined effective interrogation methods employed by our intelligence community that yield critical information that allows us to prevent terrorist attacks and to save innocent lives. The information provided by these enemy combatants is our primary source—our best source—of intelligence.

Past interrogations have guided us to the precise location of terrorists in hiding, explained how al-Qaeda leaders communicate with operatives in Iraq, and identified voices in intercepted calls. Without this information, we fight a blind war.

The families of the 9/11 victims and the Nation have been waiting 5 years for the perpetrators of these attacks to be brought to justice. They should not have to wait longer. We should do this right now; we should do it right. We are not doing so by passing this bill.

The national security policies of this administration and this Republican Congress may have been tough, but they certainly haven’t been smart. The American people are paying a tremendous price for their mistakes. History will judge our actions here today. I am convinced that future generations will look upon this passage of this bill as a grave error. I will be recorded as voting against this piece of legislation.

Mr. President, I dislike, I find repulsive, and I do not condone these evil and horrible people, these terrorists. They should be brought before the bar of justice and given what they deserve. For 5 years, that has not been the case. We Democrats want terrorists brought to justice quickly and in a way in keeping with our Constitution and, in this regard, give honor to the sacrifices made by American patriots in days past.

I yield the floor.

The PRESIDING OFFICER. The majority leader is recognized.

Mr. FRIST. Mr. President, for the past month we have debated how best to keep America safe. On one point I know all of our colleagues agree is that Khalid Sheikh Mohammed should be brought to justice and be prosecuted for masterminding the mass murders of almost 3,000 Americans on September 11. I know the American people and the families of those victims share that goal.

Every terrorist should be held accountable for their crimes against the innocent, against our enduring freedoms, against the values that we all share. Unfortunately, due to the Supreme Court’s decision in Hamdan v. Rumsfeld, prosecutions of suspected terrorists like Khalid Sheikh Mohammed are at a stand-still, and these prosecutions will remain at a stand-still until we act to authorize military commissions to try these suspected terrorists.

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Past interrogations have guided us to the precise location of terrorists in hiding, explained how al-Qaeda leaders communicate with operatives in Iraq, and identified voices in intercepted calls. Without this information, we fight a blind war.

The bill we will vote on in a few minutes addresses the concerns raised by
the Hamdan decision. It provides the legislative framework authorizing military tribunals to prosecute suspected terrorists. It ensures certain protections and rights for the accused such as the right to counsel and the right to exclude evidence obtained through torture.

At the same time, the bill recognizes that because we are at war with a different type of enemy, we should not try terrorist detainees in the same way as our uniformed military or civilian criminals.

The bill also protects classified information from terrorists who could exploit it to plan another terrorist attack.

Finally, the bill allows key intelligence programs to continue while ensuring that our detention and interrogation methods comply with both domestic and international laws, including Geneva Conventions Common Article 3.

The bottom line is the bill before us allows us to bring terrorists to justice through full and fair military trials while preserving intelligence programs—intelligence programs that have disrupted terrorist plots and saved countless American lives.

Our national security demands that we pass this bill tonight. We need this tool in the war on terror. In the 5 years since 9/11 we have not suffered another terrorist attack on U.S. soil. One reason we have remained safe is by staying on the offense against emerging threats. This bill is another offensive strike against terrorism.

For the safety and security of the American people, Mr. President, I urge my colleagues to join us in supporting the Military Commission Act of 2006.

Mr. President, I yield the floor.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading and was read the third time.

The PRESIDING OFFICER. The question is, Shall the bill, as amended, pass?

The yeas and nays have been ordered, the clerk will call the roll.

Mr. MCCONNELL. The following Senators were not present: the Senator from Maine (Ms. SNOWE).

Further, if present and voting, the Senator from Maine (Ms. SNOWE) would have voted "aye."

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

The result was announced—yeas 65, nays 34, as follows:

[Roll Call Vote No. 259 Leg.]

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The bill (S. 3930), as amended, was passed, as follows:

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Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,  

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.  
(a) SHORT TITLE.—This Act may be cited as the "Military Commissions Act of 2006."  
(b) TABLE OF CONTENTS.—The table of contents for this Act is as follows:  
Sec. 1. Short title; table of contents.  
Sec. 2. Construction of Presidential authority to establish military commissions.  
Sec. 3. Military commissions.  
Sec. 4. Amendments to Uniform Code of Military Justice.  
Sec. 5. Treaty obligations not establishing grounds for certain claims.  
Sec. 6. Implementation of treaty obligations.  
Sec. 7. Habeas corpus matters.  
Sec. 8. Revisions to Detainee Treatment Act of 2005 relating to protection of certain United States Government personnel.  
Sec. 9. Review of judgments of military commissions.  
Sec. 10. Detention covered by review of decisions of Combatant Status Review Tribunal of propriety of detention.  

II. Composition of Military Commissions  
(a) MILITARY COMMISSIONS.—  
(1) PURPOSE.—This chapter establishes the authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President or the Secretary of Defense, or the Secretary of the Army, to establish military commissions in the United States or in occupied territories should circumstances so require.  

III. Pre-Trial Procedure  
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**SEC. 2. CONSTRUCTION OF PRESIDENTIAL AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.**

The authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President or the Secretary of Defense, or the Secretary of the Army, to establish military commissions in the United States or in occupied territories should circumstances so require.

**SEC. 3. MILITARY COMMISSIONS.**

(a) MILITARY COMMISSIONS.—  
(i) PURPOSE.—This chapter establishes the authority to establish military commissions under chapter 47A of title 10, United States Code, as added by section 3(a), may not be construed to alter or limit the authority of the President or the Secretary of Defense, or the Secretary of the Army, to establish military commissions in the United States or in occupied territories should circumstances so require.

**IV. TRIAL PROCEDURE**

**V. SENTENCES**

**VI. POST-TRIAL PROCEDURE AND REVIEW OF MILITARY COMMISSIONS**

**SUBCHAPTER I—GENERAL PROVISIONS**

**Sec. 948a. Definitions.**

**948b. Military commissions generally.**

**948c. Persons subject to military commissions.**

**948d. Jurisdiction of military commissions.**

**948e. Annual report to congressional committees.**

**948f. Definitions.**

**948g. Military commissions generally.**

**948h. Military commissions generally.**

**948i. Authority for Military Commissions Under This Chapter.**
military commission as provided in this chapter.

(c) CONSTRUCTION OF PROVISIONS.—The procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice). Chapter 47 of this title does not, by its terms, apply to trial by military commission except as specifically provided in this chapter. The judicial construction and application of that chapter are not binding on military commissions established under this chapter.

(d) INAPPLICABILITY OF CERTAIN PROVISIONS.—The following provisions of this chapter shall not apply to trial by military commission under this chapter:

(A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.

(B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsion of self-incrimination.

(C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation.

(2) Other provisions of chapter 47 of this title shall apply to trial by military commission under this chapter to the extent provided by this chapter.

(e) TREATMENT OF RULINGS AND PRECEDENTS.—The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial convened under this title. The findings, holdings, interpretations, and other precedents of military commissions under this chapter may not form the basis of any holding, finding, or other determination of a court-martial convened under that chapter.

(f) STATUS OF COMMISSIONS UNDER COMMON ARTICLE 3.—A military commission established under this chapter is a regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples for purposes of common Article 3 of the Geneva Conventions.

(G) GENEVA CONVENTIONS NOT ESTABLISHING SOURCE OF RIGHTS.—No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.

§ 948c. Persons subject to military commissions

Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.

§ 948d. Jurisdiction of military commissions

(a) JURISDICTION.—A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.

(b) LAWFUL ENEMY COMBATANTS.—Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants. Lawful enemy combatants who violate the law of nations are subject to chapter 47 of this title. Courts-martial established under that chapter shall have jurisdiction to try a lawful enemy combatant for any offense committed by a member of the armed forces who is a member of a bar of a Federal court, or a member of the bar of the highest court of a State, and who is certified to be qualified for duty under section 826 of the Uniform Code of Military Justice (article 26 of the Uniform Code of Military Justice) as a military judge in general courts-martial by the Judge Advocate General of the armed force of which such member is a member or the designee of such Judge Advocate General.

(c) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person is eligible to act as military judge in a case of a military commission under this chapter if he is the accuser or a witness for the prosecution or has acted as an investigator or a counsel in the same case.

(d) CONSULTATION WITH MEMBERS: INELIGIBILITY OF CANDIDATE.—A military judge detailed to a military commission under this chapter may not consult with the members of the commission except in the presence of the accused (except as otherwise provided in section 948m of this title), trial counsel, and defense counsel, nor may he vote with the members of the commission.

(f) OTHER DUTIES.—A commissioned officer who is certified to be qualified for duty as a military judge of a military commission under this chapter may perform such other duties as are assigned to him by or with the approval of the Judge Advocate General of the armed force of which such officer is a member or the designee of such Judge Advocate General.

(1) PROHIBITION ON USE OF COURT-MARTIAL OR MILITARY COMMISSION FINDINGS.—The convening authority of a military commission under this chapter shall not prepare or review any report concerning the effectiveness, fitness, or efficiency of a military judge detailed to a military commission which relates to his performance of duty as a military judge on the military commission.

§ 948k. Detail of trial counsel and defense counsel

(a) DETAIL OF COUNSEL GENERALLY.—(1) Trial counsel and military defense counsel shall be detailed for each military commission under this chapter.

(b) Assistant trial counsel and assistant military defense counsel may be detailed for a military commission under this chapter.

§ 948l. Who may serve on military commissions

Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused.

§ 948m. Who may serve on military commissions

Military defense counsel for a military commission under this chapter shall be detailed as soon as practicable after the swearing of charges against the accused.

§ 948n. Who may serve on military commissions

(a) IN GENERAL.—Any commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter.

(b) DETAIL OF MEMBERS.—When convening a military commission under this chapter, the convening authority shall detail as members of the commission such members of the armed forces as the convening authority may designate from among such persons as the convening authority may select.

§ 948o. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948p. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense on the recommendation of the Judge Advocate General of the armed force of which the convening authority is a member or the designee of such Judge Advocate General.

§ 948q. Who may convene military commissions

Military commissions under this chapter shall be convened by a Combatant Status Review Tribunal before, on, or after September 11, 2001.

§ 948r. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948s. Who may convene military commissions

Military commissions under this chapter shall be convened by the Secretary of Defense on the recommendation of the Judge Advocate General of the armed force of which the convening authority is a member or the designee of such Judge Advocate General.

§ 948t. Who may convene military commissions

Military commissions under this chapter shall be convened by a Combatant Status Review Tribunal before, on, or after September 11, 2001.

§ 948u. Who may convene military commissions

Military commissions under this chapter shall be convened by the Secretary of Defense on the recommendation of the Judge Advocate General of the armed force of which the convening authority is a member or the designee of such Judge Advocate General.

§ 948v. Who may convene military commissions

Military commissions under this chapter shall be convened by a Combatant Status Review Tribunal before, on, or after September 11, 2001.

§ 948w. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948x. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948y. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948z. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948aa. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948ab. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948ac. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948ad. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948ae. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948af. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.

§ 948ag. Who may convene military commissions

Military commissions under this chapter may be convened by the Secretary of Defense by or on behalf of the United States.
this chapter must be a judge advocate (as so defined) who is—
"(1) a graduate of an accredited law school or is a member of the bar of a Federal court or of the highest court of a State; and
"(2) certified as competent to perform duties as defense counsel before general courts-martial by the Judge Advocate General of the armed forces under section 2760 of this title; and
"(d) CHIEF PROSECUTOR; CHIEF DEFENSE COUNSEL.—(1) The Chief Prosecutor in a military commission under this chapter shall meet the requirements set forth in subsection (b)(1).
"(2) The Chief Defense Counsel in a military commission under this chapter shall meet the requirements set forth in subsection (c)(1).
"(e) INELIGIBILITY OF CERTAIN INDIVIDUALS.—No person who has acted as an investigating officer, military judge, or member of a military commission under this chapter in any case may act later as trial counsel or military defense counsel in the same case. No person who has acted for the prosecution before a military commission under this chapter may act later in the same case for the defense, nor may any person who has acted for the defense before a military commission under this chapter act later in the same case for the prosecution.

§ 948l. Detail or employment of reporters and interpreters

"(a) COURT REPORTERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission shall detail or employ for the commission qualified court reporters, who shall make a verbatim recording of the proceedings of and testimony taken before the commission.
"(b) INTERPRETERS.—Under such regulations as the Secretary of Defense may prescribe, the convening authority of a military commission shall make or employ for the military commission interpreters who shall interpret for the commission and, as necessary, for trial counsel and defense counsel and for the accused.
"(c) TRANSCRIPT; RECORD.—The transcript of a military commission under this chapter shall be under the control of the convening authority, and the convening authority, who shall also be responsible for preparing the record of the proceedings.

§ 948m. Number of members; excuse of members

"(a) NUMBER OF MEMBERS.—(1) A military commission under this chapter shall, except as provided in paragraph (2), have at least five members.
"(2) In a case in which the accused before a military commission under this chapter may be sentenced to a penalty of death, the military commission shall have the number of members prescribed by section 948m(c) of this title.
"(b) EXCUSE OF MEMBERS.—No member of a military commission under this chapter may be absent or excused after the military commission has been assembled for the trial of a case unless excused—
"(1) as a result of challenge;
"(2) by the military judge for physical disability or other good cause; or
"(3) by order of the convening authority for good cause.
"(c) ABSENT AND ADDITIONAL MEMBERS.—Whenever a military commission under this chapter is reduced below the number of members prescribed by subsection (a), the trial may not proceed unless the convening authority details new members sufficient to provide not less than such number. The trial may proceed without the presence of the members present after the recorded evidence previously introduced before the members has been read to
the military commission in the presence of the military judge, the accused (except as provided in section 949d of this title), and counsel for both sides.

§ 948n. Service of charges

"(a) CHARGES AND SPECIFICATIONS.—(1) Charges and specifications against an accused in a military commission under this chapter shall be in writing, served by admission of the statement into evidence, or by order of the convening authority.
"(2) The accused shall be present at all proceedings, the Secretary of Defense may prescribe by subsection (a), the procedures and rules of evidence in trials by military commission under this chapter shall include the following:
"(A) The accused shall be permitted to present evidence in his defense, to cross-examine the witnesses who testify against him, and to examine and respond to evidence admitted against him on the issue of guilt or innocence and for sentencing, as provided for by this chapter;
"(B) The accused shall be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title;
"(C) The accused shall receive the assistance of counsel as provided for by section 948k;
"(D) The accused shall be permitted to represent himself, as provided for by paragraph (3).
"(2) In establishing procedures and rules of evidence for military commission proceedings, the Secretary of Defense may prescribe the following provisions:
"(A) Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.
"(B) Evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.
"(C) A statement of the accused that is otherwise admissible shall not be excluded as a result of any motion by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 949r of this title.
"(D) Evidence shall be admitted as authentic so long as—
"(i) the military judge of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.
"(ii) the military judge finds that there is sufficient basis to find that the evidence is what it is claimed to be; and
"(iii) the military judge of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.
"(iv) the military judge finds that there is sufficient basis to find that the evidence is what it is claimed to be; and
"(v) the military judge finds that there is sufficient basis to find that the evidence is what it is claimed to be; and
"(ii)" hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to permit the adverse party 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 949(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 as evidence in a proceeding before a military commission under this chapter who exercises the conduct of the proceedings.

"(3)" Paragraphs (1) and (2) do not apply if the military judge or counsel, shall—

"(A)" perform the functions necessary for the conduct of the defense to the rules of evidence prescribed pursuant to section 949a of this title.

"(B)" Prohibit the admission of evidence in a trial by military commission under this chapter.

"(c)" Session and Defense counsel—

"(1)" Be in the presence of the accused, defense counsel, and trial counsel;

"(2)" Be present during the consultation of the members with the military judge under this chapter, whether or not the consultation is open to the public.

"(d)" Hearing and determining motions and objections which may be performed by the military judge under this chapter, whether or not the consultation is open to the public.

"(e)" Perform any other procedural function which may be performed by the military judge under this chapter.

"(f)" The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

"(1)" Protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or

"(2)" Ensure the physical safety of individuals; or

"(3)" Prevent disruption of the proceedings by the accused.

"(g)" Protection of classified information—

"(1)" National security privilege—(A) Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.

"(B)" The rule in this subsection applies to all stages of the proceedings of military commissions under this chapter.
(B) The privilege referred to in subparagraph (A) may be claimed by the head of the executive or military department or government agency concerned based on a finding by the head of that department or agency that—

(i) the information is properly classified; and

(ii) disclosure of the information would be detrimental to the national security.

(C) A person who may claim the privilege referred to in subparagraph (A) may authorize a representative, witness, or trial counsel to claim the privilege and make the finding described in subparagraph (B) on behalf of such person. The authority of the representative, witness, or trial counsel to do so is presumed in the absence of evidence to the contrary.

(2) Introduction of classified information—

(A) Alternatives to disclosure.—To protect classified information from disclosure, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission; and

(ii) the substitution of a portion or summary of the information for such classified documents.

(B) Protection of sources, methods, or activities.—The military judge, upon motion of trial counsel, shall permit trial counsel to introduce otherwise admissible evidence before the military commission, while protecting from disclosure the sources, methods, or activities by which the United States acquired the evidence if the military judge finds that (i) the sources, methods, or activities by which the United States acquired the evidence are classified, and (ii) the evidence is reliable. The military judge may require trial counsel to present to the military commission and the defense, to the extent practicable and consistent with national security, an unclassified summary of the sources, methods, or activities by which the United States acquired the evidence.

(C) Assertion of national security privilege at trial.—During the examination of any witness before a military commission or in response to any question, line of inquiry, or motion to admit evidence that would require the disclosure of classified information. Following such examination or motion, the military judge shall take suitable action to safeguard such classified information. Such action may include the review of trial counsel's claim of privilege by the military judge in camera and on an ex parte basis, and the delay of proceedings to permit trial counsel to consult with the department or agency concerned as to whether the national security privilege should be asserted.

(3) Consideration of privilege and related materials.—A claim of privilege under this subsection, and any materials submitted in support thereof, shall, upon request of the Government, be considered by the military judge in camera and shall not be disclosed to the accused.

(4) Additional regulations.—The Secretary of Defense may prescribe additional regulations, consistent with this subsection, for the protection of classified information during proceedings of military commissions under this chapter. A report on any regulations so prescribed, or modified, shall be submitted to the Committees on Armed Services of the Senate and the House of Representatives not later than 60 days before the date on which such regulations or modifications, as the case may be, go into effect.

§ 949c. Continuances

(a) The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

(b) Finding of Guilt after Guilty Plea.—With respect to any charge or specification to which a plea of guilty has been made by the accused in a military commission under this chapter and accepted by the military judge, a finding of guilty of the charge or specification may be entered immediately without a vote. The finding shall constitute the finding of the accused unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as if the plea of guilty had not been entered.

§ 949f. Challenges

(a) Challenges Authorized.—The military judge, upon motion of the United States, may, for reasonable cause, challenge for cause stated to the commission the military judge; and members, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

(b) Challenges against additional members.—Whenever additional members are detailed to a military commission under this chapter, the military judge may challenge for cause against such additional members and decide, each accused and the trial counsel are entitled to one peremptory challenge against any member previously subject to peremptory challenge.

§ 949g. Oaths

(a) In general.—(1) Before performing their respective duties in a military commission under this chapter, military judges, members, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

(b) Witnesses.—Each witness before a military commission under this chapter shall be sworn or affirmed.

(c) Challenges against additional members.—If such an oath is taken, such oath need not again be taken at the time the judge advocate or other person is detailed to that duty.

(d) Right of Defense Counsel.—Defense counsel in a military commission under this chapter shall have the right to obtain discovery to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

§ 949h. Opportunity to obtain witnesses and other evidence

(a) Right of Defense counsel.—Defense counsel in a military commission under this chapter shall have the right to obtain discovery to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense.

(b) Process for Compulsion.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(i) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(ii) shall run to any place where the United States shall have jurisdiction thereof.

(c) Protection of Classified Information.—With respect to discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(A) the deletion of specified items of classified information from documents to be made available to the accused;

(B) the substitution of a portion or summary of the information for such classified documents; or

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired such evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified.

(b) Process for Compulsion.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(i) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(ii) shall run to any place where the United States shall have jurisdiction thereof.

(c) Protection of Classified Information.—With respect to discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(A) the deletion of specified items of classified information from documents to be made available to the accused;

(B) the substitution of a portion or summary of the information for such classified documents; or

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(2) (i) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired such evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified.

(b) Process for Compulsion.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(i) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(ii) shall run to any place where the United States shall have jurisdiction thereof.

(c) Protection of Classified Information.—With respect to discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(A) the deletion of specified items of classified information from documents to be made available to the accused;

(B) the substitution of a portion or summary of the information for such classified documents; or

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired such evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified.

(b) Process for Compulsion.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(i) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(ii) shall run to any place where the United States shall have jurisdiction thereof.

(c) Protection of Classified Information.—With respect to discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(A) the deletion of specified items of classified information from documents to be made available to the accused;

(B) the substitution of a portion or summary of the information for such classified documents; or

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(2) The military judge, upon motion of trial counsel, shall authorize trial counsel, in the course of complying with discovery obligations under this section, to protect from disclosure the sources, methods, or activities by which the United States acquired such evidence if the military judge finds that the sources, methods, or activities by which the United States acquired such evidence are classified.

(b) Process for Compulsion.—Process issued in a military commission under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(i) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(ii) shall run to any place where the United States shall have jurisdiction thereof.

(c) Protection of Classified Information.—With respect to discovery obligations of trial counsel under this section, the military judge, upon motion of trial counsel, shall authorize, to the extent practicable—

(A) the deletion of specified items of classified information from documents to be made available to the accused;

(B) the substitution of a portion or summary of the information for such classified documents; or

(C) the substitution of a statement admitting relevant facts that the classified information would tend to prove.

(2) In this subsection, the term 'evidence known to trial counsel', in the case of exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title.

§ 949i. Pleas of the accused

(a) Entering a plea of Not Guilty.—If an accused in a military commission under this chapter after a plea of guilty sets up matter known to trial counsel, in the case of exculpatory evidence, means exculpatory evidence that the prosecution would be required to disclose in a trial by general court-martial under chapter 47 of this title.

(b) Affirmative Defense.—It is an affirmative defense in a military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the act, or that the disease or defect does not otherwise constitute a defense.

§ 949j. Former jeopardy

(a) In General.—No person may, without his consent, be tried by a military commission under this chapter a second time for the same offense.

(b) Scope of trial.—No proceeding in which the accused has been found guilty by military commission under this chapter upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

§ 949l. Defense of lack of mental responsibility

(a) Affirmative defense.—It is an affirmative defense in a military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the act, or that the disease or defect does not otherwise constitute a defense.
"(b) BURDEN OF PROOF.—The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence that such defense exists.

"(c) FINDINGS FOLLOWING ASSERTION OF DEFENSE.—Whenever lack of mental responsibility with respect to the offense is properly at issue in a military commission under this chapter, the military judge shall instruct the members of the commission as to the defense of lack of mental responsibility under this section and shall charge them to find the accused—

"(1) guilty;

"(2) not guilty; or

"(3) subject to subsection (d), not guilty by reason of lack of mental responsibility.

"(d) REQUIRED FINDING.—The accused shall be found not guilty by reason of lack of mental responsibility under subsection (c)(3) only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

*§ 949l. Voting and rulings

"(a) VOTE BY SECRET WRITTEN BALLOT.—Voting in a military commission under this chapter on the findings and on the sentence shall be by secret written ballot.

"(b) RULINGS.—(1) The military judge in a military commission under this chapter shall rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.

"(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change his ruling at any time during the trial.

"(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote is taken of the findings of a military commission under this chapter, the military judge shall, in the presence of the accused and counsel, instruct the members as to the elements of the offense and charge the members—

"(1) that the accused must be presumed to be innocent until his guilt is established by evidence of such competency as to leave a reasonable doubt; and

"(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted.

"(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

"(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

*§ 949m. Number of votes required

"(a) CONVICTION.—No person may be convicted by a military commission under this chapter of any offense, except as provided in section 949(b) of this title or by concurrence of two-thirds of the members present at the time the vote is taken.

"(b) SENTENCES.—(1) No person may be sentenced by a military commission to suffer death as a punishment for an offense under this chapter.

"(A) the penalty of death is expressly authorized under this chapter or the law of war for an offense of which the accused has been found guilty;

"(B) trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial;

"(C) the accused was convicted of the offense by the concurrence of all the members present at the time the vote is taken; and

"(D) all the members present at the time the vote is taken concur in the sentence of death.

"(2) No person may be sentenced to life imprisonment as a punishment for an offense under this chapter except by the concurrence of not less than two-thirds of the members present at the time the vote is taken.

"(3) All other sentences shall be determined by a military commission by the concurrence of a majority of the members present at the time the vote is taken.

"(c) NUMBER OF MEMBERS REQUIRED FOR PENALTY OF DEATH.—(1) Except as provided in paragraphs (1) and (2), if the penalty of death is sought, the number of members of the military commission under this chapter shall be not less than 12.

"(2) In any case described in paragraph (1) in which 12 members are not reasonably available because of physical conditions or military exigencies, the convening authority shall specify a lesser number of members for the military commission (but not fewer than 9 members), and the military commission may be assembled, and the trial held, with not fewer than the number of members so specified. In such a case, the convening authority shall make a detailed written statement, to be appended to the record, stating why a greater number of members were not reasonably available.

*§ 949n. Military commission to announce action

"A military commission under this chapter shall announce its findings and sentence to the parties as soon as determined.

*§ 949o. Record of trial

"(a) RECORD AUTHENTICATION.—Each military commission under this chapter shall keep a separate, verbatim, record of the proceedings. As early as feasible, before it adjourns, the record shall be authenticated by the signature of the military judge. If the record cannot be authenticated by the military judge by reason of his death, disability, or absence, it shall be authenticated by the signature of the trial counsel or by a member of the commission if the trial counsel is unable to authenticate it by reason of his death, disability, or absence. Where appropriate, and as provided in regulations prescribed by the Secretary of Defense, a certified copy of a military commission under this chapter may contain a classified annex.

"(b) COMPLETE RECORD REQUIRED.—A complete record of proceedings and testimony shall be prepared in every military commission under this chapter.

"(c) PROVISION OF COPY TO ACCUSED.—A copy of the record of the proceedings of the military commission under this chapter shall be given the accused as soon as it is authenticated. If the record contains classified information, a certified copy of the record, classified annex, the accused shall be given a redacted version of the record consistent with the requirements of section 948l of this title. Defense counsel shall have access to the unredacted record, classified annex, the accused shall have access to the unredacted record, consistent with the requirements of section 948l of this title. Defense counsel shall have access to the unredacted record, classified annex, as provided in regulations prescribed by the Secretary of Defense.

"SUBCHAPTER V—SENTENCES

"Sec.

"949l. Maximum limits

"949n. Execution of sentence

"950a. Error of law, lesser included offense

"950b. Review by the convening authority

"(a) NOTICE TO CONVENING AUTHORITY OF FINDINGS AND SENTENCE.—The findings and sentence of a military commission under this chapter shall be recorded in the unredacted record of the military commission under this chapter shall be reported in writing promptly to the convening authority after the announcement of the sentence.

"(b) SUBMITTAL OF MATTERS BY ACCUSED TO CONVENCING AUTHORITY.—(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence of the military commission under this chapter.

"(2)(A) Except as provided in subparagraph (B), a submittal under paragraph (1) shall be made in writing within 20 days after the accused has been given an authenticated record of the findings and sentence of the military commission under this chapter.

"(B) If the accused shows that additional time is required for the accused to make a
of any action taken by the convening au-
ters expires, whichever is earlier.

ters may, for good cause, extend the applicable period under subparagraph (A) for
not order a rehearing, the convening author-
not order a rehearing, the convening author-

(C) ACTION BY CONVENCING AUTHORITY.—(1) The convening authority may, in his sole dis-

(b) APPEAL FROM ADVERSE RULING.—(1) A re-

(b) APPELLATE MILITARY JUDGES.—The

(b) NOTICE OF APPEAL.—The United States shall take an appeal of an order or ruling under this sec-

(b) APPEAL.—An appeal under this chapter shall be made in accordance with procedures pre-

(d) APPEAL.—In each case under subsection (b) of this section, the Court may act only

§ 950d. Appeal by the United States

§ 950e. Rehearings

§ 950g. Review by the United States Court of Appeals for the District of Columbia Cir-

§ 950c. Appellate referral; waiver or withdraw-

(a) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.—Except as provided under sub-

(a) AUTOMATIC REFERRAL FOR APPELLATE REVIEW.—Except as provided under sub-

(b) APPEAL.—In a case referred to the Court of Military Commission Review under this chapter, the court may act only with respect to matters of law.

(b) APPEAL.—In a case referred to the Court of Military Commission Review under this chapter, the court may act only with respect to matters of law.

(b) APPEAL.—Unless the United States Court ofMilitary Commission Review under this chapter has acted within 90 days from the date of the finding or ruling to which appeal is taken, the United States Attorney for the District of Columbia and the United States Solicitor General may file a petition for review in the Court of Appeals within 60 days after the date of the final order, judgment, or other final determination of the Court of Military Commission Review.

(b) APPEAL.—Unless the United States Court ofMilitary Commission Review under this chapter has acted within 90 days from the date of the finding or ruling to which appeal is taken, the United States Attorney for the District of Columbia and the United States Solicitor General may file a petition for review in the Court of Appeals within 60 days after the date of the final order, judgment, or other final determination of the Court of Military Commission Review.
"(a) written notice of the final decision of the Court of Military Commission Review is served on the accused or on defense counsel; or

(b) the accused submits, in the form prescribed by section 950c of this title, a written notice waiving the right of the accused to review by the Court of Military Commission Review of the final decision of the title.

(b) STANDARD FOR REVIEW.—In a case reviewed by the Court of Appeals under section (a), the Court of Appeals may act only with respect to matters of law.

(c) SCOPE OF REVIEW.—The jurisdiction of the Court of Appeals on an appeal under subsection (a) shall be limited to the consideration of—

(1) whether the final decision was consistent with the standards and procedures specified in this chapter; and

(2) to the extent applicable, the Constitution and the laws of the United States.

(d) SUPREME COURT.—The Supreme Court may review by writ of certiorari the final judgment of the Court of Appeals pursuant to section 1257 of title 28.

§ 950p. Execution of sentence; procedures for execution of sentence of death

(a) PURPOSE.—The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commissions.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tendency, even though failing to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(d) SOLE BASIS.—No person subject to this chapter may be convicted of an attempt to commit an offense under this chapter unless a judgment as to the legality of the proceedings of military commissions under this chapter is otherwise determined by the Court of Military Commission Review.

§ 950q. Principles

(a) Any person is punishable as a principal under this chapter, if

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission;

(2) causes another offense to be committed, knowing that an offense punishable by this chapter, or of an attempt to commit, of an offense necessarily included in the offense charged or of an offense having substantially the same result as the offense charged.

(b) ANY PERSON.—The term ‘any person’ includes a corporation, partnership, or other entity and any of its instrumentalities.

§ 950r. Accessory after the fact

(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense punishable by this chapter shall be punished as a military commission under this chapter.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tendency, even though failing to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(d) SOLE BASIS.—No person subject to this chapter may be convicted of an attempt to commit an offense under this chapter unless a judgment as to the legality of the proceedings of military commissions under this chapter is otherwise determined by the Court of Military Commission Review.

§ 950s. Conviction of lesser included offense

(a) IN GENERAL.—Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tendency, even though failing to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(d) SOLE BASIS.—No person subject to this chapter may be convicted of an attempt to commit an offense under this chapter unless a judgment as to the legality of the proceedings of military commissions under this chapter is otherwise determined by the Court of Military Commission Review.

§ 950t. Attempts

(a) IN GENERAL.—Any person subject to this chapter who attempts to commit any offense under this chapter shall be punished as a military commission under this chapter.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tendency, even though failing to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(d) SOLE BASIS.—No person subject to this chapter may be convicted of an attempt to commit an offense under this chapter unless a judgment as to the legality of the proceedings of military commissions under this chapter is otherwise determined by the Court of Military Commission Review.

§ 950u. Solicitation

(a) IN GENERAL.—Any person subject to this chapter who solicits or advises another or others to commit one or more substantive offenses triable by military commission under this chapter shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, he shall be punished as a military commission under this chapter may direct.

(b) SCOPE OF OFFENSE.—An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tendency, even though failing to effect its commission, is an attempt to commit that offense.

(c) EFFECT OF CONSUMMATION.—Any person subject to this chapter may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated.

(d) SOLE BASIS.—No person subject to this chapter may be convicted of an attempt to commit an offense under this chapter unless a judgment as to the legality of the proceedings of military commissions under this chapter is otherwise determined by the Court of Military Commission Review.
science or charitable purposes, historic monuments, hospitals, or places where the sick and wounded are collected, if such property is not being used for military purposes or otherwise serves a military objec-
tive. Such term includes objects properly identified by one of the distinctive emblems of the Geneva Conventions, but does not in-
clude civilian property that is a military objec-
tive.

(4) CONSTRUCTION.—The intent specified for an offense paragraph (1), (2), (3), (4), or (5) precludes the appli-
cability of such offense with regard to—
(A) collateral damage; or
(B) property damage, or injury incident to a lawful attack.

(5) OFFENSES.—The following offenses shall be triable by military commission under this chapter at any time without limi-
tation:

(1) MURDER OF PROTECTED PERSONS.—Any person subject to this chapter who intentionally kills one or more protected persons shall be punished by death or such other punish-
ment as a military commission under this chapter may direct.

(2) ATTACKING CIVILIANS.—Any person sub-
ject to this chapter who intentionally en-
gages in an attack upon a civilian population as such civilians not taking active part in hostilities, shall be punished, if death results to one or more of the vic-
tims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(3) ATTACKING CIVILIAN OBJECTS.—Any person subject to this chapter who intentionally engages in an attack upon protected property shall be punished as a military commis-
ion under this chapter at any time without limitation.

(4) ATTACKING PROTECTED PROPERTY.—Any person subject to this chapter who intentionally engages in an attack upon protected property for private or personal use, without the consent of a person with authority to con-
tinue the use of property for private or personal use, shall be punished as a military commission under this chapter may direct.

(5) PILLAGING.—Any person subject to this chapter who intentionally ar-
defined. In this section, the term ‘severe mental pain or suffering’ means bodily injury which involves—
(A) substantial risk of death;
(B) extreme physical pain;
(C) protracted and obvious disfigure-
ment;
(D) serious mental pain or suf-
fering incidental to lawful sanctions.

(6) SERIOUS BODILY INJURY DEFINED.—In this section, the term ‘serious bodily injury’ means bodily injury which involves—
(A) a substantial risk of death;
(B) substantial disability or serious dis-
figurement.

(7) IMPROPERLY USING A DISTINCTIVE EM-
BLEM.—Any person subject to this chapter who intentionally destroys property belonging to another person in vio-
lation of the law of war shall be punished as a military commission under this chapter may direct.

(8) USING TREACHERY OR PERFORVY.—Any person subject to this chapter who, after in-
forming the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing one or more of the victims, by death or such other punishment as a military com-
misson under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(9) DESTRUCTION OF PROPERTY IN VIOLA-
TION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally destroys property belonging to another person in vio-
lation of the law of war shall be punished as a military commission under this chapter may direct.

(10) USING PROTECTED PERSONS AS A 
SHIELD.—Any person subject to this chapter who, intentionally exploits the position of, a protected person with the intent to shield a military objective from attack, or to shield, favor, or impede military operations, may be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(11) TORTURE.—
(A) OFFENSE.—Any person subject to this chapter who commits an act specifically in-
tended to inflict severe physical or mental pain or suffering (other than pain or suf-
fering incidental to lawful sanctions) upon another person within his custody or phys-
ical control, including lawful combatants, in violation of the law of war, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(B) SEVERE MENTAL PAIN OR SUFFERING DIF-
FINED.—In this section, the term ‘severe mental pain or suffering’ has the meaning given that term in section 2340(2) of title 18.

(12) CRIMES AGAINST THE HUMANITY.

(A) OFFENSE.—Any person subject to this chapter who commits an act specifically in-
tended to inflict severe physical or mental pain or suffering (other than pain or suf-
fering incidental to lawful sanctions), including serious physical abuse, upon another person within his custody or control shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commis-
Sion under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(B) DEFINITIONS.—In this paragraph:
(i) the term ‘serious mental pain or suf-
fering’ means bodily injury that involves—
(I) a substantial risk of death;
(II) extreme physical pain;
(III) protracted and obvious disfigure-
ment of a serious nature (other than cuts, abrasions, or bruises);
(IV) significant loss or impairment of the function of a bodily member, organ, or men-
tal faculty.
(ii) the term ‘severe mental pain or suf-
fering’ has the meaning given the term ‘se-
vere mental pain or suffering’ in section 2340(2) of title 18, except that—
(I) the term ‘serious’ shall replace the term ‘severe’ where it appears; and
(II) the term ‘is punished, if death results to one or more of the victims, by death or such other punishment as a military com-
misson under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(13) INTENTIONALLY CAUSING SERIOUS BOD-
ILY INJURY.—
(A) OFFENSE.—Any person subject to this chapter who intentionally causes serious bodily injury to one or more persons, includ-

ing lawful combatants, in violation of the law of war shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(14) DESTRUCTION OF PROPERTY IN VIOLA-
TION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally destroys property belonging to another person in vio-
lation of the law of war shall be punished as a military commission under this chapter may direct.

(15) MURDER IN VIOLATION OF THE LAW OF WAR.—Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct.

(16) PROHIBITED ACTIONS ON CAPTURED PERSONS.—

(A) OFFENSE.—Any person subject to this chapter who, after in-
forming the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(17) USING TREACHERY OR PERFORVY.—Any person subject to this chapter who, after in-
forming the confidence or belief of one or more persons that they were entitled to, or obliged to accord, protection under the law of war, intentionally makes use of that confidence or belief in killing, injuring, or capturing one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punish-
ment, other than death, as a military commission under this chapter may direct.

(18) IMPROPERLY USING A DISTINCTIVE EM-
BLEM.—Any person subject to this chapter who intentionally uses a distinctive em-
blem, shall be punished as a military commission under this chapter may direct.
recognized by the law of war for combatant purposes in a manner prohibited by the law of war shall be punished as a military commission under this chapter may direct.

(20) MURDERING A DEAD BODY.—Any person subject to this chapter who intentionally mistreats the body of a dead person, without justification by legitimate military necessity, shall be punished as a military commission under this chapter may direct.

(21) RAPE.—Any person subject to this chapter who forcibly or with coercion or threat of force wrongfully invades the body of a person by penetrating, however slightly, the body of the victim, with any part of the body of the accused, or with any foreign object, shall be punished as a military commission under this chapter may direct.

(22) SEXUAL ASSAULT OR ABUSE.—Any person subject to this chapter who forcibly or with coercion or threat of force engages in sexual contact with one or more persons, or causes one or more persons to engage in sexual contact, shall be punished as a military commission under this chapter may direct.

(23) TERRORISM.—Any person subject to this chapter who intentionally kills or injures any person with the objective of intimidating any group or individual or any part of the population of the United States, or one of the co-belligerents of the enemy, shall be punished as a military commission under this chapter may direct.

(24) TERRORISM.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct.

(25) CONSPIRACY.—Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct.

(26) WRONGFULLY AIDING THE ENEMY.—Any person subject to this chapter who violates the law of war, as that term is defined in section 948a of this title, is, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.

(27) SPYING.—Any person subject to this chapter who, in situations prescribed under chapter 47A of title 10, United States Code, as added by subsection (d) of section 2441 of title 18, United States Code, as amended by subsection (a) of this section, the President has the authority to impose as a condition of the enactment of this Act, the Secretary of Defense shall submit to the Committees on Armed Services of the Senate and the House of Representatives a report setting forth the procedures for military commissions prescribed under chapter 47A of title 10, United States Code (as added by subsection (a)).

SEC. 4. AMENDMENTS TO UNIFORM CODE OF MILITARY JUSTICE.

(a) CONFORMING AMENDMENTS.—Chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended as follows:

(1) APPLICABILITY TO LAWFUL ENEMY COMBATANTS.—Section 802(a) (article 2(a)) is amended by adding at the end the following new paragraph:

"(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(2) EXCLUSIBILITY OF CHARGE 47A COMMISSIONS.—Sections 821, 828, 846, 850(a), 904, and 906 (articles 21, 28, 48, 50(a), 104, and 106) are amended by adding at the end the following new paragraph:"

"(13) Lawful enemy combatants (as that term is defined in section 948a(2) of this title) who violate the law of war.

(3) APPLICABILITY OF REQUIREMENTS RELATING TO MILITARY COMMISSIONS.—Section 836 (article 36) is amended—

(A) in subsection (a), by inserting "except as provided in chapter 47A of this title," after "after", and

(B) in subsection (b), by inserting before the period at the end "except as so applicable to military commissions established under chapter 47A of this title," after "by such prosecution, or if applicable to military commissions established under chapter 47A of this title,"

(4) PUNITIVE ARTICLE OF CONSPIRACY.—Section 881 of title 10, United States Code (article 81 of the Uniform Code of Military Justice), is amended—

(1) by inserting "(a)" before "Any person"; and

(2) by adding at the end the following new subsection:

"(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a court-martial or military commission may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a court-martial or military commission may direct.

SEC. 5. TREATY OBLIGATIONS NOT ESTABLISHING GROUNDS FOR CERTAIN CLAIMS.

(a) IN GENERAL.—No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former 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 territories.

(b) GENEVA CONVENTIONS DEFINED.—In this section, the term "Geneva Conventions" means—

(1) the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3137);

(2) the Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217); (3) the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3550); and

(4) the Convention Relative to the Protection of Civilian Persons in Time of War, done at Geneva August 12, 1949 (6 UST 3550).

SEC. 6. IMPLEMENTATION OF TREATY OBLIGATIONS.

(a) IMPLEMENTATION OF TREATY OBLIGATIONS.—

(1) IN GENERAL.—The acts enumerated in subsection (d) of section 2441 of title 18, United States Code, as added by subsection (a) of this section, and paragraphs (1) and (2) of this section, constitute violations of common Article 3 of the Geneva Conventions prohibited by United States law.

(b) PROHIBITION ON GRAVE BREACHES.—The provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character. No foreign or international source of law shall supply a basis for a finding of some of the United States as a State party to the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(c) IMPLEMENTATION BY THE PRESIDENT.—

(1) AS PROVIDED BY THE CONSTITUTION AND BY THIS SECTION.—As provided by the Constitution and by this section, the President has the authority for the United States to interpret the meaning of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.

(2) THE PRESIDENT SHALL ISSUE INTERPRETATIONS.—The President shall issue interpretations described by subparagraph (A) of Executive Order published in the Federal Register as reason to the Congress.
as to grave breaches of common Article 3 as a matter of United States law, in the same manner as other administrative regulations.

(D) Nothing in this section shall be construed to affect the constitutional functions and responsibilities of Congress and the judicial branch of the United States.

(4) DEFINITIONS.—In this subsection:

(A) "TORTURE."—The term "Torture" means—

(i) the Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, done at Geneva August 12, 1949 (6 UST 3316); and

(ii) a crime under article 3(2)(b) of the Geneva Conventions, as defined in section 2857 of title 10, United States Code.

(B) "CRUEL OR INHUMAN TREATMENT .—The term "Cruel or Inhuman Treatment" means—

(i) the Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, done at Geneva August 12, 1949 (6 UST 3217); and

(ii) a crime under article 3(2)(a) of the Geneva Conventions, as defined in section 2857 of title 10, United States Code.

(C) "COMMON ARTICLE 3 VIOLATIONS.—The term "Common Article 3 Violations" means—

(i) a criminal offense under article 3(2)(a) and (2)(b) of the Geneva Conventions, as defined in section 2857 of title 10, United States Code.

(3) COMPLIANCE.—The President shall take action to ensure compliance with this subsection, including through the promulgation of administrative rules and procedures.

SEC. 7. HABEAS CORPUS MATTERS.

(a) IN GENERAL.—Section 2241 of title 28, United States Code, in subsection (a), inserting both the subsection (e) added by section 1005(e)(1) of Public Law 109–148 (119 Stat. 2742) and the subsection (e) added by section 1005(e)(1) of Public Law 109–163 (119 Stat. 3477) and inserting the following new subsection (e):

(1) IN GENERAL.—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 and has been determined by the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States and has been determined by the United States and has been determined by the United States obligations under that Article.''.

(2) RETROACTIVE APPLICABILITY.—The amendments made by this subsection, except as specified in subsection (d)(2)(E) of section 2441 of title 18, United States Code, shall take effect as of November 26, 1997, as if enacted immediately after the amendments made by section 583 of Public Law 105–118 (as amended by section 4002(e)(7) of Public Law 107–273).

(c) ADDITIONAL PROHIBITION ON CRUEL, INHUMAN, OR DEGRADED TREATMENT OR PUNISHMENT.—

(1) IN GENERAL.—No individual in the custody or under the physical control of the United States Government of national or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.

(2) CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT DEFINED.—In this subsection, the term "cruel, inhuman, or degrading treatment or punishment" means unusual, and cruel, inhuman, or degrading treatment prohibited by the Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States, as defined in section 505 of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider 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 and has been determined by the United States obligations under that Article.''.

(3) COMPLIANCE.—The President shall take action to ensure compliance with this subsection, including through the promulgation of administrative rules and procedures.

"(A) collateral damage; or

"(B) death, damage, or injury incident to a lawful attack on the applicability of those subparagraphs to an offense under subsection (a) by reason of subsection (c)(3) in the case of an offender exercising extraterritorial jurisdiction.

"(5) DEFINITION OF GRAVE BREACHES.—The definitions in this subsection are intended only to define the grave breaches of common Article 3 and not the United States obligations under that Article.".
shall apply to all cases, without exception, pending on or after the date of the enactment of this Act which relate to any aspect of the detention, transfer, treatment, trial, or condition of detention of an alien detained by the United States since September 11, 2001.

SEC. 8. REVISIONS TO DETAINEE TREATMENT ACT OF 2005 RELATING TO PROTECTION OF CERTAIN UNITED STATES GOVERNMENT PERSONNEL.

(a) COUNSEL AND INVESTIGATIONS.—Section 104(f)(1) of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1) is amended—

(1) by striking “may provide” and inserting “shall provide”;

(2) by striking “or investigation” after “criminal prosecution”; and

(3) by inserting “whether before United States courts or agencies, foreign courts or agencies, or international courts or agencies,” after “described in that subsection”.

(b) PROTECTION OF PERSONNEL.—Section 1004 of the Detainee Treatment Act of 2005 (42 U.S.C. 2000dd–1) shall apply with respect to any criminal prosecution that—

(1) relates to the detention and interrogation of aliens described in such section; and

(2) is grounded in section 2441(c)(3) of title 18, United States Code; and

(3) relates to actions occurring between September 11, 2001, and December 30, 2005.

SEC. 9. REVIEW OF JUDGMENTS OF MILITARY COMMISSIONS.


(1) in subparagraph (A), by striking “pursuant to Military Commission Order No. 1, dated August 31, 2005 (or any successor military commission order)’’ and inserting ‘‘by a military commission under chapter 47A of title 10, United States Code’’;

(2) by striking subparagraph (B) and inserting the following new subparagraph (B):

“(B) GRANT OF REVIEW.—Review under this paragraph shall be as of right:—

(A) in clause (1)—

(i) by striking pursuant to the military order and inserting ‘‘by a military commission’’; and

(ii) by striking at Guantanamo Bay, Cuba; and

(B) in clause (ii), by striking pursuant to such order and inserting ‘‘by the military commission’’; and

(C) in subparagraph (D)(i), by striking specified in the military order and inserting ‘‘specified for a military commission’’.

(b) CLOTURE MOTION

The PRESIDING OFFICER (Mr. ALLEN). Under the previous order, pursuant to rule XXII, the Chair lays before the Senate the pending cloture motion, which the clerk will state.

The legislative clerk stated as follows:

CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move for a cloture on Calendar No. 615, H.R. 6061, a bill to establish operational control over the international land and maritime borders of the United States.

Bill Frist, Lamar Alexander, Richard Burr, Gordon Smith, John Thune, Johnny Isakson, John Cornyn, Judd Gregg, Jim Inhofe, Saxby Chambliss, Sam Brownback, Tom Coburn, Jeff Sessions, Richard Shelby, Craig Thomas, Michael B. Enzi, Lisa Murkowski.

Mr. BYRD. Mr. President, I support cloture on H.R. 6061, the Secure Fence Act. The sooner the Congress passes this bill, the sooner the Congress can put aside the misguided amnesty legislation passed by the Senate earlier this year. The American people have listened and rejected the call to offer U.S. citizenship to illegal aliens. They have said NO to amnesty! Hallelujah!

Comprehensive immigration reform is a euphemism for amnesty, and I oppose it absolutely and unequivocally. I voted against the amnesty bill passed by the Senate, and I will continue to vote against amnesty as long as I am in the Senate.

I have seen how amnesties encourage illegal immigration, with the amnesties of the 1980s and 1990s corresponding with an unprecedented rise in the population of unlawful aliens.

I have seen how amnesties open the border to terrorists, with the perpetrators of terrorist plots against our country taking advantage of amnesties to circumvent the regular border and immigration checks.

I have seen how amnesties afford special rules to some immigrants. Amnesty undermines that great and egalitarian American promise that the rules will be applied equally and fairly to everyone.

We are a nation of immigrants to be proud of. We have always welcomed immigrants to our shores, and we have encouraged and rewarded those who have come here to work hard and to contribute to our country. The Congress encouraged immigrants to learn the Constitutional principles of our Government and the history of our country. Immigrants learned English, and tried to assimilate. U.S. citizenship was their reward.

The Congress did not reward illegal aliens with U.S. citizenship.

Now that this idea of amnesty has been rejected by the Congress, perhaps the administration will begin, at long last, to realistically reduce the number of illegal aliens already in the country. Such an effort will require a significant investment of funds to hire law enforcement and border security agents, and to give them the resources and equipment they need to do their job. In the years immediately after the September 11 attacks, those funds had not only been left out of the President’s annual budgets but had been continuously blocked by the White House in the appropriations process. I and others tried to add funds where possible, but not until recently did the administration begin to recognize the inadequacies along the border. So much more is required and needs to be done.

The bill before the Senate today is a good bill. It would authorize two-layer fencing along the southern border where our security is weakest, and set timetables to which the Congress can hold the administration. But this bill will amount to little or no protection without the resources to implement it. The administration must do more. And it must continue to do more. And it must continue to do more. And it must continue to do more. And it must continue to do more.

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Mr. KENNEDY. Mr. President, now we have 4 minutes that can be equally divided between those in favor and those in opposition: am I correct?

The PRESIDING OFFICER. The Senator is correct.

Mr. KENNEDY. Mr. President, I yield myself 2 minutes.

Let us review where we in the Senate have been on the issue of immigration. May, we passed by 63 votes, with 1 favorable vote missing, a comprehensive measure to try to deal with a complex and difficult issue. The House of Representatives passed this bill, but they refused to meet with the Senate of the United States. The House of Representatives held 60 hearings all over the country at taxpayers’ expense—millions and millions of dollars. What do they come up with? After all the pounding and finger-pointing, they came up with an 800-mile fence.

Listen to Governor Napolitano: You show me a 50-foot fence, and I will show you a 51-foot ladder.

This is a feel-good bumper-sticker vote. It is not going to work. Why? Because half of all the undocumented come here legally. They don’t come over the fence.

Do you hear us? This is going to cost $8 billion. Let us listen to what Secretary Chertoff said about this issue. Secretary Chertoff said: “Don’t give us old fences. Give us 20th century solutions.” Tom Ridge, the former head of Homeland Security, said the same thing: “There is a waste of money.” Let us do what we should have done in the first place. Let us sit down with the House, the way this institution is supposed to work, rather than just take what is served up by the House of Representatives and say ‘Take it or leave it.’ That is what they are saying to the Senate.

We have had a good debate which resulted in a comprehensive measure. Let